

Columbia University

Law for Preservationists (A 6795) Syllabus

Avery 115

Prof. William J. Cook

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Course Overview: Law for Preservationists will examine the federal, state, and local laws concerning historic preservation, including tax laws and real estate opportunities (and easements for structures, open areas and historic monuments, locations, and other nationally recognized properties). Additionally reviewed are current developments in historic preservation law litigation, recent decisions in the “takings” area and other constitutional developments relating to landmarking of properties.

By the conclusion of the course, students will be able answer the following questions all preservationists need to know about the law:

1. Where does government get the authority to regulate private property for preservation purposes?
2. What are the appropriate limits to government regulation of private property?
3. From a legal perspective, what are historic resources?
4. What regulatory tools exist to protect historic resources from private actions?
5. What regulatory tools exist to protect historic resources from government actions?
6. What are special legal considerations regarding the protection of religiously owned properties?
7. What laws address the protection of other specific historic resources?
8. What legal tools encourage the voluntary protection of historic resources?
9. What other legal strategies can be employed to save historic resources?
10. What are the latest trends and developments in preservation law?

In the process of learning the answers to these questions students will develop an understanding of preservation law and a working knowledge of the legal system, as well as understand the interface between preservationists and lawyers.

Texts:

- Robert E. Stipe, ed., *A Richer Heritage: Historic Preservation in the 21st Century* (2003).

You will also receive supplementary materials, which I will distribute electronically as needed.

Assignments:

- Completion of assigned reading
- Active participation in class discussions
- Monitor breaking preservation legal issues in popular press
- Take-home final exam

Final Grade: Your grade will consist of a take-home final examination (80%) and 20% for class participation (includes all assignments).

Class 1

Course introduction, administrative matters, and planning

Overview lecture: Learning to Interpret Law: Preservation Law Fundamentals and Philosophical Underpinnings

Topics covered during lecture:

- How to read and analyze legal cases: briefing techniques
- How to read and interpret statutes: the “plain meaning rule”
- Legal principles: jurisdiction, ripeness, standing, *stare decisis*
- Standards of review: abuse of discretion v. *de novo*
- Concepts of takings and the police power
- Federalism
- Court system overview
- Legal terms: *amicus curiae* brief, procedural v. substantive due process, injunctions, rational basis, substantial evidence
- Facial v. “as applied” challenges

Class 2

An examination of the underlying purposes of historic preservation as a policy of national, state, and local government. What are the legal bases upon which the policy rests? Does it matter? Is it evolving? Is it inherently a good, or just another form of land use regulation? How does it compare to zoning? Does preservation have any negative consequences, or raise serious class, racial, education, or geographic distinctions?

- Stipe, Richer Heritage: Introduction (America's Preservation Ethos: A Tribute to Enduring Ideals); Ch. 1 (Preservation Fundamentals)
- Julia H. Miller, A Layperson's Guide to Historic Preservation Law: A Survey of Federal, State & Local Laws Governing Historic Resource Protection (2008) (TO BE DISTRIBUTED)

Class 3

Overview of preservation efforts at the federal level. The National Historic Preservation Act of 1966 (NHPA) and the concepts of "undertaking," "adverse effects," and mitigation. Elements of the federal, state, and local partnership. Creation of the National Register of Historic Places; legal effect of listing and determinations of eligibility; owner consent. Role of the Advisory Council on Historic Preservation v. National Trust for Historic Preservation.

- Stipe, Richer Heritage: Ch. 2 (The Federal Preservation Program) & Ch. 3 (The Players)
- Julia H. Miller, A Layperson's Guide to Historic Preservation Law: A Survey of Federal, State & Local Laws Governing Historic Resource Protection, pp. 1-7 (2008)
- Explore websites: Advisory Council on Historic Preservation (www.achp.org (Links to an external site.)) and National Trust for Historic Preservation (www.preservationnation.org (Links to an external site.))

Class 4

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IN-CLASS EXERCISE: Applying Section 106 | Current Litigation

- Historic Charleston & Cruise Ships
- Mt. Taylor, NM & Uranium Mining
- Cape Wind, Nantucket Sound

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Class 5

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Stipe, Richer Heritage: Ch. 3 (The States: The Backbone of Preservation)

Stipe, Richer Heritage: Ch. 4 (Local Government Programs: Preservation Where It Counts)

SUPPLEMENTAL READING

- Thompson M. Mayes, A Menu of Historic Preservation Laws and Policies at the State Level (2007)
- Constance Beaumont, State Laws to Consider Historic Resources (from Smart States, Better Communities (National Trust for Historic Preservation, 1996))
- The Historic Preservation Ordinance (NTHP Preservation Law Reporter Educational Materials, 2007)
- Frequently Asked Questions About Local Preservation Laws (NTHP Preservation Law Reporter Educational Materials, 2007)
- Assessing Economic Hardship Claims Under Historic Preservation Ordinances (NTHP Preservation Law Reporter Educational Materials, 2007)
- Demolition by Neglect (NTHP Preservation Law Reporter Educational Materials, 2007)

IN-CLASS GROUP EXERCISE: Complete an abbreviated (2-page) National Register application for a non-listed historic site of your choice, using the preliminary nomination form provided by me from the South Carolina State Historic Preservation Office. This will help you learn how to apply the National Park Service's criteria for listing properties in the National Register of Historic Places.

Class 6

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Lecture and Powerpoint presentation will cover local preservation law, how to research it, and an in-class exercise will demonstrate common differences between local laws and how such differences dictate preservation outcomes. Please have your laptop available. For background, please see Stipe, Richer Heritage: Ch. 4 (Local Government Programs: Preservation Where It Counts).

Class 7

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Lecture will focus on the topic of "regulatory takings" and the *Penn Central* decision. We will also discuss historic preservation regulation and the free exercise clause.

- *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)
- Jerold S. Kayden, Designating *Penn Central Transportation Co. v. New York City* a Landmark of Constitutional Jurisprudence (National Trust Forum, Spring 2003)
- *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied* (1991)
- John H. Sheehy, *Religious Landmark Preservation Under the First and Fifth Amendments: St. Bartholomew's Church v. City of New York*, 65 St. John's L. Rev. 553 (1991)

Class 8

Lecture and Powerpoint presentation will focus on traditional cultural properties.

Stipe, Richer Heritage: Ch. 5 (Preservation Law & Public Policy)

Stipe, Richer Heritage: Ch. 6 (Preserving Important Landscapes)

Stipe, Richer Heritage: Ch. 14 (Folklife, Intangible Heritage, and the Promise and Perils of Cultural Cooperation); Ch. 15 (Where Do We Go From Here?)

IN-CLASS DISCUSSION: How do you define a “traditional cultural property? What guidance does the federal government provide on this topic? Is it sufficient? What changes would you propose to strengthen the protection of traditional cultural properties?

Class 9

Real Estate Development & Historic Preservation

Financial incentives for historic preservation: easement donations & historic rehabilitation tax credits

SUPPLEMENTAL READING (posted on CourseWorks)

Class 10

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Historic Preservation Law in New York City | Evolution & the Next 50 Years: Panel Discussion

SUPPLEMENTAL READING: (posted on CourseWorks)

Class 11

International Cultural Heritage Law | Comparison of Legal Schemes

SUPPLEMENTAL READING (posted on CourseWorks)

Class 12

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Semester Review