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Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law

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This Article seeks to deepen legal analysis of historic preservation law by analyzing how contemporary presuppositions and legal tools shape changing preservation approaches. It is organized around legal disputes concerning the Gettysburg battlefield, a site of great national significance, which has been preserved in different forms for nearly 150 years. The Article describes the history of preservation at Gettysburg. It argues that the United States Supreme Court's constitutional approval of federal acquisition of battlefield land in 1896 reflected contemporary conservative nationalism. It also analyzes how legal tools for preservation of land surrounding the battlefield have evolved from simple ownership to coordinated regulation and contract, breaking down the traditional stark division between protected and commercial land. Finally, the Article examines how the National Historic Preservation Act governs government choices about what to preserve and how to interpret it. Because preservation of a site associated with a significant event inevitably will reflect contemporary interpretative biases, the law should mandate inclusive processes for making preservation choices and encourage the presentation of multiple perspectives.

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I. INTRODUCTION

This Article examines the historical dimension of historic preservation law by considering legal decisions concerning a place of undoubted historic significance: the Gettysburg battlefield. Gettysburg provides a revealing lens through which to focus on historic preservation law because of its continuing cultural resonance (two million people visit each year), the pioneering preservation efforts there, and recent disputes that illuminate how contemporary legal practices address public commemoration. Legal scholars have displayed little interest in such shrines of national history.¹ And the small interest legal scholars have had in historic preservation has focused on local ordinances regulating privately owned landmarks or on lands within historic districts. These laws are the subject of the most important United States Supreme Court case approving historic preservation,² have the most impact on property rights, and embody important aspirations for land use law. Effective ordinances of this sort have made an enormous difference in the character and aesthetics of urban development in the major cities of the United States and arguably have played a crucial role in the recent revival in urban life. However, such local ordinances primarily protect traditional development patterns, scale, and vernacular architecture, rather than commemorate specific persons or events significant in history.³

1. Scholars studying cultural symbols provide a more useful approach for examining how law shapes historical memory. See, e.g., Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1995); Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007). Professor Mezey, for example, demonstrates the complexity and dynamism of cultural meaning, and the struggle for control over it, to critique simplistic notions of cultural property. See Mezey, *supra*. I argue that historic landmarks convey more complex and contradictory meanings than are generally discussed.

2. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

3. See, e.g., WILLIAM J. MURTAUGH, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 103-24 (1990).

Gettysburg National Military Park, by contrast, commemorates the largest and most important battle of the Civil War,⁴ itself probably the most significant event in American history, as well as the location and occasion for the most celebrated speech in U.S. history, Lincoln's Gettysburg Address. The battlefield Park is a place set aside for visitors or pilgrims. The United States owns the Park, which is administered as a unit of the national park system. Professional managers preserve the landscape as a rural oasis, depicting primarily the preindustrial agricultural landscape as it existed on the eve of the Battle. It contrasts with dominant modes of contemporary property development, rather than trying to shape them, as municipal regulatory preservation ordinances aspire to do. The National Park Service (NPS) manages the elements of the Park to enable or induce a certain kind of reaction or reflection by visitors. Such reactions by observers at historic parks have had a large influence on design and on the political constituency for regulatory preservation.⁵ But public ownership relegates private property concerns to the margins of consideration. A national park does not offer obvious lessons for how functioning communities based upon private ownership should be organized or governed.

Historic preservation law elevates the cultural value of land, ordinarily suppressed by property law. It also reflects decisions about the land matters of community concern rather than individual dominion. Americans often have thought about the land in cultural, even spiritual terms, as evidenced by strong native traditions of landscape painting, nature poetry, and environmentalism.⁶ But property law places the mandates of the market and individual choice at the center of the actual management of the land, privatizing cultural values, and creating familiar patterns of subdivisions, shopping centers, and business parks, which bespeak only the unselfconscious culture of commercial exploitation. Elevating the cultural meaning of land brings to the fore legal conflicts over cultural meaning and priority that are veiled when land is treated as a commodity.

Historic preservation law engages these issues of contending meaning. Culture enters legal discourse because of the issues historic

4. JIM WEEKS, *GETTYSBURG: MEMORY, MARKET, AND AN AMERICAN SHRINE* 116 (2003); STEPHEN W. SEARS, *GETTYSBURG*, at xiv (2003).

5. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 1-3 (1980).

6. ROBERT PAEHLKE, *CONSERVATION AND ENVIRONMENTALISM: AN ENCYCLOPEDIA* 142 (1995).

preservation law requires law to resolve.⁷ Carol Rose recognized this distinctive feature of historic preservation law when she argued that giving effect to community voice represented its chief contribution and directed attention to how power affects whose voices are heard.⁸ Legal writing about historic preservation, however, generally downplays history's content.⁹ Nonlegal scholars, on the other hand, have applied the insights of several disciplines to explore how choices about preservation can become an area of social conflict over whose perspective a site will present.¹⁰ A good test of historic preservation law is how well it resolves conflicts about the meaning of important sites.

Gettysburg presents multiple powerful historic values that pose difficult questions about which elements should be preserved and how. People care about how Gettysburg is presented, and not just on matters of historic accuracy. The legacies of the Civil War continue today, and conflicts about how it should be remembered cluster around such a central public memorial of that struggle. The landscape encountered today reflects numerous decisions made by various persons at different times. It is a cultural construct that says as much about the continuing evolution of cultural memory as it does about the events of July 1 to July 3, 1863. At the same time, many visitors will gain their primary understanding of the Civil War from their visits to Gettysburg.

This Article is organized around a place rather than an argument. This may be peculiarly appropriate for a study of historic preservation law, which gives priority to place over propositions. Part II provides a short overview of the Battle of Gettysburg and the history of the

7. Legal theorist Roger Cotterell argues that using law to protect cultural heritage requires law to engage with multiple perspectives on cultural meaning and not assume that dominant understandings are exclusive. ROGER COTTERELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 97-102 (2006).

8. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *STAN. L. REV.* 473 (1981).

9. An exception that proves the rule is David F. Tipson, *Putting the History Back in Historic Preservation*, 36 *URB. LAW.* 289 (2004). Mr. Tipson makes an interesting argument that many historic districts subordinate conveying the history of a community "to indirect goals relating to economics and tourism." *Id.* at 308. In effect, he urges that the values of historical authenticity should play a larger role in local historic district regulation than should design standards supporting property values and tourism. *Id.* at 291-93. Mr. Tipson's preferred approach of restricting preservation to those elements of a cultural landscape that convey the narrative of local history, however, seems to rely on a naïve sense that history has some consensual content outside of the kind of concerns for present welfare that he decries. *See id.* This Article focuses on the challenges and ambiguities of preserving a site to tell important but contested history.

10. Particularly influential has been the work of David Lowenthal. *See* DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* (1985) [hereinafter *LOWENTHAL, THE PAST IS A FOREIGN COUNTRY*]; DAVID LOWENTHAL, *POSSESSED BY THE PAST: THE HERITAGE CRUSADE AND THE SPOILS OF HISTORY* (1998) [hereinafter *LOWENTHAL, POSSESSED BY THE PAST*].

preservation of the site. Part III unpacks the often-repeated idea that preservation of a site associated with significant events or persons in history serves the public value of patriotism. Focusing on the Supreme Court's important 1896 justification for federal preservation of Gettysburg, the Article argues that preservation efforts reflect interpretations of history that embody contemporary understandings and prejudices of decision makers. Part IV is more about the means of preservation. It considers the way official preservation efforts have resisted competing commercial exploitation by strongly demarking the boundary between preservation of sacred space and ordinary land development. This Part relates modern legal efforts to prevent and later demolish a large observation tower on adjoining private land. It argues that subsequent coordination of federal ownership with local regulations has blended the formerly separate spheres of cultural meaning and commerce. Part V analyzes how preservation requires choices among legitimate interpretative priorities. It considers the NPS's 1999 decision to demolish the 1962 Cyclorama Center, a modern historic landmark, in order to fulfill its vision for battlefield restoration. It argues that the National Historic Preservation Act provides an appropriate approach for resolving such conflicts, both permitting minority voices to contend for representation and empowering the park managers to make final decisions. Because preservation of a site associated with a significant event will inevitably reflect contemporary interpretative biases, the law should mandate inclusive processes for making preservation choices and encourage the presentation of multiple perspectives.

II. THE GETTYSBURG BATTLEFIELD AND THE HISTORY OF ITS PRESERVATION

A. *The Battle*

In the summer of 1863, Robert E. Lee led the Confederate Army of Northern Virginia on an invasion of the North.¹¹ He had several motives. He wanted his army to feast on the rich farmland of Pennsylvania and give the depleted fields of Virginia a respite from warring armies.¹² Confederate officials awaited with trepidation the fall of their fortress at Vicksburg on the Mississippi and hoped to gain a signal victory in the

11. For accounts of the Battle, see SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE: VOLUME 2: FREDERICKSBURG TO MERIDIAN* 428-581 (1963); JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 646-65 (1988); and SEARS, *supra* note 4.

12. SEARS, *supra* note 4, at 12.

East to uphold Southern morale.¹³ Lee hoped to defeat decisively the Union Army of the Potomac on its own ground, which could lay open Washington or Baltimore to capture, something that could enflame peace sentiment in the North.¹⁴

Lee's army crossed the Potomac into Maryland on June 22 and quickly entered Pennsylvania.¹⁵ Over the following days, Confederate soldiers marched as far as Harrisburg and York, extracting money and supplies, and marveling at the prosperity of the free labor farms that they denuded.¹⁶ Confederate soldiers seized free blacks and escaped slaves, sending them south into bondage.¹⁷ Anxiety prevailed both in the federal government and in the northern population.¹⁸ The Union army moved quickly to intercept the Confederate army, and the two clashed at the crossroads town of Gettysburg.

Advanced units fought west of the town on July 1.¹⁹ After sharp fighting, Union troops fell back to a good defensive position south of Gettysburg, near the town's Evergreen Cemetery, on land centering on Cemetery Ridge.²⁰ On July 2, Confederate troops attacked, driving back Union troops in exposed positions, but eventually were repulsed after both appalling slaughter and memorable acts of heroism on each side.²¹ The following day, July 3, Lee ordered a frontal assault by Confederate infantry, including the Virginia division led by General George Pickett, on reinforced Union defenders dug in on Cemetery Ridge and supported by superior artillery.²² Despite remarkable determination, the Confederate troops were annihilated, so that "Pickett's Charge" became the last moment when the South might have won the war on a battlefield.²³ The Confederate army drew off and retreated to Virginia; the Union army, traumatized and spent, pursued listlessly.²⁴

The reaction in Northern states was jubilant.²⁵ The Battle ended the threat of invasion and proved a decisive and heartening victory for the

13. *Id.*

14. *Id.* at 15.

15. *Id.* at 108.

16. *Id.* at 108-13.

17. *Id.* at 111-12. Sears comments, "The number of free or fugitive blacks condemned to slavery during these weeks can only be estimated, but widespread testimony suggests that it was in the hundreds." *Id.* at 112.

18. *Id.* at 110.

19. *Id.* at 162-67.

20. *Id.* at 242-43.

21. *Id.* at 264-76.

22. *Id.* at 349.

23. *Id.* at 371.

24. *Id.* at 477-78.

25. *Id.* at 478.

Army of the Potomac, so often previously bested by Lee's forces.²⁶ The public, steeped in Christian lore, saw the victory as a providential deliverance for the righteous cause.²⁷ More practically, Lincoln and his allies also understood the political value of the victory, which muted Northern antiwar sentiment and effectively ended the possibility of European intervention on behalf of the Confederacy.²⁸

B. *Preserving the Battlefield*

Commemoration of the struggle and preservation of the site began immediately. The first effort was to cope with the mass of dead and injured soldiers. A suitable burying place for the Union dead was quickly acquired and laid out.²⁹ The Soldiers' National Cemetery was dedicated adjacent to the battlefield on November 19, 1863, when Lincoln delivered his celebrated Gettysburg Address, the most enduring attempt to give meaning to the carnage.³⁰ The Pennsylvania legislature incorporated the cemetery, which was paid for by the states whose soldiers were interred there.³¹ The federal government took ownership in 1870.³² The War Department administered it as a national military cemetery until 1933, when it was taken over by the NPS.³³

A Gettysburg lawyer, David McConaughy, began to purchase land on the battlefield for preservation within days of the fighting.³⁴ The Pennsylvania legislature in April 1864 chartered the Gettysburg Battlefield Memorial Association (GBMA) "to hold and preserve the

26. *Id.*

27. NICHOLAS GUYATT, PROVIDENCE AND THE INVENTION OF THE UNITED STATES, 1607-1876, at 301 (2007).

28. SEARS, *supra* note 4, at 15.

29. *Id.* at 511.

30. One historian has observed, "In a sense, the Gettysburg Address dedicated the entire field of battle." HARLAN D. UNRAU, ADMINISTRATIVE HISTORY: GETTYSBURG NATIONAL MILITARY PARK AND GETTYSBURG NATIONAL CEMETERY, PENNSYLVANIA, at v (1991).

31. *Id.* at 15-16.

32. Joint Res. 117, 41st Cong. (1870).

33. WEEKS, *supra* note 4, at 119.

34. McConaughy wrote on July 25, 1863, to the Governor of Pennsylvania that he already had purchased

"all the land on Cemetery Hill which encircles the Evergreen Cemetery Grounds. . . . In doing so I have had two purposes, one to enlarge the area of our Cemetery . . . and (2) to secure so as to be held in perpetuity the most interesting portions of the illustrious Battlefield that we may retain them in the actual form & condition they were in during the battle, the most eloquent memorials of those glorious struggles and triumphs."

BARBARA L. PLATT, "THIS IS HOLY GROUND": A HISTORY OF THE GETTYSBURG BATTLEFIELD, 1863-2006, at 3 (2006).

battle-grounds of Gettysburg . . . and by such perpetuation, and such memorial structures as a generous and patriotic people may aid to erect, to commemorate the heroic deeds, the struggles, and the triumphs of their brave defenders.”³⁵ The preservation and memorialization effort was devoted solely to the Union effort.³⁶ After 1880, the premier Union veterans’ organization, the Grand Army of the Republic (GAR), gained control of the GBMA.³⁷ By the time the federal government established the National Military Park at Gettysburg in 1895, the GBMA controlled 522 acres of land, upon which were 17 miles of avenues and 320 monuments.³⁸ Northern state legislatures paid the bulk of the costs of these monuments, which commemorated regiments and individuals who fought for the Union.³⁹ Indeed, Northern state legislatures provided almost the entire budget for the GBMA, which was perennially short of money, although the federal government eventually paid off substantial accumulated debt.⁴⁰ Despite difficulties, the GBMA’s preservation accomplishment was unprecedented: it was the first American battlefield set aside and managed for study and reflection, a pioneering attempt to preserve historic landscape.⁴¹

Public interest in preserving Civil War battlefields grew through the 1880s, for complex reasons. The aging of veterans, mounting interest in regional reconciliation, growing affluence, improved rail transportation, nostalgia for a more rural and less ethnic past, new historical consciousness, and greater federal government powers all fueled calls for the federal government to take a strong hand in organizing parks at the sites of important Civil War battles.⁴² Congress created the Chickamauga and Chattanooga National Park by statute in 1890, the first national historic park to commemorate two battles fought in sequence in southeastern Tennessee.⁴³ By doing so, Congress sought to improve on the GBMA’s model in Gettysburg by honoring Southern, as well as

35. An Act To Incorporate the Gettysburg Battle-Field Memorial Association (Pa. 1864), reprinted in John M. Vanderslice, *Gettysburg: A History of the Gettysburg Battle-Field Memorial Association 199-201* (1896), available at <http://www.gdg.org/Research/Monuments/gbmahist.html>.

36. HENRY SWEETSER BURRAGE, *GETTYSBURG AND LINCOLN: THE BATTLE, THE CEMETERY, AND THE NATIONAL PARK* 143-44 (1906).

37. WEEKS, *supra* note 4, at 21-22.

38. *Id.* at 60-61.

39. *Id.* at 21-24.

40. *Id.* at 20-21.

41. *Id.* at 116.

42. See MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 119-20 (1991).

43. An Act To Establish a National Military Park at the Battle-field of Chickamauga, ch. 806, 26 Stat. 333 (1890) (codified as amended at 16 U.S.C. § 424 (2000)).

Northern participants, and by authorizing acquisition of a large area, 7600 acres, and construction of eight highways connecting major areas.⁴⁴ Congress also adopted a public management structure of three commissioners (two of whom had participated in the battles), who served under the direction of the Secretary of War and employed an “assistant in historical work.”⁴⁵ States could erect memorials to their troops where they had engaged, subject to supervision by the Secretary of the Interior.⁴⁶ Innovatively, the statute authorized the Secretary to lease acquired land to cultivators on condition that they would “preserve the then buildings and roads and the then outlines of field and forest.”⁴⁷ This early attempt at historic landscape management used lease terms that anticipated modern preservation easements.⁴⁸ Additional national battlefield parks were created by statute at Antietam in 1891, Shiloh in 1894, and Vicksburg in 1899.⁴⁹

The federal government’s acquisition of the Gettysburg battlefield proceeded somewhat fitfully. Congress first engaged directly with the Gettysburg National Military Park in 1887, when it appropriated \$15,000 to mark the locations and lines of regular United States Army regiments in the Battle, in anticipation of the twenty-fifth anniversary reunion of veterans in 1888.⁵⁰ Bills subsequently were introduced for further federal action at Gettysburg, particularly to mark the positions of the Confederate army, but none were enacted immediately, perhaps because of negotiations about how to coordinate federal actions with the GBMA.⁵¹ In 1893, Congress appropriated \$25,000 for determining and “preserving the lines of battle” and positions of all armies.⁵² Secretary of War Lamont, to whom the task was entrusted, then appointed a three-man commission to undertake the work.⁵³ The Commission condemned

44. JOHN C. PAIGE & JEROME A. GREENE, ADMINISTRATIVE HISTORY OF CHICKAMAUGA AND CHATTANOOGA NATIONAL MILITARY PARK ch. 1 (1983), available at http://www.nps.gov/hisotry/history/online_books/chch/adhi1.htm.

45. *Id.*

46. *Id.*

47. 16 U.S.C. § 424 (2006).

48. RONALD F. LEE, THE ORIGIN AND EVOLUTION OF THE NATIONAL MILITARY PARK IDEA 31-32 (1973). Preservation easements are a form of conservation easement, a private servitude by which an owner conveys to a nonprofit or governmental holder controls over the alteration of the historic features of a property.

49. See TIMOTHY B. SMITH, THE GOLDEN AGE OF BATTLEFIELD PRESERVATION: THE DECADE OF THE 1890’S AND THE ESTABLISHMENT OF AMERICA’S FIRST FIVE MILITARY PARKS 89, 123 (2008).

50. *Id.* at 24-25.

51. WEEKS, *supra* note 4, at 63-64.

52. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 669-70 (1896).

53. Sundry Civil Appropriations Act of Mar. 3, 1893, ch. 208, 27 Stat. 599 (1893).

electric railway lines on the battlefield, an action that was upheld by the Supreme Court in 1896; that important decision is analyzed in detail in Part III.⁵⁴

While the litigation was pending, Congress enacted legislation to establish Gettysburg Military National Park as the fourth national battlefield park.⁵⁵ The GBMA deeded its land to the United States in exchange for payment of outstanding debts.⁵⁶ The Act empowered the Secretary of War and the commissioners he appointed to receive all the battlefield land assembled by the GBMA, acquire other land within an official map showing the locations of all troops (both Union and Confederate), mark those positions, construct interior roads to facilitate visitor access, take care of the existing monuments and permit new monument construction by interested states, and make regulations for carrying out their duties.⁵⁷ Some provisions of the Act show the rudiments of preservation policy. One provision prohibits persons from damaging or removing any military structures or fences or cutting or injuring any growing tree or bush.⁵⁸ But generally more attention was paid to the care of monuments and marking of military positions, indicating that memorializing and narrating the Battle had higher priority than what later would be considered preservation.⁵⁹ The commission continued to increase the size of the Park, repeatedly using eminent domain to overcome holdouts seeking payments far in excess of market prices. The commission also erected five large steel towers in the 1890s, from which visitors could get wide views of the battlefield, and paved existing roads to facilitate carriage travel within the Park.⁶⁰ Consistent

54. *Gettysburg Elec. Ry.*, 160 U.S. 668.

55. Ch. 80, 53d Cong., Sess. III, 28 Stat. 651 (Feb. 11, 1895). The legislation had been introduced by Representative Daniel Sickles of New York, a controversial political figure who served in Congress before the Civil War, had commanded a division (incompetently) and lost a leg at Gettysburg, and had been a director of the GBMA. THOMAS A. DESJARDIN, *THESE HONORED DEAD: HOW THE STORY OF GETTYSBURG SHAPED AMERICAN MEMORY* 61-69, 165 (2004).

56. *Id.* § 1.

57. *Id.* §§ 1, 3-4, 6.

58. *Id.* § 7.

59. An Inspector reported to the War Department in 1904 that since

July, 1893, there have been constructed 20 miles of Telford avenues; 13 ½ miles of avenue fencing . . . ; 12½ miles of fencing built of posts and rails; 13 miles of gutter paving. Five and one-quarter miles of stone walls have been rebuilt at locations where stone walls existed at the time of the battle. Three hundred and twenty-four guns have been mounted; 462 tablets have been erected, and 17,100 trees have been planted. These trees are planted on ground that was covered with trees at the time of the battle.

1893-1904 GETTYSBURG NATIONAL MILITARY PARK COMMISSION ANNUAL REPORT 105 (1905).

60. *Id.* at 30-31; WEEKS, *supra* note 4, at 89.

with the War Department's primary mission, the Pennsylvania National Guard spent a week each year training on the battlefield.⁶¹ During World War I, Camp Colt was established on the battlefield as a United States Army training facility.⁶²

The War Department supervised the Park until President Roosevelt transferred all battlefield parks to the NPS in 1933.⁶³ The NPS, founded in 1916, had become heavily involved with historic preservation during the 1920s.⁶⁴ Inspired in part by the professional standards established in private preservation and restoration efforts, the NPS institutionalized historic preservation expertise within the federal government.⁶⁵ In 1935, Congress entrusted the NPS with important duties under the Historic Sites Act, which enhanced professional standards for the appraisal of proposed historic landmarks and tools for preservation.⁶⁶ The landmark 1966 National Historic Preservation Act (NHPA) confirmed the role of the NPS in establishing the criteria and administrative processes for the National Register of Historic Places.⁶⁷ In addition to expanding the role of the NPS, the NHPA gave authority to oversee its mandatory planning and consultation process to protect historic properties to the new Advisory Council on Historic Preservation, which soon became an independent agency with power to supervise compliance by all federal agencies, including NPS.⁶⁸

During these years, the NPS also attempted to cope with large increases in the number of parks it administered and, after 1945, exploding public visitation fueled by postwar consumer affluence and unprecedented automobile travel.⁶⁹ At Gettysburg, the NPS expanded visitor facilities, in some cases taking over educational or entertaining attractions that had been offered by private entrepreneurs in the adjoining

61. WEEKS, *supra* note 4, at 80.

62. See Camp Colt, <http://www.globalsecurity.org/military/facility/camp-colt.htm> (last visited Jan. 23, 2009).

63. Exec. Order No. 6166 (June 10, 1933), *reprinted as amended in* 5 U.S.C. § 901, at 733 (2000).

64. WEEKS, *supra* note 4, at 119.

65. See CHARLES B. HOSMER, JR., PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST, 1926–1949, at 469 (1981).

66. Historic Sites, Buildings and Antiquities Act, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461–467 (2006)).

67. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. § 470a(a)(2) (2006)). Section 101(a)(1)(A) of the NHPA authorizes the Secretary of the Interior to “expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.” 16 U.S.C. § 470a(a)(1)(A).

68. 16 U.S.C. § 470i(a).

69. See WEEKS, *supra* note 4, at 124.

village.⁷⁰ In 1962, NPS opened its first permanent visitor center at Gettysburg, designed in striking modernist fashion by renowned architect, Richard Neutra.⁷¹ In addition to housing a massive cyclorama painting of Pickett's Charge, the Neutra building beckoned visitors from the parking lot through its modern air-conditioned facilities, within which interpretive displays explained the Battle and then guided them directly into the center of the battlefield on Cemetery Ridge.⁷² In 1973, the NPS also acquired the adjacent Rosensteel Museum, along with its "electric map" and vast collection of Gettysburg artifacts, and made that its new visitor center, relegating the Neutra structure to be known simply as the Cyclorama Center.⁷³

For many years, various commercial attractions had clustered around the Park, catering to tourists. These greatly expanded in the 1950s and included the Prince of Peace Museum (where wax figures enacted the life of Christ), Fantasyland (which featured fairy tale characters and pony rides), and Fort Defiance (focused on Indians and guns).⁷⁴ In 1971, *U.S. News and World Report* complained about "fast-growing strips of motels, filling stations, quick-order restaurants, commercial museums and souvenir stands."⁷⁵ Concerns about intrusions on the experience of visiting the battlefield soon centered on a 307-foot observation tower constructed by Thomas Otterstein, a real estate developer, in 1974, on privately owned land 400 feet from the boundary of the battlefield Park.⁷⁶ The tower had a space-age, needlelike design. The NPS and state authorities unsuccessfully pursued legal means to prevent construction of the tower. Part IV looks more carefully at this litigation and the preservation issues it embodied. In a curious replay of *United States v. Gettysburg Electric Railway Co.*, the federal government condemned the land upon which the tower stood and demolished the structure in 2000.⁷⁷

70. *Id.* at 126-27.

71. *See id.* at 124.

72. *Id.* at 124-25.

73. WEEKS, *supra* note 4, at 136; NPS, HISTORIC AMERICAN BUILDINGS SURVEY: CYCLORAMA BUILDING 52 (2004).

74. WEEKS, *supra* note 4, at 161-63.

75. SARAH ALLABACK, MISSION 66 VISITOR CENTERS: THE HISTORY OF A BUILDING TYPE 136 (2000) (quoting *The Second Battle of Gettysburg*, U.S. NEWS & WORLD REPORT, Oct. 18, 1971, at 66-67).

76. Adam Bernstein, Obituary, *Thomas R. Ottenstein, Built Gettysburg Tower*, WASH. POST, Aug. 3, 2000, at B07.

77. John M.R. Bull, *Gettysburg Regains Its Civil War-Era Battle Vista as Observation Tower Falls*, PITTSBURGH POST-GAZETTE, July 4, 2000, available at <http://www.post-gazette.com/regionstate/20000704tower2.asp>.

The NPS currently is seeking to carry out the terms of its 1999 General Management Plan for the Park, which places at its center restoration of both natural and artificial elements of landscape to conditions approximating those on the eve of the Battle.⁷⁸ The Gettysburg Foundation, a nonprofit corporation, has raised over \$100 million in private funds to support implementation of the plan, which includes the construction of a new visitor center removed from the battlefield to house the cyclorama painting and museum collections.⁷⁹ As part of this plan, the NPS decided to demolish the Neutra cyclorama building, principally so it could restore the land where it sits to its 1863 pre-Battle condition.⁸⁰ In December 2006, the Recent Past Preservation Network, a nonprofit organization, sued the NPS, alleging that its decision to demolish the Neutra building violated the NHPA.⁸¹ This litigation shows that controversy persists about what to preserve and how. Part V examines this controversy, which raises fundamental questions about how and why a battlefield should be preserved.

C. Conclusion

The Gettysburg battlefield is the site of the most significant battle and presidential speech in U.S. history, as well as of pioneering federal efforts at historic preservation. While no one doubts the merit of preserving the battlefield, changing values have shaped how the site has been interpreted, and conflicts have arisen about how to balance competing values. Examination of the legal decisions concerning preservation at Gettysburg reveals the presuppositions behind the purposes served by commemoration and the strengths and weaknesses of the legal tools employed.

III. "PATRIOTIC" PURPOSES

A. Purposes of Historic Preservation

In her foundational 1981 article, Carol Rose explicated three perspectives or purposes that have dominated the development of historic

78. Record of Decision, General Management Plan and Environmental Impact Statement, Gettysburg National Military Park, 64 Fed. Reg. 71,483-71,492 (Dec. 21, 1999).

79. NPS, Park Superintendent To Head Gettysburg Foundation (Nov. 7, 2008), <http://www.nps.gov/gett/parknews/park-superintendent-to-head-gettysburg-foundation.htm>.

80. 64 Fed. Reg. 71,485.

81. Business Wire, Recent Past Preservation Network Sues National Park Service To Prevent Removal of Historic Building at Gettysburg, *available at* <http://www.mission66.com/cyclorama/> (last visited Feb. 9, 2009).

preservation law.⁸² The first to arise was a patriotic purpose, dominant in the nineteenth century, seeking to save places and buildings associated with significant persons and events in American history.⁸³ The second is an aesthetic purpose, aiming to preserve the integrity of buildings and other structures that display architectural merit or exemplify historic architectural styles.⁸⁴ The third purpose seeks to maintain more generally the distinctive “sense of place” that older buildings give communities.⁸⁵ These purposes overlap in many cases, have persisted into the present, and do not exhaust the goals of historic preservation.⁸⁶ Nonetheless, they offer useful organizing principles for thinking about the social roles played by historic preservation law.

The chief subject of Rose’s article was to explore the third rationale for preservation, protection of neighborhood community identity, whereby historic district regulations prevent demolitions and permit alterations and new construction on private property within designated historic districts only if “compatible” with, or “appropriate” to, the historically significant architectural context.⁸⁷ She recognized that contests over local community building reflect power relations.⁸⁸ She urged adoption of enhanced procedures for participation in such deliberations, so that the voices of minorities within and interested persons outside the designated areas would be heard.⁸⁹ Historic preservation laws of this sort combine professional evaluation of the

82. Rose, *supra* note 8, at 479-80.

83. *Id.* at 479.

84. *Id.* at 480.

85. *Id.*

86. NPS regulations establish criteria for eligibility for listing properties on the National Register of Historic Places. 36 C.F.R. § 60.4 (2008). The four elements of historical significance relate directly to the values embodied in historic preservation generally. Those properties have significance that possess integrity and

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction . . . or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history.

Id.

87. Rose, *supra* note 8, at 488-92. For an example of such a regulation, see the District of Columbia Historic Landmark and Historic District Protection Act, D.C. CODE § 6-1101 (2006).

88. See Rose, *supra* note 8, at 488-92.

89. *Id.*

historic environment with explicit and implicit interpretations of meaning that are broadly political.⁹⁰

By contrast, Rose's treatment of preservation for "patriotic" purposes assumes that such endeavors enshrine simple, well-recognized values.⁹¹ Specifically, she writes that "Gettysburg may seem the easy case."⁹² She understands that such shrines help to create a "national community" and that early preservationists attributed "political significance to physical surrounding."⁹³ But while she sees dangers and argues for examination of the processes to mitigate potential abuses of power when the preservation purposes are aesthetic or "community building,"⁹⁴ she overlooks the potential for distortion or oppression in patriotic preservation. It is this last issue that will be considered in this Part in connection with Gettysburg.

Preservation for primarily aesthetic ends seems to present simpler choices than preservation for community-building or patriotic purposes. The end suggests the means. An aesthetically significant building, especially those features that make it significant and contextualize it, should be kept as close to its original look as possible.⁹⁵ Of course, decisions about subsequent additions or changes must often be made. Should they be eliminated or earlier features recreated?⁹⁶ Also, some compromises with current needs will be made, like installing air-conditioning to preserve fragile items or encourage tourists to visit. But when the goal of preservation is to protect some physical structure

90. For more on the operation and social consequences of historic districts that lack a strong aesthetic coherence or association with an historically significant person or event, see J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405 (2004); Tad Heuer, Note, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768 (2007); Michael deHaven Newsom, *Blacks and Historic Preservation*, 36 LAW & CONTEMP. PROBS. 423 (1971); Tipson, *supra* note 9.

91. See NORMAN TYLER, *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE* 34 (2000) ("Nineteenth- and early twentieth-century organizations, including historical or patriotic societies, family organizations, and government agencies, saved landmark buildings more for patriotic reasons than because of their architectural significance.").

92. Rose, *supra* note 8, at 484.

93. *Id.* at 488, 492.

94. *Id.* at 487, 517-24.

95. Preservation primarily for aesthetic ends generally is taken to have begun with the work of the Society for the Preservation of New England Antiquities, founded in 1910, which sought to preserve colonial houses that exhibited traditional craft and design. See MICHAEL HOLLERAN, *BOSTON'S CHANGEFUL TIMES: ORIGINS OF PRESERVATION AND PLANNING IN AMERICA* 218-36 (1998); JAMES LINDGREN, *PRESERVING HISTORIC NEW ENGLAND: PRESERVATION, PROGRESSIVISM, AND THE REMAKING OF MEMORY* (1995).

96. Philip Kennicott, *Madison's Makeover*, WASH. POST, Aug. 13, 2006, at N1 (describing \$23 million project to restore Montpelier mansion to its appearance when it was Madison's home in 1817).

because it is beautiful or historically interesting, such as a Frank Lloyd Wright house or a Richardson church, the aesthetic goal provides the criteria for choosing how to preserve.⁹⁷

When a site is preserved because of persons associated with it or because of major events that occurred there, the choices made to commemorate it may be more contestable. People and events can be commemorated in many ways—such as through statues, paintings, books, films, or Web sites. Early preservationists did not take a primarily curatorial approach to sites that evoked past events or persons:

Nineteenth-century Americans' earliest historical awareness had to do with people and events, which they associated only sometimes with places and seldom with actual remaining structures. . . . History in the environment meant not antiquities surviving from earlier periods, but monuments erected by the present generation. Perhaps the most conspicuous in the nation and one of the most admired was the Bunker Hill monument in Charlestown, a 221-foot granite obelisk built between 1825 and 1843. Not until the end of the century did citizens begin to express regret that the monument's construction had effaced the revolutionary battle's last remaining actual traces.⁹⁸

Civil War battlefields were among the first places Americans sought to preserve in their original form in order to commemorate the events that occurred there. Historically accurate preservation based on scholarly research represents a modern idea of “authenticity.” It grew up with aesthetic goals for preservation and became entwined with significant persons and events by the development of Colonial Williamsburg in the 1920s.⁹⁹ Preservation and restoration reflect modern approaches to commemorating the past.

97. The established character of historic architecture helped persuade courts that early historic district regulations did not have the supposed subjectivity of merely aesthetic judgments. *See, e.g.,* *Town of Deering ex rel. Bittenbender v. Tibbets*, 202 A.2d 232 (N.H. 1964).

98. HOLLERAN, *supra* note 95, at 85.

99. Charles Hosmer's histories of the preservation movement in the United States celebrate the emergence of professional criteria and their pragmatic application to various preservation purposes. *See* Hosmer, *supra* note 65; CHARLES B. HOSMER, JR., *PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG* (1965). Interestingly, when the Society for the Preservation of Virginia Antiquities first acquired the eighteenth century Powder Horn at Williamsburg in 1889, it installed contemporary stained glass windows celebrating significant persons in the Commonwealth's colonial history. JAMES M. LINDGREN, *PRESERVING THE OLD DOMINION: HISTORIC PRESERVATION AND VIRGINIA TRADITIONALISM* 80-81 (1993). These were later removed and the building restored to its eighteenth-century appearance under the auspices of Colonial Williamsburg. *Id.*

B. Inevitable Interpretation

Past events and historical personages require interpretation. We can only encounter them at a preservation site through the mediation of cultural resource managers who communicate some understanding of the event or person through the choices they made about how to present the site. In this, a park superintendent or other manager resembles a biographer or historian, although the former may have political allegiances, duties to the public, or economic constraints that shape the interpretation as much as or more than does professional research.¹⁰⁰ When the government interprets historic sites, there is a risk that they will present “official versions” of events,¹⁰¹ but also a promise that diverse views can be heard. Celebrations of, and continuing controversy over, the Vietnam Veterans Memorial in Washington, D.C., illustrate this well: Maya Lin’s descending black wall inscribed with the names of the dead captures the essence of the war experience for many, but has been criticized strenuously by those who think it slights the national mission or the heroism of the soldiers that served. Sometimes insurgent groups consciously can change the public meaning of a memorial, as civil rights groups did the Lincoln Memorial.¹⁰²

Like the interpretive choices made in designing a memorial, preserving a place or a building because a significant person or event is associated with it also requires interpretations reflecting what is important to the public today. For example, the Mount Vernon Ladies Association has long preserved George Washington’s home at Mount Vernon, but its portrayal of slavery has evolved.¹⁰³ For more than a century, the house has conveyed how Washington’s life as a Virginia planter shaped his commitments to public service. Visitors might have

100. See LOWENTHAL, *POSSESSED BY THE PAST*, *supra* note 10, at 167-68. Michael Kammen argues that often the concept of “heritage seems to be very nearly a euphemism for selective memory because it entails, in functional terms, what history has customarily meant in everyday practice: namely, that portion of the past perceived by a segment of society as significant at any given moment.” KAMMEN, *supra* note 42, at 625. He notes elsewhere that heritage represents “an impulse to remember what is attractive or flattering and to ignore all the rest.” *Id.* at 626.

101. Early preservationists favored strictly private preservation because of “fear that government money might mean government control of presentation” but also from a belief that preservation decisions should be made by a cultured elite. See KAMMEN, *supra* note 42, at 264.

102. Scott A. Sandage, *A Marble House Divided: The Lincoln Memorial, the Civil Rights Movement, and the Politics of Memory*, 80 J. AM. HIST. 135, 136 (1993) (“Blacks strategically appropriated Lincoln’s memory and monument as political weapons, in the process layering and changing the public meanings of the hero and his shrine.”).

103. George Washington’s Mount Vernon Estate & Gardens, Preservation & Archaeology, http://www.mountvernon.org/learn/pres_arch/index.cfm/ (last visited Feb. 9, 2009).

been dimly aware of the servants who worked on the plantation. Today, visitors also encounter carefully reconstructed slave quarters detailing the experiences of enslaved workers.¹⁰⁴

In our multicultural society, preservation tourists are interested in the issues that resonate with their own time. Contemporary preservation seeks to portray the experiences of those shunted to the shadows in their own time, as well as of indispensable soldiers and statesmen.¹⁰⁵ Such exhibits convey past struggle and injustice, as well as achievement and victory.¹⁰⁶ These exhibits often present humble buildings of little aesthetic interest or even blank sites, which must be interpreted by symbols and text.¹⁰⁷ They grip us because they provide material images and perspectives on the moral paradoxes that persist in American history.¹⁰⁸

“Patriotism” does not capture the various values these exhibits or memorials express. The term itself is elusive. Love of country can be a vague emotion or the affirmation of a particular political vision. Many definitions imply ideological content. The word was used in England in the seventeenth century for persons supporting traditional rights against the prerogatives of the king¹⁰⁹ and in the United States for those actively defending against foreign invaders.¹¹⁰ The variety of meanings imparted to “patriotism” is reflected in the names of many contemporary “militia” groups defending gun rights and opposing taxes.¹¹¹

104. George Washington’s Mount Vernon Estate & Gardens, *Reconstructing a Slave Cabin at Mount Vernon*, http://www.mountvernon.org/learn/pres_arch/index.cfm/pid/938/ (last visited Jan. 17, 2009) (describing Mount Vernon’s slave quarters reconstruction).

105. DOLORES HAYDEN, *THE POWER OF PLACE: URBAN LANDSCAPES AS PUBLIC HISTORY* 48-50 (1995).

106. *Id.*

107. For example, the excavated foundations of the President’s House, where Washington and his family lived for several months each year while Philadelphia was the national capital, have been interpreted primarily to describe the enslaved people who served the household (two of whom escaped), and Washington’s unsuccessful efforts to recover them employing fugitive slave laws. See REBECCA YAMIN, *DIGGING IN THE CITY OF BROTHERLY LOVE* 44-54 (2008). Community members pressured the NPS not to ignore the relics of slavery on the site of the new Liberty Bell Center. See *id.*

108. A remarkable attempt to present the space within which slaves worked and lived, using photographs and architectural drawings from the 1930s Historic American Buildings Survey, is JOHN MICHAEL VLACH, *BACK OF THE BIG HOUSE: THE ARCHITECTURE OF PLANTATION SLAVERY* (1993).

109. RAPHAEL SAMUEL, *PATRIOTISM: THE MAKING AND UNMAKING OF BRITISH NATIONAL IDENTITY* 58 (1989).

110. GEORGE OTTO TEVELYAN, *THE AMERICAN REVOLUTION* 62-63 (1912).

111. Examples of such “militia” groups include: American Rebel Militia, Christian Patriots Defense League, Louisiana Constitutional Militia, Michigan Militia, National Alliance, and Southeastern Ohio Defense Force.

However straightforward the attitudes of nineteenth-century preservationists may seem, historians have come to see in them a variety of ideological presuppositions and engagements with contemporary social concerns.¹¹² No historical legacy has been more fraught or contested than that of the Civil War.¹¹³ Gettysburg long has been the chief “shrine” to that war. Remarkable scholarly literature has emerged that studies the history of memories of the Civil War and their popular expressions.¹¹⁴ This literature often presents or analyzes developments at Gettysburg or casts indirect light upon it. It encourages us to unpack the choices and presuppositions made in preserving the Gettysburg battlefield and provides us with a basis to better understand the legal instruments used in its preservation and consider their ongoing suitability.

Gettysburg National Military Park has always evoked powerful sentiments, the ideological content of which has changed over time. The Battle and the memorial site have meant different things to different people, and the decisions about how to preserve the site have evolved. The legal decisions concerning the Park have reflected dominant ideas of their times, even as they sought to preserve against perceived threats what was thought to be of value. The most important of these is *Gettysburg Railway*, where the United States Supreme Court held that the federal government possessed constitutional authority to take land for historic preservation purposes by eminent domain.¹¹⁵ The unanimous opinion gave federal historic preservation law a constitutional foundation.¹¹⁶ Its rhetoric also created the archetype for understanding patriotic preservation. The next Subpart analyzes that decision and the light it sheds on the relation between preservation and history.

C. *Gettysburg Electric Railway*

In the early 1890s, entrepreneurs in Gettysburg constructed an innovative electric railway service to permit the growing number of

112. See KAMMEN, *supra* note 42; EDWARD T. LINENTHAL, SACRED GROUND: AMERICANS AND THEIR BATTLEFIELDS (1993); LOWENTHAL, THE PAST IS A FOREIGN COUNTRY, *supra* note 10.

113. See generally DAVID BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001) (pointing out the effects of Civil War on race relations, American culture and society, soldiers and their families, and politics).

114. *Id.*; DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR (2008); THE MEMORY OF THE CIVIL WAR IN AMERICAN CULTURE (Alice Fahs & Joan Waugh eds., 2004).

115. United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896).

116. *Id.* at 680-83.

tourists to get around the perimeter of the Park.¹¹⁷ “The trolley opened the battlefield to the many who could not afford a [carriage], but it drew fire from some veterans’ groups and the GBMA, which had planned to place memorials on the track path.”¹¹⁸ Congress had authorized the Secretary of War to condemn lands “upon or in the vicinity of [the] battlefield”¹¹⁹ in order to preserve, mark, and provide access to the lines of battle of both armies.¹²⁰ The federal commissioners sought to buy the private land over which the tracks ran but could not reach an agreement with the railway company.¹²¹ They then exercised their authority to force sale through an action of eminent domain.¹²² The United States District Court for the Eastern District of Pennsylvania held that the United States lacked constitutional authority to condemn land for the purposes stated.¹²³

The Supreme Court’s decision in *Gettysburg Railway*, unanimously reversing that judgment, is a crucially important precedent establishing broad federal authority to preserve historic sites. Surprisingly, a Court that had held less than one year earlier that the Sherman Antitrust Act could not reach a national monopoly in sugar production because the United States Constitution did not allow Congress to regulate manufacturing,¹²⁴ here held that it did not even need to specify under which enumerated power preservation fell:

No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those

117. WEEKS, *supra* note 4, at 71.

118. *Id.* at 71-72.

119. Joint Res. No. 30, June 5, 1894, 28 Stat. 584 (authorizing the Secretary to purchase or condemn the lands).

120. Act of March 3, 1893, ch. 208, 27 Stat. 572, 599 (1893). This enactment implied authorization to purchase land. *See id.* Another important statute, Act of March 3, 1888, ch. 728, 25 Stat. 357, still in effect and codified at 40 U.S.C. § 3113 (2000), provides that whenever an officer of the United States has been authorized to “procure” land for public use, the officer is authorized to procure the land by condemnation.

121. The Condemnation Act, 40 U.S.C. § 3113 (2000), first enacted in 1888, authorizes the use of condemnation by any federal officer having statutory power to acquire real property for public purposes. Later statutes gave specific authority to take land at Gettysburg. *See infra* Part III.D. In addition to its claims based on the Constitution, Gettysburg Railway argued that Congress had not appropriated funds for condemning its land, but the Court rejected this argument based on its reading of the appropriation statutes. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 679-80 (1896). When the government filed its condemnation action, it did not yet own any land in the battlefield park. *Id.*

122. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 671 (1896).

123. *Id.* at 672-73.

124. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.¹²⁵

The trolley company argued that the preservation purposes recited in the statute were not within the purposes for which Congress could legislate under Article 1, Section 8, of the Constitution.¹²⁶ Only a few years before, the Court had upheld as a matter of first impression the constitutional authority of the federal government to condemn land for a public park, but had relied on Congress's plenary authority over the District of Columbia to sustain the action.¹²⁷ In *Gettysburg Railway*, the Court barely discussed the meaning of "public use" in the Fifth Amendment, but analyzed Congress's powers to act at all to preserve an important historic site.¹²⁸ It is important to emphasize that the trolley company's argument, which prevailed with the lower court, did not depend on anything peculiar to eminent domain and the "public use" clause, in the manner of *Kelo*.¹²⁹

Examining the Court's reasons for sustaining federal power here requires an unusually long quotation from Justice Peckham's opinion. The cumulative effect of the rhetoric, overflowing any paragraph structure, conveys a depth of feeling:

The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself and the perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the

125. *Gettysburg Elec. Ry.*, 160 U.S. at 683.

126. *Id.* at 679-81.

127. "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power." *Shoemaker v. United States*, 147 U.S. 282, 297 (1893) (upholding taking of land for Rock Creek Park in Washington, D.C., as public use).

128. *Gettysburg Elec. Ry.*, 160 U.S. at 680-83.

129. See *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding as a public use condemnation for economic redevelopment).

present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defence in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country, which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense.¹³⁰

The Court in *Gettysburg Railway* concluded that Congress's authority to use eminent domain flowed from its collective enumerated powers.¹³¹ Historic preservation that fosters attachment to the federal government must be within federal legislative authority.¹³² The Court posited that visitors to the battlefield would be touched by the enormity of the struggle and the sacrifice of the soldiers, and consequently moved to love the political institutions that the soldiers saved and which now appropriately honor their sacrifice.¹³³ The opinion forcefully identified the chief goal of such preservation as "to enhance [the citizen's] love and respect for those institutions for which these heroic sacrifices were

130. *Gettysburg Elec. Ry.*, 160 U.S. at 681-83.

131. *See id.* at 683.

132. *Gettysburg Railway* also provides impressive support for federal regulatory power over private property to promote historic preservation. The NHPA avoids such direct federal regulation—sometimes seen as a constitutional necessity. But *Gettysburg Railway* holds that there is ample legislative authority among Congress's enumerated powers, with eminent domain being treated as merely another aspect of the legislative power. *See id.* at 683-85.

133. *Id.* at 682.

made.”¹³⁴ The Court further compared the government’s interest to its “right to bury its own soldiers and to see to it that their graves shall not remain unknown or unhonored.”¹³⁵ Professor Rose characterizes *Gettysburg Railway* as the classic account of preservation for patriotic purposes “framed in the language of trust among generations.”¹³⁶

The rather bland label of patriotic sentiment obscures considerable conflict over the meaning of the Battle of Gettysburg, which was reflected in the choices made for how the site was preserved and presented. Drew Gilpin Faust recently wrote: “The Civil War matters to us today because it ended slavery and helped to define the meanings of freedom, citizenship, and equality. It established a newly centralized nation-state and launched it on a trajectory of economic expansion and world influence.”¹³⁷ Different Americans at different times have held very different understandings of what the war signified and how it should be commemorated. Consideration of these understandings will highlight the choices and omissions at the Park and in the Court’s rhetoric of preservation. This is important because all preservation efforts involve choices as to ends and means. When government takes a hand in preservation, it acts to shape cultural self-understanding. Understanding the institutions and processes by which officials have made or guided these choices can help assess the adequacy of our legal instruments for preservation.

The initial preservation efforts at Gettysburg sought to honor the Union dead who gave their lives to repel invaders and protect Northern homes.¹³⁸ The Northern press celebrated the Battle as delivery from a dangerous and resourceful enemy.¹³⁹ Confronting the extent of death in such a small area, however, traumatized town residents and military observers.¹⁴⁰ Historian Gabor Boritt described the Battle as “the greatest man-made disaster in American history.”¹⁴¹ One writer has described the extent of the carnage at Gettysburg:

[T]he fighting stretched over three days, delaying attention to the dead as military demands on the living continued unabated. By July 4, an estimated six million pounds of human and animal carcasses lay strewn

134. *Id.*

135. *Id.* at 683.

136. Rose, *supra* note 8, at 484.

137. FAUST, *supra* note 114, at xiii.

138. WEEKS, *supra* note 4, at 18-19.

139. SEARS, *supra* note 4, at 478.

140. FAUST, *supra* note 114, at 69-71.

141. GABOR BORITT, *THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS* 19 (2006).

across the field in the summer heat, and a town of 2,400 grappled with 22,000 wounded who remained alive but in desperate condition. . . . So many bodies lay unburied that a surgeon described the atmosphere as almost intolerable. Residents of the surrounding area complained of a “stench” that persisted from the time of the battle in July until the coming of frost in October.¹⁴²

The first visitors to the battlefield sought after lost husbands and children, or after souvenirs or booty.¹⁴³ “Hideous sights, smells, sounds, and clouds of flies plagued the town for weeks after the Battle, exacerbated by visitors digging up graves in search of dead relatives.”¹⁴⁴ The first land set aside on the site was for the burial of killed Union soldiers, whose bodies were retrieved from temporary graves in the fields and eventually interred in the Soldiers’ National Cemetery.¹⁴⁵ Confederate dead, however, remained in unmarked mass graves unless retrieved by family members.¹⁴⁶

Speakers at the dedication of the National Cemetery in November 1863 sought to amplify the meaning of the Battle. The featured speaker, Edward Everett, the most esteemed orator of the period,¹⁴⁷ evoked fear of the consequences of defeat for the Army of the Potomac, asking:

What . . . would . . . have been the fate of the Monumental City, of Harrisburg, of Philadelphia, of Washington, the Capital of the Union, each and every one of which would have lain at the mercy of the enemy,

142. FAUST, *supra* note 114, at 69.

143. *Id.* at 85.

144. WEEKS, *supra* note 4, at 38.

145. NPS, Gettysburg National Military Park Virtual Tour Stop #23, <http://www.nps.gov/archive/gett/gettour/tstops/tstd4-23.htm> (last visited Feb. 9, 2009).

146. “Confederates at Gettysburg were buried in trenches containing 150 or more men, often hurled rather than laid to rest.” FAUST, *supra* note 114, at 71-72.

147. See Jill Teehan, *The Intersection of Gender and Early American Historic Preservation: A Case Study of Ann Pamela Cunningham and Her Mount Vernon Preservation Effort* 15 (May 15, 2007) (unpublished paper), <http://lsr.nellco.org/cgi/viewcontent.cgi?article=102-&context=georgetown/hpps> (citing Charles B. Hosmer, Jr., *Ann Pamela Cunningham, in* KEEPERS OF THE PAST 194 (Clifford L. Lord ed., 1965)). Everett also played a key role in the successful purchase of George Washington’s home by the Mount Vernon Ladies Association, just before the war, widely recognized as the beginning of the historic preservation movement. *Id.* It is notable that Everett’s speech singled out the contributions of Northern women to the war effort, especially their service as nurses to the wounded and dying. EDWARD EVERETT, ADDRESS OF HON. EDWARD EVERETT AT THE CONSECRATION OF THE NATIONAL CEMETERY AT GETTYSBURG, 19TH NOVEMBER 1863, WITH THE DEDICATORY SPEECH OF PRESIDENT LINCOLN AND THE OTHER EXERCISES OF THE OCCASION 60-61 (1864), available at <http://www.archive.org/details/addofhonedev00everich/addofhonedev00everich.pdf>. Everett also invoked the intense personal interests of free blacks and freed slaves in the victory of Northern arms. EVERETT, *supra*, at 34-35. Women have long played a significant role in historic preservation, but not at Gettysburg. Indeed, an essay could be devoted to the battlefields as complex celebrations of “masculine” virtues.

accordingly as it might have pleased him, spurred by passion, flushed with victory, and confident of continued success, to direct his course?¹⁴⁸

Everett excoriated the slaveholders and leaders of the treasonous rebellion responsible for inflicting the agonies of war on peaceful people North and South.¹⁴⁹ At the same time, he expressed the belief that the majority of citizens in the Southern states had never favored secession and would promptly reunite when the rebel forces were smashed.¹⁵⁰ Everett also alluded delicately to the carnage:

The horrors of the battlefield, after the contest is over, the sights and sounds of woe,—let me throw a pall over the scene, which no words can adequately depict to those who have not witnessed it, on which no one who has witnessed it, and who has a heart in his bosom, can bear to dwell.¹⁵¹

Lincoln, of course, articulated the enduring image of the struggle in his brief address.¹⁵² Lincoln spoke as the leader of a “nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”¹⁵³ He equated nationhood with the commitment to equality contained in the Declaration of Independence, but which had been omitted from the Constitution and coexisted with slavery.¹⁵⁴ In Garry Wills’ memorable phrase, Lincoln had “revolutionized the Revolution,” entwining equality with liberty and self-government.¹⁵⁵ A guarantee of equal protection of the laws became part of the Constitution only with the passage of the Fourteenth Amendment in 1868, but then for nearly a century was negated in practice by unsympathetic interpretations by the Supreme Court.¹⁵⁶ The values also were long ignored at the Gettysburg National Military Park.

Lincoln spoke to dedicate a cemetery for Union dead “who here gave their lives that that nation might live.”¹⁵⁷ His rhetoric linked

148. EVERETT, *supra* note 147, at 33-34.

149. *Id.* at 62-64.

150. *Id.* at 70-71.

151. *Id.* at 59. Indiana Governor Oliver P. Morton expressed similar emancipationist views in dedicating a monument at the cemetery in 1870: “The rebellion, the offspring of slavery, hath murdered its unnatural parent, and the perfect reign of liberty is at hand.” BLIGHT, *supra* note 113, at 77 (internal quotation marks omitted).

152. There is no need here to weigh issues about the exact text of the address. I have quoted from the so-called Bliss text used in GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 263 (1992).

153. *Id.*

154. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *reprinted in* WILLS, *supra* note 152, at 263.

155. *Id.* at 38.

156. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875).

157. Lincoln, *supra* note 154.

democracy and liberty, past and future: “[W]e here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.”¹⁵⁸ He claimed that the sacrifice of the Union dead enabled the living to preserve essential democratic government and fulfill the promise of a civic nationalism.¹⁵⁹ The weaving of the promises of liberty and equality from the Declaration with the prospect of a new birth of freedom embraced the ending of slavery (begun by Lincoln’s Emancipation Proclamation earlier in 1863) within a broader notion of America as a harbinger of freedom and democracy throughout the world.¹⁶⁰ Lincoln’s brief address linked the soldiers’ sacrifice with the nation’s most attractive political values.¹⁶¹ Lincoln and Everett upheld what historian David Blight has called an “emancipationist” view of the Battle and war, emphasizing the struggle for freedom and equal citizenship.¹⁶²

Others held different understandings. Gettysburg gripped the national imagination soon after the war, although curiosity and commemoration of military heroism overshadowed more political understandings. A generation traumatized and fascinated by accounts and personal consequences of the great Battle found that viewing the actual sites kindled profound emotions. Garret Epps writes that “in the case of the Civil War, Americans found the pain of the slaughter so great that it all but eclipsed the reasons for the conflict.”¹⁶³ The GBMA maintained the battlefield as a memorial park, similar to the picturesque cemeteries of the time, constructing carriage roads, rebuilding defense

158. *Id.*

159. *Id.*

160. “Most historians . . . believe that the new birth was the freedom for slaves that was decreed by the Emancipation Proclamation and by a constitutional amendment to abolish slavery that Lincoln was soon to endorse.” James M. McPherson, *The Historian Who Saw Through America*, 55 N.Y. REV. BOOKS 46 (2008) (reviewing GEORGE M. FREDRICKSON, *BIG ENOUGH TO BE INCONSISTENT: ABRAHAM LINCOLN CONFRONTS SLAVERY AND RACE* (2008); GEORGE M. FREDRICKSON, *DIVERSE NATIONS: EXPLORATIONS IN THE HISTORY OF RACIAL AND ETHNIC PLURALISM* (2009)). Gabor Boritt shrewdly observed that Lincoln, the master politician, would not have explicitly affirmed the equality of blacks in a speech intended to broadly rally support for the war, even as his words defended emancipation. BORITT, *supra* note 141, at 115-17.

161. In the political theory of Paul Kahn, the sacrifices of the lives of the citizen soldiers symbolically constitute the nation and popular sovereignty in a fully religious sense. “Central to the mystery of the politics of sovereignty is the experience of sacrifice: that which is sacrificed becomes sacred. . . . Lincoln captures this when he speaks of the dead at Gettysburg ‘consecrating’ the land.” PAUL W. KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* 197 (2008).

162. BLIGHT, *supra* note 113, at 2, 18.

163. GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 264 (2006).

works, installing cannons, and placing wooden explanatory placards, while preserving details such as stone walls.¹⁶⁴ One historian argues that early tourists were captured by the “monstrous scene of organized killing set against pastoral American abundance.”¹⁶⁵ By 1879, state legislatures, prompted by Union veterans well organized through the many branches of the GAR (which had gained control of the GBMA), began to fund construction of memorials to regiments.¹⁶⁶ States and regiments competed for the largest and grandest memorials in the choicest locations.¹⁶⁷ “For veterans, placement of a monument at Gettysburg represented public acknowledgement of their entire wartime activity.”¹⁶⁸ Veterans and veteran groups visited frequently, sometimes camping on the grounds.¹⁶⁹ Thus, commemoration of the sacrifice of the Union troops came less to emphasize the ideological meaning of the war and more to celebrate the continuing significance of the participants.¹⁷⁰

D. Federal Preservation of Gettysburg

The federal takeover of the Park in 1895 brought much greater resources for Park management and achieved two immediate purposes.¹⁷¹ First, the government wanted to acknowledge and honor Southern, as well as Northern, soldiers.¹⁷² Second, it wanted to exclude inappropriate modern intrusions from the battlefield.¹⁷³ For both these purposes, the GBMA seemed inadequate and federal authority the better solution. The GBMA's charter embraced only commemoration of Union troops.¹⁷⁴ The Park manager was effectively controlled by the GAR, a Union veterans' organization, and funded by Northern state legislatures.¹⁷⁵ Federal money and management could defend and broaden the interests served by the Park.

The move to commemorate Southern participants in the Battle had several elements. In 1890, all the parts of the battlefield that had been

164. WEEKS, *supra* note 4, at 21.

165. *Id.* at 48.

166. *Id.* at 60.

167. *Id.* at 60-63.

168. *Id.* at 61.

169. *Id.* at 104.

170. The GAR has been called “one of the most successful special-interest groups in all of U.S. history.” Patrick J. Kelly, *The Election of 1896 and the Restructuring of Civil War Memory*, in *THE MEMORY OF THE CIVIL WAR IN AMERICAN CULTURE*, *supra* note 114, at 198.

171. WEEKS, *supra* note 4, at 64.

172. *Id.* at 63-64.

173. *Id.* at 66-68.

174. UNRAU, *supra* note 30, at 53.

175. WEEKS, *supra* note 4, at 21-22.

occupied by Southern lines remained in private hands and were under increasing development pressures.¹⁷⁶ Advocates argued that preservation and interpretation of the Southern lines was necessary to provide an accurate idea of the course of the Battle.¹⁷⁷ The first congressional action taken regarding Gettysburg, in 1893, appropriated money for preserving and marking the positions taken by *both* armies.¹⁷⁸ In appointing commissioners to carry out this work, the Secretary of War expressed the hope that “the lines occupied by both armies in that battle will be so permanently marked as to enable the important and decisive operations conducted there to be clearly seen and understood, and the field preserved in all its essential features.”¹⁷⁹ The aim here was to give visitors a deeper understanding of what happened in the Battle. This notion of historical accuracy was not seen to conflict with the erection of numerous memorials on the field.

But a larger goal was also at work here. By the 1890s, Gettysburg offered a site for celebrating and confirming reconciliation between North and South in a time of growing nationalism. As the construction of memorials and improved rail transportation transformed Gettysburg into a national shrine for commemorating the Civil War, visitors from the South increased and sought to have their story included.¹⁸⁰ A Congress that included many Southern representatives naturally reflected these desires,¹⁸¹ especially given the suppression of black political voice.¹⁸² A congressional committee argued that recognition of Southern lines at Gettysburg would be “gratifying to the remnant of the Army of Northern Virginia, and what grander evidence of the magnanimity and strength could the nation give than thus to preserve the historical data of the great turning battle of the war.”¹⁸³ Ensuing legislation authorizing battlefield markers stipulated that they should be “compiled without praise and without censure,” ensuring neutrality among the contending forces.¹⁸⁴ Subsequently, Southern states erected memorials to Confederate soldiers

176. See Richard West Sellars, *Pilgrim Places: Civil War Battlefields, Historic Preservation, and America's First National Military Parks, 1863-1900*, 2 CULTURAL RESOURCES J. 23, 39-40 (2005), available at <http://www.cr.nps.gov/history/hisnps/NPSHistory/sellars.pdf>.

177. WEEKS, *supra* note 4, at 63-64.

178. Sundry Civil Appropriations Act of Mar. 3, 1893, ch. 208, 27 Stat. 599 (1893).

179. UNRAU, *supra* note 30, at 72.

180. WEEKS, *supra* note 4, at 82.

181. BLIGHT, *supra* note 113, at 343.

182. *Id.*

183. H. COMM. ON MILITARY AFFAIRS, BATTLE LINES AT GETTYSBURG, H.R. REP. NO. 3024, at 6 (1890).

184. Sundry Civil Appropriations Act of Mar. 3, 1893, ch. 208, 27 Stat. 572 (1893); *id.* ch. 208, 27 Stat. 599.

on land acquired by the United States, which have become among the most popular shrines at the Park.¹⁸⁵

More generally, the 1890s witnessed growing calls for national reconciliation of North and South, against a background of abandoned efforts to secure basic liberties for African-Americans. Historian David Blight has described how the desire for reconciliation, rooted in the trauma of war and the need to honor the dead, contributed to gradual acceptance of white supremacist interpretations of the war as an honorable conflict over political principle rather than as a struggle against slavery.¹⁸⁶ By the 1890s, the desire for reconciliation among whites overwhelmed emancipationist sentiment and “delivered the country a segregated memory of its Civil War on Southern terms.”¹⁸⁷ It should not be surprising that the frustrations of reconstruction and the terms for reconciliation were understood according to the racist assumptions of white supremacy, because these were deeply ingrained in American culture and had barely been touched by Northern opposition to slavery.¹⁸⁸ In the year *Gettysburg Railway* was decided, “the 1896 Republican platform, for the first time since the end of the Civil War, omitted any demand that the Federal government use its police power to guarantee black suffrage in the South.”¹⁸⁹

Gettysburg had become a venue for reconciliation soon after the War, as local boosters invited former Confederate soldiers to return for commemorations. A concerted but underfunded effort at a battlefield reunion of veterans from both sides for the twenty-fifth anniversary in 1888 was followed by the massive, federally financed celebration of the fiftieth anniversary of the Battle in 1913.¹⁹⁰ More than 50,000 veterans and guests from both sides gathered on the field.¹⁹¹ The highlight was a reenactment of Pickett’s Charge by the veterans, ending in handshakes over the stone wall that the armies had fought over, communicated across the country in newspaper photographs.¹⁹² Woodrow Wilson, the first President born in the South that had been elected since the War, gave a speech in which he argued that it was “an impertinence to discourse upon how the Battle went, how it ended” or “what it signified,” but that the

185. PLATT, *supra* note 34, at 30.

186. BLIGHT, *supra* note 113, at 2.

187. *Id.*

188. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 609 (1988).

189. Kelly, *supra* note 170, at 255.

190. BLIGHT, *supra* note 113, at 383.

191. *Id.*

192. *Id.* at 383, 389.

nation should celebrate the “quarrel forgotten” except for the “splendid valor, the manly devotion of the men then arrayed against one another, now grasping hands and smiling into each other’s eyes.”¹⁹³

From the perspective of our time, these festivities cover a sinister silence. The Civil War as a transformational struggle ending slavery had been eclipsed. During Reconstruction, Congress and federal agents attempted, with however much equivocation, to secure basic freedoms and rights for emancipated African-Americans in the South.¹⁹⁴ But the federal government abandoned the effort by 1876, permitting white exclusion of blacks from voting and gradual imposition of a statutory regime subordinating blacks politically, legally, and economically.¹⁹⁵ Many white opinion leaders in the North and South portrayed the war as a tragic mistake, redeemed by heroic self-sacrifice on both sides, and called for reconciliation between the regions for the good of national unity.¹⁹⁶ Most African-Americans viewed the war differently, as a welcome conflict that gave them the opportunity for freedom.¹⁹⁷ But white supremacist mythology largely confined these views to the black community.¹⁹⁸ The 1890s saw rapid expansion of Jim Crow laws throughout the South, along with a shameful upsurge in racist atrocities, as whites lynched at least 884 blacks between 1897 and 1906.¹⁹⁹ President Wilson mandated segregation and discrimination within the federal civil service just a few months before he spoke at Gettysburg in 1913.²⁰⁰ Black veterans had been offered only segregated accommodation at the 1913 reunion anniversary, and there is no evidence that any attended.²⁰¹ The national celebration of the reconciliationist

193. *Id.* at 11.

194. *See generally* EPPS, *supra* note 163 (providing a narrative account of passage of post-Civil War Amendments); FONER, *supra* note 188 (pioneering a revisionist account of Reconstruction).

195. BLIGHT, *supra* note 113, at 137-39.

196. *Id.* at 197-98.

197. *Id.* at 198.

198. *Id.* at 354-55.

199. *Id.* at 344.

200. Wilson and his cabinet members achieved this without ever issuing an executive order, as leading federal offices individually mandated separation of black employees within offices and separate washrooms. Kathleen L. Wolgemuth, *Woodrow Wilson and Federal Segregation*, 44 J. NEGRO HIST. 158, 161 (1959). Wilson strongly defended the policy against criticism as protective of blacks. *Id.* at 169.

201. BLIGHT, *supra* note 113, at 385-86. The GAR was thoroughly segregated. *Id.* Black veteran members meeting in all-black units came to avoid large-scale GAR events because of concerns about insults by whites. *See id.*

vision at Gettysburg signaled a “kind of Southern victory in the long struggle over Civil War memory.”²⁰²

E. Gettysburg Railway in Perspective

Within this context, we must reassess the Supreme Court’s rhetoric about patriotism in *Gettysburg Railway*, decided less than five months before *Plessy v. Ferguson*, which constitutionally blessed legal subordination of African-Americans.²⁰³ The Court specified that what was at stake in the Battle was “the perpetuity of our institutions,” without any mention either of the interests of African-Americans in liberation or the progressive ideals of democracy and equality evoked by Lincoln in his Gettysburg remarks.²⁰⁴ The Court’s characterization of the struggle was entirely conservative, speaking only of the preservation of existing institutions, which implicitly denied the revolutionary aspect of the constitutional changes wrought by the war: the end of slavery and the expansion of federal power in an attempt to secure the rights of freed slaves.²⁰⁵ Rather than heralding Lincoln’s “new birth of freedom,” the Court saw the struggle as one against threats to stability.²⁰⁶ This seems consistent with its many holdings that downplayed the consequences of postwar constitutional amendments that limited the authority of the states and sought to protect blacks.²⁰⁷

Moreover, the Court conceived of the emotions stirred in battlefield visitors as a reflection of mutual benefit between the established

202. *Id.* at 397. Blight described the fifty-year commemoration as “a Jim Crow reunion, and white supremacy might be said to have been the silent, invisible master of ceremonies.” *Id.* at 9.

Historic preservation in less violently racist times also has rendered blacks invisible. In 1971, Michael deHaven Newsom criticized preservation in the Georgetown section of Washington, D.C., which indirectly displaced poor blacks and presented a distorted image of the neighborhood’s history by ignoring the work and lives of black residents. Newsom, *supra* note 90, at 424. Preservation today enthusiastically celebrates black heritage. See Byrne, *supra* note 90, at 409.

203. 163 U.S. 537 (1896).

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.

Id. at 543.

204. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681-82 (1896).

205. *Id.*

206. *Id.*

207. See *Plessy*, 163 U.S. at 542-52 (discussing the case in relation to Thirteenth and Fourteenth Amendments and earlier decisions by the Court interpreting these Amendments).

government and soldiers honored at the site, rather than of public understanding of the values represented by Lincoln's Address.²⁰⁸ The Court posited that the more a citizen was impressed by the battlefield, "the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety."²⁰⁹ This rhetoric reflects the anxieties of conservative jurists in an age much concerned with industrial unrest and unassimilated immigrants.²¹⁰ Indeed, some conservatives at the time explicitly equated the challenge to law and order posed by secession in 1861 to current challenges to the established order posed by industrial and agricultural unrest embodied in union organizing and demands for easier credit.²¹¹ The robust exercise of federal authority to address these frictions could be seen in President Cleveland's dispatch of federal troops to quell the Pullman strike in 1894, backed by federal injunctions, and his maintenance of the gold standard in fiscal policy.²¹² The Court's unanimous upholding of federal assemblage of the battlefield Park followed only eight months after the Court's unanimous upholding of enforcement by the U.S. Army of a federal injunction against the Pullman strikers.²¹³ Justice Peckham, who had just been appointed by Cleveland, was a fierce defender of laissez-faire, but upheld federal authority in the antitrust area exercised to protect small business.²¹⁴ The Court's rhetoric in *Gettysburg Railway* similarly evoked a militant nationalism, prevalent

208. *Gettysburg Elec. Ry.*, 160 U.S. at 681-83.

209. *Id.* at 682.

210. MILDRED A. BEIK, *THE MINERS OF WINDBER: THE STRUGGLE OF NEW IMMIGRANTS FOR UNIONIZATION, 1890S-1930S*, at 256 (1996).

211. A group of former Civil War generals, including Dan Sickles and O.O. Howard, campaigned in the Midwest for McKinley in 1896, making just this argument. Kelly, *supra* note 170, at 202-05.

212. *Id.* at 197-98.

213. *In re Debs*, 158 U.S. 564 (1895). The Court's rhetoric in *Debs* describes the crisis faced in essentially military terms:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

Id. at 582.

214. Peckham also was no friend of emancipation. In a profile of Peckham, Professor David Bernstein comments: "His opinions on civil rights for African Americans are remarkable only for the apparent ease in which he abandoned his usual antistatistism in voting to uphold Jim Crow laws." David Bernstein, Justice David Peckham, *The Volokh Conspiracy* (Oct. 3, 2005), <http://volokh.com/posts/1128349530.shtml>.

among conservatives in the 1890s, which sought to reshape popular memory of the Civil War against agitation for greater social equality.²¹⁵

In addition to facilitating reconciliation between North and South, the federal takeover of the Gettysburg battlefield sought to prevent the intrusion of commercial development in the historic area. Federal legislation responded directly to the construction of trolley tracks across the battlefield, on private land, which interfered with the marking of troop positions.²¹⁶ The Gettysburg Park Commission consisted of soldiers under the supervision of the Secretary of War, whose concerns were both professional and honorific.²¹⁷ Both the enacting Congress and the Supreme Court in *Gettysburg Railway* accepted that “[v]aluable lessons in the art of war can now be learned from an examination of this great battlefield.”²¹⁸ Congress expressly directed that the national military parks could be used for training by both the regular army and the national guard.²¹⁹ Gettysburg was thought to be especially suitable because the field “is of such open character as to render the details of that great battle, vast as were its movements, easily understood.”²²⁰

The priority given to accurate marking of troop positions and movements reflected several aspects of memory. Of course, it honored the effort of the soldiers by preserving landscape features that permitted visitors to imagine or understand their exploits. But focus on literal truth of which regiment moved to what position and engaged with which enemy regiment avoided both the horror of battle and divisive questions about the causes or meanings of the war. The landscaping of the commemorative Park, resembling nothing as much as a contemporary cemetery, also comforted the visitor.²²¹ A pastoral landscape marked by monuments provides a reassuring setting for studying the Battle, conveying dignity and comfort more than terror or suffering.²²² Moreover, it elevates the participants and the events of a battle rather than motives or consequences. Veneration of manly virtues of heroism and comradeship are easier to sustain without images of the horror of

215. Rhetorical stress on solidarity among white men, invoking militaristic symbolism, also reflected the mood of a national leader anticipating imperialistic conquests, brought to fruition in the Spanish-American War begun under McKinley in 1898. See EPPS, *supra* note 163, at 264-65.

216. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 670 (1896).

217. WEEKS, *supra* note 4, at 72.

218. *Gettysburg Elec. Ry.*, 160 U.S. at 681-82.

219. WEEKS, *supra* note 4, at 132.

220. S. REP. NO. 526, at 2 (1896).

221. WEEKS, *supra* note 4, at 65.

222. During the Civil War, combat changed from “a picturesque clash of Napoleonic armies into a grim industrial abattoir.” EPPS, *supra* note 163, at 153.

destruction. These also could be shared between former adversaries when the issues that propelled the conflict were submerged.

The pastoral setting conveyed other values that may have increased over time. As industrialism, the materialistic culture of the Gilded Age, immigration, and social discord became more pronounced, the heroic virtues of the soldiers seemed to embody a better time in the past. Placing the Battle in Arcadian farmland less characteristic of the industrial present enhanced its mythic character. Exclusion of modern intrusions from the Park protected this imaginative construction and thus honored the soldiers.

In sum, the patriotism held up in *Gettysburg Railway* reflects the privileged perspective of the 1890s. The Court's rhetoric, like Gettysburg's anniversary celebration of white, masculine heroism, bathes in patriotic light a conservative program of nationalism, law and order, and white supremacy. Perspectives that conflicted with this message were excluded, whether those of freed African-Americans seeking economic opportunity and civil rights, of women who suffered loss and privation on the home front or tended the wounded in the rear,²²³ or of the mechanical slaughter that decided the outcome. Gettysburg, its preservation secure due to unprecedented action by Congress warmly approved by the Court, seemed irrelevant to the contemporary "explosion of racial violence" against black Americans.²²⁴ The national memory of the war, to which it greatly contributed, facilitated national silence about racial oppression.²²⁵

My point here is not to judge the attitudes of the past by the standards of today, even if one feels shame at the ease with which widespread racial oppression was practiced. Rather, I have tried to show how the public memory of past events reflects contemporary concerns, particularly of those with the power to frame memorial sites. Patriotism

223. See BLIGHT, *supra* note 113, at 9.

224. *Id.* at 344.

225. The eminent historian, David Brion Davis, wrote:

The United States is only now beginning to recover from the Confederacy's ideological victory following the Civil War. Though the South lost the battles, for more than a century it attained its goal: that the role of slavery in America's history be thoroughly diminished, even somehow removed as a cause of the war. The reconciliation of North and South required a national repudiation of Reconstruction as "a disastrous mistake"; a wide-ranging white acceptance of "Negro inferiority" and of white supremacy in the South; and a distorted view of slavery as an unfortunate but benign institution that was damaging for whites morally but helped civilize and Christianize "African savages."

David Brion Davis, *Free at Last: The Enduring Legacy of the South's Civil War Victory*, N.Y. TIMES, Aug. 26, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0CE2D61031F935A1575BC0A9679C8B63&scp=2&sq=free%20at%20last%202001&st=cse>.

as a motive for historic preservation will always have an ideological content.²²⁶ People visit historic sites because there they find meaning for their lives today. But given that the meanings of important events are always contestable, the processes by which the meaning of a site is settled and presented must be considered.

F. Contemporary Interpretation of Gettysburg

We should end this Part with brief observations about how the Gettysburg Park has embraced issues of racial justice in recent years. Historical interpretations at heritage sites evolve with changes in the broader culture and, in recent years, have become more a subject of public and scholarly scrutiny. Gettysburg continued to convey a story of sectional reconciliation until the 1960s, emphasizing generalized patriotic themes and military color for increasing numbers of tourists, especially newly mobile families. By the centennial of the Battle, the Civil Rights Movement and the Cold War stirred reinterpretation. The centennial of the Civil War generated debate about its meaning for the contemporary struggle for civil rights, despite efforts by organizers to focus on reconciliation.²²⁷ Unlike many staged events elsewhere, the 1963 commemoration at Gettysburg “firmly reasserted that slave emancipation provided the Civil War’s greatest legacy.”²²⁸ A Kennedy administration official commemorated Gettysburg as the place where emancipation ““became possible of realization,”” although ““the equality defined on this field has been withheld from millions of our fellow citizens.””²²⁹ Cold War figures evoked the universal significance of the freedom and self-government affirmed in Lincoln’s Gettysburg Address.

But an equally enduring legacy of the centennial has been an explosion of popular fascination with conduct of the Civil War, including

226. James Lindgren, who has written extensively about early preservation in Virginia and in New England, claims that historically, “the preservation movement is best understood by examining the changing cultural politics of the time. With a perspective shaped by their social standing, property, and traditions, preservationists reacted to the unsettling changes by protecting buildings artifacts, and sites that symbolized a respected, but often imagined, past.” James Lindgren, “*A Spirit That Fires the Imagination*”: *Historic Preservation and Cultural Regeneration in Virginia and New England, 1850-1950*, in *GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES* 107, 126 (Max Page & Randall Mason eds., 2004).

227. RANDALL M. MILLER & WILLIAM PENCAK, *PENNSYLVANIA: A HISTORY OF THE COMMONWEALTH* 218 (2002).

228. See Jon Weiner, *Civil War, Cold War, Civil Rights: The Civil War Centennial in Context*, in *THE MEMORY OF THE CIVIL WAR IN AMERICAN CULTURE*, *supra* note 114, at 237. The Pennsylvania Centennial Commission mandated equality of opportunity for the Gettysburg observances. *Id.* at 250.

229. *Id.* at 251 (quoting John A. Carver, Jr., Assistant Secretary of the Interior).

personalities, tactics, uniforms, weapons, and battlefields. The NPS's effort to restore the battlefield to its condition just before the Battle has both responded to and fed this popular fascination. With this has come the heritage paraphernalia of films, collectors, specialized publications, and reenactments. A critic complained that Gettysburg had become "a kind of giant hobby set for middle-class white America."²³⁰

But both Congress and the NPS wanted more than this. In 1990, Congress added an interesting provision to a bill enacted to expand the boundaries of the Park:

In administering the park, the Secretary shall take such action as is necessary and appropriate to interpret, for the benefit of visitors to the park and the general public, the Battle of Gettysburg in the larger context of the Civil War and American history, including the causes and consequences of the Civil War and including the effects of the war on all the American people.²³¹

More generally, the National Park Service Advisory Board, chaired by John Hope Franklin, recommended "that the National Park Service . . . [e]ncourage the study of the American past, developing programs based on current scholarship, linking specific places to the narrative of our history, and encouraging a public exploration and discussion of the American experience."²³²

New facilities and technology permit the NPS to address more completely the causes and consequences of the war, while continuing its effort to restore the battlefield itself to its appearance just before the Battle. The Gettysburg Management Plan of 1999 explicitly argued that a new museum complex "outside the Battle Action Resource Area . . . would greatly improve museum interpretation at the park, and place the Gettysburg Battle in its larger context of the Civil War."²³³ At the massive new museum and visitor center, the orientation film, *A New Birth of Freedom*, narrated by Morgan Freeman, unambiguously describes the cause of the war as slavery and presents black liberation as its most

230. WEEKS, *supra* note 4, at 198.

231. Act of Aug. 17, 1990, Pub. L. No. 101-377, § 6, 104 Stat. 464 (codified at 16 U.S.C. § 430g-9 (2006)). The provision seems to have been added by the House Committee on Interior and Insular Affairs, from its amendment to H.R. 3248. See H.R. REP. NO. 101-467, at 1, 7-8 (1990).

232. NPS, Rethinking the National Parks for the 21st Century, <http://www.nps.gov/policy/report.htm> (last visited Feb. 16, 2009).

233. NPS, Final General Management Plan and Environmental Impact Statement, Gettysburg National Military Park, Gettysburg, Pennsylvania (June 1999), <http://www.nps.gov/archive/gett/gettplan/gmp99archive/gmpsum99.htm>.

significant consequence.²³⁴ The museum exhibits themselves are “based on phrases from Lincoln’s Gettysburg Address and organized to help visitors understand and appreciate the museum’s major themes, including the Gettysburg Campaign, the Civil War, and its causes and consequences.”²³⁵ Another new museum exhibit tries to correct impressions (to some extent encouraged by other current Park exhibits) that war is glorious by presenting photographs of the slain, the struggle to care for the wounded, and the burials and reburials of the dead.²³⁶ Of course, the effect of such museum exhibits on a visitor’s overall impression may be questioned, since, for example, one views a photograph of a field hospital in a discrete display case standing in air-conditioned comfort for as long as one wishes before buying an ice cream cone from the adjacent snack bar.

The NPS also provides curricular materials for schools that explore the Battle from multiple perspectives.²³⁷ One such example considers the experience of the Battle from the perspective of the free black citizens of Gettysburg, who were at risk for capture and enslavement or murder by the confederate troops.²³⁸ The curriculum guide states, “The town’s African Americans, who likely understood the causes of the conflict better than any of the town’s residents, have been largely ignored by historians.”²³⁹ It also relates the role of African-American laborers in burying the dead after the armies departed.²⁴⁰

Thus the current presentation at Gettysburg mirrors the preoccupations of today, which include questions and concerns about the experiences of African-Americans, alongside more traditional emphases, including the drama and heroism of the Battle. The new visitor center reflects the continuing popularity of the site, with vast parking areas and designated spaces for tour bus loading. It also employs state-of-the-art digital video and interactive computer exhibits. The commemoration of the Battle has been reinterpreted for a new generation.

234. Gettysburg Found., *New Museum and Visitor Center To Open at Gettysburg National Military Park* (Feb. 20, 2008), <http://www.gettysburgfoundation.org/documents/Museumopening.pdf>.

235. NPS, *The New Visitor Experience at Gettysburg National Park: Facts at a Glance*, <http://www.nps.gov/gett/parknews/upload/Gettysburg%20Fact%20Sheet%20April%202008.pdf> (last visited Feb. 16, 2009).

236. *Id.*

237. Peter Vermilyea & William Tally, *War for Freedom: African American Experiences in the Era of the Civil War—Gettysburg* (Mar. 2004), <http://www.nps.gov/gett/forteachers/upload/GETT%20War%20for%20Freedom%20Complete.pdf>.

238. *Id.* pts. IV-V.1.

239. *Id.* intro.

240. *Id.* at 39.

IV. BOUNDARIES

The federal government's condemnation of the Gettysburg trolley tracks illustrates the potential for conflict between the aspirations of park managers for commemoration and of entrepreneurs seeking to develop nearby land. As soon as curiosity seekers, veterans, and tourists began to come to Gettysburg in significant numbers, boosted by improved intercity railroad connections after 1884, local people sought to profit by catering to them. Hotels, dance halls, guides, carriages, souvenir sellers, private museums, and photographers proliferated and clustered near Park boundaries.²⁴¹ The Park commissioners' improvements also enhanced visitor pleasure and interest. They constructed five steel towers to better view the battlefield.²⁴² They also laid out paved roads, which soon drew bicycle enthusiasts, although the commissioners laid down regulations to maintain decorum.²⁴³ The government viewed the trolley as intruding into sacred space by laying track along troop lines that should be preserved and marked within the Park.²⁴⁴ The condemnation moved the boundary lines of the Park's protected space, but the "trolley company simply moved its tracks, and until displaced by the automobile, the trolley continued circulating crowds in cars appropriately named after Union generals."²⁴⁵

At the time of the creation of the national Park, the only legal preservation tool available to government was ownership. The government acquired the battlefield to preserve sites and present them in a manner that would advance the values deemed salient. In this it preserved the site much like any private owner, except backed by public money and wielding the power of eminent domain.²⁴⁶ The federal government asserted no legal authority over development outside the Park. Neither the state nor the local authorities exercised any regulatory control on private property rights. Thus the boundary of the Park not only demarcated the extent of federal control, but also separated land governed according to understandings of its cultural value from land treated as a commodity. Park ground was sacred, but surrounding land was entirely commercial. If Park commissioners were troubled by the

241. PLATT, *supra* note 34, at 15-17; WEEKS, *supra* note 4, at 92.

242. WEEKS, *supra* note 4, at 89.

243. *Id.* at 90.

244. *Id.* at 71-72.

245. *Id.* at 72.

246. Preservationists in the late nineteenth century generally distrusted government involvement, preferring to operate through elite private organizations, such as the Society for the Preservation of New England Antiquities. WILLIAM J. MURTAGH, *KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA* 16-17 (2006); *see also* discussion *supra* note 101.

presence of commercial activities on sacred ground, they would purchase the land, often using eminent domain to prevent price gauging, expanding the boundary of protected space.²⁴⁷ Within this legal structure, landscape subject to historic preservation was deeply exceptional. It was removed from the market, and, at the same time, its attraction boosted the value of surrounding private property.²⁴⁸

This stark division between protected land and commercial land held until the character of surrounding development threatened the Park. After World War II, gas stations, motels, billboards, fast-food restaurants, campgrounds, and amusement parks cluttered the surrounding landscape, as local business served the needs of swelling numbers of touring families arriving by automobile.²⁴⁹ Even President Eisenhower, who had purchased a farm nearby, complained: “I think it is a pity this one piece of terrain is not kept so that youngsters can see it nearly like it was in 1863.”²⁵⁰ But Gettysburg’s postwar sprawl was not different in kind from the rapid spread of suburban development across formerly rural areas surrounding cities, enabled by widespread automobile ownership and highway development spurred by Eisenhower’s interstate highway system.²⁵¹

Changes in park management philosophy accentuated the contrast between the Park and its surroundings. The NPS, which took over control of the Park from the War Department in 1933, combined growing expertise in historic preservation with a determination to educate and entertain a broad public.²⁵² Viewing the regimental monuments as dull and funereal, the NPS soon adopted the goal “to exert every effort toward restoring [the Park] to the condition as found during the world famous battle fought over its grounds.”²⁵³ The NPS has adhered to this priority ever since, progressively acquiring more land (doubling the size of the Park to nearly six thousand acres), removing modern buildings and train tracks, restoring farmhouses, barns, and walls, and planting and

247. WEEKS, *supra* note 4, at 60.

248. *Id.* at 184-85.

249. *Id.* at 115.

250. *Id.* at 166 (internal quotation marks omitted).

251. MATTHEW J. LINDSTROM & HUGH BARTLING, *SUBURBAN SPRAWL: CULTURE, THEORY, AND POLITICS* 221 (2003).

252. The National Park Service Organic Act states:

[T]he fundamental purpose of the said parks, monuments, and reservations [are] to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (2006).

253. WEEKS, *supra* note 4, at 120 (internal quotation marks omitted).

removing trees and crops.²⁵⁴ Thus, as the Gettysburg surroundings came to look like a more tawdry tourist version of universal strip development of the mid-twentieth century, the expanding parkland looked ever more like a pastoral dream of the preindustrial past linked to stirring events growing more remote from the present. Historian Jim Weeks emphasizes the attraction such images of the past had for just those “atomized suburban families” arriving by car seeking to reconnect to each other and some stable image of national character.²⁵⁵ The overhanging threat of nuclear war may have made the Gettysburg battle seem comparatively coherent and heroic. Thus, commercial development outside the Park grew in tension with preservation within, even as it symbiotically served and preyed upon it.

Conflict between the preservation and development took legal focus in 1971 when construction of a 307-foot commercial observation tower began on privately owned land 400 feet from the Park boundary.²⁵⁶ The tower had a space age, needlelike design, visible from many areas of the Park.²⁵⁷ Federal and state authorities sought legal means to prevent completion of the tower.²⁵⁸ Their failure to block construction highlights the limits of government ownership to achieve preservation goals. At that time, neither the Borough of Gettysburg nor surrounding Adams County had enacted any zoning or historic preservation law that would have regulated such development. Local governments and business interests tended to support construction of the tower in any event because of the additional visitors and property tax revenue it could engender.²⁵⁹

Nor did federal law regulate any such private development, despite its effect on such an important federal resource.²⁶⁰ Two weeks after Secretary Morton announced that the federal government would prevent completion of the tower, which he described as “the most damaging single intrusion ever visited upon a comparable site of American history,”²⁶¹ the NPS agreed to a land swap with the tower’s owner in order to move the site farther from the battlefield,²⁶² because it lacked

254. *Id.* at 120-21.

255. *Id.* at 158.

256. Bernstein, *supra* note 76.

257. WEEKS, *supra* note 4, at 141.

258. *Id.*

259. *Id.*

260. See JOSEPH SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 67-70 (1980).

261. See John Latschar, *The Taking of the Gettysburg Tower*, 18 *GEORGE WRIGHT F. 24* (2001) (quoting Letter from Rogers C.B. Morton, Secretary of the Interior, to Milton Schapp, Governor of Pennsylvania (June 14, 1971)).

262. WEEKS, *supra* note 4, at 141.

legal authority to prohibit the project. While the NPS might have attempted a nuisance action, its later unsuccessful action to block construction of tall buildings in Rosslyn, Virginia, visible from the National Mall in Washington, D.C.,²⁶³ suggests that such a claim would have been a stretch. The only preservation tool was ownership, and the NPS had neither the statutory authorization nor the money to buy out the tower. The National Historical Preservation Act, enacted in 1966,²⁶⁴ although a powerful tool for preservation, simply does not restrict private developments not otherwise subject to federal control.²⁶⁵ Most state preservation laws have no regulatory effect, mandating only information gathering and dissemination, and consultation in the NHPA process.²⁶⁶ *Gettysburg Railway* should be read to confer authority on Congress to enact such regulations, but political forces have chiefly reserved regulation of use of private land in state and especially local government.

In an imaginative attempt to block construction of the tower, the Commonwealth of Pennsylvania brought suit in state court, relying on recently enacted article 1, section 27, of the Pennsylvania Constitution,²⁶⁷ which provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”²⁶⁸ Pennsylvania argued that the tower would work “a despoliation of natural and historic environment.”²⁶⁹ A critic asserted: “The tower as proposed . . . would disrupt the skyline, dominate the setting from many angles, and still further erode the natural beauty and setting which once was marked by the awful conflict of a brothers’ war.”²⁷⁰ The state called as

263. *United States v. County Bd. of Arlington, Va.*, 487 F. Supp. 137 (E.D. Va. 1979).

264. 16 U.S.C. § 470 (2006).

265. See generally J. PETER BYRNE, *FEDERAL HISTORIC PRESERVATION LAW: AN INTRODUCTION* (draft manuscript, on file with author).

266. For a good description of the role of state historic preservation offices, see Elizabeth A. Lyon & David L.S. Brook, *The States: The Backbone of Preservation*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 81 (Robert E. Stipe ed., 2003). An outstanding exception, the Kansas Historic Preservation Act, KAN. STAT. ANN. §§ 75-2715 to 75-2724 (2004), would have protected the battlefield, because it regulates inappropriate new construction within 500 feet of an historic landmark. See Francois Quintard-Morenas, *Preservation of Historic Properties’ Environs: American and French Approaches*, 36 *URB. LAW* 137 (2004) (detailing the power of this Kansas legislation).

267. *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 591 (Pa. 1973).

268. PA. CONST. art. I, § 27, available at <http://sites.state.pa.us/PA-Constitution.html>.

269. *Nat’l Gettysburg Battlefield Tower*, 311 A.2d at 590 (internal quotation marks omitted).

270. *Id.* (quoting Dr. Milton E. Flower, Professor of Political Sci., Dickinson College).

witnesses architects, historians, ministers, and government officials.²⁷¹ The famed architect Louis Kahn characterized the tower as “scribbling in the sky” that would intrude upon a visitor’s sense of reverence and thrust a reminder of business realities into a pastoral setting.²⁷² Bruce Catton, the popular historian of the Civil War, testified that “the tower would jar a person . . . experiencing the battlefield back into the present day and so diminish the historic and cultural values.”²⁷³

The tower owner argued that it was a “classroom in the sky” that would educate the current generation about the importance of Gettysburg.²⁷⁴ Witnesses favoring the tower emphasized its economic and educational benefits,²⁷⁵ in fact, no one disputed that the tower provided a valuable perspective on the field for understanding strategy and setting.²⁷⁶ Evidence also established that the Park was surrounded by “a variety of commercial ventures, including a junkyard, motels, restaurants, fast food establishments, souvenir stands, an amusement park, gasoline service stations, commercial museums and exhibits and a variety of advertising signs and billboards.”²⁷⁷ The tower took advantage of the presence of the Park, but nearly all property value is parasitic in this way, as location determines value.

The litigation opposing the tower occasioned rare judicial consideration of a state constitutional provision conferring on citizens rights to preservation of the natural and historic environment. Article 1, section 27, both grants citizens such an affirmative right and also makes the Commonwealth the trustee of the public right, which places upon Pennsylvania “a definite status and imposes upon it an affirmative duty.”²⁷⁸ The lower courts held that section 27 supported an action by the Commonwealth against private owners that could be adjudicated by the courts without implementing legislation, although they denied relief on the merits.²⁷⁹ The lower courts held that the Commonwealth failed to carry its burden of proof that the tower excessively damaged the values protected by the state constitution.²⁸⁰ They expressed discomfort with ruling against the otherwise lawful tower based on a vague balancing of

271. *Id.* at 598-99.

272. The report of Kahn’s testimony is given by the court in *Commonwealth v. National Gettysburg Tower, Inc.*, 302 A.2d 886, 889 (Pa. Commw. Ct. 1973).

273. *Id.* at 890 (paraphrasing Catton’s testimony).

274. *Id.*

275. *Nat’l Gettysburg Battlefield Tower*, 311 A.2d at 588-89.

276. *Id.* at 590.

277. *Nat’l Gettysburg Tower*, 302 A.2d at 891.

278. *Id.* at 892.

279. *Id.* at 891-93.

280. *Id.* at 892.

historic or aesthetic benefits and harms and without the support of an express statutory directive.²⁸¹ Their adoption of a clear and convincing standard of proof expresses this discomfort.²⁸²

Although the Pennsylvania Supreme Court affirmed the judgment, a plurality also held that section 27 was not self-executing: “[S]upplemental legislation will be required to define the values which the amendment seeks to protect and to establish procedures by which the use of private property can be fairly regulated to protect those values.”²⁸³ The plurality argued that section 27 was the only right enumerated in the constitution that expanded rather than restrained the powers of government and that no other state had enacted an analogous provision without also expressly requiring legislative implementation.²⁸⁴ The court expressed solicitude for the effects of a contrary ruling on a private property owner who “would not know and would have no way, short of expensive litigation, of finding out what he could do with his property.”²⁸⁵ Subsequent decisions have interpreted the tower case as holding that the Commonwealth cannot bring such an action without legislative specification.²⁸⁶ At the same time, the courts’ opinions did make plain that a sole legislative purpose to preserve historic sites would be within the state’s police power, and the clarity of the policy expressed in section 27 later would support the constitutionality of municipal ordinances requiring private owners to preserve designated historic buildings.²⁸⁷

The Gettysburg tower case illustrates the practical difficulty of solving historic preservation conflicts by broadly delegating preservation disputes to the judiciary. More telling, perhaps, than the ruling that section 27 was not self-executing was the unwillingness of courts who thought it was self-executing to find that the State had shown that the tower merited demolition. The judges lacked criteria or standards by which to order the extraordinary remedy of demolition of an otherwise lawful structure on private property that no legislative body had sought to regulate. The courts lacked any common law or statutory means to

281. *Id.* at 895.

282. *Nat’l Gettysburg Battlefield Tower*, 311 A.2d at 588, 596.

283. *Id.* at 595.

284. *Id.* at 591-93.

285. *Id.* at 593. The court pointed out that the owner of the Gettysburg tower argued in the instant case that granting the Commonwealth an injunction would violate its federal equal protection and due process rights, given the numerous business and junkyards in the area impinging on the historic values of the environment more than the tower would. *Id.* at 593 n.5.

286. See Bruce Ledewitz, Pennsylvania State Constitutional Law Summary, http://www.paconstitution.duq.edu/PAC_CONST_LAW_SUMMARY.html.

287. *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1973).

mediate between historic property and ordinary commercial property. Departure from such an embedded legal paradigm requires legislative leadership. The Pennsylvania Supreme Court's ruling that section 27 is not self-executing recapitulates this observation at a higher level of abstraction, prohibiting lower courts from even engaging in the inquiry.

The application of the NHPA to the tower controversy manifests its weaknesses and only hints at its strengths. As noted above, this central federal preservation statute does not purport to regulate directly what private owners may do with historic properties. It requires federal agencies to consider in specific ways the effects of their "undertakings" on properties eligible for inclusion on the national register, but does not directly require anything of nonfederal actors.²⁸⁸ The federal government's inability to stop construction of the tower led the NPS early on into the land swap agreement to move the tower farther from the battlefield, providing a right-of-way across parkland to reach another private parcel.²⁸⁹ Ironically, this action was subject to the NHPA, requiring the NPS to consider the effect of the swap on the battlefield Park and solicit the views of the Advisory Council on Historic Preservation. NPS officials, however, entered the swap agreement before it sought the Advisory Council's comment, which today would be viewed as a clear violation of the regulations implementing the Act.²⁹⁰ The Council wrote that the tower would have an adverse effect on the Gettysburg scene and urged NPS to attempt to block its completion.²⁹¹ Having been advised by the Solicitor of the Department of Interior that it had no authority itself to prohibit construction of the tower on private land, the NPS expressed its opposition to the tower but completed the swap agreement, finding that the new site would be less destructive of historic values than the original and would "minimize the adverse effect of the tower" on Gettysburg.²⁹² Otherwise out of options and annoyed at federal dithering, Pennsylvania then sued the Secretary of the Interior, arguing, among other things, that the NPS violated section 106 of the

288. 16 U.S.C. § 470h-2 (2006). Private owners can be reached by the NHPA when they need a federal license or federal funds to carry out an activity; then the agency providing the approval or funds must comply with the section 106 process. *See, e.g.,* CTIA-The Wireless Ass'n v. FCC, 466 F.3d 105 (D.C. Cir. 2006).

289. *Nat'l Gettysburg Battlefield Tower*, 311 A.2d at 588-90.

290. Section 106 itself directs the federal agency take into account the effect of its undertaking "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 16 U.S.C. § 470f. This command is reiterated in the ACHP regulations implementing the Act, which also give detailed procedures by which the agency must take the historic resource into account. 34 C.F.R. § 800.1(c) (2008).

291. *Nat'l Gettysburg Battlefield Tower*, 311 A.2d at 589 n.1.

292. *Id.* at 597-99.

NHPA.²⁹³ The court dismissed those counts, holding that the agency had substantially complied with the statute, which preserved the agency's ultimate authority to decide whether to proceed with the swap.²⁹⁴ The NPS's slapstick entanglement with the NHPA reflects early confusion about how to comply with the new statute for which only sketchy implementing regulations then had been promulgated. Nonetheless, it may be that the land swap was a reasonable compromise, given the lack of effective prohibitory powers.

The erection of the Gettysburg tower constituted a turning point, like others that have marked the development of historic preservation law, such as the demolition of Pennsylvania Station in New York City in 1964, which stimulated enactment of New York's pathbreaking Landmarks Preservation Act in 1965.²⁹⁵ In Gettysburg itself, "[w]idespread publicity about commercial desecration . . . induced a moment of introspection."²⁹⁶ Civic and business interests came to embrace historic preservation as the means to enhance the image of the town and protect the Park as its golden egg, which now attracted nearly two million visitors each year.²⁹⁷ Perhaps it helped that the tower never became a commercial success. In any event, Gettysburg adopted a local historic preservation ordinance in 1972. For new construction and changes to the exteriors of all buildings within the Gettysburg Historic District, the Historical Architecture Review Board must review and make recommendations to the Borough Council.²⁹⁸ Main Street Gettysburg, a

293. Section 106, which is the centerpiece of the NHPA, requires federal agencies to consider the effects of their actions, including approvals, on historic resources. It provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, 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. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

294. *Commonwealth v. Morton*, 381 F. Supp. 293 (D.D.C. 1974). The court ultimately remanded the case to Interior to provide a fuller explanation why it decided not to prepare an environmental impact statement under NEPA. *Id.* at 300.

295. See ANTHONY C. WOOD, *PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY'S LANDMARKS* 323-26 (2008).

296. WEEKS, *supra* note 4, at 182.

297. *Id.* at 116-18.

298. GETTYSBURG, PA., *HISTORICAL DISTRICTS* ch. 11, pt. 1 (1991), available at Historic Districts: General Regulations, <http://www.gettysburg-pa.gov/codes/pdf/2335-011.pdf> (last visited Jan. 11, 2009). Gettysburg adopted zoning ordinance amendments in 2008 that coordinate

nonprofit organization committed to preservation and economic development, was created in 1984, and has encouraged and coordinated efforts to restore the town's historic appearance as an economic asset.²⁹⁹ In 1990, the Borough developed the Gettysburg Historic Pathway Plan, which committed the community to coordinated preservation and economic development goals.³⁰⁰ In 2000, after a comprehensive two-year planning process, the Borough and the national Park entered into the Gettysburg Interpretative Plan, which commits all stakeholders to an ongoing effort to convey "the role of the town in the Battle of Gettysburg" through preservation and interpretation, while securing economic benefits to borough residents.³⁰¹

A Gettysburg National Battlefield Historic District was listed on the National Register in 1975 and later expanded to cover most of the town and battlefield area.³⁰² As a result, federal actions having potential effects on properties within the district become subject to the study and consultation process mandated by section 106 and available for federal benefits.³⁰³ Federal legislation in 1990 authorized expansion of the boundaries of the Park and gave the NPS additional authority to accept donations of conservation easements outside the Park but within the historic district.³⁰⁴ Cooperation between borough and Park resulted in the restoration of the David Willis House, where Lincoln stayed in town the

with the historic preservation. *See, e.g.*, GETTYSBURG, PA., ZONING ORDINANCE AMENDMENTS § 606 (2008), *available at* <http://www.gettysburg-pa.gov/documents/CleanZngAmendments.pdf> (prohibiting any structure to be "erected, reconstructed, altered, restored, relocated or demolished in an Old Town District, except in conformance with . . . Gettysburg Historic Preservation District Ordinance"). Pennsylvania enabling legislation for creating historic districts regulating private development date back to 1961, and as of 2007, municipalities and home rule charter cities have designated nearly 140 historic districts. *See* MICHAEL R. LEFEVRE, HISTORIC DISTRICT DESIGNATION IN PENNSYLVANIA 5-6 (2007).

299. For example, the city has installed gaslights in the town center, made interest-free loans for façade restorations, and erected sidewalk exhibits telling the town's story of the Battle. WEEKS, *supra* note 4, at 184. For details on such plans for Gettysburg, see THE BOROUGH OF GETTYSBURG INTERPRETIVE PLAN STEERING COMM., INTERPRETATIVE PLAN: BOROUGH OF GETTYSBURG chs. 3-5 (Nov. 2000), <http://www.mainstreetgettysburg.org/images/GIP.pdf>.

300. THE BOROUGH OF GETTYSBURG INTERPRETIVE PLAN STEERING COMM., THE GETTYSBURG INTERPRETATIVE PLAN: SUMMARY, <http://www.mainstreetgettysburg.org/images/GIPs.pdf> (last visited Jan. 11, 2009).

301. *Id.*

302. A summary of the National Register listing can be found at Gomback Group, Living Places, Gettysburg Borough, http://www.livingplaces.com/PA/Adams_County/Gettysburg_Borough.html (last visited Jan. 11, 2009).

303. 36 C.F.R. pt. 800 (2008).

304. Act of Aug. 17, 1990, §§ 3-4, Pub. L. No. 101-377, 104 Stat. 646 (1990) (codified at 16 U.S.C. § 430g-4 (2006)).

night before he delivered his address.³⁰⁵ Willis House opened in 2009 as part of the national Park.³⁰⁶ Main Street Gettysburg operates and manages it under the terms of a Memorandum of Understanding with the NPS.³⁰⁷

Recent development of historic preservation laws has to some extent breached the Park. From the time the Park was founded by private purchases just after the Battle, through the federal takeover, and on through the tower controversy, property ownership was the only legal tool for preservation. The Park boundaries marked sharp division between commercial land within the market system and land set aside as an exceptional historic site managed to express cultural values. Controversies at the margins were settled by boundary adjustments through government acquisition, including use of eminent domain. Now a vast web of local and federal regulations, as well as relational contracts of all kinds, supported by collaborative planning processes, cover the environs of the Park. It might be said that historic preservation has spread from the Park to the town and countryside, blurring boundary lines between commercial and cultural lands. New regulatory tools permit sharing of control and coordination of private endeavor. Within the Gettysburg historic district, decisions about developing a parcel must respect a cultural consensus protecting collective property values. Decisions approving appearance and use involve cooperation among owners, neighbors, investors, and regulators, rather than resting in the discretion of the owner. At the same time, public investments self-consciously have created cultural identity and economic enterprise that all landowners and the local government share.

Recent federal legislation seeks to extend the web of historic preservation beyond Gettysburg, creating the Journey Through Hallowed Ground National Heritage Area (JTHG), a corridor over 175 miles long extending south from Gettysburg to Charlottesville, Virginia.³⁰⁸ Like other such NHAs,³⁰⁹ the JTHG does not impose federal control over the land use but authorizes a private nonprofit “management entity,” which will develop a management plan coordinating efforts by four states, local

305. NPS, Gettysburg National Military Park—News, <http://www.nps.gov/gett/parknews/index.htm> (last visited Feb. 15, 2009).

306. *Id.*

307. See NPS, The David Wills House (May 2, 2008), <http://www.nps.gov/gett/parknews/upload/David%20Wills%20House%20Facts%20and%20Figures%202008.pdf>.

308. Consolidated Natural Resources Act of 2008, §§ 401-411, Pub. L. No. 110-229, 122 Stat. 754 (2008).

309. There are currently forty national heritage areas. For more information, see NPS, National Heritage Areas, <http://www.nps.gov/history/heritageareas/> (last visited Jan. 11, 2009).

governments within the designated area, and federal agencies to protect and interpret cultural and natural resources.³¹⁰ The Secretary of the Interior must approve the plan, and Congress has authorized limited federal matching funds to private and other governmental contributions.³¹¹ Much of the legislation's attraction to state and local government reflects the belief that it will enhance heritage tourism.³¹² Despite the legislation's explicit disclaimer in section 408 of any abridgement of any rights in private property,³¹³ it has been denounced on property rights grounds for encouraging more restrictive local land use regulations and empowering the coordinating nonprofit, which includes representatives of preservation and conservation organizations.³¹⁴

Over a vast, complex area, the national heritage area concept casts a fragmented but cooperative approach to preservation that is friendly to sympathetic, tourist-oriented development. Thus the boundaries between sacred, historically significant land and commercial real estate have been further obscured, as they had previously been in Gettysburg. While one may wonder about the integrity of the landscape that will emerge from such a legal regime, it is hard to see how a more rigorous approach to preservation could emerge from the legislative process, given the multiple interests and levels of government affected. The model of a national park under exclusive government ownership cannot be suitable for such a large, populous, and complex area.³¹⁵ The national heritage area approach represents an innovative collaboration in planning and regulation among federal, state, and local governments, and with the nonprofit sector that has played such a large role in preservation.³¹⁶ This

310. Journey Through Hallowed Ground National Heritage Area Act, H.R. REP. NO. 110-095, at 2 (2008).

311. *Id.* at 4-5.

312. The Borough Council of Gettysburg supported the legislation, acknowledging that "[t]he community will benefit by promoting tourism and boost the local economy." Borough of Gettysburg, Council Meeting Minutes November 13, 2006 (2006), http://www.gettysburg-pa.gov/minutes/borough_council/2006/minutes110806.htm.

313. Consolidated Natural Resources Act of 2008, § 408.

314. *See, e.g.*, Ronald D. Utt, *Another Federal Assault on Property Rights: The Journey Through Hallowed Ground National Heritage Area Act*, BACKGROUND, Apr. 19, 2007, http://www.heritage.org/research/SmartGrowth/upload/bg_2025.pdf.

315. The national heritage area resembles in some respects an English national park, where private ownership persists under shared national and local regulation to safeguard cultural and natural resources while facilitating recreation, but with somewhat less ambitious public goals. *See* Federico Cheever, *British National Parks for North Americans: What We Can Learn from a More Crowded Nation Proud of Its Countryside*, 26 STAN. ENVTL. L.J. 247 (2007).

316. National Heritage Areas follow the cultural preservation model praised by Bruce Babbitt for environmental land use protection: federal leadership and committed participation by state and local officials. BRUCE BABBITT, *CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA* 177-78 (2005).

amalgam of collective direction provides the primary reason that libertarian property groups have attacked it.³¹⁷ Moreover, it offers an experiment in new governance approaches to resource management, employing multiparty, large-scale negotiation.³¹⁸

Through these means, Gettysburg has forged a community identity, in Carol Rose's sense, that has given voice to community members.³¹⁹ Recently, the Pennsylvania Gaming Control Board rejected a proposal by investors to open a casino one mile from the battlefield, outside the historic district.³²⁰ The Board cited "concerted, sustained" opposition from town residents.³²¹ These residents argued that the casino defiled the hallowed ground,³²² and preservation leaders reminded residents of the economic stakes:

The casino also would damage the existing heritage tourism and economic infrastructure of the community. Common sense tells us that casinos bring with them an atmosphere that could drive away heritage travelers. Families with young children visit Gettysburg for its wholesome, historic, family-friendly environment

[The gaming company] fails to recognize that Gettysburg already has a very low unemployment rate, due in large part to its strong economic engine, Gettysburg National Military Park. According to the National Park Service, in fiscal year 2005 Gettysburg National Military Park drew approximately \$102 million to the region, with visitor expenditures supporting 2,431 full-time job equivalents in the area surrounding the park. Heritage tourists like those at Gettysburg tend to spend more money per visit than other tourists, on average.³²³

Alignment of economic interests and landscape preservation raises a host of problems, but offers hope for the protection of cultural values in development. The JTHG NHA encompasses some of the most lovely

317. See Ronald D. Utt & Cheryl Chumley, Heritage Found., National Heritage Areas: Costly Economic Development Schemes That Threaten Property Rights (Oct. 22, 2007), <http://www.heritage.org/research/Budget/wm1671.cfm>.

318. See, e.g., Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2006).

319. See *supra* text accompanying note 8.

320. Margaret Foster, *Gettysburg Casino Denied*, PRESERVATION ONLINE, Dec. 20, 2006, available at http://finarticles.com/p/articles/mi_kmpre/is_200612/ai_n18648636 (subscription required).

321. Sharon Smith, *Opposition Cited in Casino Rejection*, PATRIOT-NEWS, Feb. 2, 2007, at C01.

322. Sentiments can be sampled at No Casino Gettysburg, <http://www.nocasinogettysburg.com> (last visited Jan. 11, 2009).

323. Jim Lighthizer, Tom Kiernan & Richard Moe, Op-Ed, *Don't Gamble with Gettysburg*, PITTSBURGH POST-GAZETTE, Nov. 29, 2006, available at <http://www.post-gazette.com/pg/06333/741920-109.stm>. The authors were presidents of, respectively, the Civil War Preservation Trust, the National Parks Conservation Association, and the National Trust for Historic Preservation.

and culturally resonant, settled landscape in the Eastern United States and is very much threatened by inappropriate subdivision and retail development.³²⁴ The program commits the partners to preserve the landscape values while promoting economic development.³²⁵ If this approach succeeds in its objective, something that is far from certain, it surely will create a new type of landscape, preserving heritage features alongside economic ventures seeking to capitalize upon them. The relation between heritage tourism and historic preservation will be pursued further in Part V.

Unlike the demolition of a defining landmark, the harm done by construction of new, historically inappropriate structures can be undone. The 1990 legislation expanding the Park boundaries effectively authorized the NPS to take the tower by eminent domain.³²⁶ Limited funds and disputes about valuation delayed the day of reckoning for some time, until Secretary of Interior Bruce Babbitt announced, standing next to the statue of General Meade, that he would “take that tower down, on [his] watch.”³²⁷ Congressional appropriations followed, as well as donation of demolition services, and a court granted the United States’ motion for possession on June 5, 2000.³²⁸ On July 3, 2000, the 137th anniversary of Pickett’s Charge, 10,000 onlookers cheered as the tower and its support structures toppled to the ground.³²⁹

V. PRESERVATION CHOICES

This Part considers the legal dispute about the NPS’s decision to demolish Richard Neutra’s 1962 Gettysburg visitor center. The Cyclorama Center, as the building came to be known, was officially declared eligible for listing on the National Register in 1998.³³⁰ Nonetheless, the NPS intends to demolish the building as part of an

324. Piedmont Envtl. Council, Honoring Local History, <http://www.pecva.org/anx/index.cfm/1,115,354,-1.html> (last visited Feb. 17, 2009).

325. Act of Aug. 17, 1990, §§ 3-4, Pub. L. No. 101-377, 104 Stat. 464 (1990) (codified at 16 U.S.C. § 430g-4 (2006)).

326. NPS, What Is a National Heritage Area?, <http://www.nps.gov/history/heritageareas/FAQ/INDEX.HTM> (last visited Feb. 17, 2009).

327. Gettysburg Nat’l Military Park, Superintendent’s Annual Report: Fiscal Year 1999 (1999), <http://www.gdg.org/Research/Monuments/super1999.html>.

328. Latschar, *supra* note 261, at 8.

329. *See id.* at 31-32. To watch the implosion and consequent excitement of several spectators, see Posting of DDCheats, The Gettysburg Tower Implosion 1, <http://www.youtube.com/watch?v=zBySY7jum4A&feature=related> (Feb. 23, 2007).

330. NPS, National Park Service Determination of Eligibility Notification for the Cyclorama Building, National Register of Historic Places (Sept. 1998), *available at* <http://www.mission66.org/cyclorama/docs/doi.html>.

effort to restore the battlefield site to its condition on the eve of the Battle, and because it has built a new visitors center.³³¹ A nonprofit organization, the Recent Past Preservation Network, has filed suit to enjoin the demolition, arguing that the NPS has violated the NHPA and NEPA.³³² Examination of this dispute further illuminates development of preservation purposes and means, highlights conundrums about preservation of modern architecture, and offers some support for the procedural and consultative approach of the NHPA.

As noted above, the NPS long has sought to balance preservation of resources entrusted to it with accommodation and education of large numbers of visitors.³³³ By the middle of the 1950s, large increases in families visiting national parks, arriving now almost entirely by automobile, combined with Cold War decreases in funding, created a crisis for the NPS.³³⁴ President Eisenhower and Congress agreed to fund an ambitious NPS plan, known as Mission 66, to rebuild and reinvent the park system.³³⁵ Mission 66 authorized development of new parks and construction of new facilities and roads in existing parks.³³⁶ It fostered invention of a new type of building, a visitor center, to orient visitors and direct them to its wonders.³³⁷

Mission 66 arrived with great fanfare during a time when many Americans were adapting to enormous social and geographic changes and felt a great need to rediscover or reinvent their historical and national identity. Mission 66 promised nothing less than to make the national park system—a coordinated system of scenic and historic places—a primary agent in the creation, interpretation, and preservation of the nation's "heritage."³³⁸

For its new construction, the NPS, like nearly all other institutional builders at the time, embraced modern design.³³⁹ At mid-century, modern design embodied for many a progressive, efficient, technological lifestyle. Urban renewal projects of the period, replacing vernacular urban

331. *Id.*

332. Business Wire, *supra* note 81. In this Article, I will discuss only incidentally the National Environmental Policy Act, which extends its protections to historic resources as elements of the human environment. 42 U.S.C. § 4331 (b) (2006).

333. Michael Kammen notes the role of the NPS in democratizing historic preservation, "moving past the patrician elite that had dominated" and connecting "patriotism with populism." KAMMEN, *supra* note 42, at 465.

334. WEEKS, *supra* note 4, at 124.

335. *Id.*

336. ETHAN CARR, MISSION 66: MODERNISM AND THE NATIONAL PARK DILEMMA (2007).

337. ALLABACK, *supra* note 75; CHRISTINE L. MADRID, MISSION 66 VISITOR CENTERS, 1956-1966: EARLY MODERN ARCHITECTURE IN THE NATIONAL PARK SERVICE (1998).

338. CARR, *supra* note 336, at 222.

339. *Id.* at 47.

buildings and streetscapes, particularly neighborhoods of poor minority residents, employed modern design in highways and high-rise dwellings and offices.³⁴⁰ The NPS choice for modernism departed from its earlier approach of constructing rustic-looking vernacular buildings that fit into their cultural context; it reflected both cultural and economic reasons.³⁴¹ Viewed in broad perspective, Mission 66 represents a governmental attempt to apply modern design to harmonize relations between nature and a democratic people.

For the first visitor center at Gettysburg, the NPS chose Richard Neutra, a highly regarded, Viennese-born, Los Angeles architect.³⁴² His buildings emphasized sleek horizontal lines and large, clear windows.³⁴³ One critic wrote that “Neutra designed the modern architecture that is now considered traditional in Southern California.”³⁴⁴ “For the Park Service, the collaboration with a world-renowned architect on such an important public building marked the high point of the entire Mission 66 architectural design effort.”³⁴⁵

The NPS had two specific criteria for the Gettysburg visitor center. First, it fixed the location near the center of the battlefield, in a place known as Ziegler’s Grove, close to where Pickett’s Charge had surged, and from which visitors easily could view or walk to significant points.³⁴⁶ Ample parking brought visitors first to the modern air-conditioned visitor center, within which the NPS presented displays interpreting the Battle, and moved visitors directly into the center of the battlefield.³⁴⁷ Such a transition space separated visitors’ experience more sharply from the tawdry commercial development spreading around the town. While the visitor center location intruded on the battlefield, and required relocation of several nineteenth-century regimental monuments, “historians and park managers at the time agreed that this would be a

340. *Id.* at 123.

341. NPS construction of rustic buildings was aided during the New Deal by inexpensive, skilled manpower supplied by Civilian Conservation Corps workers. During the boom of the 1950s, “more labor-intensive, craft-oriented construction was no longer economically competitive, and therefore for most clients—including government agencies—it was no longer an option.” *Id.* at 137.

342. *See* THOMAS HINES, *RICHARD NEUTRA AND THE SEARCH FOR MODERN ARCHITECTURE* (1982); BARBARA LAMPRECHT, *RICHARD NEUTRA: COMPLETE WORKS* (2000).

343. *See id.*

344. ALLABACK, *supra* note 75, at 102. Recently, Christie’s auctioned a Neutra house in Palm Springs, California, as a work of art for \$15 million. Paul Goldberger, *House Hunt*, *NEW YORKER*, May 23, 2008, *available at* http://www.newyorker.com/talk/2008/05/26/080526ta_talk_goldberger.

345. CARR, *supra* note 336, at 163.

346. *Id.* at 162.

347. *Id.* at 162-63.

powerful way of interpreting the battlefield, and that the encroachment on the historic scene was justified.”³⁴⁸ This accorded with the prevailing philosophy of locating Mission 66 visitor centers at central locations to support interpretation by facilitating views of important areas within parks.³⁴⁹

Second, the Neutra building would house Philip Philippoteaux’s massive, 1884 cyclorama painting of Pickett’s Charge, considered an accurate depiction of the Battle, allowing for its emphasis on “martial glory and sanitized combat.”³⁵⁰ The cyclorama was a popular art form in the late nineteenth century, featuring large concave paintings, often depicting battles.³⁵¹ Customers would sit in the middle and listen to a narration with musical accompaniment and dramatic lighting effects.³⁵² In 1913, entrepreneurs acquired the Gettysburg cyclorama from a department store in Newark, New Jersey, and constructed a modest building in Gettysburg to house it.³⁵³ The NPS acquired the cyclorama in 1941 and planned to incorporate it into the new visitor center.³⁵⁴ Accordingly, the central element of the Neutra building design is a large cylindrical drum containing an auditorium within which the cyclorama could be viewed.³⁵⁵ A lower, rectangular wing to the south contained offices and exhibit space.³⁵⁶ An exterior ramp led to a viewing platform on the top of the south wing, from which visitors could survey the

348. *Id.* at 193.

349. Ethan Carr argues that the position of the visitor center expressed a distinctly modernist view of landscape:

Rustic-era park construction had reflected an aesthetic conception of the national park in which associative architectural imagery helped “harmonize” development with its setting. Rustic buildings and villages were sited to serve as elements of larger landscape compositions that included nearby scenic features. . . .

Th[e] modernist building type also exhibited a modernist relationship between structure and site, and between visitor and landscape. . . . [T]he building and its terraces formed a discrete unit, set in an “untouched” landscape. This put the surrounding park in a new position conceptually; it was now seen less as a picturesque composition in which architecture and figures composed visual elements than as an abstraction, a pure, untouched “dream” that would only be degraded by the presence of any evidence of human activity.

Id. at 220.

350. WEEKS, *supra* note 4, at 79.

351. NPS, The Gettysburg Cyclorama, <http://www.nps.gov/gett/historyculture/gettysburg-cyclorama.htm> (last visited Feb. 17, 2009).

352. *Id.*

353. WEEKS, *supra* note 4, at 79.

354. *Id.* at 124.

355. NPS, SECTION 106 CASE REPORT, CYCLORAMA BUILDING, GETTYSBURG NATIONAL MILITARY PARK (Jan. 1999), *available at* <http://www.mission66.com/cyclorama/docs/section106.html> [hereinafter SECTION 106 CASE REPORT].

356. *Id.*

battlefield.³⁵⁷ Exterior doors could open to reveal an elevated speakers' rostrum from which thousands of people could be addressed.³⁵⁸

When the building was dedicated by former President Eisenhower on November 19, 1962, the ninety-ninth anniversary of Lincoln's Gettysburg Address, it was considered a great accomplishment.³⁵⁹ The NPS considered it the "flagship of the Mission 66 program."³⁶⁰ The *New York Times* reported that "the completion of this development augurs well for tourists whose previous battlefield tours have ended in merely the recollection of a meaningless potpourri of monuments and statutes."³⁶¹ Wolf Von Eckardt, architectural critic of the *Washington Post*, hailed the Neutra building as "one of the most handsome modern buildings in this general area," "quietly monumental but entirely unsentimental," and "a manifestation of 'cultural effectiveness.'"³⁶² Neutra's supporters claim that he "dedicated his latter-day Lincoln Memorial to the cause of international harmony in a world threatened with atomic annihilation and a nation consumed with internal issues of civil rights."³⁶³ Architectural historians argue that the building "intended to impart the lessons of the Battle and of the war to the challenges of world leadership during the Cold War."³⁶⁴ The Neutra building embodied an aspiration to capture the meaning of Gettysburg for a mass, Cold War public arriving by car with little time to spare, but seeking a meaningful connection to a receding past. Its functional modern design proclaimed technological progress enabled by the freedom preserved in the Battle.³⁶⁵

The prestige of the building rapidly declined, however, with the loss of faith in the cultural and design ideals upon which it was based. The

357. CARR, *supra* note 336, at 163.

358. Chris Madrid French, Rich and Neutra's Cyclorama Center at Gettysburg—Still Standing, <http://www.tclf.org/landslide/cyclorama/index.htm> (last visited Feb. 17, 2009).

359. Press Release, Neutra Institute for Survival by Design, Gettysburg Cyclorama Alert: We Need Your Help? (2006), <http://www.neutra.org/bulletins.html#Gettysburg>.

360. *Id.* at 195.

361. Dorothy B. Huyck, *Gettysburg's Gain: New \$1 Million Visitor Center To Give Tourists Clearer Picture of Battle*, N.Y. TIMES, May 6, 1962, at XX15.

362. Wolf Von Eckardt, *The Park Service Dares To Build Well*, WASH. POST, Mar. 29, 1964, at G6. Eckardt also claimed that Neutra was "one of the three or four living great masters of modern architecture." *Id.*

363. Mission 66, reCyclorama: The Campaign To Save Richard Neutra's Cyclorama Building at Gettysburg, History, <http://www.mission66.com/cyclorama/history/index.html> (last visited Jan. 24, 2009). Historian Jim Weeks wrote: "The Cold War revived Gettysburg's symbolic place in American exceptionalism, expressed as the rebirth of a nation divinely ordained for global leadership." WEEKS, *supra* note 4, at 143.

364. Letter from Richard Longstreth, Soc'y of Architectural Historians, to Fran Mainella, Director, NPS, (Feb. 24, 2004), *available at* <http://www.mission66.com/cyclorama/letters/images/nhlappeal2004a.pdf> and <http://www.mission66.com/cyclorama/letters/images/nhlappeal2004b.pdf>.

365. *See* WEEKS, *supra* note 4, at 125.

NPS soon moved its visitor center into a larger, 1920s museum building nearby, purchased along with the Rosensteel collection of Battle memorabilia and the remarkable “electric map.” The Neutra building, demoted to the Cyclorama Center, soon “became a symbol of what many came to see as a willingness to value interpretation and visitor experience above the stewardship of park landscapes and archeological resources.”³⁶⁶ Belief in, and sophistication about, historic preservation had grown, as marked by the passage of the National Historic Preservation Act in 1966, which might have prevented construction of the Cyclorama Center in Zeigler’s Grove had it been in effect a few years earlier.³⁶⁷ Management plans came ever more insistently to elevate the goal of restoring the landscape of the battlefield to its condition on the eve of the Battle.³⁶⁸ To this end, trees were cut down or planted and archaic grain fields or orchards recreated by strenuous landscape recreation and management.³⁶⁹ The NPS wants to provide visitors a “realistic” experience of the terrain over which the Battle was fought, without distraction by modern intrusions. The goal seems to be to encourage the visitor to enter through imagination entirely into the scene, to lose the sense of being in contemporary life for the moment. There seems little doubt that the NPS’s choice to emphasize restoration of the battlefield landscape facilitates a visitor’s ability to visualize the tactical choices made by the armies and promotes imaginative engagement by visitors. To these ends, the NPS decided to demolish the Cyclorama Center, restore the site to its 1863 condition, and remove the cyclorama painting to the planned visitor center—built away from the sensitive center of the battlefield.³⁷⁰

Contemporary historic preservation law has delayed the NPS’s demolition of the Cyclorama Center. In particular, section 106 of the NHPA requires the NPS, as a federal agency, to consider the effects of its “undertaking” on any property eligible for listing on the National

366. CARR, *supra* note 336, at 195.

367. See National Historic Preservation Act, 16 U.S.C. § 470 (2006).

368. WEEKS, *supra* note 4, at 121.

369. John Latschar, NPS, Battlefield Rehabilitation at Gettysburg, <http://www.nps.gov/gett/parknews/gett-battlefield-rehab.htm> (last visited Jan. 11, 2009).

370. The new museum visitor center is an interesting endeavor in itself. Estimated to cost \$95 million, it is being financed primarily by private donations raised by the Gettysburg Foundation, a private, nonprofit organization. Designed as faux farm buildings, it reflects a return to contextual “rustic” architecture of a somewhat postmodern type, given the luxurious, high-tech facilities actually being provided. Information can be found at Gettysburg Found., Gettysburg Battlefield, <http://gettysburgfoundation.org/index.html> (last visited Jan. 11, 2009).

Register.³⁷¹ In moving toward demolition, the NPS first found that the Cyclorama Center was not eligible for the National Register.³⁷² Because the building was less than fifty years old at the time, it could be found eligible only if found to possess “exceptional significance.”³⁷³ In a Determination of Eligibility Report, Park officials cited “technical shortcomings of th[e] building” and concluded that “though the work of a master architect, [it] can not be considered to be an exceptionally significant example of Neutra’s work.”³⁷⁴ The Pennsylvania State Historic Preservation Officer (SHPO) concurred with the NPS view.³⁷⁵ The Society of Architectural Historians requested that ACHP seek the views of the Keeper of the National Register, also an NPS employee, who has final decision on eligibility.³⁷⁶ The Keeper found the Cyclorama Center to be exceptionally significant on two criteria:³⁷⁷ as an outstanding part of Mission 66—an important initiative in the history of national parks—and as a major public work by a master architect.³⁷⁸ The evaluation of the significance of a modern building like the Cyclorama Center naturally engenders controversy.³⁷⁹ The NPS could legitimately view it as a recent mistake, which had failed to achieve even the practical goals set for it,

371. 16 U.S.C. § 470f (2006). The Advisory Council on Historic Preservation (ACHP), an independent agency created by the Act, has promulgated detailed regulations specifying how agencies must implement this duty. 36 C.F.R. pt. 800 (2008).

372. Nathan Jefferson Riddle, *Landscape Preservation and Interpretation: Issues of Use, Historical Experience, and Myth at Gettysburg National Military Park* pt. V.C (May 1999) (unpublished M.S. dissertation, Columbia University, *available at* <http://www.mission66.com/cyclorama/docs/riddle/neutral.html>).

373. 36 C.F.R. § 60.4(g) (2008).

374. Riddle, *supra* note 372, pt. V.C.

375. *Id.*

376. *Id.*

377. “Significance” is defined as one of four broad elements of historical significance plus “integrity of location, design, setting, materials, workmanship, feeling, and association.” 36 C.F.R. § 60.4. The four elements of historical significance relate directly to the values embodied in historic preservation generally. Those properties have significance that possess integrity and

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction . . . or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history.

Id.

378. The Keeper found that the Cyclorama Center is “a rare example of Neutra’s institutional design on the east coast and one of his very few Federal commissions.” NPS, *supra* note 330.

379. See THEODORE H.M. PRUDON, *PRESERVATION OF MODERN ARCHITECTURE* (2008).

but the NPS also had an incentive to discount whatever significance the building has because it creates a barrier to the NPS's achievement of its vision for site preservation.³⁸⁰ Nonetheless, the conclusion of the Keeper seems inescapable: The Cyclorama Center is a significant and distinctive work by an important architect of his time. The National Register regulations appropriately permit appeals by any interested person to an official who is somewhat insulated from political pressures and bound to apply professional criteria.³⁸¹

The NHPA does not require that the NPS preserve the Cyclorama Building (or any other historic property). Section 106 directs the responsible federal agency to consider the "adverse effects" that its undertaking may have on historic properties and consider alternatives to avoid or mitigate those effects.³⁸² To comply with the NHPA, the NPS prepared a "Section 106 Case Report" and consulted with the SHPO and the ACHP.³⁸³ The Case Report argued that the Neutra building had proved inadequate for protecting and presenting the cyclorama painting (itself on the National Register), was too small and inadequately accessible to provide other visitor services, and constituted an "intrusion" onto the historic battlefield.³⁸⁴ Indeed, the report claimed that the Cyclorama Center and its parking lots are located on "the most significant historic landscape at Gettysburg NMP, and may well be some of the most hallowed ground in the United States."³⁸⁵ Essentially, the Report argued that preservation of the building constituted a net negative for preservation, because it prevents restoration of the Zeigler's Grove site to its condition just before the Battle.³⁸⁶ Eventually, the NPS entered into a Memorandum of Understanding (MOA) with the SHPO and the ACHP providing for the demolition of the Cyclorama Center after thorough documentation of its existing condition.³⁸⁷ Although concerned

380. Mid-century modern architecture poses a distinct problem for preservationists, it often expressed hostility to the historic legacy of design and indifference to context. PRUDON, *supra* note 379, at 2-6, 18-20. Also, the materials with which it was built, particularly concrete, ages poorly. *See id.* at 2-4. Preservation organizations, including the National Trust, have mounted efforts to persuade the public of the value in preserving modernist structures. *See* Nat'l Trust for Historic Preservation, *Modernism + the Recent Past*, <http://www.preservationnation.org/issues/modernism-recent-past> (last visited Jan. 24, 2009).

381. 36 C.F.R. § 60.12 (2008).

382. 16 U.S.C. § 470f (2006); 36 C.F.R. §§ 800.5-800.6.

383. SECTION 106 CASE REPORT, *supra* note 355.

384. Riddle, *supra* note 372, pt. V.C.

385. SECTION 106 CASE REPORT, *supra* note 355.

386. *Id.*

387. An MOA is a legally binding document that records the terms and conditions agreed upon by the agency and the consulting parties to resolve adverse effects on historic properties from the federal undertaking. 36 C.F.R. § 800.16(o).

parties can seek judicial review under the Administrative Procedure Act of the agency's compliance with section 106,³⁸⁸ the execution of such an MOA practically ensures that such litigation would be fruitless.³⁸⁹ Nonetheless, in December 2006, the Recent Past Preservation Network, a nonprofit entity devoted to modern architecture, filed suit against the NPS to prevent demolition.³⁹⁰

The NPS's approach here raises legitimate questions, several of which were promptly raised in a letter objecting to the Case Report, submitted by the Society of Architectural Historians.³⁹¹ Three of these are worth noting. First, the battlefield Park already has become a cultural landscape reflecting successions of historically situated efforts to commemorate the Battle. The National Cemetery, the regimental memorials, and the avenues constructed by the GBMA and War Department, as well as Cyclorama Center, all are post-Battle additions that represent efforts of successive generations to come to terms with the Battle and all have historical significance. The NPS does not intend to remove any of these other than the Cyclorama Center, even though all "intrude" on the 1863 landscape. Thus, it has not adopted a consistent policy of restoration, but one that is selective, without disclosing any criteria. Historic preservation projects often face the question of whether to preserve later additions to properties with an earlier period of primary significance. But the later commemorative elements of the Gettysburg battlefield are not simply later adaptations for practical use, like an additional wing or later doorframe on a house, but self-conscious commemorative additions that reflect understandings of the Battle different from those of the present day. The Cyclorama Center stands as a significant element in the memorial landscape. Inclusion of multiple perspectives from different times lessens the hegemony of the present

388. Recent federal appellate decisions have made it clear that persons aggrieved by an agency's compliance with section 106 can seek judicial remedy only under the Administrative Procedure Act, 5 U.S.C. § 702 (2000). See *San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005).

389. An agency generally can, but need not, make interested citizens "consulting parties" in the section 106 process. 36 C.F.R. § 800.2(c)(5). Parties that are not consulting parties have rights to receive information about the undertaking and its effects on historic properties, to express their views, and have the agency consider them. *Id.* § 800.2(d)(1)-(2). However, only consulting parties can enter into facilitating agreements with the agency, an important form of leverage in the process.

390. Business Wire, *supra* note 81.

391. Letter from Richard Longstreth, President, Society of Architectural Historians, to John Latschar, Superintendent, Gettysburg Nat'l Military Park (Jan. 6, 1999), available at <http://www.mission66.com/cyclorama/letters/sah106.html>.

and provides the visitor with an opportunity to become conscious of the inevitability of interpretation and to consider current prejudices.

Second, the NPS decision favors reconstruction over preservation.³⁹² The location of the building does not now resemble its 1863 appearance at all, and has not for 100 years. At the time of the Battle, Ziegler's Grove provided tree cover for union artillery; after 1876, it was used as a brickyard.³⁹³ Although the NPS has gone to great lengths to research the appearance of the entire Park in 1863, it does not claim to have documentation of the appearance of the precise site in early 1863. Reconstruction of Ziegler's Grove will be speculative. Such reconstructed landscape reflects ideas about what the terrain should have looked like, rather than challenging preconceptions. Historian Jim Weeks complains: "What visitors will see is not the 1863 battlefield, but a hyperreal version of it that conforms to their image of the original . . . an 'airbrushed' improvement on the original without authentic blemishes or unpleasantries."³⁹⁴ By contrast, the NPS's demolition of the Neutra building will eliminate an actual landmark retaining integrity.

Finally, we may well ask why landscape restoration seems to have such powerful force. In the Case Report, the NPS primarily refers to its overall policy of landscape restoration and emphasizes its centrality to interpreting the Battle.³⁹⁵ It emphasizes the "hallowed" character of the Neutra site.³⁹⁶ But, leaving aside argument about comparative "hallowedness," landscape restoration is not a necessary means to honor the event or participants. The monuments and the Neutra building also honored the event. Depicting the pre-Battle countryside in some way ignores the Battle and certainly the horror of the killing. The Battle

392. The Secretary of the Interior's Standards for the Treatment of Historic Properties are widely recognized as the "basic yardstick against which restoration and rehabilitation procedures are judged." MURTAUGH, *supra* note 3, at 182; NPS, The Secretary of the Interior's Standards for the Treatment of Historic Properties (1995), http://www.nps.gov/history/local-law/arch_stnds_8_2.htm. These seem to counsel against demolishing the Neutra building. For example, Standard for Preservation 4 provides: "Changes to a property that have acquired historic significance in their own right will be retained and preserved." 36 C.F.R. § 68.3(a)(4). While this does not create a legally binding duty on the NPS, it should require them to explain more fully why reconstruction of prior landscape features has greater importance, especially because the reconstructed landscape at Zeigler's Grove inevitably must be highly speculative.

393. Riddle, *supra* note 372.

394. WEEKS, *supra* note 4, at 192.

395. SECTION 106 CASE REPORT, *supra* note 355. The NPS's estimate of the value of the site seems overblown. Zeigler's Grove sheltered Union artillery units that indeed were crucial to the Battle, but there was neither hand to hand combat nor tactical barriers at the site. *See* SEARS, *supra* note 4, at 394, 401.

396. SECTION 106 CASE REPORT, *supra* note 355.

devastated the countryside around Gettysburg.³⁹⁷ Ziegler's Grove was blown to bits by artillery fire on July 3, 1963.³⁹⁸ One might compare our attitudes toward the battlefield with those toward Ground Zero in New York, where the World Trade Center was destroyed on September 11, 2001, an event of perhaps comparable national trauma (although involving far less death and injury). It would be peculiar to restore the Twin Towers and related buildings to their exact appearance before the assault in order to commemorate what occurred; the plan for that site will erect a memorial space similar in intent to the Park developed by the GBMA in the 1880s.³⁹⁹

The NPS has argued plausibly that landscape restoration permits the visitor to see the terrain that the soldiers dealt with and that influenced the course of the Battle. But what values does that serve? The time has long since passed when one can claim that "[v]aluable lessons in the art of war can now be learned from an examination of this great battlefield."⁴⁰⁰ The period landscape permits the visitor to imagine the Battle and the tactical choices made by participants, which has had a powerful popular appeal. But narratives of maneuvers and Battle anecdotes can suppress questions about slavery, moral responsibility, and political consequences. Moreover, the pristine farmland effaces images of dead bodies and ravaged terrain. One may be concerned that tourists take away unrealistically romantic notions of war.

Similarly, while one may welcome the beauty of the recreated pastoral landscape at Gettysburg and infer from it an implicit critique of the urban sprawl of our time, one also may worry that it succeeds as an artificial ideal unconnected from any productive activity other than tourism.⁴⁰¹ Such a managed landscape can foster an intensity of

397. BORITT, *supra* note 141, at 25.

398. SEARS, *supra* note 4, at 400, 435.

399. The design for the National September 11th Memorial, now under construction consists of two large pools set within the footprints of the original Twin Towers with 30-foot waterfalls cascading down their sides. The names of the victims of the attacks of September 11, 2001, at The World Trade Center, Washington D.C., and Pennsylvania, and the February 26, 1993 World Trade Center bombing are to be inscribed around the edges of the waterfalls. The Memorial, set within an eight-acre landscaped Plaza filled with a forest of oak trees, will be a public contemplative space

The Port Auth. of N.Y. & N.J., National September 11th Memorial and Museum, http://web2.panynj.gov/wtc/wtc_memorial.html (last visited Jan. 24, 2009).

400. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681-82 (1896).

401. Two noted landscape preservationists have warned about protected historic landscapes such as battlefields, "[T]houghtful preservationists consider that managing a landscape may come at the price of losing the inherent historic character of places when landscape change is restricted and the daily activities, sights, sounds, and smells associated with them during their periods of

perception greater than that of any landscape currently in normal use, because the discords of incompatible or contested spaces are suppressed in favor of a unified vision.⁴⁰² Restoring a landscape to historic appearance ironically requires employment of continuous professional management of dynamic natural processes.⁴⁰³ Such a preserved landscape places the time of the Battle at a greater distance from the messy present. Neutra, by contrast, sought to connect the battlefield to contemporary concerns rooted in the Cold War.⁴⁰⁴

Concern about romanticization of the Battle is heightened by the NPS's solicitude for the cyclorama painting itself. However accurately Philippoteaux's massive painting of Pickett's Charge depicts uniforms and weapons, it presents the Battle as a heroic contest between worthy opponents—a "sanitized" embodiment of the reconciliationist view of the Civil War, suitable for a commercial entertainment of the 1880s. The cyclorama painting deserves preservation as late Victorian popular culture, reflecting the common historical imagination of its time.⁴⁰⁵ But official endorsement may give it inappropriate weight. The Gettysburg Foundation has restored the painting at the cost of \$13 million, and it now is presented in the new visitor center, where a "sophisticated audio system recreates the battle sounds, heightening the sense of being in the midst of Pickett's charge."⁴⁰⁶

significance no longer take place." Genevieve P. Keller & J. Timothy Keller, *Preserving Important Landscapes*, in A RICHER HERITAGE, *supra* note 266, at 187, 215.

402. David Lowenthal argues that authentic recreations have a special power to move us because they conform to our vision of the past. LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY*, *supra* note 10, at 356. As Lowenthal phrased it, "Indeed, in this sense only a replica can be authentic." Michael Kammen more generally notes the "irony that a nation of myth makers . . . ceaselessly obsessed with authenticity" and cites the popularity of Colonial Williamsburg's "authentic reproductions." KAMMEN, *supra* note 42, at 28.

403. See Kristin Mack, *Trees Lose on Manassas Battlefield: National Park and Prince William Officials Try To Restore Civil-War Era Views*, WASH. POST, Aug. 18, 2008, at B1. The NPS's highly regarded Guidelines for the Treatment of Cultural Landscapes, as presented on the NPS Web site, presents a photo of the Piper Farm on the Antietam Battlefield and notes: "[I]t was important to understand that the farm complex had a high level of integrity for its turn-of-the-century development. In fact, if the landscape was 'restored' to the period of the battle, it would have resulted in the removal of this farm complex and subsequent loss of significant history." NPS, Guidelines for Treatment of Cultural Landscapes: Factors To Consider When Selecting an Appropriate Treatment, http://www.nps.gov/history/hps/hli/landscape_guidelines/factors.htm (last visited Jan. 11, 2009).

404. "When everything in the preserved precinct dates from one selected time and nothing from any other, the effect is peculiarly static, unlike present-day landscapes, in which new and old everywhere commingle." LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY*, *supra* note 10, at 359.

405. NPS, *supra* note 235.

406. Gettysburg Found., *Conserving History in the Round, The Gettysburg Cyclorama Painting*, http://www.gettysburgfoundation.org/preserve/cyclorama_painting.html (last visited Jan. 11, 2009).

Both the cyclorama and the building designed by Neutra to house it represent significant perspectives of their respective eras on the Battle, but the former has far more current appeal than the latter. Modern architecture is unpopular, and the painting presents the Battle as we would like to think of it. Admissions paid to see the painting help support the Park's preservation. The growing reliance of the NPS on private fundraising inspires concern about the incentives to pander to common expectations. Borrowing themes from Part IV of this Article, if the adoption of a historic preservation ordinance by the Borough of Gettysburg represents the spread of preservation values from the Park to nearby commercial real estate, the emphasis on fundraising may encourage the spread of commercial tourism values from nearby enterprises to the Park itself.⁴⁰⁷

None of this means that the NPS acted unlawfully in choosing to demolish the Cyclorama Center. The NHPA recognizes the need for the responsible federal agency to make decisions about how to address historic resources within the context of its overall mission. The paradox here is that the NPS's mission has preservation at its core.⁴⁰⁸ Section 106 requires most federal agencies to balance the preservation of a historic property against its plan to fulfill some practical goal within its primary mission.⁴⁰⁹ Unlike most federal agencies, the NPS had to balance competing preservation values and projects within its overall mission to preserve and present the Gettysburg battlefield. Surely, the NPS did not consider with sufficient frankness or subtlety the nature of the tradeoffs it had made. The Case Report inadequately weighed the value of the Neutra building and dismissed offhandedly the suggestion of moving it from Zeigler's Grove.⁴¹⁰ The National Trust for Historic Preservation's comment on the NPS's Section 106 Case Study urges that NPS clarify what harm the Cyclorama Building imposes on the "character defining"

407. Concerns about the effects of commercial motives on the park have persisted. The private foundation's president earns an annual salary of nearly \$400,000, the park superintendent had announced his intention to retire and assume the presidency of the foundation but changed his mind after Department of the Interior lawyers issued an opinion warning about a conflict of interest, and the new visitor center now charges an admission fee of \$7.50 to see exhibits that had been free in the older visitor center and cyclorama center. Edward T. Pound, *A New Battle Rages at Gettysburg*, NAT'L J. MAG., Feb. 21, 2009, at 26-33. The Interior's Inspector General now is reviewing the partnership between the park and the foundation. *Id.*

408. National Park Service Organic Act, 16 U.S.C. § 1 (2006).

409. *Id.* § 470(a).

410. Record of Decision, General Management Plan and Environmental Impact Statement, Gettysburg National Military Park, 64 Fed. Reg. 71,483-71,492 (Dec. 21, 1999).

landscape to be recreated, given the persistence of other monuments.⁴¹¹ Nonetheless, the Trust agreed that the NPS should afford primary significance to the 1863 battlefield landscape and can demolish the Cyclorama Center to meet that goal.⁴¹² Decisions about what to preserve and how to interpret historic properties frequently require painful trade-offs. Section 106 creates a process by which interested persons can push the NPS to consider different perspectives, but preserves its authority to make the final decisions.⁴¹³ The process orientation of the NHPA allows for the inevitability of interpretation in historic preservation.

In challenging the Cyclorama Center decision in court, the plaintiffs did not argue that the NPS violated section 106, no doubt because they believed that they did not have a case. Section 106 achieves preservation goals by creating incentives for agencies to seek consensus with consulting parties, primarily the State Historic Preservation Officer (SHPO), rather than through judicially administered legal standards.⁴¹⁴ The SHPO as a state official has organizational independence from the federal agency subject to the act, although her positions may reflect state and local political priorities.⁴¹⁵ Agreement with consulting parties about identifying historic properties affected, the nature and extent of adverse effects, and evaluation of alternatives and mitigation greatly eases the decision path for the agency. These incentives push decisions down to a level where practical accommodation prevails. At Gettysburg, the state and the NPS share an interest in presenting the battlefield in a manner that will preserve its pilgrimage value and enhance the experience of most visitors. Given the vast resources being expended on enhancing the battlefield Park and on the related preservation projects in and around Gettysburg, it is hard to see this decision as arbitrary. While the NPS's

411. Letter from Richard Moe, President, Nat'l Trust for Historic Preservation, to John Latschar, Superintendent, Gettysburg Nat'l Military Park (Jan. 19, 1999), *available at* <http://www.mission66.com/cyclorama/letters/moe106.html>.

412. *Id.*

413. In such a situation, the NPS resembles the faithful steward of an architectural masterpiece who must make contentious decisions about how to modify the building for new or additional needs, as in the case of the Salk Institute's controversial addition to Louis Kahn's iconic research buildings, discussed by Professor Joseph Sax in *PLAYING DARTS WITH A REMBRANDT* 48-53 (1999). "Whatever the ultimate choice about a regulatory regime, some arrangement that permits the professional and affected public communities to be heard, and to convey to proprietors the importance to the community of the work they own, seems appropriate." *Id.* at 53.

414. 16 U.S.C. § 470a.

415. Under the ACHP regulations, the SHPO always is a consulting party with whom the agency must consult in specific ways and should seek an MOA. The SHPO "reflects the interest of the State and its citizens in preservation of their cultural heritage." 36 C.F.R. § 800.2 (c)(1)(i) (2006). For a realistic view of the SHPO, see THOMAS F. KING, *SAVING PLACES THAT MATTER: A CITIZEN'S GUIDE TO USING THE NATIONAL HISTORIC PRESERVATION ACT 45-46* (2007).

explanation of its decision to demolish the Cyclorama Center seems superficial and partial, many concerned entities have had the chance to argue for its preservation, and the ACHP has agreed that the NPS has fulfilled its responsibilities by signing the MOA.⁴¹⁶ Judicial intervention *now* to require a fuller explanation seems pointless without a prospect of a change in preservation philosophy among the Gettysburg Park leadership.

The plaintiffs have argued that the NPS violated section 110 of the NHPA, which provides that any federal agency “shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.”⁴¹⁷ Plaintiffs rely on the language of the statute, but it is doubtful that section 110(a), adopted as an amendment in 1980, imposes any substantive duty on agencies to preserve historic properties under their control beyond what section 106 provides. Although “the seemingly more substantive language of Section 110” supports the plaintiff’s claim that the NPS must preserve the Cyclorama Center, the statute has not been read as such.⁴¹⁸

Section 110(a) cannot be read to create new substantive preservationist obligations separate and apart from the overwhelmingly procedural thrust of the NHPA [If it were so read] Section 110 would replace Section 106 as the heart and soul of the NHPA, requiring an agency to spend money on historic preservation regardless of whether it was engaged in or contemplating an undertaking. Nothing in the statute or the legislative history suggests that Congress intended to alter the nature of the NHPA in such a fashion when it amended it in 1980, and the Court finds that Congress had no such intention.⁴¹⁹

The interpretation seems correct. To read section 110 as the plaintiff’s wish would supersede the procedural approach of section 106, which leaves the agency free finally to choose what actions to take regarding historic resources, with a substantive duty to preserve all historic properties under its control.⁴²⁰ Such a privileging of preservation over other agency missions or duties would not be politically sustainable. Moreover, section 110 specifies a number of procedural duties on federal agencies, such as adopting internal procedures to identify and nominate

416. NPS, Gettysburg National Battlefield Museum and Visitor Center (2008), <http://www.nps.gov/partnerships/gettysburg.htm> (last visited Feb. 16, 2009).

417. 16 U.S.C. § 470h-2(a)(1). According to its legislative history, section 110 “clarifies and codifies the minimum responsibilities of Federal agencies in carrying out the purposes of [NHPA].” H.R. REP. NO. 1457, at 36 (1980), *reprinted in* 1980 U.S.C.A.N. 6378, 6399.

418. *Nat’l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 917 (D.D.C. 1996).

419. *Id.* at 922.

420. 16 U.S.C. § 470f.

historic properties to the National Register, but makes no provision for the larger adjustments that would be needed to cope with a blanket requirement of preservation.⁴²¹ According to its legislative history, section 110 only “clarifies and codifies the minimum responsibilities expected of Federal agencies in carrying out the purposes of [NHPA].”⁴²²

The substantive reading of section 110 makes little sense even at Gettysburg, where the agency has been weighing different preservation values, rather than balancing preservation with some other mission. As we have seen, preserving a site associated with an event as significant as the Battle of Gettysburg requires choices of theme and method. Moreover, because the battlefield has been a site where different and successive interpretive themes have been pursued for nearly 150 years in light of changing social and political imperatives, the NPS will often need to demolish one asset to interpret another. While architectural historians and preservationists interested in the recent past properly oppose destruction of a significant modern building like the Neutra building, the NPS needs the discretion to choose its interpretation, so long as it complies fully with consideration and consultation requirements of section 106.⁴²³ Without that authority, the interpretation may lapse into obsolescence or incoherence. Those of us who regret the loss of the Neutra building should hope for a broader public appreciation of modern design and a greater willingness by preservation managers to preserve buildings that reflect the historic evolution of perspectives on significant events. It is an irony of historic preservation that to succeed it must always be up to date.

421. *Id.* § 470h-2(a)(2). The court found further support for its decision in the Guidelines for Federal Agency Responsibilities Under Section 110 of the NHPA, 53 Fed. Reg. 4728 (Feb. 17, 1988), issued by the Secretary of Interior. *Blanck*, 938 F. Supp. at 922. As the court explained:

The Section 110 Guidelines require the development by agencies of historic preservation plans and list a variety of factors that agencies “should consider” in establishing such plans and in managing historic properties. Nowhere, however, do they state that agencies have an affirmative obligation to spend money to preserve historic buildings. Rather, the entire thrust of the Guidelines is to channel agency decisionmaking in an informed preservationist direction consistent with the agency’s mission.

Id.

422. H.R. REP. NO. 1457, at 36 (1980).

423. Plaintiffs also argue that the NPS failed to comply with various duties under the National Environmental Policy Act, which also requires study of major federal actions that affect the quality of the human environment, including historic resources. 42 U.S.C. § 4332 (2000).

VI. CONCLUSION

Historic preservation reflects the present as well as the past. Decisions about preservation and presentation of a historic site of central cultural and political significance will always reflect the perspectives of contemporary society, especially those with power. When we look behind the patriotic purposes supporting public preservation of the Gettysburg battlefield, we find evolving over time a memorial to the sacrifice of the soldiers, veterans asserting their ongoing political power, the promise of emancipation and equal citizenship, assertions of national unity, white supremacy, conservative stability, renewal of an American mission to promote global freedom, nostalgia for pastoralism in the face of monotonous sprawl development, martial valor in a world of nuclear destruction, the fun of family outings, and the business of heritage tourism. In all this, the dramatic stories of the Battle and its significance for our history comes alive in different manners for different visitors.

The NHPA promotes dialogue with the NPS about what preservation decisions should be made at national historic parks, while protecting the ultimate authority of the agency to make interpretative choices. The regulations implementing section 106 of the NHPA structure a legal preference for existing resources of historic significance, by requiring the agency to identify the resources and specify the adverse effects upon them. By also requiring consultation and encouraging compromise with the SHPO and ACHP about how to resolve adverse effects and inviting public criticisms, the NHPA promotes inclusion and compromise. The capacity of interested nongovernmental entities to comment and bring suits testing compliance with the process gives them voice but not control over decisions. Despite its limitations, the NHPA process fosters a workable balance among competing priorities with the inevitable need for interpretation.

APPENDIX⁴²⁴Address delivered at the dedication
of the cemetery at Gettysburg

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they have the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

424. Lincoln, *supra* note 154, reprinted in WILLS, *supra* note 152, at 263.