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## Confronting the Appalachian Breakdown: Historic Preservation Law in Appalachia and the Potential Benefits of Historic Preservation for Rural Communities

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## CONFRONTING THE APPALACHIAN BREAKDOWN: HISTORIC PRESERVATION LAW IN APPALACHIA AND THE POTENTIAL BENEFITS OF HISTORIC PRESERVATION FOR RURAL COMMUNITIES

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*Many of the world's mythologies explain landforms as the legacies of struggles among giants, time out of mind . . . In the Appalachian plateaus, however, the works of a contemporary generation of giants are real. Flying over the plateaus, one sees the emergent formations wrought by the entities often called "corporate giants," gathered up and embodied . . . as "King Coal."<sup>2</sup>*

*The landform complexes eradicate most signs of the times they displace. But around their edges, signs of other times and other experiences of the land proliferate, evidence of a history continuing to unfold.<sup>3</sup>*

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<sup>1</sup> Used figuratively here, a "breakdown" is a term of art in Appalachian traditional folk music that denotes an "instrumental fiddle tune" played in duple meter at a quick dance speed. *Glossary of Musical and Subject Cataloging Terms*, in AMERICAN MEMORY: FIDDLE TUNES OF THE OLD FRONTIER: THE HENRY REED COLLECTION (Library of Congress perm. comp., n.d.), available at <http://memory.loc.gov/ammem/collections/reed/hrabout.html#glossary>. Breakdowns are similar to what the rest of the English-speaking world calls "reels." A "breakdown" does not imply a particular type of dance and can be used for "square dances, long ways dances, or other group dances, as well as for solo fancy dancing." *Id.*

<sup>2</sup> Mary Hufford, *Landscape and History at the Headwaters of the Big Coal River Valley*, in AMERICAN MEMORY: TENDING THE COMMONS: FOLKLIFE AND LANDSCAPE IN SOUTHERN WEST VIRGINIA 1-2 (Library of Congress perm. comp., n.d.), available at <http://memory.loc.gov/ammen/collections/tending/essay5.pdf>.

<sup>3</sup> *Id.* at 2.

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## I. INTRODUCTION TO THE APPALACHIAN REGION

The Appalachian Region is a 200,000 square-mile area that follows the Appalachian Mountains for over 1,000 miles from southern New York to northern Mississippi.<sup>4</sup> Home to approximately 23 million people living in 410 counties, Appalachia includes “all of West Virginia and parts of 12 other states: Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia.”<sup>5</sup>

The rural heart of Appalachia, West Virginia and the eastern parts of Kentucky and Tennessee, has suffered the effects of this “struggle amongst giants” most intensely as traditional sectors of employment disappear not to be replaced by other large commercial industries.<sup>6</sup> These small communities are

<sup>4</sup> Appalachian Regional Commission, *The Appalachian Region*, <http://www.arc.gov/index.do?nodeId=2> (last visited Feb. 26, 2008); see 40 U.S.C. 141 § 14102 (a)(1) (2006).

<sup>5</sup> *Id.*; see 40 U.S.C. 141 § 14102 (a)(1)(A)-(M) (2006).

<sup>6</sup> See Appalachian Regional Commission, *Economic Overview*, <http://www.arc.gov/index.do?nodeId=26> (last visited Feb. 26, 2008).

forced to find a way to supplement disappearing energy jobs. The challenge is accomplishing this while retaining the character and “sense of place” that is vital to these small communities.<sup>7</sup>

This Note will examine how historic preservation can be one way to increase economic development in Central Appalachia due to the Region’s unique historical, cultural, and natural resources, which gives Central Appalachian communities a “rural advantage.” While most of these communities lack the resources to initiate a historic preservation plan un-aided, it is imperative that local solutions be allowed to address local problems. Therefore, successfully implementing an effective preservation program requires a coordinated approach to protecting Appalachian history, culture, and heritage.

This Note looks at the ways an intergovernmental effort between federal, state, and local governments can be used to foster an effective preservation program. First, it examines the unique challenges to reducing economic distress in Appalachia. Second, it will look at the beneficial aspects of historic preservation as well as examine preservation’s general economic impact on communities. Third, this Note will address the various federal, state, and local laws and policies as they relate to historic preservation and how these laws work together to form a coordinated approach to protecting Appalachian culture and heritage. Fourth, this Note will look at the potential advantages historic preservation can offer Appalachia through increased tourism dollars by empowering local governments to take responsibility for diversifying their own economies by improving and highlighting their unique resources. Fifth, this Note will examine some of the various incentives that federal, state and local governments can enact to encourage private property owners’ enthusiastic support of the preservation initiative. Ultimately, historic preservation should offer new avenues for rural Appalachian communities to economically diversify through heritage tourism, adventure tourism, and a re-commitment of local policymakers to improving the Region’s small towns.

Finally, this Note will argue that historic preservation is important not only for economic development, but also for community cultural development. Appalachia is renowned (good or bad) for its unique cultural attributes, and protecting these characteristics is imperative to retaining cultural identities. So, more than being an economic boost to Appalachia, historic preservation will combat the “generification” of the Region and preserve its important cultural heritage for generations to come.

#### *A. Introduction to Historic Preservation*

At its core, historic preservation is aimed at increasing the quality of life of a community.<sup>8</sup> Historic preservation law refers to the system of laws avail-

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<sup>7</sup> For current purposes, “sense of place” means defining oneself in terms of a given piece of land, landscape, town, or community.

able at the federal, state, and local levels that requires preserving designated “historic” property, in some cases, and encourages preserving designated “historic” property in others.<sup>9</sup> The purposes of these statutes vary. Some laws try to even the playing field between historic rehabilitation and new construction. Other laws restrict or limit changes to historic property.<sup>10</sup> In most cases, historic properties are designated through a formal process that identifies buildings, structures, districts, and sites in a register based on statutory criteria.<sup>11</sup> Once designated, the system of federal, state, and local laws provides varying degrees of protection for the properties.<sup>12</sup>

For some, historic preservation is useful to provide a “perspective on ourselves” by helping understand the historic and cultural heritage of our country.<sup>13</sup> Others value historic preservation because of the artistic value certain historic buildings add to the aesthetics of townscapes and city streets.<sup>14</sup> In the former context, preservation is primarily concerned with buildings and structures associated with significant people, events, or institutions to a particular locality or the country as a whole.<sup>15</sup> Growing attention in this respect has been focused on protecting buildings “as an adjunct to social history” to show how people lived in previous eras of American history.<sup>16</sup> The latter justification, aesthetic value, is significant in an “era of widespread and increasing cultural homogeneity.”<sup>17</sup> Moreover, the artistic, architectural, and engineering contributions of the past inspire similar endeavors in the future.<sup>18</sup>

Historic preservation serves a more basic function than either of the previous explanations offer. The reason historic preservation is a legitimate land use is simple human emotional attachment to our collective history. His-

<sup>8</sup> NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 74:2, Vol. 3 (rev. ed. 2003); David F. Tipson, *Putting the History Back in Historic Preservation*, 36 *URB. LAW.* 289, 291-93 (2004).

<sup>9</sup> JULIA H. MILLER, *A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW 1* (National Trust for Historic Preservation 2002).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> WILLIAMS & TAYLOR, *supra* note 8.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Kristan E. Curry, *Historic Districts: A Look at the Mechanics in Kentucky and a Comparative Study of State Enabling Legislation*, 11 *J. NAT. RESOURCES & ENVTL. L.* 229, 231 n.8 (1995-96) (citing WILLIAM J. MURTAGH, *KEEPING TIME: THE HISTORY & THEORY OF PRESERVATION IN AMERICA* 28 (1993)).

<sup>16</sup> WILLIAMS & TAYLOR, *supra* note 8.

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

<sup>18</sup> *Id.* An example of the inspirational function of historic preservation is the Greek Revival architectural style that was prominently used for public buildings in the United States between 1830 and 1860 because the style harkened back to the grand civilizations of Greece as symbols of democracy. ANN ROONEY HEUER, *THE FRONT PORCH* 11 (2002).

toric properties act as an emotional stimulus to conjure patriotism, invoke memories of a better time, and reinforce a sense of community cohesiveness.<sup>19</sup> Preservation efforts can validate older neighborhoods' contribution to city history and thus encourage activity directed towards rehabilitating other neighborhoods within the city.<sup>20</sup> The same is true of the impact historic preservation initiatives could have on the small rural communities of Central Appalachia and potential trickle-up benefits for the Region as a whole.

Historic preservation has experienced a piece-meal, haphazard evolution into the legal framework of Appalachia.<sup>21</sup> In distressed rural communities, many historic properties are owned by small businesses or private individuals:

Often these people lack information about the potential economic benefits of historic buildings. Worse yet, there sometimes exists misinformation about the costs of historic preservation. These communities need . . . better information about the true costs and benefits of historic buildings . . . [and] . . . incentive programs.<sup>22</sup>

Historic preservation is uniquely suited to addressing many of the problems facing economic development in Appalachia. First, historic preservation is a tool that may be used to diversify an economy with little additional training or physical development needed because it focuses on the existing resources in a community. It encourages people to develop the skills they already possess, to make the most of the places and things they have been doing all their lives. Second, historic preservation offers an opportunity to the individuals in a community to voice their particular concerns and objectives, as well as provides a forum for the community as a unit to determine short and long term community goals. Even more, historic preservation affords communities the ability to determine for themselves the methods of achieving their goals. Third, historic preservation empowers individuals by validating their contribution to the community and its heritage. It celebrates the ordinary as well as the extraordinary, and seeks to highlight the best of what each town has to offer. Fourth, historic preservation is largely a local initiative, thus avoiding the perception that the program is yet another forced plan imposed by outside, unfamiliar, and disinterested forces. Finally, historic preservation works. Economic and cultural benefits follow when communities are given the opportunity, with the assistance of

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<sup>19</sup> WILLIAMS & TAYLOR, *supra* note 8.

<sup>20</sup> *Id.*

<sup>21</sup> Curry, *supra* note 15, at 233-35. *E.g. compare*, VA. CODE ANN. § 58.1-339.2 (1997) (historic rehabilitation tax credit) *with* KY. REV. STAT. ANN. §§ 171.396, 171.396-97 (2005) (rehabilitation of certified historic structures).

<sup>22</sup> PRESERVE AMERICA, EXECUTIVE SUMMARY OF ISSUE AREA, USING HISTORIC PROPERTIES AS ECONOMIC ASSETS ISSUE AREA, PRESERVE AMERICA SUMMIT 3 (2006).

state and federal preservation programs, to incorporate historic preservation into their everyday lives.

But a successful historic preservation initiative does not happen overnight. It is a complicated and multi-leveled process that requires coordination among federal, state, and local officials, and depends heavily on grassroots support. Before embarking on a preservation initiative, it is necessary to realistically assess the history an area has to offer.

*B. Is Appalachia's History Something to Preserve?*

Synonymous with the Region's diverse natural landscapes are the stereotypical ideas of the Region's inhabitants. Appalachia's prototypical residents include some of the most universally recognizable American icons; the accommodating Native American tribal chief, the industrious early pioneer, the rugged mountaineer, the wealthy plantation slave-owner, the fierce abolitionist, the proud Confederate, and the righteous Union soldier. More recent images of Appalachia's people include the exploited coal miner, the impoverished farmer, and the unemployed textile worker.

While Appalachia was the "stage" for some of the most significant events of American history,<sup>23</sup> the heart of the Region remains among the poorest and most "distressed" areas of the country.<sup>24</sup> The Region's illustrious history and tremendous natural resources juxtaposed by continued extreme poverty has led to many generalized, inaccurate conceptions of what the area is "really like."<sup>25</sup> Author Jeff Biggers outlines four "paradoxical images" most commonly

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<sup>23</sup> For example: the first land battle of the Revolutionary War was fought at Point Pleasant, West Virginia; the first westward migration of American Pioneers occurred through the Cumberland Gap in Kentucky, Tennessee, and Virginia; the Mountain Feuds, most notably between the Hatfields and the McCoys, were played out in West Virginia and eastern Kentucky; the first regularly published periodical devoted exclusively to abolishing slavery, *The Emancipator*, began circulation in Jonesboro, Tennessee; the first land battle of the Civil War was fought at Philippi, West Virginia; John Brown's Raid took place in Harper's Ferry, West Virginia; the Coal Mine Wars over collective bargaining rights reached its height in the Battle of Blair Mountain, when federal troops were called in because coal miners from union mines, wearing red bandanas around their necks to identify themselves (the origin of the term "redneck"), marched south to take on the non-union coal companies in two southern West Virginia counties (Harlan, Kentucky is still known as "Bloody Harlan" because of mine wars); the steel factories that allowed America's skyscrapers and massive bridges to be built were located in and around Pittsburgh, Pennsylvania; the birth of country music is claimed to have occurred in Bristol, Tennessee, and if not in Bristol, country music surely began in Appalachia somewhere; and the end of segregation and the beginning of the Civil Rights Movement began throughout Mississippi and Alabama. *See generally* JEFF BIGGERS, *THE UNITED STATES OF APPALACHIA: HOW SOUTHERN MOUNTAINEERS BROUGHT INDEPENDENCE, CULTURE, AND ENLIGHTENMENT TO AMERICA* (2006).

<sup>24</sup> *See* 40 U.S.C. § 14101(c)(1)(C) (2006).

<sup>25</sup> The introduction to an article by Brad McElhinny in the *Charleston Daily Mail* illustrates this point:

Never tire of trailer jokes? Thinking 'bout buying a satellite dish just to get the "You Might Be A Redneck If . . . Channel?" Or does it all make you so

associated with Appalachia.<sup>26</sup> First is “pristine Appalachia,” which encompasses the idyllic forested mountains and valleys rolling along the Appalachian Trail with neither consideration for the Region’s inhabitants nor any attention paid to the environmental degradation wrought by two centuries of coal mining and timbering in the Region.<sup>27</sup> Second is “backwater Appalachia,” where the hillbillies, rednecks, and country-folk call home.<sup>28</sup> Dominated by barefoot dirty-faced children and wise old men in rocking-chairs “pickin’ on their fiddles,<sup>29</sup> this image leaves no room for appreciating the wealth of political, social, and economic contributions Appalachians have made both inside and outside the Region.<sup>30</sup> Third is the “Anglo-Saxon Appalachia,” which pays homage to

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sick you’re ready to load up the truck and move to Beverly . . . if only you could locate your shoes. Well, joke’s on you, Jethro. Ain’t much you can do about it. Heck, you can’t even read this story. Seriously, if you’re so tired of redneck humor and hillbilly bashing that your wooden teeth hurt, better get used to it. Backwoods belittling has bothered our kind since way before “Deliverance.”

Brad McElhinny, *You Might Be Sick of Those Redneck Jokes*, CHARLESTON DAILY MAIL, Apr. 8, 1999, at 1A.

<sup>26</sup> BIGGERS, *supra* note 23, at xii.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* “The image of the hillbilly . . . has been a persistent national slander, one which has seen its targets gradually adopt the slur as a badge of pride.” Associated Press, *Meant to Deride, ‘Hillbilly’ Label Source of Pride*, CHARLESTON GAZETTE, Mar. 23, 2008, at A1. Some mountain residents have embraced the positive aspects of this image and are proud of their “backwoods” ways. Willie Drye, *Appalachians Are Finding Pride in Mountain Twang*, NAT’L GEOGRAPHIC NEWS, May 2, 2005, <http://news.nationalgeographic.com/news/history.html> (History & Culture News, May 2, 2005) (last visited Feb. 26, 2008).

<sup>29</sup> These “characters” appear in the long-running comic strip *Barney Google and Snuffy Smith*, created by Billy DeBeck in 1919. The comic is currently written and illustrated by John Rose and distributed by King Features Syndicate, Inc.

<sup>30</sup> BIGGERS, *supra* note 23. Many of the most influential minds in the legal profession hail from the mountains of Appalachia, including Supreme Court Justices Robert Trimble, (1776-1828), raised in Ft. Boonesboro, Kentucky; John McLean, (1785-1861), lived in many frontier towns including Morgantown, Virginia; Nicholasville, Kentucky; and Maysville, Kentucky; John McKinley, (1780-1852), raised in Kentucky; Salmon P. Chase, (1808-1873), began law practice and political career in Cincinnati, Ohio; John Marshall Harlan, (1833-1911), born in Boyle County, Kentucky; James Clark McReynolds, (1862-1946), born in Elkton, Kentucky; Stanley Forman Reed, (1884-1980), born in Mason County, Kentucky; Hugo Black, (1886-1971), born in Harlan, Alabama; and Potter Stewart, (1915-1985), raised in Cincinnati, Ohio; as well as Chief Justices John Marshall, (1755-1835), born in Germantown, Virginia; William Howard Taft, (1857-1930), born in Cincinnati, Ohio; and Frederick Moore Vinson, (1890-1953), born in Louisa, Kentucky. The Supreme Court Historical Society, *History of the Court*, [http://www.supremecourthistory.org/02\\_history/02.html](http://www.supremecourthistory.org/02_history/02.html). George Wythe, the recipient of the nation’s first Chair in Law at the College of William & Mary in 1779 and teacher to statesmen Thomas Jefferson, James Monroe, John Marshall, and Henry Clay, was also from the Region. National Constitution Center, *Delegates to the Constitutional Convention*, <http://www.constitutioncenter.org/explore/FoundingFathers/Virginia.shtml> (last visited Feb. 26, 2008) (quoting CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION (2002)). Even more, Pearl S. Buck, (1892-1973) born in Hillsboro, West Virginia, and author of the 1935 Pulitzer Prize and Howell Medal



the ancestry of the Region's initial European "white" settlers, but completely ignores the strong Native American heritage in the Region.<sup>31</sup> Moreover, this image disregards the important role that African Americans play in Appalachian society.<sup>32</sup> Last is "pitiful Appalachia" by which Appalachia is seen as "the poster Region for welfare and privation."<sup>33</sup> This image may be the most damaging because it does not account for the pride and independence that is the hallmark of the Region.<sup>34</sup> Further, this image fails to address that the majority of Appalachia is competitive with the rest of the country in terms of economic development and quality of life assessments.<sup>35</sup>

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winning book, *The Good Earth*, won the Nobel Prize in literature in 1938 and was the first American woman to do so. *A Brief Biography*, <http://www.english.upenn.edu/Projects/Buck/biography.html> (last visited Feb. 26, 2008).

<sup>31</sup> BIGGERS, *supra* note 23, at xi-xii. See generally, Albert J. Fritsch, S.J., *Forward* to TIMOTHY COLLINS, *NATIVE AMERICANS IN CENTRAL APPALACHIA: A BIBLIOGRAPHY* i-ii (1989). The second largest Native American Indian Tribe, the Cherokee:

referred to themselves as the Ani-Yunwiya or 'real people' and were a tribe of the northern Iroquois in Ontario, New York, Ohio, and Pennsylvania that traveled south along the Allegheny and Blue Ridge Mountains to settle eastern Kentucky and Tennessee, western North Carolina and Virginia, southern West Virginia, South Carolina, Georgia, and northeastern Alabama. Called the Entarironnen (mountain people) or Oyatageronon (cave people) by their northern brethren, regional tribes were referred to as Upper, or Overhill, Middle, and Lower depending upon their locality in relationship to the Appalachian Mountains.

Appalachian Traveller, Inc., *Glossary of Appalachian History, Culture, Folk Lore, Plants, and Wildlife*, <http://www.apptrav.com/glossary.html> (last visited Feb. 26, 2008). Eventually, descendants of these Native Americans would encounter some of Appalachia's most notable pioneers, including Davy Crockett, the frontiersman who was born on the side of a hill in Green City, Tennessee, and Daniel Boone, one of the first permanent settlers of the frontier in Fort Boonesboro, Kentucky, statesman, and discoverer of the Cumberland Gap.

<sup>32</sup> The most obvious example of African Americans' contribution to American society is be the Civil Rights Movement lead by Dr. Martin Luther King, Jr. The bus boycott in Birmingham, Alabama, and Rosa Parks's courageous stand for equality inspired the country to focus on ending segregation. More locally, John Henry, in the mythic battle between man and machine, beat the steam engine dying immediately afterward in the coal fields of Beckley, West Virginia. Two of the most influential and significant African Americans of the modern era, Henry Louis Gates and Rev. Leon Howard Sullivan, are from West Virginia.

<sup>33</sup> BIGGERS, *supra* note 23.

<sup>34</sup> Nothing demonstrates the pride Central Appalachians have for their home-states than the universal association with the songs they sing about home. Few would be at a loss to hum a few bars of, or know most of the chorus to, Central Appalachia's theme songs, such as *My Old Kentucky Home*, by Stephen Foster (1852); *Rocky Top*, by Boudleax Bryant & Felice Bryant (1967); and *Take Me Home, Country Roads*, by John Denver, et al. (1971). For a more academic study of Appalachia's fierce pride and independence, see Mark Banker, *Beyond the Melting Pot and Multiculturalism: Cultural Politics in Southern Appalachia and Hispanic New Mexico*, MONTANA: THE MAGAZINE OF WESTERN HISTORY, Summer 2000.

<sup>35</sup> Daniel T. Lechter & Diane K. McLaughlin, *Past is Prologue? in DEMOCRATIC DIVERSITY AND ECONOMIC CHANGE IN APPALACHIA* 7 (1999).

While each of the aforementioned images of Appalachia fails miserably to accurately describe Appalachia, there is a ring of truth in all of them. Appalachia is, all at once, in its own way, a pristine, backwater, Anglo-Saxon, and pitiful part of the country. But also, Appalachia is a vivacious, independent, and emerging part of the world. “Economic growth in the metropolitan areas of Appalachia, such as Atlanta, Birmingham, Knoxville, Cincinnati, Pittsburgh, Greensboro, Chattanooga and Roanoke, is at odds with continued isolation and increasing poverty in eastern Kentucky, West Virginia and the rest of the core areas of the Region.”<sup>36</sup>

Moreover, views of Appalachian culture are often affected more by external perception imposed onto the Region than internal influences. During the post World War I and Vietnam eras, “disgruntled urbanites perceived the mountain regions as havens from modernity” and embraced aspects of mountain culture, such as folk and bluegrass music, woodworking, and other handicrafts, as romanticized symbols of a “simpler time.”<sup>37</sup> Conversely, the economic prosperity following the 1950s led to the formation of the Works Progress Conservation Corps and the Appalachian Regional Commission to alleviate the perceived cultural deficiency and poverty of the Appalachian people who had been “left behind” by mainstream America.<sup>38</sup>

The result is that current governmental “rural policy” is limited to two areas—agriculture and manufacturing—neither of which is a realistic basis for sustainable rural economic development.<sup>39</sup> “By continuing the myth that rural and agriculture are the same,” the policy confuses the issue and absorbs a majority of the resources directed to rural areas.<sup>40</sup> Moreover, the traditional approach taken since the 1950s of transferring manufacturing jobs from urban to rural areas can no longer support fledgling rural economies because “[s]tate-encouraged manufacturing . . . is dependent on low wage, low-skill employees” and these jobs are moving offshore or being replaced by the technology sector requiring more highly skilled workers than rural communities have to offer.<sup>41</sup>

Perhaps, Appalachia is best seen as a region of contrasts. Coexisting are intense poverty and tremendous natural resource wealth,<sup>42</sup> small rural communities and growing megapolises,<sup>43</sup> complete dependence on “King Coal”

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<sup>36</sup> *Id.*

<sup>37</sup> Banker, *supra* note 34.

<sup>38</sup> *Id.*

<sup>39</sup> Karl N. Stauber *Why Invest in Rural America – And How? A Critical Public Policy Question for the 21st Century*, FED. RES. BANK OF KAN. CITY ECON. R., 2d q. 2001, at 34.

<sup>40</sup> *Id.* at 34-35.

<sup>41</sup> *Id.* at 35.

<sup>42</sup> Lechter & McLaughlin, *supra* note 35.

<sup>43</sup> *Id.*

and economic diversification.<sup>44</sup> These contrasts expose a theme that persists in Appalachia: the struggle to compete in an expanding global marketplace without losing its sense of “home.”

### 1. Historical Legacy of Geographic & Cultural Isolation

“Home” is easy to feel in Appalachia. The geographic, economic, and cultural isolation caused by the mountains has had the result that the more remote and inaccessible parts of Appalachia retain many of the traditions and characteristics of a time gone by. “The region’s fame or infamy has forced writers and critics to dwell on what has been done to Appalachia”<sup>45</sup> rather than who the Appalachian people are and how to encourage economic development in a manner that is congruent with small town priorities, and feasible given the communities’ assets and capabilities.<sup>46</sup> There is growing awareness of the many facets of Appalachian culture and heritage that have remained “unspoiled” by modern development.<sup>47</sup> The rich cultural heritage that remains so prevalent throughout Central Appalachia, yet is disappearing in the rest of the country, is increasingly being seen for what it is, an “Undiscovered National Treasure.”<sup>48</sup>

The Appalachian Mountains are among the oldest mountains in the world.<sup>49</sup> Artifacts and relics relating to every period of Native American occupation are scattered throughout the mountains, some dating back 12,000 years.<sup>50</sup> The mixed mesophytic forest that covers the Region is the biologically richest temperate-zone hardwood system on the planet.<sup>51</sup>

The geography and topography of the mountains has kept those living inside the hollows and valleys isolated from the rest of the country since the

<sup>44</sup> *Id.* Some communities have successfully diversified their economies, while some severely distressed areas still require basic infrastructure, such as water and sewer systems.

<sup>45</sup> BIGGERS, *supra* note 23.

<sup>46</sup> *See* Stauber, *supra* note 39, at 35.

<sup>47</sup> *E.g.*, Sandra Guy, *Vibrant Homestead: Re-discover gems of Appalachia*, CHI. SUN TIMES, Sept. 17, 2006, at C1 (“[I]t truly felt as though we had left the flat lands of me-first busyness and entered a new world of mountains, curvy roads and somehow fresh 300-year-old memories.”).

<sup>48</sup> In electronic form, an estimated 4 million National Geographic readers have access to expanded listings of “sites, maps, photos and summaries of locations along off-the-beaten-path cultural heritage trails,” via the National Geographic Geotourism Map, APPALACHIA: AN UNDISCOVERED NATIONAL TREASURE. Byron Crawford, *Magazine features tourist charms of Appalachia*, COURIER-JOURNAL (Louisville, Ky.), Mar. 27, 2005, at B1.

<sup>49</sup> The birth of the Appalachian range, 480 million years ago, marks the first of several mountain-building plate collisions that culminated in the construction of the supercontinent Pangaea, with the Appalachians near the center. Geological Provinces of the United States: Appalachian Highlands Region, <http://wrgis.wr.usgs.gov/docs/usgsnps/province/appalach.html> (last visited Feb. 26, 2008).

<sup>50</sup> Hufford, *supra* note 2; *see generally* Charles H. Faulkner, *Four Thousand Years of Native American Cave Art in the Southern Appalachians*, 59 J. CAVE & KART. STUD. 143, 1997.

<sup>51</sup> Hufford, *supra* note 2.

Region's first European settlers—allegedly comprised of land-grabbers, escaped convicts, and indentured servants fleeing servitude—arrived during the colonial period.<sup>52</sup> These original settlers were fierce-minded people, described by one contemporary as “ungovernable savages . . . [that] do not conceive that Government has any right to forbid their taking possession of a Vast tract of Country. . . . Nor can they be easily brought to entertain any belief of the permanent obligation of Treaties.”<sup>53</sup>

The close of the Revolutionary War brought on a wave of settlement that quickly engulfed Kentucky and western Virginia with overlapping land warrants derived from the soldiers' bounty issued after the war.<sup>54</sup> However, much to the discouragement of the prospectors, the Central Appalachian areas were undesirable, too “remote,” and in “difficult country” easier crossed on foot than horseback.<sup>55</sup> Often, the land was left unsettled and the prospectors returned back over the Alleghenies or to flatter bottomlands along the Ohio River.<sup>56</sup> Thus, the stage was set for the gradual retreat of Appalachia to the forgotten realms of collective memory.<sup>57</sup> A new democracy was busy forming in Washington, and leaders in Boston, Baltimore, Philadelphia, and Richmond let the resource-laden frontier slip from their minds.

The wealthier landowners controlled the best farmland and were able to keep connected to the rest of the country. Gradually, however, the less affluent settlers were forced deeper into the hollows of the mountains and, over time, developed a distinct life-style and worldview.<sup>58</sup> Successive generations turned these notions into a way of life for the Appalachian, who

“scrambled for a living up Appalachian hollers[,]” . . . [and] typically engaged in semisubsistence agriculture, raising corn and beans as basic staples and grazing livestock on common lands, constructed homes from logs . . . and fabricated tools and toys from wood, leather, and whatever else nature provided. Social patterns centered around family, community, and church. Distinctive oral and musical traditions and strong emphases on

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<sup>52</sup> HARRY M. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA* 5-6 (1962).

<sup>53</sup> JOHN ALEXANDER WILLIAMS, *WEST VIRGINIA: A HISTORY* 15-16 (2001) (1976).

<sup>54</sup> *Id.*; CAUDILL, *supra* note 52, at 65.

<sup>55</sup> WILLIAMS, *supra* note 53, at 25-26.

<sup>56</sup> *Id.*

<sup>57</sup> America did not “consciously ‘discover’” the Region until after the Civil War when industrial and commercial interests came in search of coal and other natural resources. Banker, *supra* note 34.

<sup>58</sup> *Id.*

honor and reputation in interpersonal relations gave meaning and order to daily lives.<sup>59</sup>

As the country grew into infancy, little more attention was paid to Central Appalachia except as a means of getting somewhere else.<sup>60</sup> The Wilderness Road was created as a southern extension of the Great Philadelphia Road and extended to the upper Piedmont of North Carolina, where Daniel Boone carved the path through the Cumberland Gap.<sup>61</sup> Besides the difficult Wilderness Road, the Virginia & Tennessee Railroad, built in the 1850s, was essentially the only means of transportation into the Region.<sup>62</sup> It was not until railroads were built to reach into the coal fields in the 1890s that accessibility to the hollows of the mountains was feasible, though far from easy.<sup>63</sup>

Urging the passage of the Good Roads Amendment to the West Virginia State Constitution in 1920, Secretary-Treasurer of the State Road Commission, J. K. Monroe, outlined the effect of isolation on the state's economy:

This people must be fed and clothed, and our farmers must do it . . . . [The current law] does not and cannot provide sufficient means to construct the roads we must have now in order to keep

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<sup>59</sup> *Id.* at 1. However, “[s]tereotypically homogeneous perceptions of an idyllic rural life . . . fail[s] to do justice to the often harsh lives these peoples have led.” *Id.* at 14.

<sup>60</sup> Southwest Virginia: "Geography of Virginia," <http://www.virginiaplaces.org/regions/15southwest.html> (last visited Feb. 26, 2008).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* In 1909, after more than seventy years of trying, the Carolina, Clinchfield, & Ohio Railway was completed, at a cost of \$125,000 per mile, connecting Dante, Virginia, and Spartanburg, South Carolina, and spanning 242 miles north/south over the Blue Ridge Mountains in a nearly perfectly straight line. J.O. Lewis, *The Costliest Railroad in America: A New Railroad That Cost More Than Thirty Million Dollars*, 1752 SCI. AM. SUPP. NO.1752, July 31, 1909, available at <http://www.johnsonsdot.com/clinchfield/clinch2.pdf>. Six years later, in 1915, the final thirty-five mile Northern Extension was finished connecting the line to the Chesapeake & Ohio Railroad in Elkhorn, Kentucky. See Clinchfield Railroad – Johnson City, Tennessee, [http://www.johnsonsdot.com/clinchfield/index\\_cl.htm](http://www.johnsonsdot.com/clinchfield/index_cl.htm) (last visited Feb. 26, 2008) [hereinafter Johnsonsdot.com]. The operation, headed by George L. Carter and engineered by Martin J. Caples, was an engineering feat unparalleled in its time that continues to be a marvel of civil engineering and physical plant construction to this day. See *id.*; Clinchfield!, <http://www.wiringfordcc.com/clinch.htm> (last updated 2005); Carolina Clinchfield Ch., Nat'l Ry. Hist. Soc., <http://www.carolina-clinchfield.org/> (last updated Jun. 8, 2005). As would later prove to be true of interstates and highways,

George L. Carter was developing towns and cities along his rail line including the new “model industrial town” of Kingsport [Tennessee]. In Johnson City, East Tennessee State University, the Tree Streets neighborhood, the Model Mill (General Mills) [and] the Ashe Street Post Office were all part of George L. Carter's handiwork and byproducts of the Clinchfield Railroad.

Johnsonsdot.com. The original Clinchfield train depot in Johnson City, Tennessee, was recently saved from demolition by private citizens who hope to restore the building. *Id.*

up with the progress along industrial lines. We have waited too long. It took a world war to make us realize how inaccessible vast areas of our State are. This State has marvelous possibilities; untold wealth in coal, oil, gas, iron ore and timber; it is fast coming to the front in fruit growing; it has a larger area of the finest blue grass land than the State of Kentucky—but it has no roads! . . . “Why was the development of West Virginia, now scarcely begun, so long retarded?” is a question asked with frequency by visitors to West Virginia . . . . Every answer made to this inquiry could be summed up in three words—LACK OF TRANSPORTATION. West Virginia's physical characteristics have been such that even railroad transportation, delayed for years, has been slow in touching great natural resources with which the Creator endowed the State. It is a familiar fact to many that one can travel from West Virginia[’s] capital to New York quicker than he can reach certain cities and towns within the State.<sup>64</sup>

Minor improvements to roads made the inner reaches more accessible by car. However, as the rural communities of Appalachia began to open to the outside world during the 1950s, the busted coal-industry turned these roadways into “one way streets” out of rural Appalachia. It was not until President Johnson declared “War on Poverty” in 1964 that any serious effort was made to “improve Appalachian highways; build new airports; and develop water, timber, agriculture, mineral, and power resources.”<sup>65</sup>

Today, the success on at least one front of the ongoing war is attributable to “a weapon of warfare as old as the Roman legions that used it to conquer and maintain an empire 2,000 years ago. In a word: roads.”<sup>66</sup> The modern Appalachian Development Highway System has had a palatable effect on the rural communities it now connects with the rest of the country, leading one commenter to observe, “Wherever the . . . Highway System goes, any passerby can see the new prosperity. Where they cannot go by modern roads is much the same as it was.”<sup>67</sup>

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<sup>64</sup> J.K. Monroe, W. Va. Sec’y-Treas., Rd. Comm., (Nov. 2, 1920), in *Passage of the Good Roads Amendment, The Road Ahead for West Virginia: L. E. Lantz Collection* (W.Va. Div. Cult. & History perm. comp. n.d.), available at <http://www.wvculture.org/hiStory/transportation/goodroads01.html>.

<sup>65</sup> Time Trail West Virginia, <http://www.wvculture.org/history/timetr/ltapr.html> (last visited Feb. 26, 2008). On April 24, 1964, President Lyndon Johnson launched his War on Poverty: “Although many of the projects did not materialize, the plan did produce the Appalachian Corridor system, funding construction of highways into isolated regions of West Virginia.” *Id.*

<sup>66</sup> John Lang, *Roads Made a Difference in Taking Appalachia Out of Isolation*, KNOXVILLE NEWS-SENTINEL, Jan. 24, 1999, at G1.

<sup>67</sup> *Id.*

## 2. Historical Legacy of Natural Resource Extraction

To comprehend the current economic disparity between the rural areas of Central Appalachia and the thriving economies of other parts of Appalachia, it is worthwhile to understand the social and political implications caused by the Region's long history of dependent development and intense natural resource extraction.<sup>68</sup> By the end of the nineteenth century, Central Appalachia had paid the price in timber and coal reserves to support the development of the country.<sup>69</sup> Coal mining in the Region reached its height in the 1920s but was severely hampered by the Depression.<sup>70</sup> The market briefly recovered during World War II.<sup>71</sup> However, by that time, advances in mine technology and changes in mine ownership had irrevocably changed the coal industry.<sup>72</sup> The abrupt end of the war caused a new recession in the Region resulting in thirty to forty percent of the mobile population leaving the area by 1950.<sup>73</sup>

In the 1960s, Appalachia tried to keep pace with the nation's insatiable appetite for energy by tapping into its natural gas and oil reserves, and developing complex chemical manufacturing sectors.<sup>74</sup> However, the Oil Crisis of the 1970s proved too much for the rural coal-based counties of Central Appalachia to bear. The coal-dependant economies fell into "a long cycle of despair," caused by the "severity of the region's lack of economic diversity."<sup>75</sup> Govern-

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<sup>68</sup> "From 1500 to the 1700s, rural America was America." Stauber, *supra* note 39, at 39. From conception, North American colonies were premised on the idea that "rural Americans . . . [would] produce surpluses and sell the excess" to England. *Id.* This mentality survived the Revolutionary War, and as urban centers became more politically and economically important, government looked to the frontier to provide food for the growing cities, the raw materials to facilitate infrastructure, and "trade items" (tobacco, cotton, timber, etc.) to export to Europe and balance the early trade deficit. *Id.* By the end of the Nineteenth Century, the frontier had virtually disappeared and the new paradigm of American life was fully developed. "Rural America was now the place that provided commodities to feed the urban machine. In a short period after the Civil War, rural America went from defining America to supplying it." *Id.* at 40. Gone forever were Thomas Jefferson's yeoman farmers, and with them the political and intellectual status agrarian livelihood had enjoyed since the country's founding. See AM. HERITAGE DICT. (4th ed. 2000) (defining yeoman as "a farmer who cultivates his own land, especially a member of a former class of small freeholders in England"). Without the sentimental esteem of lawmakers that rural farmers had traditionally enjoyed, the stage was set for the take-over of Central Appalachia by King Coal.

<sup>69</sup> Amy K. Glasmeier & Tracey L. Farrigan, *Poverty, Sustainability, and the Culture of Despair: Can Sustainable Development Strategies Support Poverty Alleviation in America's Most Environmentally Challenged Communities?*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 131, 138 (2003); see CAUDILL, *supra* note 52, at 60.

<sup>70</sup> Glasmeier & Farrigan, *supra* note 69, at 138; see CAUDILL, *supra* note 52, at 165-81.

<sup>71</sup> CAUDILL, *supra* note 52, at 219.

<sup>72</sup> Glasmeier & Farrigan, *supra* note 69, at 138-39; see CAUDILL, *supra* note 52, at 261-64.

<sup>73</sup> CAUDILL, *supra* note 52, at 258-67; Glasmeier & Farrigan, *supra* note 69, at 139.

<sup>74</sup> Glasmeier & Farrigan, *supra* note 69, at 139.

<sup>75</sup> *Id.*

ment support became the most prevalent source of livelihood, while the few available coal jobs were doled out according to cronyism and favoritism.<sup>76</sup>

It is significant that most of the Region's natural resources were, and continue to be, owned by outside interests. Beginning as early as the Revolutionary War, external ownership patterns of land in the Region show that, due in large part to aggressive land speculation by eastern capitalists, by 1810, nearly all of the land in Appalachia was held by absentee owners.<sup>77</sup> Thus, the Region's residents occupy the inconvenient position of "sitting on top of high-value resources of which they have little to no ownership yet by whose disturbance they will find themselves heavily affected."<sup>78</sup>

A century of exploitation and non-local control created an "economically dependent and democratically stunted society."<sup>79</sup> The citizens of Appalachia have repeatedly experienced their own interests being subordinated to outside economic interests.<sup>80</sup> The economic legacy of natural resource extraction and dependent development in Appalachia has left its residents with a feeling of powerlessness over their lives, livelihood, and surrounding natural environment.<sup>81</sup> This powerlessness, over time, challenges citizen involvement in efforts

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<sup>76</sup> *Id.* "In a land in which huge corporations and their friends on the judicial bench and in legislative hall had reduced the ordinary citizen to a status little better than that of a mere tenant-by-sufferance in his own home, the mountaineer had nurtured a cynicism toward government at all levels." CAUDILL, *supra* note 52, at 275.

<sup>77</sup> Glasmeier & Farrigan, *supra* note 69, at 137-38. Tax lists from 1790-1810 show that by the turn of the nineteenth century nearly all the land in West Virginia and more than half of the land in Kentucky, Tennessee, and Virginia was owned by non-local interests. *Id.* at 138. *See generally* WILLIAMS, *supra* note 53.

<sup>78</sup> Glasmeier & Farrigan, *supra* note 69, at 132. Even when miners were able to purchase the four-room company-built cottage following the coal company's decision to "get out of the real estate business" during World War II, the purchasers were told they "held the deed free from encumbrances," but the title deeds only conveyed half the title and excepted and reserved the underlying mineral rights. CAUDILL, *supra* note 52, at 265, 308-09. The result of the mineral reservation and the subsequent court treatment of the rights are illustrated by one judge's comment to a landowner plaintiff seeking damages after a coal company had destroyed the landowner's arable soil, covered his crops with rubble, and dried up his well. *Id.* The judge said:

I deeply sympathize with you and sincerely wish I could rule for you. My hands are tied by the rulings of the Court of Appeals and under the law I must follow its decisions. The truth is that about the only rights you have on your land is to breathe on it and pay the taxes. For all practical purposes the company that owns the minerals in your land owns all the other rights pertaining to it.

*Id.*

<sup>79</sup> Glasmeier & Farrigan, *supra* note 69, at 142. "Citizens still live in a state of permanent impermanence, land ownership is continually contested, the natural resource-based economy is in a persistent state of decline, and political cronyism is still the major means by which decisions are made." *Id.* at 146.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 134.



to alleviate poverty and encourage sustainable economic development.<sup>82</sup> Worse still, the Region is left with a “citizenry deeply suspicious of outside interests and fearful of the local power structure” and resistant to change.<sup>83</sup> “Appalachian experiences attest to how fiercely a group will strive to maintain its cultural identity. They also show how arrogant attempts to significantly alter a people’s inherited traditions are unlikely to prevail.”<sup>84</sup>

### C. *Social Science, Public Policy & the Appalachia Breakdown*

Appalachian experience also demonstrates that to overcome the challenges facing Appalachian economic development, “success must be defined in ways that are specific to rural communities.”<sup>85</sup> This means that in order to affect positive change in the Region—to confront the cultural and economic breakdown of Central Appalachia—public policy has to change.

Unfortunately, the majority of public policy aimed at elevating poverty in the distressed areas of Appalachia is primarily national policy created with little input from local communities. The typical “one size fits all” approach of most federal development driven legislation fails to resonate with the communities and people in the Region, leaving its inhabitants to struggle with integrating ineffective “urban policy that is poorly modified to fit nonurban settings” and “based on the erroneous assumption that there are public institutions that serve the unique needs of rural areas.”<sup>86</sup>

The failure of top-down federal economic development policies to affect urban and rural communities equally is telling. Nearly fifty years after the War on Poverty began, “rural children are [still] more likely to live in poverty than their urban counterparts.”<sup>87</sup> Moreover, rural poverty does not receive as much attention from the media or general public as urban poverty, so that it remains generally unnoticed that the middle-class is leaving rural America at a rate of about four percent a year.<sup>88</sup> Today, significant portions of rural areas are

<sup>82</sup> Stauber, *supra* note 39, at 46 (citing CYNTHIA M. DUNCAN, *WORLD’S APART: WHY POVERTY PERSISTS IN RURAL AMERICA* (1999) (comparing rural Appalachia, New England, and mid-South Delta families and finding that “communities that experience high levels of class division and domination by economic and social elites are less successful in reducing poverty”)).

<sup>83</sup> Glasmeier & Farrigan, *supra* note 69, at 139. “[C]itizens in this poor region have been let down many times in the past and have been threatened at a deeply personal level with the revocation of jobs and other means of livelihood if they fail to follow the status quo . . . the basic set of social relationships and institutional trust must be formulated to ensure some possibility of success are not yet developed.” *Id.* at 147-48.

<sup>84</sup> Banker, *supra* note 34.

<sup>85</sup> Stauber, *supra* note 39, at 35.

<sup>86</sup> *Id.* at 34.

<sup>87</sup> *Id.* at 36. “Rural poverty is generally higher than urban—15.9 percent to 12.6 percent in 1997. Between 1997 and 2000, urban poverty declined while rural poverty remained unchanged.” *Id.*

<sup>88</sup> *See id.*

populated by the rich, the poor, and an ever-decreasing middle-class. "Without the middle-class, rural America will become the involuntary home of the poor and the chosen home of the pleasure seekers, producing a rural ghetto and a rural playground."<sup>89</sup>

It is shocking to admit that "in some parts of the country, the rural ghetto already exists."<sup>90</sup> Policymakers must carefully consider that "[r]ural communities are not an artificial construct that can be laid upon a landscape like Levittown or Disney World."<sup>91</sup> It is simply not acceptable that rural public policy is outdated, unfocused, and ineffective. As a country and as neighbors, we must confront the Appalachian breakdown because, if allowed to continue expanding, the rural ghetto "will be a powerful symbol of failure *in* America and *of* American culture."<sup>92</sup>

To confront the Appalachian breakdown, social science has shown that Central Appalachians can reduce poverty and increase the well-being of the middle-class if a plan for economic development can bring about: (1) strong leadership at the community level, (2) a concentrated group or individual completely dedicated to revitalization, (3) a realistic long-term time frame for change, (4) a few early successes that are visible to all in the community, (5) production of new jobs in the community and improvement in the wage structure, (6) awareness of the global economy and strategies to take advantage of it, and (7) community identification and understanding of the truly disadvantaged in the community and the causes that keep them disadvantaged.<sup>93</sup> Study after study has revealed that Historic Preservation serves these functions in communities that take advantage of the opportunity.

#### D. *Social and Economic Benefits of Historic Preservation*

The impact of historic preservation on a community can be looked at several ways. Preservation is most frequently discussed in terms of economic impact, but historic preservation also has educational, environmental, cultural, aesthetic, and social impacts on communities as well. Economic impact can be further divided into short and long term effects. Methods of assigning value to historic preservation are varied, but generally assume one of five methodologies: basic cost studies, economic impact studies, regression analysis, contingent valuation and choice modeling, or case studies.<sup>94</sup> Moreover, the research

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

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 37.

<sup>92</sup> *Id.* (emphasis in original).

<sup>93</sup> *Id.* at 46 (citing VAUGHN GRISHAM & ROB GURWITT, *HAND IN HAND: COMMUNITY AND ECONOMIC DEVELOPMENT IN TUPELO* (1999)).

<sup>94</sup> See RANDALL MASON, *ECONOMICS AND HISTORIC PRESERVATION: A GUIDE AND REVIEW OF THE LITERATURE* (Brookings Institution 2005), available at [http://www.brookings.edu/metro/pubs/20050926\\_preservation.pdf](http://www.brookings.edu/metro/pubs/20050926_preservation.pdf).

available on historic preservation “tends to be less focused on the core ideas behind historic preservation—such as cultural significance, or the historical and aesthetic values of the built environment—and more interested in the measurable, often subsidiary benefits . . . expressible as market values.”<sup>95</sup>

Conclusive statements about the impact of historic preservation remain elusive because of the relatively “late start” historic preservation, as a field, has had compared to other economic disciplines.<sup>96</sup> However, the information economists do have indicates that historic preservation is a sound investment.

Studies show that in terms of job creation and increased local income, historic preservation is particularly strong.<sup>97</sup> Examining the impact in terms of labor, consider rehabilitating an older building instead of new construction. Not only is rehabbing an older building the ultimate form of recycling and the “green choice” for the environment, but re-using existing structures and materials more money to be spent on labor. On average, in new construction, one hundred dollars gets spent 50/50 on labor and materials compared to the same one hundred dollars being split between 60/40 and 70/30 labor and materials in rehabilitating an older building.<sup>98</sup> This disparity is called “labor intensity,” where the money spent on labor filters back into the community.<sup>99</sup> “Once we buy and hang sheet rock the sheet rock doesn’t spend more money. But the plumber gets a hair cut on the way home, buys groceries, and joins the YMCA—each recirculating that paycheck within the community.”<sup>100</sup>

Historic preservation’s effect on property values has been studied most frequently. In the worst case scenario, “housing in historic districts appreciates at a rate equivalent to the local market as a whole.”<sup>101</sup> Assuming the appreciation on property value is the same as the rest of the local market, that the property is in a historic district may make the property owner eligible for federal and state tax incentives.<sup>102</sup> The result would be that the property owner would be paying less to live in a more expensive house.

As the saying goes, the three most important things in real estate are location, location, location. The economic role historic designation plays is that it protects the “location” of the investment. People pay more to live in a pleasant neighborhood. Indeed, in a time of “City Center” renewal and the “Back to the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> DONOVAN D. RYPKEMA, THE ECONOMICS OF HISTORIC PRESERVATION, TENN. PRESERVATION TR. (Apr. 2005).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Part II.A.3 and Part II.B.3 *infra*.

City” movement, “wherever you look . . . the movement hasn’t been back to the city in general, but back to the historic neighborhoods within that city.”<sup>103</sup>

The social and economic benefits are demonstrated in a case study from Wheeling, West Virginia. The Ohio Valley Industrial and Business Development Corporation planned to convert the nineteenth century industrial Wheeling Stamp Building into fully modernized office space to house the operational headquarters of an international law firm. With a total development cost of \$9.8 million, “[h]istoric and New Markets tax credit equity bridged a \$1 million financing gap on the development budget.” The project also qualified for a ten percent state historic tax credit, resulting in \$450,000 in equity. The project made available 300 construction jobs. Upon completion, the rehabilitation of the Wheeling Stamping Building has led to the creation of 120 permanent mid-level management jobs that pay an estimated twenty-five percent more than the average wage in the area. In addition, the rehabilitation spurred other projects in the area. “Since its rehabilitation, two adaptive reuse office developments totaling \$7 million have been completed in the vicinity.” However, the most lasting effect of the project is that the rehabilitation transformed a formerly blighted area into its former commercial prominence.<sup>104</sup>

## II. A COORDINATED APPROACH TO PROTECTING APPALACHIAN HISTORY, CULTURE AND HERITAGE

A coordinated approach to historic preservation is needed for one very simple reason: it cannot be done unilaterally. Historic preservation presents unique challenges that can only be surmounted by a multi-tiered approach blending the support of the people in a community with actions taken by federal, state, and local governments.

There are limits at the federal, state, and local levels that can only be overcome through a coordinated effort. At the federal level, the national government is limited to exercising one of its enumerated powers. Contrary to conventional understanding, listing on the National Register does not protect historic buildings from demolition, unless the building is owned by a federal agency.<sup>105</sup> While federal laws do prescribe procedures that must be followed by the federal government, beyond the procedural protections, federal laws afford little substantive protection for historic places. Largely, this is because, as a matter of federalism, the power to zone and regulate land use is left to the states as part of the state’s police power to regulate for the general welfare.

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<sup>103</sup> RYPKEMA, *supra* note 97.

<sup>104</sup> *Wheeling Stamping Building, Wheeling, WV*, NATIONAL TRUST COMMUNITY INVESTMENT FUND, Mar. 12, 2007, available at [http://www.ntcicfunds.com/library/profile\\_Wheeling.pdf](http://www.ntcicfunds.com/library/profile_Wheeling.pdf).

<sup>105</sup> See, e.g., KENTUCKY HERITAGE COUNCIL, PLANNING TO PRESERVE: THE 2004 STATE HISTORIC PRESERVATION PLAN FOR THE COMMONWEALTH OF KENTUCKY PRESERVATION PLAN 85 (Rachel Kennedy ed., 2003) available at [http://www.state.ky.us/agencies/khc/preservation\\_plan.htm](http://www.state.ky.us/agencies/khc/preservation_plan.htm).

At the state level, government action affecting historic resources is subject to state legislation similar to the federal laws. While state legislators are closer to local decision-makers than their federal counterparts, state legislators are still responsible for dealing with the larger problems of state government. Adding to the confusion is that topography and demographics vary largely from one side of a state to the other. For example, from east to west, the topography of Kentucky changes from the imposing mountains of the eastern Kentucky coal fields to the rolling hills of central Kentucky's famous Bluegrass, to the flat bottomlands at the confluence of the Ohio and Mississippi Rivers in western Kentucky. The Commonwealth is flanked on the north by the fertile farmland along the Ohio River and by the Cumberland, Dale Hollow, Barklay, and Kentucky Lakes on the south. The geological diversity alone is mind-boggling, but add to that the different types of communities that make up these areas, and it becomes readily apparent that state governments are unequipped to deal with the diversity and variety of local traits, customs, landscapes, and history that differentiate the communities within the state. State governments are therefore limited in their understanding of what aspects of community culture and heritage make each community attractive to outsiders, as well as what aspects are defining and fundamental community traits to insiders.

Therefore, local input is vital. The majority of states have addressed the issue by delegating police power to local municipalities via a home-rule or other enabling statute, especially where private action affects privately owned historic property. However, local governments do not have the resources or expertise to coordinate planning and preservation on a large scale. Moreover, because municipalities are constrained to regulate only within their borders, developing a regional or multi-county plan is difficult and must be organized by the state.

To avoid these intra-governmental clashes, a coordinated approach to protecting Appalachian culture and heritage is the only way to ensure cooperation and success in a preservation program. Each level—federal, state, and local government—must work together to create a multi-tier approach to historic preservation. Such an approach is imperative because each tier of government contributes in ways that the other tiers are unable to accomplish. The federal government has the resources and expertise to effectuate successful preservation planning and objectives on a large scale; the state has the authority to regulate land use and coordinate regional cooperative efforts amongst neighboring localities, counties, and states; and municipalities have the familiarity with specific historic sites and the local support of the people who ultimately provide the manpower that carries out the program. The following discussion focuses on the interaction between the three levels of government and highlights the beneficial functions each level of government serves, as well as the limits on each imposed by our federalist system.

### A. Federal Law and Policies

Federal law is limited to merely protecting historic property from federal intrusion.<sup>106</sup> Nonetheless, the federal government does provide four important functions in a multi-tiered collaborative historic preservation initiative: (1) federal law is a springboard for state and local protective preservation law; (2) federal law reinforces the importance of coordinated state, national, and local protection of historic, cultural, and natural resources; (3) federal law provides funding through grant-in-aid programs and tax incentives that encourage private property owners to engage in historic preservation; and (4) the federal government and its agencies have expertise in planning, access to resources that it makes available to state and local governments, and engages in technology sharing that can help state and local governments successfully plan for historic preservation.

At the federal level, the National Historic Preservation Act (“NHPA”),<sup>107</sup> Section 4(f) of the Department of Transportation Act (“Section 4(f)”)<sup>108</sup> and the National Environmental Policy Act (“NEPA”)<sup>109</sup> are the primary statutes protecting historic resources.<sup>110</sup> In 2005, Congress voted to streamline the environmental regulations under Section 4(f) and NEPA.<sup>111</sup> These new regulations could potentially change some of the only substantive protection for historic property under federal law.<sup>112</sup> The following discussion is an overview of the NHPA and the key federal transportation and tax laws affecting historic property.

<sup>106</sup> MILLER, *supra* note 9, at 2.

<sup>107</sup> National Historic Preservation Act, 16 U.S.C. §§ 470 - 470x-6 (2006).

<sup>108</sup> Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1966) (amended and re-codified at 49 U.S.C. § 303 (2006)) (referred to as “Section 4(f)”). The provisions of Section 4(f) apply only to agencies within the Department of Transportation. A similar law exists that applies only to the Federal-Aid Highway Program. *See* 49 U.S.C. § 138 (2006). Both laws were amended in 2005 by Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59 § 6009(a), 119 Stat. 1144, 1874-1875 (2005) [hereinafter SAFETEA-LU]. *See infra* notes 200-01 and accompanying text.

<sup>109</sup> National Environmental Policy Act, 42 U.S.C. § 4321 (2006); *see also* 40 C.F.R. §§ 1500-18 (2008).

<sup>110</sup> MILLER, *supra* note 9, at 4.

<sup>111</sup> SAFETEA-LU, Pub. L. No. 109-59, § 6009(b), 119 Stat. 1144, 1876-77 (2005); Proposed Rules & Request for Comments, Parks, Recreation Areas, Wildlife and Waterfowl Refugees, and Historic Sites, 71 Fed. Reg. 42,611 (July 27, 2006).

<sup>112</sup> N.B. On March 12, 2008 the Department of Transportation issued the final regulations “clarifying the factors to be considered and the standards to be applied when determining if an alternative for avoiding use of a Section 4(f) property is feasible and prudent” and moved the Section 4(f) regulation to 23 C.F.R. § 774 (2008). The new regulations clarify the Section 4(f) approval process, simplify the regulatory process, and address the new *de minimis* exception to the Section 4(f) process. *See id.* This Note was already being prepared for publication before the regulation was finalized and reflects the law prior to March 12, 2008. *See infra* notes 190-205 and accompanying text.

## 1. The National Historic Preservation Act

The NHPA is the key federal legislation that adopts, as a national policy, a leadership role for the federal government in the preservation of the nation's historic resources by establishing procedures for protecting historic resources in federal undertakings.<sup>113</sup> The NHPA also outlines the stewardship obligations of federal agencies.<sup>114</sup> These provisions are referred to as Section 106 and Section 110 respectively.

As the purpose statement of the NHPA makes clear, the NHPA was enacted to “to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments . . . to expand and accelerate their historic preservation programs and activities.”<sup>115</sup> Thus, the policy espoused in the NHPA is that the federal government will act “in partnership with the States, local governments, Indian tribes and private organizations and individuals to”<sup>116</sup> encourage preservation of the country's irreplaceable heritage.<sup>117</sup> This language is significant because it evidences an integral aspect of historic preservation policy; “[i]t is not the province of a single national government agency or national museum.”<sup>118</sup> Rather, historic preservation is an intra-governmental activity that requires the cooperation between local, state, and federal government and the private sector.<sup>119</sup>

The NHPA operates in three primary ways. First, it authorizes the expansion and maintenance of the National Register of Historic Places.<sup>120</sup> Second, it establishes the Section 106 protective review process that prohibits federal agencies from approving any federal undertaking that could adversely affect historic properties, unless the agency consults with the State Historic Preservation Officer (“SHPO”) taking into account the effects of the undertaking on historic properties and affords the Advisory Council on Historic Preservation (“ACHP”) a reasonable opportunity to comment on the undertaking.<sup>121</sup> Third, it imposes stewardship obligations upon federal agencies that include preserving historic properties owned by the federal government and the use of historic

<sup>113</sup> Sandra G. McLamb, Group Note, *Preservation Law Survey 2001: State Preservation Law*, 8 WIDENER. L. SYMP. J. 463, 464 (2002) (discussing 16 U.S.C. § 470f (referred to as “Section 106”).

<sup>114</sup> 16 U.S.C. § 470h-2 (referred to as “Section 110”).

<sup>115</sup> 16 U.S.C. § 470(b)(7).

<sup>116</sup> 16 U.S.C. § 470-1.

<sup>117</sup> 16 U.S.C. § 470(b)(4).

<sup>118</sup> Francis P. McManamon, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century*, 16 CONN. J. INT'L L. 247, 263 (2001).

<sup>119</sup> *Id.*

<sup>120</sup> 16 U.S.C. § 470a(1)(A). *See also* National Register of Historic Places, 36 C.F.R. §§ 60.1-60.15 (2008); Determinations of Eligibility for Inclusion in the National Register, 36 C.F.R. §§ 63.1-63.6 (2008).

<sup>121</sup> 16 U.S.C. § 470f.

buildings to the maximum extent possible by federal agencies.<sup>122</sup> The following discusses each in turn.

*a. The National Register of Historic Places*

The threshold inquiry in nearly all historic preservation law is whether the property is listed on a federal, state, or local register. At the federal level, the National Register of Historic Places is the nation's official inventory of "districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering and culture."<sup>123</sup> Pursuant to Title I of the NHPA, the Secretary of the Interior oversees National Register listings and is responsible for developing the criteria for determining eligibility for inclusion of properties on the register.<sup>124</sup> The newly amended National Park Service ("NPS") regulations designate properties<sup>125</sup> as "historic," thus entitled to listing in the National Register of Historic Properties, where:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded,

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<sup>122</sup> 16 U.S.C. § 470h-2(a).

<sup>123</sup> 16 U.S.C. § 470(a)(1)(A). The Secretary's regulations explain:

The National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment. Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property.

36 C.F.R. § 60.2.

<sup>124</sup> 16 U.S.C. § 470(a)(1)-(2). The criteria are listed in 36 C.F.R. § 60.4.

<sup>125</sup> The type of property eligible for consideration includes

any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior . . . [including] artifacts, records, and remains that are related to and located within such properties.

36 C.F.R. § 800.16(l)(1) (2008).



or may be likely to yield, information important in prehistory or history.<sup>126</sup>

Properties are added to the National Register in a number of ways. First, both Congress and the President are authorized to create historic areas in the National Park System.<sup>127</sup> Second, the Secretary of the Interior can declare the property to be of national significance and designate it as a National Historic Landmark.<sup>128</sup> Third, SHPOs can nominate a property for inclusion through a State Historic Preservation Program subject to the approval of the NPS.<sup>129</sup> Fourth, if such property is located in a state with no approved State Historic Preservation Program, the Secretary may accept a nomination directly from any person or local government.<sup>130</sup> Last, the Secretary can accept nominations of

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<sup>126</sup> 16 U.S.C. § 470(a)(2); 36 C.F.R. § 60.4. The regulations also include a list of exceptions, and exceptions to the exceptions:

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years *shall not* be considered eligible for the National Register. However, such properties will qualify if they are *integral parts of districts* that do meet the criteria of if they fall within the following categories:

- (a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or
- (b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or
- (c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life; or
- (d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
- (e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or
- (f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or
- (g) A property achieving significance within the past 50 years if it is of exceptional importance.

36 C.F.R. § 60.4 (emphasis added).

<sup>127</sup> 36 C.F.R. § 60.1(b)(1). Further, the regulations provide that “all or portions of which may be determined to be of historic significance consistent with the intent of Congress.” *Id.*

<sup>128</sup> 36 C.F.R. § 60.1(b)(2).

<sup>129</sup> 16 U.S.C. § 470a(a)(3); 36 C.F.R. § 60.1(b)(3).

<sup>130</sup> 16 U.S.C. § 470a(a)(4); 36 C.F.R. §60.1(b)(4).

federal properties prepared by federal agencies, submitted by the Federal Preservation Officer and approved by NPS.<sup>131</sup>

The effect of a property being listed, or eligible for listing, is three-fold. First, any adverse impact on properties listed or eligible for listing must be taken into account in any federal undertaking under Section 106.<sup>132</sup> Second, National Register designation opens the door for other federal laws to apply to the property. These laws include eligibility for federal grants-in-aid programs,<sup>133</sup> certain federal tax provisions allowing favorable tax treatments for rehabilitation,<sup>134</sup> and, if a listed property contains surface coal resources, provisions of the Surface Mining and Control Act of 1977 may require consideration of a property's historic value in determining whether to issue a surface coal mining permit.<sup>135</sup> Third, National Register listing serves a gatekeeping function for state and local laws that can provide more protection for the property than federal law, as well as avail the owner of the property additional tax benefits.

#### *b. Section 106 Protective Review*

Section 106 of the NHPA, the “regulatory heart” of the Act,<sup>136</sup> provides the ACHP the opportunity to comment on federal undertakings before federal funding or licenses are issued and requires the heads of federal agencies or departments to “take into account the effect of the undertaking” on any historic property.<sup>137</sup> Courts have occasionally referred to Section 106 as a “stop, look, and listen” provision,<sup>138</sup> often analogizing this section of the NHPA with the procedural protections offered in the NEPA.<sup>139</sup>

The ACHP has promulgated binding regulations that establish a four-step process for compliance with the “consideration” requirement in Section 106 review.<sup>140</sup> First, the agency must determine if Section 106 applies to a given

<sup>131</sup> 36 C.F.R. § 60.1(b)(5).

<sup>132</sup> 16 U.S.C. § 470f; 36 C.F.R. § 60.2(a).

<sup>133</sup> 36 C.F.R. § 60.2(b).

<sup>134</sup> 36 C.F.R. § 60.2(c).

<sup>135</sup> 36 C.F.R. § 60.2(d).

<sup>136</sup> MILLER, *supra* note 9, at 6.

<sup>137</sup> 16 U.S.C. § 470f. Under the regulations, the head of the agency is called the “agency official.” This is the official who “has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance.” 36 C.F.R. § 800.2(a) (2008).

<sup>138</sup> *E.g.*, *Bus. & Residents Alliance v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005).

<sup>139</sup> *See e.g.*, *Save Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49, 63 (1st Cir. 2001); *Dugong v. Rumsfeld*, 2005 U.S. Dist. LEXIS 3123, at \*42-43 (N.D. Cal. 2005); *Maxwell St. Historic Pres. Coal. v. Bd. of Trs. of the Univ. of Ill.*, 2000 U.S. Dist. LEXIS 11750, at \*7 (D. N. Ill. 2000) (citing *Edwards v. First Bank of Dundee*, 534 F.2d 1242, 1245 (7th Cir. 1976)).

<sup>140</sup> *See* 36 C.F.R. §§ 800.1-800.16, App. A (2008).

project.<sup>141</sup> Generally, this is the most litigious step in the review process as this inquiry turns on whether the agency action is an “undertaking.”<sup>142</sup> Second, if the agency action is an undertaking, the agency must identify the properties in the area that are listed in or are eligible for listing on the National Register.<sup>143</sup> Third, the agency must determine how the identified historic resources might be affected by the proposed agency action and explore alternatives that may avoid or reduce adverse impacts on historic properties.<sup>144</sup> Last, the agency must reach

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<sup>141</sup> 36 C.F.R. § 800.3(a) (2008). The decision is made by the head of the agency, although the ACHP can advise the official on whether there is an undertaking. If the undertaking is not the type of activity to affect historic properties, the Section 106 obligations are satisfied for the undertaking. In addition, agency action subject to a program alternative or alternate agency procedure can similarly avoid Section 106 review. 36 C.F.R. § 800.14 (2008).

<sup>142</sup> Under the ACHP regulations, an undertaking is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 CFR § 800.16(y). *But see, e.g., Bus. & Residents Alliance*, 430 F.3d at 594 (concluding “that an urban empowerment zone’s use of federal block grant funds in connection with individual projects does not trigger the requirements of Section 106, on the grounds that once an empowerment zone has been created and has received . . . [the] grants, there is no federal involvement in the funding decisions for individual projects”); *Sugarloaf Citizens Ass’n v. Fed. Energy Regulatory Comm’n.*, 959 F.2d 508, 513 (4th Cir. 1992) (holding the NHPA “by its terms, has a narrow reach and is triggered only if a federal agency has the authority to license a project or approve expenditures for it,” therefore, the FERC certification of a facility as a qualifying small power production facility “[did] not have sufficient control over the project . . . to federalize it”).

<sup>143</sup> “The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.” 36 C.F.R. § 800.16(1)(2) (emphasis added).

<sup>144</sup> The regulations list the following criteria to assess adverse effects at 36 C.F.R. § 800.5 (2008):

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. . . . Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to: (i) Physical destruction of or damage . . . of the property; (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, . . . that is not consistent with the . . . standards for the treatment of historic properties and applicable guidelines; (iii) Removal of the property from its historic location; (iv) Change of the character of the property’s use or of physical features . . . that contribute to its historic significance; (v) Introduction of . . . elements that diminish the integrity of the property’s significant historic features; (vi) Neglect of a property . . . except where such neglect and deterioration are recognized qualities of a property of . . . significance to an Indian tribe or Native Hawaiian organization; and (vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate

an agreement with the SHPO<sup>145</sup> on “measures to deal with any adverse effects or obtain advisory comments from the ACHP, which are sent directly to the head of the agency.”<sup>146</sup>

In addition, each step in the Section 106 review process imposes upon the agency official the additional obligation to consult with the appropriate SHPO and other parties that have the right to consult under the regulations.<sup>147</sup> These additional consulting parties can include local governments,<sup>148</sup> applicants for federal assistance permits,<sup>149</sup> and “individuals and organizations with a demonstrated interest in the undertaking . . . due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.”<sup>150</sup>

Whether agency action is an “undertaking,” the trigger for Section 106 compliance is often a contested issue because the definition in the NHPA and the ACHP regulations are unclear on what federal action is an “undertaking.” The regulations define an undertaking as any “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”<sup>151</sup> Specifically, courts struggle with determining what activities fall within the “direct or indirect jurisdiction” category and what federally funded activities do not. Neither the NHPA nor the ACHP regulations clearly differentiate the two.

The Second Circuit approached the question by relying on textual clues of Section 106 of the NHPA in *Business and Residents Alliance of East Harlem v. Jackson*.<sup>152</sup> In that case, the court read the statute’s reference to “the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking,” in conjunction with the language “shall,

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. . . restrictions or conditions to ensure long-term preservation of the property’s historic significance.

*Id.* (emphasis added) (internal citations omitted).

<sup>145</sup> The SHPO “reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.” 36 C.F.R. § 800.2(c)(1)(i).

<sup>146</sup> *Protecting Historic Properties: A Citizen’s Guide to Section 106 Review*, ADVISORY COUNCIL ON HISTORIC PRESERVATION 5 (2001), available at [www.achp.gov/citizensguide.pdf](http://www.achp.gov/citizensguide.pdf).

<sup>147</sup> See 36 C.F.R. § 800.3(c), (f)(1)-(3); 36 C.F.R. § 800.4(a); 36 C.F.R. § 800.5(a); 36 C.F.R. § 800.6(a), (a)(2).

<sup>148</sup> 36 C.F.R. § 800.2(c)(3).

<sup>149</sup> 36 C.F.R. § 800.2(c)(4).

<sup>150</sup> 36 C.F.R. § 800.2(c)(5).

<sup>151</sup> 36 C.F.R. § 800.16(y).

<sup>152</sup> 430 F.3d 584, 592 (2d Cir. 2005).

prior to the approval of the expenditure of any Federal funds on the undertaking,” to infer that in order to meet “a qualifying level of jurisdiction over the undertaking, the federal agency must have some degree of power to approve or otherwise control the expenditure of federal funds on that undertaking.”<sup>153</sup> In other words, the court held that the expenditure of funds language modified the jurisdiction requirement. This reasoning is consistent with the purpose of the NHPA, according to the court, because “[i]f the federal agency has no direct or indirect power to effectuate the results of the Section 106 review by making a resultant funding decision, then such a review will be merely an empty exercise.”<sup>154</sup>

Other courts have focused the analysis on factors that would indicate a federal undertaking to “include the agency’s ‘initiation, its funding, or its authorization’ of the alleged undertaking.”<sup>155</sup> This analysis leads to a broader reading of an undertaking, finding sufficient federal involvement in agency action by “either a federal agency’s decision-making authority over a project or actual expenditure [of federal funds].”<sup>156</sup> Issues over whether or not agency action is an undertaking have plagued the NHPA for decades. It appears that no definitive answer is forthcoming anytime soon. Future courts will most likely perform a similar test to the one that the Second Circuit used, or courts may decide the question on a case-by-case basis.

Two recent developments in the case law present interesting questions to the historic preservation practitioner. First, a district court in California held in *Dugong v. Rumsfeld*, that Section 106 review is applicable to agency action potentially affecting historic resources located outside the United States when the resource is designated on a historic register of a foreign government regardless of whether the resources would similarly be protected under the NHPA.<sup>157</sup> Although Congress amended the NHPA in 1980 to include property listed on the World Heritage List or on a foreign country’s equivalent of the National Register to oblige United States agencies to conduct a Section 106 review before approving federal undertakings affecting the property,<sup>158</sup> the district court was faced with determining how extensive and inclusive the NHPA’s amended language was.

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (quoting 16 U.S.C. § 470f).

<sup>155</sup> *Dugong v. Rumsfeld*, 2005 U.S. Dist. LEXIS 3123, at \*44 (N. D. Cal. Mar. 2, 2005).

<sup>156</sup> *Id.* at \*45.

<sup>157</sup> *Id.* at \*46.

<sup>158</sup> 16 U.S.C. § 470a-2 (providing that “[p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects”).

In *Dugong v. Rumsfeld*,<sup>159</sup> environmental groups and Japanese private citizens challenged the Special Action Committee on Okinawa (“SACO”) decision under the Administrative Procedures Act (“APA”)<sup>160</sup> and the NHPA because the construction of a military base in the proposed location “could ‘destroy the most important known remaining dugong habitat in Japan.’”<sup>161</sup> The case was brought under the NHPA because the Okinawa dugong, a marine mammal, “is central to the creation mythology, folklore, and rituals of traditional Okinawan culture . . . [and] [i]n Japan, the Okinawa dugong is a protected ‘natural monument’ under that country’s Law for the Protection of Cultural Properties.”<sup>162</sup> In refusing the Department of Defense’s summary judgment motion arguing that the Japanese list was not equivalent to the National Register, the court held:

[t]o require that foreign lists include only those types of resources which are of cultural significance in the United States would defy the basic proposition that just as cultures vary, so too will their equivalent legislative efforts to preserve their culture.<sup>163</sup>

The significance of the case is that it highlights the different standard that governs Section 470a-2 of the NHPA for determining the eligibility of properties for protective review. Under this standard, the determinative fact is the property’s actual inclusion on a foreign list, not whether the property would be eligible for listing on the Nation Register under domestic law.

The second development has potentially further-reaching implications and centers on the question of whether the NHPA creates a direct private right

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<sup>159</sup> 2005 U.S. Dist. LEXIS 3123. The facts of the case deserve some attention:

The United States Department of Defense maintains and controls a number of military bases on Okinawa, including the Marine Corps Air Station Futenma, which operates facilities and provides services and materials to support Marine Corps aircraft operations. . . . [A] Special Action Committee on Okinawa (“SACO”), a bilateral [Japanese-American] committee [was created] with the primary purpose of reducing the burden of the United States military presence on the Okinawans . . . . SACO recommended that Marine Corps Air Station Futenma be replaced by a sea-based facility . . . . The Basic Plan issued by this body in July, 2002, approved the Governor of Okinawa’s decision to relocate Marine Corps Air Station Futenma to Nago City’s Henoko District, immediately offshore from the Marine Corps’ Camp Schwab. *Id.* at \*2-6.

<sup>160</sup> Administrative Procedure Act 5 U.S.C. §§ 701-06 (2006).

<sup>161</sup> *Dugong*, 2005 U.S. Dist. LEXIS 3123, at \*7-9 (referencing a 2002 United Nations Environmental Programme report).

<sup>162</sup> *Id.* (explaining the “dugong is a herbivorous marine mammal that inhabits tropical and subtropical coastal and island waters in the Indo-Pacific from East Africa to Vanuatu.”).

<sup>163</sup> *Id.* at \*22.

of action to challenge agency decisions.<sup>164</sup> In 2005, the Ninth Circuit held that Section 106 of the NHPA does not give rise to a direct private right of action, and therefore, all challenges to agency decisions must instead be brought pursuant to the APA rather than the NHPA.<sup>165</sup> The court based its conclusion on the notion that a private right of action generally arises in the context of a claim against a third party, not against the federal government.<sup>166</sup> The court reasoned that permitting a case to bypass the APA and proceed directly under the NHPA would allow plaintiffs to “sidestep the traditional requirements of administrative review under the APA without express Congressional authorization.”<sup>167</sup> Moreover, the APA already includes a series of procedural requirements—such as the exhaustion requirement and the limitation of challenges to final agency action—that if omitted would make “little sense in light of the administrative review scheme set out in the APA,” namely, that an aggrieved party can sue under the APA to force compliance with Section 106 without having a private right of action under the statute.<sup>168</sup>

The Ninth Circuit’s treatment of the issue directly contradicts precedent in several other circuits holding the NHPA does create a direct private right of action.<sup>169</sup> As is more frequently the case, courts have simply assumed the NHPA contained authorization and reached the merits of the case without addressing the issue.<sup>170</sup> The majority of circuits have been operating as if the direct right existed for at least seventeen years.<sup>171</sup> Presumably, these courts have looked to the attorneys’ fees provision of the NHPA, which authorizes the award of fees to a successful plaintiff “[i]n any civil action brought in any United States district court by *any interested person to enforce the provisions [the NHPA].*”<sup>172</sup> The holding by the Ninth Circuit reopens the question and could possibly result in other courts following its lead. Thus, litigants in upcoming preservation cases should be aware that it may be prudent to assert both

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<sup>164</sup> See 16 U.S.C. § 470w-4 (“In any *civil action* brought in any United States district court by *any interested person to enforce the provisions of this Act . . .*”) (emphasis added).

<sup>165</sup> *San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005) (affirmed by *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006)).

<sup>166</sup> *San Carlos Apache Tribe*, 417 F.3d at 1096.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *E.g.*, *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991). For an in-depth discussion on the circuit split see Timothy J. Famulare, Note, *Has Sandoval Doomed the Private Right of Action Under the National Historic Preservation Act?*, 16 B.U. PUB. INT. L.J. 73 (2006).

<sup>170</sup> See, *e.g.*, *Vieux Carre Prop. Owners, Residents & Assocs. v. Brown*, 875 F.2d 453 (5th Cir. 1989); *Lee v. Thornburgh*, 877 F.2d 1053 (D.C. Cir. 1989); *Nat’l Ctr. for Pres. Law v. Landrieu*, 635 F.2d 324 (4th Cir. 1980) (*per curiam*); *Waterbury Action to Conserve Our Heritage, Inc. v. Harris*, 603 F.2d 310 (2d Cir. 1979). *But see* *Nat’l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908 (D.C. Cir. 1996).

<sup>171</sup> Since at least 1989.

<sup>172</sup> 16 U.S.C. § 470w-4 (emphasis added).

NHPA and APA claims in order to successfully survive a motion to dismiss in a suit to challenge agency decisions or force an agency to comply with the NHPA. In addition, the added procedural limitations of exhaustion and final agency action may become stumbling blocks in upcoming litigation.

*c. Federal Stewardship of Historic Properties*

Section 110(a) of the NHPA imposes stewardship obligations on federal agencies “to assume responsibility for the preservation of historic properties which are owned or controlled by such agency.”<sup>173</sup> However, one court has held that Section 110 does not create substantive preservation obligations “separate and apart from the overwhelmingly procedural thrust” of the rest of the NHPA.<sup>174</sup> The court held that the NHPA does not require agencies “to undertake any preservation beyond what was necessary to comply . . . with . . . the Section 106 consultation process” and the agency’s own preservation plan.<sup>175</sup> Due to “the limited nature” of Section 110, the court reasoned, all the NHPA required was for an agency to “undertake the level of preservation necessary to carry out the requirements of Section 110, consistent with [the agency’s] mission.”<sup>176</sup>

If the “limited nature” of Section 110 does not impose stewardship obligations for federal agencies, President Clinton’s 1996 Executive Order, *Locating Federal Facilities on Historic Properties in Our Nation’s Central Cities*, certainly does. The Order was released as one of his administration’s “community empowerment initiatives” in an effort to revitalize traditional centers of growth and commerce in metropolitan areas, and has been adopted into the NHPA.<sup>177</sup> It provides that before leasing, constructing, or otherwise acquiring buildings in which to perform agency functions, each “agency shall use, to the maximum extent feasible, historic properties available to the agency.”<sup>178</sup> Pursu-

<sup>173</sup> 16 U.S.C. § 470h-2(a)(1).

<sup>174</sup> *Blanck*, 938 F. Supp. at 922.

<sup>175</sup> *Id.* at 925. *But see* *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, 194 F. Supp. 2d 977 (D. S.D. 2002); *Brewery Dist. Soc. v. Fed. Highway Admin.*, 996 F. Supp. 750 (S.D. Ohio 1998).

<sup>176</sup> *Blanck*, 938 F. Supp. at 922; *see generally* 16 U.S.C. § 470h-2(a)(1). The court reached its conclusion on the premise that Section 110 is to be read in conjunction with Section 106 “which constitutes the main thrust of the NHPA.” *Id.* Accordingly, an agency’s duty to act under the NHPA is “triggered only when there is an undertaking and that obligation, once triggered, is procedural in nature.” *Id.* Moreover, in the court’s view, “the Section 110 Guidelines demonstrate that the Secretary of the Interior has interpreted Section 110 to embody the requirement that agencies thoroughly consider preservationist goals in all aspects of agency decision-making but that Section 110 does not itself affirmatively mandate the preservation of historic buildings or other resources.” *Id.* Therefore, the court refused to order the agency to restore the historic district owned by the agency to its original condition nor to spend future funds on preventing the further deterioration of the district. *Id.*

<sup>177</sup> Exec. Order No. 13,006, 61 Fed. Reg. 26,071 (May 21, 1996) *reprinted in* 16 U.S.C. §470h-2(a)(1).

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



ant to the Order, federal agencies must use historic properties in central business areas whenever it is “operationally appropriate and economically prudent.”<sup>179</sup> Additionally, the Order establishes a hierarchy of suitable historic building locations.

First choice goes to historic properties in historic districts.<sup>180</sup> Next, agencies shall consider other sites within a historic district.<sup>181</sup> The sites need not be developed.<sup>182</sup> If there is still no suitable location in any historic district, agencies then may look to historic properties outside the historic district.<sup>183</sup> Only after exhausting all possible locations, or establishing that locating in a historic property would be unfeasible or financially imprudent, can a federal agency acquire newer buildings outside a historic city center.<sup>184</sup> In addition to the building location decision, the Order mandates that “[a]ny rehabilitation or construction [of agency facilities] . . . must be architecturally compatible with the character of the surrounding historic district or properties.”<sup>185</sup>

President George W. Bush took federal use of historic property one step further with the *Preserve America* Executive Order.<sup>186</sup> The *Preserve America* Initiative expanded federal agencies’ leadership roll to include “actively advancing the protection, enhancement, and contemporary use of the historic properties owned by the Federal Government, and by promoting intergovernmental cooperation and partnerships for the preservation and long-term use of historic properties.”<sup>187</sup>

Part of the new approach calls for managing historic properties as assets that contribute to a community’s economic vitality and promote local economic development.<sup>188</sup> Thus, the *Preserve America* Order stands for the use of historic

<sup>179</sup> Exec. Order No. 13,006, 61 Fed. Reg. 26,071 (May 21, 1996).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Exec Order No. 13,287, 68 Fed. Reg. 10,635 (Mar. 3, 2003).

<sup>187</sup> *Id.* This policy should be achieved:

[T]hrough the protection and continued use of the historic properties owned by the Federal Government, and by pursuing partnerships with State and local governments, Indian tribes, and the private sector to promote the preservation of the unique cultural heritage of communities and of the Nation and to realize the economic benefit that these properties can provide. Agencies shall maximize efforts to integrate the policies, procedures, and practices of the NHPA and this order into their program activities in order to efficiently and effectively advance historic preservation objectives in the pursuit of their missions.

*Id.*

<sup>188</sup> The focus on linking historic preservation and economic development in the *Preserve America* Order has become a funding priority for federal Economic Development Administration investments in support of long-term, coordinated regional economic development initiatives in

properties in a manner that contributes to the long-term preservation and productive “use of those properties as Federal assets and, where consistent with agency missions, governing law, and the nature of the properties, contributes to the local community and its economy.”<sup>189</sup> The policy is directed at attaining the concomitant goals of fostering a broader appreciation for the development of the underlying values of the United States and realizing the economic benefit that historic properties can provide communities.<sup>190</sup>

## 2. Federal Transportation Laws and Policies

The major federal transportation law effecting historic properties is Section 4(f) of the Department of Transportation Act of 1966 (“Section 4(f)”)<sup>191</sup>. Section 4(f), unlike the NHPA, contains substantive protections for historic sites by requiring the Department of Transportation (“DOT”) to avoid highway projects that use or substantially effect historic sites, unless doing so would not be feasible and prudent.<sup>192</sup> This law has recently been changed and the new Section 4(f) remains substantially the same but adds a *de minimis* exception.<sup>193</sup> The exception operates to allow highway projects whose effects on historic sites would be merely *de minimis*.

Prior to the revision, Section 4(f) provided that Secretary of the Transportation “shall not” authorize any program or project which “requires the use of . . . any land from an historic site of national, State, or local significance” as determined by the federal, state, or local officials, unless, “(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such . . . historic site resulting from such use.”<sup>194</sup>

In other words, Section 4(f) prohibited the Secretary of Transportation from approving any highway project that used or substantially impaired any historic site, as determined by federal, state, or local officials.<sup>195</sup> Where a proposed project would impair a historic site, but avoiding the historic site is deemed imprudent and unfeasible, all possible planning to minimize harm must

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underperforming areas of the country. See Solicitation of Proposals for Economic Development Assistance Programs, 71 Fed. Reg. 9,308; 9,311 (Feb. 23, 2006).

<sup>189</sup> Exec. Order No. 13,287, 68 Fed. Reg. 10,635 (Mar. 3, 2003).

<sup>190</sup> *Id.*

<sup>191</sup> Department of Transportation Act of 1966 49 U.S.C. § 1653(f) (amended and recodified at 49 U.S.C. § 303). The law was amended in 2005 by SAFETEA-LU, Pub. L. 109-59 § 6009(a), 119 Stat. 1144, 1874-1875 (2005); see *supra* note 112.

<sup>192</sup> 49 U.S.C. § 303(a) (all agencies within Department of Transportation); 23 U.S.C. § 138(a) (Federal-Aid Highway Program).

<sup>193</sup> 49 U.S.C. § 303(b); 23 U.S.C. § 138(b); see *supra* note 112.

<sup>194</sup> 49 U.S.C. § 303(a); 23 U.S.C. § 138(a).

<sup>195</sup> 49 U.S.C. § 303(a); 23 U.S.C. § 138(a).

be done.<sup>196</sup> Because neither the statute nor the regulations define “prudent” and “feasible,” courts have interpreted “feasible” to mean “consistent with sound engineering.”<sup>197</sup> However, the courts are split on the meaning of “prudent” under Section 4(f).<sup>198</sup> Generally, though, “prudent” has been construed, more or less, as meaning “not presenting unique problems.”<sup>199</sup>

In 2005, Congress amended Section 4(f) with part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), a surface transportation reauthorization bill, in order to better cope with modern transportation projects and continue to protect and preserve historic sites.<sup>200</sup> The SAFETEA-LU amendments created a *de minimis* exception to the substantive provision protecting historic sites in subsection (a) of Section 4(f).<sup>201</sup>

The new *de minimis* exception allows for highway projects to move forward if the “project will have a *de minimis* impact on the [historic] area.”<sup>202</sup> However, with respect to historic sites, the Secretary of Transportation can only make a *de minimis* finding if, in accordance with the consultation process outlined in the NHPA, “(i) the transportation program or project will have no adverse effect on the historic site; or (ii) there will be no historic properties affected by the transportation program or project.”<sup>203</sup> In addition, there must be a finding that the Secretary has “received written concurrence from the applicable State Historic Preservation Officer.”<sup>204</sup>

Reflecting an attempt to address the mistakes of the original Section 4(f), the SAFETEA-LU amendments mandate that the Secretary of Transportation promulgate new regulations, after consulting with the appropriate affected agencies and interested parties, within one year of the Act’s passage.<sup>205</sup> The

<sup>196</sup> Michael Jay Kaplan, Annotation, *Construction and Application of § 4(f) of Department of Transportation Act of 1966 (49 U.S.C.A. § 1653(f)), as Amended, and § 18(a) of Federal-Aid Highway Act of 1968 (23 U.S.C.A. § 138) Requiring Secretary of Transportation to Determine that all Possible Planning for Highways has been done to Minimize Harm to Public Park and Recreation Lands*, 19 A.L.R. 904 (2007).

<sup>197</sup> *Id.* SAFETEA-LU requires the Secretary to promulgate regulations that clarify the factors and standards to determine whether an alternative is prudent and feasible. Pub. L. No. 109-59, § 6009(b), 119 Stat. 1144, §§ 1876-77 (2005); see *supra* note 112.

<sup>198</sup> *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159 (4th Cir. 1990) (illustrating the stance of the Fourth, Seventh, and Tenth Circuit Courts of Appeals, employing a less stringent standard for prudence, and developing a balancing test for determining prudence); *La. Envtl. Soviet v. Coleman*, 537 F.2d 79 (5th Cir. 1976) (illustrating the stance of the Fifth, Ninth, and Eleventh Circuit Courts of Appeals and employing a stricter standard for prudence).

<sup>199</sup> Kaplan, *supra* note 196.

<sup>200</sup> SAFETEA-LU, Pub. L. No. 109-59, § 6009(a)(1), 119 Stat. 1144, §§ 1874-1875 (2005).

<sup>201</sup> 49 U.S.C. § 303(b); 23 U.S.C. § 138(b).

<sup>202</sup> 49 U.S.C. § 303(b)(1); 23 U.S.C. § 138(b)(1).

<sup>203</sup> 49 U.S.C. § 303(b)(2)(a); 23 U.S.C. § 138(b)(2)(A).

<sup>204</sup> 49 U.S.C. § 303(b)(2)(b); 23 U.S.C. § 138(b)(2)(B).

<sup>205</sup> SAFETEA-LU, Pub. L. No. 109-59, § 6009(a)(1), 119 Stat. 1144, §§ 1874-1875.

regulations' purpose is to "clarify the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives" required by subsection (a) of Section 4(f).<sup>206</sup> However, preservationists are confident that the regulations interpreting the *de minimis* exception to Section 4(f) will be reasonable and retain the substantive protections for historic sites congruent with the intent of Congress.

Other federal transportation laws significantly affect historic property, even if the laws do not protect historic sites *per se*, by providing a source of federal funding for preservation projects or making federal services available to local communities. In the 1990s, Congress made significant changes to federal transportation funding programs with the passage of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") by expanding the ways state governments could spend federally appropriated highway funds.<sup>207</sup> ISTEA's successor, the Transportation Equity Act for the 21st Century ("TEA-21"),<sup>208</sup> passed in 2005, continues to provide states with the flexibility to spend federal funds traditionally restricted to highways on "transportation enhancements."<sup>209</sup> Both Acts create a pool of federal highway funds that states may use to pay for twelve categories of activities related to surface transportation, although not directly related to paving roads.<sup>210</sup> The most common preservation-related activities eligible for TEA-21 funding are

- (1) purchasing or otherwise acquiring historic sites or buildings in historic districts and neighborhoods;
- (2) funding scenic or historic highway programs and corresponding facilities including tourist and welcome centers;
- (3) landscaping and preserving historic buildings or structures in historic districts;
- (4) the restoration of historic buildings for transportation-related purposes;
- (5) improving access to historic sites;
- (6) rehabilitating and operating historic transportation buildings, structures, or facilities,

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<sup>206</sup> *Id.* The proposed regulation's notice and comment period ended in September of 2006. Proposed Rules & Request for Comments, Parks, Recreation Areas, Wildlife and Waterfowl Refugees, and Historic Sites, 71 Fed. Reg. 42,611 (2006). As of submission of this Note, the Secretary of Transportation had not issued the final Section 4(f) regulations, however, while preparing for publication the final regulations were issued at 23 C.F.R. § 774 (2008) (effective Mar. 12, 2008). See *supra* note 112.

<sup>207</sup> Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, 105 Stat. 1914 (1991).

<sup>208</sup> Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 463 (2005).

<sup>209</sup> See Trip Pollard, *Follow the Money: Transportation Investments for Smarter Growth*, 22 TEMP. ENVTL. L. & TECH. J. 155, 166-67 (2004).

<sup>210</sup> *Id.*

such as rail depots; and (7) establishing transportation museums.<sup>211</sup>

Beyond protecting historic structures from the adverse impacts of highway projects and making transportation funds available to states to use for projects other than paving roads, the federal government has also instituted programs to protect the historic *means* of transportation. Two examples of this type of programs are the National Historic Covered Bridge Preservation Program (“Covered Bridge Program”) and the American Heritage River initiative.

In addition to canals, railways, and steamships, a quintessential component of early American transportation was the network of covered bridges throughout the country.<sup>212</sup> These bridges are more than relics of time gone by; the federal government has recognized that “covered bridges are unique structures embodying character, functionality and historical prominence.”<sup>213</sup> The Covered Bridge Program was established by TEA-21, and continued in SAFETEA-LU to “find comprehensive and proven means of maintaining the ability of these vestiges of our bridge-building heritage to continue to serve current and future generations.”<sup>214</sup> Beginning in fiscal year 2006 and lasting until 2009, the Covered Bridge Program will be allotted ten million dollars annually to provide states with grants for rehabilitation, repair, and preservation of historic covered bridges.<sup>215</sup> In addition, the Secretary of Transportation is authorized to perform research on covered bridges and create education programs about these national treasures.<sup>216</sup> Projects eligible for grants of rehabilitation, repair, and preservation include activities ranging from the installation of fire

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<sup>211</sup> Nat’l Trust, Twelve Transportation Enhancement Activities, *available at* [http://www.nationaltrust.org/issues/transportation/transportation\\_12activities.html](http://www.nationaltrust.org/issues/transportation/transportation_12activities.html) (last visited Feb 15, 2008).

<sup>212</sup> At the turn of the Nineteenth Century, more than 10,000 covered bridges dotted the American landscape. Smithsonian Inst. Traveling Exhibition Serv., Covered Bridges: Spanning the American Landscape, <http://www.sites.si.edu/exhibitions/exhibits/bridges/main.htm>. Today only 800 remain. *Id.* Appalachia has a considerable amount of historic covered bridges. Pennsylvania alone boasts over 200 historic covered bridges, more than any other state. *Id.* Photos of fourteen of West Virginia’s seventeen covered bridges are available at <http://www.wvtourism.com/photogallery/CoveredBridges/index.htm>. One of the Mountain State’s bridges, “[t]he 285-foot-long Philippi Bridge on US 119/250 in Barbour County . . . is the only structure of its kind that is still part of a federal highway. In 1861, the bridge was the site of the first land battle of the Civil War.” West Virginia: Mountaineer Country: Articles, *We’ve Got It Covered*, <http://www.westvirginia.com/mountaineer/articles.cfm>.

<sup>213</sup> SAFETEA-LU, Pub. L. 109-59, § 1804.

<sup>214</sup> *Id.* “For the purposes of this program, the term ‘historic covered bridge’ means a covered bridge that is listed or eligible for listing on the National Register for Historic Places.” Memorandum from James D. Cooper, Dir. Office of Bridge Tech., U.S. Dept. of Trans. F. Hwy. Admin., to Dir. of Field Ser. Div. Adm’rs F. Lands Hwy. Div. Engineers (Oct. 11, 2001), *available at* <http://www.fhwa.dot.gov/bridge/cbrfc.html>.

<sup>215</sup> Pub.L. 109-59, § 1804 (2005).

<sup>216</sup> *Id.*

protection systems and other fire prevention activities to the relocation of bridges to historic preservation sites.<sup>217</sup> Research and education activities include collection and dissemination of information on historic covered bridges, and research on the history of historic bridges in the United States.<sup>218</sup>

In 1997, President Clinton established the American Heritage Rivers initiative (“AHRI”) which requires federal agencies to coordinate federal plans, programs, and resources with the espoused goals and needs of the communities along designated American Heritage Rivers.<sup>219</sup> The AHRI is, by design, a “local initiative . . . driven by local priorities with initial federal assistance from a ‘River Navigator,’ an interagency liaison who helps match available federal resources to community needs, leverages funding for creative public-private partnerships, and helps build self-sustaining organizations.”<sup>220</sup> The initiative has three objectives: (1) natural resource and environmental protection, (2) economic revitalization of the surrounding communities, and (3) historic and cultural preservation, but “the Federal role is solely to support community-based efforts to preserve, protect, and restore these rivers and their communities.”<sup>221</sup> Any person living in a river community, or the community as a whole, can nominate their river, river stretch, or river confluence for designation as an American Heritage River.<sup>222</sup>

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<sup>217</sup> *Id.* Grants are awarded to states for “projects that demonstrate a need for assistance in carrying out” one of these objectives but must also ensure that the bridge retains its historical significance. *National Historic Covered Bridge Preservation Program, FY 2006 Solicitation for Project Applications*, M. Myint Lwin, Dir., Office of Bridge Tech., U.S. Dept. of Trans. Fed. Hwy Admin. (July 10, 2006), available at <http://www.fhwa.dot.gov/bridge/071006.cfm>. Therefore,

grants will be awarded for projects only if: (A) to the maximum extent practicable, the project (i) is carried out in the most historically appropriate manner; and (ii) preserves the existing structure of the historic covered bridge; and (B) the project provides for the replacement of wooden components, with wooden components, unless the use of wood is impracticable for safety reasons.

*Id.* In addition, “each project must be carried out in the most historically appropriate manner” in compliance with federal standards and any standards or guidelines approved by the SHPO. *Id.*

<sup>218</sup> Pub. L. 109-59, § 1804.

<sup>219</sup> Exec. Order No. 13,061, 62 Fed. Reg. 48443 (Sept. 15, 1997) (as amended Exec. Order No. 13093, 63 Fed. Reg. 40357 (July 29, 1998)).

<sup>220</sup> *Faces of American Heritage Rivers*, Env'tl. Prot. Agency (2005), available at [http://www.epa.gov/rivers/Faces\\_of\\_AHRI\\_Sept2005.pdf](http://www.epa.gov/rivers/Faces_of_AHRI_Sept2005.pdf) [hereinafter *Faces of AHRI*].

<sup>221</sup> *Id.* at 1.

<sup>222</sup> *Id.* Nominations must be made in coordination with the state and local governments and are judged on: (1) the unique or distinctive characteristics of the natural, economic, agricultural, scenic, historic, cultural, and recreational resources of the river; (2) the effectiveness of the community’s plan of action and the extent the plan addresses the objectives of the initiative; (3) the measure of community support for the nomination evidenced in letters from officials, private citizens, local businesses, and state and local governments; and (4) the willingness and capability of the community to forge partnerships to assist in meeting their goals and objectives. Exec. Order No. 13,061, 62 Fed. Reg. at 48445.

Once designated as a Heritage River Community, federal agencies acting in that community must adopt a policy “under which they will seek to ensure that their actions have a positive effect on the natural, historic, economic, and cultural resources” of the community.<sup>223</sup> To that end, agencies are required to (1) consult with the river community early in the planning stages of federal actions; (2) take into account the community’s plans, goals, and objectives; (3) ensure that federal undertakings are compatible with the overall character of the community, and (4) ensure that federal help for one community does not adversely affect neighboring communities.<sup>224</sup> Additionally, agencies are encouraged to develop formal and informal partnerships to assist river communities and should provide “public access, physical space, technical assistance, and other support for American Heritage River communities.”<sup>225</sup>

Because the AHRI is the product of an Executive Order rather than legislation, there is no private right of action against the federal government or any of its instrumentalities for failing to comply with AHRI duties.<sup>226</sup> Likewise, judicial review of agency decisions is unavailable.<sup>227</sup> However, the AHRI can nonetheless provide some federal assistance for Appalachian communities along the Region’s Heritage Rivers, including the Upper Susquehanna-Lackawanna Rivers, The New River, and the Potomac River and the surrounding watersheds of the rivers.<sup>228</sup> The common trait among Heritage River communities is that “they are all strong local partnerships with clear visions for improving the environment, revitalizing their economies, and preserving and celebrating local culture and history.”<sup>229</sup>

### 3. Federal Tax Incentives for Historic Preservation

The Historic Tax Credit Program<sup>230</sup> is the largest federal program, in terms of dollars, specifically devoted to historic preservation.<sup>231</sup> It pays for itself. The program is self-sustaining through the “combination of income taxes on workers, construction firms, and suppliers; the fact that the tax credit itself is

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See a map of all American Heritage Rivers at [http://www.epa.gov/rivers/AHR\\_designated\\_rivers\\_map.pdf](http://www.epa.gov/rivers/AHR_designated_rivers_map.pdf).

<sup>229</sup> *Faces of AHRI*, *supra* note 220, at 1.

<sup>230</sup> See Tax Reform Act of 1986 Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of 26 U.S.C.); I.R.C. § 47 (2006); U.S. DEP’T OF THE INTERIOR & NAT’L PARK SER., PRESERVATION TAX INCENTIVES FOR HISTORIC BUILDINGS, HERITAGE PRESERVATION SERIES (2004).

<sup>231</sup> PRESERVE AMERICA, EXECUTIVE SUMMARY OF ISSUE AREA, USING HISTORIC PROPERTIES AS ECONOMIC ASSETS ISSUE AREA, PRESERVE AMERICA SUMMIT 9 (2006).

effectively subject to capital gains tax on sale of the property; and the high ration of tax credits to private investment.”<sup>232</sup> The current federal tax incentives for preservation include a twenty percent tax credit for the certified rehabilitation of certified historic structures and a ten percent tax credit for the rehabilitation of non-historic, non-residential buildings built before 1936.<sup>233</sup> In both instances the rehabilitation must be substantial and involve a depreciable building.<sup>234</sup>

Congress has amended the program to more closely align with the purposes behind historic preservation. Provisions of the Pension Protection Act of 2006 instituted the first major reform in the law pertaining to historic preservation tax deductions in twenty-five years.<sup>235</sup> While the provisions do substantively change the program, the overall success of the Historic Tax Credit Program should not be severely hampered. These changes specifically relate to preservation facade easement donations and were enacted to address abuses by some easement holding organizations and promoters.<sup>236</sup> Other sections of the bill affect all charitable contributions.<sup>237</sup>

The new law disallows deductions for facade easements that do not protect the entire exterior of a property, imposes stricter valuation standards of proof on owners, requires certification of the organization’s ability to manage and enforce the easement, institutes a new filing fee for donations more than \$10,000, and prohibits easements that allow changes incompatible with the building’s historic character.<sup>238</sup> Among the law’s other important changes are that it eliminates deductions for non-building structures and land areas in registered historic districts and not individually listed on the National Register and imposes a percentage-based reduction in the easement for buildings that also qualify for the tax credit.<sup>239</sup>

These changes are merely an attempt by Congress to encourage higher standards of practice for the parties involved in these transactions. By reforming the law instead of eliminating it, “Congress has soundly affirmed the validity of preservation easements and the federal tax incentives that encourage them.”<sup>240</sup>

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<sup>232</sup> *Id.*

<sup>233</sup> PRESERVATION TAX INCENTIVES, *supra* note 230.

<sup>234</sup> *Id.*

<sup>235</sup> See Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006).

<sup>236</sup> *Id.*; NAT’L TRUST FOR HISTORIC PRESERVATION, SUMMARY OF CHANGES TO PRESERVATION EASEMENTS IN THE PENSION PROTECTION ACT OF 2006 (2006) [hereinafter CHANGES TO PRESERVATION EASEMENTS]; Nat’l Trust for Historic Preservation, *Congress Enacts Easement Reform Provisions in Pension Bill*, PUB. POL’Y WKLY. BULL. 1 (Sept. 8, 2006) [hereinafter *Easement Reform*].

<sup>237</sup> See Pub. L. No. 109-280, § 1219, 120 Stat. 780.

<sup>238</sup> *Easement Reform*, *supra* note 236

<sup>239</sup> CHANGES TO PRESERVATION EASEMENTS, *supra* note 236.

<sup>240</sup> *Id.*



Moreover, the Pension Reform Act of 2006 actually increases the amount available to most taxpayers for deductions to fifty percent rather than the previous thirty, and extends the carry-over period from five to fifteen years for deductions.<sup>241</sup>

### B. *State Laws and Policies*

State governments play a very important role in historic preservation. Due to the limited nature of the regulatory powers vested in the federal government, the power to regulate land-use and economic development decisions remains with the states. Accordingly, state governments may be better equipped to develop a functional approach to historic preservation than the federal government.<sup>242</sup> This argument rests on the familiar assumptions that (1) the science of government is the science of experiment; (2) states are engaged in public policy competition among themselves; (3) state legislative bodies are in a position to be more responsive to constituents than Congress; and (4) states can make public policy tailored to their unique circumstances.<sup>243</sup> These assumptions are not new and have been the focus of countless debates by some of the most esteemed jurists.<sup>244</sup> Erring on the side of caution, the author defers to the opinion espoused by Justice Louis D. Brandeis in 1932, as to what he called “one of the happy incidents of the federal system.”<sup>245</sup> Competition between states and local problem-solving often results in the “happy incident” where “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>246</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> As used here, federalism refers to the vertical division of power set up under the Constitution; certain enumerated powers are delegated to the federal government and the rest are reserved to the states as part of states’ general police power. *See* U.S. CONST. amend. X.

<sup>243</sup> Joseph Lesser and Vigdor D. Bernstein, *The Evolution of Public Purpose, General Welfare, and American Federalism*, 19 URB. LAW. 603, 638 n.193 (1987) (citing WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, *THE STATUS OF FEDERALISM IN AMERICA* 33 (1986)).

<sup>244</sup> Courts have struggled with the adequacy and ability of state governments throughout American history. *See, e.g.,* Muller v. Oregon, 208 U.S. 412 (1908); Lochner v. New York, 198 U.S. 45 (1905); Holden v. Hardy, 169 U.S. 366 (1898); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Chicago, Milwaukee & St. Paul Ry. v. Minnesota 134 U.S. 418 (1890); Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886); Munn v. Illinois, 94 U.S. 113 (1876); The Slaughterhouse Cases, 83 U.S. 36 (1873); Mayor of N. Y. v. Miln, 36 U.S. 102 (1837); Thorpe v. Rutland & Burlington R.R., 27 Vt. 140 (Vt. 1854); Commonwealth v. Alger, 61 Mass. 53 (Mass. 1851); Sandra Day O’Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573 (2001).

<sup>245</sup> *New State Ice v. Leibman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (comparing FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 49-51 (1930)).

<sup>246</sup> *Id.* This oft-quoted sentence is generally found in judicial opinions followed immediately by the word “but,” as in “I agree with this, but not in this case.” *See, e.g.,* Ward v. ESTALEIRO ITAJAI S/A, 2008 WL 878937 \*7 (S.D. Fla. 2008) (discussing state created discovery rules). Or sometimes it appears in the dissents of cases overturning statutes on constitutional grounds, *See,*

Luckily, in the area of historic preservation, there has been a significant amount of experimentation at the state level.<sup>247</sup> Every state has enacted some form of historic preservation legislation.<sup>248</sup> State legislators can limit state government action with regard to historic property in much the same way the federal government does by enacting procedural protections state agencies must comply with when performing state business. In addition, the majority of laws affecting private property rights come from state law. As such, states generally regulate historic preservation in one of four ways. Two involve regulating public property and two involve regulating private property.

First, states establish state registers of historic property within the state similar to the National Register. Second, states adopt “Little 106” laws, similar to the NHPA’s provisions, that create procedural protection for historic resources from unwarranted state intrusion. Third, states create incentives in the state property tax system to encourage historic preservation by private property owners. Finally, states make local zoning authority—the authority of local planners and officials to regulate how private property is used—contingent upon compliance with state-mandated comprehensive planning schemes or growth management initiatives. The following discusses each in turn.

### 1. State Registers of Historic Places

Most states have created state registers comparable to the National Register that serve as the official listing of significant historic resources in that state. New York, North Carolina, Ohio, Tennessee, Virginia and West Virginia all have official state historic registers.<sup>249</sup> Each state used the criteria for eligibility promulgated by the Secretary of the Interior and the NPS as a prototype for her legislation. Kentucky does not have an official state register and participates in the National Register listing process exclusively.<sup>250</sup>

In addition to the federal definition of historic places, state law also includes provisions for determining which property is historic within her borders. Often, these state provisions use National Register listing as a gateway for state and local protection of historic properties. For example, a historical site in West Virginia is

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e.g., *United Farm Workers of Am. v. Ariz. Agricultural Employment Relations Bd.*, 1983 WL 21393 \*14 (C.A.9) (1983) (Ferguson, J., dissenting).

<sup>247</sup> Christopher J. Duerksen, *Historic Preservation Law*, in RATHKOPF’S THE LAW OF ZONING AND PLANNING § 19.1 (4th ed. 2006).

<sup>248</sup> *Id.*

<sup>249</sup> See N.Y. PARKS, REC. & HIST. PRESERV. LAW § 14.05 (McKinney 2006); N.C. GEN. STAT. § 121-4.1 (2007); OHIO REV. CODE ANN. § 149.55 (West 2008); TENN. CODE ANN. §§ 4-11-201 - 4-11-207 (2007); VA. CODE ANN. §§ 10.1-2202.6 – 2202.7 (2006); W. VA. CODE § 29-1-8 (2007).

<sup>250</sup> See KY. REV. STAT. ANN. §§ 171.381 to 171.382 (West 2008).

the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure whether standing, ruined or vanished, where the location itself possesses historical, cultural or archaeological value regardless of the value of any *existing structure and designated as historic on a national, state or local register*.<sup>251</sup>

Another example evidences a more hands-off approach to identifying historic properties, leaving it up to local government to develop its own criteria for designation. In Kentucky, city and county governments are authorized to enact legislation and ordinances to regulate “an area that has historical, architectural, natural, or cultural significance that is suitable for preservation or conservation.”<sup>252</sup> The Kentucky General Assembly offers little guidance to local lawmakers determining what property is historic and suitable for preservation.

Nonetheless, in the majority of jurisdictions, historic properties are generally identified according to criteria in a statute or administrative regulation, and, once identified, may be listed on a state or federal register. A property becomes “historic” and eligible for designation when the site or structure is associated with significant people, places or events that have some significant cultural, heritage, or natural aspect such that preserving the property or properties for future generations is essential to experiencing a cultural or aesthetic value integral to a peoples’ collective history. Once listed, the property becomes eligible for state and federal tax incentives and any protection offered the property via local, state, or federal law.

West Virginia’s state Register of Historic Places statute is typical. The register is operated by the Historic Preservation Section of the Division of Culture and History for use as a planning tool for state and local government.<sup>253</sup> The eligibility criteria for state listing are nearly identical to the NPS criteria.<sup>254</sup> Properties already listed on the National Register automatically are eligible for listing on the state register.<sup>255</sup> The duties of the Section also parallel the federal model by requiring the agency to develop a procedure for nominations and protection of listed and nominated properties.<sup>256</sup> West Virginia also conditions historic preservation tax incentives on a property’s listing on either the National Register or the state register.<sup>257</sup>

The nomination process in West Virginia is fairly straightforward. Any person can nominate a property for listing on the state register, including the

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<sup>251</sup> W. VA. CODE § 8A-1-2(n) (emphasis added).

<sup>252</sup> KY. REV. STAT. ANN. § 82.660 (West 2008).

<sup>253</sup> W. VA. CODE § 29-1-8.

<sup>254</sup> See W. VA. CODE R. § 82-2-3 (2007).

<sup>255</sup> W. VA. CODE R. § 82-2-3.1(f).

<sup>256</sup> W. VA. CODE § 29-1-8.

<sup>257</sup> *Id.*

Division of Culture and History.<sup>258</sup> Once the Division receives an application for a nomination, the Division must notify the owners of the property as well as local elected officials that the property is under consideration for listing.<sup>259</sup> Owners of private property nominated for state register listing have thirty days to object to the nomination in writing.<sup>260</sup> A majority of property owners must object in writing to table a nomination of a historic district.<sup>261</sup> If there is no objection, the Archives and History Commission determines the eligibility of the property.<sup>262</sup> If a property is designated, the preservation and protection mechanisms in the Little 106 law are invoked for any future state undertaking.

Ohio's statute is slightly different in that it directs the Ohio Historical Society<sup>263</sup> to maintain a State Registry of Historic Landmarks to ensure "that the scientific knowledge about Ohio's history is made available to the public and is not willfully or unnecessarily destroyed or lost."<sup>264</sup> Once designated, the law prohibits any private person or public entity from destroying, demolishing, removing, or improving the building or structure without first notifying the Society, giving the Society access to the structure, allowing the Society to assist in the planning of the project and permission to observe and record any findings of historic significance.<sup>265</sup> The law further deems the desecration of a state historic landmark a misdemeanor of the second degree.<sup>266</sup> Listing on the register requires the written permission of the landowner and the agreement can be terminated by subsequent owners.<sup>267</sup>

Virginia amended its historic preservation laws in 2006 to clarify what types of resources were to be included on the Virginia Landmarks Register.<sup>268</sup> Virginia laws direct the Director of the Department of Historic Resources to "conduct a broad survey and to maintain an inventory of buildings, structures, districts, objects, and sites of historic, architectural, archaeological, or cultural interest which constitute the tangible remains of the Commonwealth's cultural, political, economic, military, or social history."<sup>269</sup> The Register was enacted "in

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<sup>258</sup> W. VA. CODE R. § 82-2-3.2.

<sup>259</sup> W. VA. CODE R. § 82-2-3.2.b.

<sup>260</sup> W. VA. CODE R. § 82-2-3.2.b.A.

<sup>261</sup> W. VA. CODE R. § 82-2-3.2.b.B.

<sup>262</sup> W. VA. CODE R. § 82-2-3.2.c.

<sup>263</sup> "The Ohio Historical Society does this, in part, through a unique private-public partnership with the State of Ohio. The Ohio Historical Society is an independent 501(c)(3) non-profit organization that carries out 22 state-mandated functions in exchange for state funding." Ohio Historical Society, Legislative Update, *available at* <http://www.ohiohistory.org/about/lu/>. The group manages fifty-nine sites statewide, and gets about two-thirds of its revenue from the state. *Id.*

<sup>264</sup> OHIO REV. CODE ANN. § 149.55 (West 2008).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> VA. CODE ANN. § 10.1-2202 (2007).

<sup>269</sup> *Id.*

order to encourage, stimulate, and support the identification, evaluation, protection, preservation, and rehabilitation of the Commonwealth's significant historic . . . resources; in order to establish and maintain a permanent record of those resources; and in order to foster a greater appreciation of these resources among the citizens of the Commonwealth."<sup>270</sup> The amendments clarified that the Director is to "publish lists of properties, including buildings, structures, districts, objects, and sites, designated as landmarks[;] . . . inspect designated properties from time to time[;] and periodically publish a complete register of designated properties setting forth appropriate information concerning those properties."<sup>271</sup>

Other Appalachian states have created unique state registries that recognize the importance of places, buildings, and other resources considered to be fundamental to that particular state's history. Properties on these registries generally do not derive any protection from designation as the designations are usually only honorary. An example of one such registry is the Register of Heritage Farms in Kentucky.<sup>272</sup>

## 2. Little 106 Laws in Appalachia

As does their federal counterpart, Little 106 Laws focus more on the process of agency decision-making rather than providing substantive protection to historic property.<sup>273</sup> Often, Little 106 Laws merely obligate the state agency to consider the potential adverse effects of the proposed agency action on historic property. Rarely is there a requirement that adverse effects be avoided.

State laws in Appalachia are no different. The following three approaches highlight the different ways state governments have instituted checks upon agency decisions by requiring compliance with some form of procedure prior to state action. West Virginia closely follows the federal procedure, Tennessee imposes more stringent protections, and Kentucky is much more hands-off and, instead, focuses on the education and planning aspects of historic preservation.

In West Virginia, the Historic Preservation Section of the Division is charged with locating, surveying, investigating, registering, preserving, restoring, and protecting architectural, archaeological, and cultural sites relating to West Virginia from its earliest time to the present.<sup>274</sup> In addition, the rule authorizes the Division to promulgate regulations to review the effect of state projects on historic resources in the state.<sup>275</sup> The review process pertains to all state

<sup>270</sup> *Id.*

<sup>271</sup> VA. CODE ANN. § 10.1-2202.7 (2006) (emphasis added).

<sup>272</sup> KY. REV. STAT. ANN. § 171.388 (West 2007).

<sup>273</sup> Constance Beaumont, *State Laws to Consider Historic Properties*, in SMART STATES, BETTER COMMUNITIES 45 (1996).

<sup>274</sup> W. VA. CODE § 29-1-8(a) (2007).

<sup>275</sup> W. VA. CODE § 29-1-8(d); see W. VA. CODE R. §§ 82-2-1 *et seq.* (2007).

undertakings<sup>276</sup> permitted, funded, licensed, or assisted by the State, unless the funding comes from any county's general revenue fund.<sup>277</sup> The regulations promulgated by the Division were adopted by the West Virginia Legislature in 1991 and carry the force of law.<sup>278</sup>

All state undertakings on land owned or leased by the state, or on private land where the state has acquired investigation and development rights are subject to the review process.<sup>279</sup> The state agency proposing the undertaking must consult with the Division and assess the effects of the activity on historic property.<sup>280</sup> Members of the public interested in the undertaking are allowed to reasonably participate and their views should be given consideration during the assessment.<sup>281</sup> If the agency determines that there will be an adverse effect, the agency must "take into account" the effects and seek ways to avoid or reduce the harm to historic properties.<sup>282</sup> If the agency and the Division reach an agreement on the proper way to "take into account" the adverse effects, the parties execute a Memorandum of Agreement documenting the actions to be taken.<sup>283</sup> If, however, there is no agreement, the Division provides final comments to the agency and documents the historic property before the undertaking initiates.<sup>284</sup>

Tennessee requires all state agencies, entities with control over state property, and institutions of higher learning to consult with the Tennessee Historical Commission for advice on possible alternatives before altering, demolishing, or transferring any property that is or may be of historical, cultural, or

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<sup>276</sup> Under West Virginia law, "[u]ndertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a State agency or licensed, permitted, or assisted by a State agency. Undertakings include new and continuing projects, activities, or programs." W. VA. CODE R. § 82-2-2.3.

<sup>277</sup> W. VA. CODE § 29-1-8(a), (d)(2).

<sup>278</sup> Chapter 29A of the West Virginia Code, the State's Administrative Procedure Act, defines the types of rules and establishes the procedures for promulgating rules by agencies covered in the Act. The Act is administered by the Legislative Rule Making Review Committee and the Administrative Law Division of the Secretary of State. Legislative rules are passed by both houses of the legislature and signed into law by the governor. *See generally* W. VA. CODE §§ 29A-3-1 through 29A-3-17.

<sup>279</sup> W. VA. CODE R. § 82-2-5.1. The destruction or disturbance of a historic landmark, site, or district on land, except as provided for in the regulations, constitutes a misdemeanor with a fine of not more than five hundred dollars, or imprisonment in the county jail up to six months, or both. W. VA. CODE § 29-1-8B.

<sup>280</sup> W. VA. CODE R. § 82-2-5.4.

<sup>281</sup> W. VA. CODE R. § 82-2-5.1d, 82-2-5.4.

<sup>282</sup> W. VA. CODE R. § 82-2-5.4d.

<sup>283</sup> W. VA. CODE R. § 82-2-5.4d(1).

<sup>284</sup> W. VA. CODE R. § 82-2-5.4d(2).

architectural significance.<sup>285</sup> The commission is allowed thirty days to review and comment on the activity before the project is approved.<sup>286</sup> The State Building Commission is directed to consider the Historical Commission's comments in its decision on whether or not to approve the agency's plan.<sup>287</sup> The Historical Commission's comments are based on the standard of review for rehabilitation used by the Secretary of the Interior.<sup>288</sup>

The Kentucky General Assembly established the Kentucky Heritage Council comprised of sixteen members with an interest in preservation to oversee historic preservation in the State.<sup>289</sup> The Council is

dedicated to the preservation and protection of all meaningful vestiges of Kentucky's heritage for succeeding generations, and in pursuit of this dedication it shall engage in and concern itself with worthy projects and other matters related to the conservation and continuing recognition of buildings, structures, sites, and other landmarks associated with the archaeological, cultural, economic, military, natural, political, or social aspects of Kentucky's history.<sup>290</sup>

Among its duties, the Council is to cooperate in developing a review process for publicly funded, assisted, or licensed undertakings that may affect historic properties within the Commonwealth.<sup>291</sup>

A unique aspect of the Kentucky law is its emphasis on public awareness and education. One of the Council's primary functions is to operate programs to educate the public about historic preservation.<sup>292</sup> "Council programs are implemented by a staff of professional historians, architectural historians, historic architects, archaeologists and planners."<sup>293</sup> As such, the Council is directed to serve as a liaison for professional organizations concerned with historic preservation<sup>294</sup> as well as to encourage the integration of historic preservation planning with all levels of government.<sup>295</sup>

<sup>285</sup> TENN. CODE ANN. § 4-11-111(a) (West 2007).

<sup>286</sup> TENN. CODE ANN. § 4-11-111(c).

<sup>287</sup> TENN. CODE ANN. § 4-11-111(e).

<sup>288</sup> TENN. CODE ANN. § 4-11-111(d).

<sup>289</sup> KY. REV. STAT. ANN. §§ 171.3801, 171.381 (West 2008).

<sup>290</sup> KY. REV. STAT. ANN. § 171.381(1).

<sup>291</sup> KY. REV. STAT. ANN. §§ 171.381 3(f), 171.381(2).

<sup>292</sup> KY. REV. STAT. ANN. § 171.381 7(j).

<sup>293</sup> Kentucky Heritage Council, Homepage, <http://www.state.ky.us/agencies/khc/khchome.htm> (last visited Feb. 17, 2008).

<sup>294</sup> KY. REV. STAT. ANN. § 171.381 7(i).

<sup>295</sup> KY. REV. STAT. ANN. § 171.381 7(e).

### 3. State Tax Incentives for Historic Preservation

The primary mechanism states use to induce private property owners to engage in historic preservation and rehabilitation of their historic property is state property and income tax incentives for historic preservation. Three primary rationales validate these incentives. First, incentives help offset additional expenditures that may be necessary to comply with any applicable historic preservation ordinance affecting the property. Second, incentives may be used to offset economic hardships that might otherwise result in an unlawful taking. Third, rehabilitation can be a catalyst for neighborhood revitalization and conservation.<sup>296</sup>

Usually, state legislation to facilitate preservation appears as one of the following: a property tax abatement; a property tax freeze; a property tax credit; tax-exempt bond financing; mortgages, guarantees, or credit enhancement; tax credit financing; relief from local sales tax; local government acquisition and subsequent write-down sale of historic resources for rehabilitation; direct loans or grants; or relief from zoning and building code regulations.<sup>297</sup>

Kentucky has very strong tax incentives for historic preservation and serves as a good example of a state's commitment to encouraging historic preservation within her borders. Thirty percent of qualified rehabilitation expenses are offered as a state tax "credit for owner-occupied residential properties." A minimum investment of \$20,000 is required, with the total credit not to exceed \$60,000. There is a twenty percent income tax credit for all other properties and similarly requires the \$20,000 minimum rehabilitation investment, "or the adjusted basis,<sup>298</sup> whichever is greater."<sup>299</sup> Such properties include commercial and industrial buildings, income-producing properties, historic landscapes, and properties owned by governments and nonprofit organizations.<sup>300</sup> Effective January 1, 2007, the maximum credit that can be claimed with respect to property that is not owner-occupied residential is \$400,000.<sup>301</sup> The maximum credit

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<sup>296</sup> See generally National Trust for Historic Preservation, <http://www.nationaltrust.org> (last visited Feb. 17, 2008).

<sup>297</sup> For a comprehensive list of state historic preservation tax incentives by state see CONSTANCE E. BEAUMONT & ELIZABETH G. PIANCA, STATE TAX INCENTIVES FOR HISTORIC PRESERVATION: A STATE-BY-STATE SUMMARY (2007) available at <http://www.nationaltrust.org/help/downloads/taxincentives.pdf> (last visited Feb. 17, 2008).

<sup>298</sup> An "adjusted basis" is the amount of the credit awarded per project if total eligible credits requested exceed the annual statewide credit cap. Kentucky Heritage Council, Untitled Document, <http://www.state.ky.us/agencies/khc/press/PRESS131.HTM> (last visited Feb. 17, 2008).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*



for owner-occupied residential property remains \$60,000.<sup>302</sup> The credit is freely transferable. The total program cap is \$3 million annually.<sup>303</sup>

In addition, Kentucky authorizes local governments to establish a program to grant property tax assessment moratoriums (freezes) to a property owner as an inducement toward the repair, rehabilitation, or restoration of real property which is at least twenty-five years old.<sup>304</sup> Property qualifying for the moratorium will have its assessment frozen at the pre-rehabilitation level for a period not to exceed five years.<sup>305</sup> At the expiration of the moratorium, the property will be reassessed at its fair market value.<sup>306</sup> The frozen assessment is applicable only with regard to the taxes imposed by the legislative body granting the moratorium.<sup>307</sup>

While other states have enacted various tax incentive frameworks to encourage historic preservation, Kentucky's approach is among the most progressive in the country. States that authorize tax and financial incentives for historic preservation have shown that these are a powerful tools to induce private expenditures on historic preservation and can significantly affect the economic and cultural development of local communities.

#### 4. State Law and Private Property

The power to regulate private property rights<sup>308</sup> lies with the state under the "general police power."<sup>309</sup> As Appalachia's own, United States Supreme Court Justice John Marshall Harlan explained, "[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."<sup>310</sup> Pursuant to this power, states can limit private property rights.<sup>311</sup> One of these limits is zoning.<sup>312</sup>

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *See generally id.*

<sup>305</sup> KY. REV. STAT. ANN. 99.600(1).

<sup>306</sup> KY. REV. STAT. ANN. 99.600(2).

<sup>307</sup> KY. REV. STAT. ANN. §§ 99.595-99.605.

<sup>308</sup> Private property rights references the ability of property owners to use property in any manner they see fit.

<sup>309</sup> ARDEN H. RATHKOPF & DAREN A. RATHKOPF, 3 RATHKOPF'S LAW OF ZONING AND PLANNING § 36:4 (Edward H. Ziegler, Jr., et. al. eds., 4th ed., 2004).

<sup>310</sup> *Chi., Burlington & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906).

<sup>311</sup> The West Virginia Court held

The right of the Legislature to enact such reasonable and wholesome laws as in its judgment will promote the public welfare includes the power to impose such reasonable restrictions on the right to secure individuals as the Legislature deems to be for the best interest for the community, even though such restrictions were unknown to the common law.

Today, state legislatures affect historic private property primarily through enabling laws that are a grant of police power to local governments to enact ordinances according to the local governments' delegated authority. Similar to congressional delegations to administrative agencies, "the police power of the State is vested in the legislative branch . . . and may be . . . delegated by it . . ." to local municipal governments.<sup>313</sup>

By the time of the Great Depression, "forty-seven of the forty-eight states had zoning enabling acts, and over nine hundred cities, with a total population of more than 46 million (sixty-seven percent of the urban population), had adopted zoning."<sup>314</sup> Over time, it became assumed that land-use decisions were inherently of local concern—meaning that regulation of private property was accomplished "through municipal zoning, exercised by cities and towns with little or no state oversight, and typically without any requirement that it be consistent with a comprehensive land use plan."<sup>315</sup> However, this assumption was soon challenged by federal efforts to gain more control over land-use decisions and natural resource management during the 1960s. This decade saw the adoption of many of the "quality of life" regulatory schemes intended by Congress to improve Americans' daily life, including the major environmental statutes, workplace safety statutes, anti-discrimination statutes, and the NHPA.

In turn, state governments began "reasserting" control over local land-use plans, either of their own initiatives, or because the federal government, holding the purse-strings, had conditioned continued federal funding on state compliance with the federal schemes which usually required states to enact comparable legislation.<sup>316</sup> The premise of the states' contention for retaking control of land-use decisions was that localities were delegated the power to zone, but the state could always rescind or limit its grant of power. Many states continued to afford municipalities some autonomy via home-rule authority.<sup>317</sup> However, it is clear that few states considered zoning to be among a locality's inherent powers.<sup>318</sup> "Even in such 'strong' home rule states, courts have upheld

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Huntington v. State Water Comm'n, 73 S.E.2d 833, 840-42 (W. Va. 1953).

<sup>312</sup> Mary W. Blackford, Comment, *Putting The Public's Trust Back In Zoning: How The Implementation Of The Public Trust Doctrine Will Benefit Land Use Regulation*, 43 HOU. L. REV. 1211, 1223 (2006). Zoning affects private property "by identifying properties by their respective uses and segregating particular uses to isolated zones." *Id.*

<sup>313</sup> *Huntington*, 73 S.E.2d at 841.

<sup>314</sup> RATHKOPF & RATHKOPF, *supra* note 309, at § 36:2 (parentheses in original).

<sup>315</sup> *Id.* § 36:1.

<sup>316</sup> *Id.* § 36:4.

<sup>317</sup> Home-rule power can be expressed in a state constitution, statute, or judicial doctrine. DALE KRANE, PLATON N. RIGOS, & MELVIN B. HILL, JR., HOME-RULE IN AMERICA: A FIFTY STATE SURVEY 19 (2001).

<sup>318</sup> In the sense that municipalities could exercise the power to zone absent a legislative delegation.

the power of the state legislature to supersede local zoning where statewide interests are at stake."<sup>319</sup>

The result has been that it is generally recognized that state governments are vested with the power to regulate, limit, and expand private property rights through zoning, a power which may be exercised by local municipalities only in accordance with and pursuant to any conditions stipulated by the state in the state's legislation that asserted statewide and regional control over local development policies. As Wickersham explained, the four most common types of this legislation are (1) statewide or regional land-use classification or districting by the state; (2) state regulation of critical resources; (3) state regulation of major development projects; and (4) statewide or regional requirements that local governments adopt comprehensive plans and implementing regulations consistent with statewide or regional goals.<sup>320</sup>

Increasingly, preservation laws and regulations are no longer stand-alone regulatory regimes. Rather, historic preservation is integrated into comprehensive planning mandates used in conjunction with other mainstream state authorized land-use controls.

Common elements of state statutes concerning historic preservation include a combination of the following: (1) a statement of purpose; (2) a requirement for a survey or inventory of historic properties; (3) authorization to establish historic districts; (4) authorization to designate individual landmarks; (5) authorization to establish a state register of historic buildings; (6) provisions for variances (especially with respect to 3 and 4 above); (7) a definition of scope of control involved; (8) criteria for judging conformity; (9) a provision to reference expert agency for report; (10) authorization for acquisition of property (and attendant ownership rights), and for its management and disposition; (11) provisions for tax adjustments, in light of restrictions above; (12) a provision for a state plan on historic preservation; and (13) occasionally, specific qualifications are required for the nominees to an agency concerned with historic preservation.<sup>321</sup> Therefore, in theory, state governments have the authority to regulate land-use decisions through zoning or other land-use planning device. In practice, state land-use and historic preservation legislation is a roadmap for local governments to follow to ensure statewide compliance and coordination in land-use and historic preservation decisions.

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<sup>319</sup> RATHKOPF & RATHKOPF, *supra* note 309, at § 36:4 (citing Richard Briffault, *Our Localism: Part I The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990)).

<sup>320</sup> James H. Wickersham, *Statewide and Regional Land Use Controls*, RATHKOPF & RATHKOPF, *supra* note 309, at § 36:1.

<sup>321</sup> WILLIAMS & TAYLOR, *supra* note 8, § 74.9, at 511.

a. *Integrating Preservation into Comprehensive Planning*

Often, states require municipalities to create a comprehensive plan as the first stop on these roadmaps.<sup>322</sup> Via an enabling statute, state government delegates authority to local governments to regulate private actions regarding property. Local governments can then pass zoning ordinances, authorize design review boards, and create planning commissions to identify historic property. The authority of such commissions and boards varies in each state. The enabling legislation of nearly every state authorizes or requires local governments to establish some kind of municipal planning board or commission.<sup>323</sup>

More and more states are requiring local governments to work together with these planning commissions to prepare comprehensive plans to ensure that municipalities carefully consider and evaluate land-use choices. Increasingly, historic preservation is becoming one of the factors that local governments must address to comply with the state's comprehensive planning requirements.<sup>324</sup>

A typical definition of a comprehensive plan is a "plan for physical development, including land use, adopted by a governing body, setting forth guidelines, goals and objectives for all activities that affect growth and development in the governing body's jurisdiction."<sup>325</sup> The governing body charged with developing the comprehensive plan is usually a municipality or county, but may include regional, multi-county, and joint planning bodies.<sup>326</sup> Comprehensive planning can be either mandatory or voluntary.<sup>327</sup> The trend in Appalachia has been toward integrating the use of comprehensive planning as a prerequisite for other land-use control mechanisms. As such, historic preservation is a mandatory factor planning bodies must consider when developing comprehensive plans.<sup>328</sup>

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<sup>322</sup> The Supreme Court's holding in *Kelo v. City of New London*, 545 U.S. 469 (2005), emphasized the importance of a city's land-use plan.

Justice Stevens' majority opinion noted on numerous occasions the fact that the city had formulated an economic development plan for the area and that the land acquisitions merely carried out that plan in accordance with state law. The primacy of the plan was advanced to respond to the suggestion that the eminent domain exercise at issue was a cover to allow the transfer of property from one private person to another.

Edward J. Sullivan, *Recent Developments in Land Use, Planning and Zoning Law: Recent Developments in Comprehensive Planning Law*, 38 URB. LAW. 685, 697 & n.100 (2006).

<sup>323</sup> KENNETH H. YOUNG, 4 ANDERSON'S AMERICAN LAW OF ZONING § 23:18, 212 (4th ed. 1996).

<sup>324</sup> Curry, *supra* note 15, at 267 (for a model local preservation ordinance); David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289 (2004) (a sectional analysis of local preservation ordinances).

<sup>325</sup> W. VA. CODE § 8A-1-2(c).

<sup>326</sup> See, e.g., W. VA. CODE § 8A-2-3 – 8A-2-5.

<sup>327</sup> See, e.g., W. VA. CODE § 8A-2-1(a) (adopting a voluntary system).

<sup>328</sup> E.g., KY. REV. STAT. ANN. § 100.187(5) (West 2007).

Kentucky approaches the issue somewhat differently. In the Commonwealth, after adopting a comprehensive plan, legislative bodies and fiscal courts may enact permanent land use regulations “to facilitate . . . the visual or historical character of the unit.”<sup>329</sup> Once a legislative body designates an urban residential zone, the use of any particular structure may be regulated on an individual basis though must be guided by the architecture, size, or traditional use of the building.<sup>330</sup> Structures within the zone are not limited to residential use, rather the statute encourages a mixture of uses so as to stabilize and protect “the urban residential character of the area.”<sup>331</sup>

Regardless of whether the state uses a separate historic preservation statute or integrates historic preservation into her larger land-use planning laws, historic preservation is gaining more attention from local planners.

*b. Integrating Other Land-use Tools with Historic Preservation*

Of the most widely discussed developments in land-use law is the concept of growth management. While growth management is typically associated with controlling “urban sprawl,” aspects of the initiative could easily be translated to the more rural areas of Appalachia and would continue to provide guidance to the more populated areas of the Region. It is somewhat difficult to precisely define growth management because it is frequently used in conjunction with the catch phrase “Smart Growth.” However, the two terms do mean different things.

Growth management is a political process “to organize and balance the multiple priorities of growing areas” in an ordered, compact way “that makes fiscal, environmental, and community sense.”<sup>332</sup> The defining feature of growth management is the use of “urban growth boundaries” which function to encourage orderly residential and commercial growth and operate to apprise private developers where public infrastructure will be provided for residential and commercial development.<sup>333</sup> In addition, growth management laws’ function is to “control the pace of development.”<sup>334</sup> Whereas, “‘Smart Growth’ is a political agenda that has been adopted by advocacy

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<sup>329</sup> KY. REV. STAT. ANN. § 100.201(2).

<sup>330</sup> KY. REV. STAT. ANN. § 100.201(3).

<sup>331</sup> *Id.*

<sup>332</sup> Posting of J. Hayes, Thurston County, to GM Forum, <http://courses.washington.edu/gmforum/>. Click on “Planners” hyperlink; then select “10/27/00 Smart Growth” hyperlink (Oct. 24, 2000) [hereinafter J. Hayes].

<sup>333</sup> *Fact Sheet: Growth Management Laws* (Farmland Info. Ctr., Am. Farmland Trust), 1998, at 2, available at [http://www.farmlandinfo.org/documents/29481/FS\\_GML\\_9-98.pdf](http://www.farmlandinfo.org/documents/29481/FS_GML_9-98.pdf) (last visited Feb. 18, 2008).

<sup>334</sup> *Id.*

groups and professional organizations . . . Smart Growth takes the logic of growth management and forwards it as an anti-sprawl and pro-open space agenda.”<sup>335</sup>

Several states have formerly adopted growth management as their “method” of land-use by realigning their relationships with local governments to promote planning at state, regional, and local government, and encourage consistency in the plans.<sup>336</sup> These acts are designed primarily to address “the need to guide urban development more effectively than local governments can through individual action.”<sup>337</sup>

There are six common components of the “intergovernmental planning responsibilities” that typify growth management schemes: (1) articulated state plans with purpose statements; (2) state administrative agency plans that are consistent with the state plan; (3) statutory requirement for local governments to develop comprehensive plans that are both internally consistent *and* consistent with the plans of neighboring jurisdictions; (4) provisions encouraging regional cooperation; (5) process for achieving consistency between regional, local, state, and administrative agency plans; and (6) conflict resolution or appeal procedure.<sup>338</sup>

The overarching benefit of growth management is that “[s]tate and regional growth management laws transcend local boundaries and can create incentives for many jurisdictions to work toward common goals.”<sup>339</sup> Additionally, “[g]rowth management laws allow state and local governments to protect large blocks of agricultural land,”<sup>340</sup> open space, and historic property with a single legislative act.

The shortcomings of adopting a traditional growth management scheme in Appalachia are plain. First, there is not the pressing urban growth problems that growth management was created to deal with.<sup>341</sup> Second, forced “[r]egional planning is especially controversial in many states and may be strongly opposed

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<sup>335</sup> J. Hayes, *supra* note 332. Some examples of professional organizations are the American Planning Association’s Smart Growth America coalition and the National Association of Homebuilders Smart Growth Policy. *Id.*

<sup>336</sup> Douglas R. Porter, Symposium, *Land Use Law Reform Symposium: State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 483 (1993).

<sup>337</sup> *Id.* at 495.

<sup>338</sup> *Id.* at 483.

<sup>339</sup> *Fact Sheet: Growth Management Laws*, *supra* note 333, at 2.

<sup>340</sup> *Id.*

<sup>341</sup> See generally Porter, *supra* note 336, at 482.

by local governments.”<sup>342</sup> Third, “growth management laws are complex”<sup>343</sup> and would have to be rewritten to conform to the needs of rural Appalachia.<sup>344</sup>

The concept behind the intergovernmental approach is a good one in that it works to ensure that different government entities in different communities are working toward the same “big picture.” The same is true in historic preservation. A coordinated approach would derive the benefits of the growth management programs’ consistency and avoid the drawbacks by limiting the amount of local control that was actually taken out of local hands. Ideally, an intergovernmental historic preservation program would be less “top down” than growth management because the value of historic resources depends so heavily on local opinion and attitudes. Directed at that precise issue, the “‘New Regionalism’ movement has suggested voluntary local measures and interlocal cooperation can be effective substitutes for centralized control.”<sup>345</sup> Moreover, the New Regionalists argue that voluntary regional governance is in fact superior to a formalized regional government founded on “institutions that regulate vertically.”<sup>346</sup>

### C. Local Preservation Ordinances & Home-Rule

As the Supreme Court observed in 1917 in *Jones v. Portland*, local authorities “manifestly” have “peculiar facilities for acquiring accurate information” that enable local lawmakers to fashion appropriate responses to problems.<sup>347</sup> This sentiment was reinforced during the 1960s when many state municipal codes were reordered or rewritten to address the changing nature of American cities and towns.<sup>348</sup> “The Great Society programs of the Johnson presidency were the order of the day.”<sup>349</sup> State and local governments made heavy use of the “financial incentives to generate plans and innovate pro-

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<sup>342</sup> *Fact Sheet: Growth Management Laws*, *supra* note 333 at 2. See Porter, *supra* note 336, at 500. “[B]y forcing confrontations between conflicting state and local interests, the state statutes probably have increased at least the perception of divisiveness and disagreement.” *Id.*

<sup>343</sup> *Fact Sheet: Growth Management Laws*, *supra* note 333, at 1.

<sup>344</sup> Beyond complexity, state growth management laws “have also attracted charges that they engender stultifying regulations, intractable bureaucracies, and misguided policies.” Porter, *supra* note 336, at 500.

<sup>345</sup> Note, *Old Regionalism, New Regionalism, and Envision Utah: Making Regionalism Work*, 118 HARV. L. REV. 2291, 2292 (2005); see also Janice C. Griffith, Symposium, *Democracy in Action: The Law & Politics of Local Governance: Regional Governance Reconsidered*, 21 J. L. & POL. 505 (2005).

<sup>346</sup> *Old Regionalism*, *supra* note 345, at 2292.

<sup>347</sup> Joseph Lesser & Vigdor D. Bernstein, *The Evolution of Public Purpose, General Welfare, and American Federalism*, 19 URB. LAW. 603, 638 (1987) (quoting 245 U.S. 217, 221 (1917)).

<sup>348</sup> Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653, 657 (1995).

<sup>349</sup> *Id.*

grams.”<sup>350</sup> To inspire such undertakings, many state legislatures granted local governments home-rule authority delegating to local governments “maximum flexibility to . . . choose their own goals and select the means to achieve them.”<sup>351</sup> Home-rule authority represents the concept of local self-governance.

The allocation of decision-making authority between state and local government, especially regarding land-use planning, economic development strategies, and natural resource management is significant to historic preservation. The degree of home-rule power a municipality wields will determine whether the city can issue bonds, raise taxes, enact a zoning ordinance, designate a historic landmark, create a city park, build a bike trail along the river, elect its own officials, and how the leaders of the city work together as parts of a larger community. Moreover, the state’s home-rule policy and enabling statutes will determine which—the state or the municipality—has the authority under state law to implement protection of historic and cultural resources.

Home-rule authority can be divided into three degrees based on the extent of freedom from reliance upon the state legislature for power.<sup>352</sup> “Mandatory constitutional home rule,” also known as “self executing home rule,” is the strongest because the principle of home-rule is incorporated into the state’s constitution, and the state legislature can only enact “general laws applicable to all” municipalities.<sup>353</sup> Mandatory constitutional home-rule provisions vary greatly, but generally are one of two types. The first rests on a “*grant of powers approach*” which stands on an enumerated separation of powers theory where the state delegates certain powers to municipal governments or designates certain matters as being purely of local concern.<sup>354</sup> The second is the “*instrument of limitation approach*” based on a “devolution of powers idea” that localities are free to exercise all the powers of local self-government except those expressly denied, restricted, or prohibited by either the state’s constitution, home-rule charter of the community, or general state law.<sup>355</sup>

The second degree of home-rule authority derives from “permissive constitutional home-rule” provisions which “authorize the state legislature to enact” laws delegating home-rule powers to local governments, “but do not impose an obligation upon the legislature to so act.”<sup>356</sup> Local governments are free to exercise any power that the state legislature grants it, so long as the power is not prohibited by either the state constitution or general laws.<sup>357</sup>

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<sup>350</sup> *Id.* The programs focused on regional planning, development and the perceived advantages of a rational allocation of resources and public services. *Id.*

<sup>351</sup> *Id.* at 658.

<sup>352</sup> LEAGUE OF WOMEN VOTERS OF THE FAIRFAX AREA ED. FUND, DILLON’S RULE: GOOD OR BAD FOR LOCAL GOVERNMENTS? 2 (2004) [hereinafter LEAGUE OF WOMEN VOTERS].

<sup>353</sup> *Id.*

<sup>354</sup> Based on the classical concept of home-rule, *imperium in imperio*. *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> KRANE, RIGOS & HILL, *supra* note 317, at 19.



The weakest degree of home-rule authority is legislative home-rule where the state legislature extends local self-governing authority piecemeal “by statute rather than by constitutional authorization.”<sup>358</sup>

How home-rule actually works is very different from state to state. Appalachia has some representative examples. West Virginia has a mandatory constitutional home-rule provision.<sup>359</sup> It authorizes the West Virginia Legislature to provide “general laws for the incorporation and government of cities,” but once a municipal corporations’ population reaches two thousand, “the electors of municipality may pass all laws and ordinances relating to its municipal affairs” as long as they are consistent with state law.<sup>360</sup> The power of the state legislature to preempt local ordinances is not mitigated by the amendment to the constitution because of a provision that voids all municipal laws and ordinances that conflict with state law.<sup>361</sup> At minimum, the home-rule validates the concept of local self-government being rooted in the constitution, even if only in form and not substance. However, in 2007, the legislature passed a Pilot Program to Increase Powers of Municipal Self Government which will authorize as many as five “pilot municipalities and metro governments in West Virginia to exercise broad-based home-rule . . . [to] allow the Legislature the opportunity to evaluate the viability of allowing municipalities to have broad-based state home-rule to improve urban and state development.”<sup>362</sup> Home-rule in Pennsylvania is laid out in Article IX of the state constitution. This article however, requires the state legislature to control certain aspects of local governments, as well as give constitutional home-rule rights to municipalities.<sup>363</sup>

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<sup>358</sup> LEAGUE OF WOMEN VOTERS, *supra* note 352, at 2.

<sup>359</sup> W. VA. CONST. art. VI, § 39(a). For a thorough analysis of the West Virginia Home-Rule Amendment and its treatment by the courts, see Robert Bastress, *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683 (2007).

<sup>360</sup> W. VA. CONST. art. VI, § 39(a).

<sup>361</sup> KRANE, RIGOS, & HILL, *supra* note 317, at 446.

<sup>362</sup> W. VA. CODE § 8-1-5A(4). The participating local governments will have the following powers:

[t]he authority to pass *any* ordinances, acts, resolutions, rules and regulations not contrary to the constitutions of the United States or West Virginia, federal law or chapters sixty-a, sixty-one and sixty-two of this code as specified in their written and approved plans: *Provided*, That the pilot municipalities may not adopt any ordinance, rule, regulation or resolution or take any action that would create a defined contribution employee pension or retirement plan for its employees currently covered by a defined benefit pensions plan; and (2) Any other powers necessary to implement the provisions of its approved plan.

W. VA. CODE § 8-1-5a(j)(1)-(2) (emphasis added). In 2012 the legislature will evaluate the program to determine “the effectiveness of expanded home rule” and “whether the expanded home rule should be continued, reduced, expanded or terminated in the state.” W. VA. CODE § 8-1-5a(k)(1)-(2).

<sup>363</sup> PENN. CONST. art. IX, § 2.

As required by the state constitution, the legislature enacted The Home-Rule Law, which establishes the procedure for adoption of a home-rule charter.<sup>364</sup> The voters of a local jurisdiction elect a government study commission charged with studying the existing form of government, exploring alternatives, and deciding whether or not to recommend change.<sup>365</sup> If the commission decides to recommend home-rule, it drafts a charter that is presented to the voters for their decision.<sup>366</sup> Adoption of a home-rule charter comes only with the approval of a majority voting in a referendum.<sup>367</sup>

Kentucky's constitution prohibits local privilege and special legislation. However, the state legislature has continued to regulate local matters by enacting laws that only apply to first-class cities, of which there is one,<sup>368</sup> or only apply to urban-metro governments, of which there are two.<sup>369</sup> Still, in 1994 the voters ratified a home-rule amendment to the constitution permitting the Kentucky General Assembly to grant home-rule to cities.<sup>370</sup> The home-rule statute was actually passed prior to the constitutional amendment.<sup>371</sup> The statute requires local functions to take place "within the boundaries of the city" and places an additional requirement that the function be for a "public purpose" for the city.<sup>372</sup>

Virginia, unlike most states, still remains legally committed to the principle that local governments can exercise only those powers that are expressly granted by the state. There is no home-rule in Virginia. All cities and towns operate with a charter. The charter requires a special act of the Virginia Assembly that applies to one particular town.<sup>373</sup>

The idea of local governance, as a political theory, certainly is as appealing as the system of checks and balances, federalism, and separation of powers. However, the fact remains that local governments never have been autonomous; to assert as much would ignore the plain facts of history.<sup>374</sup> Municipal corporations always have been creatures of the state, empowered only with those pow-

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<sup>364</sup> PA. STAT. ANN. §§53-2901 *et seq.* (1997).

<sup>365</sup> PA. STAT. ANN. §§ 53-2901 to 2921.

<sup>366</sup> PA. STAT. ANN. §§ 53-2923 to 2924.

<sup>367</sup> SEC. DENNIS YABLONSKY, DEP'T OF CMTY. & ECON. DEV., HOME RULE IN PENNSYLVANIA 4 (2003), available at [www.newpa.com/download.aspx?id=43](http://www.newpa.com/download.aspx?id=43) (last visited Feb. 20, 2008).

<sup>368</sup> See KY. REV. STAT. ANN. §83.410 (West 2006) (discussing first-class cities, Louisville being the only one in the Commonwealth).

<sup>369</sup> Lexington-Fayette Metro-County Government and Louisville-Jefferson County Metro Government.

<sup>370</sup> Curry, *supra* note 15, at 239.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> KRANE, RIGOS, & HILL, *supra* note 317, at 430.

<sup>374</sup> Howard Lee McBain, *The Doctrine of an Inherent Right to Self-Government*, 16 COLUM. L. REV. 299, 299 (1916).

ers specifically delegated by the legislature.<sup>375</sup> What is also true is that times have changed. State legislatures have ceded extensive authority to local governments to choose elected officials, to determine the governmental structure, to raise revenue, and to regulate for general welfare, including the power to zone.<sup>376</sup> The problem, however, is these “grants of power [are] much less empowering than they might seem.”<sup>377</sup> In reality, local governments are often powerless to actually affect any change because of outside pressures and statutorily imposed limits that have not been approved locally and cannot be removed.<sup>378</sup> In truth, “[l]ocal power exists only to the extent higher-level jurisdictions choose to recognize it.”<sup>379</sup>

Fueled by modern policy debates on economic development, urban sprawl, fiscal and quality of life issues, globalization, and modernization of state governments,<sup>380</sup> home-rule questions will continue to present problems for local governments as long as courts continue to apply “the gratuitous negative inferences that grew in the shadow of the strict construction of Dillon’s Rule, and lingered after its legislative abolition.”<sup>381</sup> Dillon’s Rule is a method of construing legislative delegations of police power against the local government that stems from John F. Dillon’s nineteenth-century, *Treatise on the Law of Municipal Corporations*.<sup>382</sup> Dillon outlines the “undisputed proposition of law” that municipalities can possess and exercise only those powers expressly granted to them by the state; those powers necessary for, implied in, or incident to the express powers; and those powers essential and indispensable to the purpose of the municipality.<sup>383</sup>

After its birth into the law of municipal corporations, Dillon’s Rule was adopted almost universally. It remains the law of Virginia. However, in the states that did not retain the amount of state control Virginia has, electing rather to adopt some sort of home-rule, Dillon’s Rule repeatedly has thrown a wrench into enabling legislation intended to delegate a large amount of authority to a city.

A recent example from West Virginia illustrates how devoted the judiciary seems to be to this doctrine that has seen its time and gone. As discussed

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<sup>375</sup> KENNETH Y. YOUNG, 1 ANDERSON’S AMERICAN LAW OF ZONING, § 2.15, 55 (4th ed. 1996).

<sup>376</sup> David J. Barron & Gerald F. Frug, *Defensive Localism: A View of the Field From the Field*, 21 J. L. & POL. 261, 263 (2005).

<sup>377</sup> *Id.* at 264.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> KRANE, RIGOS, & HILL, *supra* note 317, at 14; see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

<sup>381</sup> Lorensen, *supra* note 348, at 658.

<sup>382</sup> JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

<sup>383</sup> *Id.*

above, West Virginia has mandatory constitutional home-rule.<sup>384</sup> The state legislature recodified the state's entire Municipal Code in 1969, with the express purpose "to give effect to the 'Municipal Home Rule Amendment' to the constitution . . . ."<sup>385</sup> Further, the statute provides "[t]he enumeration of powers and authority granted in [the Municipal Code] shall *not* operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied within the purposes of this chapter . . . ."<sup>386</sup> Lastly, the legislature directed the courts that, "the provisions of this chapter shall be given full effect *without* regard to the common-law rule of strict construction . . ." when interpreting the statute.<sup>387</sup> In other words, "Dillon's Rule is dead."<sup>388</sup>

Thirty-seven years later, the West Virginia Supreme Court still applies the old rule of strict construction to power delegations. The case at bar was a certified question in June of 2006.<sup>389</sup> The enabling legislation the Court was interpreting was among the powers granted to county commissions.<sup>390</sup> The Court's analysis of the statute began with some limiting cannons of construction then proceeded to quote Dillon's Rule from a case decided in 1920.<sup>391</sup> The Court concluded that, because the statute said "in the event a county has not created or designated a planning commission," it precluded counties that had planning commissions from passing an ordinance.<sup>392</sup> However, under West Virginia's Land Use Planning provisions, a prerequisite to county commissions' authority to make land-use decisions is to have a planning commission.<sup>393</sup> Moreover, the Court had a patent statement of legislative intent to allow county regulations of commercial property in the statute they were construing.<sup>394</sup> The opinion does not say why the provision did not apply, and the court avoided the

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<sup>384</sup> W. VA. CONST. art VI § 39(a) (stating that "through its legally constituted authority, [a municipality] may pass all laws and ordinances relating to its municipal affairs").

<sup>385</sup> W. VA. CODE § 8-1-1.

<sup>386</sup> W. VA. CODE § 8-1-7 (emphasis added).

<sup>387</sup> *Id.* (emphasis added).

<sup>388</sup> Lorensen, *supra* note 348, at 658.

<sup>389</sup> *T. Weston, Inc. v. Mineral County*, 638 S.E.2d 167 (W. Va. 2006).

<sup>390</sup> W. VA. CODE § 7-1-3jj. Former West Virginia University Professor of Law, Willard Lorensen, has noted that Dillon's Rule does not even apply to county commissions. *See* Lorensen, *supra* note 348, at 659.

<sup>391</sup> *T. Weston, Inc.*, 638 S.E.2d at 169. The Court stated, "the county [commission] is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed." *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *See, e.g.*, W. VA. CODE § 8A-7-1.

<sup>394</sup> "No provision in this section may be construed to limit the authority of a county to restrict the commercial use of real estate in designated areas through planning and zoning ordinances." W. VA. CODE § 7-1-1 (2006).

question of whether the county could pass the ordinance based on its general home-rule power. The lesson in this case is that the West Virginia Supreme Court will apply the strict “policy-straitjacket of Dillon’s Rule” even in the face of numerous clear legislative delegations on top of a constitutional amendment without any explanation of why.<sup>395</sup> Apparently, a court can just cite Dillon’s Rule without warning and rely on “dubious case authority” to support its position.<sup>396</sup>

The Dillon’s Rule debate has raged for over for a century. Until courts either stop applying Dillon’s Rule when legislatures have extended broad authority to local government, or legislatures renounce home-rule and redraw the lines between state and local power, it appears Dillon’s Rule will continue to resurface in judicial opinions.<sup>397</sup>

This is unfortunate in light of the fact that Dillon’s Rule shackles local officials and prevents them from quickly and effectively reacting to local and unique problems with an equally uniquely tailored local response. In effect, application of the Rule promotes the status quo and attempts to stop progress. The uncertainty created by haphazard application of the Rule gives credence to the wisdom in relegating Dillon’s Rule to the legal trash bin with other outdated legal principals.<sup>398</sup> From a historic preservation standpoint, this uncertainty surrounding the lingering vestiges of Dillon’s Rule may thwart local governments’ willingness to implement innovative development policies which is the very task historic preservation, comprehensive planning, and growth management require local governments to do.

In the historic preservation context, the more home-rule power granted to local governments, the greater the community involvement, popular support, and civic pride in community programs. Because home-rule essentially allows communities to govern themselves, citizens will be less skeptical and more willing to participate in the process because they know the local leaders; the history and heritage of the local area; and the particular social, cultural, and economic needs of their community. Home-rule affords the opportunity for citizens to witness the direct results of their historic preservation strategy at work and to experience the gratification in their collective achievements. An indirect result of a successful, locally mandated policy that emphasizes the community’s culture, history, and heritage is the heightened sense of self-worth from the realization that through working together as a community, its unique cultural assets have been preserved for coming generations and that the individual’s, family’s and neighborhood’s contribution to their community’s history is worth preserv-

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<sup>395</sup> See Lorensen, *supra* note 348, at 659.

<sup>396</sup> See *id.*

<sup>397</sup> See, e.g., *Somerset v. Weise*, 263 S.W.2d 921 (Ky. 1954); *Heaton v. Charlotte*, 178 S.E.2d 325 (N.C. 1971); *Chesapeake v. Gardner Enters., Inc.*, 482 S.E.2d 812 (Va. 1997); *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001).

<sup>398</sup> LEAGUE OF WOMEN VOTERS, *supra* note 352, at 3.

ing. Gradually, these communities will become more accepting of the expertise and resources that state and federal agencies can provide to them.<sup>399</sup>

### III. HISTORIC PRESERVATION AS A TOOL FOR ECONOMIC DEVELOPMENT IN APPALACHIA

Any plan to confront the Appalachian breakdown must be conscious of the unique cultural and economic conditions in Central Appalachia. These conditions are the culmination of historically determined patterns of power and decision-making, problems with the utilization of resources, recurring patterns of out-migration, and the inability of current residents to work together to build the type of community they desire.<sup>400</sup>

Historic preservation addresses all of these issues. No one will disagree that “the region needs more community based development strategies that broaden the base of participants and include new groups, citizens, nongovernmental organizations, churches, and private funders in planning for development. Assets in this context are not just those that focus on the individual but must also transcend to the level of community . . . .”<sup>401</sup> Historic preservation is an excellent vehicle for beginning this process. Beyond improving the physical environment and morale of a community, there are economic benefits to capitalizing on Appalachia’s “Rural Advantage” through historic preservation.

One economic benefit of historic preservation to communities in Central Appalachia is increased heritage tourism. Appalachia already has the resource base and the potential attractions to exploit the growing travel and tourism industry.<sup>402</sup> Tourism generates \$100 billion in tax revenue for federal, state, and local governments.<sup>403</sup> Tourism results in \$163 billion in direct payroll and “one out of every eight U.S. non-farm jobs is directly and indirectly created by travel and tourism.”<sup>404</sup> Moreover, tourism is one of America’s top service exports generating \$93 billion dollars in revenue from international visitors.<sup>405</sup>

Heritage tourism is an economic building tool ideally suited for the Region because communities are able to benefit from the “Rural Advantage,” a

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<sup>399</sup> Barron & Frug, *supra* note 376, at 261.

<sup>400</sup> Appalachia: Challenges for the Future, in DEMOGRAPHIC DIVERSITY AND ECONOMIC CHANGE IN APPALACHIA (2002).

<sup>401</sup> Glasmeier & Farrigan, *supra* note 69, at 147.

<sup>402</sup> Mike Woods, *The Rural South: Preparing for the Challenges of the 21st Century*, (S. Rural Dev. Ctr.), June 2000, at 1.

<sup>403</sup> Travel Ind. Assoc. Am., Domestic Travel Fast Facts—Travel Trends from “A to Z”, [http://www.tia.org/pressmedia/domestic\\_a\\_to\\_z.html](http://www.tia.org/pressmedia/domestic_a_to_z.html) (last visited Feb. 19, 2008) [hereinafter *Fast Facts*].

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

unique asset to small-town Appalachia.<sup>406</sup> “Rural areas . . . often have natural resources, authentic agricultural or ecological-based activities, scenic beauty, history, and ‘small town charm’ which may appeal to urbanites caught up in today’s fast paced lifestyle.”<sup>407</sup>

Heritage tourism describes travel when tourists visit a specific area based “on the unique or special aspects of that locale’s history, landscape, and culture.”<sup>408</sup> Also called cultural heritage tourism, this type of business plan attracts tourists seeking to travel “to experience the places and activities that authentically represent the stories and people of the past.”<sup>409</sup> Heritage tourism helps promote “a preservation interest, sensibility, and ethic, while at the same time educating Americans about their country’s past and contributing to the economy.”<sup>410</sup> It brings attention to and recognizes the unique cultural history of the area, while at the same time providing an economic windfall to the people and infrastructure in Appalachia.<sup>411</sup>

Heritage tourism can be an economic engine for the Appalachian region.<sup>412</sup> Travel industry studies confirm that heritage tourism is the number one interest of American travelers.<sup>413</sup> In 2003, eighty-one percent of all American adult travelers were considered “historic/cultural travelers.”<sup>414</sup> In 2006, more than seventy-five percent of all American travelers attended a cultural or historic event while on vacation.<sup>415</sup> Further, with weekend travel seeming to be the preferred travel of future tourists, heritage tourism is poised to be the next great cottage industry that will have a significant impact on the communities with historic or cultural attractions.<sup>416</sup>

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<sup>406</sup> Fred D. Baldwin, *ARC Fall Conference Focuses on the “Rural Advantage,”* APPALACHIAN MAGAZINE 17, Mar. 2006.

<sup>407</sup> Woods, *supra* note 402, at 1.

<sup>408</sup> ACHP, *Defining Heritage Tourism*, <http://www.achp.gov/ht/defining.html> (last visited Feb. 22, 2008).

<sup>409</sup> *Id.*

<sup>410</sup> ACHP, *Fed. Heritage Tourism Summit I, Heritage Tourism and the Federal Government, REPORT ON PROCEEDINGS 7* (Nov. 14, 2002).

<sup>411</sup> In 2001, heritage travelers filled Maryland’s coffers with \$2.3 billion dollars, \$1.9 billion of which came from out-of-state travelers. ACHP, *Why is the Federal Government Involved? The Benefits of Heritage Tourism*, <http://www.achp.gov/ht/benefits.html> (last updated Mar. 3, 2006) [hereinafter *Benefits of Heritage Tourism*].

<sup>412</sup> *See generally id.*

<sup>413</sup> *See Travelers’ Desire to Experience History and Culture Stronger than Ever*, (Travel Ind. Ass’n Am. (TIA)), <http://www.tia.org/pressmedia/pressrec.asp?Item=284> (last updated Jun. 30, 2003) [hereinafter *Desire to Experience History*] (summarizing the results of the HISTORIC/CULTURAL TRAVELER, 2003 ED. study conducted by the TIA and Smithsonian Magazine).

<sup>414</sup> *Id.*

<sup>415</sup> *Fast Facts*, *supra* note 403.

<sup>416</sup> *Id.*

Besides the obvious economic impact on Appalachia, heritage tourism can have a more meaningful impact on the citizens of Appalachia. Heritage tourism could be an “important agent in promoting community pride and enhancing quality of life.”<sup>417</sup> By focusing on their “heritage assets,” communities tend to revitalize and restore their infrastructure and gain an appreciation for their own contributions to society.<sup>418</sup>

Other rural tourism opportunities well-suited to Central Appalachia include recreation and natural attractions, agritourism, and eco-tourism.<sup>419</sup> The Region’s scenic beauty and natural landscapes are ideal for recreational/adventure tourism activities including white water rafting, spelunking, and mountain biking. Agritourism is a strategy that incorporates a tourism element into farm operation.<sup>420</sup> It expands farm business and can add to new festivals and markets regionally.<sup>421</sup> “Visitors desire to see the real farm activity and often this means additional consideration for safety, environmental concerns, rest stops, and other facilities.”<sup>422</sup> Further, “[e]cotourism is the purposeful travel to natural areas to understand the culture and natural history of the environment, taking care not to alter the integrity of the ecosystem, while producing economic opportunities that make the conservation of natural resources financially beneficial to local citizens.”<sup>423</sup>

The rural communities of Central Appalachia can incorporate any mix of these niche travel markets into an integrated strategy to diversify and grow a local economy. What is essential to all of them is the authenticity and genuineness that can only be achieved through careful planning for the future and steadfast preservation of the past. In this light, the federal government has encouraged communities to integrate historic preservation, heritage tourism, rural recreational/adventure tourism, and community economic development in the National Heritage Area program.

A National Heritage Area is a congressionally “designated place where natural, cultural historic and recreational resources combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography.”<sup>424</sup> The program is coordinated by a local entity in partnership with the National Park Service (“NPS”) and various state and local stakeholders

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<sup>417</sup> *Benefits of Heritage Tourism*, *supra* note 411.

<sup>418</sup> *Id.*

<sup>419</sup> Woods, *supra* note 402, at 1.

<sup>420</sup> *Id.* at 4.

<sup>421</sup> *Id.* at 3-4.

<sup>422</sup> *Id.* at 4.

<sup>423</sup> *Id.*

<sup>424</sup> ALLIANCE OF NAT’L HERITAGE AREAS, ECONOMIC IMPACT OF HERITAGE TOURISM SPENDING 2005 (2005), [www.nationalheritageareas.org/doc/ANHA2005.pdf](http://www.nationalheritageareas.org/doc/ANHA2005.pdf) [hereinafter HERITAGE TOURISM SPENDING].



to work collaboratively on projects congruent with the area's stated management plan goals.<sup>425</sup>

The heritage area concept offers an innovative method for citizens, in partnership with local, state, and federal government, and local non-profit and private sector interests, to shape the long-term future of their environment. Heritage areas work across jurisdictional and demographic boundaries by identifying multiple cultural landscapes that are linked thematically, historically, or geographically.<sup>426</sup>

The collaboration takes the form of providing "educational and inspirational opportunities which encourage residents and visitors to stay in a place, but accomplishes this using an approach to conservation that does not compromise traditional local control over the landscape."<sup>427</sup> The NPS is involved for a limited time and in a very hands-off way. In fact, Heritage Areas are not units of the NPS, nor is any land owned or managed by the agency. Even more, Congress has repeatedly refused to enact any centralized systematic way of determining eligibility for the program.<sup>428</sup> Rather, Heritage Areas tend to originate from grassroots activism.<sup>429</sup> Typically, regional economic development is a goal, and to accomplish this, localities work on a larger regional scale.<sup>430</sup> Moreover, Heritage Areas are "working landscapes," meaning their conservation centers on a way of life that is becoming or has become obsolete.<sup>431</sup>

Appalachia has several recognized Heritage Areas including: The National Coal Heritage Area,<sup>432</sup> the Rivers of Steel National Heritage Area,<sup>433</sup> the Shenandoah Valley Battlefields National Historic District,<sup>434</sup> the Tennessee

<sup>425</sup> Nat'l Park Ser., What is a National Heritage Area?, [www.cr.nps.gov/heritageareas/FAQ/INDEX.htm](http://www.cr.nps.gov/heritageareas/FAQ/INDEX.htm) (last visited Feb. 24, 2008) [hereinafter *What is a National Heritage Area?*].

<sup>426</sup> *Id.*; see George Wright Society, *Stewardship of Heritage Areas*, 20 GEORGE WRIGHT F. NO. 2 (Brenda Barrett & Nora Mitchell, eds., 2003).

<sup>427</sup> *Id.* Moreover, the initiative is gaining more and more federal support. The President's proposed budget for 2008 included a 2.6 million dollar increase from the previous year's budget to be allocated for heritage areas for a total of 10 billion dollars. See ACHP News, *President's 2008 Budget Proposes Increases for Historic Preservation*, <http://www.achp.gov/news22107.html> (last updated Feb. 11, 2008).

<sup>428</sup> SARAH PESKIN, AMERICA'S SPECIAL LANDSCAPES: THE HERITAGE AREA PHENOMENON, Nat'l Park Ser., 2 (2001).

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *National Heritage Area: Developing a Model for Measuring Success*, (Nat'l Park Serv. 2004), <http://www.nps.gov/history/heritageareas/REP/meassucc.pdf>.

<sup>432</sup> Pub. L. No. §§ 104-333, 110 Stat. 4243 (1996).

<sup>433</sup> Pub. L. No. §§ 104-333, 110 Stat. 4252 amended by Pub. L. No. §§ 106-13, 113 Stat. 1501A-15B.

<sup>434</sup> Pub. L. No. §§ 104-333, 110 Stat. 4174 (1996).

Civil War Heritage Area,<sup>435</sup> the Wheeling National Heritage Area,<sup>436</sup> and the Blue Ridge National Heritage Area.<sup>437</sup>

An important part of Heritage Areas' goals is attracting tourism to heritage sites, facilities, and other attractions.<sup>438</sup> "Community leaders, residents, businesses and local governments . . . work together to preserve, promote, and celebrate their region's heritage, culture and natural resources for the benefit of future generations."<sup>439</sup>

The economic impact study from 2005 shows how well the program is working. The total direct and indirect value-added to the community from heritage tourism in terms of personal income to workers, profits, rents for businesses, and indirect business taxes is estimated to have reached \$5 billion. Based on the averages from five Heritage Areas, it is estimated that visitors to the Heritage Areas across the country generated roughly \$8.438 billion in sales. The direct economic impact nationally is estimated at generating 116,192 jobs and nearly \$2.5 billion in wages. The estimated total economic impact of all visitors to Heritage Areas is more than \$8.5 billion in spending and \$5 billion dollars value-added to the local communities.<sup>440</sup>

This is not to suggest that Central Appalachia should hang its hat on tourism. However, the financial rewards for taking an active interest in the community in which one lives may justify the larger rewards of historic preservation.<sup>441</sup> Appalachia needs to realistically assess its strengths and weakness. Major metropolitan areas will attract the bulk of larger employers.<sup>442</sup> To succeed in diversifying its economy, Appalachia has to creatively differentiate itself

<sup>435</sup> Pub. L. No §§ 104-333, 110 Stat. 4245 (1996).

<sup>436</sup> Pub. L. No §§ 106-291, 114 Stat. 814 (2000).

<sup>437</sup> Pub. L. No § 108, 117 Stat. 1241 (2003).

<sup>438</sup> HERITAGE TOURISM SPENDING, *supra* note 424.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* The NPS reports that in 2004, 42,965,637 people visited heritage areas and volunteers worked 219,506 hours. Heritage Areas negotiated 1,274 formal partnerships and 3,639 informal partnerships. The Heritage Areas managed 558 educational programs reaching 737,751 participants. Heritage Areas awarded 111 grants to the National Register eligible structures and were involved in 113 road enhancement projects. The areas awarded 341 grants which leveraged \$44,488,296 in additional funds. Sixty-six grants were awarded for recreational trails enhancing eighty-five miles of trails and eighty-three trail projects. The NPS Heritage Partnerships Program funding leverages \$83,691,954 in other federal, state, local, and private dollars; a ratio of 1:6. HERITAGE TOURISM SPENDING, *supra* note 424, at 3.

<sup>441</sup> See Stauber, *supra* note 39, at 44-45 (quoting DAVID LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* 516-17 (1999) ("If we have learned anything from the history of economic development, it is that culture makes all the difference.") and AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 10-11 (1999) ("With adequate social opportunities, individuals can effectively shape their own destiny and help each other. They may not be seen primarily as passive recipients of the benefits of cunning development programs.")).

<sup>442</sup> *Id.*

from the rest of the country by creating a market niche.<sup>443</sup> Describing a fifty mile rail-trail and water trail extending out from Morgantown, West Virginia, Peggy Pings, an outdoor recreation planner and program manager for the West Virginia Field Office of the Rivers, commented that “developing attractions around these kinds of assets leads naturally to partnerships across government lines, ‘Its like a watershed model. What happens upstream affects what happens downstream.’”<sup>444</sup>

#### IV. CONCLUSION

Rather than declaring “War on Poverty”—which is, for Central Appalachia, a way of life—government entities would be better served to engage in a peace-keeping mission to reach an agreeable and realistic vision for Central Appalachia’s future development in a way that is consistent to the traditional values of these communities and capitalizes on the rich history and deep sense of pride that is the hallmark of Appalachia. A multi-tiered, coordinated, and comprehensive approach to historic preservation is one way to confront the Appalachian breakdown by giving local communities and their residents “the tools to care for the places that give their lives meaning.”<sup>445</sup>

Only by a concerted and focused effort on the part of each level of government can Central Appalachia meet any of the challenges that threaten the Region’s future economic survival. Local communities can benefit from the technical expertise of federal agencies in managing large and complex projects. Similarly, state governments can be instrumental in instituting regional cooperation and giving local governments the control they need to institute the changes they want to see in their community.

An example of a coordinated approach is the Johnsonville State Historic Park Area in Tennessee. The Tennessee War Commission was enacted in 1994 to develop a plan of incentives available to local landowners and local governments to preserve, conserve, and restore significant sites, including battlefields, in the State related to the French and Indian War, the American Revolution, the War of 1812, the United States Mexican War, and the “War Between the States.”<sup>446</sup> The main purpose of the Commission is not only to preserve the legacy of the wars in Tennessee, but also to encourage cooperation between local governments, private citizens, and the state government while working toward a

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<sup>443</sup> “Competitive advantage comes from two sources: low cost or differentiation.” Stauber, *supra* note 39, at 44 (citing MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 37 (1998)). A firm, nation, or community cannot have both. *Id.* “Porter’s work on inner cities suggests these same concepts apply to communities, including rural ones, and his international work suggests parallels between developing nations with their dependence on cheap labor and natural resources, and rural America.” *Id.*

<sup>444</sup> Baldwin, *supra* note 406.

<sup>445</sup> PESKIN, *supra* note 428.

<sup>446</sup> TENN. CODE ANN. §4-11-502 (2006).

common goal.<sup>447</sup> In the spirit of cooperation, the Commission undertakes the added function of maintaining “a geographic database and information system that can be used to locate, track, and cross-reference significant historical and cultural properties . . . associated with the wars.”<sup>448</sup>

In 1996, Congress created the Tennessee Civil War National Heritage Area, a statewide partnership unit of the NPS which receives most of its funding from federal and state sources.<sup>449</sup> The Heritage Area is administered by Middle Tennessee State University and assisted by an advisory board made up of state agencies, various non-profit organizations, and local officials.<sup>450</sup> A key component of the Heritage Area is that it does not own or acquire historic property.<sup>451</sup> Rather, it enhances state efforts to promote and conserve the heritage of the Civil War and Reconstruction through direct assistance and partnership funds.<sup>452</sup> By working with key partners, the Heritage Area assists state parks and state historic sites in various ways including preparing nominations to the National Register and funding research projects for new exhibits.<sup>453</sup>

Among the National Heritage Area’s first projects was to nominate Johnsonville State Historic Park Area<sup>454</sup> to the National Register.<sup>455</sup> Local officials had already begun the process hoping National Register designation would bring new attention “to this little-visited jewel in the state park system” and create new preservation possibilities for the park’s resources.<sup>456</sup> The Wars Com-

<sup>447</sup> *Id.*

<sup>448</sup> TENN. CODE ANN. §4-11-502(4).

<sup>449</sup> Carroll Van West, *Revisiting Our Civil War Legacies: Tennessee State Parks and the Tennessee Civil War National Heritage Area*, THE TENNESSEE CONSERVATIONIST (2002), available at [http://www.state.tn.us/environment/tn\\_consv/archive/civilwarlegacy.pdf](http://www.state.tn.us/environment/tn_consv/archive/civilwarlegacy.pdf).

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* Some of the “key partners” include Tennessee Historical Commission, the Tennessee Department of Tourist Development, and Tennessee State Parks. *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> In November of 1864, Major General Nathan Bedford Forrest’s cavalry took up artillery positions on the west bank of the Tennessee River, at Johnsonville. Forrest’s men sank four federal gunboats and destroyed a Union Army supply depot on the east bank of the river. The estimated cost of supplies lost in the supply depot is \$2.2 million. The battlefield is now a Tennessee State Historic Park, operated by the State Park System. Four of the original rifle pits remain preserved and two large forts are open to visitors. Johnsonville State Historic Park Website, <http://state.tn.us/environment/parks/Johnsonville/>.

<sup>455</sup> The area was designated in 2000. Van West, *supra* note 449.

<sup>456</sup> *Id.*

Why Johnsonville? First, the physical setting of the federal fort . . . was excellent. To tell the story of the military base and the town of Johnsonville that grew around it, many resources remained: two redoubts, rifle pits, site of a horse corral, an old railroad turntable, excellent views of the river, and later historic cemeteries. Adding to those valuable resources was the story of Johnsonville itself. The park was directly associated with the Union occupation of Tennessee, a key November 1864 battle, and the actions of African-American

mission was able to fund “four seasons of extensive underwater archaeological investigations at Johnsonville resulting in the location and survey of several Civil War naval shipwrecks.”<sup>457</sup> Plans are underway to attempt to raise and conserve these military artifacts.<sup>458</sup>

In October of 2006, a Civil War Enhancement Grant<sup>459</sup> was secured for the creation of a Historic Johnsonville Welcome and Civil War Interpretive Center that will feature public use facilities and offer visitors interpretive displays based on the naval activity on Tennessee waterways during the Civil War, the importance of the state’s railway system during the War, and feature the significant contributions of the Tennessee United States Colored Troops, who built and guarded the railroad stretching from Johnsonville to Nashville.<sup>460</sup>

Johnsonville exemplifies how well a coordinated approach to historic preservation can operate. By capitalizing on the expertise of each level of the government, the community of New Johnsonville can reap the rewards of a process that the local chamber of commerce began seven years ago. Now, the town can market the discoveries of the shipwrecks and remaining forts through the NPS’s Heritage Area websites and marketing materials. The park has a wonderful facility to welcome tourists and public interest in the ongoing discoveries taking place there. Local residents have the satisfaction that local leaders chose this process, pride in their contribution to its development, and the knowledge that Johnsonville’s important piece of Civil War history will remain accessible to future generations. Without funding from both the state and federal government, the transformation of this “jewel in the state park system” may never have happened. It is likely that without the managerial assistance of the Wars Commission and Heritage Area, the local government could not have unilaterally attracted enough attention to the park to secure funding for ongoing discovery and additional facilities. Moreover, with the shared vision of the park firmly established, private investors can more easily find their “place” in the scheme and invest in projects consistent with the vision.

In many ways the people of Appalachia are like the mountains that have been their home for generations. The Appalachian Mountains are some of the

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soldiers, members of the famed regiments of the United States Colored Troops (USCT). Many Civil War era sites neglect the story of the USCT and ignore the drama of enslaved peoples gaining freedom and taking up arms against their former masters. Here at Johnsonville was an opportunity to tell the whole story of the Civil War—how these years of destruction were also times of Emancipation and new opportunities for formerly enslaved men and women.

*Id.*

<sup>457</sup> Fred M. Prouty, Dir. of Programs, Tenn. Wars Comm’n Report of Activities, *Governor Bredesen Announces Civil War Enhancement Grant for Humphreys County* (Oct. 20, 2006).

<sup>458</sup> *Id.*

<sup>459</sup> The Tennessee Department of Environment and Conservation matched federal funds made available through the TEA-21 grant program. *Id.*

<sup>460</sup> *Id.*

oldest in the world, and their settlers have toiled on their hillsides for thousands of years. The terrain was too difficult to try to navigate, so people just avoided the mountains. Similarly, the residents of Appalachia have been avoided by outsiders, labeled too stupid, too unruly, too poor, or too hard to control. Used by the rest of country to support industry and fuel America's ascension to international prominence, the mountains are exploited with no attention to the environmental devastation left behind. Similarly, the economic and cultural devastation experienced by the residents of Appalachia goes largely unnoticed in a country preoccupied with poverty in urban ghettos.

Maybe appreciation for Appalachia is too much to ask from a country that is willing to blow the tops off the some of oldest mountains in the world. Perhaps it is unreasonable to assert that the New River, pre-dated only by the Nile River in Egypt, is worthy of some respect. But this cannot be true. Environmentalists have begun fighting for the natural environment in Appalachia.<sup>461</sup> It is time we did the same for the people who live there because the Appalachian Mountains are more than just a natural landscape. They are "icons of our national character and important to our sense of ourselves as a nation . . . compare[able] to the cathedrals and castles that characterize the cultural riches of Europe."<sup>462</sup>

Protecting Appalachia's historic and cultural environment is just as important as protecting its natural one because Appalachia's natural beauty is enhanced, if not surpassed, by its cultural significance. "Even when our country only included the 13 original colonies . . . our national identity was based on principles strongly tied to not just to any land, but to the image of a limitless wilderness of abundant forests, rich soils and bountiful waters that early settlers could claim through sheer hard work."<sup>463</sup>

As Americans continue to lose touch with our national identity, places like Appalachia, whose people have not forgotten, will finally be appreciated for the cultural and historic heritage these residents have preserved for us. Rather than changing Appalachia to keep pace with modern times, lawmakers

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<sup>461</sup> See, e.g., Hannah C. Halbert, *From Picket Line to Courtroom: The Changing Forum for Regional Resistance, Environmental Reform and Policy Change in Appalachia*, 25 *HAMLIN J. PUB. L. & POL'Y* 375 (2004).

<sup>462</sup> PESKIN, *supra* note 428.

<sup>463</sup> *Id.*

should finally realize that changing is not beneficial to Appalachia, and this truth is perhaps the Region's greatest asset. Preserve, protect, and restore it.

*Rebecca S. Schoen\**

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\* The author dedicates this Note to her next-door neighbor growing up, Mr. Herman Wood, who told the seven year-old girl about fighting in the Battle of the Bulge during World War II, a story she quickly recorded in her diary and did not think of again until ninth grade social studies, when she learned that her neighbor had been one of the few American soldiers to survive that important battle along the border of Belgium and Germany in 1944, and what that battle had meant in terms of Germany's eventual defeat and world history. Thanks for teaching me that history is everywhere, even in our own back yards. I have been looking ever since.