

# PRESERVING NATIONAL HISTORIC LANDMARKS?

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*“Now is the dramatic moment of fate, Watson, when you hear a step upon the stair which is walking into your life, and you know not whether for good or ill.”*<sup>1</sup>

## INTRODUCTION

The 1935 passage of the Historic Sites Act (HSA) marked the beginning of a meaningful transformation in the relationship between the federal government and the still-emerging field of historic preservation.<sup>2</sup> Although not the first of what could be broadly defined as historic preservation-based legislation, in many ways, the HSA was proof that the field was beginning to transition from antiquarianism to its modern role focused on the attainment of a multitude of public policy goals, including economic development, land use control, and place-making.<sup>3</sup> As drafted, the HSA had grand intentions. It sought to professionalize an avocational pursuit, bring needed rigor to efforts to preserve the nation’s heritage, and provide a platform for a meaningful expansion of the National Park Service (NPS) to include more historic sites—transforming both the mission and reach of what had largely been a “western land management agency.”<sup>4</sup> To this end, the HSA provided for an emerging—though not exclusive—

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<sup>1</sup> ARTHUR CONAN DOYLE, *THE HOUND OF THE BASKERVILLES* (1902).

<sup>2</sup> See JOHN H. SPRINKLE, JR., *CRAFTING PRESERVATION CRITERIA: THE NATIONAL REGISTER OF HISTORIC PLACES AND AMERICAN HISTORIC PRESERVATION* 6 (2014) (exploring the impact of the two major historic preservation legislative efforts of the twentieth century—the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966). Prior to the Historic Sites Act, federal preservation efforts had been essentially episodic; however, efforts to preserve historic battlefields marked the largest pre-HSA federal involvement. See generally J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 *TUL. ENVTL. L. J.* 203 (2009) (discussing the movement to protect historic Civil War battlefields as lasting monuments to the conflict).

<sup>3</sup> See Francis P. McManamon, *An Introduction to Heritage Resources Law*, in *HERITAGE RESOURCES LAW* 1, 1, 8 (Sherry Hutt et al. eds., 1999); see also Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *STAN. L. REV.* 473, 474–76 (1980) (discussing the various motivating factors fueling historic preservation initiatives); see generally THOMPSON MAYES, *WHY DO OLD PLACES MATTER?: HOW HISTORIC PLACES AFFECT OUR IDENTITY AND OUR WELLBEING* (2015) (providing perspective on the impact of historic sites and the motivations behind preservation efforts).

<sup>4</sup> See SPRINKLE, *supra* note 2, at 7; CHARLES B. HOSMER, JR., *PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST, 1926–1949*, at 471 (1981) (discussing the growth of the NPS during the 1920s–30s to encompass both historic sites as well as sites in the eastern United States).

federal role within the field.<sup>5</sup> To begin this task, the HSA would authorize a historic survey of the nation's past to guide NPS's eventual acquisition decisions.<sup>6</sup> Out of this early effort at survey and evaluation, properties recognized as having national significance would ultimately come to be classified as National Historic Landmarks (NHLs)—the highest recognition of historic properties under federal preservation law.<sup>7</sup>

Nearly eighty years later, NHLs continue to serve as an important part of the national preservation framework,<sup>8</sup> but perhaps not exactly as generally understood or even anticipated at the time. First, the majority of NHLs have not been acquired by the NPS, but are instead owned and operated by non-profit organizations, state and local governments, and even private owners, who generally steward these resources without federal support, oversight, or intervention.<sup>9</sup> By virtue of this fact, a

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<sup>5</sup> See Donald Dworsky et al., *Federal Law*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 191, 230–31 (Christopher J. Duerksen ed., 1983) (describing the various authorities given to the Department of the Interior by the Historic Sites Act of 1935). Even during the earliest days of the preservation movement, it was apparent that the federal government would not be able to protect all historic properties worthy of long-term stewardship, and that encouraging local organizations and states to take on some of this work would also be necessary. See NAT'L PARK SERV., HOW TO PREPARE A NATIONAL HISTORIC LANDMARK NOMINATION 12 (1999), <http://www.nps.gov/nr/publications/bulletins/pdfs/=nhls.pdf> (citing then Secretary of the Interior Harold Ickes for the signaling role of the survey in pointing out significant properties to alternative qualified operators who might be willing to work to secure their preservation).

<sup>6</sup> See BARRY MACKINTOSH, NAT'L PARK SERV., THE HISTORIC SITES SURVEY AND THE NATIONAL HISTORIC LANDMARKS PROGRAM: A HISTORY v (1985) (noting that the NHL program has “served to qualify and disqualify sites for the National Park System, to appease politicians and interest groups, and occasionally to offend citizens unsympathetic to its actions”).

<sup>7</sup> See THOMAS F. KING, CULTURAL RESOURCE LAWS & PRACTICE 17–18 (4th ed. 2013). The formal NHL designation would not emerge until 1960 when the list of nationally significant properties was made public in the midst of Mission 66 efforts (the formal effort to celebrate the agency's fiftieth anniversary) to propel the NPS forward. See NAT'L PARK SERV., *supra* note 5, at 14.

<sup>8</sup> See *National Historic Landmarks Program, Effects of Designation*, NAT'L PARK SERV., <http://www.nps.gov/nhl/learn/pubs/NHLFederalEffects.pdf> (last visited Mar. 1, 2016).

<sup>9</sup> See Linda Pinkerton, *Aesthetics and the Single Building Landmark*, 15 TULSA L.J. 610, 611 n.5 (1980) (The Historic Sites Act of 1935, ch. 593, 49 Stat. 666 (current version at 54 U.S.C. §§ 102303, 320101–04, 320106 (Supp. II 2015)), provides “the strongest federal control, that is, the authorization for the government to acquire sites of national historical significance subject to an

considerable number lack any degree of meaningful regulatory protection. This is perhaps surprising, but it is revealing of the complex relationship between the federal government and the nation's most significant historic properties.<sup>10</sup>

One potential way that additional numbers of nationally significant historic properties could be protected is through the use of preservation easements, held by the NPS, state historic preservation offices, or non-profit preservation organizations.<sup>11</sup> Relying on the expanded use of less than fee interests to secure historic properties, without taking on direct ownership responsibilities, allowed the movement to leverage its scarce resources to permanently protect critically important historic resources otherwise left vulnerable or at risk.<sup>12</sup> This approach has

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appropriation by Congress. This delegation was upheld as constitutional in *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939), but has scarcely been used.”). A significant number of NHLs have ultimately come under federal control and present a number of management and preservation issues. Despite the numerous challenges these properties face, this Article primarily focuses on properties outside of federal ownership, as they remain the most vulnerable to direct loss. *See National Historic Landmarks, Threatened List*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/threatened.htm> (last visited June 1, 2015) (discussing threatened NHLs, which are largely held in private ownership; as of October 2016, this database is temporarily down for NPS system upgrades).

<sup>10</sup> *See* SPRINKLE, *supra* note 2, at 1 (“Unlike in the United Kingdom or other countries, being listed on the National Register comes with no inherent federal mandate for preservation, either on the part of the owner of the property or by local, state or federal government.”). Designation as a NHL is not a perfect system for determining historic significance and remains subject to ongoing and valid criticism regarding our ability to properly identify and represent a wide mix of reflective properties. *See generally* Jessica Goad et al., *Better Reflecting Our Country's Growing Diversity*, CTR. FOR AM. PROGRESS (Feb. 19, 2014) <https://www.americanprogress.org/issues/green/report/2014/02/19/84191/better-reflecting-our-countrys-growing-diversity/>; *see also* Ned Kaufman, *Historic Places and the Diversity Deficit in Heritage Conservation*, CRM, Summer 2004, at 68 (discussing this complex issue in greater detail).

<sup>11</sup> *See Preservation Easements*, NAT'L TR. FOR HISTORIC PRES., <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/> (last visited Mar. 1, 2016). For the purposes of this Article, the term “preservation easement” is utilized to collectively refer to the form of less than fee interests utilized to protect historic resources. Considerable debate rages over whether this is the appropriate way to characterize this interest, but preservation easement is the most common term utilized within the historic preservation community, and will be utilized consistently throughout this Article. *See* SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 535 (2012) (discussing this ongoing debate).

<sup>12</sup> *See* J. MYRICK HOWARD, *BUYING TIME FOR HERITAGE: HOW TO SAVE AN ENDANGERED HISTORIC PROPERTY* 89 (2007) (profiling Preservation North Carolina's efforts to utilize easements to protect additional historic properties).

been explored in the past, but has not been implemented to specifically ensure continuing protection for NHL properties.<sup>13</sup> A targeted effort to use this tool has considerable merit as preservation continues to evolve away from its traditional dependence on acquisition and regulatory controls to expand both the number and type of historic resources that are protected.<sup>14</sup>

The purpose of this Article is to explore how so many resources within the most elite strata of American historic resources have remained unprotected and to examine the potential for the use of preservation easements to address this shortcoming. To this end, Part I of this Article explores the development of the NHL program in conjunction with federal preservation law—transitioning from a narrow focus on outright acquisition to include procedural protections and financial incentives, while at the same time gradually reflecting a much more inclusive view of what properties are important to interpreting the nation’s history.<sup>15</sup> Going beyond this retrospective, Part II will explore the current state of the NHL program and its role within the contemporary preservation movement. Lastly, Part III will examine the NPS’s use of preservation easements to protect important historic sites and consider the role that this tool could play in increasing the effectiveness of efforts to protect NHLs. Ultimately, the story of the NHL program is, in many respects, one of unrealized potential. That said, it is one that can chart a path forward to protect some of the most important elements of our collective built heritage.

## I. THE ORIGINS OF THE NHL PROGRAM

To understand the development of the NHL program, this Part will provide a brief overview of the pre-New Deal history of the preservation movement, detailing the HSA’s enactment,

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<sup>13</sup> See, e.g., RUSSELL L. BRENNEMAN, SHOULD “EASEMENTS” BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS?: A STUDY FOR THE NATIONAL PARK SERVICE iv (1974).

<sup>14</sup> See generally CARL R. NOLD, WHY DO WE OWN? ALTERNATIVES TO THE HISTORIC HOUSE MUSEUM (2007), <http://www.southphillyblocks.org/pacscl/docs/deaccession/CarlNoldWhyDoWeOwn.pdf> (last visited Mar. 1, 2016) (discussing the limitations of the house museum model as a scalable approach to preservation efforts writ large).

<sup>15</sup> See generally NAT’L PARK SERV., SURVEYING AMERICAN HISTORY: THE ROLE OF THE NATIONAL PARK SERVICE 1 (2003) (discussing the gradual expansion of the NHL program to encompass a wider range of properties reflective of a diversity of cultural experiences).

implementation, and gradual evolution as historic preservation law began to enter into the mainstream of urban planning efforts.

### A. *Historic Preservation Prior to the New Deal*

#### 1. *Overview*

Many are likely familiar with some version of the traditional linear story of pre-New Deal historic preservation.<sup>16</sup> In this admittedly oversimplified narrative, American historic preservation begins with the purchase and subsequent operation of Mount Vernon as a house museum by the Mount Vernon Ladies Association in the middle part of the nineteenth century, and gradually expands during the subsequent decades as additional groups adopt this model to protect sites associated with the Founding Fathers, other significant historical figures, or particularly revered ancestors.<sup>17</sup> The majority of these properties were operated as historic house museums, dedicated to telling the stories associated with American Revolution-era history.<sup>18</sup> The fruits of this strand of preservation activity can still be seen today, although the historic house museum model has not necessarily

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<sup>16</sup> See NORMAN TYLER, *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE* 33–39 (2d ed. 2009) (providing an overview of the history of the preservation movement); see also Tersh Boasberg, *The Washington Beat: Historic Preservation? Some Practical Problems with the Federal Funding Approach*, 5 URB. L. 749, 749–50 (1973) (discussing the origins of the shift away from the house museum model). This chronological narration is admittedly an oversimplification, but highlights different modes of preservation and the significant shift from direct purchase to regulated districts to market-driven intervention through incentive programs. See Max Page & Randall Mason, *Introduction: Rethinking the Roots of the Historical Preservation Movement*, in *GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES* 6–8 (Randall Mason & Max Page eds., 2004) (discussing the complexity and nuances underlying the true history of the historic preservation movement).

<sup>17</sup> See Jeremy C. Wells, *The Plurality of Truth in Culture, Context, and Heritage: A (Mostly) Post-Structuralist Analysis of Urban Conservation Charters*, 2 CITY & TIME 1, 4 (2007); see also Albert B. Wolfe, *Conservation of Historical Buildings and Areas—Legal Techniques*, 1963 A.B.A. SEC. REAL PROP. PROB. & TR. PROC. 18 (1963) (discussing this movement generally); see also Sean M. Fagan, *An Analysis of the Evolution of Theory and Management in the Trustees of Reservations* 1–5 (Jan. 1, 2008) (unpublished M.S. thesis, University of Pennsylvania) (on file with author) (noting that these early efforts often involved important landscape elements in addition to historic resources).

<sup>18</sup> See DONNA ANN HARRIS, *NEW SOLUTIONS FOR HOUSE MUSEUMS: ENSURING THE LONG-TERM PRESERVATION OF AMERICA'S HISTORIC HOUSES* 4 (2007).

worked as a viable model for the long-term care and stewardship of all historic sites—even those initially dedicated to this use.<sup>19</sup>

During the early twentieth century, the significance of American architecture began to be recognized by the emerging field of architectural historians,<sup>20</sup> and efforts were made to protect historic neighborhoods through regulated historic districts.<sup>21</sup> In 1931, Charleston created the first regulatory district of this type—the Old and Historic District—which now has grown to protect over 4,800 properties in the city’s historic core.<sup>22</sup> A limited number of other cities began to explore this model, providing for a base level of regulatory models nationwide that slowly expanded over the course of the twentieth century to include local historic districts in every state.<sup>23</sup> Despite these notable examples, pre-New Deal attempts to protect historic properties were on the whole

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<sup>19</sup> See generally Stephanie K. Meeks, *House Museums: A 20th Century Paradigm*, NAT’L TR. FOR HISTORIC PRES. (Oct. 30, 2013), [https://savingplaces.org/press-center/media-resources/house-museums-a-20th-century-paradigm#.V6ksMpMrI\\_U](https://savingplaces.org/press-center/media-resources/house-museums-a-20th-century-paradigm#.V6ksMpMrI_U) (discussing the challenges associated with this approach and advocating for the adoption of new models).

<sup>20</sup> See Mark D. Brookstein, *When History is History: Maxwell Street, Integrity, and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1856–59 (2001) (exploring the shift to consideration of aesthetic and architectural significance); see also Bertram K. Little, *William Sumner Appleton*, 69 PROC. MASS. HIST. SOC’Y, Oct. 1947–Jan. 1950, at 422–25 (discussing the origins of the move towards appreciation of architectural significance).

<sup>21</sup> See David Listokin, *Growth Management and Historic Preservation: Best Practices for Synthesis*, 29 URB. L. 199, 200–04 (1997) (charting the expansion of preservation efforts to include regulatory districts).

<sup>22</sup> See *About: History*, PRES. SOC’Y OF CHARLESTON, <https://www.preservationsociety.org/about-preservation-society-of-charleston.php#history> (last visited Oct. 16, 2016) (detailing the history of this district). The constitutional basis for “aesthetic zoning” such as Charleston’s ordinance and a similar initiative to protect New Orleans’ Vieux Carre district was not firmly established at the time they were put in place. Ultimately, many communities were reluctant to implement preservation regulations without more clear legal authority; it would take judicial action to confirm the appropriateness of this degree of regulation, which would not come until 1978 with the Supreme Court’s decision in *Penn Central*. See Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It’s Been, Where It’s Going*, in A HANDBOOK OF HISTORIC PRESERVATION LAW, *supra* note 5, at 13–17 (discussing the impact of the *Penn Central* decision on regulatory efforts nationally).

<sup>23</sup> See JACOB H. MORRISON, HISTORIC PRESERVATION LAW 1–9 (1957) (charting early efforts to use regulatory controls to preserve the built environment); see also Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 FORDHAM L. REV. 729, 734–41 (1960) (discussing New Orleans and Nantucket’s efforts to enact local historic districts).



rather limited.<sup>24</sup> To summarize the majority of such efforts, it is perhaps enough to note these activities were mostly confined to individualized protection of cherished resources for either historical or familial importance, or for the protection of groups of properties widely recognized as having national significance.<sup>25</sup>

## 2. *Pre-New Deal Preservation in the Federal Sphere*

Prior to the New Deal, the federal role in this space was even more limited.<sup>26</sup> Even “its [modest] efforts were . . . haphazard.”<sup>27</sup> In 1906, Congress enacted the first preservation-related law, the Antiquities Act, which applies to federal lands.<sup>28</sup> The Antiquities Act focuses on protecting archeological sites by criminalizing the looting of prehistoric and historic sites on lands, providing a permitting scheme for approving certain archaeological excavations, and providing a process for designating national monuments.<sup>29</sup> Overall, the Antiquities Act has generally had little

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<sup>24</sup> See Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 710–12 (1962) [hereinafter *The Police Power*]; see also Note, *La Recherche du Temps Perdu: Legal Techniques for Preservation of Historic Property*, 55 VA. L. REV. 302, 302 (1969) (noting early preservation efforts and their relative lack of success in frustrating or blunting losses given relentless development pressure).

<sup>25</sup> See Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, 1, 1–4 (Robert E. Stipe ed., 2003); see also Fiske Kimball, *The Preservation Movement in America*, 1 J. AM. SOC'Y ARCHITECTURAL HISTORIANS 15, 15–17 (1941) (describing efforts to establish house museums); *The Police Power*, *supra* note 24, at 709 (charting this growth over the early twentieth century).

<sup>26</sup> See SPRINKLE, *supra* note 2, at 7.

<sup>27</sup> HOSMER, *supra* note 4, at 471.

<sup>28</sup> See Antiquities Act, ch. 3060, 34 Stat. 225 (1906) (codified as amended at 54 U.S.C. § 320301 (Supp. II 2015)); see also Richard Waldbauer & Sherry Hutt, *The Antiquities Act of 1906 at Its Centennial*, CRM, Winter 2006, at 36, 42–44 (detailing the legislative process that led to the enactment of the Antiquities Act). Specifically, the Antiquities Act was driven by concerns regarding the looting of sites in the American West, for example, the cliff dwellings at Mesa Verde and yet, the chief use of the Act's authorities has been for protection of the natural environment. See RONALD F. LEE, THE ANTIQUITIES ACT OF 1906 ch. 4 (electronic ed. 2001), [http://www.nps.gov/archeology/pubs/lee/Lee\\_CH4.htm](http://www.nps.gov/archeology/pubs/lee/Lee_CH4.htm).

<sup>29</sup> See Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 66–67 (1993). Beyond regulating or preventing the looting of historic sites, the Antiquities Act gave the President broad authority to designate or reserve as monuments sites of scientific or historic interest. See 54 U.S.C. § 320301 (Supp. II 2015). To date, over 100 resources have been designated (either presidentially or congressionally) as

impact on historic structures, but it evinced the slow beginning of federal efforts to protect a broader range of cultural sites.<sup>30</sup>

Beyond the Antiquities Act, the federal government was directly involved in one other area prior to the 1930s: battlefield preservation.<sup>31</sup> Beginning in the late nineteenth century, there had been strong congressional interest in acquiring battlefields for historic and memorial purposes.<sup>32</sup> Interestingly, this activity focused primarily on Civil War sites and was driven at least in part by those who had been actively involved in the still relatively recent conflict.<sup>33</sup> Initially, federally acquired battlefields fell under the jurisdiction of the War Department.<sup>34</sup> In 1933, President Roosevelt administratively transferred these sites to the NPS, their current stewarding agency, marking the beginning of the agency's leadership role in the area of historic resource protection.<sup>35</sup>

Overall, early efforts to preserve the nation's built heritage were slow to develop and it took considerable effort to gain even tentative momentum.<sup>36</sup> With the few exceptions discussed above,

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national monuments. See *Archaeology Program*, NAT'L PARK SERV., <http://www.nps.gov/archeology/sites/antiquities/fullmap.htm> (last visited June 1, 2016).

<sup>30</sup> See BRONIN & BYRNE, *supra* note 11, at 3–4 (discussing the early history of the Antiquities Act).

<sup>31</sup> See RONALD F. LEE, *THE ORIGINS AND EVOLUTION OF THE NATIONAL MILITARY PARK IDEA* pt. IV (1973), [http://www.nps.gov/parkhistory/online\\_books/history\\_military/nmpidea6.htm](http://www.nps.gov/parkhistory/online_books/history_military/nmpidea6.htm) (charting the late nineteenth century movement to protect Civil War battlefields). These efforts continue today and still involve federal support. See, e.g., *American Battlefield Protection Program*, CATALOG OF FIN. DOMESTIC ASSISTANCE, <https://www.cfda.gov/index?s=program&mode=form&tab=core&id=2b2df69d1c976e11de585d7a341019c7> (last visited Mar. 1, 2016).

<sup>32</sup> See Richard W. Sellars, *Pilgrim Places: Civil War Battlefields, Historic Preservation, and America's First National Military Parks, 1863–1900*, CRM, Winter 2005, at 22, 23–27, 42–47.

<sup>33</sup> See James Hessler, *Dan Sickles: The Battlefield Preservationist*, THE CIVIL WAR TR., <http://www.civilwar.org/education/history/on-the-homefront/battlefield-preservation/dan-sickles-the-battlefield.html> (last visited Mar. 1, 2016) (exploring General Sickles' prominent role in advocating for the preservation of the Gettysburg battlefield). Other sites acquired prior to the New Deal included the Washington Birthplace National Monument and Colonial National Monument. See MACKINTOSH, *supra* note 6, at 3.

<sup>34</sup> See Sellars, *supra* note 32, at 23.

<sup>35</sup> See Exec. Order No. 6166 (June 10, 1933); see also Barry Mackintosh, *A Brief History of the National Park Service*, NAT'L PARK SERV. (1999), <http://www.nps.gov/parkhistory/hisnps/NPSHistory/briefhistory.htm>.

<sup>36</sup> See TYLER, *supra* note 16 (charting this slow development over the late nineteenth through early twentieth century).

the early successes were largely accomplished without the involvement of the federal government.<sup>37</sup> While small in number, early efforts to acquire historic sites provided motivation for like-minded advocates—who were perhaps more significant for their inspirational and aspirational qualities than for providing useful instruction for their successors.

### B. *The Historic Sites Act of 1935*

One of the primary ways in which the federal government under the New Deal differed from previous eras was in the development of the administrative state, which would expand the federal government's role across a wide number of economic and noneconomic sectors.<sup>38</sup> Planning for the natural and the built environments was no exception.<sup>39</sup> Out of this increasing willingness to involve the federal government in what had traditionally been left almost exclusively to private initiative came the HSA.<sup>40</sup> To understand the development of what eventually

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<sup>37</sup> Notably, some in the preservation movement had reservations regarding any federal intervention in this sphere. *See, e.g.*, James M. Lindgren, *A Spirit that Fires the Imagination*, in *GIVING PRESERVATION A HISTORY*, *supra* note 16, at 75, 75–93 (discussing the Society for the Protection of New England Antiquities' founder William Sumner Appleton's concerns regarding the politicization of historic preservation efforts); HOSMER, *supra* note 4, at 570 (noting that Appleton "was praying daily for the demise of the great majority of federal projects and the strengthening of State projects").

<sup>38</sup> *See* Henry L. Henderson & David B. Woolner, *Introduction*, in *FDR AND THE ENVIRONMENT 1–4* (Henry L. Henderson & David B. Woolner eds., 2005) (discussing the Great Depression policy climate generally); *see also* HOSMER, *supra* note 4, at 471 (noting the interest in the run-up to and during the Great Depression for an increased federal role in historic resource protection). A few programs prior to the HSA had involved historic preservation objectives—the Civilian Conservation Corps (which performed work on historic sites) and the Historic American Buildings Survey (HABS) which put unemployed architects and specialists to work documenting the nation's most important sites. *See* Catherine C. Lavoie, *Architectural Plans and Visions: The Early HABS Program and Its Documentation of Vernacular Architecture*, 13 *PERSP. VERNACULAR ARCHITECTURE* 15, 15–17 (2006).

<sup>39</sup> *See Preservation of Historic American Sites, Buildings, Objects, and Antiquities of National Significance: Hearing on H.R. 6670 and H.R. 6734 Before the H. Comm. on Pub. Lands*, 74th Cong. 5–6 (1935) (comparing the proposed historic resource survey to planning of the National Resources Board involving land and resource use); *see also* Donald C. Swain, *The National Park Service and the New Deal, 1933–1940*, 41 *PAC. HIST. REV.* 312, 312–15 (1972).

<sup>40</sup> *See* Historic Sites Act, ch. 593, pmb., 49 Stat. 666 (1935) (codified at 54 U.S.C. § 320101 (Supp. II 2015)) ("It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national

became the NHL program, an understanding of the HSA is vital.<sup>41</sup> In the midst of early New Deal efforts and the internal politics of the National Park Service, the HSA had several ambitious functions, each of which are discussed in turn.

### 1. *Documentation of Historic Resources*

Dissemination of knowledge and information regarding historic resources was probably the HSA's most important initial function.<sup>42</sup> By 1935, the unprecedented disruption of the U.S. economy had led to high unemployment for architects and historians, who would be put to work documenting and performing research under the authorities of the Act.<sup>43</sup> While the scope of this effort was broad, there were a few primary areas of focus, including the Historic American Buildings Survey (HABS), efforts to mark and educate the public about historic properties, and most importantly for the purposes of this Article, the National Historic Sites Survey.

#### a. *The Historic American Buildings Survey (HABS)*

Although this ambitious effort began on an ad hoc basis as a work relief program even before the passage of the HSA, HABS was expressly authorized through the Act in August of 1935.<sup>44</sup>

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significance for the inspiration and benefit of the people of the United States.”); see *supra* Section I.A.1.

<sup>41</sup> See WILLIAM J. MURTAGH, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 58–61 (1990) (profiling the sweeping impact of this legislation).

<sup>42</sup> See John H. Sprinkle, Jr., “An Orderly, Balanced and Comprehensive Panorama . . . of American History”: Filling Thematic Gaps within the National Park System, 27 GEORGE WRIGHT F. 269, 269–71 (2010) (discussing the motivations and impact of the HSA on survey efforts).

<sup>43</sup> See *The Historic American Buildings Survey (HABS) and the Historic American Engineering Record (HAER)*, LIBRARY OF CONG., <http://www.loc.gov/rr/program/bib/newdeal/habs.html> (last visited Mar. 1, 2016) (describing the formation of the Historic American Buildings Survey (HABS) and the motivations behind this program). The HABS/HAER/Historic American Landscape Survey (HALS) program still exists today and has created over 500,000 drawings and photographs for over 41,000 historic structures. See Elizabeth Terry Rose, *Historic American Buildings Survey Marks 75 Years*, NAT'L PARK SERV., <http://www.nps.gov/hdp/75thsymposium.htm> (last visited Mar. 1, 2016).

<sup>44</sup> See MACKINTOSH, *supra* note 6, at 4, 6 (describing the emergency relief work of HABS prior to the HSA as an “administrative improvisation” as it lacked clear legal authority); see also John A. Burns, *HABS/HAER—Moving Forward with the Past*, CRM, Vol. 16, no. 3, at 1, 1, 7 (1993) (discussing

Originally funded by the Works Progress Administration, HABS had an important role in locating historic sites of national significance.<sup>45</sup> Under HABS, architects and historians were put to work photographing and preparing measured drawings of important historic sites.<sup>46</sup> This work would have an important value as it would begin to document and record individual historic resources and begin to remove some of the imprecision that had marked former efforts to understand heritage assets.<sup>47</sup> It would also provide a base of knowledge regarding historic sites and their architectural forms that has continuing value.<sup>48</sup>

b. *Historic Marker and Educational Efforts*

Beyond documentation of important historic sites, the HSA also attempted to foster greater “professional respectability in the field of historic preservation” and to utilize the sites as a mechanism for communicating and teaching a variety of historical themes.<sup>49</sup> To accomplish this mission, the HSA created a program of historic markers or tablets to commemorate or explain the importance of the sites evaluated under the survey program.<sup>50</sup> The

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documentation under this program); 49 Stat. at 666–68.

<sup>45</sup> See MACKINTOSH, *supra* note 6, at 4, 6; see also Dworsky et al., *supra* note 5, at 191, 231 (Notably, the authorities under the HAS “provided the legal basis for the creation of three major federal programs still in operation that focus on documentation: (1) the Historic American Engineering Record, which documents and maintains records of engineering accomplishments; (2) the Historic American Buildings Survey, which began prior to the 1935 Act but was given added stimulus by the new law; and (3) the National Survey of Historic Sites and Buildings, which began in 1937 . . .”).

<sup>46</sup> See Lisa Pfueller Davidson & Martin J. Perschler, *The Historic American Buildings Survey During the New Deal Era: Documenting “a Complete Resume of the Builders’ Art”*, CRM, Fall 2003, at 49, 52–54.

<sup>47</sup> See SPRINKLE, *supra* note 2, at 19–36 (discussing the development of standards of significance through the twentieth century). The records of the HABS program remain an important source of knowledge regarding historic properties and are particularly helpful in providing information about lost resources, including for reconstruction. See *id.*

<sup>48</sup> In fact, the HABS records are the most widely used collection within the entire Library of Congress. See *Heritage Documentation Programs*, NAT’L PARK SERV., <http://www.nps.gov/hdp/about.htm> (last visited Mar. 1, 2016). This work also continues to inform current preservation efforts. See, e.g., Sally Zimmerman, *A Documentary Legacy*, HISTORIC NEW ENG., Summer 2015, at 26, 26–29 (discussing the role HABS documentation plays in regional preservation efforts).

<sup>49</sup> See SPRINKLE, *supra* note 2, at 140.

<sup>50</sup> The marker or plaque program under the HSA has an interesting history as the National Park Service’s involvement or interest in carrying out such a

marker or plaque program concept has been a lasting legacy of the HSA, as it was later expanded to recognize properties listed on the National Register of Historic Places.<sup>51</sup>

c. *The Historic Sites Survey*

Last and perhaps most importantly, the nation's first formal "listing" of historic properties, the National Survey of Historic Sites and Buildings (commonly referred to as the Historic Sites Survey), was developed under the HSA with the idea of evaluating important properties for possible inclusion within the National Park System.<sup>52</sup> The Historic Sites Survey actually envisioned a layered approach for assessing properties based upon its options for defining the ultimate federal role.<sup>53</sup> Even at this early phase, it was recognized that the federal government could not acquire all historic properties worthy of protection, which led early administrators to "envison[] the largest number being cared for by others, a lesser number becoming subject to federal cooperation with their owners, and the fewest assigned exclusively to Service custody."<sup>54</sup> The administrators further suggested that sites be classified into local, state, and national categories. In setting up this framework, they "hop[ed] these [classifications] would not carry invidious connotations of superiority-inferiority," as historic significance was not intended to be the sole criterion for acquisition.<sup>55</sup>

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program was initially driven by external pressure—namely the desire of a property owner to have a family property recognized for its historic significance. See MACKINTOSH, *supra* note 6, at 22–23 (discussing the politics behind the first historic marker on Blair House in Washington, D.C.). The current National Register of Historic Places marker initiative grew out of these earlier efforts and still plays a strong role in disseminating information to both the owners of historic resources and the general public. See *id.*

<sup>51</sup> See *Frequently Asked Questions: How do I get a Plaque?*, NAT'L PARK SERV., <http://www.nps.gov/nr/faq.htm#plaque> (last visited Mar. 1, 2016). Other marker programs of varying types have been used nationwide, with some dating to even before the Historic Sites Act. See, e.g., Chris Marstall, *History, Preserved in Sturdy Cast Iron*, BOS. GLOBE (Oct. 31, 2011), <http://www.bostonglobe.com/ideas/2011/10/29/history-preserved-sturdy-aluminum/82ay0Le8UjWULp03laaqjM/story.html> (detailing the use of historic markers to commemorate the tercentenary of the Massachusetts Bay Colony in 1930).

<sup>52</sup> See Lea, *supra* note 25, at 8.

<sup>53</sup> See MACKINTOSH, *supra* note 6, at 10.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* A large number of other factors would guide acquisition decisions—including, but not limited to, the owner's willingness to sell or

Because of the survey's focus on informing NPS acquisition decisions, its results were kept strictly confidential to avoid any unintended consequences associated with disclosure.<sup>56</sup> This confidentiality applied not only to properties that would actually be targeted for possible acquisition, but all properties evaluated under the survey, which limited the value of the survey's data.<sup>57</sup> This confidentiality was largely driven by NPS's view that the initiative could be completed in a reasonable amount of time.<sup>58</sup> Once the survey was completed, the appropriate acquisition decisions could be made, and information regarding the remaining properties could be made available and used to inform state and local acquisition decisions.<sup>59</sup> In hindsight, this is somewhat revelatory of how new the field truly was, as survey work is really never complete in light of the passage of additional time and evolving conceptions of historic significance.<sup>60</sup>

Given resource constraints, NPS had to be exceedingly strict in their evaluative efforts to avoid burdening the federal government with more properties than could realistically be acquired, managed, and maintained—which, in turn, had a direct bearing on the nature of the work under the Historic Sites Survey.<sup>61</sup> In the period from 1935 to 1966 (the period between the enactment of the HSA and the National Historic Preservation Act (NHPA)), NPS evaluated 560 properties.<sup>62</sup> Of these properties,

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convey to the federal government, regional considerations, the availability of funds, and the property's relative ability to convey or communicate a historic theme or narrative. *See id.*

<sup>56</sup> *See* NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, HOW TO PREPARE A NATIONAL HISTORIC LANDMARK NOMINATION 13–14 (1999). It was recognized that harm could potentially come from disclosing sites under consideration for purchase—ranging from inflation of the asking price to outright demolition or, on the other hand, undue expectations regarding the government's ability to take on the property. *See* MACKINTOSH, *supra* note 6, at 14–15.

<sup>57</sup> *See* SPRINKLE, *supra* note 2, at 214, 216.

<sup>58</sup> *See id.* at 214, 216–19.

<sup>59</sup> *See* MACKINTOSH, *supra* note 6, at 20. This need for discretion in defining properties of national significance was further fueled by political motivations as soon after the HSA's passage, NPS staff was deluged with congressional requests for evaluation and acquisition of specific sites. *See id.* at 18.

<sup>60</sup> *See Guidelines for Local Surveys*, NAT'L PARK SERV., <http://www.nps.gov/nr/publications/bulletins/nrb24/chapter1.htm> (last visited June 1, 2016) (noting the importance of up-to-date surveys in preservation planning).

<sup>61</sup> *See* MACKINTOSH, *supra* note 6, at 20–21.

<sup>62</sup> *See id.* at 20; SPRINKLE, *supra* note 2, at 216–19 (providing a list of properties designated as National Historic Sites).

only 27, or under five percent of the total number of properties evaluated, would be selected as National Historic Sites.<sup>63</sup> Upon selecting a property as a National Historic Site, the NPS would attempt to acquire the property, or to enter into a cooperative agreement with the property's owners to provide technical and financial support for the property's long-term preservation and interpretation for the benefit of the greater public, and for "foster[ing] public awareness of American history and concern for preserving its tangible evidences."<sup>64</sup> Based upon this exclusivity in both selection and purpose, the National Historic Sites were intended to represent a unique, narrow band of historic properties.<sup>65</sup> This targeted focus has remained: the National Historic Sites still exist as management units within NPS's internal administrative structure, and they have incrementally expanded to include 78 historic resources.<sup>66</sup>

Overall, the functions of the HSA discussed in this Section are largely educational or informational in their function. While this may seem of small consequence, these efforts informed the larger public, expanded the constituency in support of preserving important heritage assets, identified potential future acquisitions, and helped to encourage individual owners or custodians of these properties to safeguard historic resources.<sup>67</sup> These functions

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<sup>63</sup> See SPRINKLE, *supra* note 2, at 216–19.

<sup>64</sup> See *id.* at 216–17.

<sup>65</sup> See, e.g., DAVID GRAYSON ALLEN, *THE OLMSTEAD NATIONAL HISTORIC SITE AND THE GROWTH OF HISTORIC LANDSCAPE PRESERVATION* 27–28 (2007) (evaluating the internal conflicts within NPS regarding converting the Olmstead residence from a NHL to an NHS based upon its level of significance). The existence of non-federally controlled National Historic Sites led to public confusion. After the NHLs, there would be very few non-federally owned National Historic Sites, which led the NPS's eventual development of an "affiliated areas" concept to address properties similar to Touro Synagogue. See DWIGHT E. RETTIE, *OUR NATIONAL PARK SYSTEM: CARING FOR AMERICA'S GREATEST NATURAL AND HISTORIC AREAS* 62–65 (1995) (discussing the affiliated areas concept and its development).

<sup>66</sup> See Denise E. Antolini, *National Park Law in the United States: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 851, 867 (2009) (describing NPS's administrative structure and noting that as of 2009, NPS administered seventy-eight National Historic Sites as part of its portfolio); see also Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment: Legislation and its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779, 808–09 (1997) (exploring NPS's current tiered framework).

<sup>67</sup> See, e.g., *Historical Plaques*, N.Y. CMTY. TR., <http://www.nycommunitytrust.org/AboutTheTrust/OurHistoryAwards/Historicalplaques/>



remain vital components of the preservation movement and were first established at the national level within the context of the HSA.

## 2. *Historic Sites*

Beyond its general educational purposes, the HSA also contemplated a direct relationship between the federal government and historic sites.<sup>68</sup> During the New Deal, there was strong interest in having a greater federal leadership role with regard to preserving nationally significant sites, and NPS would spend the next several decades trying to define the appropriate scope and degree of this involvement. This Section analyzes the ways in which the HSA authorized the NPS to engage with historic properties—ranging from authorizing physical repairs or rehabilitation to operation and outright acquisition.

### a. *Authorization of Work on Historic Sites*

The HSA authorized NPS to “[r]estore, reconstruct, rehabilitate, preserve and maintain historic or prehistoric sites.”<sup>69</sup> This language granted the agency general authority to expend funds in support of preservation efforts on lands and buildings owned by the NPS. Additionally, NPS was empowered to make grants to non-federal owners of nationally significant properties.<sup>70</sup>

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tabid/362/Default.aspx (last visited June 1, 2015) (describing historic plaque program in New York).

<sup>68</sup> See *Preservation of Historic American Sites, Buildings, Objects, and Antiquities of National Significance: Hearing on H.R. 6670 and H.R. 6734 Before the H. Comm. on Pub. Lands*, 74th Cong. 5–6 (1935) (discussing the potential federal role proposed in this legislation).

<sup>69</sup> See 54 U.S.C. § 320102(g) (Supp. II 2015); John Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31, 32–34 (1976). The restore, reconstruct, rehabilitate, and preserve standards laid out in the HSA were later adopted by the Secretary of the Interior as the appropriate preservation treatment approach, although not until 1992. See *A History of the Secretary of the Interior's Standards*, TECH. PRES. SERV., NAT'L PARK SERV., <http://www.nps.gov/tps/standards/history-of-standards.htm> (last visited Mar. 1, 2016) (charting the evolution of the Secretary of the Interior's standards).

<sup>70</sup> See Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 81 (2006) (noting that “[f]ederal grants to states for preserving historic sites . . . have a long provenance”). *But see* Gregory E. Andrews, *Historic Preservation in the Private Sector*, in *THE AMERICAN MOSAIC: PRESERVING A NATION'S HERITAGE* 208, 209 (Robert E. Stipe & Antoinette J. Lee eds., 1987) (explaining limitations on federal funding

As a result, for nearly the first time “[f]inancial aid, technical assistance, and other cooperation were available to those cooperating with the Interior Department.”<sup>71</sup> This authority recognized the need for direct federal brick-and-mortar investment in preserving historic resources. It also had an important spillover effect in developing and informing professional practices and standards nationwide.<sup>72</sup>

b. *Operation of Historic Sites*

The HSA also authorized the operation of nationally significant historic sites owned by the NPS, either directly by NPS<sup>73</sup> or through cooperative agreements with third parties.<sup>74</sup> Operation of sites that the NPS had acquired made sense, as the purpose behind the acquisition of these important heritage assets was largely for museum and interpretative use.<sup>75</sup> This museum

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for preservation efforts during this period).

<sup>71</sup> See Dworsky et al., *supra* note 5, at 191, 232.

<sup>72</sup> Although long authorized, grants to owners of non-federally owned historic properties have ebbed and flowed over time depending on appropriations. For a recent example, a prominent grant program, the Save America’s Treasures program, has not been funded since 2010. While funded (1999–2010), the program provided nearly 1,200 grants and over \$300,000,000 to significant sites nationwide to promote brick and mortar work and conservation treatment of important collections. See *Save America’s Treasures Grants*, NAT’L PARK SERV., <http://www.nps.gov/preservation-grants/sat/> (last visited June 1, 2016); see also *Historic Preservation*, AM. ALL. OF MUSEUMS, (last visited Aug. 8, 2016), <http://www.aam-us.org/docs/default-source/advocacy/brief-historic-preservation.pdf?sfvrsn=20>.

<sup>73</sup> See 54 U.S.C. § 320102 (e)–(f) (Supp. II 2015). It is interesting to note the impact of the federal government’s role in acquiring and operating historic sites and its influence on even existing efforts. For an example, take Derby Wharf in Salem, Massachusetts. Prior to the HSA, the Society for the Preservation of New England Antiquities (SPNEA) had only been able to secure the protection of one historic resource (the Richard Derby House) of the complex that would become the Salem Maritime National Historic Site. Without the platform of the HSA to secure federal and state funds, it is unlikely that SPNEA would have been able to accomplish the creation of the site in anything resembling its current form. See, e.g. Edwin W. Small, *The Derby House*, 47 OLD TIME NEW ENG., 100–07 (1957) (discussing the relationship between SPNEA and NPS on this project).

<sup>74</sup> See 54 U.S.C. §§ 102303, 320101–04 (Supp. II 2015) (this authority was limited, however, by the requirement of a prior authorization of funding to facilitate the desired project). Relatedly, the Act also authorized the formation of a corporation to protect or administer historic properties as another possible option if it was not feasible for NPS to directly acquire or operate a site. See *id.* It is unclear whether this authority was ever utilized.

<sup>75</sup> See JESSICA F. DONNELLY, INTERPRETING HISTORIC HOUSE MUSEUMS 26 (2002) (discussing the Historic Sites Act and the interpretation of these sites).

function remains one of the most visible roles that the NPS plays in the overall field of historic preservation.<sup>76</sup>

Significantly, this authority also allowed the NPS to work with private owners and state and local governments to restore, maintain, and present historic properties to the public without having to take on ownership responsibilities.<sup>77</sup> Authority to enter into cooperative agreements was an express recognition that it might be desirable to designate non-federally owned resources as National Historic Sites as a vehicle for promoting their significance.<sup>78</sup> For example, Touro Synagogue (1763), in Newport, Rhode Island was designated as a National Historic Site in 1946.<sup>79</sup> Significant as an early surviving synagogue, it has remained an active faith community and likely would not be an acquisition target given its religious use.<sup>80</sup> A cooperative agreement, however, allowed the site to be opened to the greater public with NPS aiding in its operation and historic interpretation.<sup>81</sup> In reality, this authority was more frequently used to allow non-profit organizations to occupy federally-owned structures than to provide support for non-federally owned historic sites, but it did allow for the development of important partnerships through either relationship structure.<sup>82</sup> Under the terms of HSA cooperative agreements, federal assistance (technical and potentially financial) would remain potentially available as long as the site was maintained to NPS's standards, but no permanent protection was required in order to participate.<sup>83</sup>

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<sup>76</sup> See *Museum Management Program*, NAT'L PARK SERV., <http://www.nps.gov/museum/> (last visited June 1, 2015).

<sup>77</sup> See 54 U.S.C. §§ 102303, 320101–04 (Supp. II 2015).

<sup>78</sup> See SPRINKLE, *supra* note 2, at 217 (listing NHS designations prior to the NHPA's enactment in 1966).

<sup>79</sup> See *id.* at 134 (profiling the effort to designate this property in the greater context of grappling with how to address historic religious structures).

<sup>80</sup> See TOURO SYNAGOGUE, <http://www.tourosynagogue.org/> (last visited June 1, 2015).

<sup>81</sup> See Nat'l Park Serv., *Touro Synagogue National Historic Site*, in COLONIALS AND PATRIOTS (online ed. 2005), [https://www.nps.gov/parkhistory/online\\_books/colonials-patriots/siteb2.htm](https://www.nps.gov/parkhistory/online_books/colonials-patriots/siteb2.htm) (last visited Aug. 16, 2016) (explaining the site's operational structure).

<sup>82</sup> See HOSMER, *supra* note 4, at 687; see also *Summary of Roundtable Discussion on the Preservation of Historic Architectural Monuments*, J. SOC'Y ARCHITECTURAL HISTORIANS, Apr. 1941, at 21–24 (discussing this program).

<sup>83</sup> See HOSMER, *supra* note 4, at 687.

c. *Acquisition of Historic Sites*

Lastly, the HSA had a strong focus on the acquisition of nationally significant historic properties.<sup>84</sup> The HSA authorized the federal government to “acquire in the name of the United States by gift, purchase, or otherwise any property, personal or real, or any interest or estate therein . . . .”<sup>85</sup> This authority extended to the acquisition of historic sites through eminent domain, provided funds were appropriated and authorized.<sup>86</sup> This authority, however, has not often been utilized for a variety of reasons, both practical and political.<sup>87</sup>

Although broad, the NPS’s acquisition authorities were certainly not unlimited.<sup>88</sup> For example, no property owned by a religious institution, owned by an educational institution, or administered for the benefit of the public could be acquired without the owner’s consent.<sup>89</sup> Additionally, the Act did not automatically authorize funding for acquisitions of these sites, which would require future appropriations.<sup>90</sup> Not surprisingly then,

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<sup>84</sup> See 54 U.S.C. § 320102(e) (Supp. II 2015); see also Newton B. Drury, *The National Park Service and the Preservation of Historic Sites and Buildings*, 1 J. SOC’Y ARCHITECTURAL HISTORIANS, no. 3–4, July–Oct. 1941, at 18, 18–19 (describing early NPS acquisitions of historic sites).

<sup>85</sup> 54 U.S.C. § 320102(e) (Supp. II 2015).

<sup>86</sup> See Marilyn Phelan, *A Synopsis of Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 69 (1993) (describing this authority). The most dramatic use of eminent domain involved the Jefferson National Expansion Memorial in St. Louis—the first area to come into the national parks system under the HSA. In the late 1930s, the federal government sought to acquire lands to create a monument dedicated to western expansion. The lands being acquired and cleared contained important historic resources that were demolished—which was controversial even at the time. See HOSMER, *supra* note 4, at 626 (“But one must face the facts: the JNEM involved the demolition of a large downtown area of commercial buildings that possessed architectural and engineering significance.”).

<sup>87</sup> See, e.g., *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939) (potentially the sole example of the federal government’s use of eminent domain to acquire a historic site under the HSA); Larz F. Neilson, *Town Almost Lost Tavern in ‘73*, WILMINGTON TOWN-CRIER, (May 25, 2013), [http://homenewshere.com/wilmington\\_town\\_crier/news/article\\_5b6c645c-c3c5-11e2-8243-0019bb2963f4.html](http://homenewshere.com/wilmington_town_crier/news/article_5b6c645c-c3c5-11e2-8243-0019bb2963f4.html) (exploring town’s use of eminent domain to protect a historic tavern—which now operates as the town’s museum).

<sup>88</sup> See *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 846 (E.D. Va. 1980) (noting that this acquisition authority is limited to properties of national significance).

<sup>89</sup> 54 U.S.C. § 320102(e) (Supp. II 2015).

<sup>90</sup> See HOSMER, *supra* note 4, at 680 (discussing the very real limitations on the ability of the federal government to acquire historic sites—including the

NPS's use of the acquisition authority was far more difficult to exercise and channel than some advocates within the agency and the preservation community would have preferred.<sup>91</sup> One difficulty arose from political pressures, which could sway this process to fund the acquisition of historic sites the agency did not necessarily want to acquire or that it did not regard as having national significance.<sup>92</sup> It would be difficult to isolate acquisition decisions entirely from the political calculus, which could dilute the agency's efforts.<sup>93</sup> Beyond political considerations, obtaining funds to acquire historic sites was often difficult.<sup>94</sup> "Despite the free-spending image of the New Deal, President Roosevelt's Bureau of the Budget remained watchful for unnecessary federal expenditures."<sup>95</sup> In fact, in 1939, Roosevelt, in a letter to his Secretary of the Interior, noted that "[i]n view of the financial situation, it is my desire that the number of historic sites to be established be kept to an absolute minimum . . . ." <sup>96</sup> This cautionary guidance would become formal policy with the beginning of the Second World War, as the program was put on hold for the duration of the conflict.<sup>97</sup>

Despite meaningful limitations, the HSA was instrumental in providing a mechanism to expand NPS's holdings to become more geographically distributed (to include the eastern United States) and to begin to interpret different stories of the nation's shared past.<sup>98</sup> This early work under the HSA authorities ultimately provided the foundation of the NHL program—both its pioneering

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historic Blair and Decatur houses in Washington).

<sup>91</sup> See *id.* at 649–58 (noting that the NPS staff assigned to the Salem Maritime Park had frustrations with the slow pace of the project).

<sup>92</sup> See MACKINTOSH, *supra* note 6, at 16–17 (explaining NPS's effort not to focus on sites brought to its attention by outside groups, which was shaped by the agency's experience with the Dr. John McLoughlin House in Oregon City, Oregon). National significance was considered the key criterion for funding under the HSA, and political pressure could be asserted to cross this threshold requirement. See *id.*

<sup>93</sup> See *id.* at 17.

<sup>94</sup> See HOSMER, *supra* note 4, at 680–85.

<sup>95</sup> MACKINTOSH, *supra* note 6, at 20.

<sup>96</sup> See *id.* at 21.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*; see also Ellen K. Foppes & Robert M. Utley, *Present at the Creation: Robert M. Utley Recalls the Beginnings of the National Historic Preservation Program*, PUB. HISTORIAN, Spring 2002, at 61, 67–73 (describing the formation of several national historic sites under this authority).

historical research and its expansion of the NPS system.<sup>99</sup>

### C. *Evolution After World War II*

World War II had a profound impact on domestic historic preservation efforts, which would remain at a standstill for the duration of the conflict.<sup>100</sup> Post-war, renewed attention was given to efforts to preserve the nation's past, which led to the formal creation of the NHL program and the introduction of a regulatory framework that would ultimately require federal agencies to consider the impacts of their projects on historic sites.<sup>101</sup> This Section discusses the transition from the Historic Sites Survey to the NHL program, and explores the impact of the NHPA in transforming the landscape of federal historic preservation law and policy.

#### 1. *The Rise of the NHL Program*

In the 1950s, NPS administrators began to consider how the results of the Historic Sites Survey could be used to have a wider impact on efforts to preserve important historic structures.<sup>102</sup> As noted, the list of properties evaluated under the survey was initially kept strictly confidential.<sup>103</sup> The purpose of this confidentiality makes sense in light of the fact that the role of the program was intended as a sort of feeder system for the NPS, targeting appropriate properties that would expand NPS's ability to communicate distinct strands of the nation's larger historical

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<sup>99</sup> See Barry Mackintosh, *The National Park Service Moves into Historical Interpretation*, PUB. HISTORIAN, Spring 1987, at 51, 51–53; see also SPRINKLE, *supra* note 2, at 20.

<sup>100</sup> See HOSMER, *supra* note 4, at 717 (stating that “[t]he years of expanding federal preservation activity that followed the passage of the Historic Sites Act ended abruptly with the Japanese attack on Pearl Harbor”).

<sup>101</sup> See Lea, *supra* note 25, at 8–9; TYLER, *supra* note 16, at 44–50 (describing the creation of post-WWII preservation programs as a response to the increasing pace of development during this period).

<sup>102</sup> See ETHAN CARR, MISSION 66: MODERNISM AND THE NATIONAL PARK DILEMMA 196 (2007) (profiling this expansion).

<sup>103</sup> See Sprinkle, *supra* note 42, at 270 (“From the mid-1930s through the advent of the Mission 66 program the designation of historic sites as nationally significant was both a sensitive and secret undertaking.”); see Alvin P. Stauffer & Charles W. Porter, *The National Park Service Program of Conservation for Areas and Structures of National Historical Significance*, 30 MISS. VALLEY HIST. REV., no. 1, June 1943, at 25, 28.

narratives.<sup>104</sup> Releasing information before the properties could be acquired by the NPS could have had detrimental impacts, as owners would fear looming federal involvement in their properties, which might cause them to inflate their financial demands or take decisive actions to make their properties less suitable for acquisition.<sup>105</sup> With the larger agency-wide Mission 66 on the horizon to mark the fiftieth anniversary of the creation of the NPS, the Historic Sites Survey received additional funding, and its director Ronald Lee determined that the agency “must devise some method to make the fruits useful whether or not areas were added to the National Park System.”<sup>106</sup>

The arrived-upon solution was to create “a new category of historic sites and buildings under the Historic Sites Act to be known as Registered National Historic Landmarks,” which would recognize important properties not targeted for federal acquisition.<sup>107</sup> Owners of properties of “exceptional value” would receive a certificate upon meeting certain programmatic conditions.<sup>108</sup> Overall, this program:

was designed with both carrot and stick incentives for the preservation of nationally significant properties. The carrot was the prestigious national designation by the Secretary of the Interior, manifested by the bronze plaque and certificate. The stick was the prospect of losing the designation, plaque, and certificate should the property be destroyed or unacceptably compromised.<sup>109</sup>

In October 1960, the first 92 properties were announced, and the NHL program was underway in a rudimentary but recognizable form.<sup>110</sup> This effort began the slow expansion of historic properties

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<sup>104</sup> See SPRINKLE, *supra* note 2, at 26–27; see also HOSMER, *supra* note 4, at 626. Conversely, there was also a risk from going too far in the other direction—that of disappointing property owners when a property was not actually chosen. See *id.*

<sup>105</sup> See NAT’L PARK SERV., *supra* note 2, at 190.

<sup>106</sup> See MACKINTOSH, *supra* note 6, at 37.

<sup>107</sup> See *id.* at 38–39.

<sup>108</sup> See *id.* at 38.

<sup>109</sup> *Id.* at 105.

<sup>110</sup> See *id.* at 40–41 (noting that NPS deliberately announced such a large number of the nominations at once to allay individual owner concerns about federal acquisition). Notably, in the program’s early version, properties were not designated as NHLs, only as eligible. To become an actual landmark, the property’s owner would have to sign an agreement to maintain the property as well as permit periodic inspections from NPS staff. See *id.*

that the agency would ultimately recognize as having significance.<sup>111</sup>

## 2. *The National Historic Preservation Act of 1966*

As preservation law has evolved, so has the relationship between the federal government and nationally significant historic sites.<sup>112</sup> When the NHPA was enacted in 1966, it had large consequences for the entire field.<sup>113</sup> With significant amendments, the NHPA essentially established the current operating structure of federal preservation law in the United States by broadening the federal role in evaluating properties of local and state significance, authorizing grants to state and local governments, imposing procedural requirements upon federal agencies before impacting qualifying historic properties, and creating a federal agency (the Advisory Council for Historic Preservation) to assist agencies with compliance.<sup>114</sup> While the NHPA's impacts are considerable, this Section will primarily focus on the development of the National Register of Historic Places and the 1980 amendments to the NHPA, as they most clearly impact and define the role of NHLs within the current framework of federal preservation law.

### a. *The National Register of Historic Places*

One of the major components of the NHPA was the creation

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<sup>111</sup> See SPRINKLE, *supra* note 2, at 16–17.

<sup>112</sup> See James A. Glass, *Impacts of the National Historic Preservation Act: A 25th Anniversary Assessment*, CRM, Vol. 14, No. 4 Supp., at 6, 9–10 (1991) (noting the impacts of the NHPA on “what is preserved, how it is preserved, why it is preserved, and who preserves it”); see also KING, *supra* note 7, at 246.

<sup>113</sup> See Margaret F. England, *Regionalism and Historic Preservation*, 8 WIDENER L. SYMP. J. 347, 347–48 (2002) (describing the HSA and the NHPA as “the primary pieces of federal legislation governing historic preservation”). By the mid-1960s, the pace of post-war development fueled concern regarding the future of America's built legacy. Noting significant losses, a special committee of the United States Conference of Mayors prepared an influential book, *With Heritage So Rich*, which directly shaped the development of the NHPA. See generally SPECIAL COMM. ON HISTORIC PRES., U.S. CONFERENCE OF MAYORS, WITH HERITAGE SO RICH (1966).

<sup>114</sup> See KING, *supra* note 7, at 246; see also Jerry L. Rogers, *The National Register of Historic Places: A Personal Perspective on the First Twenty Years*, 9 PUB. HISTORIAN, Spring 1987, at 90, 93 (noting the problems this posed for the preexisting NHL program: the boundaries of these properties had largely not been precisely defined, as there was no real reason to do so prior to the imposition of Section 106 reviews).



of the National Register of Historic Places.<sup>115</sup> As designed, the National Register was intended to be a comprehensive national survey of historic properties and districts, whether significant locally, at the state level, or nationally.<sup>116</sup> The National Register expanded designation of historic sites beyond just nationally significant historic sites.<sup>117</sup> Designation on the National Register does not directly provide protection against demolition, but rather serves as a planning tool to provide decision-makers with information regarding historic properties and to qualify properties for certain financial incentives.<sup>118</sup> The National Register initially only included the existing NHLs and historic units of the National Park System, but rapidly expanded to its current number of over 1,400,000 resources, with properties listed both individually and as contributing properties to National Register districts.<sup>119</sup>

Although the NHLs are included on the National Register, the programs were not combined for a number of reasons, both practical and political.<sup>120</sup> Barry Mackintosh, a notes that some of this reflected the interests of the program's respective chairs:

The divergent personalities and professional emphases of Murtagh [NR] and Sheely [NHL] . . . counted against amalgamation: Sheely was a traditional historian upholding associative values in historic preservation; Murtagh emphasized aesthetic and environmental values to compensate for what he perceived as undue stress on the 'Washington slept here' syndrome.<sup>121</sup>

This identity issue still presents substantial messaging and focus challenges.<sup>122</sup> Despite retaining its status as a standalone

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<sup>115</sup> See Rogers, *supra* note 114, at 92 (describing the development of this primary designation process).

<sup>116</sup> See Byrne, *supra* note 2, at 213 (describing the impact of the NHPA).

<sup>117</sup> See BRONIN & BYRNE, *supra* note 11, at 57–58; see also Laura Weber, *Wins and Losses: The National Register of Historic Places in Minnesota*, MINN. HIST., Fall 1997, at 302, 302–07.

<sup>118</sup> See John Fowler, *The Federal Preservation Program*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 26, at 35, 44.

<sup>119</sup> See *National Register of Historic Places*, NAT'L PARK SERV., <http://www.nps.gov/nr/research/> (last visited Oct. 16, 2016).

<sup>120</sup> See MACKINTOSH, *supra* note 6, at 61.

<sup>121</sup> *Id.*

<sup>122</sup> See Rose, *supra* note 3, at 474–76 (noting the different motivations and the messaging challenges preservationists continue to face); Dworsky et al., *supra* note 5, at 233 (explaining that “[t]he search for a balance between federal

designation, the NHPA did not give preferential treatment to NHL properties in either the availability of grants or protection, which left the program in an odd position: part of the National Register, but with little if anything distinguishing its properties from other designated resources.<sup>123</sup> This was intentional—to shift away from the prior focus on national significance as the field expanded—but it clearly left the NHL program with at least a temporary identity crisis.<sup>124</sup>

b. *The 1980 Amendments*

The NHL program remained in administrative limbo until 1980, when it attained independent legal recognition through amendments to the NHPA.<sup>125</sup> The portion of the 1980 amendments impacting NHL properties was drafted within the context of the NPS's decision to accept a sizable number of preservation easements protecting NHL properties.<sup>126</sup> In response to litigation invalidating this action, Congress required NPS to establish detailed criteria for designating NHLs and for giving notice to interested parties regarding pending nominations.<sup>127</sup> In 1983, NPS

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concern with nationally significant properties and those of lesser significance continues today”).

<sup>123</sup> See KING, *supra* note 7, at 246.

<sup>124</sup> See MACKINTOSH, *supra* note 6, at 61–62.

<sup>125</sup> See National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 201, 94 Stat. 2987, 2988 (codified as amended at 54 U.S.C. § 320101 (Supp. II 2015)); see also MACKINTOSH, *supra* note 6, at 93–94 (explaining the administrative challenges the program faced from 1966 to 1980, including briefly leaving NPS to form a standalone agency within the Department of the Interior).

<sup>126</sup> See NAT'L PARK SERV., *supra* note 56, at 14. One of the biggest impacts of the 1980 amendments involved the controversial issue of owner consent. Prior to 1980, an owner of a potentially listed property could not block a designation. The amendments, however, now require owner consent in order to list a qualifying resource. See Jess Theodore, *Over My Dead Property! Why the Owner Consent Provisions of the National Historic Preservation Act Strike the Wrong Balance Between Private Property and Preservation* (Georgetown Law Historic Pres. Papers Series, Paper No. 30, 2008), [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1027&context=hpps\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1027&context=hpps_papers) (describing this shift and its impacts on designation). The amendments also added section 110, which imposed stewardship obligations upon federal agencies relating to historic properties within their real estate portfolios.

<sup>127</sup> See Pub. L. No. 96-515, § 201, 94 Stat. at 2988–89 (codified as amended at 54 U.S.C. 320301–03 (Supp. II 2015)). The amendments also retroactively recognized prior recognized national historic landmarks as having national significance as of the date of their publication in the National Register. See *id.*; see generally *Historic Green Springs v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

issued regulations implementing these requirements.<sup>128</sup> Under NPS's regulations, NPS established evaluative criteria that are largely similar to the National Register criteria, but vary to give it independent application.<sup>129</sup> For one example, the NHL program criteria refer to properties that relate to "some great idea or ideal of the American people"—which is a broader concept than is found within the standard National Register criteria.<sup>130</sup> To qualify for designation as a NHL, a property must have national significance, which the regulation defined as "resources that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association."<sup>131</sup> Overall, the 1980 amendments and NPS's implementing regulations provide the current structure of the contemporary NHL program, explored in more detail below.

## II. THE NHL PROGRAM TODAY

The NHL program continues to have an important role in federal efforts to recognize nationally important historic sites, but as is demonstrated by its evolving focus and mission, it has diverged considerably from its original focus on acquisition of historic sites for museum use.<sup>132</sup> To describe the current NHL program, this Part focuses on the current state of the NHL program, how a property is designated, the impacts of NHL designation, and current threats to nationally important properties.

### A. *Understanding the NHLs*

The NHL program, as currently constituted, essentially is the "honor roll" of the National Register.<sup>133</sup> Overall, there are approximately 2,500 NHLs nationally with at least one NHL found

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<sup>128</sup> See 36 C.F.R. § 65.4 (2015)

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See generally 36 C.F.R. §§ 65.1–65.10 (2015); *National Historic Landmarks Program*, NAT'L PARK SERV., <http://www.nps.gov/nhl/learn/intro.htm> (last visited Mar. 1, 2016); NAT'L PARK SERV., NATIONAL HISTORIC LANDMARKS DESIGNATED AFTER 1999 (2006) <http://www.nps.gov/nhl/learn/pubs/NHLBookUpdate2006.pdf> (profiling relatively recent NHL designations).

<sup>133</sup> See SPRINKLE, *supra* note 2, at 18.

in every state.<sup>134</sup> While this may seem a large number of properties, NHLs comprise under three percent of the individually listed resources found on the National Register.<sup>135</sup> This percentage drops rather dramatically when contributing properties to National Register Historic Districts are also considered, as district nominations make up the majority of the National Register, and a single nomination can consist of dozens of contributing historic resources.<sup>136</sup> In a given year, about 20 properties are typically designated as NHLs—demonstrating the difficulty of obtaining this designation.<sup>137</sup> The properties designated as NHLs fall into five general resource categories: historic buildings, districts, sites, structures, and objects.<sup>138</sup> To qualify as an NHL, proposed properties must meet stringent criteria of national significance.<sup>139</sup> The current criteria under which a property can potentially qualify are: (1) association with past historical events; (2) association with important people; (3) association with ideals that have shaped the nation; (4) outstanding architectural design or construction; (5) properties that characterize a way of life; and (6) places that may yield information about the nation's past, such as archaeological sites.<sup>140</sup> These themes, while similar to the National Register criteria, diverge to address the thematic nature of the NHL program's historical development.<sup>141</sup>

Even if a property meets the NHL criteria, a variety of exceptions can apply to exclude a property from designation.<sup>142</sup>

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<sup>134</sup> See *National Historic Landmarks Program*, *supra* note 132.

<sup>135</sup> See *id.* This list is always expanding, however, as the recent designation of nine additional properties demonstrates. See Dept. of Interior, Press Release, *Secretary Jewell, Director Jarvis Announce Nine New National Historic Landmarks Highlighting America's Diverse History and Culture* (Sept. 30, 2014), <http://www.doi.gov/news/pressreleases/secretary-jewell-director-jarvis-announce-nine-new-national-historic-landmarks-highlighting-americas-diverse-history-and-culture.cfm>.

<sup>136</sup> See *National Historic Landmarks Program*, *supra* note 132.

<sup>137</sup> See NAT'L PARK SERV., *SURVEYING AMERICAN HISTORY—THE ROLE OF THE NATIONAL PARK SERVICE* (2003), <https://www.nps.gov/nhl/learn/pubs/SurveyingAmericanHistory.pdf>.

<sup>138</sup> See NAT'L PARK SERV., *supra* note 56, at 9.

<sup>139</sup> See 36 C.F.R. § 65.4 (2015). These criteria are more stringent than the National Register criteria for eligibility. See 36 C.F.R. § 60.4 (2015).

<sup>140</sup> See 36 C.F.R. § 65.

<sup>141</sup> See *National Register Bulletin—How to Apply the National Register Evaluation Criteria*, NAT'L PARK SERV., [http://www.nps.gov/nr/publications/bulletins/nrb15/nrb15\\_9.htm](http://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_9.htm) (last visited Mar. 1, 2016).

<sup>142</sup> See BRONIN & BYRNE, *supra* note 11, at 142.

For example, structures that have achieved significance within the past fifty years are generally not eligible for designation unless they are of “exceptional importance.”<sup>143</sup> Other exclusions apply to bar certain resources including relocated structures, reconstructed buildings, and religious properties, unless the resource’s significance stems from its architecture or historical importance (a secular basis).<sup>144</sup> There are exceptions to almost all of the exclusions, however—allowing some properties that would otherwise be excluded to qualify and rejecting a bright-line approach to determining historic significance.<sup>145</sup>

The NHLs range from Elvis’s Graceland in Nashville, Tennessee to Thoreau’s Walden Pond in Concord, Massachusetts, but share the common characteristics of having national significance and maintaining a sufficient degree of historic integrity to allow the site to convey its significance.<sup>146</sup> Ownership of these properties is decidedly mixed.<sup>147</sup> About half remain in private ownership, while the remaining properties are owned by federal, state, or local governments, or non-profit organizations.<sup>148</sup>

### B. *How a Property Becomes an NHL*

NHLs are ultimately designated by the Secretary of the Interior.<sup>149</sup> Applications are typically advanced by the property’s owner or an advocate for the property (with the owner’s consent).<sup>150</sup> Often, however, potential NHLs are identified through

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<sup>143</sup> See John H. Sprinkle, Jr., “*Of Exceptional Importance*”: *The Origins of the “Fifty-Year Rule” in Historic Preservation*, 29 PUB. HISTORIAN, Spring 2007, at 81.

<sup>144</sup> See generally John H. Sprinkle, Jr., *Viewpoint: “History Is as History Was, and Cannot be Changed”*: *Origins of the National Register Criteria Consideration for Religious Properties*, 16 BUILDINGS & LANDSCAPES, Fall 2009, at 1 (charting the development, within the National Register criteria, of the current approach to evaluating the significance of historic religious properties).

<sup>145</sup> See 36 C.F.R. § 65.2 (2015).

<sup>146</sup> See *Graceland*, NAT’L HISTORIC LANDMARKS PROGRAM, NAT’L PARK SERV., <http://tps.cr.nps.gov/nhl/detail.cfm?ResourceId=1146152923&ResourceType=Building> (last visited June 1, 2015); *Walden Pond*, NAT’L HISTORIC LANDMARKS PROGRAM, NAT’L PARK SERV., <http://tps.cr.nps.gov/nhl/detail.cfm?ResourceId=599&ResourceType> (last visited June 1, 2015).

<sup>147</sup> See BRONIN & BYRNE, *supra* note 11, at 62–63.

<sup>148</sup> See *id.*

<sup>149</sup> See 36 C.F.R. § 65.5 (2015); see also NAT’L PARK SERV., *supra* note 56, at 9.

<sup>150</sup> See Theodore, *supra* note 126, at 3–4.

thematic studies commissioned by the NPS.<sup>151</sup> Thematic studies provide “a comparative analysis of properties associated with a specific area of American history, such as Labor or Women’s History.”<sup>152</sup> Thematic studies seek to ensure that larger historic narratives of the nation’s past are told through the properties listed as NHLs.<sup>153</sup> Current thematic studies range from sites related the Civil Rights Movement to a study of large federal dam projects.<sup>154</sup> The thematic studies fill gaps within the nation’s history, but are not comprehensively commissioned—meaning the studies go deep into specific resource types, but may not cover all properties meriting scholarly attention and ultimately designated.<sup>155</sup> This scoping problem can lead to criticism of the NHL program (and other preservation programs) as being somewhat uneven in terms of the resources ultimately designated.<sup>156</sup>

If an owner decides to pursue designation, a nomination must be prepared.<sup>157</sup> The nomination process can be time consuming and can require professional expertise and guidance to prepare the background research and formal nomination.<sup>158</sup> Once the

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151 See *Full List of NHL Theme Studies*, NAT’L PARK SERV., <http://www.nps.gov/nhl/learn/themestudiesintro.htm> (last visited Mar. 1, 2016).

152 See *id.*

153 See SPRINKLE, *supra* note 2, at 26–27.

154 See *Full List of NHL Theme Studies*, *supra* note 151. For a representative example of a thematic study, see the recent study focused on Japanese Americans’ experience during World War II. See *generally* NAT’L HISTORIC LANDMARKS PROGRAM, NAT’L PARK SERV., JAPANESE AMERICANS IN WORLD WAR II (2012), <http://www.nps.gov/nhl/learn/themes/JapaneseAmericansWWII.pdf>.

155 See *Full List of NHL Theme Studies*, *supra* note 151.

156 See *generally* PRESERVE AMERICA, DETERMINING WHAT’S IMPORTANT (2006), <http://www.preserveamerica.gov/docs/Determining%20Whats%20Important%20Panel%20Report%20-%20Final.pdf> (reporting on the uneven treatment of cultural experiences within the preservation movement).

157 See *National Historic Landmarks Program*, *supra* note Historic Green Springs v. Bergland, 132. A property can be determined eligible for NHL designation if the owner does not consent to its formal listing. To date, only five properties have been determined eligible for NHL status, but have not been listed, owing to owner objections. See *Properties Determined to be Eligible for National Historic Landmark Designation*, NAT’L PARK SERV., <http://www.nps.gov/nhl/find/eligible.htm> (last visited June 1, 2015).

158 See, e.g., STATE HISTORICAL SOC’Y OF IOWA, CONSULTANTS LIST FOR PREPARATION OF NATIONAL REGISTER NOMINATIONS (2012), [http://www.iowahistory.org/historic-preservation/assets/IowaNationalRegisterConsultants\\_2012.pdf](http://www.iowahistory.org/historic-preservation/assets/IowaNationalRegisterConsultants_2012.pdf) (last visited Mar. 1, 2016) (providing a list of consultants available to help with nominations).

nomination is prepared, the owners, elected officials, State Historic Preservation Officers, and the members of Congress for the district in which the property is located have the opportunity to respond to the proposed designation.<sup>159</sup> Upon completion of an NHL nomination, properties proposed for NHL status are evaluated by NPS staff and the National Park System Advisory Board, who make a formal recommendation to the Secretary for designation.<sup>160</sup> If the property is favorably reported, it will be designated a NHL. If not, it will be referred to the appropriate official for potential resubmission for listing on the National Register.<sup>161</sup>

### C. *The Impact of NHL Designation*

NHL designation remains, as it has always been, largely honorific.<sup>162</sup> There are, however, a few direct and indirect impacts that can come from listing—potential regulatory impacts, a closer working relationship with NPS, possible financial incentives, and deterrence against demolition or insensitive alteration—which are discussed in turn below.<sup>163</sup>

#### 1. *Regulatory Impacts*

Federal preservation law places heightened responsibilities on federal agencies to avoid impacts to NHL properties under sections 106 and 110(f) of the NHPA as well as under parallel state and local laws.<sup>164</sup> Under these laws, agencies must evaluate the impact of their projects on historic resources and potentially avoid adverse impacts.<sup>165</sup>

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<sup>159</sup> See 36 C.F.R. § 65.5 (2015).

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC PRESERVATION 2 (2008).

<sup>163</sup> See *id.*

<sup>164</sup> See 54 U.S.C. § 320301 (Supp. II 2015). Other federal laws require consideration of historic resources and NHLs, including the National Environmental Policy Act (NEPA) and section 4(f) of the Department of Transportation Act; in short, NEPA and section 4(f) do not have higher thresholds for NHL properties. See MILLER, *supra* note 162, at 2–5. This Section, however, focuses on those sections of federal procedural law that relate to NHLs more specifically.

<sup>165</sup> See BRONIN & BYRNE, *supra* note 11, at 125–27; see also *Neighborhood Assoc. of the Back Bay v. Fed. Transit Admin.*, 463 F.3d 50, 63 (1st Cir. 2006) (discussing the more stringent procedural requirements involved in project

a. *Section 106 of the NHPA*

Section 106 of the NHPA requires federal agencies to assess and consider the impacts of major federal projects on historic resources as part of the decision-making process.<sup>166</sup> An independent federal agency, the Advisory Council for Historic Preservation (ACHP), issues regulations, advises agencies regarding compliance with this consultative process, and can become directly involved at the request of the agency head.<sup>167</sup> Given the heightened importance of NHLs, the NPS must also be invited to participate in any consultation regarding a property so designated.<sup>168</sup> Section 106 dictates a process, not an outcome, and a successful consultation can still result in adverse effects to a historic resource.<sup>169</sup> The direct involvement of the NPS, however, increases the odds of a successful preservation outcome by placing additional pressure on the federal agency and typifies the intended relationship between these properties and the NPS.<sup>170</sup>

b. *Section 110 of the NHPA*

Section 110 of the NHPA addresses direct federal ownership of historic properties.<sup>171</sup> Under section 110(f), federal agencies must, to the maximum extent possible, undertake the planning and actions necessary to minimize harm to any NHL.<sup>172</sup> This section

planning when impacts to NHLs are contemplated). Beyond the regulatory provisions of sections 106 and 110, NHLs potentially are also protected from certain mining activity. *See* 36 C.F.R. § 65.2(c) (2015).

<sup>166</sup> *See* 36 C.F.R. § 800.10 (2015); *see also* Denise Ryan, *Federal Designation as a Preservation Tool: Benefits and Challenges*, F.J., Winter 2015, at 49, 50.

<sup>167</sup> *See About the ACHP: General Information*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/aboutachp.html> (last visited Mar. 1, 2016).

<sup>168</sup> *See* 36 C.F.R. § 800.10(c) (2015).

<sup>169</sup> *See* David A. Lewis, *Identifying and Avoiding Conflicts between Historic Preservation and the Development of Renewable Energy*, 22 N.Y.U. ENVTL. L.J. 274, 300–03 (2015) (discussing this process).

<sup>170</sup> *Section 106 Consultation Involving National Historic Landmarks*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/regs-nhl.html> (last visited Mar. 1, 2016).

<sup>171</sup> 54 U.S.C. § 306101 (Supp. II. 2015). Many of NPS's authorities have been recently moved to a newly created title of the U.S. Code (54 U.S.C.) to convert isolated statutes to positive law. *See Introduction: Federal Preservation Laws*, NAT'L PARK SERV., <http://www.nps.gov/history/laws.htm> (last visited Oct. 24, 2016); *H.R. 1068 (113th Congress): Title 54, United States Code, National Park System*, OFFICE OF LAW REVISION COUNSEL, <http://uscode.house.gov/codification/t54/index.html> (last visited Oct. 24, 2016).

<sup>172</sup> *See id.*



ostensibly imposes a higher standard of care upon federal agencies to plan for the preservation of historic properties under their control. It also affords both the ACHP and NPS the opportunity to comment on proposed impacts.<sup>173</sup> Courts, however, have interpreted section 110 as not imposing substantive protections beyond what is found under section 106 of the NHPA, which limits its effect.<sup>174</sup>

c. *Possible Application of State and Local Laws*

Some state and local laws build upon federal designation as the basis for their protective schemes.<sup>175</sup> Land use regulations are generally far stronger at the local level and are able to directly control certain uses outside of federal control.<sup>176</sup> This varies by jurisdiction, but many local landmark laws and demolition delay bylaws are tiered back into this designation—which would potentially provide regulatory protection for some NHL properties if authorized.<sup>177</sup>

2. *Closer Working Relationship with the NPS*

The owners of NHLs are intended to have a closer working relationship with the NPS than the agency typically has with the owners of National Register properties, with NPS potentially even

<sup>173</sup> See *Section 106 Consultation Involving National Historic Landmarks*, *supra* note 170.

<sup>174</sup> See, e.g., *Nat'l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996) (holding that federal agency was not required to expend additional funds to preserve historic resources, only to plan for their long-term preservation).

<sup>175</sup> See BRONIN & BYRNE, *supra* note 11, at 69 (noting the impact of “cross-referencing”). This can happen for example, under a demolition delay bylaw, where the NHL status is the mechanism for determining which proposed demolitions trigger review under the community’s ordinance. See JULIA H. MILLER, *NAT’L TR. FOR HISTORIC PRES., PROTECTING POTENTIAL LANDMARKS THROUGH DEMOLITION REVIEW 2–3* (2006).

<sup>176</sup> See Tersh Boasberg, *A New Paradigm for Preservation, in PAST MEETS FUTURE: SAVING AMERICA’S HISTORIC ENVIRONMENTS* 145, 146 (Antoinette J. Lee ed., 1992) (describing the role of local governments in regulating the built environment).

<sup>177</sup> See *id.* at 145; see also CHRISTOPHER C. SKELLY, *MASS. HISTORICAL COMM’N, PRESERVATION THROUGH BYLAWS AND ORDINANCES: TOOLS AND TECHNIQUES FOR PRESERVATION USED BY COMMUNITIES IN MASSACHUSETTS* 49 (2003), <https://ia801301.us.archive.org/12/items/preservationthro00skel/preservationthro00skel.pdf> (discussing the three possible options for structuring demolition delay bylaws—including categorical cross-referencing or tiering off of other designations).

providing technical assistance.<sup>178</sup> One of the primary ways NPS interacts with NHL properties is through site monitoring, and NPS makes biennial reports to Congress on the state of the NHL program.<sup>179</sup> To this end, the NPS keeps a database and actively tracks threats to NHL properties.<sup>180</sup> The threats to NHLs are categorized as emergency (recent catastrophic damage has occurred needing immediate intervention), threatened (priority one—a property that has suffered damage, or may suffer an imminent loss of integrity), watch (priority two—a property that faces impending actions or circumstances that make it likely to lose integrity), and satisfactory (priority three—properties facing no current threat).<sup>181</sup> This monitoring function requires the NPS to keep a fairly close watch on the NHLs and draws attention to resources that are vulnerable.

### 3. *Financial Incentives*

From a financial perspective, there can be some advantages to owning a NHL. For example, under the Save America's Treasures grant program, NHL status was essentially a requirement of to receive funding (although National Register properties of national significance could also qualify).<sup>182</sup> Other federal grant assistance is available to NHL properties through the Historic Preservation Fund when appropriated.<sup>183</sup> Beyond federal funding, NHL status is often considered to be a positive factor for many state, local, and foundation funders, as it allows a resource to stand out from other historic sites requesting financial assistance.<sup>184</sup> Other federal

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<sup>178</sup> See 36 C.F.R. § 65.7 (2015) (“NPS maintains a continuing relationship with the owners of National Historic Landmarks. Periodic visits, contacts with State Historic Preservation Officers, and other appropriate means will be used to determine whether landmarks retain their integrity, to advise owners concerning accepted preservation standards and techniques and to update administrative records on the properties.”).

<sup>179</sup> *Id.*

<sup>180</sup> See *List of Threatened National Historic Landmarks*, *supra* note 9 (linking to a database tracking this information).

<sup>181</sup> See NAT'L PARK SERV., NATIONAL HISTORIC LANDMARKS AT THE MILLENNIUM: A REPORT TO CONGRESS 4 (2001).

<sup>182</sup> See 54 U.S.C. § 308901 (Supp. II 2015).

<sup>183</sup> See, e.g., Dworsky et al., *supra* note 5, at 208; *Frequently Asked Questions*, NAT'L PARK SERV., NAT'L HISTORIC LANDMARKS PROGRAM (2015), <https://www.nps.gov/nhl/contact/faq.htm#17> (discussing possible funding options).

<sup>184</sup> See, e.g., *Johanna Favrot Fund for Historic Preservation*, NAT'L TR. FOR

financial incentives may apply, such as the federal rehabilitation tax credit and the federal incentives associated with the donation of qualifying conservation easements. However, these do not provide any additional benefits beyond those generally afforded to National Register-designated properties.<sup>185</sup>

#### 4. *Public Perception and Deterrent Effect*

Lastly, there is somewhat of a deterrent effect stemming from the threat of possible delisting, which does happen occasionally if a property is altered to the extent that it loses its integrity as a historic resource or is demolished.<sup>186</sup> A prominent recent example was the 2005 delisting of Chicago's Soldier Field after its extensive expansion—which, in the view of the NPS, added features inconsistent with its historic appearance and ultimately did not retain sufficient historic fabric to continue as an NHL.<sup>187</sup> While the impact of a threat of delisting is not entirely effective or even always apparent, “their mere delegation . . . [at least] cause[s] someone to think twice (but one dares not hope for three times) about tearing [an NHL property] down.”<sup>188</sup>

#### D. *Threats to NHLs*

Approximately half of NHLs remain privately owned and, thus, perhaps more vulnerable to loss and insensitive alteration.<sup>189</sup> By far the greatest threat to NHLs does not stem from affirmative change or demolition but from prolonged neglect—often from lack

HISTORIC PRES., <http://www.preservationnation.org/resources/find-funding/special-funds/johanna-favrot-fund.html> (last visited Mar. 1, 2016) (limiting eligibility for privately-owned resources to NHL properties).

<sup>185</sup> See Kathryn W. Howe, *Private Sector Involvement in Historic Preservation*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 25, at 279 (explaining federal preservation incentives generally).

<sup>186</sup> See *Withdrawal of National Historic Landmark Designation*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn.htm> (last visited Mar. 1, 2016).

<sup>187</sup> See Hal Dardick & David Mendall, *Stadium Has Lost Landmark Look*, U.S. SAYS, CHI. TRIB., July 21, 2004, at 1 (discussing the impacts of this renovation on its landmark status).

<sup>188</sup> See BRENNEMAN, *supra* note 13, at iii.

<sup>189</sup> See *National Historic Landmarks Program*, NAT'L PARK SERV., <https://www.nps.gov/nhl/find/nhlsinparks.htm> (last visited Aug. 27, 2016) (noting that the overwhelming majority of NHLs remain in private ownership); see also de Teel Patterson Tiller, *Preserving Our National Heritage*, CRM, Sept. 1997, at 3, 3 (providing overview of the NHL program and challenges facing its properties).

of funding or resources.<sup>190</sup> NHLs, like other historic properties, require ongoing maintenance that can present challenging stewardship responsibilities.<sup>191</sup> According to the NPS, in a given year, approximately six percent of the NHL are considered endangered, and the majority of these threats are from deferred maintenance.<sup>192</sup>

Beyond ongoing threats, there are situations, like Soldier Field, where designation is officially revoked.<sup>193</sup> As of February 2015, this has happened thirty-one times in the history of the program.<sup>194</sup> The reasons for withdrawal range. For the Robert Frost Farm in East Shaftsbury, Vermont, subsequent modifications to the resources were “so extensive that the buildings no longer retained their historic appearance.”<sup>195</sup> The Benjamin Wade House in Jefferson, Ohio was actually demolished.<sup>196</sup> Of the thirty-one withdrawals, ten designations were withdrawn for inappropriate alterations, while the remaining twenty-one involved outright demolition or loss.<sup>197</sup> After adjusting for natural disasters,

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<sup>190</sup> See NAT'L PARK SERV., NATIONAL HISTORIC LANDMARKS AT THE MILLENNIUM: A REPORT TO CONGRESS 12 (2001) (reporting that the majority of threatened properties are at risk due to funding issues).

<sup>191</sup> See NAT'L PARK SERV., *supra* note 180, at 12 (noting that “[d]eterioration is the major problem afflicting NHLs, generally due to lack of funds for ongoing maintenance”).

<sup>192</sup> See NAT'L PARK SERV., NATIONAL HISTORIC LANDMARKS STEWARDS HANDBOOK 1 (1997); see also Susan Escherich, *The National Historic Landmarks Assistance Initiative*, CRM, Vol. 20, No. 9, at 9, 9–12 (1997) (profiling and providing case studies of the various threats these properties often face).

<sup>193</sup> See *Withdrawal of National Historic Landmark Designation*, *supra* note 186.

<sup>194</sup> See *id.*

<sup>195</sup> See *The Robert Frost Farm: “The Gully”*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn/frost.htm> (last visited Mar. 1, 2016).

<sup>196</sup> See *The Benjamin Wade House*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn/wade.htm> (last visited Mar. 1, 2016) (profiling the demolition of this structure to make way for a bank parking lot).

<sup>197</sup> Not all of the total loss situations have involved affirmative demolition by a property owner. For example, five NHLs have been lost due to disaster events—including both fire and flood. See, e.g., *Fort Ross Chapel*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn/fortross.htm> (last visited June 1, 2015) (fire); *U.S.S. Inaugural*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn/inaugural.htm> (last visited June 1, 2015) (flood); *Piedmont Manufacturing Company*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn/piedmont.htm> (last visited June 1, 2015) (fire); *Sourdough Lodge*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn/sourdough.htm> (last visited June 1, 2015) (fire); *Wickyup*, NAT'L PARK SERV., <http://www.nps.gov/>

approximately one to two percent of NHLs have been lost through proactive action by their owners.

To summarize, the NHL program has continued to evolve beyond its initial focus on acquisition to play an important role in recognizing properties of national significance.<sup>198</sup> Although some clarity has developed as to the program's role within the federal preservation framework, threats remain and important properties continue to be lost. The following Part will focus on options short of acquisition that would allow for additional substantive protection for nationally significant historic resources—namely through the use of preservation easements.<sup>199</sup>

### III. PRESERVATION EASEMENTS AND NHLs

Preservation has grown to play a role in protecting a collective sense of community and fostering economic development—growing beyond the broadest concepts of the field's progenitors to protect an expanding array of resources.<sup>200</sup> NHLs perhaps relate more to the field's first concepts, but there remains a compelling need to protect nationally significant structures from outright loss or demolition.<sup>201</sup> Owing to resource constraints, the NPS's acquisition authority has been infrequently used.<sup>202</sup> The HSA and other NPS authorities, however, also authorize the acquisition of less than fee interests—which allows the federal government to acquire or facilitate the acquisition of preservation easements to protect properties remaining in private ownership.<sup>203</sup> This Part will explore preservation easements generally, the NPS's use of this tool historically, and the potential role preservation

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nhl/find/withdrawn/wickyup.htm (last visited June 1, 2015) (fire).

<sup>198</sup> See Fowler, *supra* note 69, at 36.

<sup>199</sup> See *Preservation Fundamentals*, NAT'L PARK SERV., [http://www.nps.gov/nr/national\\_register\\_fundamentals.htm](http://www.nps.gov/nr/national_register_fundamentals.htm) (last visited Mar. 1, 2016).

<sup>200</sup> See Fowler, *supra* note 69, at 39.

<sup>201</sup> See *Resurrection Manor*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/withdrawn/resurrection.htm> (last visited Mar. 1, 2016) (describing the delisting of an early Maryland manor after its demolition to allow for construction of a single family home).

<sup>202</sup> See Dworsky et al., *supra* note 5, at 232. The authors note Secretary of the Interior Harold Ickes' testimony regarding the HSA: "It would certainly not be desirable for the Federal government to attempt to take over all the historic sites in the country. In fact, by far the greater number of such sites are of local rather than national significance, and should therefore be cared for by State or local government, or private organizations." *Id.*

<sup>203</sup> 54 U.S.C. § 320102(e) (Supp. II 2015).

easements could playing in protecting NHLs.

### A. *Preservation Easements Generally*

A preservation easement can be defined as a legal agreement between a property owner and a third party (the easement-holder—typically a governmental entity or a preservation non-profit) to address the long-term preservation of a historic resource.<sup>204</sup> By conveying a preservation easement, the property owner agrees to maintain a property in an appropriate state of preservation, while the easement-holder commits to monitoring and enforcing the terms of this agreement.<sup>205</sup> There are various pathways for facilitating this transaction, ranging from the potential use of the available tax incentives to the outright purchase of the property interest.<sup>206</sup>

The terms of each agreement vary and are shaped by the goals of the property owner, the goals of the easement-holder, and the unique nature of the resource that is to be protected.<sup>207</sup> Perhaps the most important aspect of the preservation easement is its potentially perpetual duration, which allows for the protection of a property beyond an owner's ownership or lifetime.<sup>208</sup> This tool

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<sup>204</sup> See Jessica Owley, *The Future of the Past: Historic Preservation Easements*, ZONING L. & PRAC. REP., Nov. 2012, at 1, 1.

<sup>205</sup> See Martha Jordan, *Repairing Façade Easements: Is This the Gift That Launched a Thousand Deductions?*, 22 AKRON TAX J. 101, 108–10 (2007).

<sup>206</sup> See Paul W. Edmondson, V.P. and Gen. Counsel, Nat'l Tr. for Historic Pres., Presentation at the ALI-ABA Program: Conservation Easements: The Urban Experience (Mar. 7, 2008) (outline available at SN055 ALI-ABA 201) (profiling the various options for securing protection of historic properties through less than fee interests). Within the context of donative easements, preservation of a qualifying historic resource qualifies as a conservation value under the Internal Revenue Code. See Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning for the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 83–84 (2006) (explaining this fact and the importance of historic preservation interests in the early development of the Uniform Conservation Easement Act, which shaped enabling legislation nationwide).

<sup>207</sup> See Will Cook, *The Future of the Past: A New Frontier Called Interior Easements*, PRESERVATION PROGRESS, Spring 2005, at 8 (explaining one unique role preservation easements can play—protecting significant interior features of a targeted historic resource that are otherwise left outside the scope of most preservation regulations).

<sup>208</sup> See generally Ann T. Schwing, *Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 218 (2013). But see Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA.

also provides the potential advantage—from an easement-holder’s perspective—of being able to ensure the preservation of a significant historic resource without having to take on the responsibilities of ownership and maintenance.<sup>209</sup> Related benefits accrue to a preservation-minded property owner, who is able to protect an important resource against future alteration permanently.<sup>210</sup>

Attempts to use less than fee interests to protect both built and natural resources date back to as early as the 1890s and the Olmstead firm’s efforts to protect parkland in both Boston and California.<sup>211</sup> Over the course of the twentieth century, the merits of this form of protection became apparent to many interested in resource protection.<sup>212</sup> In the 1950s and 1960s, states began experimenting with enabling legislation to overcome the common law barriers to property interests of this type.<sup>213</sup> By the mid-1970s,

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L. REV. 739, 741–42 (2002) (exploring the perpetual duration of these restrictions as well as the mix of the benefits and challenges this duration presents); Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 122 (2011). *Historic Green Springs v. Bergland*,

<sup>209</sup> See Ellen E. Katz, *Conserving the Nation’s Heritage Using the Uniform Conservation Easement Act*, 43 WASH. & LEE L. REV. 369, 375–77 (1986); HOWARD, *supra* note 12, at 89–96 (describing Preservation North Carolina’s use of preservation easements to protect historic properties—which has expanded their reach and impact throughout the state).

<sup>210</sup> See, e.g., *Historic New England Protects Stanton-Tucker House*, HISTORIC NEW ENG. (Jan. 2015), <http://www.historicnewengland.org/about-us/press-media/news-releases/historic-new-england-protects-stanton-tucker-house> (profiling a recent easement effort and the motivations behind the grant).

<sup>211</sup> See WILLIAM WHYTE, URB. LAND INSTITUTE TECH. BULL. NO. 36, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS I (1959) (describing early efforts to protect open space around Boston, the subsequent enactment of authorities, and their relatively limited use during this period); see generally Thomas J. Reed, Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME L. REV. 379, 380–92 (1969) (charting the early use of preservation easements to protect historic properties); *Authority to Grant Conservation Easements Under 40 U.S.C. § 319*, 17 U.S. Op. Off. Legal Counsel 16, 21 n.11 (1993) (citing THOMAS S. BARRETT & PUTNAM LIVERMORE, *THE CONSERVATION EASEMENT IN CALIFORNIA* 11 (1983)) (exploring the first general scenic easement deeds in California).

<sup>212</sup> See generally Russell Brenneman, Esq., Keynote Address at the Joint Meeting of the Connecticut Association of Conservation Commissions and Representatives of Connecticut Land Trusts: Some Private Approaches to the Preservation of Open Land (February 16, 1967).

<sup>213</sup> See Russell D. Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231, 233 (1976) (discussing Massachusetts’ adoption of the first enabling legislation for this form of property

the express recognition of federal tax incentives for owners of qualifying properties began to slowly fuel an increased number of easement donations.<sup>214</sup> This slow growth dramatically expanded in the early twentieth century as the land trust movement took hold and protected massive amounts of acreage nationally—including substantial parts of some states—for example, over of the state of Maine.<sup>215</sup> For a variety of reasons, preservation easements have not been as heavily used as other forms of conservation easements, but this tool has been successful in protecting thousands of properties nationally, demonstrating its general effectiveness.<sup>216</sup>

### B. *Early NPS Easement Efforts*

During this same period, the involvement of the NPS within the easement arena can best be described as largely episodic, but certainly important from a precedential perspective.<sup>217</sup> NPS has been involved with the use of easements in three primary ways: (1) conservation easements designed to protect the views from parkways; (2) conservation easements tailored to protect the settings of national parks; and (3) preservation easements focused

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interest); MARILYN MEDER-MONTGOMERY, A LEGAL MECHANISM FOR PROTECTING CULTURAL RESOURCES 3–4 (1984) (exploring the legal development of preservation easements); John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 613 (1972) (discussing issues associated with negative easements under the common law); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638, 642–43 (1960) (charting the origins of state enabling legislation during this period).

<sup>214</sup> See ELIZABETH WATSON & STEFAN NAGEL, NAT'L TR. FOR HISTORIC PRES., ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 4 (2007) (explaining how the IRS eventually recognized charitable deductions associated with conservation easement donations); Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 493–95 (2004).

<sup>215</sup> See Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROBS. 1, 1–3 (2011) (noting that “[f]or better and for worse, conservation easements have displaced both public land acquisition and governmental regulation as the darling of the land conservation movement” and charting this growth).

<sup>216</sup> See RICHARD J. RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 295–98 (2011) (providing estimates of easement donation numbers in major cities nationally).

<sup>217</sup> See Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 126–27 (2010) (discussing early conservation easement efforts involving NPS).



on the protection of historic structures.

### 1. *Easements and Scenic Parkways*

In many ways, the NPS was a pioneer of early scenic easements designed to protect viewsheds—primarily for the protection of newly constructed parkways.<sup>218</sup> During the Great Depression, the NPS initiated a campaign to purchase conservation easements along the Blue Ridge Parkway.<sup>219</sup> A similar campaign focused on the protection of views surrounding the Natchez Trace in Tennessee—a project that eventually protected more than 5,000 acres.<sup>220</sup> “Generally, the[se] easements involved restrictions of new structures to farm and residential buildings, and a prohibition against dumping, billboards, and cutting ‘mature trees and shrubs.’”<sup>221</sup> Similar campaigns would continue for most of the decade, including, most notably, the authorization of funds for the acquisition of open space surrounding roads and parkways in the National Capital Region.<sup>222</sup> Overall, considerable agency effort focused on the use of “scenic” easements to protect the views along the various parkways then under construction.<sup>223</sup>

### 2. *Easements and the National Parks*

The NPS also used scenic easements to protect significant areas surrounding national parks. Prior to 1974, significant efforts included obtaining conservation easements protecting areas associated with the Guadalupe Mountains National Park (Texas), Dinosaur National Monument (Utah), Nez Perce National Park (Idaho), and Acadia National Park (Maine).<sup>224</sup> These conservation

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<sup>218</sup> See generally WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 95 (1968) (documenting early efforts to acquire less than fee interests); see also Russell Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 *LAW & CONTEMP. PROBS.* 416, 416–17 (1971) (noting the need to protect the surroundings of historic resources, not just the historic structures).

<sup>219</sup> See John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 *ENVTL. L.* 319, 333 (1997).

<sup>220</sup> See BRENNEMAN, *supra* note 13, at 35.

<sup>221</sup> *Id.*

<sup>222</sup> See Capper-Crampton Act of 1930, ch. 354, 46 Stat. 482 (codified as amended at 40 U.S.C. § 8732 (2012)) (providing authority for the acquisition of less than fee interests, and authorizing more than \$30,000,000 in expenditures for park and open space projects along the capital region’s roadways).

<sup>223</sup> See Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 *DENV. L.J.* 167, 181–183 (1968).

<sup>224</sup> See BRENNEMAN, *supra* note 13, at 35.

easements “follow[ed] a general format developed by the NPS which generally restrict[ed] the land against use for mining, industrial or commercial purposes or erection of any structures without the consent of the Secretary of [the] Interior and strictly limit[ed] the right to cut timber and the use of trailers.”<sup>225</sup>

NPS also used this tool to acquire scenic easements around historic landscapes, including “Antietam Battlefield in Maryland, Manassas in Virginia, and Vicksburg in Mississippi.”<sup>226</sup> “These easements permit[ted] the use of the land for agricultural or residential purposes but exclude[d] commercial, business or industrial buildings, and in some cases, power lines. The general topography of the landscape [was also required] to be maintained its present condition . . . .”<sup>227</sup> Other early conservation easements protecting historic landscapes included efforts to protect views along the Potomac River (opposite Mount Vernon) and along the James River (opposite Colonial National Park, near Jamestown).<sup>228</sup> These conservation easements had the practical effect of expanding the park’s protection to areas outside of direct federal ownership—preserving important visual, habitat, and other linkages that otherwise might have been lost.

### 3. *Easements and Historic Sites*

Lastly, the NPS has occasionally used easements to protect historic structures. The HSA defined the nature of interests in historic properties that the NPS could acquire broadly to include “any interest or estate therein.”<sup>229</sup> This authority would lead to the NPS’s acceptance of an easement protecting historic Tudor Place

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<sup>225</sup> *Id.* at 35–36.

<sup>226</sup> See WHYTE, *supra* note 218, at 86 (discussing NPS’s efforts to purchase easements from neighboring property owners); see also GEORGIE BOGE & MARGIE H. BOGE, PAVING OVER THE PAST: A HISTORY AND GUIDE TO CIVIL WAR BATTLEFIELD PRESERVATION 156–160 (1993) (discussing the history of efforts to protect Antietam); Cunningham, *supra* note 223, at 187–88 (describing the legislation authorizing the purchase of scenic easements surrounding the battlefield).

<sup>227</sup> BRENNEMAN, *supra* note 13, at 36.

<sup>228</sup> See *id.* at 37. The effort to protect Mt. Vernon was called “Operation Overview” by the Mount Vernon Ladies’ Association, and it succeeded in creating Piscataway Park, the first national park to be dedicated to scenic protection. See also Denise D. Meringolo, *The Accokeek Foundation and Piscataway Park*, CRM, Winter 2008, at 45.

<sup>229</sup> See 54 U.S.C. § 320102(e) (Supp. II 2015).

(1815) in Georgetown.<sup>230</sup> Here, a family member, through a bequest, granted a perpetual “scenic” easement to the NPS to protect his family’s estate in November of 1966.<sup>231</sup> This easement prevented subdivision, limited exterior modifications, and restricted use of the property to either museum or residential use.<sup>232</sup> The property ultimately became a prominent house museum that interprets the history and domestic life within the nation’s capital from the 18th to 20th centuries.<sup>233</sup>

Overall, it is not entirely clear how these early easement efforts were regarded within the agency, and there would be a continuing debate over the merits of moving in this direction.<sup>234</sup> One ongoing objection related to transaction costs, as in the early years, and even today, it is often difficult to determine whether an easement will provide more cost-effective protection than fee ownership over the long term.<sup>235</sup> Other objections related to the difficulty of managing an easement portfolio and the concern that this would take away from the agency’s acquisition funding.<sup>236</sup> This thinking could also have been shaped by earlier easement efforts. For example, the Blue Ridge easements proved quite difficult to enforce and led to strained relationships between the NPS and the grantors—primarily over what rights had actually

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230 See BRENNEMAN, *supra* note 13, at 37.

231 See NAT’L PARK SERV., EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS 6–7 (2010).

232 See MACKINTOSH, *supra* note 6, at 97.

233 See TUDOR PLACE, <https://www.tudorplace.org/> (last visited Mar. 1, 2016).

234 See Jan Z. Krasnowiecki & James C.N. Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 194 n.58 (“Difficulties have . . . been encountered in connection with the scenic easements which were acquired by the States and conveyed to the National Park Service for the parkways . . . . Experience has demonstrated many difficulties of administration, and a lack of effectiveness of these easements.”) (quoting S. REP. NO. 87-433 (1961)).

235 See Marvin M. Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 282–83 (1966) (discussing the ongoing controversy over the relative cost of easement versus fee control). Selection of the appropriate preservation strategy is still an issue today as divergent needs and project demands may make fee purchase the better option in many instances. See ELIZABETH BYERS & KAREN M. PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 48 (2d ed. 2005) (discussing acquisition of fee versus easement interests).

236 See MACKINTOSH, *supra* note 6, at 98–99.

been retained.<sup>237</sup> Other agencies within the Department of the Interior had similar experiences. For instance, the Fish and Wildlife Service (FWS) used easements to protect large amounts of critical duck habitat in North Dakota during the 1950s through 1970s.<sup>238</sup> Many farmers, however, apparently regretted these conveyances.<sup>239</sup> By the 1980s, FWS acquisitions had proven so controversial that North Dakota actually amended its enabling legislation to bar the grant of perpetual conservation easements.<sup>240</sup> Overall, the agency's early experiences with the tool are probably best described as mixed, but these efforts did lay the foundation for future experimentation in protecting both open space and historic properties.<sup>241</sup>

### C. *Historic Green Springs and the Brenneman Report*

#### 1. *The Battle Over Historic Green Springs*

In the mid-1970s, the NPS was offered a considerable portfolio of preservation easements designed to protect the Green Springs area between Richmond and Charlottesville in Virginia's historic countryside.<sup>242</sup> The region was deemed to be important from a historic perspective as "a beautiful and remarkably well-preserved concentration of eighteenth and nineteenth century

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<sup>237</sup> See Cunningham, *supra* note 223, at 182; see also WHYTE, *supra* note 218, at 84 (explaining the roots of these tensions). This reluctance to utilize easements was deeply embedded in NPS policy. For example, in the early 1960s, the NPS actively opposed the use of easements to protect the Ozark Rivers National Monument's viewshed. See BRENNEMAN, *supra* note 13, at 38 n.10.

<sup>238</sup> See Murray G. Sagsveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659, 661 (1984).

<sup>239</sup> See *id.* at 662.

<sup>240</sup> See Jon J. Jensen, *Limitations on Easements in North Dakota May Have Unintended Consequences for Qualified Conservation Easement Charitable Contributions*, 87 N.D. L. REV. 343, 345 (2011) (charting the development of the FWS efforts and the resulting land use conflicts with impacted farmers); see also *North Dakota v. United States*, 460 U.S. 300 (1983) (concluding that the state could not withdraw its consent to prior easement conveyances made to the federal government).

<sup>241</sup> As of 2004, the NPS alone held easements protecting 253,348 acres. See BYERS & PONTE, *supra* note 235, at 8; see also Gerald Korngold, *Government Conservation Easements: A Move to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 475 (2013) (providing statistics on easements held by governmental bodies).

<sup>242</sup> See *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

buildings of architectural merit.”<sup>243</sup> Despite this significance, the area’s traditional rural countryside was under considerable threat.<sup>244</sup> Historic Green Springs, Inc. (HGSI), a local non-profit preservation organization, had acquired preservation easements protecting approximately half of the 14,000 acres in this historic community and offered to assign these restrictions to the NPS.<sup>245</sup> The initial reason for this easement effort was to block the construction of a proposed prison in the region.<sup>246</sup> After a four year battle, HGSI was eventually able to block the prison’s construction,<sup>247</sup> but soon mining interests threatened to commence strip mining in the area, which led to further opposition from HGSI.<sup>248</sup> Assignment of the organization’s easements to the NPS was ultimately seen as desirable as a way to “preclude their condemnation by the state or county” to clear the way for mining.<sup>249</sup>

HGSI’s efforts to use historic preservation laws to protect the

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<sup>243</sup> See *id.* at 842.

<sup>244</sup> See *id.*; see also Olivia S. Choe, *A Missed Opportunity: Nonprofit Antitrust Liability in Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 113 YALE L.J. 533, 534–35 (2003) (documenting the ongoing dispute over mining in this historic area of Virginia).

<sup>245</sup> See *Historic Green Springs*, 497 F. Supp. at 839.

<sup>246</sup> See Nat’l Tr. for Historic Pres., *Virginians Go to Court to Bar Prison in Historic Area*, PRESERVATION NEWS, Oct. 1970, at 1; see also Nat’l Tr. for Historic Pres., *Gov. Holton Listens But Prison Okayed*, PRESERVATION NEWS, May 1, at 8; Carleton Knight III, *State Moves Prison from Green Springs*, PRESERVATION NEWS, Nov. 1972, at 1 (reporting on the Governor’s decision to relocate the proposed prison provided the area demonstrated its commitment to preservation); Carleton Knight III, *Who Is Linwood Holton and Why is He Doing These Terrible Things to Us?*, PRESERVATION NEWS, May 1973, at 3 (explaining the Governor’s reversal of positions despite the donation by residents of easements protecting over 7,000 acres); Nat’l Tr. for Historic Pres., *Easements and the Trust*, PRESERVATION NEWS, Jan. 1973, at 5 (explaining that the assurances the Governor requested were being provided through easement donations).

<sup>247</sup> See Nat’l Tr. for Historic Pres., *Construction Begins at Green Springs*, PRESERVATION NEWS, Oct. 1973, at 2 (detailing the beginning of construction on the prison project despite widespread opposition); Nat’l Tr. for Historic Pres., *Green Springs Wins Four-Year Legal Battle*, PRESERVATION NEWS, June 1974, at 1 (noting Virginia’s abandonment of the proposed prison).

<sup>248</sup> See Nat’l Tr. for Historic Pres., *Green Springs Faces New Court Threats*, PRESERVATION NEWS, June 1975, at 3; see also 4 AMERICAN LAND PLANNING LAW § 75.11 (2014) (discussing the origins of this campaign as a response to a proposal to locate a state prison in the area).

<sup>249</sup> See MACKINTOSH, *supra* note 6, at 98.

area actually began in the early 1970s.<sup>250</sup> In 1972, the district was designated as a Virginia Historic Landmark (the state's register of historic places) by the Virginia Historic Landmarks Commission.<sup>251</sup> In early 1973, the state advanced the nomination to the Keeper of the National Register, who approved the site for designation on the National Register.<sup>252</sup> In 1974, the Secretary of the Interior formally designated the district as an NHL at the recommendation of the NPS's Advisory Board.<sup>253</sup>

After designating the district as an NHL, NPS began to consider whether to accept HGSI's offer to assign the preservation easements.<sup>254</sup> NPS directed its senior historian to evaluate the merits of accepting the easements that had been offered by HGSI.<sup>255</sup> This recommendation, "submitted in November 1976, noted many flaws in the terms and the extent of the easements, such as their failure to grant public use and access, and to prohibit in all cases subdivision and development of the land," but noted that it would be a first step towards protecting this important area.<sup>256</sup> Some were reluctant, however, to accept the easements, "foreseeing trouble in the fact that only half of the historic district would be so protected, with nonparticipating owners, holders of mineral rights, and local officials opposed to federal involvement."<sup>257</sup> On March 18, 1977, the NPS announced that it intended to accept HGSI's offer.<sup>258</sup> NPS staff would subsequently admit nomination was defective after the process was challenged by opponents.<sup>259</sup> The Secretary of the Interior, under his own authority, re-designated the property as a NHL and remedied this

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<sup>250</sup> See Nat'l Tr. For Historic Pres., *Virginians Go to Court*, *supra* note 246, at 1.

<sup>251</sup> See *United States v. Blackman*, 613 S.E.2d 442, 444 (Va. 2005) (explaining the history of this designation).

<sup>252</sup> See National Register of Historic Places, 39 Fed. Reg. 35,399 (Oct. 1, 1974); see also *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 843 (E.D. Va. 1980).

<sup>253</sup> See MACKINTOSH, *supra* note 6, at 98.

<sup>254</sup> See *id.*

<sup>255</sup> See *Historic Green Springs*, 497 F. Supp. at 843.

<sup>256</sup> See *id.*

<sup>257</sup> See MACKINTOSH, *supra* note 6, at 100.

<sup>258</sup> See *Historic Preservation Easements; Proposed Acceptance*, 42 Fed. Reg. 15,146 (Mar. 18, 1977) (publicly announcing the agency's decision to accept the HGSI easements).

<sup>259</sup> See MACKINTOSH, *supra* note 6, at 100.

procedural defect.<sup>260</sup>

The NPS officially accepted HGSI's offer at the end of the Ford Administration in late 1977 (ultimately accepting easements from thirty eight owners protecting 7,000 acres), but this did not end the dispute.<sup>261</sup> One of the mining interest holders, Virginia Vermiculite, along with the county's board of supervisors and several non-participating landowners, had in the intervening period challenged the landmarking of this district in federal district court.<sup>262</sup> In his ruling, Judge Merhige invalidated the designation "based on the Department's failure to promulgate substantive standards for national historic significance and its failure to prepare and publish rules of procedure to govern the designation process."<sup>263</sup> This decision led to NPS obtaining a legislative fix through the 1980 amendments to the NHPA, effectively grandfathering in all formerly designated NHLs and thus protecting the earlier HGSI and NPS efforts.<sup>264</sup> To this day, the Green Springs NHL district remains relatively intact as a landscape that continues to tell the story of that area of Virginia.<sup>265</sup>

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<sup>260</sup> See Green Springs Historic District, 43 Fed. Reg. 3,317 (Jan. 24, 1978); see also *Historic Green Springs*, 497 F. Supp. at 843; Nat'l Tr. for Historic Pres., *Update*, PRESERVATION NEWS, Feb. 1978, at 12 (noting the acceptance of this donation by the United States).

<sup>261</sup> See *United States v. Blackman*, 613 S.E.2d 442, 444 (Va. 2005) ("In 1978, HGSI decided to convey its entire portfolio of easements to the United States. In the resulting deed of easement to the United States, all of the original grantors of similar easements within the District acknowledged their agreement to the conveyance by affixing their signatures to the deed.").

<sup>262</sup> See *Historic Green Springs*, 497 F. Supp. at 839. This dispute actually ended up becoming a foundational case on requiring formal standards to define historic significance, as the court—despite recognizing the historic and aesthetic merit of the district—found that the lack of standards precluded meaningful judicial review. See ADVISORY COUNCIL FOR HISTORIC PRES., AN OVERVIEW OF HISTORIC PRESERVATION LAW UPDATE 1996–2000 (2000), <http://www.achp.gov/caselaw96-00.pdf>; see also Paul D. Edmondson, *Historic Preservation Regulation and Procedural Due Process*, 9 ECOLOGY L. Q. 743, 744 (1981) (discussing the due process issues stemming from the decision).

<sup>263</sup> See *Historic Green Springs*, 497 F. Supp. at 843.

<sup>264</sup> See Nat'l Tr. for Historic Pres., *Corning Rescues 1921 Bridge*, PRESERVATION NEWS, Oct. 1981, at 2 (noting the vacatur of the earlier ruling based upon the legislative remedy obtained by the NPS). In response to this decision's successful challenge of NPS's procedures, the 1980 amendments required the agency to establish standards for evaluating and designating NHL properties. NPS would issue these regulations in 1983. See BRONIN & BYRNE, *supra* note 11, at 455.

<sup>265</sup> See *Green Springs*, NAT'L PARK SERV., <http://www.nps.gov/grsp/index.htm> (last visited Mar. 1, 2016). NPS is still responsible for monitoring and

## 2. *The Brenneman Report and the Proposed NPS Easement Program*

During the internal NPS debate over whether to accept the easements offered by HGSI, the NPS considered whether it might make sense to operate a larger easement program focused on protecting NHL properties.<sup>266</sup> As noted in the prior Section, there was not universal interest within the NPS in taking on preservation easements, as there was strong “fear that the National Park Service’s overriding responsibilities may serve to weaken the commitment of state and local officials or members of the private sector in a situation where a property may be declining,” which might even occasionally require the NPS to acquire a property in order to fulfill its responsibilities as easement-holder.<sup>267</sup> Others within the NPS “foresaw major funding and staffing requirements to support an easement program, which would involve extensive land title work, property inspections, and enforcement of easement terms.”<sup>268</sup>

Despite legitimate reservations, internal advocates were at least able to fund a request for proposals for a study of the merits of this potential undertaking.<sup>269</sup> In 1974, the NPS hired Russell Brenneman, a pioneering advocate for the use of easements, to evaluate the potential of a federal program to hold preservation easements to protect NHL properties.<sup>270</sup> Brenneman’s analysis first reviewed the NHL program and its position in the mid-1970s as essentially the honor roll of the National Register for Historic Places.<sup>271</sup> The report spent considerable time investigating whether easements would offer stringent enough protection for this resource category—ultimately answering the question in the

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enforcing these restrictions. *See, e.g.,* United States v. Blackman, No. 3:04-CV-46, 2005 WL 2675095 (W.D. Va. Oct. 19, 2005), *aff’d*, No. 06-4167, 2007 WL 1578278 (4th Cir. May 31, 2007) (placing defendant in criminal contempt for violation of the terms of a preservation easement protecting a historic manor house). This dispute also involved a certified question to the Supreme Court of Virginia to determine whether a negative easement was allowed under Virginia law at the time of the donation, a question that the court answered in the affirmative. United States v. Blackman, 613 S.E.2d 442 (Va. 2005).

<sup>266</sup> *See* MACKINTOSH, *supra* note 6, at 98–99.

<sup>267</sup> *See id.*

<sup>268</sup> *See id.* at 99.

<sup>269</sup> *See* BRENNEMAN, *supra* note 14, at iii.

<sup>270</sup> *See id.* at 125.

<sup>271</sup> *See id.* at 20–21; SPRINKLE, *supra* note 2, at 18.



affirmative.<sup>272</sup> Brenneman then evaluated existing efforts to protect NHLs (which he deemed insufficient), and the potential for using preservation easements to protect these properties.<sup>273</sup> Brenneman's conclusion was that "[t]he 'appropriateness' of the Federal Government's acceptance and holding of easements on National Historic Landmarks presents a policy, not a legal, question," as the HSA provided for the use of this mechanism under specified conditions, namely preserving nationally significant sites for "public use."<sup>274</sup>

The survey then evaluated whether an NHL easement program made sense for the NPS as a programmatic initiative. The majority of State Historic Preservation Officers and other interested parties surveyed endorsed this proposal given the importance of the NHL as a resource class.<sup>275</sup> In sum, with certain programmatic decisions and assumptions in place, Brenneman's report concluded that it would be beneficial for the NPS to operate this type of program.<sup>276</sup> Despite the report's recommendations, NPS managers were not overly eager to implement the findings.<sup>277</sup> After NPS received the report, administrative planning was slow to advance.<sup>278</sup> As administrations changed, so too did interest in an expanded NHL easement program, and "[t]he proposed program was [eventually] a dead letter."<sup>279</sup>

#### D. *NPS Grants and the Save America's Treasures Program*

##### 1. *Overview*

One of the primary ways in which the NPS has become involved with easement efforts is through its grant programs, when authorized and funded.<sup>280</sup> A requirement of many of the agency's grant programs historically has been the conveyance of a preservation easement to secure the value of the federal

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272 See BRENNEMAN, *supra* note 14, at 6.

273 See *id.*

274 See *id.* at 125.

275 See *id.*

276 See *id.*

277 See MACKINTOSH, *supra* note 6, at 99.

278 See *id.*

279 See *id.*

280 See NAT'L PARK SERV., HISTORIC PRESERVATION GRANTS-IN-AID POLICIES AND PROCEDURES, ix-x (1972).

government's investment in the property.<sup>281</sup> For example, the brick-and-mortar grants under the Historic Preservation Fund (eliminated in the early 1980s) required a preservation easement in order to give NPS a long-term return on its investment.<sup>282</sup>

The most recent effort to use easements to protect NHLs involved the Save America's Treasures (SAT) program.<sup>283</sup> The SAT program's funding mix included brick-and-mortar grants to NHL properties for much needed repairs and rehabilitation.<sup>284</sup> To qualify for consideration through the competitive grant process, a historic property was required to be an NHL or to be listed on the National Register of Historic Places as having national significance.<sup>285</sup> The program also had an earmark component, which awarded about half of the overall project funding.<sup>286</sup> When a grant to a historic resource was awarded, conveyance of an easement was required as a condition of funding.<sup>287</sup> The duration of these easements had to be for at least fifty years or permanent.<sup>288</sup> With limited exceptions, SAT easements had to

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281 See *id.* at 23.

282 See *id.* at 47.

283 See Christen Sproule, *Federal Funding for the Preservation of Religious Historic Places: Old North Church and the New Establishment Clause*, 3 GEO. J.L. & PUB. POL'Y 151 (2005).

284 See Save America's Treasures, *Save America's Treasures Awards 1999–2010 by State*, PRESIDENT'S COMM. ON THE ARTS & HUMANITIES 2, [http://www.pcah.gov/sites/default/files/SAT%20Awards%201999-2010%20Table\\_2.pdf](http://www.pcah.gov/sites/default/files/SAT%20Awards%201999-2010%20Table_2.pdf). The funding mix went beyond historic sites alone and would include grants to preserve “cultural achievements embodied in the books, documents, paintings, film, music and the like.” See *Save America's Treasures*, NAT'L TR. FOR HISTORIC PRES., <http://www.preservationnation.org/travel-and-sites/save-americas-treasures/> (last visited June 1, 2015) (discussing this program and its impact on nationally significant sites).

285 See Sproule, *supra* note 283, at 160–62.

286 See *Save America's Treasures Grants Announced*, HERITAGE PRES., <http://www.heritagepreservation.org/update/2006/06wiSAT.HTM> (last visited June 1, 2015) (describing the 2006 project mix).

287 See NAT'L PARK SERV., HISTORIC PRESERVATION FUND GRANT MANUAL 6-41 (2007).

288 See *id.* Notably, SAT grants were among the first federal funds to be extended to historic religious properties. Direct brick-and-mortar grants to historic religious properties were, for a significant period of time, barred on First Amendment grounds, but have recently been allowed under shifting constitutional interpretations that allowed direct funding under the SAT program to be extended to religious properties—if the purpose and historical significance were secular, such as the SAT grant to Boston's Old North Church (the home of “one if by land, two if by sea” lanterns and a major tourist draw). See Sproule, *supra* note 283, at 154 (discussing this evolution).

cover the entire property being funded, and required the property to be maintained according to the Secretary of Interior's Standards for Rehabilitation.<sup>289</sup> Notably, the terms of the SAT model easement required protected properties to be open to the public at least twelve days a year to maximize the public benefit.<sup>290</sup> In all, the SAT program was tailored to maximize the public's investment in important heritage assets by requiring a high level of significance and ensuing continuing protection and public access.

There are two aspects of the SAT program that are worthy of specific mention. First, a notable wrinkle to the SAT program was that the easements were not intended to be donated directly to the NPS, but to the applicable State Historic Preservation Officer (SHPO).<sup>291</sup> This approach allowed the NPS to secure the desired degree of protection while avoiding direct responsibility for monitoring the properties.<sup>292</sup> This may have simplified the transactional process, as in many states the SHPOs are the default easement-holder, and they have experience using this tool to secure the long-term protection of significant properties.<sup>293</sup> Second, an important limitation to this program was that the properties eligible to participate include only those owned by federal, state, local, and tribal government entities and non-profit organizations (i.e. it did not extend to other ownership forms, such as privately-owned residences).<sup>294</sup> This scope perhaps makes sense from a public policy standpoint and is an attempt to maximize the public benefit, but a property's historic significance is not dictated

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<sup>289</sup> See SPROULE, *supra* note 283, at 163-64.

<sup>290</sup> See *Sample Preservation Easement/Covenant for a Save America's Treasures Grant to a Historic Subject Property*, NAT'L PARK SERV. [http://www.nps.gov/preservation-grants/manual/Model\\_Easement.pdf](http://www.nps.gov/preservation-grants/manual/Model_Easement.pdf) (last visited Mar. 1, 2016).

<sup>291</sup> See NAT'L PARK SERV., *supra* note 287, at 6-33.

<sup>292</sup> This is a fairly common approach for federal agencies involved in protecting the built and natural environments. For example, the Natural Resources Conservation Service (NRCS) allows state, local, and non-profit entities to hold all interests acquired under its ACEP-ALE program. See *Agricultural Conservation Easement Program*, NAT. RES. CONSERVATION SERV. <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited Mar. 1, 2016).

<sup>293</sup> See, e.g., *MHC Survey and Planning Grant Program*, SEC'Y OF THE COMMONWEALTH OF MASS., <http://www.sec.state.ma.us/mhc/mhchpp/grdhpp.htm> (last visited Mar. 1, 2016).

<sup>294</sup> See *Save America's Treasures*, CATALOG OF FEDERAL DOMESTIC ASSISTANCE, <https://www.cfda.gov/index?s=program&mode=form&tab=core&id=2e2a06746dbd9eaf542706819b682238> (last visited Mar. 1, 2016).

by its ownership structure, and this requirement may have been artificially limiting.

## 2. *The Impacts of the SAT Program*

Overall, the SAT program was highly successful. During its approximately ten years of funding, a total of 331 NHL properties received financial support.<sup>295</sup> Not surprisingly, this could have a dramatic impact on a state's built environment and in improving the condition of its heritage assets.<sup>296</sup> For an illustrative example, take Virginia's experience.<sup>297</sup> In Virginia, a total of fifty-one projects received SAT funding, totaling \$8,634,778.<sup>298</sup> Significant projects included funding the conservation treatment of Thomas Jefferson's executive papers (while he was Governor of Virginia), George Washington's tent at the Colonial National Historic Park, and of important collections at both Jamestown and Colonial Williamsburg.<sup>299</sup> On the historic resource side specifically, eleven NHLs received financial support, including St. Luke's Church (Smithfield), the Woodrow Wilson Birthplace (Staunton), and Monumental Church (Richmond).<sup>300</sup> These eleven NHL projects received \$4,608,000, which constituted over half of Virginia's total share of SAT funding (ranging from a programmatic low of \$150,000 to a more than \$1,000,000 investment in Montpelier, James Madison's Orange County estate).<sup>301</sup>

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<sup>295</sup> See *Save America's Treasures Awards 1999–2010 by State*, *supra* note 284. A total of 1,241 projects were funded during this period, so NHLs accounted for about 25% of the project mix nationally.

<sup>296</sup> See *id.* When looking at funding levels for these projects, the brick-and-mortar investment is not inconsiderable, but the federal grants were often only a small portion of the overall funding mix, as these grants galvanized community and state investments to make often-needed repairs to nationally important heritage assets. See, e.g., *About Beauport*, BEAUPORT BLOG, <https://beauportblog.wordpress.com/about/> (last visited Mar. 1, 2016) (discussing the funding mix needed to complete preservation work at Beauport, the Sleeper-McCann House (1907) in Gloucester, Massachusetts—an SAT funded project).

<sup>297</sup> See *National Historic Landmarks in Virginia*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/statelists/va.htm> (last visited June 1, 2015).

<sup>298</sup> See *id.*; see also *Save America's Treasures Awards 1999–2010 by State*, *supra* note 284, at 66–67 (discussing Virginia's funding under SAT).

<sup>299</sup> See *Save America's Treasures Awards 1999–2010*, *supra* note 284, at 66–67.

<sup>300</sup> See *id.*

<sup>301</sup> See *National Historic Landmarks in Virginia*, *supra* note 297. See *Save America's Treasures Awards 1999–2010 by State*, *supra* note 284. This calculation simply takes the total of NHLs in Virginia (122) against the list of

There are currently 122 NHLs in Virginia, so during this ten year period, the SAT program was able to protect nearly 10 percent of the state's most important historic resources.<sup>302</sup> The program had an even more dramatic effect in Pennsylvania, where out of the state's 167 NHLs, 32 received SAT funding—resulting in the protection of nearly 20 percent of the state's NHLs.<sup>303</sup> On a national level, approximately 10 to 15 percent of all NHL properties were protected through SAT easements, which shows the program's overall protective impact, not to mention the much needed direct investment in preserving the nation's heritage infrastructure.<sup>304</sup>

In sum, the NPS has considerable experience with conservation easements of all forms, including a recent effort to primarily target NHLs through the SAT program. The NPS's recent

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funded SAT NHL projects (11) during this period.

<sup>302</sup> As of June 2015, Virginia has the fifth most NHLs in the nation—following New York (269), Massachusetts (187), Pennsylvania (167), and California (144). See *National Historic Landmarks by State or Territory*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/statelists.htm> (last visited June 1, 2015). This calculation does not account for the fact that some of the resources covered under SAT easements may have already been subject to existing restrictions of some form. It is not uncommon for highly significant historic resources, particularly in states with long-standing preservation grant programs, to be covered by multiple preservation easements. See, e.g., Jess R. Phelps, *Scarcely a Vestige of Antiquity Remains: Evaluating the Role of Preservation Easements in Protecting Historic Religious Architecture*, 44 ENVTL. L. REP. 10808, 10824–25 (2014) (discussing easement numbers in Massachusetts and providing examples of layered restrictions).

<sup>303</sup> See, e.g., *National Historic Landmarks in Pennsylvania*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/statelists/pa.htm> (last visited Mar. 1, 2016); see also *Save America's Treasures Awards 1999–2010 by State*, *supra* note 284, at 53–56 (funding 32 of the state's 167 NHLs through SAT funding). Other states may have higher percentages of funding as a ratio of NHLs, but have a smaller number of landmarks—somewhat “skewing” the percentage of resources protected. Pennsylvania's share of total SAT funding was over \$35,000,000, the most of any of the states, and nearly double that of any state's share, with the exception of New York. See *id.*

<sup>304</sup> See *National Historic Landmarks*, NAT'L PARK SERV., <https://www.nps.gov/nhl> (last visited June 21, 2016) (explaining that there are nearly 2500 NHLs); See *Save America's Treasures Awards 1999–2010 by State*, *supra* note 284, at 1 (noting the 331 NHLs receiving SAT grants). Overall, this equates to roughly 13% of total NHLs obtaining funding through this funding mechanism. This impact should be tempered a bit to represent the fact that privately-owned properties (the most vulnerable NHLs) were not included in the funding mix, but it still represents significant progress, as properties owned by the federal, state, and local governments and non-profit organizations are still vulnerable to loss.

effort was able to use the network of SHPOs to administer acquired interests and eliminate burden on the agency while protecting federal investment—which may prove a model for future efforts.

### E. *Utilizing Preservation Easements to Protect NHLs*

Overall, the NHL program, although providing important recognition to designated resources, provides little direct substantive protection.<sup>305</sup> Given resource constraints and the relative infeasibility of protecting significant numbers of additional historic sites through direct federal ownership, there has been periodic interest in exploring other pathways for providing meaningful protection to or to otherwise support efforts to preserve these resources. As noted, one of the primary ways that this could be accomplished is through the expanded use of preservation easements. This Section evaluates the potential for such an effort.

#### 1. *The Benefits of Expanding Efforts to Protect NHLs*

The development of an initiative to secure NHL properties through preservation easements has special merit and could have benefits for the overall field of historic preservation—including increased protection of vitally important resources, establishing a greater identity for the NHL program, and potentially preventing condemnation of nationally important sites.

##### a. *Increased Protection for Nationally Significant Properties*

The most straightforward benefit of using easements to specifically target properties would be that more nationally significant sites would be permanently protected. Given funding (through the existing SAT authority or other similar legislation), meaningful financial support could fund brick-and-mortar preservation work on important historic sites while simultaneously securing their long-term preservation. If such a program were contemplated, it would be worthwhile to consider including privately-owned properties in the overall funding mix. Privately-owned NHLs are among the most susceptible to deferred maintenance and neglect, and the hardest to fund with private or

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<sup>305</sup> See *Frequently Asked Questions*, NAT'L PARK SERV., <https://www.nps.gov/nhl/contact/faq.htm> (last visited June 21, 2016).

foundational dollars.<sup>306</sup> Even properties within local historic districts are under threat should the district at some future point be abolished, and the entirety of covered historic properties are often not protected given regulatory and constitutional constraints (typically limited to what is visible from a public way).<sup>307</sup> Absent financial incentives, however, it is unlikely that many owners of significant historic assets, even non-profit organizations and cultural institutions, would voluntarily grant the federal government or another qualified holder a partial interest in their properties. There are some benefits to the donor of a preservation easement, such as having access to professional staff from the holding entity and ensuring that a historic resource is permanently protected, but financial realities, such as concerns over future marketability and resale values, likely weigh more heavily for most private owners.<sup>308</sup> In short, obtaining a stable funding stream and coupling preservation grants with easement protections would provide a powerful tool for protecting historic properties.

There are, however, potentially other ways to promote the preservation of NHL properties should funding remain difficult to secure, including through the encouragement of donations (with or without reliance on the possible tax incentives) to qualified easement holders.<sup>309</sup> If NPS began to track and report on which NHLs are protected as part of an overall effort to monitor these resources, the agency may be better able to encourage owners to

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<sup>306</sup> See, e.g., *Massachusetts Preservation Projects Fund*, SEC'Y OF THE COMMONWEALTH OF MASS., <http://www.sec.state.ma.us/mhc/mhcmpopf/mppfidx.htm#elig> (last visited Mar. 1 2016) (noting that only governmentally and non-profit owned properties are eligible grant recipients).

<sup>307</sup> See Sarah Conde, *Striking a Match in the Historic District: Opposition to Historic Preservation and Responsive Community Building 11* (Georgetown Law Historic Pres. Papers Series, Paper No. 24, 2007), [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1023&context=hpps\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1023&context=hpps_papers); Dan McCall, *The Role of Easements in Historic Preservation: Implications of Valuing a Property Right as a Commodity 4* (Georgetown Law Historic Pres. Papers Series, Paper No. 7, 2004); see generally Robert W. Mallard, *Avoiding the "Disneyland Facade": The Reach of Architectural Controls Exercised by Historic Districts over Internal Features of Structures*, 8 WIDENER L. SYMP. J. 323 (2002).

<sup>308</sup> See *Easements to Protect Historic Properties*, NAT'L PARK SERV., <http://www.nps.gov/tps/tax-incentives/taxdocs/easements-historic-properties.pdf> (last visited June 1, 2015).

<sup>309</sup> See MICHAEL STEINITZ, MASSACHUSETTS: A CASE STUDY—COMMENTS ON TRENDS IN PRESERVATION EASEMENTS SINCE 2003, at 2 (2011) (mapping the various ways easement protection can be secured).

voluntarily protect their properties, and to encourage state and local governments and preservation non-profits to target these resources. In short, the mere recognition that NHLs should be permanently protected would help to foster and promote this important end result.

b. *Providing Greater Identity to the NHL Program*

One of the greatest challenges the NHL program has faced is in establishing an independent identity and purpose.<sup>310</sup> Placing a greater emphasis on securing easement protection would allow the program to be differentiated from the National Register and would potentially set up a more formal hierarchy of properties within the NPS framework. Under such a framework, national monuments designated under the authorities of the Antiquities Act would continue to be the most important properties (consisting of 100-120 properties) and would have the most federal involvement, as a federal property interest is required for this designation.<sup>311</sup> Next would come NHLs, currently consisting of approximately 2,500 properties, where securing easement protection (although not necessarily held by a federal agency) would be the end goal. Last would follow the vast majority of historic resources listed on the National Register (approximately 1,500,000 resources contained within 90,000 listings), where properties would continue to be incentivized primarily through the rehabilitation tax incentives and any applicable local regulations. Although there are already a few distinctions between NHL and National Register properties, if securing easement protection were expressly added to this mix, a clearer line could be drawn.<sup>312</sup>

Placing an emphasis on securing the permanent protection of NHLs would return the program to its first principles and would perhaps incentivize or encourage additional NHL nominations.<sup>313</sup> Creating this hierarchy would also allow NHLs to be used as a planning tool apart from National Register properties and

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<sup>310</sup> See KING, *supra* note 7, at 246 (describing NHLs as “rather anachronistic today, confusingly redundant with the National Register.”).

<sup>311</sup> See 54 U.S.C. § 320301 (Supp. II 2015); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 488–89 (2003) (describing the impact of the Antiquities Act and its limitations).

<sup>312</sup> See *supra* Section II.A.

<sup>313</sup> See Carol D. Shull, *Expanding Participation and Support for the Designation of NHLs*, CRM, Vol. 20, No. 9, at 6, 6–7 (1997) (discussing the need for additional nominations of nationally significant properties).



encourage SHPOs to consider easements as a larger component of their statewide preservation strategies.<sup>314</sup>

c. *Preventing Condemnation of Nationally Significant Properties*

Finally, another possible benefit (depending upon the structure of any future initiative) would be to prevent condemnation of NHL properties by state and local governments.<sup>315</sup> A federal property interest could be potentially important in preventing efforts to use eminent domain to condemn historic sites or landscapes.<sup>316</sup> Particularly within the landscape context, this would have importance, as open space or working lands will generally present lower project costs to a proponent than a more developed alternative.<sup>317</sup> In protecting against this form of strategic condemnation, a federally-held preservation easement could potentially serve as a meaningful check against ill-designed projects threatening historic resources of national importance and their corresponding landscapes.<sup>318</sup>

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<sup>314</sup> See, e.g., *New Hampshire's Five-Year Preservation Plan 2016–2020*, N.H. DIV. OF HISTORICAL RES., <https://www.nh.gov/nhdhr/programs/plan.htm> (last visited Mar. 1, 2015) (providing an example of a state preservation plan).

<sup>315</sup> See Nancy C. McLaughlin, *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (or Not)*, 26 VA. ENVTL. L.J. 399, 416–26 (2008) (discussing the issues involved with condemnation of federally-held easements). At some level, however, condemnation through the use of eminent domain may be needed as a way to address change over time. See Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1082 (2007).

<sup>316</sup> See BYERS & PONTE, *supra* note 235, at 171 (explaining that “[f]ederal property interests . . . usually cannot be condemned by a state, and property interests held by a state agency usually cannot be condemned by a local government or another state agency”).

<sup>317</sup> Notably, the recognition of the ability of federal easements to protect against local or state exercise of condemnation authority is not a new one, although it is perhaps underutilized. The NPS’s acceptance of the Green Springs easements was motivated at least in part by this recognition. See MACKINTOSH, *supra* note 6, at 98.

<sup>318</sup> See McLaughlin, *supra* note 315, at 416–26. If the easement is held by a state entity rather than the federal government, the issues become more complex and it is unclear whether condemnation could be prevented. See generally Daniel Shean, *Introduction: Condemning Open Space*, 26 VA. ENVTL. L.J. 395 (2008) (framing the positions of various constituents regarding conflicts between utility corridors and protected open space in Virginia); George C. Freeman, Jr., *An Update on Virginia Law Applicable to the Possible Destruction of “Perpetual” Easements on Historic Properties and Open Space by Condemnation: It All*

## 2. *The Challenges Associated with an Expanded Effort to Protect NHLs*

Despite the benefits of protecting NHLs with preservation easements, this effort would not be without challenges – many of which would be similar to those already faced by land trusts and preservation easement-holding organizations. A few of the principal issues are addressed in turn.

### a. *The National Scope of NHLs*

By definition, NHLs are found across the nation, but the distribution is not uniform or balanced. For example, Massachusetts is home to 187 NHLs.<sup>319</sup> North Dakota can only claim 6.<sup>320</sup> The geographic spread of the NHLs presents challenges, as the NPS lacks the staff to monitor these properties properly and, in some areas, lacks a physical presence sufficient to take on additional management responsibilities.<sup>321</sup> This uneven resource allocation also leads to workload imbalances, further burdening the agency's staff who have the expertise needed to monitor historic sites.

One possible solution to minimize the administrative costs associated with this effort would be to partner with local, state, regional, or national easement-holders; this could shift some of the costs, expenses, and staffing to the levels where there are already existing relationships with property owners and staff who can effectively monitor and enforce the easement terms.<sup>322</sup> This model was most recently used under the SAT program, which required grant recipients to convey a fifty-year or perpetual easement to the

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*Depends Upon Who is the Grantee*, 26 VA. ENVTL. L.J. 429 (2008); Frederick S. Fisher, *Condemning Protected Open Space Land: Perspective of the Virginia Outdoors Foundation*, 26 VA. ENVTL. L.J. 437 (2008).

<sup>319</sup> See *Listing of National Historic Landmarks by State: Massachusetts*, NAT'L PARK SERV., <http://www.nps.gov/nhl/find/statelists/ma/MA.pdf> (last visited Oct. 26, 2016).

<sup>320</sup> See *Listing of National Historic Landmarks by State: North Dakota*, NAT'L PARK SERV., <https://www.nps.gov/nhl/find/statelists/nd/ND.pdf> (last visited Oct. 26, 2016).

<sup>321</sup> Notably, the NHL program did have regional historians who were intended to monitor their sites periodically, but this did not work in practice, and was eliminated in 1966. See MACKINTOSH, *supra* note 6, at 60.

<sup>322</sup> See NAT'L TR. FOR HISTORIC PRES., BEST PRACTICES FOR ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP 39–40 (2008) (discussing the process of determining the appropriate easement-holder and what factors go into this process).

applicable SHPO as a condition of their projects being funded.<sup>323</sup> This is somewhat akin to the long-established arrangement between the NPS and the SHPOs for the review and administration of historic rehabilitation tax credit projects, a highly successful partnership.<sup>324</sup> A cooperative arrangement of this type adheres to a basic preservation principle—“that historic properties are best looked after by the people and organizations closest to them.”<sup>325</sup> “The goal should be to have as many of these restrictions on national landmarks as possible with as little public cost as possible, rather than have the easement in any and all events in the hand of the ‘logical holder.’”<sup>326</sup>

If it is ultimately desirable for the NPS to hold these easements, there is also the potential for a formal delegation of management responsibilities to the SHPOs, or for entering into a co-holding arrangement.<sup>327</sup> This solution was suggested by Brenneman in his 1974 report—“[t]he point is that merely because the National Park Service is the holder of easements on National Historic Landmarks, it should not be assumed that all day-to-day management responsibilities must necessarily be taken care of by it.”<sup>328</sup> In many areas, the NPS would be able to rely on experienced and qualified state or local governments or non-profit organizations to take on the monitoring and enforcement of any acquired easements on behalf of NPS. Overall, the geographic distribution of NHLs would certainly present challenges, but should not be insurmountable.

#### b. *Transaction Costs*

Beyond the geographic distribution, obtaining new preservation easements is not a cost-neutral exercise.<sup>329</sup> Negotiating preservation easements can be a time-consuming

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<sup>323</sup> See NAT’L PARK SERV., *supra* note 291, at 6–41 (providing SAT template easement).

<sup>324</sup> See Brian Goeken, *Tax Credit Resources from the National Park Service*, F.J., Spring 2013, at 53; see also Andrew Potts, *When Preservation Came to the Tax Code*, F.J., Spring 2013, at 7 (for a detailed history of the development of this credit).

<sup>325</sup> See BRENNEMAN, *supra* note 13, at v.

<sup>326</sup> *Id.* at 126.

<sup>327</sup> See BYERS & PONTE, *supra* note 235, at 178–79 (describing the benefits of this potential approach).

<sup>328</sup> BRENNEMAN, *supra* note 13, at 127.

<sup>329</sup> See Nat’l Tr. for Historic Pres., *supra* note 322, at 39–40.

endeavor even with a willing donor or grant recipient.<sup>330</sup> Each easement needs to be tailored to a specific property, and inevitably some negotiation will be involved.<sup>331</sup> “Historic preservation easements . . . involve different drafting and stewardship considerations than other conservation easements.”<sup>332</sup> For example, “[a] key factor to drafting historic preservation easements is to provide sufficient flexibility to ensure that the building will be usable for future residents, while respecting the past.”<sup>333</sup> Some standardization, in the form of a model easement adopted by the NPS to be used by the agency or its designated easement-holders, could streamline some of this process.<sup>334</sup> Beyond negotiating the language of the easement document, baseline documentation will need to be performed to establish the condition of the property at the time of the donation or grant.<sup>335</sup> This baseline documentation typically consists of floor plans, site plans, and comprehensive documentary photography, which is vitally important in demonstrating the condition of the resource in case of a potential violation or casualty event.<sup>336</sup> Depending on the staffing of the easement-holder, this documentation may be performed in-house or it may require outsourcing to a third party or commercial entity.<sup>337</sup> Overall, transaction costs associated with

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330 See BYERS & PONTE, *supra* note 235, at 43 (“One thing to count on is that acquiring a conservation easement takes time.”).

331 See HOWARD, *supra* note 207, at 90.

332 BYERS & PONTE, *supra* note 235, at 72.

333 *Id.* (quoting Paul Edmonson, V.P. and Gen. Counsel, Nat’l Tr. for Historic Pres.).

334 See JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 9 (2005), [http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/reinventing\\_ces\\_critical\\_examination\\_and\\_ideas\\_for\\_reform.pdf](http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/reinventing_ces_critical_examination_and_ideas_for_reform.pdf) (referring to the need for more standardized language); WATSON & NAGEL, *supra* note 214, at 18–19. Some of the development of NHL preservation easements should be made less complex, as the properties have generally already been thoroughly researched and documented, which reduces the need for some threshold historic research. See *id.*

335 See BYERS & PONTE, *supra* note 235, at 100–15 (discussing baseline documentation generally).

336 See NAT’L TR. FOR HISTORIC PRES., *supra* note 323, at 39–40 (describing the basics of documentation and the requirements involved in various transactional forms).

337 See BYERS & PONTE, *supra* note 235, at 102 (exploring the issue of who prepares the baseline documentation). Various other legal requirements apply, including the recording requirements associated with standard real estate transaction and charitable donations. See WATSON & NAGEL, *supra* note 214, at 17–18.

the negotiation and acquisition of preservation easements could be a barrier—but not an absolute bar—to expanding efforts to protect additional NHLs through this mechanism.

c. *Costs of Monitoring and Enforcement*

Once a preservation easement is in place, the work of the easement-holder truly begins.<sup>338</sup> Responsible easement-holders monitor each protected property at least annually and more often when rehabilitation or repair work is underway, as that is when a property is most vulnerable to inadvertent loss.<sup>339</sup> At its best, this monitoring involves a professional staff—to perform site visits to evaluate compliance with the terms of the easement and to build professional relationship with property owners to facilitate working relationships.<sup>340</sup> These site visits, and the correspondence between the property owner and easement-holder memorializing the approvals and issues discussed, must be documented for the easement-holder's records. Such records are also of critical importance should litigation prove necessary.<sup>341</sup>

Beyond monitoring, project review takes up a considerable amount of an easement-holder's time.<sup>342</sup> Many of the projects end up falling in the category of routine maintenance and are easily addressed under the easement's affirmative maintenance provisions.<sup>343</sup> Even so, a conscientious property owner may want advice on the best methods for carrying out routine maintenance and will seek advice from the professional staff before committing to a course of treatment.<sup>344</sup> Larger projects obviously require additional attention and scrutiny.<sup>345</sup> At many organizations, a project review committee will be tasked with consideration of this level of project, and will be bound by professional standards as well as the terms of the agreement in determining whether to

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338 See HOWARD, *supra* note 12, at 92–93 (discussing the long-term obligations associated with holding an easement).

339 See WATSON & NAGEL, *supra* note 214, at 18–19.

340 See *id.* at 18–19.

341 See *id.* at 19.

342 See *id.* at 20.

343 See NAT'L TR. FOR HISTORIC PRES., *supra* note 323, at 40.

344 See WATSON & NAGEL, *supra* note 214, at 20.

345 See, e.g., *Protecting Virginia's Historic Landmarks*, VA. DEP'T OF HISTORIC RES., <http://www.dhr.virginia.gov/easement/easement.htm> (last visited Mar. 1, 2016) (providing a project request form for owners of protected properties).

approve a requested modification.<sup>346</sup> Considerable staff time will be involved in working with a property owner and a property owner's contractors to provide guidance on the preparation of the request, to shape and influence the ultimate project, and to monitor implementation on the ground.<sup>347</sup>

On the violation side, an easement is a perpetual property interest and requires diligence from the easement-holder to ensure continued compliance.<sup>348</sup> When violations inevitably occur, the easement-holder will need to act to ensure that its interest remains protected.<sup>349</sup> Responses by the holder will necessarily vary upon the severity of the violation.<sup>350</sup> Not every violation requires legal action, but enforcement of easements does take attention to detail and the willingness and resources to intervene.<sup>351</sup> Enforcement takes considerable staff time and can be quite costly, potentially requiring litigation support.<sup>352</sup> To minimize the monitoring and

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<sup>346</sup> See, e.g., *Administration of the Preservation Easement Program*, HISTORIC NEW ENG., <http://www.historicnewengland.org/preservation/preservation-easements/administration-of-the-stewardship-program> (last visited Mar. 1, 2016) (explaining the role of the organization's easement review committee, tasked with evaluating proposed modifications).

<sup>347</sup> See WATSON & NAGEL, *supra* note 214, at 20. Normally, the earlier the easement-holder is involved in the project design process, the more successful the final project will be. If the holder can work with the architect and provide guidance early on, this input can be included in the project design, which can help to avoid false starts and other expensive commitments that can lead to conflict between the property owner and the easement-holder over the long-term. *See id.*

<sup>348</sup> See BYERS & PONTE, *supra* note 235 at 156–60 (discussing easement violations and a holder's obligations).

<sup>349</sup> See Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 388 (2001) ("Enforcement is key to maintaining the integrity of a conservation easement."); see also Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 758–59 (2005) (discussing the benefits and challenges stemming from non-enforcement and the desire of third parties to intervene to address a violation).

<sup>350</sup> See Jessica Jay, *Enforcing Conservation Easements Against Third Party Violators*, 32 UCLA ENVTL. L.J. 81, 82–84 (2014) (discussing violations generally); see also BYERS & PONTE, *supra* note 235, at 162–64 (examining how easement holders respond to violations).

<sup>351</sup> See generally Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373 (2001).

<sup>352</sup> See, e.g., *United States v. Blackman*, No. 3:04-CV-46, 2005 WL 2675095 (W.D. Va. Oct. 19, 2005) (charting DOJ's enforcement of the terms of an easement over a period of years), *aff'd*, No. 06-4167, 2007 WL 1578278 (4th

enforcement burden on the NPS, enforcement could be left to the applicable holder, or administered through a third party right of enforcement. This would allow NPS to intervene only when the easement-holder failed to enforce its interest.<sup>353</sup> Monitoring and enforcing easements protecting NHL properties will also take effort, but such an effort would ensure greater protection for the nation's most significant properties.

### CONCLUSION

Overall, historic preservation has evolved considerably in the eighty years since the enactment of the HSA, and even in the forty years since the recommendations from the Brenneman report. Once primarily focused on the acquisition of nationally significant historic resources, federal preservation policy is now considerably broader in its effort to be more representative of the true diversity of the American experience and to promote other societal goals beyond the interpretative historic house museum model.<sup>354</sup> Despite moving beyond these roots, the nation's most significant sites still merit considerable attention and focused effort to secure their long-term protection. As additional federal acquisition of large numbers of historic sites is not a likely or even realistic solution to achieving this important goal, other solutions are necessary.

Given resource constraints, it would appear that efforts to encourage or obtain preservation easement protection for privately-owned NHL properties provides the most realistic path forward—allowing preservationists to protect these resources without having to take on ownership and maintenance obligations. Ideally, such a model could be coupled with financial support that

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Cir. May 31, 2007). In light of the possible exposure, the Land Trust Alliance has recently established an insurance fund to defend their easements against legal challenges. See *About Terrafirma Risk Retention Group*, TERRAFIRMA, <http://www.terrafirma.org/about> (last visited Mar. 1, 2016).

<sup>353</sup> See Jessica Owley & Stephen J. Tulowiecki, *Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program*, 33 PUB. LAND & RESOURCES L. REV. 47, 89–90 (2012) (discussing enforcement issues and the potential benefits of having a third party right of enforcement as a supplemental remedy).

<sup>354</sup> See Stephanie Meeks, President, Nat'l Tr. for Historic Pres., Address at Hampton University: Towards a More Perfect Union: Engaging a More Diverse Community in Preservation (Oct. 10, 2014), <http://www.preservationnation.org/who-we-are/press-center/speeches-op-eds/towards-a-more-perfect-union.html> (discussing successes but charting the need for further effort in this vein).

could be reinvested in the physical care of protected resources to encourage broader owner participation. Short, however, of a focused effort to use this tool to secure NHLs, nationally significant resources will continue to be lost to deferred maintenance, insensitive alteration, and even to outright demolition. These are losses that could be avoided, and such an effort would play an important role in protecting some of the most important and fragile components of our collective built heritage.