

Hallowed Ground:
The Gettysburg Battlefield in Historic Preservation Law

Peter Byrne
Georgetown University Law Center

My purpose here is to explore some inner dynamics of historic preservation law by considering legal decisions concerning a place of undoubted historic significance. In choosing Gettysburg as a lens through which to focus on historic preservation law, I might be thought to have made an odd choice. Of course the Gettysburg battlefield park is world famous, visited each year by two million visitors. But the branch of historic preservation law that has the most impact on property rights and embodies important aspirations for land use law consists of the ordinances adopted at the local level, which are the principal vehicles for regulating private use of land and alteration of buildings. Effective ordinances of this sort have made enormous differences in the patterns and aesthetics of urban development in the major cities of the US, and arguably have played a crucial role in the revival in urban living that has characterized the past decade. Such local ordinances are the subjects of the most important Supreme Court case approving historic preservation¹ and the most penetrating legal scholarship addressing the area.

Gettysburg National Military Park, by contrast, is owned by the United States, administered as a unit of the national park system, relegating private property concerns to the margins of consideration. Moreover, it is preserved through professional management as a rural oasis, depicting primarily the look of the place on the eve of the battle. Thus it exists in contrast to dominant modes of contemporary development rather than trying to shape them, as municipal regulatory preservation ordinances aspire to do. The battlefield park is a place set aside for visitors or pilgrims. The elements of the park are managed to enable or induce a certain kind of reaction or reflection by visitors. Arguably such reactions by observers at various historic parks have had a large influence on taste in design and on the political constituency for regulatory preservation. But they do not offer obvious lessons for how functioning communities based upon private ownership should be organized or governed.

Historic preservation law tends to elevate 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 placed the mandates of the market and individual choice at the center of the actual management of the land, privatizing these cultural values, and creating familiar patterns of subdivisions, shopping centers, and business parks, which bespeaks only the unselfconscious culture of

¹ Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

commercial exploitation. But elevating the cultural meaning of land brings to the fore conflict over cultural meaning and priority that were veiled when land was treated as a commodity. As Roger Cotterell might say, culture enters legal discourse because of the issues historic preservation law requires law to resolve. Historic preservation law engages these issues of contending meaning. 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.² In recent years, scholars, such as Dolores Hayden, have applied the insights of several disciplines to explore how choices about preservation can become areas of social conflict over whose culture a site will present. A good test of historic preservation law is how well it resolves conflicts about the meaning of important sites.

Gettysburg presents powerful historic value posing difficult questions about which elements should be preserved how. People care a lot about how Gettysburg is presented, and not just based on values of historic accuracy. The legacies of the Civil War, arguably the most important event in US history, continue today, and conflicts about how it should be understood cluster around such a central public memorial of that conflict. 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 cultural memory of today as it does about the events of July 1 to 3, 1863. How Gettysburg is interpreted will constitute many visitors primary understanding of the Civil War for us today.

I. The Gettysburg Battlefield and the History of Its Preservation

In the summer of 1863, Robert E Lee led the Confederate Army of Northern Virginia on an invasion of the North. He held several motives. He wanted to feast his army on the rich farmland of Pennsylvania and provide the depleted fields of Virginia a respite from warring armies. He also wanted to encourage growing anti-war sentiment in the North. Confederate officials awaited the fall of their fortress at Vicksburg on the Mississippi with trepidation, and hoped to gain a signal victory in the East to uphold morale. Lee hoped to defeat decisively the Union Army of the Potomac on its own ground, which could lay open Washington or Baltimore to capture, something that could enflame peace sentiment in the North.

Lee's army crossed the Potomac into Maryland on June x, and advanced units entered Pennsylvania immediately. 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 partisans and opportunists following the army seized free blacks and escaped slaves, sending them south in bondage. Anxiety prevailed both in the federal government and in the northern

² Carol M. Rose, Preservation and community: New Directions in the Law of Historic Preservation, 33 Stan. L. Rev. 473 (1981).

population generally. 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. 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 unions troops in exposed positions but eventually repulsed after appalling slaughter and memorable acts of heroism on both sides. The following day, Lee ordered a frontal assault by Confederate infantry, including the Virginia regiment led by General George Pickett, on reinforced Union defenders dug in on Cemetery Ridge, 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. The Confederate army 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. NY Times. Vicksburg. 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.

The scenes of horror on the fields and in the forests around Gettysburg on the days after the battle, July 4, can hardly be imagined, with masses of dead soldiers and horses lying in the summer heat. Preservation of the battlefield began immediately after armies moved away. Two Gettysburg lawyers purchased land for a national cemetery for Union soldiers who had died in the battle (confederate dead were piled into unmarked graves). The Soldiers' National Cemetery was dedicated on November 19, 1863, when Lincoln delivered his celebrated Address, the most enduring attempt to give meaning to the carnage.³ The Pennsylvania legislature incorporated the cemetery a few months later, and it was transferred to the federal government in 1872 and administered by the War Department until 1933 as national military cemetery.

David McConaughy also began purchase of land on the battlefield for preservation immediately. 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." [cite] As this language makes clear, the preservation and memorial effort was devoted solely to the Union effort. This character was confirmed when the premier union veterans organization, The Grand Army of the Republic (GAR), gained control of the GBMA by 1880. By the time the federal government established the National Military Park at Gettysburg in 1895, the GBMA

³ One historian 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).

controlled 522 acres of land, upon which were 17 miles of avenues and 320 monuments. Northern state legislatures 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, and the federal government eventually paid off substantial accumulated debt. Nonetheless, the GBMA's preservation accomplishment was unprecedented; the first American battlefield set aside and managed for study and reflection, a pioneering attempt to preserve historic landscape.

The federal government's acquisition of the Gettysburg battlefield proceeded somewhat fitfully. 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. 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 the same area of southeastern Tennessee. 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) under the direction of the Secretary of War and empowered to employ 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." Thus an early attempt at historic landscape management calls for lease terms that anticipate modern preservation easements.⁴

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 large 25th anniversary reunion in 1888. Bills subsequently were introduced for further federal action at Gettysburg, particularly to mark the positions of the Confederate army, but nothing was 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, including former Union and Confederate generals, and John Batchelder, who had fought in the battle and devoted his subsequent life to documenting and publicizing the battle and site.

By that time, entrepreneurs in Gettysburg had purchased land and constructed an innovative trolley service to permit the growing number of tourists to get around the site. "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

⁴ Ronald F. Lee, *The Origin and Evolution of the National Military Park Idea* (1973).

on the track path.”⁵ The federal commissioners sought to buy the land over which the tracks ran but could not reach an agreement with the railway company. The commissioners employed their authority to force sale through an action of eminent domain.⁶ When the government filed its condemnation action, it did not yet own the battlefield park. The federal circuit court held that the United States lacked constitutional authority to condemn land for the purposes stated. The Supreme Court decision unanimously reversing that judgment, *United States v. Gettysburg Electric Railway co.*⁷, represents a crucially important precedent establishing broad federal authority to preserve historic sites. Somewhat 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 the constitution did not allow Congress to regulate manufacturing, here held that it did not need even to specify under which enumerated power the power to preserve 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.”⁸

In the next section, we will consider more closely what purposes the Court believed protecting the park served.

While the litigation was pending, Congress enacted the legislation to establish Gettysburg National Park as the second national battlefield park.⁹ The GBMA deeded its 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 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.¹⁰ But generally more attention was paid to the care of monuments and marking of military positions, indicating that memorializing and

⁵ Jim Weeks, *Gettysburg: Memory, Market, and an American Shrine*, 71-72 (2003).

⁶ 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 its reading of the appropriation statutes.

⁷ 160 U.S. 668 (1896).

⁸ *Id.* at

⁹ 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, had commanded a division (incompetently) and lost a leg at Gettysburg, and had been a director of the GBMA.

¹⁰ *Id.*, sec. 7.

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.¹¹ Consistent with the War Department's mandate, the Pennsylvania National Guard spent a week each year training on the battlefield. During World War I, Camp Colt was established on the battlefield as a army training facility. The commissioners maintained the battlefield as memorial to soldiers of both sides where the course of fighting could be seen.

The War Department supervised the park until President Roosevelt transferred all the battlefield parks to the National Park Service 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 the preservation and restoration efforts at the private Colonial Williamsburg, the NPS institutionalized historic and preservation expertise. In 1935, congress entrusted it with important duties under the Historic Sites Act, that led to enhanced professional standards in the appraisal of proposed historic landmarks and tools for preservation. The landmark 1966 National Historic Preservation Act confirmed the role of the NPS in establishing the criteria and administering the processes of the National Register of Historic Places. The NHPA, however, also 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.

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 NPA expanded visitor facilities, in some cases taking over educational or entertaining attractions that had been offered by private entrepreneurs in the adjoining village. Most importantly, in 1941, the NPS purchased the remaining Gettysburg cyclorama, painted by Paul Philippoteaux in the 1880's, depicting on a massive, 360 degree concave canvas Pickett's Charge in a form that emphasized "martial glory and sanitized combat."¹² Customers would sit in the middle and listen to a narration with musical accompaniment and dramatic lighting effects. Entrepreneurs had brought the cyclorama to Gettysburg in 1913 from a department store in Newark, New Jersey, and constructed a building to house it. Seeing the interest this archaic entertainment had for visitors, the NPS incorporated the cyclorama into its presentation of the battle and housed it in its important 1962 Visitor Center at the center of the battlefield on Cemetery Ridge. Remarkably, the cyclorama painting itself was named a National Historic Landmark in 1944.

¹¹ Weeks 89.

¹² Weeks, 79.

National park visitor centers were conceived as part of the important Mission 66 development program, beginning in the 1950's, under which Congress funded large scale NPS construction to modernize operations to meet the vastly increased number of visitors arriving by car. The Gettysburg Visitor Center, designed by renowned modern architect, Richard Neutra, was considered the "the flagship of the Mission 66 program."¹³ In addition to housing the cyclorama painting, the Neutra building moved visitors from the parking lot through its modern air conditioned facilities, within which the NPS presented displays interpreting the battle, and moved them directly into the center of the battlefield. Dedicated by former President Eisenhower in 1962, during the centennial commemorations of the Civil War, for some the Neutra building powerfully connected the events of the battle with the modern technologically advanced nation defending western freedom during the Cold War. In 1973, the NPS also acquired the adjacent Rosensteel Museum, along with its "electric map" and vast collection of Gettysburg artifacts, and made that its new visitor center, relegating the Neutra structure to be known simply as the Cyclorama Center. It was determined to be eligible for the National Register of Historic Places in 1998.

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 (fort and guns). 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."¹⁴ Concerns about intrusions on the experience of visiting the battlefield soon centered on a 307-foot observation tower constructed by Thomas Otterstein, a real estate developer (and Georgetown Law graduate!), in 1974, on privately-owned land 400 feet from the boundary of the battlefield park.¹⁵ 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 but failed. In Part III below, I look more carefully at this litigation and the preservation issues it embodied. Finally, 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.

Since the tower controversy in the early 1970's, the NPS and the residents of Gettysburg both have pursued efforts to eliminate incongruous modern intrusions and authentically restore historic buildings and landscape. The NPS has acquired land within the viewshed of the park eliminating motels, gas stations, and utility lines; it has meticulously restored farm buildings and the agricultural landscape. It has won from Congress authorization to expand dramatically the size of the park to nearly 6,000 acres.¹⁶ Moreover, a federal Gettysburg Battlefield Historic District was designated and Congress gave NPS additional authority to acquire more land and accept donations of

¹³ Ethan Carr, *Mission 66: Modernism and the National Park Dilemma* 188 (U. Mass. Press, 2007).

¹⁴ Quoted in Sarah Allaback, *Mission 66 Visitor Centers; The History of a Building Type* 136 (2000).

¹⁵ Adam Bernstein, *Obituary, Thomas R. Otterstein, Built Gettysburg Tower*, Wash. Post, Aug. 3, 2000, at B07. The

¹⁶ Pub. L. 101-377, 104 Stat. 464 (1990).

conservation easements outside the park but within the district.¹⁷ The Borough has enacted a comprehensive zoning code, a local historic preservation ordinance, which requires approval by a public architectural review board for alterations and new construction on private property within a large, designated historic district, and a signage ordinance.¹⁸ In December 2006, sustained community objection prompted the Pennsylvania Gaming Control Board to deny a license to a proposed casino one mile from the battlefield.¹⁹ The NPS also has entered into relationships with a variety of public and private organizations to plans and carry out preservation activities.

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.²⁰ The Gettysburg Foundation, a non-profit corporation, is seeking to raise \$125 million in private funds to support implementation of the plan, which includes construction of a new visitor center, which will house the cyclorama painting and a vast collection of Civil War objects. Controversy has centered on the NPS's decision to demolish the Neutra cyclorama building, principally so it can restore the land where it sits to its 1863 pre-battle condition and replace regimental monuments moved for the building. 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 National Historic Preservation Act. Thus, questions persist of what to preserve, raising more fundamental questions of how and why should a battlefield be preserved. Part IV examines this controversy.

II. Patriotic Purposes

In a foundational 1981 article, Carol Rose explicated three perspectives or purposes that have dominated the development of historic preservation law.²¹ The first to arise was a patriotic purpose, which focuses on saving places and buildings associated with significant persons and events in American history. The second is an aesthetic purpose, seeking to preserve the integrity of buildings and other structures of architectural merit or exemplifying historic architectural styles. The third purpose seeks to maintain more generally the distinctive "sense of place" that older buildings give communities. These purposes overlap in many cases, have persisted into the present, and

¹⁷ *Id.*, §§ 3 and 4.

¹⁸ Weeks, 183.

¹⁹ Margaret Foster, *Gettysburg Casino Denied*, Preservation Online, December 20, 2006, at http://www.nationaltrust.org/Magazine/archives/arc_news_2006/122006.htm.

²⁰ National Park Service, *Record of Decision, Final General Management Plan and Environmental Impact Statement for Gettysburg National Military Park* (November 1999), at <http://www.nps.gov/archive/gett/gettplan/gmp99archive/rod-gett.htm>.

²¹ Carol M. Rose, *Preservation and community: New Directions in the Law of Historic Preservation*, 33 *Stan. L. Rev.* 473, 479-80 (1981).

do not exhaust the goals of historic preservation.²² Nonetheless, they offer useful organizing principles for thinking about the social roles historic preservation law plays. Rose's chief subject in her article was to explore the third rationale for preservation, protection of 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. She recognized that community identity will be a contested concept reflecting power relations and urged careful consideration of procedures for participation in such deliberations so that the voices of minorities would be heard. She recognized that 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.

By contrast, Rose's treatment of preservation for "patriotic" purposes accepts that such endeavors enshrine simple, well-recognized values. Specifically, she writes that "*Gettysburg* may seem the easy case". But, 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.²³ 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 history of memories of the Civil War and their popular expressions.²⁴ 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

²² 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.

Significance thus embraces places made historically important by association with important events or persons, those with aesthetic or cultural value, and those (including archeological) that may provide useful information to the trained eye. Despite the curious references to "our" history or past, the criteria do not intend to enshrine only properties of national significance, but also to state and local history, as well as those of ethnic and religious minorities. While no elements of the criteria explicitly embrace Carol Rose's notion of voice for the local community, the very breadth of the listed criteria permit neighborhoods or their communities to argue for the "significance" of events, person, or architecture that embody their particular identities. The "criteria are worded in a manner to provide for a wide diversity of resources." Id. It is clear that American history here includes state, tribal, and local history. A property will be considered eligible for listing if it satisfies one criterion but may be found to satisfy more than one.

²³ See Michael Kammen, *Mystic Chords of Memory, The Transformation of Tradition in American Culture* (1991); David Lowenthal, *The Past is a Foreign Country* (1985).

²⁴ Drew Gilpin Faust, *The Republic of Suffering: Death and the American Civil War* (2008); Alice Fahs & Joan Waugh, eds., *The Memory of the Civil War in American Culture* (2004); David Blight, *Race and Reunion: The Civil War in American Memory* (2001).

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.

Preservation for primarily aesthetic ends seems to present simpler choices. The end suggests the means. An aesthetically significant building, especially those features that make it significant and those that contextualize them, 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 tourists to visit. But when the goal of preservation is to protect some physical structure because it is beautiful or historically interesting in itself, such as a Frank Lloyd Wright house or a Richardson church, the aesthetic goal provides the criteria for choosing how to preserve.

When a site is preserved because of persons associated with it or because of major events that occurred there, the choices made to commemorate them may be broader. People and events can be commemorated in many ways – through statues, paintings, books, films, websites. Symbolic representations may more powerfully conjure the past person or event than a preserved building. Early preservationists did not take a primarily curatorial approach to sites that evoked past events or persons. When the Society for the Preservation of Virginia Antiquities first acquired the 18th century Guardhouse at Williamsburg in 19??, it installed contemporary stained glass windows celebrating significant persons in the Commonwealth’s colonial history. These were later removed and the building restored to what can be known about its 18th century appearance when Colonial Williamsburg was created. Fidelity to accuracy in preservation based on scholarly research is a modern idea.²⁵

Past events and historical personages require interpretation. We cannot present them in themselves. We must settle on our understanding of them and find ways to communicate it, as every biographer and historian knows. Celebrations of and continuing controversy over the Vietnam 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 experience for many, but has been contested strenuously by those who think it slights the national mission or military heroism. Preserving a place or a building because of a person or event associated with it requires similar interpretations about what is important for us. There is obvious value in the care with which George Washington’s home at Mount Vernon long has been thoughtfully preserved by the Mount Vernon Ladies Association, but it has evolved in its decisions about how to present slavery on the plantation. For more than a century, visitors were dimly aware of his “faithful servants,” as they toured simple but noble rooms that conveyed the role of Washington’s life as Virginia planter in shaping his commitments to public service and self-restraint. Today,

²⁵ 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).

visitors also encounter reconstructed slave quarters while learning about the ambiguous morality of his freeing of his slaves at his death.²⁶ In our multicultural society, visitors are interested in the issues most resonant 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.²⁷ Such exhibits convey past struggle and injustice as well achievement and victory. These often present humble buildings of little aesthetic interest or blank spaces, which must be interpreted by symbols and text. They grip us because they provide perspective on the moral paradoxes that persist in American history. “Patriotism” does not capture the value these exhibits possess.

Gettysburg National Military Park illuminates these concerns about what an historic site commemorates and how. The meaning of the battle has changed for different groups of people over time and the choices about how to preserve the site have evolved. The legal decisions concerning it have reflected dominant values of their times, even as they sought preserve what was thought to be of value against perceived threats.

The Supreme Court’s decision in *Gettysburg Railway* is significant and interesting within this context. Congress had authorized the Secretary of War to condemn lands “upon or in the vicinity of [the] battlefield”²⁸; in order to preserve, mark, and provide access to the lines of battle of both armies.²⁹ The trolley tracks both disfigured terrain where the battle had raged and interfered with veterans’ marking the positions where their regiments had fought.

It is important to emphasize that the Railway’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*. Condemnation is a legislative power. Rather, it argued that the preservation purposes recited in the statutes 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.³⁰ *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.

²⁶ Also, the unearthing of the foundations of the President’s House near Independence Hall, where Washington and his family lived for several months each year while Philadelphia was the national capital, has been interpreted primarily to describe the escape of two of the family slaves and Washington’s unsuccessful efforts to recover them employing the fugitive slave statutes.

²⁷ Dolores Hayden, *The Power of Place: Urban Landscapes as Public History* (1995).

²⁸ Joint Resolution, June 5, 1894, 28 Stat. 584. This resolution recited that the Secretary was authorized to purchase or condemn the lands.

²⁹ [Quote] 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.

³⁰ “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).

Examining the Court's reasons for sustaining federal power here requires an extensive quotation from Justice Peckham's opinion:

“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.

The Court concluded, in language quoted earlier, that Congress's authority to use eminent domain flowed from several of its enumerated powers. Historic preservation that fosters attachment to the federal government must be within federal legislative authority.³¹ The Court takes judicial notice that visitors to the battlefield must 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 identifies 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."³² 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."³³ Professor Rose characterizes *Gettysburg Railway* as the classic account of preservation for patriotic purposes "framed in the language of trust among generations."

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 should be preserved and presented. "The Civil War matters to us today because it ended slavery and helped to define the meanings of freedom, citizenship, and equality. It established a newly centralized nation-state and launched it on a trajectory of economic expansion and world influence."³⁴ 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 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. Confronting the extent of death in such a small area traumatized town residents and military observers. Drew Gilpin Faust has described the extent of the carnage at Gettysburg:

"[T]he fighting stretched over three days, delaying attention to the dead as military demands on the living continued unabated. By July 4, an estimated six million pounds of human and animal carcasses lay strewn across the field in the summer heat, and a town of 2,400 grappled with 22,000 wounded who remained alive but in desperate condition.... So many bodies lay unburied that a surgeon described the atmosphere as almost intolerable. Residents of the surrounding area complained of a

³¹ *Gettysburg Railway* provides clear 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.

³² 160 U.S. at 682.

³³ *Id.* at 683.

³⁴ Drew Gilpin Faust, *The Republic of Suffering: Death and the American Civil War*, xiii (2008).

“stench” that persisted from the time of the battle in July until the coming of frost in October.”³⁵

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.”³⁶ The first land set aside on site was for grieving and honoring killed Union soldiers, whose bodies were retrieved from temporary graves in the fields and eventually interred in the solemn and moving National Cemetery paid for by Pennsylvania. Confederate dead, however, remained in unmarked mass graves unless retrieved by family members.³⁷ The Northern press celebrated the battle as delivery from a dangerous and resourceful enemy.

Speakers at the dedication of the National Cemetery that November were among the first to amplify the meaning of the battle. The featured speaker, Edward Everett, the most esteemed orator of the period,³⁸ 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 direct his course?”³⁹ 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.”⁴⁰

³⁵ Republic of Suffering 69.

³⁶ Weeks, 38.

³⁷ “Confederates at Gettysburg were buried in trenches containing 150 or more men, often hurled rather than laid to rest.” Faust at 71-72.

³⁸ 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. Key role of women in historic preservation ever since although not at Gettysburg. 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.

³⁹ 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=M9uVW7THSjQC&dq=edward+everett+gettysburg+speech&printsec=frontcover&source=web&ots=Rbf-NThlqY&sig=5CByPbUqBAoFHZojSqUDmZRSFLw#PPA33,M1>.

⁴⁰ *Id.* at 59. Henry Ward Beecher expressed similar emancipationist views in dedicating the 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 at 104.

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 spoke to dedicate a cemetery for union dead, “who here gave their lives that that nation might live.” As Garry Wills has shown, Lincoln’s rhetoric evoked both ancient and nineteenth century approaches to funerary oration.⁴¹ But it is his political claim that continues to inspire: “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.” Thus, Lincoln claimed that the sacrifice of the union dead enabled the living to preserve essential democratic government and fulfill the promise announced in the Declaration of Independence. The weaving of the promises of liberty and equality from the Declaration with the prospect of a new birth of freedom embraces the ending of slavery, begun by the Emancipation Proclamation earlier in 1863, within a broader notion of America as a harbinger of freedom and democracy throughout the world. Lincoln’s brief address marked the Gettysburg battlefield with the nation’s most attractive political values. Lincoln effectively dedicated the entire battlefield and not just the cemetery.⁴² 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.

Gettysburg exerted a grip on the national imagination after the war, although curiosity and commemoration of military heroism submerged 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 emotion not unpleasant. The GBMA soon began to turn the battlefield into a memorial park, 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”.⁴³ By 1879, state legislatures, prompted by union veterans well-organized in associations like the GAR (which purchased 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.” Thus commemoration of the sacrifice of the Union troops came less to emphasize the ideological meaning of the war than to celebrate the continuing significance of the participants. The GAR has been called “one of the most successful special-interest groups in U.S. history.”⁴⁴ Veterans and veteran groups visited frequently, sometimes camping on the grounds.

The federal takeover of the park purposively modified the emphasis in the interpretation of the battle. Two purposes predominated. First, the government wanted to

⁴¹ Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (1992).

⁴² Admin history

⁴³ Weeks, 48.

⁴⁴ Patrick J. Kelly, *The Election of 1896 and the Restructuring of Civil War Memory*, in Fahs & Waugh, 198.

celebrate 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 best solution. GBMA's charter embraced only commemoration of Union troops and it was effectively controlled by a union veterans' organization, many of whom continued to raise the "bloody shirt" in anger at the South. Federal money and professional management could defend and shape the park.

The desire to commemorate Southern participants in the battle had several elements. By 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.⁴⁵ 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."⁴⁶ The aim here was to give visitors a fuller understanding of what happened in the battle.

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 as one nation. As the construction of memorials and improved rail transportation transformed Gettysburg into a national site for celebrating 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. A Congressional committee argued that recognition of Southern lines 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?"⁴⁷ Subsequent legislation authorizing battlefield markers stipulated that they should be "compiled without praise and without censure," insuring neutrality among the contending forces.⁴⁸ Subsequently, Southern states erected memorials to confederate regiments on land acquired by the United States.

More generally, the 1890's witnessed growing calls for national reconciliation of north and south, although at the cost of abandoning efforts to secure basic liberties in the South 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 drive for reconciliation overwhelmed emancipationist sentiment and "delivered the

⁴⁵ Sundry Civil Appropriations Act of March 3, 1893, 27 Stat. 599.

⁴⁶ Quoted in Admin hist at 72.

⁴⁷ U.S. Congress, House Committee on Military Affairs. *Battle Lines at Gettysburg*, 51st Cong., 1st Sess., 1890, H. Rept. 3024, at 6.

⁴⁸ 27 Stat. 599.

country a segregated memory of its Civil War on Southern terms.”⁴⁹ Another historian has emphasized that “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.”⁵⁰

Gettysburg became a site for sectional reconciliation soon after the War, as local boosters invited former Confederate soldiers to return for commemorations. These accelerated toward the 25th anniversary in 1888 and culminated in the celebration of the 50th anniversary of the battle in 1913. More than 50,000 veterans and guests from both sides gathered on the field for events with government endorsement and financial support. President Wilson, the first President born in the south elected since the war, gave a speech about the “quarrel forgotten.” 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. (389)

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 Americans viewed the war differently, as a welcome conflict that gave them the opportunity for freedom. But white supremacist mythology confined these views largely within the black community. The 1890’s saw rapid expansion of Jim Crow laws throughout the South, and President Wilson mandated segregation and discrimination with 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 Gettysburg anniversary, and there is no evidence that any attended.⁵¹ Gettysburg’s national celebration of the reconciliationist vision within this context signaled a “kind of Southern victory in the long struggle over Civil War memory.”⁵²

Within this context, we can reassess the Supreme Court’s rhetoric about patriotism in *Gettysburg Railway*, decided less than five months before *Plessy v. Ferguson*⁵³, which constitutionally blessed legal subordination of African Americans.

⁴⁹ David Blight, *Race and Reunion: The Civil War in American Memory*, 2 (2001),

⁵⁰ Patrick J. Kelly, *The Election of 1896 and the Restructuring of Civil War Memory*, in Fahs & Waugh, 181.

⁵¹ 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.

⁵² *Id.* at 397.

⁵³ 163 U.S. 537 (1896). “A statute which implies merely a legal distinction between the white and colored races -- a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color -- has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.” *Id.* at 543.

The Court specified that what was at stake in the battle was “the perpetuity of our institutions”, without any mention of the interests of African Americans in liberation, cited directly by Everett and alluded to by Lincoln in their respective Gettysburg remarks. The Court’s characterization of the struggle is entirely conservative, speaking only of the preservation of existing institutions, which implicitly denies the revolutionary aspect of the constitutional changes wrought by the war, which ended slavery and expanded federal power in an attempt to secure the rights of freed slaves. Perhaps most startling, the Court ignores the patent fact that roughly half the battle contestants were viewed at the time as in treasonous rebellion against constitutional institutions, and that many visitors would come to mourn and praise the “lost cause.”

Moreover, the Court conceived of the emotions stirred in battlefield visitors as a reflection of mutual support between the established government and soldiers honored at the site, rather than in public understanding of the values reflected, for example, in Lincoln’s Address. This implicit skepticism about intelligently shared public values may reflect the anxieties of conservative jurists in an age much concerned with industrial unrest and unassimilated immigrants. Indeed, conservatives at the time often equated the challenge to law and order posed by secession in 1861 to current challenges to the established order posed by industrial and agricultural unrest embodied in union organizing and demands for easier credit. The robust exercise of federal authority to 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.⁵⁴ The Court’s unanimous upholding of federal assembling the battlefield park follows by x months, the Court’s unanimous upholding of enforcement by the army of a federal injunction against the Pullman strikers.⁵⁵ 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.⁵⁶

The other purpose advanced by the federal takeover was a defense against the incursion of modern commercial development into the historic area. Federal legislation responded directly to the construction of tracks for a trolley that would encircle the exiting park and interfere 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

⁵⁴ Kelly, *supra* note x, at 197-98.

⁵⁵ 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.

⁵⁶ 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 antistatistism in voting to uphold Jim Crow laws.” <http://volokh.com/posts/1128349530.shtml>.

approving Supreme Court accepted that “[v]aluable lessons in the art of war can now be learned from an examination of this great battlefield.” 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 character as to render the details of the great battle, vast as were its movements, easily understood.”⁵⁷

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. Many veterans, like O.W. Holmes, lost faith in large purposes in the reality of the killing. Preservation of the agricultural character of the setting also comforts the visitor. An open, pastoral landscape marked by monuments provides a reassuring setting for studying the battle. The scene does not convey terrifying death and destruction. 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 conveys other values that may have increased over time. As industrialism and the materialistic culture of the Gilded Age 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 present enhanced its mythic character. Exclusion of modern intrusions from the park protected this imaginative construction and thus honored the soldiers.

In short, the patriotism held up in *Gettysburg Railway* reflects the privileged perspective of that time. The Court’s rhetoric, like Gettysburg’s 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, or of women who suffered loss and privation at a distance or tended the wounded in the rear, or of the mechanical slaughter that decided the outcome. Gettysburg, its preservation secure due to unprecedented action by Congress warmly approved by the Court, seemed irrelevant to the contemporary “explosion of racial violence” whereby whites lynched at least 884 blacks between 1897 and 1906.⁵⁸ The national memory of the war, to which it greatly contributed, facilitated national silence about racial atrocities.

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

⁵⁷ S. Rep. 526, Sen. Comm. On Military Affairs, 54th Cong., 1st Sess, p. 2 (1896).

⁵⁸ Blight at 344.

practiced. 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 contested, the processes by which the meaning of a site is settled and presented must be considered.

[Under construction: Gettysburg continued to convey a story of reconciliation until the 1960's, when the civil rights movement and the cold war stirred reinterpretation. Account of multiple meaning presented today: romance and heroism, black liberation, pastoralism. 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."⁵⁹ The provision seems to have been added by the House Committee on Interior and Insular Affairs, from its amendment to H.R. 3248.⁶⁰

In 2001, the National Park Service Advisory Board, chaired by John Hope Franklin, recommended an enhanced commitment by the NPS to educating Americans about their history. "The National Park System Advisory Board, therefore, recommends 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."⁶¹ A film recently shown regularly at the Cyclorama Center portrayed the war primarily in terms of black liberation. In the new museum and visitor center the NPS promises that "eleven [of twelve galleries] will be 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."⁶²

The NPS 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."⁶³ It also relates the role of African American laborers in burying the dead after the armies departed.⁶⁴

⁵⁹ Pub. L. 101-377, § 6, Aug. 17, 1990, 104 Stat. 467, codified at 16 U.S.C. § 430g-9.

⁶⁰ See H. Rep. 101-467.

⁶¹ National Park Service Advisory Board, Rethinking the National Parks for the 21st Century, at <http://www.nps.gov/policy/report.htm>.

⁶² NPS, The New Visitor Experience at Gettysburg National Park: Facts at a Glance, at <http://www.nps.gov/gett/parknews/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=140604>.

⁶³ War For Freedom: African American experiences in the Civil War – Gettysburg, at <http://www.nps.gov/gett/forteachers/upload/GETT%20War%20for%20Freedom%20Complete.pdf>.

III. Boundaries

The federal government's condemnation of the Gettysburg Electric Railway tracks illustrates the potential for conflict between the aspirations of park managers and of entrepreneurs seeking to profit from development of nearby land. As soon as curiosity seekers, veterans, and tourists began to come to Gettysburg in numbers, boosted by improved railroad connections after 1884, local people sought to profit from catering to them. Hotels, dance halls, guides, carriages, souvenir sellers, private museums, photographers proliferated and clustered near park boundaries. The park commissioners' improvements also enhanced visitor pleasure and interest; they constructed five steel towers to better view the battlefield and the paved roads soon drew bicycle enthusiasts, although the commissioners laid down regulations to maintain decorum. But the government viewed the trolley as intruding in to sacred space by laying track along troop lines that should be preserved and marked with the park. The condemnation moved the boundary lines to preserve the sacred area, 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."⁶⁵

At the time of the creation of the national park, the only legal preservation tool available to government was ownership. The government took ownership of the battlefield to preserve sites considered inspiring and present them in a manner that would advance the values it thought 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 control over development of the park environs. 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 purchase the land, often using eminent domain to prevent price gauging, moving the boundary of protected space. Within this legal structure, landscape subject to historic preservation was deeply exceptional and removed from the market.

This stark division between preservation land and commercial land held up until the character of development changed in a way that threatened the sacred character of the surrounded 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

⁶⁴ *Id.* at 39.

⁶⁵ Weeks, 72.

like it was in 1863.” But Gettysburg’s post-war sprawl was not different in kind from the rapid spread of suburban development across formerly rural areas surrounding cities, also enabled by widespread automobile ownership and highway development spurred by Eisenhower’s own 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. Viewing the regimental monuments as dull and funereal the NPS soon adopted the goal “to exert every effort toward restoring it to the condition as found during the world famous battle fought over its grounds.”⁶⁶ 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 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.⁶⁷ Perhaps additionally, the overhanging threat of nuclear war made the 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 and made it seem more valuable.

Conflict between the preservation and development took legal focus in 1971 when Thomas Otterstein began construction of a 307-foot observation tower on privately-owned land 400 feet from the boundary of the battlefield park.⁶⁸ The tower had a space age, needle-like design, visible from many areas of the park. Federal and state authorities sought legal means to prevent construction of the tower. Their failure to do so highlights the limits of property rights 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.

Federal law did not regulate any such private development, despite its effect on such an important federal resource. Two weeks after Secretary Morton announced that he would prevent completion of the tower, which he described as “the most damaging single intrusion ever visited upon a comparable site of American history,”⁶⁹ the NPS agreed to a

⁶⁶ Weeks, 120.

⁶⁷ *Id.* 158.

⁶⁸ Adam Bernstein, Obituary, Thomas R. Ottenstein, Built Gettysburg Tower, Wash. Post, Aug. 3, 2000, at B07. The

⁶⁹ See John Latschar, The Taking of the Gettysburg Tower, 18 The George Wright Forum, No. 1, at 24 (2001).

land swap with Ottenstein in order to move the tower farther from the battlefield, because it lacked legal control over 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 on the National Mall in Washington, DC,⁷⁰ suggests that such a claim would have been a stretch. The only preservation tool was ownership and the NPS had neither the statutory authorization or the money to buy out the tower. The National Historical Preservation Act, enacted in 1966 and a powerful indirect spur to preservation, simply does not restrict private developments not otherwise subject to a federal license.⁷¹ Most state preservation laws have no regulatory effect,⁷² 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, arguing 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.”⁷³ The state relied 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.” 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.⁷⁴ Bruce Catton, then a popular historian of the Civil War, testified that “the tower would jar a person ... experiencing the battlefield back into the present day and so diminish the historic and cultural values.”⁷⁵ The tower owner argued that it was a “classroom in the sky” that would educate the current generation about the importance of Gettysburg.⁷⁶ On the one hand, the government cannot provide the experience of the battlefield that it deems best without eliminating the tower because it visually intrudes into the images presented by the restored fields proclaiming the proximity of modernity. Witnesses favoring the tower emphasized its economic and educational benefits; everyone agreed that the tower provided a valuable

⁷⁰ *United States v. County Board of Arlington, Virginia*, 487 F. Supp. 137 (E.D. Va. 1979).

⁷¹ *See generally* J. Peter Byrne, *Federal Historic Preservation Law: An Introduction* (manuscript draft on file with author). See DOI solicitor ruling.

⁷² One state whose excellent law, modeled on that of France, would have protected the battlefield in Kansas, whose [cite] regulates inappropriate new construction within 500 feet of an historic landmark. See Pierre .

⁷³ *Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 590 (Pa. 1973).

⁷⁴ The report of Kahn’s testimony is given by the court in *Commonwealth v. National Gettysburg Tower, Inc.*, 302 A.2d 886, 889 (Pa. Commw. Ct. 1973).

⁷⁵ *Id.* (paraphrase by court).

⁷⁶ *Id.*

perspective on the field for understanding strategy and setting. 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.”⁷⁷ The tower takes advantage of the presence of the park, but nearly all property value is parasitic in this way, as location determines value and the efforts of others determine the value of location.

The lower courts held that the Commonwealth failed to carry its burden of proof that the tower 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. But this concern may be expressed even more by the ruling of the Pennsylvania Supreme Court that the constitutional provision guaranteeing a right to preservation was not self-executing.

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 but also makes the state the trustee of the public right, placing upon Pennsylvania “a definite status and imposes upon it an affirmative duty.”⁷⁸ The lower courts held that Section 27 supported an action by the Commonwealth against private owners that could be adjudicated by the courts without implementing legislation, although they denied relief on the merits.⁷⁹ Although the Pennsylvania Supreme Court affirmed this disposition, 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.”⁸⁰ 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.⁸¹ 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.”⁸² Even though four of seven judges in the case seem to have rejected the view that the Commonwealth cannot bring such an action without legislative specification, it seems to

⁷⁷ Id. at 891.

⁷⁸ Id.

⁷⁹ Id. at 891-93.

⁸⁰ Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, Inc., supra, 311 A.2d at 594.

⁸¹ Id. at 591-93.

⁸² 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.

have prevailed in Pennsylvania.⁸³ At the same time, the courts' opinions did make plain that a sole legislative purpose to preserve historic sites would be within the state's police power, and the clarity of the policy expressed in Section 27 later would support the constitutionality of municipal ordinances requiring private owners' to preserve designated historic buildings.⁸⁴

The Gettysburg tower case illustrates practical difficulty of solving historic preservation conflicts by judicial adjudication based upon abstract principles. 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. Cultural values do not reveal and present themselves coherently but must be articulated in some dialogue between scholarly or critical expertise and popular engagement. In the tower case, the Pennsylvania courts would not make value judgments about visual damage to historic values when the property and regulatory systems failed to clarify which interests should predominate. The boundary between historic property and commercial property remains too stark. 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 illustrated its weaknesses but only hints at its strengths. As noted above, this central federal preservation statute does not purport to regulate directly what private owners may do with historic properties. It requires federal agencies to consider in specific ways the effects of their "undertakings" on properties eligible for inclusion on the national register, but does not directly require anything of non-federal actors.⁸⁵ 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. 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

⁸³ See Bruce Ledewitz, Summary, Pennsylvania Constitution, II, B, 2, c, at http://www.paconstitution.duq.edu/PAC_CONST_LAW_SUMMARY.html.

⁸⁴ *United Artists Theater Circuit, Inc v. City of Philadelphia*, 635 A. 2d 612, 620, (Pa. 1973);

⁸⁵ Private owners sometimes 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 must comply with the 106 process. .

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. The court dismissed those counts, holding that the agency had substantially complied with the statute, which preserved the agency’s ultimate authority to decide whether to proceed with the swap.⁸⁶ 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 had been promulgated. Nonetheless, it may be that the land swap may have been a reasonable compromise, given the lack of effective prohibitory regulations.

The erection of the Gettysburg tower constituted a turning point, like other that have marked the development of historic preservation law, like 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.”⁸⁷ Civic and business interests came to embrace historic preservation as the means to enhance the image of the town and protect the golden egg of the park, which now brought nearly two million visitors each year, and attract these historically minded tourists into the town. 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. 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 look as an economic engine.⁸⁸ In 1990, the Borough developed the Gettysburg Historic Pathway Plan, which committed the community to the preservation and coordinated 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 commit 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.⁸⁹ 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.⁹⁰ As a result, federal actions having potential effects on properties within

⁸⁶ *Commonwealth of Pennsylvania v. Morton*, 381 F. Supp. 293 (D.D.C. 1974). The court ultimately remanded the case to Interior to provide a fuller explanation why it decided not to prepare an environmental impact statement under NEPA.

⁸⁷ Weeks, 182.

⁸⁸ 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.

⁸⁹ A summary of the Gettysburg Interpretative Plan can be found at <http://www.mainstreetgettysburg.org/images/GIPs.pdf>.

⁹⁰ A summary of the National Register listing can be found at http://www.livingplaces.com/PA/Adams_County/Gettysburg_Borough.html.

the district become subject to the study and consultation process mandated by section 106 and become available for federal benefits. Federal legislation in 1990 authorized expansion of the boundaries of the park and NPS participation in various preservation activities within the federal historic district. Cooperation between borough and park now is resulting in restoration of the David Wills House, where Lincoln stayed in town the night before he delivered his address. Wills House open in summer 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.

Thus recent development of historic preservation laws has to some extent collapsed the boundaries marked at the beginning of this Part. From the time the park was founded by private purchases just after the battle, through the federal takeover, and through the tower controversy, property ownership was the sole 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, covers 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. 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.

Through these means, Gettysburg has forged a community identity, in Carol Rose's sense, that has given voice to community members. Recently, the Pennsylvania Gaming Control Board rejected a proposal by investors to open a casino one mile from the battlefield, outside the historic district. The Board cited "concerted, sustained" opposition from town residents.⁹¹ These residents argued that the casino defiled the hollow ground,⁹² 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

⁹¹ Sharon Smith, Opposition Cited in Casino Rejection, Patriot-News, Feb. 2, 2007, at

⁹² Sentiments can be sampled at <http://www.nocasinogettysburg.com>.

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.⁹³

Consideration of the relation between heritage tourism and historic preservation will be pursued 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 authorized NPS to take the tower by eminent domain. 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’s motion for possession on June 5, 2000. On July 3, 2000, 10,000 people cheered as the tower, its support structures exploded, sank to the ground.⁹⁴

IV. Choosing Which History

The section considers the legal dispute about the NPS’s decision to demolish Ricahrd Neutra’s 1962 Gettysburg visitor center. The Cyclorama Center, as the building is known for reasons that will appear, 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.⁹⁵ Examination of this dispute further reveals development of preservation purposes and means, highlights conundrums about preservation of modern architecture, and illustrates the genius 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 involved development of new parks and construction of new facilities and roads in existing

⁹³ 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.

⁹⁴ See Latschar, *supra*, note x, at 31-32.

⁹⁵ 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).

parks.⁹⁶ It featured invention of a new type of building, a visitor center, to orient and teach visitors, interpreting the park and its wonders.⁹⁷

“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.”⁹⁸

For its new construction, the NPS, like nearly all other institutional builders at the time, embraced modern design. This was a common choice at the time; the 1958 Air Force Academy campus, designed by Walter Netsch, is an outstanding example, the chapel of which is now a National Historic Landmark. 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.⁹⁹ Viewed in broad perspective, Mission 66 represents a large cultural attempt to apply instrumental reason to harmonize relations between nature and a democratic people.

For the first visitor center at Gettysburg, the NPS chose Richard Neutra, a highly regarded, Viennese-born, Los Angeles architect. His buildings emphasized sleek, open lines. “Neutra designed the modern architecture that is now considered traditional in Southern California.”¹⁰⁰ “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.”¹⁰¹

The NPS had two important specific criteria for the Gettysburg visitor center. First, it fixed the location near the center of the battlefield, known as Ziegler’s Grove, from which visitors could view the center of the field where Pickett’s Charge had failed and easily walk to significant points. Ample parking brought visitors first to the visitor center, where they would learn about what they would see and their significance. Such an entrance separated visitors’ experience more sharply from the tawdry commercial

⁹⁶ Ethan Carr, *Mission 66: Modernism and the National Park Dilemma* (U. Mass. Press, 2007).

⁹⁷ Sarah Allaback, *Mission 66 Visitor Centers: The History of a Building Type* (2000).

⁹⁸ Carr, 222.

⁹⁹ 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.

¹⁰⁰ Allaback, 102.

¹⁰¹ Carr 163.

development spreading around the town. While the visitor center location intruded on the battlefield, and required relocation of several 19th 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.”¹⁰² This accorded with the general approach to locating Mission 66 visitor centers at central locations to support interpretation by facilitating views of important areas within parks.

Second, the Neutra building would have to house the massive, 1884 cyclorama painting of Pickett’s Charge. The concept was to join the cyclorama, a museum, and administrative offices in a single building. Accordingly, the central element of the building is a large cylindrical drum containing an auditorium within which the painting could be viewed. A lower, rectangular wing to the south contained offices and display space. An exterior ramp led to a viewing platform on the top of the south wing, from which visitors could view the battlefield. Crowds of up to 30,000 people could be accommodated outside the building whose doors could open to reveal an elevated rostrum.

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.”¹⁰³ 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.”¹⁰⁴ 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.’”¹⁰⁵ 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.”¹⁰⁶ Architectural historians claim 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.”¹⁰⁷ The Neutra center 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.

¹⁰² Carr 193.

¹⁰³ Id. 195.

¹⁰⁴ Dorothy B. Huyck, Gettysburg’s Gain: New \$1 Million Visitor Center to Give Tourists a Clearer Picture of Battle, N. Y. Times, May 6, 1962, at ?

¹⁰⁵ 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.”

¹⁰⁶ The Campaign to Save Richard Neutra’s Cyclorama Building at Gettysburg.

<http://www.mission66.com/cyclorama/history/index.html>. Historian Jim Weeks wrote: “The Cold War revived Gettysburg’s symbolic place in American exceptionalism, expressed in the rebirth of a nation divinely ordained for global leadership.” Weeks 143.

¹⁰⁷ Letter from Richard Longstreth, Society of Architectural historians, To Fran Minella, Director, NPS, re: Appeal of National Historic Landmark Ruling, February 24, 2004.

The prestige of the building rapidly declined, however, with the loss of faith in the cultural and design ideals upon which it was based. In 1971, the NPS purchased a private museum with a large collection of battle memorabilia and the remarkable “electric map;” it moved its visitor center into the larger, nearby 1920’s museum building. The Neutra building, demoted to the Cyclorama Center, soon “became a symbol of what many came to see a willingness to value interpretation and visitor experience above the stewardship of park landscapes and archeological resources.”¹⁰⁸ Belief in and sophistication about historic preservation grew, as marked by the passage of the National Historic Preservation Act in 1966, which probably would have prevented construction of the Cyclorama Center on the battlefield had it been in effect a few years earlier.¹⁰⁹ Park managers wanted to give visitors a palpable experience of the past. 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.¹¹⁰ To this end, trees have been cut down or planted; archaic grain fields or orchards recreated by strenuous landscape recreation and management.¹¹¹ The NPS wants to provide visitors a realistic sense of the scene without distraction by modern intrusions. The object 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. To these ends, the NPS decided to demolish the Cyclorama Center, restore the site to its 1863 condition, and move the cyclorama painting to a new visitor center to be built away from the sensitive center of the battlefield.¹¹²

This change in emphasis may have several causes.¹¹³ [more]

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 building eligible for listing on the National Register.¹¹⁴ 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.¹¹⁵ The National Register criteria and processes are governed by regulations promulgated by a different division of the NPS itself.

In the process 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

¹⁰⁸ Carr, 195.

¹⁰⁹ 16 U.S.C. § 470a, et seq.

¹¹⁰ 1993 Management Plan.

¹¹¹ John Latschar, Battlefield Rehabilitation at Gettysburg, at www.nps.gov/gett/parknews/gett-battlefield-rehab.htm.

¹¹² 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>.

¹¹³ Interesting to note that the Gettysburg National cemetery was closed or new internments in 1972, after “heavy demands for burials as a result of the Vietnam War.” Admin History 344.

¹¹⁴ 16 U.S.C. § 470f.

¹¹⁵ 36 C.F.R. Part 800.

old at the time, it could be found eligible only if found to possess “exceptional significance.”¹¹⁶ 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”.¹¹⁷ 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 exceptionally significant on two criteria:¹¹⁸ it was an outstanding part of Mission 66, a noteworthy historical event, and as the important work of a master architect.¹¹⁹ The evaluation of the significance of a building like the Cyclorama Center naturally engenders controversy. The NPS could legitimately view it as lacking significance, judging it as a mistake that failed to achieve even the goals set for it, but also had an incentive to discount whatever significance it has as creating a barrier to achieving its larger preservation goals for the park. The National Register regulations, however, appropriately permit appeals by any interested person to an official somewhat insulated from political pressures deciding largely on professional criteria.¹²⁰ Preservationists reject the view that subjective reactions to a building should control; discounting significance because one finds a building ugly replicates attitudes that at mid-century doomed many Victorian buildings thought beautiful today.

The NHPA does not require that the NPS preserve the Cyclorama Building (or any other historic property). To comply with the NHPA, the Park Service prepared a “Section 106 Case Report” and consulted with the SHPO and the ACHP.¹²¹ Section 106 directs inquiry to “adverse effects” that an undertaking may have on identified historic properties and consideration of alternatives to avoid or mitigate those effects.¹²² 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 itself constituted an “intrusion” onto the historic battlefield. Indeed, the report claimed that the location of the

¹¹⁶ 36 C.F.R. § 60.4(g).

¹¹⁷ <http://www.mission66.com/cyclorama/docs/riddle/neutral.html>. [need better cite].

¹¹⁸ “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.

¹¹⁹ 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]

¹²⁰ 36 C.F.R. § 60.12.

¹²¹ The Case Report can be found at <http://www.mission66.com/cyclorama/docs/section106.html>.

¹²² 36 C.F.R. § 800.5 - .6.

Cyclorama Center and its parking lots “is 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 historic landscape at a climactic site of the battle. Eventually, the NPS entered into a Memorandum of Understanding with the SHPO and the ACHP providing for the demolition of the Cyclorama Center after thorough documentation of its existing condition.¹²³ Although concerned parties can seek judicial review under the APA of the agency’s compliance with section 106,¹²⁴ the execution of such an MOA practically ensures that such litigation would be fruitless.

But the NPS’s approach here raises serious questions, several of which were promptly raised in a letter objecting to the Case Report, submitted by the Society of Architectural Historians.¹²⁵ 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 recount the efforts of 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 they also “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 earlier period of primary significance.¹²⁶ But the later commemorative elements of the Gettysburg battlefield are not simply later adaptations for practical use, like a wing or new doorframe on a house, but self-conscious commemorative additions that reflect understandings of the battle different from those of the present day. The cyclorama Center cannot be fairly termed an “intrusion,” even if today’s park managers regret the decisions of their predecessors.

Second, the NPS decision favors restoration over preservation. The location of the building does not 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 1963, the reconstruction of the site will be speculative. Historian Jim Weeks complains: “What visitors see¹²⁷ 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.” By contrast, it will demolish an acknowledged landmark retaining integrity.

¹²³

¹²⁴ Note on judicial review under 106.

¹²⁵ Richard Longstreth, President, Society of Architectural Historians, to John Latschar, Superintendent, Gettysburg National Military Park. Jan. 6, 1999, at <http://www.mission66.com/cyclorama/letters/sah106.html>.

¹²⁶ 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).

¹²⁷ 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 the centrality of the building site to the battle.¹²⁸ It emphasizes the “hallowed” character of the site. But, leaving aside argument about comparative “hallowedness,” one cannot accept that landscape restoration is 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. 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 trauma. It would be peculiar to restore the twin towers and related buildings to their appearance before the assault in order to commemorate what occurred; the plan for the site will erect a memorial square not unlike the park developed by the GBMA.

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.”¹²⁹ The period landscape permits the visitor to imagine the battle and the participants, which has had a powerful popular appeal. But this becomes “heritage tourism” as much as historical preservation, elevating the heroism and pageantry of battle over meaning or suffering. Focus on maneuvers and battle anecdote suppresses 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 casual tourists and enthusiastic re-enactors alike take away unrealistically romantic notions of war. Similarly, while one may welcome the beauty of the recreated pastoral landscape in itself or as an implicit critique of the ugly urban sprawl of our time, one also may worry that it succeeds as an artificial ideal unconnected from any productive activity other than tourism.

Concern about romanticization of the battle is exacerbated by the Park Service’s solicitude for the cyclorama painting itself. However accurately Philipoteaux’s massive painting of Pickett’s Charge depicts uniforms, it presents the battle as an heroic contest between worthy opponents – a “sanitized” embodiment of the reconciliationist view of the Civil War. The cyclorama painting was created essentially as a commercial exhibit. The cyclorama painting certainly deserves preservation as a late Victorian popular entertainment, reflecting the character of historical imagination. But the cyclorama painting is being restored at the cost of \$ 16.4 million, being raised by private donations. It will be 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

¹²⁸ The NPs 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.

¹²⁹ 160 U.S. at 682.

charge.”¹³⁰ 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 contemporary popular appeal than the latter. The growing reliance of the NPS on private fundraising may increase concerns about providing popular exhibits. Thus, if the adoption of an historic preservation ordinance by the Borough of Gettysburg represents the spread of preservation from the park to commercial real estate, the emphasis on fundraising may prompt the spread of commercial values to the park.

None of this means that the NPS acted unlawfully or even wrongly in choosing to demolish the Cyclorama Center in order to recreate Zeigler’s Grove. 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. Perhaps the NPS did not consider with sufficient frankness or subtlety the nature of the tradeoffs it had made. Indeed, the National Trust for Historic Preservation’s comment on the NPS’s Section 106 Case Study urge that NPS clarify what harm the Cyclorama Building imposes on the “character defining” landscape to be recreated given the persistence of other monuments.¹³¹ 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. No doubt opponents of the demolition can view the Trust’s position as waffling. But decisions about what to preserve and how to interpret historic properties must be made by someone. Section 106 creates a process by which interested persons can push federal agencies to consider different perspectives while making such decisions.

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 depends primarily on “consulting parties,” primarily the SHPO and the ACHP, to hold the federal agency to its duties. The SHPO as a state official has organizational independence from the federal agency subject to the act, although may reflect state and local political priorities. Agreement with consulting parties about identifying historic properties affected, the nature and extent of adverse effects, and evaluation of alternatives and mitigation greatly eases the decision path for the agency. These incentives push decisions down to a level where practical accommodation prevails. At Gettysburg, the state and the NPS share an interest in presenting the battlefield in manner that will preserve the pilgrimage value and satisfy those who care the most about the site. The NHPA encourages greater exchange of more perspectives on preservation issues than previously. The parties executed an MOA that states their joint commitment to the plan and appropriately renders judicial invalidation unlikely.

[under construction: The plaintiffs have argued that the NPS violated section 110 of the NHPA, which requires federal agencies to “assume responsibility ... In the end, the

¹³⁰ <http://gettysburgfoundation.org/campaign-4.htm>.

¹³¹ Richard Moe, President, National Trust for Historic Preservation, to John Latschar, Superintendent, Gettysburg National Military Park, Jan. 19, 1999, at <http://www.mission66.com/cyclorama/letters/moe106.html>.

NPS plan to restore Ziegler's Grove may give us the perspective on the battle that meets the cultural needs of most visitors in our time.]

Conclusion

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 perspectives of veterans coping with death and asserting their ongoing political power, the promise of emancipation and equal citizenship, assertions of national unity, white supremacy, and 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.

The National Historic Preservation Act creates dialogue with the National Park Service about what preservation decisions should be made while protecting the authority of the responsible 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, 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 recognizes the clash of differing priorities and the inevitable need for interpretation.