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Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law

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The Gettysburg Battlefield in Historic Preservation Law

J. Peter Byrne*

Abstract

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 paper describes the history of preservation at Gettysburg. It argues that the 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.

* Professor of Law, Georgetown University Law Center. Thanks for helpful comments go to Naomi Mezey, Nicole Garnett, Nestor Davidson, Gregg Kettles, Sara Bronin, and Karen Byrne, and to participants at faculty workshops at Georgetown and Notre Dame law schools and at the 2008 Law and Society Conference. Thanks also to the staff at the Georgetown University Law Library for great research support.
This paper 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 persons 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 Rather, they have focused such interest as they have had in historic preservation on local ordinances regulating privately owned landmark or lands within historic districts. These laws are the subject of the most important 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 US, 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., Naomi Mezey, The Paradoxes of Cultural Property, 107 Colum. L. Rev. 2004 (2007); 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). 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. I argue that historic landmarks convey more complex and contradictory meanings than are generally discussed.
Gettysburg National Military Park, by contrast, commemorates the largest and most important battle of the Civil War, itself probably the most significant event in American history, as well as the location and occasion for the most celebrated speech in US 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 pre-industrial agricultural landscape as it existed on the eve of the battle. Thus 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 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 taste in design and on the political constituency for regulatory preservation. 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 makes decisions about the land matters of community concern rather than individual dominion. Americans often have thought about the land in primarily cultural, even spiritual terms, as evidenced by strong native traditions of landscape painting, nature poetry, and environmentalism. 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 conflict 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 preservation law requires law to resolve. 4 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. 5 Legal writing about historic preservation, however, generally downplays history’s content. 6 Non-legal scholars, however, 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. 7 A good test of historic preservation law is how well it resolves conflicts about the meaning of important sites.

4 Legal theorist Roger Cotterrell 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)[I am checking this cite].
6 An exception that proves the rule is David F. Tipson, Putting the History Back in Historic Preservation, 36 The Urban Lawyer 289-316 (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. Mr. Tipson’s preferred approach of restricting preservation to those elements of a cultural landscape that convey the narrative of local history, however, probably relies on a naïve sense that history has some consensual content outside of the kind of concerns for present welfare that he decries. This article focuses on the challenges and ambiguities of preserving a site to tell important but contested history.
7 Particularly influential has been the work of David Lowenthal. See The Past is a Foreign County (1985) and The Heritage Crusade and the Spoils of History (1998).
Gettysburg presents multiple powerful historic values, which pose difficult questions about which elements should be preserved and how. People care a lot 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 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 I provides a short overview of the Battle of Gettysburg and the history of the preservation of the site. Part II unpacks the often-repeated idea that preservation of 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 III 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 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 IV analyzes how preservation requires choices among legitimate interpretative priorities. It considers the National Park Service’s 1999 decision to demolish the 1962 Cyclorama Center, itself a modern historic landmark, in order to fulfill its vision for battlefield restoration. The part 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 inevitably will reflect contemporary interpretative biases, the law should mandate inclusive processes for making preservation choices and encourage the presentation of multiple perspectives.

I. 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. 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. Confederate officials awaited with trepidation the fall of their fortress at Vicksburg on the Mississippi, and hoped to gain a signal victory in the East to uphold Southern morale. Lee hoped to defeat decisively the Union Army of the

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Potomac on its own ground, which could lay open Washington or Baltimore to capture, something that could enflame peace sentiment in the North.

Lee’s army crossed the Potomac into Maryland on June 22 and quickly entered Pennsylvania. 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. Confederate soldiers seized free blacks and escaped slaves, sending them south in bondage. Anxiety prevailed both in the federal government and in the northern population. The Union army moved quickly to intercept the Confederate army, and the armies clashed at the crossroads town of Gettysburg.

Advanced units fought on July 1 west of town. 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. On July 2, Confederate troops attacked, driving back Union troops in exposed positions, but eventually were repulsed after appalling slaughter and memorable acts of heroism on both sides. 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. 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. The Confederate army

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9 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.” Sears, supra note 8, at 112.
drew off and retreated to Virginia; the Union army, traumatized and spent, pursued listlessly.

The reaction in Northern states was jubilant. The battle ended the threat of invasion and proved a decisive and heartening victory for the Army of the Potomac, so often previously bested by Lee’s forces. The public, steeped in Christian lore, saw the victory as a providential deliverance for the righteous cause. More practically, Lincoln and his allies also understood the political value of the victory, which muted Northern anti-war sentiment and effectively ended the possibility of European intervention on behalf of the Confederacy.

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. 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.\textsuperscript{10} The Pennsylvania legislature incorporated the cemetery, which was paid for by the states whose soldiers were interred there.\textsuperscript{11} The federal government took

\textsuperscript{10} One historian has observed, “In a sense, the Gettysburg Address dedicated the entire field of battle.” Harlan D. Unrau, Administrative History of Gettysburg National Military Park, v (1991).
\textsuperscript{11} Id. at 15-16.
ownership in 1872. The War Department administered it as a national military cemetery until 1933, when it was taken over by the National Park Service.

A Gettysburg lawyer, David McConaughy, began purchase of land on the battlefield for preservation within days of the fighting. The Pennsylvania legislature in April, 1864, chartered the Gettysburg Battlefield Memorial Association (GBMA) “to hold and preserve, the battlefields 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.” The preservation and memorial effort was devoted solely to the Union effort. After 1880, the premier union veterans’ organization, The Grand Army of the Republic (GAR), gained control of the GBMA. 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. Northern state legislatures largely paid for these monuments, which commemorated regiments and individuals who had fought for the Union. 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. Despite difficulties, the GBMA’s

12 16 Stat. 390.
13 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 beheld 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.” Quoted in Barbara L. Platt, “This Is Holy Ground”: A History of the Gettysburg Battlefield, 1863 – 2006, 3 (2006).
14 Establishing Act for Battlefield Memorial Association, quoted in Platt, supra note x, at 5.
preservation accomplishment was unprecedented: the first American battlefield set aside and managed for study and reflection, a pioneering attempt to preserve historic landscape.

Public interest in preserving Civil War battlefields grew through the 1880’s for complex reasons. The aging of veterans, mounting interest in regional reconciliation, growing affluence and improved rail transportation, nostalgia for a more rural, 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.\(^\text{15}\) Congress created the Chickamauga and Chattanooga National Park by statute in 1890, the first national historic park, which commemorated two battles fought in sequence in southeastern Tennessee.\(^\text{16}\) Congress sought here to improve on the GBMA’s model in Gettysburg by honoring Southern as well as Northern participants and by authorizing acquisition of a large area, 7,600 acres, and construction of eight highways connecting major areas. 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.” States could erect memorials to their troops where they had engaged, subject to supervision by the Secretary. Innovatively, the statute authorized the Secretary to lease acquired land to cultivators on condition that they “will preserve the present buildings and roads, and present outlines of field and forest.” This early attempt at historic landscape management used lease terms that anticipate modern preservation


easements. Additional national battlefield parks were created by statute at Antietam in 1891, Shiloh in 1894, and Vicksburg in 1899.

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 US Army regiments in the battle, in anticipation of the 25th anniversary reunion of veterans in 1888. 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. In 1893, Congress appropriated $25,000 for determining and “preserving the lines of battle” and positions of all armies. Secretary of War Lamont, to whom the work was entrusted, then appointed a three-man commission to undertake the work. This act led to the condemnation of electric railway lines on the battlefield upheld by the Supreme Court in 1896; that important decision is analyzed in detail in Part II of this article.

While the litigation was pending, Congress enacted legislation to establish Gettysburg National Park as the fourth national battlefield park. The GBMA deeded its

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17 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 non-profit or governmental holder controls over the alteration of the historic features of a property.
19 *Id.* at 24-25.
21 Ch. 80, 53d Cong., Sess. III, 28 Stat. 651 (Feb. 11, 1895). The legislation had been introduced by Rep. Daniel Sickles of New York, a controversial political figure who served in congress before the Civil War,
land to the United States the next year in exchange for payment of outstanding debts. 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. 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 cut or injure any growing tree or bush. 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. 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 1890’s, from which visitors could get wide views of the battlefield, and paved existing roads to facilitate carriage travel within the park. Consistent with the War Department’s primary mission, the Pennsylvania National Guard spent a week each year training on the

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22 Id., sec. 7.
23 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 …; 12 ½ miles of fencing built of posts and rails; 13 miles of gutter paving. Five and one-fourth 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.” Annual Reports of the Gettysburg National Military Park Commission to the Secretary of War, 1893-1904, 105 (1905);
battlefield. During World War I, Camp Colt was established on the battlefield as an army training facility.

The War Department supervised the park until President Roosevelt transferred all the battlefield parks to the National Park Service (“NPS”) in 1933. The NPS, founded in 1916, had begun to seriously involve itself with historic preservation during the 1920’s. Inspired in part by the professional standards established in private preservation and restoration efforts, the NPS institutionalized historic preservation expertise within the federal government. In 1935, Congress entrusted it with important duties under the Historic Sites Act, which enhanced professional standards for the appraisal of proposed historic landmarks and tools for preservation. 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. 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.

25 Executive Order, No. 6166, June 10, 1933.
29 16 U.S.C. 470i(a).
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. 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 village. In 1962, NPS opened its first permanent visitor center at Gettysburg, designed in striking modernist fashion by renowned architect, Richard Neutra. 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. In 1973, the NPS also acquired the adjacent Rosensteel Museum, along with it “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.

For many years, various commercial attractions had clustered around the park catering to tourists. These greatly expanded in the 1950’s, and included the Prince of Peace Museum (where wax figures enacted the life of Christ), Fantasyland (fairy tale characters and pony rides), and Fort Defiance (Indians and guns).\(^30\) 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.”\(^31\) Concerns about intrusions on the experience of visiting the battlefield soon centered on a 307-foot

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\(^{30}\) See Weeks, supra, at 161-63.

observation tower constructed by Thomas Otterstein, a real estate developer (and Georgetown Law graduate!), in 1974, on privately-owned land 400 feet from the boundary of the battlefield park.  

The tower had a space age, needle-like design. National Park Service and state authorities unsuccessfully pursued legal means to prevent construction of the tower. In Part III below, I look more carefully at this litigation and the preservation issues it embodied. In a curious replay of Gettysburg Electric Railway, the federal government condemned the land upon which the tower stood and demolished the structure in 2000.

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 the natural and built elements of landscape to conditions approximating those on the eve of the battle. The Gettysburg Foundation, a non-profit corporation, raised $125 million in private funds to support implementation of the plan, which included construction of a new visitor center removed form the battlefield to house the cyclorama painting and museum collections. As part of this plan, the NPS’s decided to demolish the Neutra cyclorama building, principally so it can restore the land where it sits to its 1863 pre-battle condition. In December 2006, the Recent Past Preservation Network, a non-profit organization, sued the NPS, alleging that its decision to demolish the Neutra building violated the NHPA. This litigation shows that controversy persists about what to preserve.

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and how. Part IV examines this controversy, which raises fundamental questions about how and why should a battlefield be preserved.

C. Conclusion

The Gettysburg battlefield thus has been 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.

II. “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 preservation law. The first to arise was a patriotic purpose, dominant in the 19th century, seeking to save places and buildings associated with significant persons and events in American history. 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. The third purpose seeks to maintain more generally the distinctive “sense of place” that older

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buildings give communities. These purposes overlap in many cases, have persisted into the present, and do not exhaust the goals of historic preservation.\(^{35}\) Nonetheless, they offer useful organizing principles for thinking about the social roles played by historic preservation law. Rose’s chief subject in her 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.\(^{36}\) She recognized that contests over local community building reflect power relations. 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. Historic preservation laws of this sort combine professional evaluation of the historic built environment with explicit and implicit interpretations of meaning that are broadly political.\(^{37}\)

\(^{35}\) National Park Service regulations establish criteria for eligibility for listing properties on the National Register of Historic Places. 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.” 36 C.F.R. § 60.4.


\(^{37}\) 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 Tad Heuer, Note, Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations, 116 Yale L. J. 768 (2007); J. Peter Byrne, Two Cheers for Gentrification, 46 How. L. J. 405 (2004); Tipson, note x, supra: Michael deHaven Newsome, Blacks and Historic Preservation, 36 Law & Contemp. Probs. 423 (1971).
By contrast, Rose’s treatment of preservation for “patriotic” purposes assumes that such endeavors enshrine simple, well-recognized values. Specifically, she writes that “Gettysburg may seem the easy case”. She understands that such shrines help to create a “national community”, and that contemporary preservationists attributed “political significance to physical surrounding.” 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”, 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. Of course, decisions about subsequent additions or changes must often be made. Should they be eliminated or earlier features recreated? Also some compromises with current needs will be made, like installing air conditioning to preserve fragile items or encourage

38 See also Norman Tyler, Historic Preservation: an Introduction to Its History, Principles, and Practice, 34 (2000) (“Nineteenth- and early twentieth-century organizations, including historical and patriotic societies, family organizations, and government agencies, saved landmark buildings more for patriotic reasons than because of their architectural significance.”)
39 Rose, supra note x, at 484.
40 Id., at 488, 492.
41 Id. at 487, 517-24.
43 Philip Kennicott, Madison’s Makeover, Wash. Post, Aug. 13, 2006, at N 1 (describing $23 million project to restore Montpelier mansion to appearance when Madison’s home in 1817).
tourists to visit. But when the goal of preservation is to protect some physical structure
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.44

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, websites. 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 this 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 that the
monuments construction had effaced the revolutionary battle’s last
remaining actual traces.45

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

44 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
45 Holleran, supra note x, at 85.
1920’s.\textsuperscript{46} Preservation and restoration reflect modern approaches to the commemorating the past.

**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.\textsuperscript{47} When the government interprets historic sites, there is a risk that they will present “official versions” of events,\textsuperscript{48} but also a promise that diverse views can be heard. Celebrations of, and continuing controversy over, the Vietnam Veteran’s Memorial in Washington illustrate this well: Maya Lin’s descending black wall inscribed with the names of the dead captured the essence of the war

\textsuperscript{46} Charles Hosmer’s histories of the preservation movement in the U. S. celebrate the emergence of professional criteria and their pragmatic application to various preservation purposes. *Preservation Comes of Age: From Williamsburg to the National Trust, 1926 – 1949* (1981); *Preservation Before Williamsburg* (1965). Interestingly, when the Society for the Preservation of Virginia Antiquities first acquired the 18th 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 18th century appearance under the auspices of Colonial Williamsburg.

\textsuperscript{47} See Lowenthal, *Heritage Crusade*, supra note x, 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 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 x, 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.

\textsuperscript{48} Early preservationists favored strictly private preservation because of “fear that government money might mean government control of preservation” but also from a belief that preservation decisions should be made by a cultured elite. *See id.* at 264.
experience for many, but has been contested 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.\(^{49}\)

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 for us today. For example, the Mount Vernon Ladies Association long has preserved thoughtfully George Washington’s home at Mount Vernon, but the interpretation has evolved in how to present slavery. For more than a century, the house has conveyed how Washington’s life as Virginia planter shaped his commitments to public service. Visitors might have been dimly aware of the servants who worked on the plantation. Today, they also encounter carefully reconstructed slave quarters detailing the experiences of enslaved workers.\(^{50}\)

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.\(^{51}\) Such exhibits convey past struggle and injustice as well achievement and victory. These often present humble buildings of little aesthetic interest

\(^{49}\) 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.”).

\(^{50}\) Mount Vernon’s slave quarters reconstruction is described at [http://www.mountvernon.org/learn/pres_arch/index.cfm/pid/938/](http://www.mountvernon.org/learn/pres_arch/index.cfm/pid/938/).

or even blank sites, which must be interpreted by symbols and text. They grip us because they provide material images and perspectives on the moral paradoxes that persist in American history.

“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 17th century for persons supporting traditional rights against the prerogatives of the king and in the United States for those actively defending against foreign invaders. Patriotism easily veers off into xenophobia, as reflected in the names of many contemporary “militia” groups defending gun rights and opposing taxes.

However straightforward the attitudes of 19th century preservationists may seem, historians have come to see in them a variety of ideological presuppositions and engagements with contemporary social concerns. No historical legacy has been more fraught or contested than that of the Civil War. Gettysburg long has been the chief “shrine” to that war. A remarkable scholarly literature has emerged that studies the

52 Also, 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 who escaped, and Washington’s unsuccessful efforts to recover them employing fugitive slave laws. Community members pressured the NPS not to ignore the relics of slavery on the site of the new Liberty Bell Center. See Rebecca Yamin, Digging in the City of Brotherly Love, 44-54 (2008).

53 A remarkable attempt to present the space within which slaves worked and lived, using photographs and architectural drawings from the 1930’s Historic American Buildings Survey, is John Michael Vlach, Back of the Big House: The Architecture of Plantation Slavery (1993).

history of memories of the Civil War and their popular expressions. These often present or analyze developments at Gettysburg or cast indirect light upon it. This work encourages us to unpack the choices and presuppositions made in preserving the Gettysburg battlefield. It is hoped that this will provide us with a basis to understand better the legal instruments used in its preservation and consider their ongoing suitability.

Gettysburg National Military Park always has 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 it have reflected dominant ideas of their times, even as they sought to preserve what was thought to be of value against perceived threats. The most important of these is *United States v. Gettysburg Electric Railway Co.*, where the Supreme Court held that the Federal government possessed constitutional authority to take land for historic preservation purposes by eminent domain. The unanimous opinion gave federal historic preservation law a constitutional foundation. Its rhetoric also created the archetype for understanding the patriotic preservation. In the next section, I will analyze that decision and the light it sheds on the relation between preservation and history.

B. Gettysburg Electric Railway

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56 160 U.S. 668 (1896).
In the early 1890’s, entrepreneurs in Gettysburg constructed an innovative electric railway service to permit the growing number of tourists to get around the perimeter of the park. “The trolley opened the battlefield to many who could not afford a carriage, but it drew fire from many veterans’ groups and the GBMA, which had planned to place memorials on the track path.” Congress had authorized the Secretary of War to condemn lands “upon or in the vicinity of [the] battlefield” in order to preserve, mark, and provide access to the lines of battle of both armies. The federal commissioners sought to buy the private land over which the tracks ran but could not reach an agreement with the railway company and then exercised their authority to force sale through an action of eminent domain. The federal circuit court held that the United States lacked constitutional authority to condemn land for the purposes stated.

The Supreme Court 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 Sherman Antitrust Act could not reach a national monopoly in sugar production because

57 Weeks, supra note x at 71-72.
58 Joint Resolution, June 5, 1894, 28 Stat. 584. This resolution recited that the Secretary was authorized to purchase or condemn the lands.
59 Act of March 3, 1893, c. 208, 27 Stat. 572, 599. This enactment impliedly authorized purchase of land. Another important statute, Act of March 3, 1888, c. 728, 25 Stat. 357, still in effect and codified at xx, 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.
60 The Condemnation Act, 40 U.S.C. § 3113 (2005), 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. In addition to its claims based on the constitution, Gettysburg Railway argued that Congress has not appropriated funds for condemning its land, but the court rejected this argument based on it reading of the appropriation statutes. When the government filed its condemnation action, it did not yet own any land in the battlefield park.
the constitution did not allow Congress to regulate manufacturing,61 here held that it did not need even 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 powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.”62

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. 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 act.63 In Gettysburg Railway, Gettysburg Railway 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. 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.64

62 160 U.S. at 683.
63 “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, 302 (1893)(upholding taking of land for Rock Creek Park in DC as public use).
Examine 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 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 defense 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.65

The Court had concluded, in the language I quoted earlier, that Congress’s authority to use eminent domain flowed from its collective enumerated powers. Historic preservation that fosters attachment to the federal government must be within federal legislative authority.66 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. 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 made.”67 The court further compares the government’s interest to its “right to bury its own soldiers and see to it that their graves shall not remain unknown or unhonored.”68 Professor Rose characterizes Gettysburg Railway as the classic account of preservation for patriotic purposes “framed in the language of trust among generations.”69

But 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

65 160 U.S. at 682-83.
66 Gettysburg Railway provides impressive support also for federal regulatory power over private property to promote historic preservation. The NHPA avoids such direct federal regulation, and this has sometimes been seen as a constitutional necessity. But Gettysburg Railway holds that there is ample legislative authority among Congress’s enumerated powers, eminent domain being treated as merely another aspect of the legislative power.
67 160 U.S. at 682.
68 Id. at 683.
69 Rose, supra note x, at 484.
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.”70  Different Americans at different times have held very different understandings of what the war signified and how it should be commemorated. Consideration of these also 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 among ends and means. When government takes a hand in preservation, it acts to shape cultural self-understanding. Understanding the institutions and process 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. The Northern press celebrated the battle as delivery from a dangerous and resourceful enemy. Confronting the extent of death in such a small area, however, traumatized town residents and military observers. Historian Gabor Borritt described the battle as “the greatest man-made disaster in American history”.71  Many writers have 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 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

70 Faust, supra note x, at xiii (2008).
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.\textsuperscript{72}

The first visitors to the battlefield sought after lost husbands and children, or after souvenirs or booty. “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.”\textsuperscript{73} The first land set aside on 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. Confederate dead, however, remained in unmarked mass graves unless retrieved by family members.\textsuperscript{74}

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,\textsuperscript{75} evoked fear of the consequences of defeat for the Army of 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, accordingly as it might have pleased him, spurred by passion, flushed with victory, and confident of continued success, to

\begin{footnotesize}
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\item[72] Faust, \textit{supra} note x, at 69.
\item[73] Weeks, \textit{supra} note x, at 38.
\item[74] “Confederates at Gettysburg were buried in trenches containing 150 or more men, often hurled rather than laid to rest.” Faust, \textit{supra} note x, at 71-72.
\item[75] Everett also paid 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. \textit{See} Jill Teehan, \textit{The Intersection of Gender and Early American Historic Preservation: A Case Study of Ann Pamela Cunningham and Her Mount Vernon Preservation}, Georgetown Law Historic Preservation Papers Series, Paper 21 (May 15, 2007) at \url{http://lsr.nellco.org/georgetown/lhps/papers/21}. Everett’s speech singles out the contributions of Northern women to the war effort, especially their service as nurses to the wounded and dying. Everett also invoked the intense personal interests of free and freed African Americans in the victory of Northern arms. 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.
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direct his course? Everett excoriated the slaveholders and leaders of the treasonous rebellion responsible for inflicting the agonies of war on peaceful people North and South. 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. 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.”

But, of course, Lincoln articulated the enduring image of the struggle in his brief address. Lincoln spoke as the leader of a “nation, conceived in liberty, and dedicated to the proposition that all men are created equal.” 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. In Garry Wills’ memorable phrase, Lincoln had “revolutionized the Revolution,” entwining equality with liberty and self-government. A guarantee of equal protection of the laws became part of the constitution only with passage of the Fourteenth Amendment in 1868, but then for

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76 Edward Everett, Address at the Dedication of the National Cemetery at Gettysburg. 19 November 1863, with the Dedicatory Speech of President Lincoln, 33-34 (1864), available at http://books.google.com/books?hl=en&id=M9uYVW7THSjOCSdq=edward+everett+gettysburg+speech&printsec=frontcover&source=web&ots=Rbf-NThlqY&sig=5CBvPbUqBAoFHzOijSquDmZRSFLw#PPA33,M1.

77 Id. at 59. Henry Ward Beecher expressed similar emancipationist views in dedicating a monument at the cemetery in 1869: “The rebellion, the offspring of slavery, has murdered its unnatural parent, and the perfect reign of liberty is at hand.” Quoted by Blight in Fahs and Waugh, supra note x, at 104.

78 There is no need here to weigh issues about the exact text of the address. I have quoted form the so-called Bliss text used in Garry Wills, Lincoln at Gettysburg: The Words That Remade America, 263 (1992).

79 Id. at 38 (1992).
nearly a century was negated in practice by unsympathetic interpretations by the Supreme Court.80 The values also were long ignored at the Gettysburg park.

Lincoln spoke to dedicate a cemetery for union dead, “who here gave their lives that that nation might live.” His rhetoric linked democracy and liberty, past and future: “we here highly resolve that the dead shall not have died in vain, that the nation shall, under God, have a new birth of freedom, and that the government of the people, by the people, and for the people, shall not perish from the earth.” 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. 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.81 Lincoln’s brief address linked the soldiers’ sacrifice with the nation’s most attractive political values.82 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.83

80 See, e.g. The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1875).
81 “Most historians … believe that the new birth was the freedom of the 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, N.Y. Rev. Books, Vol 55. No. 19, December 4, 2008, at 46. 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. Borritt, supra, 115-17.
82 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 become 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).
83 Blight, supra note x, at 2, 18.
Others held different understandings. Gettysburg gripped the national imagination soon after the war, although curiosity and commemoration of military heroism eclipsed 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.”84 The GBMA maintained the battlefield as a memorial park, similar to the picturesque cemeteries of the time, constructing carriage roads, rebuilding defense works, installing cannon, and placing wooden explanatory placards, while preserving details like stone walls. One historian argues that early tourists were captured by the “monstrous scene of organized killing set against pastoral American abundance”.85 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. States and regiments competed for the largest and grandest memorials in the choicest locations. “For veterans, placement of a monument at Gettysburg represented public acknowledgement of their entire wartime activity.”86 Veterans and veteran groups visited frequently, sometimes camping on the grounds. 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.87

85 Weeks, supra note x at 48.
86 Id. at 61.
87 The GAR has been called “one of the most successful special-interest groups in U.S. history.” Patrick J. Kelly, The Election of 1896 and the Restructuring of Civil War Memory, in Fahs & Waugh, supra note x, at 198.
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. First, the government wanted to acknowledge and honor Southern as well as Northern soldiers. Second, it wanted to exclude inappropriate modern intrusions from the battlefield. For both these purposes, the GBMA seemed inadequate and federal authority the better solution. GBMA’s charter embraced only commemoration of Union troops. The park manager was effectively controlled by the GAR, a union veterans’ organization, and funded by Northern state legislatures. 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 occupied by Southern lines remained in private hands and were under increasing development pressures. Advocates argued that preservation and interpretation of the Southern lines was necessary to provide an accurate idea of the course of the battle. The first congressional action taken regarding Gettysburg, in 1893, appropriated money for preserving and marking the positions taken by both armies.88 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.”89
The aim here was to give visitors a fuller 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 also was at work here. By the 1890’s, 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. A Congress including many Southern representatives naturally reflected these desires, especially given the suppression of black political voice. As noted above, the 1890’s saw an unprecedented federal effort at Civil War battlefield commemoration that celebrated both blue and gray.90 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?” 91 Subsequent legislation authorizing battlefield markers stipulated that they should be “compiled without praise and without censure,” insuring neutrality among the contending forces.92

89 Quoted in Unrau, supra note x, at 72.
90 See above.
92 27 Stat. 599.
Subsequently, Southern states erected memorials to confederate soldiers on land acquired by the United States, which have become among the most popular shrines at the park.\textsuperscript{93}

More generally, the 1890’s 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. By the 1890’s, the desire for reconciliation among whites overwhelmed emancipationist sentiment and “delivered the country a segregated memory of its Civil War on Southern terms.”\textsuperscript{94} 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.\textsuperscript{95} In the year \textit{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 military power to guarantee black suffrage in the South.”\textsuperscript{96}

Gettysburg had became a venue for reconciliation soon after the War, as local boosters invited former Confederate soldiers to return for commemorations. A concerted

\textsuperscript{93} Platt, \textit{supra} note x, at 30.
\textsuperscript{94} David Blight, \textit{supra} note x, at 2 (2001).
\textsuperscript{96} Kelly, \textit{supra} note x, at 181.
but underfunded effort at a battlefield reunion of veterans form both sides for the 25th
anniversary in 1888 was followed by the massive, federally-financed celebration of the
50th anniversary of the battle in 1913. More than 50,000 veterans and guests from both
sides gathered on the field. 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. Woodrow Wilson, the
first President born in the South 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 should celebrate the “quarrel forgotten” except for the “splendid
valor, the manly devotion of the men then arrayed against each other, now grasping hands
and smiling into each other’s lives.”

From our perspective, 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. 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. 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. Most African

97 Blight, supra note x, at 389.
98 Quoted in Blight, supra note x, at 11.
99 See generally Epps, supra note x (narrative account of passage of post-Civil War Amendments); Foner,
supra note x (pioneering revisionist account of Reconstruction).
Americans viewed the war differently, as a welcome conflict that gave them the opportunity for freedom. But white supremacist mythology largely confined these views to the black community. The 1890’s 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. President Wilson mandated segregation and discrimination within the federal civil service just a few months before he spoke at Gettysburg in 1913. Black veterans had been offered only segregated accommodation at the 1913 reunion anniversary, and there is no evidence that any attended. The national celebration of the reconciliationist vision at Gettysburg signaled a “kind of Southern victory in the long struggle over Civil War memory.”

E. Gettysburg Railway as Interpretation

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.

100 Blight at 344.
101 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.
102 The GAR was thoroughly segregated. Black veteran members meeting in all-black units came to avoid large scale GAR events because of concerns about insults by whites.
103 Blight at 397. Blight described the 50-yesr commemoration as “a Jim Crow reunion, and white supremacy might be said to have been the silent, invisible master of ceremonies.” Id. at 9.
104 163 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
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. 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 expansion federal power in an attempt to secure the rights of freed slaves. Rather than heralding Lincoln’s “new birth of freedom,” the Court saw the struggle as one against threats to stability. This seems consistent with its many holdings that downplayed the consequences of post-war constitutional amendments that limited the authority of the states and sought to protect blacks.105

Moreover, the Court conceived of the emotions stirred in battlefield visitors as a reflection of mutual benefit between the established government and soldiers honored at the site, rather than of public understanding of the values represented by Lincoln’s Address. The Court posited that the more a citizen was impressed by the battlefield, “the greater 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.”106 This rhetoric reflects the anxieties of conservative jurists in an age much concerned with industrial unrest and unassimilated immigrants. Indeed, some conservatives at the time explicitly equated the challenge to law and order posed by secession in 1861 to current challenges

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105 See note x, supra.
106 160 U.S. at 683.

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.
to the established order posed by industrial and agricultural unrest embodied in union
organizing and demands for easier credit. 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. The Court’s unanimous upholding of federal
assembling the battlefield park followed by only eight months the Court’s unanimous
upholding of enforcement by the U.S. Army of a federal injunction against the Pullman
strikers. 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. The Court’s rhetoric in Gettysburg Railway similarly evoked a
militant nationalism, prevalent among conservatives in the 1890’s, which sought to
reshape popular memory of the Civil War against agitation for greater social equality.

In addition to facilitating reconciliation between North and South, the federal
takeover of the Gettysburg battlefield sought to prevent the intrusion of commercial

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107 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 x, at 202-05.
108 Id. at 197-98.
109 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.
110 Peckham also was no friend of emancipation. In a forthcoming 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 antistatism in voting to uphold Jim Crow laws.”
111 Rhetorical stress on solidarity among white men, invoking militaristic symbolism, also reflected the
mood of a national leaders anticipating imperialistic conquests, brought to fruition in the Spanish-
American War begun under McKinley in 1898. See Epps, supra note x, at 264-65.
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. The Gettysburg Park Commission consisted of soldiers
under the supervision of the Secretary of War, whose concerns were both professional
and honorific. 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.”\(^{112}\) Congress expressly directed that the national
military parks could be used for training by both the regular army and the national guard.
Gettysburg was thought to be especially suitable because the field “is of such open
color character as to render the details of the great battle, vast as were it movements, easily
understood.”\(^{113}\)

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.\(^{114}\) A pastoral landscape marked by monuments provides a
reassuring setting for studying the battle, conveying dignity and comfort more than terror

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\(^{112}\) *Gettysburg Railway*, *supra*, 160 U.S. at 262.


\(^{114}\) Weeks, *supra* note x, at 65.
or suffering.\textsuperscript{115} 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 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 more 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 \textit{Gettysburg Railway} reflects the privileged perspective of the 1890’s. 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,\textsuperscript{116} 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

\textsuperscript{115} During the Civil War, combat changed from “a picturesque clash of Napoleonic armies into a grim industrial abattoir”. Epps, \textit{supra} note x, at 153. Focus on individual bravery and tactical decisions by generals emphasizes the former over the latter.

\textsuperscript{116} See note x, \textit{supra}. 
racial violence” against black Americans. The national memory of the war, to which it greatly contributed, facilitated national silence about racial oppression.

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

F. Contemporary Interpretation of Gettysburg

117 Blight, supra note x, at 344.
118 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 Legacy, N.Y. times, August 26, 2001, at http://query.nytimes.com/gst/fullpage.html?res=9B0CE2D61031F935A1575BC0A9679C8B63&scp=2&sq=
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, become more a subject of public and scholarly scrutiny. Gettysburg continued to convey a story of sectional reconciliation until the 1960’s, 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. Unlike many staged events elsewhere, the 1963 commemoration at Gettysburg “firmly reasserted that slave emancipation provided the Civil War’s greatest legacy.”120 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.”121 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 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

120 See Jon Weiner, Civil War, Cold War, Civil Rights: The Civil War Centennial in Context, in Fahs and Waugh, supra note x, at 237. The Pennsylvania Centennial Commission mandated equality of opportunity for the Gettysburg observances. Id. at 250.
121 Id. at 251 (quoting John A. Carver, Jr., Assistant Secretary of the Interior).
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.” 122

But both Congress and the NPS wanted a 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.” 123 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.” 124

New facilities and technology permit the Park Service 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

122 Weeks, at 198.
Resource Area … would greatly improve museum interpretation at the park, and place the Gettysburg Battle in its larger context of the Civil War …”¹²⁵ At the massive new museum and visitor center, the orientation film, *A New Birth of Freedom*, narrated by Morgan Freemen, unambiguously describes the cause of the war as slavery and presents black liberation as its most significant consequence. 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.”¹²⁶ 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. 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 so long as one wishes for so long as she 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. One 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. 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.”127 It also relates the role of African American laborers in burying the dead after the armies departed.128

Thus the current presentation at Gettysburg mirrors the preoccupations of today, which include questions and concerns 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.

III. 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 inter-city railroad connections after 1884, local people sought to profit by catering to them. Hotels, dance halls, guides, carriages, souvenir sellers, private museums, photographers proliferated and clustered near park


128 Id. at 39.
boundaries. The park commissioners’ improvements also enhanced visitor pleasure and interest. They constructed five steel towers to better view the battlefield. They also laid out paved roads, which soon drew bicycle enthusiasts, although the commissioners laid down regulations to maintain decorum. But 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. 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.”

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. 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, it 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 presence of commercial activities on sacred ground, they would

129 Platt at 15-17; Weeks at 92.
130 Weeks, 72.
131 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. [cite]
purchase the land, often using eminent domain to prevent price gauging, expanding the boundary of protected space. 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.

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. 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.”\textsuperscript{132} But Gettysburg’s post-war 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.

Changes in park management philosophy accentuated the contrast between the park and its surroundings. The National Park Service, 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.\textsuperscript{133} Viewing the regimental

\textsuperscript{132} Quoted in Weeks, \textit{supra} note x, at 166.
\textsuperscript{133} The National Park Service Organic Act states that “the fundamental purposes of the said parks, monuments, and reservations [are] to conserve the scenery and the natural and historic objects and the
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.” 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 removing trees and crops. Thus, as the Gettysburg surroundings came more 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 pre-industrial 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. 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. The tower had a space age, needle-like design, visible from many areas of the park. Federal and state authorities sought legal means to

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134 Weeks, 120.
135 Id. 158.
prevent construction of the tower. Their failure to do so highlights the limits of government ownership to achieve preservation goals. At that time, neither the Borough of Gettysburg nor the 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.\textsuperscript{137}

Nor did federal law regulate any such private development, despite its effect on such an important federal resource.\textsuperscript{138} 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,”\textsuperscript{139} the NPS agreed to a land swap with Ottenstein in order to move the tower farther from the battlefield, because it lacked legal authority to prohibit the project. While the Park Service 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, DC,\textsuperscript{140} 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, although a powerful tool for preservation, simply does not restrict private developments not otherwise subject to federal control.\textsuperscript{141} Most state preservation laws

\textsuperscript{137} Weeks, supra note x, at 141.
\textsuperscript{138} See Joseph Sax, Mountains Without Handrails: Reflections on the National Parks, (1980).
\textsuperscript{141} See generally J. Peter Byrne, Federal Historic Preservation Law: An Introduction (manuscript draft on file with author). See DOI solicitor ruling.
have no regulatory effect, consisting of information gathering and dissemination, and consultation in the NHPA process. *Gettysburg Electric 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 it 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 the recently enacted Article 1, § 27 of the Pennsylvania Constitution, 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.” Pennsylvania argued that the tower would work “a despoliation of natural and historic environment” and “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.” The state called as witnesses architects, historians, ministers, and government officials. 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. Bruce Catton, the popular historian of the Civil War, testified that “the

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tower would jar a person … experiencing the battlefield back into the present day and so diminish the historic and cultural values.” 145

The tower owner argued that it was a “classroom in the sky” that would educate the current generation about the importance of Gettysburg.146 Witnesses favoring the tower emphasized its economic and educational benefits; and, in fact, that the tower provided a valuable perspective on the field for understanding strategy and setting was not disputed. 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.” 147 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 state the trustee of the public right, which places upon Pennsylvania “a definite status and imposes upon it an affirmative duty.”148 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

145 Id. (paraphrase by court).
146 Id.
147 Id. at 891.
148 Id.
on the merits. 149 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. They expressed discomfort with ruling against the otherwise lawful tower based on a vague balancing of historic or aesthetic benefits and harms and without the support of an express statutory directive. Its adoption of a clear and convincing standard of proof expresses this discomfort.

Although the Pennsylvania Supreme Court affirmed the judgment below, a plurality also held that that Section 27 was not self-executing: “supplemental 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.” 150 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. 151 The court expressed solicitude for the effects of a contrary ruling on a private property owner who “would not know and have no way, short of expensive litigation, of finding out what he could do with his property.” 152 Subsequent decisions have interpreted the tower case as holding that the Commonwealth cannot bring such an action without legislative specification. 153 At the

149 Id. at 891-93.
151 Id. at 591-93.
152 Id. at 592. 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.
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. 154

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 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 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

154 United Artists Theater Circuit, Inc v. City of Philadelphia, 635 A. 2d 612, 620, (Pa. 1973);
“undertakings” on properties eligible for inclusion on the national register, but does not
directly require anything of non-federal actors.\textsuperscript{155} 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 park land to reach
another private parcel. 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.\textsuperscript{156} The Council wrote
that the tower would have an adverse effect on the Gettysburg scene and urged NPS to
attempt to block its completion. 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, 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 “minimize the adverse effect of the tower on Gettysburg”. Otherwise out of options
and annoyed at federal dithering, Pennsylvania then sued the Secretary of the Interior,
arguing, among other things, that NPS violated section 106 of the NHPA.\textsuperscript{157} The court

\textsuperscript{155} 16 U.S.C. § 470a et seq. 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 106 process. See, e.g., CTIA-The Wireless Association v. FCC, 466 F.3d 105 (D.C. Cir. 2006).

\textsuperscript{156} 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,
34 C.F.R. § 800.1(c), which also give detailed procedures by which the agency must take the historic
resource into account.

\textsuperscript{157} 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 he case may be, take into account the effect of the undertaking on any district,
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. 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. In Gettysburg itself, “[w]idespread publicity about commercial desecration … induced a moment of introspection.” 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. 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 recommendation to the Borough Council.\textsuperscript{161} Main Street Gettysburg, a non-profit 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.\textsuperscript{162} In 1990, the Borough developed the Gettysburg Historic Pathway Plan, which committed the community to coordinated preservation and economic development goals. 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.\textsuperscript{163}

A Gettysburg National Battlefield Historic District was listed on the National Register in 1975 and expanded later, covering most of the town and battlefield area.\textsuperscript{164} 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 become

\textsuperscript{161} Gettysburg’s historic district regulations can be viewed at \url{http://www.gettysburg-pa.gov/codes/pdf/2335-011.pdf}. Gettysburg adopted zoning ordinance amendments in 2008, that coordinate with the historic preservation. See, e.g., Section 606, Ordinance No. 1352-08 (adopted May 8, 2008)(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.”), at \url{http://gettysburg-pa.gov/documents/CleanZngAmendments.pdf}. 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, \textit{Historic District Designation in Pennsylvania}, 5-6 (2007).

\textsuperscript{162} For example, it 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 184. See also \url{http://www.mainstreetgettysburg.org/}.

\textsuperscript{163} A summary of the Gettysburg Interpretative Plan can be found at \url{http://www.mainstreetgettysburg.org/images/GIPs.pdf}.

\textsuperscript{164} A summary of the National Register listing can be found at \url{http://www.livingplaces.com/PA/Adams_County/Gettysburg_Borough.html}. 

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available for federal benefits. Federal legislation in 1990 authorized expansion of the boundaries of the park and gave NPS additional authority to accept donations of conservation easements outside the park but within the historic district.\textsuperscript{165} Cooperation between borough and park now is resulting in restoration of the David Willis House, where Lincoln stayed in town the night before he delivered his address. Willis House will open in 2008 as part of the national park. Main Street Gettysburg will operate and manage it under the terms of a Memorandum of Understanding with the NPS.\textsuperscript{166}

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 though 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 intermittent planning processes, cover the environs of the park. It might be said that historic preservation has spread from the park to 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, a corridor over 175 miles long extending south from Gettysburg to Charlottesville, Virginia. Like other such NHA’s, the JTHG does not impose federal control over the land use but authorizes a private non-profit “local coordinating entity,” which will develop a management plan coordinating efforts by four states, local governments within the designated area, and federal agencies to protect and interpret cultural and natural resources. The Secretary of the Interior must approve the plan, and Congress has authorized limited federal matching funds to private and other governmental contributions. Much of the legislation’s attraction to state and local government reflects the belief that it will enhance heritage tourism. Despite the legislation’s explicit disclaimer in section 406 of any abridgement of anyone’s rights of private property, it has been denounced on property rights grounds for encouraging more restrictive local land

168 There currently are 40 national heritage areas. For more information, see http://www.nps.gov/history/heritageareas/.
use regulations and empowering the coordinating non-profit, which includes representatives of preservation and conservation organizations.  

The national heritage area concept casts over a vast, complex area 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 previously had 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. The national heritage approach represents an innovative collaboration in planning and regulation among federal, state, and local governments, and with the non-profit sector that has played such a large role in preservation. This amalgam of collective direction provides the primary reason that libertarian property groups have attacked it. Moreover, it


171 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. Env. L. Rev. 247 (2007).

172 National Heritage Areas follow for cultural preservation the 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).
offers an experiment in new governance approaches to resource management, employing multi-party, large scale negotiation.¹⁷³

Through these means, Gettysburg has forged a community identity, in Carol Rose’s sense, that has given voice to community members.¹⁷⁴ Recently, the Pennsylvania Gaming Control Board rejected a proposal by investors to open a casino one mile from the battlefield, outside the historic district.¹⁷⁵ The Board cited “concerted, sustained” opposition from town residents.¹⁷⁶ These residents argued that the casino defiled the hollow ground,¹⁷⁷ 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 …. [A proponent] 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.¹⁷⁸

¹⁷⁴ See notes x – xx and accompany text, supra.
¹⁷⁷ Sentiments can be sampled at http://www.nocasinogettysburg.com.
¹⁷⁸ Jim Lighthizer, Tom Kiernan and Richard Moe, *Don’t Gamble with Gettysburg*, at http://www.post-gazette.com/pg/06333/741920-109.stm. The authors were presidents respectively of the Civil War Preservation Trust, the National Parks Conservation Association, and the National Trust for Historic Preservation.
The aligning 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 and culturally resonant settled landscape in the Eastern United States, very much threatened by inappropriate subdivision and retail development. The program commits the partners to try to preserve the landscape values while promoting economic development. If this approach succeeds in its objective, something far from certain, it surely will create some 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 IV of this article.

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 NPS to take the tower by eminent domain.179 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 my watch.” Congressional appropriations followed, as well as donation of demolition services, and a court granted the United States’ motion for possession on June 5, 2000. On July 3, 2000, the 137th anniversary of Pickett’s Charge, 10,000 onlookers cheered as the tower, its support structures exploded, sank to the ground.180

180 See Latschar, supra, note x, at 31-32.
IV. Preservation Choices

The section 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. Nonetheless, the NPS intends to demolish the building as part of an effort to restore the battlefield site to its condition on the eve of the battle, and because it has built a new visitors center. A non-profit organization, the Recent Past Preservation Network, has filed suit to enjoin the demolition, arguing that the NPS has violated the NHPA and NEPA. 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. By the middle of the 1950’s, 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. President Eisenhower and Congress agreed to fund an ambitious NPS plan, known as Mission 66, to rebuild and reinvent the park system. Mission 66 authorized development of new parks and construction of new facilities and roads in

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181 In this paper, 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).
182 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 x, at 465.
existing parks. It fostered invention of a new type of building, a visitor center, to orient visitors and direct them to its wonders.

“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 and 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.”

For its new construction, the NPS, like nearly all other institutional builders at the time, embraced modern design. At mid-century, modern design embodied for many a progressive, efficient, technological life-style. Urban renewal projects of the period, replacing vernacular urban buildings and streetscapes, particularly neighborhoods of poor minority residents, employed modern design in highways and high-rise dwellings and offices. 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. Viewed in broad perspective, Mission 66 represents a governmental attempt to apply modern design to harmonize relations between nature and a democratic people.

185 Carr, 222.
186 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 ‘fifties, “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.” Carr at 137.
For the first visitor center at Gettysburg, the NPS chose Richard Neutra, a highly regarded, Viennese-born, Los Angeles architect.\(^{187}\) His buildings emphasized sleek horizontal lines and large, clear windows. One critic wrote that “Neutra designed the modern architecture that is now considered traditional in Southern California.”\(^{188}\) “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.”\(^{189}\)

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. 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. 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 19\(^{th}\) century regimental monuments, “historians and park managers at the time agreed that this would be a powerful way of interpreting the battlefield, and that the encroachment on the historic scene was justified.”\(^{190}\) This accords with the prevailing philosophy of locating Mission 66 visitor centers at central


\(^{189}\) Carr 163.

\(^{190}\) Carr 193.
locations to support interpretation by facilitating views of important areas within parks.

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.” The cyclorama was a popular art form in the late nineteenth century featuring large concave paintings, often depicting battles. Customers would sit in the middle and listen to a narration with musical accompaniment and dramatic lighting effects. 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. The NPS acquired the cyclorama in 1941 and planned to incorporate it into the new visitors center. Accordingly, the central element of the Neutra building design is a large cylindrical drum containing an auditorium within which the cyclorama could be viewed. A lower, rectangular wing to the south contained offices and exhibit space. An exterior ramp led to a viewing platform on the top of the south wing, from which visitors could survey the battlefield. Exterior doors could open to

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191 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 associational 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…. [The] 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 landscape in a new position conceptually; it was now seen lass 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.”

Carr, supra note x, at 220.

192 Weeks at 79.
reveal an elevated speakers’ rostrum from which thousands of people could be addressed.

When the building was dedicated by former President Eisenhower on November 19, 1962, the 99th anniversary of Lincoln’s Gettysburg Address, it was considered a great accomplishment. The Park Service considered it the “flagship of the Mission 66 program.”

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.” Wolf Von Eckardt, architectural critic of the Washington Post hailed the Neutra building as “one of the most handsome modern buildings in the general area,” “quietly monumental but entirely unsentimental,” and “a manifestation of ‘cultural effectiveness.’” 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.” 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.” 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

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193 Id. 195.
195 Wolf Von Eckardt, The Park Service Dares to Build Well, Wash. Post, March 29, 1964, at G6. Eckardt also claimed that Neutra was “one of the three or four living great masters of modern architecture.”
modern design proclaimed technological progress enabled by the freedom preserved in
the battle.\footnote{198 See Weeks, \textit{supra} note x, at 125.}

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 NPS soon moved its visitor
center into a larger, nearby 1920’s museum building 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.”\footnote{199 Carr, 195.} 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.\footnote{200 16 U.S.C. § 470a, et seq.}
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.\footnote{201 1993 Management Plan.} To this end, trees have been cut down or planted,
and archaic grain fields or orchards recreated by strenuous landscape recreation and
management.\footnote{202 John Latschar, \textit{Battlefield Rehabilitation at Gettysburg}, at \url{www.nps.gov/gett/parknews/gett-battlefield-rehab.htm}.} 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 seeing 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 new visitor center to be built away from the sensitive center of the battlefield. 203

Contemporary historic preservation law has delayed the Park Service’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 Register.204 In moving toward demolition, the NPS first found that the Cyclorama Center was not eligible for the National Register. Because the buildings was less than 50 years old at the time, it could be found eligible only if found to possess “exceptional significance.” 205 In a Determination of Eligibility Report, park officials cited “technical short comings of the 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.” 206 The Pennsylvania State Historic Preservation Officer (SHPO) concurred with the NPS view. 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. The Keeper found the Cyclorama Center to be

203 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, non-profit organization. Designed as faux farm buildings, it reflects a return to contextual “rustic” architecture of a somewhat post-modern type, given the luxurious, high tech facilities actually being provided. Information can be found at http://gettysburgfoundation.org/index.htm.

204 16 U.S.C. § 470f. 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. Part 800.

205 36 C.F.R. § 60.4(g).

exceptionally significant on two criteria: 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. The evaluation of the significance of a modern building like the Cyclorama Center naturally engenders controversy. The NPS could legitimately view it as a recent mistake, which had failed to achieve even the practical goals set for it, but the Park Service also had an incentive to discount whatever significance the building has because it creates a barrier to the Service achieving its vision for site preservation. 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.

207 “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.

208 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.” [cite? Complaint]


210 Mid-century modern architecture poses a distinct problem for preservationists, it often expressed hostility to the historic legacy of design and indifference to context. Also, the materials with which it was build, particularly concrete, ages poorly. Preservation organizations, including the National Trust, have mounted efforts to persuade the public of the value if preserving modernist structures. See http://www.preservationnation.org/issues/modernism-recent-past.

211 36 C.F.R. § 60.12.
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.\textsuperscript{212} To comply with the NHPA, the Park Service prepared a “Section 106 Case Report” and consulted with the SHPO and the ACHP.\textsuperscript{213} 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. Indeed, the report claimed that the Cyclorama Center and its parking lots are located on “indeed the most significant historic landscape at Gettysburg NMP, and may well be some of the most hallowed ground in the United States.” 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. 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.\textsuperscript{214} Although concerned parties can seek judicial review under the Administrative Procedure Act of the agency’s compliance with section 106,\textsuperscript{215} the execution of such an MOA practically

\textsuperscript{212} 16 U.S.C. § 470f.; 36 C.F.R. § 800.5 -.6.
\textsuperscript{213} The Case Report can be found at http://www.mission66.com/cyclorama/docs/section106.html.
\textsuperscript{214} An MOA is a legally binding document that records the terms and condition 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).
\textsuperscript{215} 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. See San Carlos Apache Tribe v. United States, 417 F. 3d 1091 (9th Cir. 2005).
ensures that such litigation would be fruitless. In December 2006, the Recent Past Preservation Network, a non-profit entity devoted to modern architecture, filed suit against the NPS to prevent demolition.

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. I will here discuss three. 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 the 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 a additional wing or later doorframe on a house, but self-conscious commemorative additions that reflect

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216 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. at § 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.


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

Second, the NPS decision favors reconstruction over preservation.219 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. 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 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 unpleasantness.”220 By contrast, the NPS’s demolition of the Neutra building will eliminate an actual landmark retaining integrity.

219 The Secretary the Interior’s Standards for Treatment of Historic Properties, http://www.nps.gov/history/local-law/arch_stnds_8_2.htm, are widely recognized as the “basic yardstick against which restoration and rehabilitation procedures are judged.” Murtaugh, supra note x, at 182. 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 since the reconstructed landscape at Zeigler’s Grove inevitably must be highly speculative.

220 Weeks, 192.
Finally, we may well ask why landscape restoration seems to have such powerful force. In the Case Report, NPS primarily refers to its overall policy of landscape restoration and emphasizes its centrality to interpreting the battle.\textsuperscript{221} It emphasizes the “hallowed” character of the Neutra site. 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 devastated the countryside around Gettysburg.\textsuperscript{222} Ziegler’s Grove was blown to bits by artillery fire on July 3, 1963. 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 1880’s.\textsuperscript{223}

\textsuperscript{221} 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.

\textsuperscript{222} Borritt, \textit{supra} note x, at 25.

\textsuperscript{223} The design for the National September 11 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 ....”

\texttt{http://www.panynj.gov/wtc/wtc_memorial.html}. 
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 past when one can claim that “valuable lessons in the art of war can now be learned from an examination of this great battlefield.” 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 farm land 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. Such a managed landscape can foster an intensity 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. Restoring a landscape to historic appearance ironically requires employment of

224 160 U.S. at 682.
225 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 significance no longer take place.” Genevieve P. Keller and J. Timothy Keller, Preserving Important Landscapes, in Stipe, supra note x, at 187, 215.
226 David Lowenthal argues that authentic recreations have a special power to move us because they conform to our vision of the past. “Indeed, in this sense only a replica can be authentic.” The Past is a Foreign County, supra note x, at 356. Michael Kammen more generally notes the “irony of a nation of
continuous professional management of dynamic natural processes. 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.

Concern about romanticization of the battle is heightened by the Park Service’s solicitude for the cyclorama painting itself. However accurately Phillipoteaux’s massive painting of Pickett’s Charge depicts uniforms and weapons, it presents the battle as an heroic contest between worthy opponents – a “sanitized” embodiment of the reconciliationist view of the Civil War, suitable for a commercial entertainment of the 1880’s. The cyclorama painting deserves preservation as late Victorian popular culture, reflecting the common historical imagination of its time. 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 will recreate the battle sounds, heightening the sense of being in the midst of Pickett's charge.”

myth makers … ceaselessly obsessed with authenticity” and cites the popularity of Colonial Williamsburg’s “authentic reproductions.” Kammen, supra note x, at 28.

227 See Kristin Mack, Trees Lose on Manassas Battlefield: National Park and Prince William Officials Try To Restore Civil-War Era Views, Wash. Post, August 18, 2008, at B1. The NPS’s highly regarded Guidelines for the Treatment of Cultural Landscapes, as presented on the NPS website, presents a photo of the Piper Farm on the Antietem 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.”

228 “When everything in the preserved precinct dates from one selected time and nothing from any other, the effect is particularly static, unlike present-day landscapes, in which the old and new everywhere commingled.” Lowenthal, The Past is a Foreign County, supra note x, at 359.
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. Thus, borrowing terms from Part III of this article, if the adoption of an 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 fund raising may encourage the spread of commercial tourism values from nearby enterprises to the park itself.

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. Unlike most federal agencies, which section 106 requires to balance the preservation of an historic property against its plan to fulfill some practical goal within its primary mission, 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. 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” landscape to be recreated given the persistence of other monuments. 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. 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. 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. 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. Agreement with


231 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 important to the community of the work they won, seems appropriate.” Id. at 53.

232 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 States and their citizens in preservation of their cultural heritage.” 36 C.F.R. § 800.2 (c)(1)(i). For a realistic view of the SHPO, see
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 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 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. 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 responsibilities for the preservation of historic properties which are owned or controlled by such agency.”233 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

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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 so read.234

“Section 110(a) cannot be read to create any new substantive preservationist obligations separate and apart from the overwhelmingly procedural thrust of 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.”235

Judge Friedman’s view seems correct. To read section 110 as the plaintiffs 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. 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 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.236 According to its legislative history, section 110 only “clarifies and codifies the minimum responsibilities of Federal agencies in carrying

235 Id. at 922.
236 16 U.S.C. § 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. “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.” Blanck, 938 F. Supp. at 922.
out the purposes of [NHPA].”237

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 106.238 Without that authority, the interpretation may lapse into obsolescence or incoherence. Those of us who regret the loss of the Neutra buildings 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.

Conclusion

238 Plaintiffs also argue that the NPS failed to comply with various duties under the National Environmental Policy Act, 42 U.S.C. § 4332, which also requires study of major federal actions that affect the quality of the human environment, including historic resources.
Historic preservation reflects the present as well as the past. Decisions about preservation and presentation of an 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 the 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 and for 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 National Historic Preservation Act promotes dialogue with the National Park Service 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 non-governmental 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.