Heritage values and legal rules

Identification and treatment of the historic environment via an adaptive regulatory framework (part 1)

Jeremy C. Wells
School of Architecture, Art and Historic Preservation, Roger Williams University, Bristol, Rhode Island, USA, and
Lucas Lixinski
Faculty of Law, University of New South Wales, Sydney, Australia

Received 19 November 2015
Revised 21 April 2016
30 July 2016
Accepted 27 September 2016

Abstract

Purpose – Existing regulatory frameworks for identifying and treating historic buildings and places reflect deference to expert rule, which privilege the values of a small number of heritage experts over the values of the majority of people who visit, work, and reside in historic environments. To address this problem, the purpose of this paper is to explore a fundamental shift in how US federal and local preservation laws address built heritage by suggesting a dynamic, adaptive regulatory framework that incorporates heterodox approaches to heritage and therefore is capable of accommodating contemporary sociocultural values.

Design/methodology/approach – The overall approach the authors use is a comparative literature review from the fields of heterodox/orthodox heritage, heterodox/orthodox law, adaptive management, and participatory methods to inform the creation of a dynamic, adaptive regulatory framework.

Findings – Heterodox heritage emphasizes the need for a bottom-up, stakeholder-driven process, where everyday people's values have the opportunity to be considered as being as valid as those of conventional experts. Orthodox law cannot accommodate this pluralistic approach, so heterodox law is required because, like heterodox heritage, it deconstructs power, values participation, and community involvement.

Practical implications – Orthodox heritage conservation practice disempowers most stakeholders and empowers conventional experts; this power differential is maintained by orthodox law.

Originality/value – To date, there have been few, if any, attempts to address critical heritage studies theory in the context of the regulatory environment. This paper appears to be the first such investigation in the literature.

Keywords Adaptive regulatory framework, Administrative law, rules, and regulations, Community values, Critical heritage studies, Participatory democracy, Urban conservation planning

Paper type Conceptual paper

Introduction

In the second decade of the twenty-first century, there is a growing body of evidence that conventional, or orthodox, heritage conservation practice is consistently a top-down process that defers to expert rule, is overly reliant on objective art/historical values, and therefore fails to understand the meanings and values that most stakeholders hold for cultural heritage. Critical heritage studies researchers, who are chiefly responsible for this research, are increasingly calling for a new approach to conservation based on bottom-up methods that democratize heritage and seek a better understanding of the values and meanings that everyday people have for tangible and intangible heritage of all forms. Significant scholarship has addressed the perceived shortcomings of museum and object interpretation and archaeological practice, but few critical heritage studies scholars have looked at architectural and urban conservation practice.

Journal of Cultural Heritage Management and Sustainable Development
Vol. 6 No. 3, 2016
pp. 345-364

2044-1266
DOI 10.1108/JCHMSD-11-2015-0045

This paper represents the first known attempt to integrate an emancipatory critical heritage studies perspective into architectural and urban conservation practice, which is implicit in UNESCO's (2011, Article 24) recommendation that in historic urban environments, "regulatory systems should […] include legislative and regulatory measures aimed at the conservation and management of the tangible and intangible attributes of the urban heritage, including their social, environmental and cultural values." The law is principal to architectural and urban conservation because private property owners must adhere to specific rules and regulations defined by local, state, and federal governments. It is therefore not possible to discuss how architectural and urban conservation practice can change without assuring the centrality of law in all such discussions. Because of critical heritage studies' emphasis on the dynamic quality of meanings associated with the historic environment, our exploration therefore focuses on how to create a dynamic, adaptive regulatory framework that is capable of accommodating the sociocultural and experiential values upon which critical heritage studies theory is based. As (Lixinski, 2015) has found, there is no published literature on this topic, which means that this paper must explore areas with little or no precedent in the field of heritage conservation. This situation therefore dictates that we must adopt a transdisciplinary perspective based on the work of scholars in external fields to inform heritage conservation.

Our primary purpose is to explore the feasibility of this mixture of critical heritage studies theory (which we refer to in this paper as "heterodox heritage") and architectural/urban conservation practice to create a needed epistemological platform that will make it easier for others to explore potential solutions; because of the inchoate nature of the problem, we cannot yet offer concrete solutions. As will be seen in part 2 of this paper, there are fundamental issues that may prove intransigent in such an implementation.

The overall methodology that we used for this study was to determine the bodies of knowledge necessary for a dynamic, adaptive regulatory framework for architectural and urban conservation and then attempt a transdisciplinary synthesis based on theories from these areas. We determined that a review of the literature in critical heritage studies (heterodox) theory, heritage conservation law, adaptive management, and community participation methods would be essential to our endeavor. We also thought it necessary to review orthodox heritage theory to provide context for and serve as an essential foil to heterodox theory. In a similar sense, because orthodox law is problematic in terms of implementing heterodox heritage concepts, we also thought it necessary to explore heterodox concepts in law as well.

Because this study explores the literature of six different fields, it was necessary to split the paper into two separate sections to keep the size manageable. Part 1 (this paper) will address heterodox and orthodox heritage and heterodox and orthodox law. Part 2 will address adaptive management and community participation theory and then perform a synthesis of all these field areas to explore the feasibility of creating a dynamic, adaptive regulatory framework for architectural/urban conservation.

We have chosen to narrow the focus of this exploration to only the US federal and local laws that are used most frequently in historic preservation practice[1]. This choice allows us to explore these tensions in a country which, like the majority of the world, does not benefit from the law-making efforts of bodies like the Council of Europe (2005) and its Faro Convention, and to keep our analysis contained to an article. These US federal laws, and a brief summary of their purpose, are listed in Table I. All states provide enabling legislation to empower local municipalities to create their own historic

Legislative act	Section of statute	Rule	Common term	Purpose
The National Historic Preservation Act of 1966 (and as amended)	Section 106	36 CFR Part 800	"Environmental review"	Federal agencies should take into consideration the effect of an undertaking on historic resources
	Section 101	36 CFR Part 60	"National Register of Historic Places criteria"	Codifies criteria for authenticity and significance of historic properties
	Section 101	36 CFR Part 68	"Secretary of the Interior's Standards"	Codifies acceptable treatment methods for retaining the authenticity of historic properties
Tax Reform Act of 1986	Section 251	Internal Revenue Code Section 47	"Preservation tax credit"	Mandates how the Secretary of the Interior's Standards are to be used in preservation tax credit projects

Table I. Frequently used federal historic preservation laws in the USA

preservation ordinances; the two most prevalent activities that these ordinances regulate are the designation of local historic properties and districts and requirement for design review. The former activity is primarily meant to identify individually listed historic buildings and contributing buildings in districts that are then subject to the design review process. It is beyond the scope of this paper to describe the details of these laws. For a detailed description we refer the reader to *Historic Preservation Law* by Sara Bronin and Peter Byrne (2012).

As is readily evident in Table I, there are two doctrines upon which federal historic preservation laws are based, and which are intimately associated with orthodox practice at the local level as well in the USA: The National Register of Historic Places and the Secretary of the Interior's Standards. The National Register of Historic Places criteria (National Park Service, 1997b) defines how buildings, structures, or districts are historically significant and the physical characteristics they must have in order to have "historical integrity" or historical authenticity. The Secretary of the Interior's Standards for the Treatment of Historic Properties[2] defines how to retain the historical integrity of these properties. Based on a random sample of 50 municipalities around the country, obtained from the National Park Service's Certified Local Government database[3], and performed by the first author, it appears that nearly all local preservation ordinances base their criteria for the designation of local historic buildings and local historic districts on the National Register criteria and their essential criteria for design review on the Standards, even though there is no mandated requirement from the federal government to do so. This result is substantiated by similar claims from Richard Longstreth (2014, p. 13) and De Teel Patterson Tiller (2014, p. 45). The form in which this manifests in a preservation ordinance in one of three ways:

(1) The National Register Criteria and/or the Standards are mentioned by name in the preservation ordinance as the required rule with the directive to refer to these criteria and standards externally.

(2) The National Register criteria and/or the Standards are repeated, verbatim, in the text of the preservation ordinance (Sometimes the source of these criteria and standards are cited, but not always).

(3) The National Register criteria and/or the Standards are partially copied and/or paraphrased in the text of the preservation ordinance, usually without credit as to their source.

It is beyond the scope of this paper to describe all of the laws in which the National Register Criteria and the Secretary of the Interior's Standards are required or the exact nature of these documents, the history of their development, and how they are used, as all of these elements have been covered in great detail elsewhere. For the purposes of this exploration, it is most important to remember their association with orthodox heritage.

Orthodox and heterodox approaches to built heritage

Work that intersects with and affects the historic environment is concerned with two primary activities: the identification of so-called "historic" buildings, places, and landscapes and the treatment of these heritage objects. In simplistic terms, orthodox heritage focuses on the heritage object while heterodox heritage focuses on people and their relationship with heritage. Heterodox heritage theory, because it is based on contemporary sociocultural meanings, demands an adaptive regulatory tool to implement rules that direct the conservation of the historic environment because these meanings are dynamic in every sense of the word. This section will attempt to articulate the similarities and differences in orthodox and heterodox approaches, especially in terms of the critical response of heterodox approaches in critiquing orthodox practices.

Orthodox heritage

Orthodox heritage can be understood through the following characteristics:

(1) its value system is defined through preservation doctrine and the tangible qualities of fabric;

(2) law is used to enforce this preservation doctrine;

(3) heritage is rare and unique;

(4) the identification and treatment of heritage is the domain of experts;

(5) its ontological/epistemological orientation is empiricist-positivist;

(6) historical significance is based on a positivistic view of history;

(7) significance lies in the past, not the present;

(8) reason, rather than evidence, is used to substantiate practice;

(9) historical authenticity is dependent on the tangible presence of fabric that has "experienced" past events and people;

(10) the treatment of built heritage seeks to reveal the "true nature or condition" of a building or place by avoiding a "false sense of history;" and

(11) heritage values are assumed to be immutable and are fixed through the use of lists.

Broadly speaking, preservation doctrine, as used in the context of orthodox heritage and this paper, is the prescribed delimitation of the acceptable and unacceptable activities of practitioners; examples include the Venice Charter (ICOMOS, 1964) and the Secretary of the Interior's Standards for the Treatment of Historic Properties (Morton and Hume (1977) and as amended). It is outside the scope of this paper to complete a full historical review of preservation/conservation doctrine; we therefore refer the reader to Jokilehto (1999), Price *et al.* (1996), and Wells (2007) for additional details. Preservation doctrine emphasizes a "fabric-based" (Mason, 2003) approach to conservation in which the tangible qualities of materials are conserved rather than the meanings associated with these objects; Muñoz Viñas (2005) describes the affinity of experts for building and landscape fabric as a "material fetish," Although historic preservation is not unique among other disciplines in prescribing the proper activities of its professionals through doctrine, what is novel is that the preservation field is alone in mandating the use of this doctrine to officially ascribe a legally enforceable value to a place, which is embedded in federal, state, and local statutes and ordinances along with administrative law.

In terms of the regulatory environment, the authors acknowledge that the courts have established that the conservation of the historic environment is in the public interest and determined that the collective values that people attach to the historic environment are a valid justification for preservation laws (e.g. *Penn Central Transportation Co. et al. v. New York City Co. et al.*, 1978). It is important to note, however, that the courts have not clearly established the scope, definition, or character of these sociocultural values or how they could be applied in a regulatory framework; in addition, an assessment or understanding of contemporary sociocultural values have never been required by the courts in the historic preservation laws under consideration in this paper.

Within this regulatory framework, arguments for historical significance are made by experts and bolstered by claims that a particular heritage object is rare or unique and are common in National Register nominations as well as similar nominations from around the world, including World Heritage (see criteria iii and iv in the 2015 Operational Guidelines to the World Heritage Convention, which are criteria for declaring Outstanding Universal Value). In the USA, the idea that heritage is the domain of experts began to take final form in the mid-1960s, concurrent with the passage of the National Historic Preservation Act (1966), which required a massive effort to survey the entire country for historic properties that was facilitated by the regulatory requirement to create a new class of historic preservation professionals to perform this work (Tomlan, 1994, p. 190).

The orthodox heritage values of these professionals, which Laurajane Smith (2006, p. 29) describes as the "Authorized Heritage Discourse" (AHD), demands that "the proper care of heritage, and its associated values, lies with the experts, as it is only they who have the abilities, knowledge, and understanding to identify the innate value and knowledge contained at and within historically important sites and places." Smith describes how preservation doctrine provides the basis of a "self-referential authority of conservation and management philosophy of practice" (p. 94) used by heritage experts to "sideline" the "values and meanings that are situated outside the dominant [expert-driven] discourse" (p. 106). The presence of the AHD is substantiated through empirical research by John Schofield (2009, 2014), Waterton and Smith (2010), Sharon Milholland (2010), Lisanne Gibson (2009), Peter Howard (2009), Laurajane Smith (2009), Waterton *et al.* (2006), and James Gard'ner (2004); the key takeaway from these studies is that experts control the official meanings of heritage and in the process, discount local or community values.

Since the passage of the National Preservation Act in 1966, the perceived need for the heritage expert to determine historical significance and sanction appropriate interventions has been codified into federal, state, and local laws, such as the Section 106 process and hundreds of local preservation ordinances. While government staff tout public involvement in these laws, in reality, because of their reliance on expert rule, the meanings and values of the public are consistently marginalized (King, 2009). At the local level, while volunteers in preservation commissions have quasi-judicial authority, their decisions are highly mediated by the professional preservation planners that support these commissions. For instance, a typical operating procedure across the country is for city staff to recommend how members of a commission should vote to either approve or deny a specific design review application. The volunteer members of a commission also rely on staff to assess the official historical significance of properties and to train the commission members in their roles (for more specific examples, refer to the National Alliance of Preservation Commissions training materials such as Reap and Melvin, 2007; Whipple, 2001; Stipe, 1994).

Tainter and Lucas (1983) describe the ontological and epistemological orientation of experts' orthodox approaches to heritage as resting on an empiricist-positivist paradigm, which assumes that experience is objective and remains consistent from one person to another, and all meaning is self-evident and therefore does not change over time. This paradigm is also explicit in assuming that significance is "present in a cultural property, rather than in the mind of the observer" (p. 712). What this means in practical terms is that the orthodox identification and treatment of built heritage is based on only those characteristics that can be directly perceived with or described through the senses, with the visual sense being the most important. Evidence for this empiricist-positivist paradigm can be found in how "historical integrity" (i.e. historical authenticity) is assessed for National Register of Historic Places properties (National Park Service, 1997a, p. 45) and the ubiquity of historical positivism to create narratives based on the systematic gathering of art/historical "facts" in order to create an argument for significance (Green, 1998).

Orthodox heritage practice is based on rational assumptions rather than on empirical evidence, especially in terms of how everyday people perceive and value heritage (Avrami *et al.*, 2000). An example, widely used in US preservation law, is the "50-year" rule that separates what is significant (longer than 50 years ago) from that which is not (younger than 50 years ago). The origins of this rule are actually political and not based on any kind of evidence about how people perceive heritage vs non-heritage (Sprinkle, 2007). Another example found in doctrines, such as the Venice Charter or the Secretary of the Interior's Standards, directs that "old" fabric must be differentiated from "new" fabric, which assumes that everyday people are unable to tell "real" historic architecture from "fake" architecture. This claim does not appear to be supported by empirical evidence, however (Levi, 2005).

Thus, orthodox heritage is increasingly interpreted as a belief system of experts rather than a scientifically grounded enterprise (Waterton *et al.*, 2006; Wells, 2007). Orthodox approaches assume only fabric that experienced past events or people is "real" or "genuine" (Muñoz Viñas, 2005); or, as the National Park Service directs, "[f]or a property to be significant […] the physical structure must have been there to "witness" the event or series of events" (O'Donnell, 1998, p. 2). This "material fetish" assumes that even if it were possible to duplicate an historic object, down to the subatomic level, and perfectly reproduce every imperfection, the "copy" will still not be construed to be real or authentic. The difference between the original and the copy is not based on any tangible, physical reality, but rather is entirely intangible. In other words, the way in which orthodox theory increases the value of an object once it has been in context with people or events from the past is not rational or scientific; there is nothing tangible in the way objects experience history unless there is a physical imprint left in the fabric from an event. If I hold a book in my hand owned (and touched) by Thomas Jefferson, it immediately has more value than the same book owned by someone less prominent. Yet, objectively, they are the same book. Once authentic heritage objects that have borne witness to the past have been identified, orthodox approaches seek a treatment method to conserve this authenticity. Muñoz Viñas (2005, p. 91) describes this process as a "truth-enforcement" operation that seeks "to reveal and preserve an object's true nature or true condition." The way that this concept is presented in preservation doctrine is to not "lie," which typically manifests as avoiding a "false sense of history" through the use of "conjectural features or features from other buildings" (Weeks and Jandl, 1996, p. 19). This phrase originated in the Secretary of the Interior's Standards, a set of treatment guidelines based on the Venice Charter (Morton, 1995; Stipe, 1990, p. 411) and created to administer federal historic preservation tax credit projects, but which has been subsequently adopted by most state and local governments across the country. "Avoiding a false sense of history" is a common directive in the design guidelines used by historic preservation commissions in the USA and is also found in the statutes of hundreds of preservation ordinances[4]. A false history, however, implies a false or unreal object, or an object that does not exist; avoiding a "false sense of history" is really another way of stating that the heritage object needs to be in a "preferred state" defined by orthodox values, but this state has no bearing on how "real" the object is (Muñoz Viñas, 2005, p. 93). Falsehood, therefore, "is in the eye of the beholder" (Muñoz Viñas, 2005, p. 99) and is not an objective criterion for authenticity.

Whether we believe that a certain version of history is "true" or "false," the values associated with orthodox heritage are assumed to be immutable and fixed primarily because of the need to "list" buildings and places (Wells, 2007). Processes that officially recognize built heritage, and which are often embedded in laws, such as the National Register of Historic Places (USA), National Heritage List (UK), or the Commonwealth Heritage List (Australia), permanently fix values associated with their historical significance because of the nature of these lists or registers. Once a building is listed, there is no incentive to update its nomination to account for changing cultural or historic values. For example, Somerset Place State Historic Site in Creswell, North Carolina, was listed on the National Register in 1970 based on its architectural significance. The fact that it was a plantation house with a history of slavery barely noted a mention at the time. Today, the primary significance of the site is widely acknowledged to derive from its association with slavery. The National Register nomination remains unchanged, however.

Heterodox heritage

Heterodox heritage can be understood through the following characteristics:

(1) its value system is based on the contemporary social, cultural, and personal beliefs, perceptions, and feelings of a wide range of stakeholders;

(2) experts use social science research methods to understand these values or empower communities as co-researchers through participatory methods; in this latter mode, the expert becomes an expert "facilitator" to equalize power differentials;

(3) heritage can be found everywhere;

(4) everyone is a heritage expert;

(5) heritage bridges natural and cultural divides;

(6) its ontological/epistemological orientation (i.e. its perspective of the nature of reality and its body of knowledge) is informed by post-colonial, post-structuralist, and post-modern theory;

(7) significance is multidimensional and consists of cultural practices, person-place relationships, and emotional bonds with place;

(8) significance lies in the present, not the past; in other words, significance is defined by what people think is important about the characteristics of a heritage object at this very moment, independently of historical facts;

(9) it has had little effect on the actual practice of historic preservation, but emphasizes that evidence should be used to substantiate changes to practice;

(10) authenticity is pluralistic, not controlled by any one entity, and defined by social, cultural, or personal values and may have no direct relationship to physical fabric; ideas can be "authentic;" and

(11) heritage values are not fixed, and are best understood as processes that are in constant flux.

As opposed to orthodox heritage's empiricist-positivist paradigm, heterodox heritage uses the perspectives of post-colonialism, post-structuralism, and post-modernity; its theoretical origins can be traced to the mid-1980s and the publication of David Lowenthal's (1985) influential book, *The Past is a Foreign Country* (Carman and Sørensen, 2009), which challenged the notion that it is possible to fully know or recreate the past. Lowenthal's main argument is that preservation has a closer relationship to fantasy, consumerism, and nostalgia than it does to an objective account of history. This early exploration of the subjective quality of heritage has matured into an interest in how the historic environment influences cultural practices (Mehrotra, 2007), person-place relationships (Swensen and Saeter, 2011), and place attachment (Wells and Baldwin, 2012). Heterodox approaches therefore assume that all heritage is, in essence, intangible because it is constructed from cultural and individual meanings, thereby rendering the separation between "tangible" and "intangible" heritage artificial (Smith, 2006).

A major emphasis of heterodox heritage is exploring the identification and treatment of heritage from the perspective of most stakeholders rather than the orthodox, doctrine-driven approach of experts. The goal is to "[break] down the bureaucratic divide between laypersons and experts, suggesting new models for heritage-decision-making processes in the future" (Harrison, 2013a, p. 5). Although sometimes misconstrued as an effort to replace expert values with laypersons' values, there is a desire to consider a wide range of values on their own merits, regardless of origin, on a case-by-case basis (Gibson and Pendlebury, 2009, p. 1); thus, everyone is, in essence, a "heritage expert" (Schofield, 2014, pp. 7-8). Heterodox heritage is especially interested in how communities define, value, and use historic places through social science research methodologies (ethnographies are particularly well-represented) with a focus on the "surface" quality of personal experience and the everyday objects and environments of people as opposed to the rare, unique, or monumental (Schofield, 2009, p. 112).

Heterodox heritage is concerned with conserving the meanings associated with heritage (Zancheti and Loretto, 2012). Understanding these meanings is critical to the process of how most stakeholders value the historic environment (Cane, 2009; Filippucci, 2009; Low, 1994; Schofield, 2014). While a sociological or anthropological (group) perspective dominates heterodox literature, there is a growing interest in the role of individual or experiential values in understanding these values, such as how and why authentically "old" places elicit different emotional responses than "new" places and how these experiences attach people to place (Bagnall, 2003; DeLyser, 1999; Stefanovic, 1998; Wells and Baldwin, 2012). Heterodox heritage is therefore "centered on people and sense of place" (Morgan *et al.*, 2010, p. 114) and is less concerned with the tangible, objective qualities of fabric.

Heterodox approaches do not require an understanding of the objective qualities of fabric to identify authentic heritage objects; instead, the ideas and experience of people define authenticity (Wells, 2010); or, in another sense, if people believe or feel an object is authentic, then it is, regardless of its tangible qualities. This post-modern concept of authenticity has become increasingly recognized in international doctrine since the late twentieth century (Petzet, 2004) starting with the Nara Document on Authenticity (ICOMOS, 1994). The idea of authenticity no longer defined by "facts," but rather the "sincerity" of lived reality (Harrison, 2013b, p. 278), is therefore antithetical to orthodox approaches because it challenges traditional concepts of univocal authenticity.

Instead of assuming that significance resides in the past and creating a "natural" and "cultural" dichotomy as with orthodox approaches, heterodox approaches focus on the present and future "relationship[s] between people, objects, places and practices [without] distinguish[ing] between or prioritiz[ing] what is 'natural' and what is 'cultural' " (Harrison, 2013a, p. 4) . Alan Dyer (2007) describes the separation of heritage into "natural" and "cultural" categories as a "false dichotomy" because the imprint of humans is all over the planet, even in seemingly untouched natural landscapes: "the two forms of heritage are but two sides of the same coin, and a reflection of the two diversities" (p. 99).

Because it acknowledges the impossibility of fixing dynamic cultural values in lists, heterodox heritage is critical of historic "registers," or lists of historic buildings and places (King, 2009) because they "'fossilize' the site" (Ross, 2010, p. 120), To list values associated with cultural landscapes, which are inherently dynamic, is especially problematic (Francaviglia, 2000, p. 68; Alanen and Melnick, 2000; Cane, 2009, p. 164). Zancheti and Loretto's (2012) concept of "dynamic integrity" in which "maintaining continuity of cultural meanings in time" replaces traditional notions of maintaining fabric presents another challenge to fixing meanings in lists.

To date, heterodox heritage has made little inroads toward impacting the practice of historic preservation or built heritage conservation. For the most part, orthodox heritage approaches remain the domain of heritage practitioners while heterodox heritage is espoused by academics, mostly from the field of critical heritage studies. A critique of heterodox heritage is that while it excels at examining the problems in the identification and treatment of built heritage, it has done little in terms of influencing change in these areas and may well "become a marginal endeavour, by (further) alienating those working in the heritage sector outside academia" (Winter, 2013, p. 533). To date, there have been few attempts to bridge the orthodox and heterodox divide with practitioners seemingly little aware of these academic efforts.

Other critiques on heterodox approaches to heritage focus on problems of cultural relativism, the degrading of authority, and the resulting increased commercial exploitation of heritage (Glendinning, 2013, pp. 417-418). This is especially true when non-Western values privilege "spirit more than materials" (Silva and Chapagain, 2013, p. 45). Orthodox systems established a clear line of authority to identify and protect heritage, with relatively simplistic systems based on what can be seen, which is then enforced by law. In the absence of these control mechanisms, there is a concern that historic buildings, places, and landscapes will be lost in a radically pluralistic environment where no set of values seem to be more important than another, which means that there is "no simple, technical, objective way to make decisions" (Mason and Avrami, 2002, p. 25). The logical conclusion is that rather than helping to conserve heritage, heterodox approaches and their *laissez faire* attitudes present a clear and present threat to the historic environment. The challenge to the heterodox approach is to incorporate the law more directly in their accounts of the historic environment, as a means to harness some of that pluralist energy. But that requires understanding what different legal accounts of heritage law can (and cannot) do. We move to this discussion next.

Orthodox and heterodox approaches to heritage law

Orthodox law

Orthodox heritage law can be understood through the following characteristics:

1. the main purpose of the law is to preserve historical fabric, as defined by heritage experts;
2. law considers heritage to be outside the stream of commerce;
3. law is articulated in the language of subjective rights and disputes between opposable sides, which cannot capture collective goods properly;
4. law defers to experts to the detriment of people who live in and around heritage;
5. experts are needed by the law to interpret statutory definitions of heritage;
6. heritage needs to be specifically defined so it can be protected;
7. heritage protection is done primarily through lists; and
8. heritage protection is the domain of administrative law.

Traditionally, the relations between heritage and the law have been stabilized by a sense of separateness. Arguments about historical or archaeological value, which are so important in heritage, are deemed secondary in the law, because they do not fit the law's structure. Even cases dealing directly with heritage buildings, such as *Penn Central Transportation Co. v. New York City* (1978) (about Grand Central Station in New York City, and whether its adaptive use would have compromised the integrity of the building and its heritage value) often deal with heritage buildings taking into account its aesthetic value over its historical value. Orthodox approaches to the law frame the law around disputes, and disputes in the language of subjective rights ("I (we) have the right to perform in a specific way/to own that object/to have my (our) interests recognized by others"), which does not easily accommodate interests such as heritage, which do not properly belong to one identifiable individual or group of individuals.

Law's contemporary orthodox understanding of heritage, akin to its understanding of other "common goods" (such as the environment) is that it belongs to society as a faceless, abstract concept. This is an important shift in this area, though. Historically, cultural heritage has been thought of as cultural "property," bringing with it the whole range of subjective rights (the "bundle of rights") that is typical of understandings of property. But ideas like intergenerational equity required that the law thought of heritage beyond the interests of identifiable owners or possessors, hence the switch from "property" to "heritage" (Francioni, 2007, 2008; Blake, 2000; Bendix, 2011; Prott and O'Keefe, 1992).

One of the consequences of the contemporary understanding, which places heritage outside the reach of a legal order based on subjective rights, is for orthodox law to put heritage in a sort of bubble protected from those (individual) subjective rights and claims associated with them. Thus, heritage is usually thought of as *res extra commercium* (a thing outside the stream of commerce), which is a means of protecting it from the commodifying effects of the law that come from translation of legal interests into subjective rights.

Orthodox heritage law, therefore, isolates heritage and considerations associated with it from the gravitational pull of subjective rights and its commodifying effects. But, in order to be able to accomplish this isolation, the law ends up being deferential to considerations external to itself, validating and protecting orthodox approaches to heritage in this process. And these approaches are usually heavily reliant on expert rule, which has problematic implications in the legal sphere (Lixinski, 2013). More specifically, the law avoids articulating heritage claims (because the language of subjective rights is inadequate) and the void is filled by experts whom the law protects and whose interests and subjective rights end up replacing in effect those that the law refuses to articulate. The subjective rights paradigm is not fully suspended, then, in heritage law, but rather the subjective interests of experts end up being those assessed by the law. One of the key negative consequences is that ("regular") people are alienated from the decision-making processes around the heritage they are surrounded by, and with which they interact on a regular basis.

Take for instance the process of nominating a heritage site for the World Heritage List. As drafted, the 1972 World Heritage Convention requires that states put forth a property for inclusion on the list, a nomination which will be assessed by expert bodies. Nowhere in this central international process of heritage protection are communities really required to participate, and states and experts end up having the prerogative to decide what heritage is worth protecting, and in what terms it should be protected. Despite the many iterations of the operational directives of the convention, which have kept the instrument updated and introduced major changes such as the category of cultural landscapes, experts are still a very central figure in the implementing process (Francioni, 2008). Similar examples exist in federal, state, and local preservation laws in the USA that, while providing a role in some instances for citizen volunteers (such as with local preservation commissions), experts still control the process and these volunteers are often deferential to the experts from whom they receive directions on how to decide a particular design review case[5]. This is partly because, in order to change the rules (for instance, to make experts' roles less central), experts will need to consent to the change.

After a legal regime is put into place, therefore, the role of the orthodox lawyer is simply to ensure its functioning in its own terms, making the law act as the humble servant or deferential enforcer of heritage law (Lixinski, 2015). This orthodox approach, however, still leaves some room for the system to rely on contemporary (and sometimes even heterodox) approaches to heritage, even if those will still be informed by expert considerations:

> From a legal perspective, the opinions of experts may be essential not only in gauging an object's authenticity in a world which is awash with forgeries, but also in identifying objects for the purpose of criminal prosecution or civil action for recovery. […] The courts may well depend upon experts when called upon to interpret the wording of any statutory definition of cultural property. The legislature may have tried and failed or simply have neglected to consider a proper definition which captures the intrinsic values contained within certain types of cultural property. Indeed, cultural objects are so diverse, and their intrinsic values are so difficult to identify at times, that the opinion of experts may be needed in relation to the application of any statutory provision which specially affects them. […] Although the use of experts may make legislative schemes costly and unwieldy to administer, if an attempt is made to avoid this problem by simply ignoring cultural characteristics altogether, not only would it be ethically dubious, but it may bring different problems in its wake (footnotes omitted) (Ulph and Smith, 2012, pp. 17-18).

These spaces for more interaction between heritage considerations and the law, while a positive improvement from the law simply acting as a humble servant of heritage approaches, still rely on experts to tell the law what heritage is, why it should be protected, for whose benefit, and in what terms. That seems out of line with (heterodox) understandings of heritage as belonging to a community (however) of "regular" people, not a class of experts. Heterodox approaches to heritage question a lot of these assumptions (Harrison, 2013a), but in the process the law is also resisted as part of the set of institutional practices that misplace power with respect to heritage.

Heterodox law[6]

Heterodox heritage law can be understood through the following characteristics:

(1) law is first and foremost a language of power;

(2) the law is part of a system that creates and perpetuates unequal power relationships, but it can also be used to challenge those relations;

(3) understandings of law and power are plural;

(4) social science methods can be used to better understand and channel power, even if law is still suspicious of replacing one type of expert (the lawyer) with another (the social scientist), and uses social science methods to move the expert to a facilitator role;

(5) disputes between opposing parties are not the only domain of the law;

(6) heritage law's role is to serve plural understandings of heritage and articulate the claims of all heritage stakeholders;

(7) administrative law is an insufficient category through which to deal with heritage and its stakeholders;

(8) the law still requires fairly specific definitions of what heritage is, but can allow for the reassessment of the values associated with heritage, and broader understandings of power turn these commodifying moments into opportunities for stakeholders other than experts; and

(9) values other than "justice" may guide the development of the legal system.

Heterodox approaches to law, despite heritage studies' resistance to the law in general, have much to offer heritage. For one, they are much more open to the input of other disciplines, as opposed to orthodox law's tendency to operate in silos. Additionally, heterodox law is also much more aware of law's relationship with power, and works on means to use legal argument to challenge power relations. Our understanding of the potentials and pitfalls of heterodox law relies on critical legal studies, particularly as articulated in Duncan Kennedy's (2006) work. More specifically, it relies on the critic of orthodox law as being primarily formalistic and, as a result, being unable to question basic assumptions about the distribution of power in society that premise the legal system. Heterodox law, rather than relying on those assumptions, deconstructs them, by exposing the inequalities that are perpetuated or created in the application of law. Similarly, here we argue that law should not embrace assumptions made in the past about how heritage law protects heritage, or at least not do so blindly.

This challenge to power relations by heterodox law can happen for instance by bringing new actors and new understandings of the law and its possibilities to bear on the way the law is administered and reformed, or what is routinely referred to as legal pluralism (Berman, 2009; Teubner, 1992; Krisch, 2010; Kennedy, 2007, p. 646). Plural voices in the legal system broaden the number of stakeholders whose voices can be heard, and it can also play an important role in enhancing agency for heritage holders.

We are mindful that there are limits to what we can do *vis-à-vis* heterodox law, at least if we wish to still keep the basic structures of the legal system, or what Ben Golder (2014) has referred to in a different context as "muscular pragmatism". More specifically, while we are critical of the legal system and propose heterodox perspectives *vis-à-vis* heritage law, most of our suggestions below and in part 2 still work within the confines of the existing legal system, and propose reform instead of radical transformation.

Suchman and Mertz (2010) have looked at some of the possibilities of heterodox approaches to the law (or what they call "new legal empiricism") in a review article in which they identify in the social sciences a similar disconnect to what we observe with respect to heritage law: the lack of awareness of the new possibilities of heterodox law as a means to advance normative agendas of other disciplines, as opposed to a field that operates in isolation. Much of this new legal empiricism can be traced back to US legal realism in the 1930s, which was for the most part an early critique of the idea of law as a (formalist) application of rules to facts, without consideration of external factors. What Suchman and Mertz call "New Legal Realism," in particular, seems apt for our present purposes, as it actively seeks to promote translation between law and the social sciences, and to influence practice based on insights from theory.

According to Berman (2009), one of the most significant contributions of pluralism scholars in the 1970s and 1980s was precisely to expand the boundaries of the "legal," by allowing nonofficial normative orders to be considered as law as well. In the heritage context, there are two distinct but interrelated implications: one is that expert rule in heritage is understood as being part of normative ordering, and not only an external phenomenon that the law is only tangentially concerned with; and the second implication is that communities from where heritage stems are also (or should be) actors in the normative ordering of heritage, and, if they are not involved in these processes, the effect will be the diminished entrenchment of the official legal rules. For heritage, it means people on the ground will be less invested in the continuity of heritage, thus compromising its survival.

Among these plural and interdisciplinary approaches to the law, one that seems particularly suited for discussion in our present context is the import of psychology (and, more specifically, positive psychology) to the law. Positive psychology seems to challenge the law in particular by moving the yardstick against which law's effectiveness is measured away from the notion of justice (grounded on subjective rights, which, as we discussed above, are not particularly well suited to the heritage context) toward law's capacity to promote happiness (Bagaric and McConvill, 2005; Kasser, 2005).

Positive psychology's intervention in the field of psychology meant a move away from a focus only on disease toward one on positive attributes, capacities and aspirations (Seligman and Csikszentmihalyi, 2000). This intervention translates to the legal field by moving the law away from a focus on conflict and disputes ("disease") toward a focus on what the law can positively promote in society.

In terms of application of positive psychology to the law, Bagaric and McConvill (2005) suggest that "laws should only be passed if there is evidence to support the view that they are likely to promote happiness" (p. 22). They put special emphasis on liberty as a key value of happiness, and argue, for instance, that "planning laws restricting what one can do with his or her property […] should be relaxed" (p. 23). The relationship between law and happiness is relatively under-studied in legal circles, outside studies about happiness among members of the legal profession (but see Posner and Sunstein, 2010). This idea clearly extends to (parts of) heritage law, which is often treated as a branch of urban planning law. How, then, can positive psychology insights be reconciled with heritage law? The first step is to consider whether there are objectives other than liberty that should also be considered, and whether those values can outweigh liberty in some instances. Those objectives include participation, community involvement (a sense of "belonging" to a wider social group), all of which can be facilitated by heritage practices. These practices are what Kasser (2005) calls "intrinsic" pursuits, and are more conducive to personal well-being in the long term.

More generally, though, a focus on liberty as the key value to be promoted leads necessarily to a rather utilitarian view of the legal system, which is not necessarily aligned with positive psychology, and one that, when taken too seriously in the law, can lead to problematic results that rights-based normative theories were developed to counter. Which is why Bagaric and McConvill (2005) themselves concede that a supervisory role remains for morality.

Concluding remarks

Part 1 of this paper summarized heterodox heritage vs orthodox heritage and heterodox law vs orthodox law in an attempt to present the basic problem that a dynamic, adaptive regulatory framework is addressing in architectural/urban conservation practice and to present a possible tool (heterodox law) for implementing such a framework.

Heterodox heritage is a reaction to orthodox heritage, or more specifically orthodox heritage conservation practice. It seeks to address the perceived wrongs in this practice by advocating for a bottom-up, stakeholder/community-driven approach in which the values of everyday people, who represent most stakeholders of the historic environment, are as important, or sometimes more so, than the values of conventional experts. Orthodox heritage conservation practice on the other hand, is defined by expert rule and top-down processes that privilege objective art/historical values and sidelines the values of most people. Thus, a dynamic, adaptive regulatory framework must engage most stakeholders as equals with conventional experts in a way that can effectively collect and act upon these meanings and values.

The contemporary sociocultural and experiential values that most people hold for built heritage and cultural landscapes do not fit the structure of orthodox law, because of the reliance on expert rule. Orthodox law therefore protects the expert's view of heritage while deprecating or ignoring the perspective of other stakeholders. Heterodox law, like heterodox heritage, deconstructs power, values participation and community involvement, and opens a space where the benefits of heritage to society can be framed in terms of the improvement of people's well-being rather than through the much narrower lens of justice.

The second part of this paper (part 2) will explore adaptive management theory and community participatory methods to help construct a theoretical model for how a dynamic, adaptive regulatory framework might work and if it is feasible within time and resource constraints.

Notes

1. Because the laws, rules, and regulations in this paper are based in the USA, we will occasionally use US-centric terminology. For this reason, the reader should be aware that "historic preservation" is essentially a synonym for "heritage conservation" and more specifically, "architectural conservation" or "urban conservation."
2. See: www.nps.gov/tps/standards.htm
3. The US National Park Service "certifies" local governments if they have an historic preservation commission, preservation ordinance, and an historic property inventory and involve the public in planning processes. The Certified Local Government (CLG) database was used because a municipality must have an historic preservation ordinance in order to be a CLG. As of July 2016, there are 1,949 CLGs. See: http://grantsdev.cr.nps.gov/CLG_Review/search.cfm
4. The prevalence of the phrase "false sense of history" in design guidelines and preservation ordinances can be verified by performing Google searches on " 'design guidelines' 'false sense of history' " and "ordinance preservation 'false sense of history' ".
5. Standard operating procedure for local preservation commissions, as advocated by the National Alliance for Preservation Commissions (the body that represents all historic preservation commissions in the USA), is for city staff (the "experts") to prepare a "staff report" for use by the commission, complete with a recommended finding of fact for the citizen volunteers to read aloud in a public commission meeting, raising questions in terms of how much staff has control and influence over the commissions' decisions.
6. We are much indebted to Darragh O'Keeffe for the discussions on positive psychology that helped shape part of this section.

References

Alanen, A.R. and Melnick, R.Z. (2000), "Why cultural landscape preservation?", in Melnick, R. (Ed.), *Preserving Cultural Landscapes in America*, Johns Hopkins University, Baltimore, MD, pp. 1-21.

Avrami, E., Mason, R. and de Torre, M.L. (2000), *Values and Heritage Conservation*, Getty Conservation Institute, Los Angeles, CA.

Bagaric, M. and McConvill, J.A. (2005), "Goodbye justice, hello happiness: welcoming positive psychology to the law", *Deakin Law Review*, Vol. 10 No. 1, pp. 1-26.

Bagnall, G. (2003), "Performance and performativity at heritage sites", *Museum and Society*, Vol. 1 No. 2, pp. 87-103.

Bendix, R. (2011), “Héritage et patrimoine: de leurs proximités sémantiques et de leurs implications”, in Bortolotto, C. (Ed.), *Le patrimoine culturel immatériel*, Éditions de la Maison des sciences de l’homme, Paris, pp. 99-121.

Berman, P.S. (2009), “The new legal pluralism”, *Annual Review of Law and Social Science*, Vol. 5, pp. 225-242.

Blake, J. (2000), “On defining the cultural heritage”, *International & Comparative Law Quarterly*, Vol. 49, pp. 61-85.

Bronin, S.C. and Byrne, J.P. (2012), *Historic Preservation Law*, Foundation Press Thomson/West, New York, NY.

Cane, S. (2009), “Why do we conserve? Developing understanding of conservation as a cultural construct”, in Richmond, A. and Bracker, A. (Eds), *Conservation: Principles, Dilemmas and Uncomfortable Truths*, Butterworth-Heinemann, Amsterdam and Boston, MA, pp. 163-176.

Carman, J. and Sørensen, M.L.S. (2009), “Heritage studies: an outline”, *Heritage Studies: Methods and Approaches*, Routledge, New York, NY, pp. 11-28.

Council of Europe (2005), *The Framework Convention on the Value of Cultural Heritage for Society (Faro Convention)*, Council of Europe, Paris, available at: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/199 (accessed November 7, 2016).

DeLyser, D. (1999), “Authenticity on the ground: engaging the past in a California ghost town”, *Annals of the Association of American Geographers*, Vol. 89 No. 4, pp. 602-632.

Dyer, A. (2007), “Inspiration, enchantment and a sense of wonder … can a new paradigm in education bring nature and culture together again?”, in Howard, P. and Papagiannēs, T. (Eds), *Natural Heritage: At the Interface of Nature and Culture*, Routledge, London, pp. 86-97.

Filippucci, P. (2009), “Heritage and methodology: a view from social anthropology”, in Sørensen, M.L.S. and Carman, J. (Eds), *Heritage Studies: Methods and Approaches*, Routledge, New York, NY, pp. 319-325.

Francaviglia, R. (2000), “Selling heritage landscapes”, in Alanen, A.R. and Melnick, R. (Eds), *Preserving Cultural Landscapes in America*, Johns Hopkins University Press, Baltimore, MD, pp. 44-69.

Francioni, F. (2007), “A dynamic evolution of concept and scope: from cultural property to cultural heritage”, in Yusuf, A.A. (Ed.), *Standard-Setting in UNESCO: Volume 1: Normative Action in Education, Science and Culture*, UNESCO, Paris, pp. 221-236.

Francioni, F. (2008), “Cultural property-international law”, in Wolfrum, R. (Ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, p. 16.

Gard’ner, J.M. (2004), “Heritage protection and social inclusion: a case study from the Bangladeshi community of East London”, *~~International Journal of Heritage Studies~~*, Vol. 10 No. 1, pp. 75-92.

Gibson, L. (2009), “Cultural landscapes and identity”, in Gibson, L. and Pendlebury, J. (Eds), *Valuing Historic Environments*, Ashgate Publishing, Surrey and Burlington, VT, pp. 67-92.

Gibson, L. and Pendlebury, J. (2009), “Introduction: valuing historic environments”, in Gibson, L. and Pendlebury, J. (Eds), *Valuing Historic Environments*, Ashgate Publishing, Surrey and Burlington, VT, pp. 1-16.

Glendinning, M. (2013), *The Conservation Movement: A History of Architectural Preservation: Antiquity to Modernity*, Routledge, London.

Golder, B. (2014), “Beyond redemption? Problematizing the critique of human rights in contemporary international legal thought”, *London Review of International Law*, Vol. 2 No. 1, pp. 77-114.

Green, H.L. (1998), “The social construction of historical significance”, in Tomlan, M.A. (Ed.), *Preservation of What, for Whom? A Critical Look at Historical Significance*, National Council for Preservation Education, Ithaca, NY, pp. 85-94.

Harrison, R. (2013a), *Heritage: Critical Approaches*, Routledge, New York, NY.

Harrison, R. (2013b), "Heritage", in Graves-Brown, P. and Angela, P. (Eds), *The Oxford Handbook of the Archaeology of the Contemporary World*, Oxford University Press, Oxford, pp. 273-288.

Howard, P. (2009), "Historic landscapes and the recent past: whose history?", in Gibson, L. and Pendlebury, J. (Eds), *Valuing Historic Environments*, Ashgate Publishing, Surrey and Burlington, VT, pp. 51-63.

ICOMOS (1964), *The Venice Charter*, ICOMOS, Paris, available at: www.icomos.org/charters/venice_e.pdf (accessed November 7, 2016)

ICOMOS (1994), *Nara Document on Authenticity*, ICOMOS, Paris, available at: www.international.icomos.org/charters/nara_e.htm (accessed November 7, 2016).

Jokilehto, J. (1999), *A History of Architectural Conservation*, Butterworth Heinemann, Oxford.

Kasser, T. (2005), "Personal aspirations, the 'good life', and the law", *Deakin Law Review*, Vol. 10 No. 1, pp. 33-47.

Kennedy, D. (2006), *The Rise and Fall of Classical Legal Thought*, Beard Books, Washington, DC.

Kennedy, D. (2007), "One, two, three, many legal orders: legal pluralism and the cosmopolitan dream", *NYU Review of Law and Social Change*, Vol. 31 No. 3, pp. 641-659.

King, T.F. (2009), *Our Unprotected Heritage: Whitewashing the Destruction of our Cultural and Natural Resources*, Left Coast Press, Walnut Creek, CA.

Krisch, N. (2010), *Beyond Constitutionalism: The Pluralist Structure of International Law*, Oxford University Press, Oxford.

Levi, D.J. (2005), "Does history matter? Perceptions and attitudes toward fake historic architecture and historic preservation", *Journal of Architectural and Planning Research*, Vol. 22 No. 2, pp. 149-159.

Lixinski, L. (2013), "International cultural heritage regimes, international law and the politics of expertise", *International Journal of Cultural Property*, Vol. 21 No. 1, pp. 407-429.

Lixinski, L. (2015), "Between orthodoxy and heterodoxy: the troubled relationships between heritage studies and heritage law", *International Journal of Heritage Studies*, Vol. 21 No. 3, pp. 203-214.

Longstreth, R. (2014), "The dilemma of adding", in Longstreth, R. (Ed.), *Frank Lloyd Wright: Preservation, Design, and Adding to Iconic Buildings*, University of Virginia Press, Charlottesville, VA, pp. 13-39.

Low, S.M. (1994), "Cultural conservation of place", in Hufford, M. (Ed.), *Conserving Culture: A New Discourse on Heritage*, University of Illinois Press, Urbana, IL, pp. 66-77.

Lowenthal, D. (1985), *The Past is a Foreign Country*, Cambridge University Press, Cambridge.

Mason, R. (2003), "Fixing historic preservation: a constructive critique of 'significance'", *Places*, Vol. 16 No. 1, pp. 64-71.

Mason, R. and Avrami, E. (2002), "Heritage values and challenges of conservation planning", in Teutonico, J.M. and Palumbo, G. (Eds), *Management Planning for Archaeological Sites*, Getty Conservation Institute, Los Angeles, CA, pp. 13-26.

Mehrotra, R. (2007), "Conservation and change: questions for conservation education in urban India", *Built Environment*, Vol. 33 No. 3, pp. 342-356.

Milholland, S. (2010), "In the eyes of the beholder: understanding and resolving incompatible ideologies and languages in US environmental and cultural laws in relationship to Navajo sacred lands", *American Indian Culture and Research Journal*, Vol. 34 No. 2, pp. 103-124.

Morgan, D.W., Morgan, N.I., Barrett, B. and Copping, S. (2010), "From national to local: intangible values and the decentralization of heritage management in the United States", in Smith, G.S., Messenger, P.M. and Soderland, H.A. (Eds), *Heritage Values in Contemporary Society*, Left Coast Press, Walnut Creek, CA, pp. 113-128.

Morton, W.B. (1995), "The secretary of the interior's standards for historic preservation projects: ethics in action", in Striner, R. and Tiller, D.P. (Eds), *Ethics in Preservation: Lectures Presented at the Annual Meeting of the National Council for Preservation Education, Indianapolis, Indiana, October 23, 1993*, National Council for Preservation Education, Ithaca, NY, pp. 14-23.

Morton, W.B. and Hume, G.L. (1977), *The Secretary of the Interior's Standards for Historic Preservation Projects*, US Department of the Interior, Heritage Conservation and Recreation Service, Technical Preservation Services Division, Washington, DC.

Muñoz Viñas, S. (2005), *Contemporary Theory of Conservation*, Elsevier, Amsterdam.

National Historic Preservation Act (1966), United States Public Law 89-665; 80 STAT.915; 16 U.S.C. 470 et seq.

National Park Service (1997a), "National Register Bulletin: how to apply the National Register Criteria for Evaluation", US Department of the Interior, National Park Service, Washington, DC.

National Park Service (1997b), "National Register Bulletin: how to complete the National Register Registration Form", US Department of the Interior, National Park Service, Washington, DC.

O'Donnell, E. (1998), "National Register Bulletin 39: Researching a Historic Property" National Park Service, Washington, DC.

Petzet, M. (2004), "Principles of preservation: an introduction to the international charters for conservation and restoration 40 years after the Venice Charter", in Petzet, M. (Ed.), *International Charters for Conservation and Restoration*, ICOMOS, München, pp. 7-29.

Posner, E.A. and Sunstein, C.R. (2010), *Law and Happiness*, University of Chicago Press, Chicago, IL.

Price, N.S., Talley, M.K.J. and Vaccaro, A.M. (1996), *Historical and Philosophical Issues on the Conservation of Cultural Heritage*, The Getty Conservation Institute, Los Angeles.

Prott, L.V. and O'Keefe, P.J. (1992), "'Cultural heritage' or 'cultural property'?", *International Journal of Cultural Property*, Vol. 1 No. 2, pp. 307-320.

Reap, J.K. and Melvin, B.H. (2007), *Law and the Historic Preservation Commission: What Every Member Needs to Know*, National Park Service, Washington, DC.

Ross, A. (2010), "Defining cultural heritage at Gummingurru, Queensland, Australia", in Phillips, C. and Allen, H. (Eds.), *Bridging the Divide: Indigenous Communities and Archaeology into the 21st Century*, Left Coast Press, Walnut Creek, CA, pp. 107-128.

Schofield, J. (2009), "Being autocentric: towards symmetry in heritage management practices", in Gibson, L. and Pendlebury, J. (Eds), *Valuing Historic Environments*, Ashgate Publishing, Surrey and Burlington,VT, pp. 93-113.

Schofield, J. (2014), *Who Needs Experts? Counter-Mapping Cultural Heritage*, Ashgate, Farnham.

Seligman, M.E.P. and Csikszentmihalyi, M. (2000), "Positive psychology: an introduction", *American Psychologist*, Vol. 55 No. 1, pp. 5-14, doi: 10.1037/0003-066X.55.1.5.

Silva, K.D. and Chapagain, N.K. (2013), *Asian Heritage Management: Contexts, Concerns, and Prospects*, Routledge, New York, NY.

Smith, L. (2006), *Uses of Heritage*, Routledge, London and New York, NY.

Smith, L. (2009), "Deference and humility: the social values of the country house", in Gibson, L. and Pendlebury, J. (Eds), *Valuing Historic Environments*, Ashgate, Burlington, VT, pp. 33-50.

Sprinkle, J.H. (2007), "'Of exceptional importance': the origins of the 'fifty-year rule' in historic preservation", *The Public Historian*, Vol. 29 No. 2, pp. 81-103.

Stefanovic, I.L. (1998), "Phenomenological encounters with place: Cavtat to square one", *Journal of Environmental Psychology*, Vol. 18 No. 1, pp. 31-44.

Stipe, R.E. (1990), "ICOMOS: A quarter of a century symposium sub-theme the Venice Charter", in Swiss Committee of ICOMOS (Ed.), *ICOMOS International Symposium: ICOMOS, a Quarter of a Century, Achievements and Future Prospects; Lausanne, Switzerland, October 6-11*, Swiss Committee of the International Council on Monuments and Sites, Berne, pp. 407-421.

Stipe, R.E. (1994), *A Letter to George: How to Keep the Preservation Commission out of Court and Avoid Being Sued*, North Carolina State University, Raleigh, NC.

Suchman, M.C. and Mertz, E. (2010), "Toward a new legal empiricism: empirical legal studies and new legal realism", *Annual Review of Law & Social Science*, Vol. 6, pp. 555-579.

Swensen, G. and Saeter, O. (2011), "The mall method: applied in a study of inhabitants' appreciation of urban cultural heritage areas", *International Journal of Qualitative Methods*, Vol. 10 No. 2, pp. 125-139.

Tainter, J.A. and Lucas, G.J. (1983), "Epistemology of the significance concept", *American Antiquity*, Vol. 48 No. 4, pp. 707-719.

Teubner, G. (1992), "The two faces of Janus: rethinking legal pluralism", *Cardozo Law Review*, Vol. 13, pp. 1443-1462.

Tiller, D.T.P. (2014), "Obey the imperatives of our own moment: a call for contemporary design of high caliber in historic districts", in Longstreth, R. (Ed.), *Frank Lloyd Wright: Preservation, Design, and Adding to Iconic Buildings*, University of Virginia Press, Charlottesville, VA, pp. 40-50.

Tomlan, M. (1994), "Historic preservation education: alongside architecture in academia", *Journal of Architectural Education*, Vol. 47 No. 4, pp. 187-196.

Ulph, J. and Smith, I. (2012), *The Illicit Trade in Art and Antiquities: International Recovery and Civil and Criminal Liability*, Hart Publishing, Oxford.

UNESCO (2011), *Recommendation on the Historic Urban Landscape, Including a Glossary of Definitions*, United Nations Educational, Scientific and Cultural Organization, Paris, available at: http://portal.unesco.org/en/ev.php-URL_ID=48857&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 7, 2016).

Waterton, E. and Smith, L. (2010), "The recognition and misrecognition of community heritage", *International Journal of Heritage Studies*, Vol. 16 No. 1, pp. 4-15.

Waterton, E., Smith, L. and Campbell, G. (2006), "The utility of discourse analysis to heritage studies: the Burra Charter and social inclusion", *International Journal of Heritage Studies*, Vol. 12 No. 4, pp. 339-355.

Weeks, K.D. and Jandl, H.W. (1996), "The secretary of the Interior's Standards for The Treatment Of Historical Properties: a philosophical and ethical framework for making treatment decisions", in Kelley, S.J. (Ed.), *Standards for Preservation and Rehabilitation*, ASTM, Conshohocken, PA, pp. 7-23.

Wells, J.C. (2007), "The plurality of truth in culture, context, and heritage: a (mostly) post-structuralist analysis of urban conservation charters", *City and Time*, Vol. 3 No. 2:1, pp. 1-13.

Wells, J.C. (2010), "Authenticity in more than one dimension: reevaluating a core premise of historic preservation", *Forum Journal*, Vol. 24 No. 3, pp. 36-40.

Wells, J.C. and Baldwin, E.D. (2012), "Historic preservation, significance, and age value: A comparative phenomenology of historic Charleston and the nearby new-urbanist community of I"On", *Journal of Environmental Psychology*, Vol. 32 No. 4, pp. 384-400.

Whipple, S.D. (2001), *Defensible Decision Making: Preservation Commissions and the Law*, Maryland Department of Housing and Community Development, Lanham, MD.

Winter, T. (2013), "Clarifying the critical in critical heritage studies", *International Journal of Heritage Studies*, Vol. 19 No. 6, pp. 532-545.

Zancheti, S.M. and Loretto, R.P. (2012), "Dynamic integrity: A new concept to approach the conservation of historic urban landscape (HUL)", Textos para discussão No. 53, Centro de Estudos Avançados da Conservação Integrada, Olinda, pp. 1-11.

Further reading

Hodsoll, F., Leighty, W.H. and Morgan, D.L. (2007), *Back to the Future: A Review of the National Historic Preservation Program*, National Academy of Public Administration, Washington, DC.

UNESCO (2015), *Operational Guidelines for the Implementation of the World Heritage Convention*, World Heritage Centre, Paris, available at: http://whc.unesco.org/en/guidelines/ (accessed November 7, 2016).

About the authors

Jeremy C. Wells is an Assistant Professor in the School of Architecture, Art and Historic Preservation at the Roger Williams University. His teaching and research focuses on the application of social science research methods to improve the practice of historic preservation. Jeremy C. Wells is the corresponding author and can be contacted at: jwells@rwu.edu

Lucas Lixinski is a Senior Lecturer at the Faculty of Law, UNSW Australia. He researches and writes primarily in the areas of public international law, international cultural heritage law, and international human rights law.

Heritage values and legal rules

Identification and treatment of the historic environment via an adaptive regulatory framework (part 2)

Jeremy C. Wells
School of Architecture, Art and Preservation, University of Maryland, College Park, Maryland, USA, and
Lucas Lixinski
Faculty of Law, University of New South Wales, Sydney, Australia

Received 30 July 2016
Revised 12 May 2017
Accepted 24 July 2017

Abstract

Purpose – Existing regulatory frameworks for identifying and treating historic buildings and places reflect deference to expert rule, which privileges the values of a small number of heritage experts over the values of the majority of people who visit, work, and reside in historic environments. The purpose of this paper is to explore a fundamental shift in how US federal and local preservation laws address built heritage by suggesting a dynamic, adaptive regulatory framework that incorporates heterodox approaches to heritage and therefore is capable of accommodating contemporary sociocultural values.

Design/methodology/approach – The overall approach used is a comparative literature review from the fields of heterodox/orthodox heritage, heterodox/orthodox law, adaptive management, and participatory methods to inform the creation of a dynamic, adaptive regulatory framework.

Findings – Tools such as dialogical democracy and participatory action research are sufficiently pragmatic in implementation to envision how an adaptive regulatory framework could be implemented. This new framework would likely require heterodox definitions of law that move beyond justice as a primary purpose and broaden the nature of legal goods that can be protected while addressing discourses of power to benefit a larger group of stakeholders.

Practical implications – The authors suggest that an adaptive regulatory framework would be particularly beneficial for architectural and urban conservation planning, as it foregrounds considerations other than property rights in decision-making processes. While such a goal appears to be theoretically possible, the challenge will be to translate the theory of an adaptive regulatory framework into practice as there does not appear to be any precedent for its implementation. There will be issues with the need for increased resources to implement this framework.

Originality/value – To date, there have been few, if any, attempts to address critical heritage studies theory in the context of the regulatory environment. This paper appears to be the first such investigation in the literature.

Keywords Adaptive regulatory framework, Administrative law, rules and regulations, Community values, Critical heritage studies, Participatory democracy, Urban conservation planning

Paper type Research paper

Introduction

Part 1 of this paper summarized heterodox heritage (also known as critical heritage studies theory) vs orthodox heritage and heterodox law vs orthodox law in an attempt to present the basic problem that a dynamic, adaptive regulatory framework is addressing in architectural/urban conservation practice and to present a possible tool (heterodox law) for implementing such a framework. The dynamic, adaptive regulatory framework is presented as a possible method to address the inherent inequities in orthodox architectural/urban conservation practice, which is dominated by compliance-based activities.

Heterodox heritage is a reaction to orthodox heritage or, more specifically, orthodox heritage conservation practice. It seeks to address the perceived wrongs in this practice by advocating for a bottom-up, stakeholder-/community-driven approach in which the values of everyday people, who represent most stakeholders of the historic environment, are as important, or sometimes more so, than the values of conventional experts. Orthodox

Journal of Cultural Heritage Management and Sustainable Development
Vol. 7 No. 3, 2017
pp. 345-363
© Emerald Publishing Limited
2044-1266
DOI 10.1108/JCHMSD-07-2016-0044

heritage conservation practice, on the other hand, is defined by expert rule and top-down processes that privilege objective art/historical values and sideline the values of most people. Thus, a dynamic, adaptive regulatory framework must engage most stakeholders as equally with conventional experts in a way that can effectively collect and act upon these meanings and values.

The contemporary sociocultural and experiential values that most people hold for built heritage and cultural landscapes do not fit the structure of orthodox law because of the reliance on expert rule. Orthodox law therefore protects the expert's view of heritage while deprecating or ignoring the perspective of other stakeholders. Heterodox law, like the heterodox heritage, deconstructs power, value participation and community involvement, and opens a space where the benefits of heritage to society can be framed in terms of the improvement of people's well-being rather than through the much more narrow lens of justice.

The second part of this paper (part 2) builds upon the literature on heritage and law and explores the adaptive management theory and community participatory methods to help construct a theoretical model for how a dynamic, adaptive regulatory framework might work and if it is feasible within time and resource constraints.

The overall approach that this theoretical exploration takes is defining the nature of heterodox heritage and heterodox law, which was done in part 1 of this paper, and use this information, informed by the adaptive management and community participation theory, to build possible ways in which the regulatory environment could be adapted to accommodate this new perspective for architectural/urban conservation. Because heterodox heritage focuses on subjective, pluralistic meanings, it offers unique challenges in trying to incorporate its goals within a legal framework that assumes objectivity, due process, and an outcome of justice rather than happiness as was discussed in the section on heterodox law in part 1.

Revisiting the discussion on heterodox heritage, such a regulatory framework would need to:

(1) consider a wide range of social, cultural, personal, and expert values from as many stakeholders as possible with the assumption that non-expert values can be as important as expert values;

(2) use social science research methods to gather and understand these values, especially methods based on participatory research that equalize the power differential between experts and community members;

(3) assume that heritage can be found everywhere, even in the near past;

(4) assume that heritage is a continuum between natural and cultural perspectives;

(5) allow for significance arguments based on cultural practices, person-place relationships, and emotional bonds with place;

(6) assume that the primary goal is to protect the meanings associated with built heritage;

(7) not use lists, but rather dynamically assess the valuation and treatment of built heritage on a case-by-case basis; and

(8) be practical and cost effective to administer.

With these goals in mind, we will now explore how such a regulatory framework could be created and the necessary legal perspectives would substantiate its practice, starting with an overview of the adaptive management theory.

Precedents for a dynamic, adaptive regulatory framework

Because the purpose of this paper focuses on adaptive regulatory frameworks, we thought that there might be some useful and relevant literature on adaptive management in administrative law, especially as it relates to environmental law or political science. What we have found is that while federal agencies often tout "adaptive management" (see Holling, 1978) in their policies, there are no prescriptive guidelines on how this should be done; in other words, there does not to appear to be *any* regulatory standards/rules based on the adaptive management principles (Ruhl and Fischman, 2010, p. 440). The reason for this lack of adaptive rules is that it is very difficult to modify the standards of a rule after it is implemented without rewriting and re-implementing the rule itself and the courts are unprepared to expect otherwise (Ruhl and Fischman, 2010, pp. 438-440). In other words, there seems to be little, if any, precedent for a rule that can accommodate contextually defined standards that are expected to change over time.

The way in which the administrative law is implemented, specifically the requirements for public participation, judicial review, and finality, has been proposed as a fundamental barrier for implementing the adaptive regulatory rules (Glicksman and Shapiro, 2004; Ruhl, 2005; Shapiro *et al.*, 2012; Jordan, 2000; McGarity, 1992; Rubin, 2004). In the traditional model of rulemaking, a public commenting process is one of the last stages of rulemaking; once the rule is implemented (otherwise known as "finality"), however, the assumption is that no further public input is required and, in practice, this is usually the case. The perception is that by allowing an agency to dynamically modify standards, the participation of the public can be circumvented. As Craig and Ruhl (2014) explain, however, there is a potential for the increase in public input over static rulemaking processes because a public participatory process informs how the standards are modified. The problems with judicial review are more salient, however, as there exists the potential to invoke a judicial review at each point where the standards are modified, but minor changes may indeed be exempt from some processes as defined by the federal Administrative Procedures Act (Craig and Ruhl, 2014, pp. 32-33). Lastly, finality, or the need for a court (when undertaking judicial review) to understand a rule as fixed and unchanging, is also problematic because it prevents an agency from dynamically adapting standards to the changing contexts (Craig and Ruhl, 2014, p. 36).

Underlying many of these tensions is the separation of powers issues, as, in the example of judicial review, where the judicial branch scrutinizes the Legislative's actions against a higher legal standard, which is often the constitution. That said, the separation of powers is often very blurred with respect to heritage, as much of the work on the detail is done via prescriptive legal forms that are enacted by the Executive, rather than Legislative branch, for implementation by the very same Executive branch. The key tension is then the interaction between the Executive and Judicial branches, in which the judicial branch measures the compatibility between the Executive law-making and the parameters set by the framework legal form, enacted by the Legislative branch.

Even in terms of a general institutional policy – other than rulemaking – there is little agreement on exactly what constitutes the adaptive management. According to Allen *et al.* (2011, p. 1342), the myriad of "inconsistent and even contradictory approaches and definitions of adaptive management have resulted in confusion and limited the ability of management organizations to develop consistent and repeatable comprehensive adaptive management programs." Part of this confusion appears to be related to unpredictable outcomes caused by opening environmental management processes to outsiders which is required by the adaptive management; this "socially induced uncertainty" (Tyre and Michaels, 2011) is problematic in many institutions that have long relied on the authoritarian regimes of knowledge and predictability (Gunderson, 1999). In this sense, adaptive management is, in part, a process of sharing power with stakeholders and seeks uncertainty to inform policy. We recognize these problems of uncertainty and potentially incompatible administrative rulemaking processes as significant and unresolved issues in any process, based in law, that attempts to dynamically adapt to sociocultural values. We will now discuss the ineffective way in which the community is currently engaged in the participatory processes that address architectural/urban heritage.

Why existing community engagement models for architectural/urban conservation are ineffective

The central argument in this paper is that the orthodox architectural/conservation practice fails to effectively engage with and collect meanings from most stakeholders. An often-heard refrain, however, is that preservation/conservation planning has always involved the community input (at least in western contexts), and this is true. We do not debate if community engagement has occurred; rather, our focus is on the depth of engagement, which is often exceedingly shallow in orthodox approaches.

Community engagement has long been a part of preservation/conservation planning processes in the USA and abroad. For instance, the Secretary of the Interior's Standards for Preservation Planning (NPS, 1983) directs that public participation should be integral to the identification and protection of historic resources and that the overall success of this process "depends on how well it solicits and integrates the views of various groups." The American Planning Association has also long recommended community participation and involvement in heritage planning processes (White and Roddewig, 1994). One could argue that what makes the identification of historic buildings, structures, and places unique in the USA is that any citizen can prepare and submit a nomination of such a resource to the National Register of Historic Places, which is a system that has been in place since the late 1960s.

In some countries in Europe, Article 12 of the Faro Convention (Council of Europe, 2005) "encourages" the participation of "everyone" in the identification, interpretation, protection, and conservation of cultural heritage, but, much like examples from the USA, it neither mandates such participation nor defines the characteristics of this activity. Similarly, the Faro Convention expressly shies away from creating enforceable rights, meaning that States Parties' commitment to encouraging the participation is more aspirational than actual. Shaheed (2011), in her report to the Human Rights Council of the United Nations, recommends that "Concerned communities and relevant individuals should be consulted and invited to actively participate in the whole process of identification, selection, classification, interpretation, preservation/safeguard, stewardship and development of cultural heritage." This approach is evident in the recommendations made by UNESCO (2015) for World Heritage nominations and the conservation of historic urban landscapes, in which an expert "learns from the traditions and perceptions of local communities" (UNESCO, 2011, Article 13).

Heterodox critics, such as Watson and Waterton (2010, p. 1), readily acknowledge that community participation in orthodox practice has increased, but are concerned that it is often a "box ticking" process that overemphasizes "political imperatives that celebrate[s] the value of community without ever examining its definition or content." Similarly, Chirikurea *et al.* (2010, p. 30) make the charge that "professionals pay lip-service to the whole concept of participation because the interests of local communities and those of professionals do not always coincide." Pannekoek (1998, p. 8) is more extreme, implying that orthodox practitioners may distrust the knowledge and motives of communities, who are perceived as the "the enemy" of the " 'real' truth." Moreover, there is concern that orthodox practitioners are simply adopting more inclusive community rhetoric without actually changing the practice (Turnpenny, 2004, p. 297). For instance, Historic England (English Heritage, 2008) directs practitioners to balance the values of conventional experts and community values in planning processes, but without visiting how this actually works in a regulatory environment. What does then "participation" actually mean in an orthodox and heterodox context? In order to help answer this question, Table I attempts to create a typology of participation, organized from "top-down" to "bottom-up" approaches. What emerges is that the specific laws upon which this paper focuses (Section 106, National Register nominations, local property designation, and design review) do not involve much community participation compared to most interactive participatory approaches.

Typology	Primary objectives	Description	Examples	Overall approach
Passive participation	Convey information to public; experts in control	Experts share information with community members; main goal is not to gather information from public, although public can "speak". Experts have no obligation to incorporate or act upon these public comments	Public meeting; local designation of properties; design review; NR nominations	Top-down
Participation in information giving	Gather information from the community without dialog; experts in control	Experts define research agenda and gather information from community	Community sentiment survey	
Participation by consultation	Gather information from the community with dialog; experts in control	Experts identify and engage participants, but are not required to include or act upon any of the information that community members share	Section 106	
Functional participation	Gather information from the community via engaged dialog; some power sharing between community participants and experts	Experts define overall project, goals, and objectives that must be met and then initiate the formation and involvement of groups of community members and the procedural rules that must be followed by participants	Preservation commissions (citizen volunteers)	
Interactive participation	Experts and community participants engage as equals as co-researchers in overall process	Experts and community members work as equals in defining the overall project, goals, and objectives that must be met and co-organize groups of participants. Participants jointly agree on procedural rules	Community archaeology	
Self-mobilization	Community in control of process; experts contribute when asked	Community members independently initiate a project and then involve experts in the process. The primary goal is for a community to empower itself to identify, plan for, and take action on a plan	Action research	Bottom-up

Source: Adapted from Pretty (1994)

Table I. Typology of community participation

Orthodox theory and practice, as defined by Gibson (2009, p. 75), is based on a top-down, "transmission-based model" in which "communication with people and communities [is] the second step after the evaluation of fabric (and the establishment of its significance) by experts." Community engagement in heterodox theory attempts to equalize the power structure between the expert and community by redefining the actors in terms of "communities of practice"; in this model, experts are but one community of practice among equals (Gibson, 2009, p. 88). In the orthodox top-down model, the values of the heritage expert define the ontological boundaries of the community engagement process, whereas in a bottom-up approach, the community itself is empowered to define what it believes to be heritage independent of the orthodox doctrine and law. Ideally, the outcomes from this bottom-up community engagement process are then respected and valued by the heritage experts (Turnpenny, 2004, p. 302; Mason, 2002, p. 17).

The objective requirements of orthodox law demand that experts simplify the complex nature of built heritage, even when this is against public sentiment (Domer, 2009, p. 107), but in the bottom-up community engagement, experts "must relinquish control" and serve as facilitators (Nicholas, 2008, p. 244) in a process that emphasizes "openness, multivocality, personal engagement, ethics, sharing of authority and interpretation, local and cultural knowledge, and the fact that history matters to people" (Silliman, 2008, p. 2). A top-down community engagement process, according to Spennemann (2006, p. 10), "tends to underestimate places of importance to the community, and overemphasize historic objects that heritage experts are comfortable working with, while a community-driven [bottom-up] approach tends to favor 'popular' places and overlooks or even actively ignores places that do not fit the community mold."

In practice, even though an orthodox law requires community participation in heritage regulatory processes, the rule for implementing such processes, as Gibson (2009) indicates, always starts with the values of experts in terms of defining and protecting heritage, rather than starting with the broader and more inclusive values of the community. (Again, the rule defines that expert values must be used first before community values; this order is critical to understand). Non-experts are then obligated to argue using the regulatory language of the experts (and, more importantly, in the language of the rule itself), which defines Smith's (2006) theory of the "Authorized Heritage Discourse" that describes the power differential in interactions between experts and communities. In essence, the system works rather well at excluding the possibility of heritage, even though community input is typically present at some stage of the process. As Gibson (2009, p. 74) explains, this situation is because "despite rhetoric to the contrary, social and cultural values are still not widely accepted in actual practice as definitive categories of value in their own right."

But what is actually happening in practice? Perhaps, on the ground, in implementing an orthodox law, community participation is, in fact, more pervasive and profound than expected. To answer this question, an investigation into what is arguably the most engaged orthodox heritage law, Section 106, is useful, as well as the local orthodox laws upon which this paper is based.

36 CFR Part 800, which is the rule that implements Section 106, is specific in requiring a "consultation" process in which a wide variety of stakeholders are to be engaged whenever there is a federal "undertaking" that may impact a National Register or National Register-eligible property. The rule requires that experts must first establish National Register status or eligibility of the property after which stakeholders are then consulted. Ostensibly, this consultation process is more demanding than the public hearings that are part of the other orthodox laws discussed herein because it requires heritage experts to engage with, listen to, and consider the values of stakeholders. King (2009), a cultural resource management (CRM) professional with many decades of Section 106 experience, is highly critical of this process. While lauding the stated aims of Section 106 and some of the requirements of the implementing rule, he describes the overall system as being highly favorable to developers and, in its implementation, it unintentionally excludes public participation "where most consultations do not involve real listening or significant project modification" (King, 2009, p. 46). Mills *et al.* (2008, p. 46) also agree that "the typical Section 106 process [does] not involve real listening or significant project modification." In addition, King (2009, p. 14) describes how the rule has become too "esoteric, so laden with jargon and obscure procedures, that citizens – whose heritage the laws are intended to protect – have a little chance to get their concerns heard, their heritage taken care of, or even to understand what is and isn't being done to 'protect the environment.' Few real opportunities exist to negotiate with project proponents for the protection of [a community's] heritage."

There are two primary reasons why the public participation is limited within the Section 106 process. First, because experts control the flow of data in the process due to regulatory requirements, it is very difficult for the average member of the public to learn about federal undertakings or the result of a particular Section 106 review. In an age of internet ubiquity, there is no central, GIS-enabled electronic clearinghouse for this information. Instead, the public must contact their state historic preservation office for information, keep a very keen eye on obscure notices posted in print publications, or hope and wait that the lead federal agency (or its consultant) will request that they become a consulting party. In addition, Section 106 data, of any kind, are very difficult for the public to obtain (Hodsoll *et al.*, 2007, p. 17). Second, while ostensibly there is a lead federal agency in charge of the Section 106 process, most reviews are farmed off to CRM firms. The result is a clear conflict of interest in which a CRM firm is paid by the very developer who desires a finding of no adverse effect. CRM firms are thus put in the untenable position of serving their client's desires or the public's interest; this particular characteristic of the system, as King (2009, p. 36) indicates, is corrupt and rewards a behavior that marginalizes public participation. Federal agencies, who should be accountable for the Section 106 process, are instead just "going through the motions" (Hodsoll *et al.*, 2007, p. 15) rather than encouraging a public participation that would arguably take more time and resources and be burdensome to developers.

State historic preservation offices, who are charged to help coordinate the Section 106 process, also operate in a way that marginalizes public participation. Interviews of state historic preservation office employees described that their work on Section 106 projects is "like running a factory assembly line" (Hodsoll *et al.*, 2007, pp. 11-15). King (2009, p. 104) makes the charge that state historic preservation offices care much more about regulating how buildings are described and how photos should be taken rather than "finding and consulting local people, finding out what's important to them, looking at the landscape in general, or considering the social character of neighborhoods."

At the local level, although there is a variation in the practice depending on specific preservation ordinances, typical community participation in designation and design review processes is limited to initiating requests, public hearings, and for a limited number of community members, serving on a preservation commission. Citizens and/or staff of the local municipality can initiate a request to consider a particular building or district for inclusion in a local register of historic places. The nomination must meet the objective criteria for significance and authenticity (again, usually based on National Register criteria) established in the preservation ordinance. The staff review the nomination for adherence to the criteria in the ordinance and provides recommendations to an historic preservation commission, which usually consists of citizen-volunteers appointed by a mayor and/or city council. The commission holds a public hearing to consider the nomination in which community members are invited to "comment." If the commission approves the nomination, it is then sent to the city council for its consideration and approval. City council members are not beholden to the criteria in the preservation ordinance, and can therefore vote to deny a local historic building/district nomination based on any reasonable criteria. As with the preservation commission, there is a public hearing in which citizens are invited to comment. A more in-depth discussion of local preservation ordinances is outside the scope of this paper, but the reader is referred to Roddewig (1983) and Bronin and Byrne (2012) for more details.

The design review process is similar to the designation process, but in most municipalities, there is no involvement of the city council. As a quasi-judicial body, the decision that the commission makes in terms of approval or denial of a design review application is therefore enforceable by law. The process begins with a property owner (or his/her representative) submitting an application to modify a property listed on the local historical register. The staff review the application, which is again the objective criteria in their municipality's preservation ordinance (again, usually based on the Secretary of the Interior's Standards), and make a recommendation for approval or denial to the commission. Many municipalities also have "design guidelines," which are also usually based on the Secretary of the Interior's Standards, but which, because they are just guidelines (and not a rule), can be interpreted more subjectively than the requirements stated in the ordinance. If the commission votes to approve the design review application, then the municipality issues a "certificate of appropriateness," which is functionally akin to a building permit in terms of legal enforcement.

Note that not all municipalities require in their preservation ordinance that the design review process must be conducted in the context of a public hearing. Where the first author worked as lead to the historic preservation commission in the city of Denver, Colorado, for instance, there was no requirement for a public hearing. By policy, however, the commission did allow the public to comment on projects. In Denver, as well as in a number of other municipalities, there also exists the possibility of administrative approvals to design review applications in which there is no public input at all (Typically, these are minor projects such as re-roofing a building).

In these local processes, it is important to note the central role of the public hearing and public comments. This is largely the extent to which public participation is possible at the local level in terms of activities controlled by an orthodox law (The authors acknowledge that preservation planning processes have much more possibility for public participation, but this is not the scope of this exploration which focuses on the specific laws described in the Introduction). While there may be some exceptions, the authors are not aware of any municipality that requires in an ordinance that public comments must be objectively taken into consideration at either the preservation commission or city council level. In practice, however, the individuals who sit on the commission and council do consider these comments, at least informally. This public comment process is rigidly controlled in most situations by limiting comments by time (e.g. three or five minutes) and reinforces the power differential between a member of the public and the commission or council by the arrangement of the room, including placing the officials in power above the level of the citizens. Dialog in this context is usually not acceptable and citizens who push this envelope can be forcibly expelled from the meeting; thus, citizen comments typically do not receive a reply from commission or council members and are single-ended in nature.

A more effective way of engaging stakeholders: the adaptive regulatory framework

Some of the most important characteristics of heterodox heritage are that a wide variety of stakeholders and their values should be involved in identifying and protecting heritage in a process that recognizes that these values constantly change. This assumption means that the traditional expert-driven process of orthodox heritage that inscribes static art/historical heritage values into lists will not work. This leaves three essential problems:

(1) Is it possible to design a process in which a wide range of stakeholders participates in identifying and protecting built heritage?

(2) How can this process work without using lists to fix heritage values in a way that is dynamic and can respond to changing contexts, priorities, and conditions on a case-by-case basis?

(3) Can this process be required by law, and if so, how?

Another principle that would be incompatible with heterodox heritage law would be the creation of districts. If we assume that "heritage is everywhere," then the use of boundaries to segregate heritage from non-heritage would be artificial. And, without heritage lists, the practical implication is that the identification of built heritage and the regulatory approval of changes to the identified heritage would need to take place on-the-fly, on a case-by-case basis.

The ideal dynamic regulatory framework, based on heterodox approaches, might therefore use the following process:

(1) An owner wishes to make changes to a property.

(2) Stakeholders who will be affected by the changes to the property are identified.

(3) These stakeholders are empowered to lead a process to determine, in consultation with a range of experts, if the property has heritage values associated with it, and is therefore "historic"; experts do not lead this process, but rather facilitate it with the goal of equalizing power differentials between participants and ensuring the mutual respect of differences in ontological and epistemological orientations.

(4) If the property is determined to be historic, then the participants determine if the changes being proposed will negatively impact these values and thereby alter the property's perceived authenticity.

(5) If the participants determine that the property's authenticity will be negatively affected, they enter into a negotiation process to achieve a consensus with the owner on ways to protect the property's perceived authenticity.

(6) The consensus is recorded and made legally enforceable.

The basic principle in operation, as articulated by King (2009), is that if a community says that a building, structure, place, or landscape is historic, then this decision should be respected by those in power. In other words, the community's values are considered on their own merits rather than being filtered through an inflexible regulatory system that retains only values congruent with what experts believe is important. What appears on the surface to be a relatively simple process, however, is actually far more complicated than what most orthodox heritage laws require. While a number of participatory planning and social science research processes exist that can identify and gather values from stakeholders, the process will likely be significantly more time- and resource-intensive to perform dynamically on a case-by-case basis. In many ways, this begins to look like how 36 CFR Part 800 and its requirement to "consult" with stakeholders is used to implement Section 106 of the National Historic Preservation Act, which is far from a quick process.

Section 106 began with the concise requirement that any federal agency "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register," but, through administrative law (36 CFR Part 800), became a 16,000-word tome that critics charge as a "bureaucratic nightmare" (Burch, 2011, p. 535) with built-in conflicts of interest (King, 2009) that prevent it from performing as was intended (Table II). An important distinction, however, between Section 106 and the proposed model for the adaptive regulatory framework is that while exhibiting some qualities of dynamically assessing sociocultural values, Section 106 does not require historic properties to be conserved; rather, the goal is to achieve a consensus on how an intervention should proceed.

While the authors acknowledge the difficulties in implementing an adaptive regulatory framework for the identification and protection of built heritage, the primary goal in this investigation is to explore the theoretical possibilities for how contemporary sociocultural and experiential values could be gathered from most stakeholders, as this is an important and unanswered question. For instance, the newest guidelines that discuss "community participation," such as the HUL approach, are silent on specific methodologies and techniques that can be used to access important sociocultural and experiential meanings; more specifically, HUL fails to offer specific methodological guidelines that would be able to inform an adaptive regulatory framework. Moreover, the answer to this question will help to determine if heterodox approaches to protecting heritage are actually feasible.

	36 CFR Part 800, 36 CFR Part 60, 36 CFR Part 68, IRS Code Section 47	Adaptive regulatory framework
Overall process	Top-down	Bottom-up
Character of expertise	Documentary expertise	Participatory expertise
Role of conventional, trained experts (e.g. employees, consultants)	Authority and control	Facilitation
Role of law	Enforcement of expert rule	Provides language for the articulation of claims by the broader community
Goal of law	Justice	Happiness
Who controls the manner of participation	Conventional experts	Stakeholder participants
Identification of stakeholders	Conventional experts identify stakeholders	Stakeholders self-identify members
Decision-making process	Conventional experts make final decisions	Participant stakeholders make final decisions through consensus
Values and meanings associated with heritage	Defined by statute	Defined by stakeholders
Method used to gather meanings and values	Objective facts defined by statute based on aesthetics and historical facts	Social science methods, especially those that emphasize the equalization of power between the "subject" and researcher (e.g. action research, dialogical democracy)
Heritage places	Few in number; rare	Ubiquitous
Relationship between natural and cultural heritage	Separate spheres	Continuum
Nature of what is being conserved	Tangible fabric	Intangible meanings
Recording of information	Lists and registers	Dynamic, on an as-needed, contextual basis (no lists)

Table II. Comparison of orthodox heritage regulatory system, as represented by specific US laws, with an adaptive regulatory framework

The reassessment of heritage law means, first and foremost, the opening up of the law for methods available in the social sciences. One of those is what Callon *et al.* (2009) and others have called "dialogical democracy" through "hybrid forums." Hybrid forums essentially work as the means to bring together experts, non-experts, laypersons (in the case of built heritage, people who live in or around heritage sites) and politicians together. The involved non-expert groups play the important role of rebalancing the interests at stake away from an expert rule, and generate their own forms of knowledge that have a bearing in governance. Specifically with respect to the law, it means that the law stops operating as the enforcer of expert rule, and can again function as a language for the articulation of claims by the broader community. In practice, it means putting local actors front and center in law-making and law-implementation. In some instances, the application of dialogical democracy means partly doing away with representative democracy as the primary means of law and policy design, or at least adding other mechanisms next to it.

There is an important distinction to be drawn in this context between "documentary" expertise and "participative" expertise. In the former, because of its reliance on objectivity, expertise is a profession that can be difficult to challenge; in the latter, expertise is something that is open to different capacities, and that can inform how people relate to heritage (Tornatore, 2011). The approach of dialogical democracy in many respects recalls the idea of participatory action in a social theory (Fals Borda, 2001), which also proposes blurring the distinction between the expert and the layperson, or, perhaps more radically, between the object of study and the researcher, as action research seeks to do. Participatory action means reconsidering the role of the heritage holder as a part of the heritage themselves, and restoring some of their agency, which is often stripped away in favor of base decisions about whether heritage should be protected, for instance, and in what terms. These decisions are the rules of the game, which the expert lays out acting as the stage manager. Further, in the case of heritage, it would mean understanding that heritage is not only something to be gazed at, but something that is lived in by the people who should have a say in how their heritage is understood by the field of heritage and the regulatory spaces associated with it. Participatory action research (PAR) is a formal research methodology that enhances dialogical democracy by helping constitute the actors needed for the hybrid forums, and by validating these fora as producing important and actionable knowledge about heritage and its values. In PAR, everyone is a "co-researcher" and all elements of the research project are negotiated between the co-researchers, including the research question, the way in which the question will be answered, and how data will be analyzed to answer the question. A critical component of PAR is that members of a community conduct this research equally with conventional experts and thus are active participants in identifying and solving specific problems (McTaggart, 1991).

Dialogical democracy in the planning and heritage context would work so as to inform processes about how heritage is chosen for listing or other forms of protection, why it is valued, and what the narrative of value around it is. In the specific context of intangible cultural heritage, for instance, the 2003 Convention for the Safeguarding of the Intangible Heritage requires that communities, groups, and sometimes individuals be involved domestically in the process of identifying heritage for addition to national inventories that serve as the basis for international nominations, and that is a terrific new development in heritage law internationally, but it is still fraught with difficulties. More specifically, and borrowing a critique from the context of "participatory development" (Kapoor, 2008), it is still the experts who decide the rules for the participation of communities, how they get to be defined, when they speak, and for what purposes.

Dialogical democracy has much in common with the PAR methodology used in the social sciences, but not with the most of other social science methodologies that typically isolate the researcher from the subject. Both dialogical democracy and PAR share a concern with maximizing the participation of as wide an array of stakeholders as possible in an environment that mitigates differentials in social hierarchy and power. Although there are a number of different interpretations of PAR, it is often used in situations where a group of people wish to examine a common problem and solve it themselves through a variety of social science methodologies (McTaggart, 1991). A "facilitator," who is an expert in the process used to implement PAR, empowers these groups of people in identifying and solving their problems (Ohmer and Karen, 2009). Unlike a typical social science research, which is designed and implemented by an expert, in PAR, the theoretical goal is to provide an environment in which laypeople can do this work for themselves; although, in reality, the facilitator often becomes an active participant in the process (Kemmis and McTaggart, 2005). Examples of this kind of research include an investigation into how visitors to museums and heritage sites in the UK perceived the authenticity of their experience (Kidd, 2011) and how cultural heritage can be sustained in the industrial region of Rjukan, Norway (Birkeland, 2008).

Because heterodox heritage focuses on the meaning more than generalization, the social science methodologies associated with it tend to be qualitative in nature, with ethnographies predominating. Although action research is a time-intensive process, ethnographies are even more so because of the need to obtain the *emic* or "insiders" perspective on the culture under study (Guba and Lincoln, 1994), which means being embedded in the culture as an actor for a long enough period of time to be accepted, which can take months, if not years.

In an answer to this problem of obtaining an *emic* perspective, some anthropologists advocate the use of a "rapid ethnographic assessment procedure" (REAP) or "short-term ethnographies," whereby the depth of meaning lost by accelerating the research process is offset by being able to produce usable data in a few weeks or less. Rather than being a liability, REAPs might offer certain advantages over traditional ethnographies, especially in terms of its emphasis on visual aspects, and can offer a "route to producing alternative ways of knowing about and with people and the environments of which they are part," as Pink and Morgan (2013, p. 359) advocate. Low's (2002) version of REAP is specifically geared toward cultural heritage and has been used in a few case studies, such at Independence National Park where Taplin *et al.* (2002) revealed that minority perspectives in the park's interpretation were underrepresented; similar results emerged from a study of the "President's House Site" in Philadelphia (Fanelli, 2005).

Content analysis, while employed frequently in the social sciences, especially in tourism studies, has been comparatively underrepresented in heritage studies. It presents a pragmatic, efficient, and potentially rapid method of understanding heritage meanings from electronic communication, such as is found on the internet, although some methodological issues remain (McMillan, 2009). The promise lies in automation, via computer software, in collecting and analyzing meanings. Usually not associated with the human subject research, the goal of content analysis is to qualitatively and/or quantitatively understand meanings from written documents, photographs, or multimedia. Examples of this kind of research include an analysis of the meanings of visitors to the Elmina and Cape Coast "slave castles" in Ghana (Amaquandoh and Brown, 2008) and heritage conservation impact assessments (Roders and van Oers, 2013).

Other social science research methods have been used to research heritage, including grounded theory (Milligan, 2007), qualitative case studies (Fink, 2006), phenomenologies (Wells and Baldwin, 2012), visual preference studies (Galindo and Hidalgo, 2005), as well as mixed methods (Paulsen, 2007, p. 30), but with the exception of action research, REAPs, and perhaps content analysis, these seem ill-suited to inclusion in the adaptive regulatory framework because of intensive resource requirements (mainly time) and a focus on creating theories rather than on practical applications. Quantitative methods, such as survey methodologies, offer a relatively low resource overhead and can be quick to administer, but lack the depth of meaning that is a requirement of heterodox heritage approaches, but can be useful if the objective is generalization. They can be particularly effective for complementing a qualitative method in sequence, when the qualitative method is designed to understand a phenomenon and the quantitative method attempts to generalize narrowly defined, discrete characteristics of the phenomenon.

Admittedly, dialogical democracy and social science methods, in general, can be very resource-intensive. For instance, they require more time for consultations to take place, which can be exploited by some parties to delay a conservation process until after irreparable harm has happened to the heritage. Participatory methodologies, such as PAR and hybrid forums, are typically more cost effective than more discrete methodologies such as ethnographies or qualitative case studies, however (Evans *et al.*, 2006). Processes like the participatory budget, that was invented in Southern Brazil and quickly spread to over 50 cities across Europe (Sintomer *et al.*, 2012), show us that the time add-on has not been a major factor against the expansion of the program, given the relatively long-term nature of planning decisions to begin with. In Porto Alegre (southern Brazil), where participatory budgeting was first pioneered, it is a process in which a share of the city's budget is allocated to the different neighborhoods, who get to decide how the money is spent across 18 different areas, including cultural heritage conservation (under the category of culture) (Prefeitura de Porto Alegre, 2016). Participatory budgeting has been connected to reducing poverty and improving fiscal performance, even if it has also increased operational costs of city governments (World Bank, 2008). In a similar sense, while an adaptive regulatory framework for heritage conservation would surely result in increased costs for a municipality, these costs could be offset by economic gains because of the potential for a more widespread built heritage conservation activity. An increased amount of the built environment would therefore be identified by communities as "historic" and individuals from these communities would then be more likely to invest in the rehabilitation of buildings. Municipalities would see a potential increase in taxes through rising property values and heritage tourism.

The data, documentation, and decisions that dialogical democracy and PAR generate also require more human resources to compile the information and give it a form that can be actionable in terms of policy and legal development. But, depending on the format adopted, those actionable points are derived from the meetings themselves, and voted upon right there and then (at least in the participatory budget model), so this does not seem to be a prominent concern, either.

In terms of perception, dialogical democracy and PAR can still be seen as somewhat exclusionary, as there is always a question about who gets to engage in these processes. Critics lament that public participatory processes tend to overemphasize those individuals who naturally dominate discussions and marginalize people who are quieter or more guarded in their ideas, especially if there are class issues involved (Mosse, 2001). A charge usually leveled at heritage processes of community participation is that middle-class, often retired, people tend to participate more in these processes than other segments of society because of their time and resource availability and their overall interest in heritage matters (Waterton and Smith, 2010). A counter-argument is that the same can be said of most participatory processes (in that they are open to all, but only a relative few actually participate). Perhaps, the participation by wider segments of society can be facilitated by, for instance, holding relevant meetings outside normal work hours, and addressing other potential obstacles to participation (such as providing carers for the children of the participants). More traditional social science methods might also be paired with participatory processes in order to uncover the values of a wider range of stakeholders.

There is also a problem with determining the scope of the community affected by the heritage in order to identify stakeholders: is it the local community (and if so, within what distance of the heritage site), the state-wide community, the nation, or even humankind as a whole? Different legal frameworks give different answers, and the level of the law being implemented usually gives a good idea as to the scope of the affected community, but there can be a difference between what a local community thought of their heritage when it was protected under a local ordinance and the way the "international community" will perceive it when it is considered by the UNESCO, for instance. This disconnect should be minimized to the possible extent, so as to avoid local alienation in the aftermath of protection by the broader fora.

In terms of legal and regulatory issues, the law, particularly the heterodox law, can be thought of as a language of articulation of power and the claims associated with it. Moving away from subjective rights is a challenge as far as the law is concerned, and one that happens unevenly across jurisdictions. Whereas common law jurisdictions (the USA, the UK, Australia, Canada) tend to be more open to recognizing the ability of interests other than subjective rights being litigated, civil law countries are less amenable to the proposition (Dawidowicz, 2013). International law, too, is generally opposed to the notion of *actio popularis*, or the idea that entities not directly affected by a wrong can bring claims for its redress, as is also generally underprepared to deal with entities other than States as litigants (Morss, 2013).

More importantly, though, in order to respond to the challenges highlighted above, the law needs to incorporate more opportunities for the participation in legal-political processes. That can happen through opening up more avenues for popular legislative power, as opposed to the traditional delegated legislative power. These initiatives seem to work best in local government contexts, however, particularly in states and countries with large populations.

Lastly, there should be a consideration for how the overall success of an adaptive regulatory framework could be assessed or measured. As with the participatory emphasis on identifying and treating built heritage, communities and experts should collaborate, equally, in determining what should be measured and how it should be measured, as Fraser *et al.* (2006) advocate in an environmental conservation context; in this context, indicators are defined and collected "at as local a level as possible, and then aggregated using a relatively simply and transparent aggregation process, thereby allowing information to be both summarized quickly for policy makers, and unpacked for more careful monitoring and follow-up" (Fraser *et al.*, 2006, p. 126). A participatory approach could also be supplemented by more traditional social science methods, such as Nazarea *et al.* (1998) describe, using a method derived from clinical psychology based on interviews to create indicators that focus on intrinsic indicators, such as the quality of life.

Concluding remarks

There are many difficult questions that we cannot answer in this paper without additional research and the development of test cases. We believe that our intervention's value is in posing the questions contained in this study so that others may follow. For instance, it is beyond the scope of this paper to address specific issues of social exclusion or inclusion primarily because there has yet to be a functional adaptive regulatory framework from which a case study could provide data to understand this issue. Specific questions that are implied from our overall approach that we cannot yet answer include:

(1) Who should have the power to identify stakeholders and engage them in this process?

(2) Who should identify and involve the conventional experts? What kinds of experts ought to be involved?

(3) How should "being affected" by a change to built heritage be defined?

(4) Who gets to decide how the power is distributed among the participants?

(5) Who gets to determine if the property is historic and authentic and why?

(6) How the answers to all these questions lead to the creation of specific laws and regulations?

Each of the six questions above is a potential area of research for others to pursue and is, again, beyond the possible scope of this paper.

The way in which this paper frames experts may appear to be prejudicial. It is important to clarify that the aim of an adaptive regulatory framework is not to reject expert knowledge, but rather to define a possible method that can balance expert knowledge with a wider array of stakeholder values. It also encompasses, as Fortman (2008, p. 8) describes, framing science unconventionally as consisting of both "civil science" (the meanings of everyday people) and "conventional science" (the meanings of experts). Thus, in the model of an adaptive regulatory framework, both "civil experts" (e.g. community members) and "conventional experts" (e.g. heritage professionals) must work together, equally, respecting each other's ontological and epistemological orientations and traditions. The role of the heritage expert therefore becomes one of the expert facilitators. It is, in essence, based on the mutual respect and power sharing of the members of all communities of practice involved in the identification and protection of cultural heritage.

Traditionally, historic preservation in the USA has focused on aesthetics and property rights in terms of the regulatory environment, especially at the local level, and to a lesser degree, on historical associations with buildings and places. We suggest that an adaptive regulatory framework foregrounds other, more subjective, considerations such as human flourishing, community identity, emotional attachment, and community empowerment in decision-making processes. While historic preservation has been called a national and international social and political movement (Riesenweber, 2008, p. 28; Mosler, 2011, p. 2), encompassing a broad swath of people from all backgrounds, only a few of these individuals, largely associated with art/historical disciplines, were responsible for the creation of the value system that was then incorporated into an orthodox heritage law (Wells, 2007). In this light, an adaptive regulatory framework can be viewed as a tool to democratize the doctrinal perspective contained in the orthodox law from a heterodox heritage perspective. A major concern, however, is whether the material manifestation of heritage would be threatened using this tool because of the possibility of widely divergent values between civil and conventional experts. On the other hand, if conventional experts choose to trust the wider perspective of civil experts, perhaps the net result will actually be an increased retention of the historic fabric. Conventional experts will therefore need to accept the socially induced uncertainty that promises both major risks and rewards if an adaptive regulatory framework is employed in some fashion.

As understandings of heritage move away from orthodox approaches based on authentic historical fabric protected for its own sake toward protecting heritage as a relational, community-driven process, the possibility of addressing heritage through theoretical and practical changes to law should be considered. While an orthodox law, with its deference to expert rule, seemed to be able to accommodate orthodox heritage well, it is somewhat unfit to look at heritage as part of larger social and cultural processes. Heterodox law, because it allows for more plural understandings of what the law is, and allows for the power to be contested and reallocated within the boundaries of the legal system, seems more able to respond to the changes happening in how heritage is understood, identified, and protected.

Processes like dialogical democracy and PAR seem to be adequate avenues for challenging heritage on the ground, and it is law's role to create regulatory avenues through which these processes can be made part of the framework that decides upon heritage and its values. As law moves away from thinking about its ultimate goal only as justice, and incorporates other possibilities of legal goods to be protected by the law (as opposed to simply deferring in these matters to experts outside the law), discourses of power can be rearticulated to the benefit of plural stakeholders in heritage.

Ultimately, the challenge will be translating the theory of an adaptive regulatory framework into practice as there are few precedents for its implementation. In addition to legal challenges, resistance to giving more power to communities and less to experts will be a difficult political process to navigate. Governmental entities will also be concerned with the potential for increased resources (time and money) to implement this framework. If communities increasingly perceive and act on the need to have their heritage needs better addressed by the law, then the political may respond in kind.

References

Allen, C.R., Fontaine, J.J., Pope, K.L. and Garmestani, A.S. (2011), "Adaptive management for a turbulent future", *Journal of Environmental Management*, Vol. 92 No. 5, pp. 1339-1345.

Amaquandoh, E. and Brown, D.O. (2008), "A content analysis of sentiments expressed by visitors to cultural heritage sites at the Elmina and cape coast former slave castles in Ghana", *Consortium Journal of Hospitality & Tourism*, Vol. 12 No. 2, pp. 77-90.

Birkeland, I. (2008), "Cultural sustainability: industrialism, placelessness and the re-animation of place", *Ethics, Place and Environment*, Vol. 11 No. 3, pp. 283-297.

Bronin, S.C. and Byrne, J.P. (2012), *Historic Preservation Law*, Foundation Press Thomson/West, New York, NY.

Burch, J.R. (2011), "National historic preservation act of 1966", in Lindstrom, M.J. (Ed.), *Encyclopedia of the US Government and the Environment: History, Policy, and Politics*, ABC-CLIO, Santa Barbara, CA, pp. 533-535.

Callon, M., Lascounes, P., Barthe, Y. and Burchell, G. (2009), *Acting in an Uncertain World: An Essay of Technical Democracy*, MIT Press, Cambridge, MA.

Chirikurea, S., Manyanga, M., Ndoro, W. and Pwiti, G. (2010), "Unfulfilled promises? Heritage management and community participation at some of Africa's cultural heritage sites", *International Journal of Heritage Studies*, Vol. 16 Nos 1-2, pp. 30-44.

Council of Europe (2005), "The framework convention on the value of cultural heritage for society (faro convention)", Council of Europe, Paris, available at: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/199 (accessed 21 August 2017).

Craig, R.K. and Ruhl, J.B. (2014), "Designing administrative law for adaptive management", *Vanderbilt Law Review*, Vol. 67 No. 1, pp. 1-87.

Dawidowicz, R. (2013), "Class action lawsuits in Europe: a comparative and economic analysis", in Mathis, K. (Ed.), *Law and Economics in Europe: Foundations and Application*, Springer, Amsterdam, pp. 231-252.

Domer, D. (2009), "Old but not good old history: prospects and problems of freezing time in old buildings", *Journal of Architectural and Planning Research*, Vol. 26 No. 2, pp. 95-110.

English Heritage (2008), "Conservation principles policies and guidance for the sustainable management of the historic environment", English Heritage, London, available at: https://historicengland.org.uk/images-books/publications/conservation-principles-sustainable-management-historic-environment/ (accessed 21 August 2017).

Evans, K., de Jong, W., Cronkleton, P., Sheil, D., Lynam, T., Kusumanto, T. and Colfer, C.J.P. (2006), *Guide to Participatory Tools for Forest Communities*, Center for International Forestry Research, Bogor.

Fals Borda, O. (2001), "Participatory (action) research in social theory: origins and challenges", in Reason, P. and Bradbury, H. (Eds), *Handbook of Action Research: Participative Inquiry and Practice*, Sage, Thousand Oaks, CA, pp. 27-37.

Fanelli, D.D. (2005), "History, commemoration, and an interdisciplinary approach to interpreting the president's house site", *The Pennsylvania Magazine of History and Biography*, Vol. 129 No. 4, pp. 445-460.

Fink, L. (2006), "When community comes home to roost: the southern milltown as lost cause", *Journal of Social History*, Vol. 40 No. 1, pp. 119-145.

Fortman, L. (2008), "Doing science together", in Fortmann, L. (Ed.), *Participatory Research in Conservation and Rural Livelihoods: Doing Science Together*, Blackwell Publishing, Oxford, pp. 1-17.

Fraser, E.D.G., Dougill, A.J., Mabee, W.E., Reed, M. and McAlpine, P. (2006), "Bottom up and top down: analysis of participatory processes for sustainability indicator identification as a pathway to community empowerment and sustainable environmental management", *Journal of Environmental Management*, Vol. 78 No. 2, pp. 114-127.

Galindo, M.P. and Hidalgo, M.C. (2005), "Aesthetic preferences and the attribution of meaning: Environmental categorization processes in the evaluation of urban scenes", *International Journal of Psychology*, Vol. 40 No. 1, pp. 19-26.

Gibson, L. (2009), "Cultural landscapes and identity", in Gibson, L. and Pendlebury, J. (Eds), *Valuing Historic Environments*, Ashgate Publishing, Surrey and Burlington, pp. 67-92.

Glicksman, R.L. and Shapiro, S.A. (2004), "Improving regulation through incremental adjustment", *University of Kansas Law Review*, Vol. 52 No. 5, pp. 1179-1248.

Guba, E.G. and Lincoln, Y.S. (1994), "Competing paradigms in qualitative research", in Denzin, N.K. (Ed.), *Handbook of Qualitative Research*, Sage Publications, Thousand Oaks, CA, pp. 105-117.

Gunderson, L. (1999), "Resilience, flexibility and adaptive management – antidotes for spurious certitude?", *Conservation Ecology*, Vol. 3 No. 1, p. 7, available at: https://www.ecologyandsociety.org/vol3/iss1/art7/

Hodsoll, F., Leighty, W.H. and Morgan, D.L. (2007), *Back to the Future: A Review of the National Historic Preservation Program*, National Academy of Public Administration, Washington, DC.

Holling, C.S. (Ed.) (1978), *Adaptive Environmental Assessment and Management*, Wiley, Chichester.

Jordan, W.S. III (2000), "Ossification revisited: does arbitrary and capricious review significantly interfere with agency ability to achieve regulatory goals through informal rulemaking?", *Northwestern University Law Review*, Vol. 94 No. 2, pp. 393-450.

Kapoor, I. (2008), *The Postcolonial Politics of Development*, Routledge, London.

Kemmis, S. and McTaggart, R. (2005), "Participatory action research: communicative action and the public sphere", in Denzin, N.K. and Lincoln, Y.S. (Eds), *The Sage Handbook of Qualitative Research*, Sage Publications, Thousand Oaks, CA, pp. 559-604.

Kidd, J. (2011), "Performing the knowing archive: heritage performance and authenticity", *International Journal of Heritage Studies*, Vol. 17 No. 1, pp. 22-35.

King, T.F. (2009), *Our Unprotected Heritage: Whitewashing the Destruction of Our Cultural and Natural Resources*, Left Coast Press, Walnut Creek, CA.

Low, S.M. (2002), "Anthropological-ethnographic methods for the assessment of cultural values in heritage conservation", in de Torre, M.L. (Ed.), *Assessing the Values of Cultural Heritage*, Getty Conservation Institute, Los Angeles, CA, pp. 31-49.

McGarity, T.O. (1992), "Some thoughts on 'deossifying' the rulemaking process", *Duke Law Journal*, Vol. 41 No. 6, pp. 1385-1462.

McMillan, S.J. (2009), "The challenge of applying content analysis to the World Wide Web", in Krippendorff, K. and Bock, M.A. (Eds), *The Content Analysis Reader*, Sage Publications, Thousand Oaks, CA, pp. 60-67.

McTaggart, R. (1991), "Principles for participatory action research", *Adult Education Quarterly*, Vol. 41 No. 3, pp. 168-187.

Mason, R. (2002), "Assessing values in conservation planning: methodological issues and choices", in Torre, M. (Ed.), *Assessing the Values of Cultural Heritage*, The J. Paul Getty Trust, Los Angeles, CA, pp. 5-30.

Milligan, M.J. (2007), "Buildings as history: the place of collective memory in the study of historic preservation", *Symbolic Interaction*, Vol. 30 No. 1, pp. 105-123.

Mills, B.J., Altaha, M., Welch, J.R. and Ferguson, T.J. (2008), "Field schools without trowels: teaching archaeological ethics and heritage preservation in a collaborative context", in Silliman, S.W. (Ed.), *Collaborating at the Trowel's Edge: Teaching and Learning in Indigenous Archaeology*, University of Arizona Press, Tucson, AZ, pp. 26-49.

Morss, J.R. (2013), *International Law as the Law of Collectives: Toward a Law of People*, Ashgate, Surrey.

Mosler, S. (2011), *Heritage Politics in Adelaide*, University of Adelaide Press, South Australia.

Mosse, D. (2001), " 'People's knowledge', participation and patronage: operations and representations in rural development", in Cooke, B. and Kothari, U. (Eds), *Participation: The New Tyranny?*, Zed Books, London, pp. 16-35.

Nazarea, V., Rhoades, R., Bontoyan, E. and Flora, G. (1998), "Defining indicators which make sense to local people: intra-cultural variation in perceptions of natural resources", *Human Organization*, Vol. 57 No. 2, pp. 159-170.

Nicholas, G.P. (2008), "Melding science and community values: indigenous archaeology programs and the negotiation of cultural differences", in Silliman, S.W. (Ed.), *Collaborating at the Trowel's Edge: Teaching and Learning in Indigenous Archaeology*, University of Arizona Press, Tucson, AZ, pp. 228-249.

NPS (1983), *Secretary of the Interior's Standards for Preservation Planning*, National Park Service, Washington, DC.

Ohmer, M.L. and Karen, D. (2009), *Consensus Organizing: A Community Development Workbook: A Comprehensive Guide to Designing, Implementing, and Evaluating Community Change Initiatives*, Sage Press, Los Angeles.

Pannekoek, F. (1998), "The rise of the heritage priesthood or the decline of community based heritage", *Forum Journal*, Vol. 12 No. 3, pp. 4-10.

Paulsen, K.E. (2007), "Strategy and sentiment: mobilizing heritage in defense of place", *Qualitative Sociology*, Vol. 30 No. 1, pp. 1-19.

Pink, S. and Morgan, J. (2013), "Short-term ethnography: intense routes to knowing", *Symbolic Interaction*, Vol. 36 No. 3, pp. 351-361.

Prefeitura de Porto Alegre (2016), "Orçamento participativo – prioridades Temáticas das Regiões", Prefeitura de Porto Alegre, Porto Alegre, available at: www2.portoalegre.rs.gov.br/op/default.php?p_secao=35 (accessed April 21, 2016).

Pretty, J.N. (1994), "Alternative systems of inquiry for sustainable agriculture", *IDS Bulletin*, Vol. 25 No. 2, pp. 37-48.

Riesenweber, J. (2008), "Landscape preservation and cultural geography", in Longstreth, R.W. (Ed.), *Cultural Landscapes: Balancing Nature and Heritage in Preservation Practice*, University of Minnesota Press, Minneapolis, MN, pp. 23-34.

Roddewig, R.J. (1983), *Preparing a Historic Preservation Ordinance*, American Planning Association, Chicago, IL.

Roders, A.P. and van Oers, R. (2013), "Managing change: integrating impact assessments in heritage conservation", in Albert, M.T., Bernecker, R. and Rudolff, B. (Eds), *Understanding Heritage: Perspectives in Heritage Studies*, De Gruyter, Berlin, pp. 89-104.

Rubin, E. (2004), "It's time to make the administrative procedure act administrative", *Cornell Law Review*, Vol. 89 No. 1, pp. 95-190.

Ruhl, J.B. (2005), "Regulation by adaptive management is it possible?", *Minnesota Journal of Law, Science and Technology*, Vol. 7 No. 1, pp. 21-57.

Ruhl, J.B. and Fischman, R.L. (2010), "Adaptive management in the courts", *Minnesota Law Review*, Vol. 95 No. 2, pp. 424-484.

Shaheed, F. (2011), "Report of the independent expert in the field of cultural rights; human rights council, 17th session", United Nations General Assembly, New York, NY, available at: www.refworld.org/docid/50f01fb12.html (accessed 21 August 2017).

Shapiro, S., Fisher, E. and Wagner, W. (2012), "The enlightenment of administrative law: looking inside the agency for legitimacy", *Wake Forest Law Review*, Vol. 47 No. 3, pp. 463-465.

Silliman, S.W. (2008), "Collaborative indigenous archaeology: troweling at the edges, eying the center", in Silliman, S.W. (Ed.), *Collaborating at the Trowel's Edge: Teaching and Learning in Indigenous Archaeology*, University of Arizona Press, Tucson, AZ, pp. 1-24.

Sintomer, Y., Herzberg, C., Röcke, A. and Allegretti, G. (2012), "Transnational models of citizen participation: the case of participatory budgeting", *Journal of Public Deliberation*, Vol. 8 No. 2, pp. 1-32, available at: www.publicdeliberation.net/jpd/vol8/iss2/art9

Smith, L. (2006), *Uses of Heritage*, Routledge, London and New York, NY.

Spennemann, D.H.R. (2006), "Gauging community values in historic preservation", *CRM: The Journal of Heritage Stewardship*, Vol. 3 No. 2, pp. 6-20.

Taplin, D.T., Scheid, S. and Low, S.M. (2002), "Rapid ethnographic assessment in urban parks: a case study of independence national historical park", *Human Organization*, Vol. 61, pp. 80-93.

Tornatore, J.L. (2011), "Du patrimoine ethnologique au patrimoine culturel immatériel: suivre la voie politique de l'immatérialité culturelle", in Bortolotto, C. (Ed.), *Le patrimoine Culturel Immatériel*, Éditions de la Maison des sciences de l'homme, Paris, pp. 213, 226-227.

Turnpenny, M. (2004), "Cultural heritage, an ill-defined concept? A call for joined-up policy", *International Journal of Heritage Studies*, Vol. 10 No. 3, pp. 295-307.

Tyre, A.J. and Michaels, S. (2011), "Confronting socially generated uncertainty in adaptive management", *Journal of Environmental Management*, Vol. 92 No. 5, pp. 1365-1370.

UNESCO (2011), *Recommendation on the Historic Urban Landscape, Including a Glossary of Definitions*, United Nations Educational, Scientific and Cultural Organization, Paris, available at: http://portal.unesco.org/en/ev.php-URL_ID=48857&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO (2015), *Operational Guidelines for the Implementation of the World Heritage Convention*, World Heritage Centre, Paris, available at: http://whc.unesco.org/en/guidelines/

Waterton, E. and Smith, L. (2010), "The recognition and misrecognition of community heritage", *International Journal of Heritage Studies*, Vol. 16 No. 1, pp. 4-15.

Watson, S. and Waterton, E. (2010), "Heritage and community engagement", *International Journal of Heritage Studies*, Vol. 16 Nos 1-2, pp. 1-3.

Wells, J.C. (2007), "The plurality of truth in culture, context, and heritage: a (mostly) post-structuralist analysis of urban conservation charters", *City and Time*, Vol. 3, Nos 2/1, pp. 1-13.

Wells, J.C. and Baldwin, E.D. (2012), "Historic preservation, significance, and age value: a comparative phenomenology of historic Charleston and the nearby new-urbanist community of I'On", *Journal of Environmental Psychology*, Vol. 32 No. 4, pp. 384-400.

White, B.J. and Roddewig, R.J. (1994), *Preparing a Historic Preservation Plan*, NTHP and American Planning Association, Washington, DC and Chicago, IL.

World Bank (2008), *Rumo a um Orçamento Participativo mais Inclusivo e Efetivo em Porto Alegre*, World Bank, Washington, DC.

Further reading

Winter, T. (2013), "Clarifying the critical in critical heritage studies", *International Journal of Heritage Studies*, Vol. 19 No. 6, pp. 532-545.

About the authors

Jeremy C. Wells is an Assistant Professor in the School of Architecture, Planning and Preservation, University of Maryland, College Park. His teaching and research focuses on the application of social science research methods to improve the practice of historic preservation. Jeremy C. Wells is the corresponding author and can be contacted at: jeremy@heritagestudies.org

Lucas Lixinski is a Senior Lecturer at the Faculty of Law, UNSW, Australia. He researches and writes primarily in the areas of public international law, international cultural heritage law, and international human rights law.