

REEVALUATING THE ROLE OF ACQUISITION-BASED
STRATEGIES IN THE GREATER HISTORIC PRESERVATION
MOVEMENT

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“but there are points in connection with it which are not entirely devoid of interest and even of instruction.”¹

I. INTRODUCTION

Despite many striking similarities in their respective goals, organizational structures, and in their often-comingled histories, there are meaningful differences in the approaches taken by contemporary land conservation and historic preservation advocates.² This gap is most visible when it comes to the role that strategies based on securing affirmative resource protection play in their comparative efforts to protect the environment—both natural and built.³ Land conservation advocates largely default to acquisition-based strategies in order to ensure the perpetual protection of targeted tracts—most commonly through the use of conservation easements.⁴ Land trusts, although initially a small player in the environmental movement, have continued to expand the scope of their efforts and have utilized acquisition-based strategies to protect

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¹ Arthur C. Doyle, *The Adventure of the Blue Carbuncle*, in *THE NEW ANNOTATED SHERLOCK HOLMES* 196, 197–98 (Leslie S. Klinger ed., 2005).

² Val Talmage, *Lessons from Land Conservation*, *FORUM J.*, Fall 2010, at 11, 16.

³ *Id.*

⁴ Julie A. Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS, PAST, PRESENT AND FUTURE* 9, 11–16 (Julie A. Gustanski & Roderick H. Squires eds., 2000).

millions of acres over the past several decades.⁵ Land conservation's operating playbook, seemingly drawn from thin air in the late 1960s and early 1970s, is actually the complex product of an evolutionary developmental history shaped by numerous layered choices regarding how best to incorporate non-economic policy considerations into the collective management of the American landscape.⁶ Their work, however, is at its most basic level unquestionably shaped by a strong policy preference to use acquisition as the favored strategy often regardless of the ultimate land management objective.⁷

Although historic preservationists have many similar goals as far as protecting historic properties, acquisition-based strategies play a much smaller role in their efforts.⁸ As a general rule, preservationists are much more likely to rely on regulatory controls, incentive programs, and site-specific advocacy as they seek to avoid adverse impacts to targeted heritage sites.⁹ To a lesser extent, affirmative resource protection is often seen as a highly desirable objective, but one that is often frustrated by a lack of resources or by a more immediate need to focus on other issues, such as preventing a historic structure's pending demolition or imminent collapse.¹⁰ This remains the case despite the fact that there are new and

⁵ RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 2–8 (2004) (exploring the explosive development of the land trust movement). *But see* Nancy McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND USE & ENVT'L L. 47, 52–55 (2005) (discussing the field's challenges in reaching maturity).

⁶ SALLY K. FAIRFAX ET AL., BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004 8–12 (2005) (rejecting the standard origin story of the land trust movement in favor of a more complex mosaic of various competing priorities and policy considerations that have directly influenced its existing form).

⁷ Federico Cheever & Jessica Owley, *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OCPEs)*, 40 HARV. ENVT'L L. REV. 1, 2 (2016) (discussing the predominant and relatively dynamic role that land trusts play in the modern environmental movement); *see also* Nancy McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 3 UTAH L. REV. 687, 703–07 (2013) (charting the exponential growth of land trusts during the last twentieth century and exploring potential future directions of the movement overall).

⁸ To some extent this approach may have merit as reliance on acquisition-based tools is not without its own set of issues. *See, e.g.*, Julia D. Mahoney, *Land Preservation and Institutional Design*, 24 J. ENVT'L L. & LITIG. 434 (2008) (critiquing perpetual land restrictions as unrealistic and advocating for structural reforms).

⁹ Talmage, *supra* note 2, at 16 (discussing preservationists' failure to more creatively leverage their resources to support preservation work/resource protection generally). These strategies, however, can be quite successful for certain types of projects. *See, e.g.*, David Weible, *Cincinnati's Union Terminal Now Saved for Future Generations*, NAT'L TRUST FOR HISTORIC PRES. (Nov. 5, 2014), <https://savingplaces.org/stories> (discussing advocates' successful campaign to leverage public funds to save an important threatened local landmark).

¹⁰ Sarah N. Conde, *Striking a Match in the Historic District: Opposition to Historic Preservation and Community Building 1*, 14–16 (Georgetown Law: The Scholarly Commons, Working Paper No. 24, 2007), available at http://scholarship.law.georgetown.edu/hpps_papers/24 (discussing opposition to historic districts generally); WASHINGTON, D.C. HISTORIC PRES. REVIEW

increasingly sophisticated challenges to the traditional model of historic preservation, including a growing reluctance towards using regulatory controls to protect significant historic neighborhoods,¹¹ the challenges that historic coastal communities face in confronting sea-level rise,¹² and in making the field more representative of the shared American experience.¹³

For a variety of reasons then, contemporary historic preservation advocates have placed much less of an emphasis on acquisition-based strategies than their land conservation counterparts.¹⁴ This focus has contributed to a meaningful divide between the preservation and conservation disciplines as far as how to approach a given resource problem.¹⁵ This gap is worthy of close examination to explore the reasons for this divergence, as well as how it impacts relative practices within the two closely-aligned disciplines as a lens for examining their relative efficacy. In particular, this comparative examination can provide direct insight into the structure of current historic preservation practice and help us to assess whether acquisition-based strategies can be utilized to greater advantage in their efforts to protect the built environment.

To understand the origins of the comparative gap in practice, Section II of this article explores the evolving role that acquisition-based

BD., STAFF REPORT AND RECOMMENDATION, ANACOSTIA HISTORIC DISTRICT 4–5 (2015) (noting the challenges associated with preventing demolition by neglect).

¹¹ *Tools to Help Protect Your Historic District*, PRES. LEADERSHIP BLOG (Mar. 30, 2016, 4:16 PM), <http://forum.savingplaces.org/blogs/forum-online/2016/03/30/tools-to-help-protect-your-historic-district> (profiling recent legislative challenges); see also Kriston Capps, *Why Historic Preservation Districts Should Be a Thing of the Past*, CITYLAB (Jan. 29, 2016), <http://www.citylab.com/housing/2016/01/why-historic-preservation-districts-should-be-a-thing-of-the-past/431598> (profiling the legislative challenges against regulatory districts as restrictive of affordable housing).

¹² Anthony Veerkamp, *Preservation in a Changing Climate: Time to Pick up the Tab*, FORUM J., Summer 2015, at 9, 12–13 (discussing the challenges preservationists face in dealing with sea level rise—both resources and addressing this within the framework of our current views on how to assess significance and integrity).

¹³ J. Peter Byrne, *Historic Preservation and its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 666 (2012) (countering and critiquing arguments regarding historic preservation's impacts on urban design/communities).

¹⁴ Lina Confresí & Rosetta Radtke, *Local Government Programs: Preservation Where it Counts*, 117, 122–23, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY (Robert E. Stipe ed., 2003) (profiling the priorities of local historic preservation organizations).

¹⁵ Talmage, *supra* note 2, at 16 (discussing the relative approaches of land trusts and preservation advocates when confronting a given problem). While this article largely focuses on the shortcomings of the modern preservation community with regard to acquisition-based strategies, there are clearly things that preservationists do exceedingly well that land trusts could similarly draw from. See Wendy Nicholas, *Collaborating to Save Whole Places*, FORUM J., Fall 2010, at 7, 8–9 (profiling the intersection of preservation and land conservation strategies).

strategies have played within the historic preservation arena and how these efforts fit within the wider mosaic of historic preservation law. Section III will examine the common origins of land conservation and historic preservation, with a particular focus on their collaborative work in developing the modern conservation easement as the primary acquisition-based strategy. Section IV will evaluate the various reasons that acquisition-based strategies have played such a comparatively large role within land conservation efforts—institutional, structural, and financial. Finally, Section V will offer some focused suggestions regarding how acquisition-based strategies could be better incorporated into the contemporary historic preservation efforts. Ultimately, historic preservation, if it is to better incorporate acquisition-based resource protection, will likely need to evaluate the shortcomings of the current structural model and adapt its strategies accordingly in order to provide better options for protecting the built environment.

II. A HISTORY OF HISTORIC RESOURCE PROTECTION

While resource protection plays a role in historic preservation efforts, this is often not the primary strategy as other considerations are equally and perhaps even more important for preservationists seeking to advocate for the built environment both locally and nationally.¹⁶ As it is the purpose of this article to explore acquisition-based resource protection efforts, it is perhaps necessary to develop a working definition to clarify what is actually being investigated. Thus, within this article, acquisition-based resource protection refers to direct efforts to protect a historic site or conservation parcel (such as purchase of a property or an interest in a property) rather than more indirect efforts (such as advocacy or encouraging investment in historic infrastructure or in restoration activities), which may also result in similar outcomes. Based upon the limitations of fee acquisition, this article will largely center on preservation easements.¹⁷

Within historic preservation, resource protection has always played a meaningful role in efforts to save important places. However, its function has not been the same over the field's history, as goals have evolved to

¹⁶ Ryan Howell, *Throw the "Bums" Out? A Discussion of the Effects of Historic Preservation Statutes on Low-Income Households Through the Process of Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUSTICE 541, 552–54 (2008); see also THOMPSON MAYES, *WHY DO OLD PLACES MATTER?: HOW HISTORIC PLACES AFFECT OUR IDENTITY AND OUR WELLBEING* 6–22 (2015) (providing perspective on the various motivations behind preservation efforts and why it matters).

¹⁷ For a general discussion of the financial challenges of house museums, see Gretchen Sullivan Sorin, *Foreward* to FRANKLIN D. VAGNONE & DEBORAH E. RYAN, *ANARCHIST'S GUIDE TO HISTORIC HOUSE MUSEUMS* 11 (2015).

accommodate shifting societal priorities and objectives.¹⁸ To overly generalize a non-homogenous field that has strong regional variations, the predominant operating model within the preservation arena can be viewed as going through three primary phases of development; each is addressed in turn below.¹⁹

III. MARKET INTERVENTION—A STARTING POINT

The earliest historic preservation projects involved the direct acquisition of historic properties, typically for operation as house museums.²⁰ These projects often had a vague goal of both protecting the resources and also using these facilities for educating the public about various aspects of the nation's historical development.²¹ The earliest projects were tailored and expressly designed to use capital, most often privately raised, to protect historic properties through fee ownership.²² Within the preservation arena, these projects were typically the province of non-profit organizations, as the federal government would not play a large role in acquiring and operating historic sites until the New Deal began to transform the relationship between government and the nation's

¹⁸ CHARLES B. HOSMER, JR., PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG 29–40 (1965) (profiling the earliest preservation efforts). This summation is also less linear than typically described as a complicated mixture of different factors and influences have shaped the movement's history. *See also* RANDALL MASON, THE ONCE AND FUTURE NEW YORK: HISTORIC PRESERVATION AND THE MODERN CITY xi–xx (2009) (challenging myths about preservation's origins and profiling the more complete range of actions that early preservationists championed).

¹⁹ Max Page & Randall Mason, *Introduction: Rethinking the Roots of the Historical Preservation Movement* to GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION 3, 6–8 (Randall Mason & Max Page eds., 2004) (providing a summation of the history of the preservation movement but cautioning generalization given the regional and local variability).

²⁰ Walter M. Whitehill, "Promoted to Glory . . .": *The Origin of Preservation in the United States*, in WITH HERITAGE SO RICH 137, 139 (1966); *see also* Nicholas A. Robinson, *Historic Preservation Law: The Metes and Bounds of a New Field*, 1 PACE L. REV. 511, 514–18 (1980) (profiling the development of this area of law).

²¹ *See, e.g., Early History of the Mount Vernon Ladies' Association*, MOUNT VERNON, <http://www.mountvernon.org/research-collections/digital-encyclopedia/article/early-history-of-the-mount-vernon-ladies-association/> (last visited Feb. 28, 2016) (explaining motivations behind the acquisition of Mount Vernon by the Mount Vernon Ladies Association and Ann Pamela Cunningham in the late 1850s); *see also* Thomas J. Reed, Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME L. REV. 379, 390–91 (1968) (charting this thread of acquisition activity more broadly).

²² Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 708–09 (1963) (discussing the evolutionary growth of the historic house movement); *see also* Jessica Owley, *Cultural Heritage Conservation Easements: Heritage Protection with Property Law Tools*, 49 LAND USE POL'Y 177, n.1 (2015) (discussing the use of property mechanisms to protect historic sites—largely through fee acquisition).

most significant historic sites.²³ Despite a lack of consistent and meaningful governmental support, early preservation advocates were able to generate considerable enthusiasm for purchasing historic sites, as thousands of local historical organizations formed to protect individual structures in the pre-World War II period and beyond.²⁴

Not surprisingly, the primary challenge that the early proponents of these projects faced was ensuring their financial sustainability. Acquiring the properties was one thing, but covering the ongoing maintenance and operating costs was quite another.²⁵ Admissions and other revenues were seldom sufficient to cover the often-considerable expenses of operating a historic site as a house museum.²⁶ For example, William Sumner Appleton of the Society for the Preservation of New England Antiquities (“SPNEA”), who is often described as the first “professional” preservationist, was at least somewhat conscientious in seeking to assure that his organization’s projects were facially capable of being self-sustaining.²⁷ In addition to having a preservation purpose, his projects would also include an economic model that potentially allowed for a

²³ MICHAEL A. TOMLAN, HISTORIC PRESERVATION: CARING FOR OUR EXPANDING LEGACY 33–34 (2015); *see also* Note, *La Recherche du Temps Perdu: Legal Techniques for Preservation of Historic Property*, 55 VA. L. REV. 302, 302–05 (1969) (discussing the limited reach of early preservation activities); Melissa A. MacGill, *Old Stuff is Good Stuff: Federal Agency Responsibilities under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L. J. 697, 703 (1994) (noting the limited early federal role).

²⁴ WALTER M. WHITEHILL, INDEPENDENT HISTORICAL SOCIETIES 1–18 (1962) (addressing the explosive growth of local historic organizations to protect individual resources). Up through the New Deal, governmental bodies at the state and federal level were extremely reluctant to fund preservation projects—even those involving resources of transcendent national importance, such as Jefferson’s Monticello. *See* HOSMER, *supra* note 18, at 160–65 (profiling the congressional debate over this proposed acquisition). Despite this public enthusiasm, acquisition efforts overwhelmingly centered a narrow band of historic resources—generally those associated with the founding fathers and the revolutionary period. *See* VAGNONE & RYAN, *supra* note 17, at i (discussing the formations of the field as well as the challenges and opportunities faced by museum professionals in becoming more inclusive and responsive to their contemporary communities writ large).

²⁵ *See, e.g.*, JANE C. NYLANDER & DIANE L. VIERA, WINDOWS ON THE PAST: FOUR CENTURIES OF NEW ENGLAND HOUSES 17 (2d ed. 2009). This challenge remains today as many house museums struggle to survive and care for their legacy real estate holdings. *See* DONNA A. HARRIS, AFTER THE HOUSE MUSEUM: ENSURING THE LONG-TERM PRESERVATION OF AMERICA’S HISTORIC HOUSES 3–4 (2010).

²⁶ Cary Carson, *The End of History Museums: What’s Plan B?*, PUB. HISTORIAN, Fall 2008, at 9, 10–13 (discussing resource issues that historic house museums have faced over their entire history).

²⁷ *The Society for the Preservation of New England Antiquities*, BULL. OF THE SOC’Y FOR THE PRES. OF NEW ENGLAND ANTIQUITIES, May 1910, at 4. Despite this focus on sustainability, funding would become a challenge for SPNEA as the organization expanded. The organization likely acquired more properties in its early years than it could steward, which would be a drag upon its operations that would not be fully addressed until the 1980s when its easement program began to deaccession many of its properties—demonstrating the ability of easements as a legal mechanism for protecting important early structures. *See* NYLANDER & VIERA, *supra* note 25, at 219–20

meaningful portion of the carrying costs to be deferred, either through parallel operation as a business or even as a private residence.²⁸ In the organization's early years, this earned income was a vital component in allowing the organization to leverage its limited donated funds to their greatest possible effect and often helped Appleton to convince SPNEA's trustees that acquiring additional properties would not be an undue burden on the organization's already stressed operations.²⁹ Whether this economic sustainability was actually obtained is another question, and probably should be counted in the negative, as the organization would eventually deaccession many of its acquisitions during the 1970s and 1980s when other protective options became available, in an effort to reduce a considerable maintenance backlog and constantly growing operating expenses.³⁰

While early market intervention certainly allowed important sites to be preserved, the use of fee purchases to accomplish these transactions perhaps diluted the movement's early momentum and the ability of advocates to creatively leverage this support to protect larger numbers of important historic resources.³¹ This reliance on outright purchase, as the

²⁸ Comment, *Legal Methods of Historic Preservation*, 19 BUFF. L. REV. 611, 615 (1969) (discussing SPNEA's operating model). Revenue drawn from museum attendance exclusively was not, and still is not alone, a successful model for caring for these heritage assets. See HISTORIC NEW ENGLAND, ANNUAL REPORT FISCAL YEAR 2015 24–25 (2015). For example, the organization's financial statement for FY 2015 notes that only 18 percent of the organization's income came from revenue from all operations (\$2,159,000). The cost of maintaining the organization's historic sites alone (\$2,879,000) exceeds this amount (not to mention operation and public programming expenses). Thus, the organization continues to rely on endowment support and contributed income to fund its operations. *Id.*

²⁹ Albert Wolfe, *Conservation of Historical Buildings and Areas—Legal Techniques*, ABA PROC. SEC. OF REAL PROPERTY, PROB. AND TRUST LAW, Aug. 1963, at 18, 18–19. This type of approach was not always successful. Wallace Nutting, another early advocate for historic resources, tried to make preservation into a sustainable business model by acquiring a network of historic properties designed as tourist attractions during the 1920s. This effort was ultimately not successful. See THOMAS A. DENENBERG, WALLACE NUTTING AND THE INVENTION OF OLD AMERICA 113 (2004) (discussing Nutting's attempts to market a "chain" of colonial-era houses). This focus is still vitally important to house museums. See Katherine Malone-France, *Shared Use in Action at Cooper-Molera Adobe*, PRES. LEADERSHIP BLOG (Aug. 20, 2015, 4:38 PM), <http://forum.savingplaces.org/blogs/forum-online/2015/08/20/shared-use-in-action-at-cooper-molera-adobe> (discussing efforts to diversify the funding mix at NTHP historic sites); Kimberley Bender, *Brewmaster Studios: A Community Partnership Takes Off*, PRES. LEADERSHIP BLOG (Mar. 29, 2016, 2:51 PM), <http://forum.savingplaces.org/blogs/special-contributor/2016/03/29/brewmaster-studios-a-community-partnership-takes-off> (profiling the efforts of Washington D.C.'s Heurich House museum to create mission related opportunities and partnerships to offset some operating costs).

³⁰ Jessica Neuwirth et al., *Abbott Lowell Cummings and the Preservation of New England*, PUB. HISTORIAN, Fall 2007, at 57, 65–66 (discussing the organization's deaccession efforts and the reasons this course of action was ultimately pursued).

³¹ Richard A. Moe, *Are There Too Many House Museums?*, FORUM J., Fall 2002, at 1 (discussing the resource challenges currently faced by the field).

only legal tool generally available at the time, was highly resource intensive due to acquisition costs, any rehabilitation expenses, and ongoing carrying costs associated with these projects.³² Many early preservation organizations would and are still grappling with the consequences of this complicated legacy, as in some instances it fundamentally reshaped their missions, in whole or in part, away from advocacy or intervention efforts towards more resource management or interpretive-centric operations.³³

A. The Shift to a Regulatory Paradigm

Acquisition of historic sites was the initial model for historic preservation, but direct regulation of historic properties quickly overtook market intervention as the preferred method of protecting historic properties.³⁴ The shift towards regulatory approaches was motivated by the idea of context and the express recognition that a strategy relying exclusively on individual acquisitions lacked the ability to protect

³² ROGER R. WEYENETH, *HISTORIC PRESERVATION FOR A LIVABLE CITY: HISTORIC CHARLESTON FOUNDATION 1947–1997*, 10 (2000) (describing the organization’s early museum efforts as enormously expensive and not easily capable of replication). Beyond the traditional house museum model, a few notable early efforts attempted to purchase historic properties, rehabilitate the structures, and then sell the historic properties to sensitive owners. Although the restored properties might have lacked long-term protection, they demonstrated the economic viability of restoring historic houses and put these resources back to productive use. *See* TOMLAN, *supra* note 23, at 49–53 (profiling efforts in Charleston and Providence to use real estate investment mechanisms as a preservation strategy through these proto-revolving funds).

³³ JAMES LINDGREN, *PRESERVING THE OLD DOMINION: HISTORIC PRESERVATION AND VIRGINIA TRADITIONALISM* (1993) (discussing the evolution of the Association for the Preservation of Virginia Antiquities, founded in 1889, which is now Preservation Virginia). Preservation Virginia has over its history owned over 200 historic properties, many of which are now owned and operated by other organizations (or have returned to private ownership). For example, the organization’s holdings in Fredericksburg were turned over to a new 501(c)(3) non-profit. *See* WASHINGTON HERITAGE MUSEUMS, <http://www.washingtonheritagemuseums.org> (last visited Feb. 28, 2016). The National Trust for Historic Preservation has also faced this dilemma in recent years as it works to confront its legacy real estate holdings. *See* Stephanie Meeks, *Speech at Gathering of National Trust for Historic Preservation: Historic House Museums: A 20th Century Paradigm* (Oct. 30, 2013) (transcript available at <https://savingplaces.org/press-center/media-resources/house-museums-a-20th-century-paradigm>). *But see* Ruth Graham, *The Great House Museum Debate*, *BOSTON GLOBE*, Aug. 10, 2014 (profiling the current debate in the historic house museum field about the role and the continuing value of these legacy institutions).

³⁴ WILLIAM J. MURTAGH, *KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA* 103–04 (1990); *see also* Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 *FORD. L. REV.* 729, 734–39 (1961) (profiling the development of regulatory districts). The transition from acquisition to regulation happened gradually over the course of the twentieth century as local historic district regulation demonstrated its ability to protect historic neighborhoods and gained legal support. *See* Paul S. Byard, *Historic Preservation Law and Advocacy*, 1 *PACE L. REV.* 615, 615–18 (1980).

meaningful communities from insensitive development.³⁵ In short, in order to obtain its desired results, the movement needed to work at a much larger scale than acquisition-based organizations could operate, even if practically and financially feasible.³⁶ To accomplish these objectives, advocates began to experiment with land use regulations—namely through the development of the local historic district ordinance (district-based) and less commonly through landmarks laws (typically single resource-based).³⁷ Generally, a local historic district or landmarks ordinance defines protected areas or resources subject to binding design controls and typically requires property owners to seek approval from a regulatory commission before making certain exterior modifications to their historic properties.³⁸ Overall, regulating historic sites was and is generally predicated on the idea of mutual benefit.³⁹ In theory, a property owner can be burdened by regulatory controls because of the offsetting benefits that they and other resource owners receive by virtue of the reciprocal limits placed on the larger whole. For example, while it may arguably cost a property owner more to maintain her historic property as required under historic district regulations, these compliance costs are ideally offset by the benefits of certainty as far as neighborhood appearance, known development patterns, and generally-rising property values.⁴⁰ This facially cost-neutral mechanism with its regulatory predicate was appealing, as it allowed advocates to protect large contextual assemblages of buildings without having to expend many

³⁵ *Legal Methods of Historic Preservation*, 19 BUFF. L. REV. 611, 616 (1969) (“[p]reservation of a few isolated old houses appears a pathetic and dreary effort; a visit to one of the ‘antiquities’ is likely to evoke discomforting thoughts of foolish elderly aunts and musty corners.”).

³⁶ HOSMER, *supra* note 18, at 29–40.

³⁷ TOMLAN, *supra* note 23, at 28–30.

³⁸ See Reed, *supra* note 21, at 383 (summarizing land use regulations in this context). District regulations can vary considerably depending upon the objectives of the community. For example, some communities may regulate paint color; others may not include this within the scope of their ordinance. Other forms of regulatory control include local landmarking of historic resources (imposing restrictions on individual landmark properties) and demolition delay ordinances (imposing requirements on a property owner seeking to demolish a historic structure—which also vary—but can include a waiting period and first offering the property to the community for purchase at its appraised value). See, e.g., John S. Pyke, Jr., *Architectural Controls and the Individual Landmark*, 36 LAW & CONTEMP. PROBS. 398, 402–05 (1971) (discussing these tools).

³⁹ BILL SCHMICKLE, *THE POLITICS OF HISTORIC DISTRICTS: A PRIMER FOR GRASSROOTS PRESERVATION* 30–48 (2007) (discussing the considerations typically underlying an effort to create a new local historic district and the underlying arguments in favor of such a campaign). The validity of early preservation ordinances was in question through the 1970s. The Court’s decision in *Penn Central* validated historic landmarking regulations and has provided the constitutional basis for expanded regulatory action in this sphere. Christopher J. Duerksen & David Bonderman, *Historic Preservation Law: Where It’s Been, Where It’s Going*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 1, 13–20 (Christopher J. Duerksen ed., 1983).

⁴⁰ See Reed, *supra* note 21, at 387–89 (exploring the need to protect the contextual setting of historic sites and the corresponding economic value of this type of initiative)

resources—either privately or through government expenditures—other than the costs of creating the district and of providing funding/support the commission tasked with design review.⁴¹ Thus, the ability of the regulatory model to protect larger numbers of properties with little or minimal direct cost was a very attractive policy solution to contemporary preservation advocates.⁴²

From a relatively slow start (largely limited to the southern United States before the Second World War), local historic districts became an increasingly popular preservation model from the 1960s onward, after the constitutional authority to utilize this type of regulatory authority was clarified by various court rulings, and ultimately by the Supreme Court in its 1978 decision in *Penn Central*, upholding New York City's landmarks law.⁴³ It is currently estimated that there are over 2,300 local historic districts nationwide.⁴⁴ Despite the relative popularity of this mechanism, regulatory controls are not capable of addressing all resources worthy of protection.⁴⁵ For one, regulatory efforts of this nature are not conducive or politically acceptable in all areas meriting focused preservation attention.⁴⁶ While opposition to this form of regulatory control has always been present, it appears to be growing.⁴⁷ Local land

⁴¹ See JACOB H. MORRISON, *HISTORIC PRESERVATION LAW* 133–34 (1965) (exploring early local historic district efforts); see also BILL SCHMICKLE, *PRESERVATION POLITICS: KEEPING HISTORIC DISTRICTS VITAL* 1–7 (2012) (discussing the efficient operation of historic districts generally).

⁴² NORMAN TYLER ET AL., *HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE* 155 (2d ed. 2009). This did not, however, completely stop the earlier efforts to protect properties through fee ownership. Even through the current time, there are properties that for a variety of reasons merit operation as a museum and new house museums do open—although much less frequently than in previous periods. See Carl R. Nold, *The Eustis Estate*, *HISTORIC NEW ENGLAND*, Winter 2013, at 6, 6–9 (explaining the organization's motivations/reasons for recently acquiring and preparing to open this 1878 Gilded Age mansion as a house museum).

⁴³ Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals*, in A RICHER HERITAGE: *HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY*, *supra* note 14, at 1, 15 (noting that “[m]uch of the recent success of preservation at the local level has rested on [this] spectacular, if narrow, 5–4 decision of the Supreme Court in 1978”); see also Byard, *supra* note 34, at 615–18 (detailing the advocacy leading up to the *Penn Central* decision).

⁴⁴ *Working in the Past in Local Historic Districts*, NAT'L PARK SERV., <http://www.nps.gov/tps/education/workingonthepast/> (last visited Feb. 28, 2016) (profiling historic district efforts nationally).

⁴⁵ John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of the Urban Landmark*, 85 HARV. L. REV. 574, 580–82 (1972) (evaluating the effectiveness of local historic districts and landmark programs where property values are lower or the density of properties is roughly equivalent to avoid differential comparison between varying resource types).

⁴⁶ See *Tools to Help Protect Your Historic District*, PRES. LEADERSHIP BLOG, *supra* note 11.

⁴⁷ Mark D. Brookstein, *When History is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI-KENT L. REV. 1847, 1863 (2001) (discussing local advocates inability to protect an important local area in the face of strong opposition). *But see* SCHMICKLE, *supra* note 39, at 6–8 (exploring the process of creating a local historic district and noting that the

use regulations are also typically unable to protect interior elements or historic properties needing individualized treatment (either owing to location, the nature of the resource, or the resource's heightened significance).⁴⁸ Beyond coverage gaps, local land use regulations do not provide incentives or fund direct investment in historic infrastructure, leaving owners to bear much of the compliance burden, and create a perceived need or benefit for policy solutions to provide assistance.⁴⁹ As a result of these gaps, considerable reliance continues to be placed on individual property owners to maintain important historic structures without support or guidance from preservation advocates at any level.⁵⁰ It is clear, however, that despite these challenges and limitations, the preservation movement largely embraced regulatory controls as an operational model in the 1960s and 1970s, which potentially eliminated some of the earlier motivation to utilize acquisition-based strategies to protect heritage resources.

B. The Development of Incentives

During the 1980s, additional tools were developed to encourage additional preservation effort, namely (1) the historic rehabilitation tax credits (funding investment in critical urban infrastructure); and (2) the charitable deductions for qualifying conservation easement donations (facilitating individualized protection of historic resources).⁵¹ These tools were designed to address perceived gaps in the dominant regulatory

challenges preservationists face are not insurmountable even in areas seemingly not disposed to take this form of action).

⁴⁸ Albert H. Manwaring, IV, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations*, 25 NEW ENG. L. REV. 291, 291-93 (1990) (discussing limitations on the authority of local governments to protect historic interior features).

⁴⁹ Kathryn W. Howe, *Private Sector Involvement in Historic Preservation*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 14, at 279, 280-83 (noting the policy motivations behind tax incentives generally).

⁵⁰ Daphna Lewinson-Zamir, *The Conservation Game: The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J. L. & PUB. POL'Y 733, 746-51 (1997) (exploring the role of individual property owners in the historic preservation movement; by far, most investment in historic resources is a direct result of individual investment in historic homes and structures).

⁵¹ ELIZABETH WATSON & STEFAN NAGEL, ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 4, 8 (2007) (explaining the historical development of the tax incentives for easements targeting historic structures). The use of these new tools also was prompted by an expansion in the type of resource that preservationists began to target for attention. As "new" preservation took hold, the institutional framework necessarily came under stress and required finding new ways to accommodate these objectives. See Carol Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1980) (noting the expansion of this movement and the corresponding impact on the framework of historic preservation laws).

model and to bring market-based principles to bear on these resource challenges.

1. *The Historic Rehabilitation Tax Credit*

The historic rehabilitation tax credit created an important source of federal investment in the historic preservation sector.⁵² The initial purpose of the historic rehabilitation tax credit was to target investment into urban areas that traditional developers had largely overlooked.⁵³ By shifting capital towards rehabilitation rather than new construction, urban communities were able to use the historic tax credits as a powerful revitalization tool and overcome the existing post-World War II policy preferences associated with demolition, urban development/blight removal, and suburban development.⁵⁴ First enacted in the late 1970's, the historic rehabilitation tax credit provides investors with a tax credit for a portion of their investment costs—currently 20 percent for qualifying expenditures on qualifying historic structures, which is defined as a property designated on the National Register or contributing to a National Register Historic District.⁵⁵ To qualify for the credits, the investment must fund a “substantial rehabilitation” exceeding either the owner’s basis in the property or \$5,000.⁵⁶ The federal historic rehabilitation tax credit is often coupled with other federal and state tax credits to provide substantial amounts of the overall funding mix for certain types of qualifying projects.⁵⁷

While this extensive federal investment certainly ensures at least temporary security for the targeted resource, it does not ensure that after

⁵² *Historic Tax Credits*, NAT'L TRUST FOR HISTORIC PRES., <http://www.preservationnation.org/take-action/advocacy-center/policy-resources/historic-tax-credits> (last visited Feb. 28, 2016) (profiling the role of this tool in shaping urban communities).

⁵³ Stephanie Ryberg-Webster, *Urban Policy in Disguise: A History of the Federal Historic Rehabilitation Tax Credit*, 14 J. PLANNING HISTORY, Fall 2014, at 204; see also David C. Harrison, *Housing Rehabilitation and the Pittsburgh Graded Property Tax*, 2 DUQ. L. REV. 213, 213 (1964) (discussing the disincentives against projects involving rehabilitation rather than new construction).

⁵⁴ 121 CONG. REC. 3004 (1975) (discussing the motivations behind the new tax incentive legislation); see also Ryberg-Webster, *supra* note 53, at 208; David Listokin & Siona Listokin-Smith, *Response: Improving the Incentives for Historic Preservation—A Reply to David Kohtz*, 90 TEX. L. REV. 285, 288 (2012).

⁵⁵ 26 U.S.C. § 47 (2006); *20% Historic Rehabilitation Tax Credit*, NAT'L PARK SERV., <http://www.nps.gov/tps/tax-incentives/before-you-apply> (last visited Feb. 28, 2016); see also Andrew Potts, *When Preservation Came to the Tax Code*, FORUM J., Spring 2013, at 7 (profiling the development of this investment tool).

⁵⁶ 26 U.S.C. §§ 47(c)(1)(A), 47(c)(1)(C).

⁵⁷ Lauren K. Shores, Comment, *Defending the Historic Preservation Tax Credit*, 77 MO. L. REV. 199, 225 (2012) (discussing challenges to Missouri’s historic tax credits based upon criticisms that the tax credits were funding projects that were not economically viable); see SARA BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 615–17 (2012) (providing a case study of a tax credit project involving multiple funding streams).

the repayment period has run that the resource will remain in a state of good preservation, or even remain at all as there is no affirmative preservation requirement associated with the historic tax credits.⁵⁸ The tax credit also relies on market conditions to dictate which resources will receive what level of financial investment, which may or may not be the most significant structures from an overall preservation standpoint.⁵⁹ Structural limitations also impact the practical availability of this tool. For example, to benefit from the federal tax credits requires sufficient tax liability on the part of the developer, which will require either sufficient taxable income or syndication to others with sufficient exposure who can then utilize the credits.⁶⁰ The tax credit also does not apply to owner-occupied historic resources and requires a commercial use, further constraining its availability.⁶¹ Despite these limitations, the federal historic tax credit continues to play a leading role in historic preservation efforts and has spurred the rehabilitation of thousands of historic properties nationwide, which has had a multiplier effect in revitalizing historic neighborhoods more broadly.⁶²

2. Tax Incentives for Qualifying Conservation Easement Donations

Preservation non-profits and government entities have utilized preservation easements⁶³ as a tool to protect thousands of historic

⁵⁸ See 26 U.S.C. § 50(a) (2006). Recapture of the historic rehabilitation tax credits results when the building is disposed of or ceases to be investment property. The recapture period is five years, but drops on a percentage basis (20 percent) annually.

⁵⁹ Larry Curtis, *A Developer's Perspective: Embracing Diversity in Economic Development*, FORUM J., Spring 2014, at 32, 32–34 (discussing the role the tax credits play in a developer's financing model).

⁶⁰ David F. Schoen & Megan K. Palmer, *Historic Tax Credits Bring Needed Equity Financing to Urban Revitalization*, PROB. & PROP. Sept./Oct. 2012, at 45. Syndication of the credits earned from a project is the most common approach to addressing this issue, but the complexity and transaction costs can serve as a barrier to entry for smaller scale projects. See *Historic Preservation and Community Development: Why Cities and Towns Should Look to their Past as a Key to their Future: Hearing Before the Subcomm. on Federalism and the Census of the H. Comm. on Governmental Reform*, 109th Cong. 54–55 (2006) (statement of John Leith-Tetrault, Nat'l Trust for Historic Preservation) (discussing the challenges advocates of small projects face in accessing the credit—higher transaction costs and lower financial return).

⁶¹ 26 U.S.C. § 50(b)(2); see also *Dennis v. Comm'r*, T.C. Memo 1993-345, No. 3721-92 (Aug. 5, 1993) (denying tax incentives for property occupied by owner).

⁶² BRONIN & BYRNE, *supra* note 57, at 615. An example of this popularity is the growing number of states that have similarly implemented tax credit programs that can be coupled with the federal historic tax credits. See Erica Stewart, *The Historic Tax Credit: A Proven Community Revitalization Tool*, FORUM J., Spring 2013, at 35.

⁶³ There is a robust debate on the appropriate characterization of this form of property interest. See generally Michael Allan Wolf, *Conservation Easements and the "Term Creep" Problem*, 3 UTAH L. REV. 787 (2013). For the purposes of the article, preservation easements will be utilized to distinguish between land trust and historic preservation efforts throughout this Article where appropriate, but technically preservation easements are a subset or type of conservation easement

properties, but their use of easements has ebbed and flowed over time.⁶⁴ To provide a working definition of this legal mechanism, a preservation easement can be generally defined as an agreement whereby the owner of a historic property conveys to a third party (an easement-holder) a limited non-possessory (and typically perpetual) interest in their property.⁶⁵ This conveyance is intended to protect the historic property from insensitive alteration or demolition, and will grant the easement holder the ability to approve future alterations and to enforce the terms of the easement against future owners of the property.⁶⁶ The benefit to this approach from a preservation organization's standpoint is that it allows the organization to permanently protect historic properties without having to take on the considerable obligations of fee ownership.⁶⁷ From an owner's perspective, it allows for control and for protection of a property beyond their ownership or even their lifetime.⁶⁸ This transaction can be facilitated in a variety of ways—including purchase (market or bargain sale), exaction, or through charitable donation (as has most often been the case).⁶⁹ As a donation of a partial interest in real estate, the tax status of charitable donations of this nature was in question until IRS letter rulings in the 1960s and corresponding changes in tax policy, confirmed the charitable deductibility of qualifying transactions.⁷⁰ Since that time, tax

for IRS purposes. *See also* BRONIN & BYRNE, *supra* note 57, at 535 (discussing the debate over terminology in this arena).

⁶⁴ *See* Jessica Owley, *The Future of the Past: Historic Preservation Easements*, 35 ZONING AND PLANNING L. REP. 1, 1 (Nov. 2012) (discussing preservation easements generally); Richard J. Roddewig, *Preservation Easement Law: An Overview of Recent Developments*, 18 URB. LAW. 229 (1986) (discussing the development of preservation easements); *see also* RICHARD J. RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 121 (2011) (profiling the approximate number of easements held by various holders as of 2011). Some preservation organizations had been experimenting with rights of entry and covenants prior to enabling legislation allowing non-profit entities to acquire perpetual conservation easements, but this does not appear to have been an overly common practice. *See* Wolfe, *supra* note 29, at 19 (profiling SPNEA's use of these tools and some of the legal challenges practitioners faced in seeking to utilize common law instruments).

⁶⁵ TYLER ET AL., *supra* note 42, at 243–44. Under the Internal Revenue Code, historic preservation is one the conservation purposes for which a qualifying easement donation can potentially be claimed. *See* 26 U.S.C. § 170(h)(4)(A) (2006) (conservation purpose defined).

⁶⁶ ELIZABETH BYERS & KAREN M. PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 224–25 (2d ed. 2005).

⁶⁷ Ellen Edge Katz, *Conserving the Nation's Heritage Using the Uniform Conservation Easement Act*, 43 WASH. & LEE L. REV. 369, 375–76 (1986).

⁶⁸ Nicholas Carson, Note, *Easier Easements: A New Path Forward for Conservation Easement Deduction Valuation*, 109 NW. U. L. REV. 739, 743–44 (2014).

⁶⁹ Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004) (describing these pathways).

⁷⁰ WATSON & NAGEL, *supra* note 51, at 4; *see also* Thomas Coughlin, *Preservation Easements: Statutory and Tax Planning Issues*, 1 PRES. L. REP. 2011 (1982) (discussing the use of the tool and the requirements of a qualifying transaction).

incentivized preservation easements have been utilized by many non-profit and governmental holders to provide permanent protection to significant historic properties.⁷¹

Traditionally, most preservation organizations sought easement donations in a fairly passive manner, largely relying on property owners to affirmatively seek out this degree of protection.⁷² The initial perception was that organizations and agencies involved in this field were assisting historic property owners in protecting their lands and resources, and were less motivated by the potential financial incentives than by a genuine desire to protect heritage assets.⁷³ In the early 2000s, the use of this tool started to change as the tax incentives became more popular and began to be utilized for new functions not originally foreseen, including many transactions with questionable conservation value.⁷⁴ As a result of investigative reporting and Congressional scrutiny, the IRS began targeting preservation easements as an area of abuse and auditing many of these transactions with an eye toward protecting the public's investment.⁷⁵ Façade easements, or easements designed to protect only a limited portion of a property's exterior (a single façade facing a public

⁷¹ J. Myrick Howard, *Nonprofits in the American Preservation Movement*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 14, at 313, 340 (discussing the value and use of the tool). *But see* JAMES W. ELY & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 12:3 (2015) (explaining that “there has been little litigation in the field, and it is difficult to determine the long-term success of the movement to encourage preservation easements”).

⁷² *See, e.g.*, NYLANDER & VIERA, *supra* note 25, at 219–27 (profiling SPNEA's decision to start protecting privately-owned homes with preservation easements as a way to augment the organization's preservation mission); *Tax Credits & Loans: Preservation Easements*, STATE OF R.I. HISTORICAL PRES. & HERITAGE COMM'N, <http://www.preservation.ri.gov/credits/easements.php> (last visited Aug. 4, 2016) (referring to the State of Rhode Island's use of this tool).

⁷³ Mary A. King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RES. J. 65, 120–21 (2007) (discussing the experience and warnings of leading practitioner Stephan Small and his alarm at seeing a change in the nature of the field during this period). *But see* 2011 Fitch Forum: Part IV, *New York City's Landmark Law at Forty-Five: Perpetually Young or Showing its Age?*, 18 WIDENER L. REV. 259, 293–95 (2012) (discussing the 1980s boom and bust in façade easement development activity, but also discussing the challenges to the “traditional concept of what a preservation easement should be, and types of properties it should be on”). An additional thread of early donation activity focused on securing the protection of urban structures taking advantage of the historic tax credits. *See id.* at 292–95 (discussing the common use of the charitable deduction for qualifying easement transactions during the 1980s to further offset project costs associated with historic tax credit projects).

⁷⁴ McLaughlin, *supra* note 7, at 703–07 (charting this development against the explosive growth in the use of conservation easements as a primary mechanism for land protection); 2011 Fitch Forum: Part IV, *supra* note 73, at 294–96 (discussing the expansion of this tool during the 2000s to protect single family homes and properties already protected by local historic district regulation).

⁷⁵ Press Release, IRS, IRS Announces the 2005 Dirty Dozen (Feb. 28, 2005); Carson, *supra* note 68, at 744–46 (discussing the IRS enforcement and scrutiny of tax-incentivized easement donations generally).

way), and properties already protected under local regulations were particularly scrutinized.⁷⁶ In 2006, Congress placed heightened substantive and procedural requirements on this donative form.⁷⁷ In response, organizations had to become more sophisticated in order to not run afoul of the increased level of IRS attention and consider how to continue their efforts to affirmatively protect individual historic resources in this new climate.⁷⁸

At the current time, there are a variety of challenges facing the preservation easement community. The most common for tax-incentivized easements at least is how to appropriately value these donations, which is not in itself a new issue.⁷⁹ Each individual easement is tailored to the characteristics of the property being protected.⁸⁰ In turn, the terms of the easement impact valuation, as the charitable deduction will be calculated by assessing the loss in a historic property's value that is attributable to the restrictions being placed on the structure.⁸¹ To appropriately value this donation requires an appraiser with experience with historic resources, who is able to take into consideration all of the variability that defines these transactions.⁸² Failure to appropriately value

⁷⁶ See, e.g., Craig R. McCoy & Linda K. Harris, *Saving Treasures That Benefit Few: As Federal Law Helps Protect Private Property, the Public Often Gets Little*, PHILA. INQUIRER, Feb. 24, 2002, at A1.

⁷⁷ Pension Protection Act of 2006, Pub. L. 109-280, § 1213, 120 Stat. 780, 1075–76 (codified as amended in scattered sections of 26 U.S.C.) (requiring protection of a structure's entire exterior, prohibiting incompatible changes to the protected fabric, requiring certification that the organization is capable of enforcing the terms of the easement, and imposing more detailed reporting requirements—for both qualifying transactions and for the institution's operating practices).

⁷⁸ Laura Johnson, *An Open Field: Emerging Opportunities for Global Private Land Conservation* 5, 8 (Lincoln Inst. of Land Pol'y, Working Paper No. WP14J1, 2014) (discussing this evolution). One of the outgrowths of this scrutiny was the development of an accreditation program by the Land Trust Alliance to confirm and promote best transactional practices. See *About: Benefits of Accreditation*, LAND TRUST ACCREDITATION COMM'N <http://www.landtrustaccreditation.org/about/benefits-of-accreditation> (last visited Aug. 4, 2016). Preservation organizations have not developed a similar accreditation program, but the National Trust has modified the Land Trust Alliance best practices for use within historic preservation easement holding organizations. See NAT'L TRUST FOR HISTORIC PRES., *BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP* (2008).

⁷⁹ 2011 Fitch Forum: Part IV, *supra* note 73, at 295 (profiling valuation changes and discussing the author's study of easement values in several residential Chicago neighborhoods—some resulting in no loss in property value and others a four to six percent loss).

⁸⁰ Dorothy Gray, Comment, *Alternatives to Destruction: Two New Developments in Historic Preservation*, 19 SANTA CLARA L. REV. 719, 740 (discussing preservation easement transactions generally).

⁸¹ See generally Nancy A. McLaughlin, *supra* note 7 (discussing issues associated with the valuation of conservation and preservation easements).

⁸² See RODDEWIG, *supra* note 64, at 133–40. This is an overview of the appraisal process, but for a variety of practical reasons, before and after valuation methodology generally applies to donations of preservation easements. *Id.* at 124.

this deduction can result in a denial of the charitable deduction and the potential application of substantial accuracy-related penalties.⁸³

Given recent challenges, many preservation easement organizations have undergone a subtle transition to other transactional models.⁸⁴ To illustrate this point, in 2009 the National Park Service (“NPS”) only reviewed 72 certification requests for historic structures seeking to take advantage of the charitable deduction; in 2005, or before the heightened IRS scrutiny, the NPS reported reviewing over 800 certification requests. This indicates a significant slowdown in attempts to access the charitable deduction.⁸⁵ This did not, however, necessarily impact gross donation numbers system-wide.⁸⁶ In Massachusetts, one of the few states where sufficient data exists to assess donation levels, other mechanisms were more frequently utilized to protect important structures, including exacted easements, purchased easements, easements secured as a condition of grant funding, and purely donative, or non-tax incentivized, easements.⁸⁷ Thus, while tax incentivized easement activity ground to a virtual halt after 2005, Massachusetts preservationists were able to offset the loss of this incentive almost entirely—protecting nearly the same number of historic structures as before despite, at least initially, comparatively less favorable economic conditions.⁸⁸ It is unclear (and highly unlikely) that organizations in other states fared as well, but there appears to be some growing support for public investment in securing resource protection through other means than tax-incentivized

⁸³ See, e.g., *Kaufman v. Comm’r*, T.C. Memo 2014-52, No. 15997-09 (Mar. 31, 2014) (imposing valuation penalties for gross over-appraisal of the value of façade easement donation); *Gemperle v. Comm’r*, T.C. Memo 2016-1, No. 19599-12 (Jan. 4, 2016) (imposing 40 percent gross over-valuation penalties on easement donation rejected for failure to include appraisal with applicable donor’s tax return).

⁸⁴ See, e.g., NAT’L TRUST FOR HISTORIC PRES., *supra* note 78, at 40 (detailing best practices for responsible easement organizations).

⁸⁵ 2011 Fitch Forum: Part IV, *supra* note 73, at 297.

⁸⁶ For example, the nation’s largest easement-holder—the Washington, D.C.-based L’Enfant Trust—has begun to shift some of the organization’s focus toward using revolving fund mechanisms to acquire, rehabilitate, protect, and resell historic properties as a way to have continuing relevance to its community. See, e.g., *Historic Properties Redevelopment Program*, THE L’ENFANT TRUST, <http://www.lenfant.org/revolving-fund-program.html> (last visited Aug. 4, 2016).

⁸⁷ Michael Steinitz, Mass Hist. Comm’n, Remarks at the National Preservation Conference: A Case Study—Comments on Trends in Preservation Easements since 2003, at 2 (Oct. 20, 2011) (providing empirical data for preservation easement donation trends in Massachusetts).

⁸⁸ *Id.* at 2. This, however, may not be true in other jurisdictions. See Julianne W. Johnson, *The Financial Impact of Historic Preservation Easements on Encumbered Property Appreciation in Charleston, SC* 43 (May 1, 2013) (unpublished M.S. thesis, Univ. of Clemson) (on file with author) (profiling the number of easement donations in Charleston over time, which may reflect market flows more than reluctance to utilize the tax incentives given the uptick post-2005 followed by a post-2009 drop in activity).

easement—largely as a matter of state, rather than federal, policy.⁸⁹ Given the large declines in certification requests to the NPS, however, it would appear that the IRS audit activity has had a large chilling effect. It will take time to find other incentives that might replace or offset the former reliance on the tax incentives, should this be the direction that these non-profit actors decide to move towards.

Overall, historic preservation efforts have gone through three primary and interlinked phases of evolutionary development—initial fee acquisition-based approaches, regulatory approaches, and incentive-based approaches. While all three models continue to play a role, incentive-based approaches remain in the forefront for new projects or investment, given certain structural limitations on acquisition in fee or regulatory controls.⁹⁰ Beyond new initiatives, considerable effort has focused on ensuring the continued availability of the current framework, particularly the long-standing regulatory authorities at the local level, which are increasingly under attack, and the more recent threats to funding of tax credits for fiscal considerations.⁹¹ Thus, historic preservation advocates are less focused on working to secure affirmative protection for individual historic resources, as compared to addressing structural or system-wide concerns.⁹² This is in part a strategic decision, as the increasingly diverse array of historic properties that advocates have sought to protect may have rendered the goals of preservationists distinct from those of other resource advocates more focused on securing affirmative protection.⁹³ Additionally, acquiring affirmative resource protection at the project level in itself may not be sufficient, as there may also be concerns about a property's condition that need to be immediately remedied to prevent an immediate and total loss, and the costs of this form of effort requires a unique, although perhaps not necessarily greater, level of capital investment.⁹⁴ In short, there are certainly many plausible explanations for this shift away from acquisition and an emphasis on resource protection. It is worth considering, however, that the modern land trust movement has made altogether different strategic judgments.

⁸⁹ See, e.g., *About LCHIP*, LAND AND CMTY. HERITAGE INVESTMENT PROGRAM, <http://www.lchip.org> (last visited Aug. 4, 2016) (profiling a state grant program in New Hampshire that requires easement donations as a grant condition).

⁹⁰ Talmage, *supra* note 2, at 16 (discussing the predominate strategies utilized within the historic preservation movement).

⁹¹ See, e.g., *About the Coalition*, HISTORIC TAX CREDIT COAL., <http://historiccredit.com/about/coalition> (last visited Aug. 4, 2016).

⁹² See, e.g., *Sustainable Communities*, NAT'L TRUST FOR HISTORIC PRES., <http://www.preservationnation.org/information-center/sustainable-communities> (last visited Aug. 4, 2016) (profiling preservation priorities within the built environment).

⁹³ Talmage, *supra* note 2, at 16.

⁹⁴ TOMLAN, *supra* note 23, at 82–85.

While certainly still valuing site-specific advocacy, land conservation advocates have placed secondary priority on this type of objective, and have focused primarily on direct and aggressive intervention in the real estate market.⁹⁵ It is this disconnect that this article is ultimately seeking to explore: whether additional benefit can be obtained by reevaluating the preservation movement's current approaches and use of acquisition-based strategies.

IV. COMPARATIVE DEVELOPMENTAL HISTORIES: HISTORIC PRESERVATION AND LAND CONSERVATION

Beyond understanding the evolution of efforts to affirmatively protect heritage assets, a comparative lens between the history of land conservation and historic preservation provides a framework to see how and why these efforts have diverged over time and with what impacts. As noted, contemporary land conservation projects often vary significantly in design from those in the preservation arena, chiefly through a willingness to risk capital through real estate intervention rather than seeking to indirectly fund restoration work (through grants) or utilize other forms of site-specific advocacy.⁹⁶ This section will explore the interlinked evolution of efforts to acquire resource protection, with a specific focus on the development of conservation easements designed to protect the built and natural environment before moving on to explore the reasons and motivations that fuel the current divergence in comparative practice.

A. *A Unified Beginning?*

The somewhat artificial divide between land trusts and historic preservation organizations has not always existed, at least not to its current extent.⁹⁷ The nation's first land trust, the Massachusetts-based Trustees of Reservations, was actually formed with the idea that important places, whether historic or natural, should be protected, though conservation projects quickly came to the forefront in the organization's acquisition priorities.⁹⁸ Founded in 1891, the Trustees of Reservations continues to primarily focus on protecting important conservation tracts,

⁹⁵ Talmage, *supra* note 2, at 16.

⁹⁶ *Id.*

⁹⁷ Notably, this divide does not exist internationally; outside of the United States "it's standard practice to save places comprehensively, coordinating protection of significant historic, cultural, natural, and social values to nurture more sustainable and livable communities." Roberta Lane, *Make No Little Plans: Community Planning for Whole Places*, FORUM J., Fall 2010, at 42, 42.

⁹⁸ GORDON ABBOTT, JR., *SAVING SPECIAL PLACES: A CENTENNIAL HISTORY OF THE TRUSTEES OF RESERVATIONS* 1–15 (1993) (discussing the formation of the Trustees of Reservations and their initial organizational goals).

but cultural resource protection remains part of its mission.⁹⁹ Currently, the Trustees protect and operate a number of historic properties as house museums, including five National Historic Landmarks.¹⁰⁰ In February 2016, the Trustees announced the acquisition of its 115th reservation, the Fruitlands, in Harvard, Massachusetts (c.1825), which is a National Historic Landmark, and evidences their continuing work in this arena.¹⁰¹ Incorporating a preservation mission is unusual, but not atypical, for land conservation organizations, and many historic preservation organizations also protect significant conservation tracts as part of their efforts.¹⁰² This unified approach to resource protection makes intuitive sense, as in many geographic areas projects will invariably combine both attributes. Not surprisingly, this unity of interests is actually found in almost all international efforts to protect significant historic and conservation resources.¹⁰³

Although this pronounced division did not initially exist, specialization took hold relatively quickly. In 1925, many of Massachusetts's most important early land conservation and historic preservation organizations, including the Trustees of Reservations, the Appalachian Mountain Club, and the SPNEA met to begin exploring how to protect the rural countryside. They collectively focused on areas of both natural and historic significance.¹⁰⁴ This effort culminated in a 1929 report entitled *The Needs and Uses of Open Space*, which identified and targeted the state's most important sites for protection.¹⁰⁵ This partnership would bear considerable fruit as the majority of resources targeted for

⁹⁹ Press Release, Trustees of Reservations, The Trustees Renew Focus on Cultural Properties Enlivening Some of Massachusetts' Most Iconic Historic Sites (May 21, 2015) (announcing the Trustees' efforts in the cultural resource arena).

¹⁰⁰ *Historic Houses*, TRUSTEES OF RESERVATIONS, <http://www.thetrustees.org/what-we-care-about/history-culture/historic-homes> (last visited Aug. 4, 2016).

¹⁰¹ Press Release, Trustees of Reservations, The Trustees Announces that Fruitlands Museum will become its 115th Reservation (Feb. 17, 2016). The Fruitlands Museum, a National Historic Landmark, is the former utopian farm experiment of the Alcott family, and has been an independent museum since 1914. See WHITEHILL, *supra* note 24, at 526–28 (discussing the acquisition and operation of this property as a historic house museum).

¹⁰² Elisabeth Ptak, *Time and Place: Historic Preservation and Land Conservation*, SAVING PLACES, Winter 2015, at 24, 24–27 (exploring land trusts involved in historic preservation efforts or parallel efforts supporting preservation efforts directly); see also Stephanie K. Meeks, *Introduction*, FORUM J., Fall 2010, at 5, 5–6 (discussing the National Trust's longstanding interest in natural places).

¹⁰³ Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENV'T'L L. REV. 119 (2010); Roberta Lane, *Make No Little Plans: Community Planning for Whole Places*, FORUM J., Fall 2010, at 42, 42–43.

¹⁰⁴ ABBOTT, *supra* note 98, at 29.

¹⁰⁵ REPORT OF GOVERNOR'S COMMITTEE ON NEEDS AND USES OF OPEN SPACE 5 (1929); ROBERT McCULLOUGH, *LANDSCAPE OF COMMUNITY: A HISTORY OF COMMUNITY FORESTS IN NEW ENGLAND* 288–91 (1995) (placing the development of this report in its historical context).

preservation were eventually protected in some fashion by some entity, but the specialization of non-profit organizations was already abundantly clear.¹⁰⁶ As a result, organizations would often defer to another's expertise in determining whether to take on a project. For instance, the Trustees would often defer to SPNEA with regard to historic structures and vice versa.¹⁰⁷ Overall, while specialization was quickly developing, collaboration remained close between area organizations working in this arena, indicating that there were enough resource issues to allow new entrants to help address these considerations.¹⁰⁸

B. Ongoing Collaboration

Overall, while specialization came relatively early, the resource challenges were considerable enough to merit more participants with different skillsets becoming involved in efforts to protect important places.¹⁰⁹ Despite this divided responsibility and focus, historic preservation and land conservation proponents and practitioners often worked together to accomplish shared goals and objectives and, in a very meaningful sense, expanded the overall constituency in support of their mutually shared goals and objectives.¹¹⁰ This section will explore several examples of this early collaboration, examining (1) the gradual development and recognition of the tax incentives for conservation easements; (2) the creation of the Uniform Conservation Easement Act; and (3) the shared professional relationships/overlap that typified this arena. As discussed, advocates in both arenas were closely united in their efforts to develop, utilize, and disseminate the use and best practices of

¹⁰⁶ See 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, Univ. of Penn) (on file with author) (noting that these early efforts often frequently involved important landscape elements in addition to historic resources).

¹⁰⁷ *Id.* This only would change with the acquisition of the William Cullen Bryant homestead in Cummington, Massachusetts, which TTOR acquired after the offer of the property to SPNEA was declined. *Id.*

¹⁰⁸ See ABBOTT, *supra* note 98, at 35. In some degree, this accord undoubtedly relates to the close social networks between trustees at these prominent Boston-based institutions, particularly in the period surrounding their respective formations. *Id.*

¹⁰⁹ RUSSELL L. BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 4* (1967) (noting the various organizational options for a property owner to consider working with, even as early as the late 1960s, depending upon their conservation or preservation objectives).

¹¹⁰ See, e.g., Richard West Sellars, *A Very Large Array: Early Federal Historic Preservation—The Antiquities Act, Mesa Verde, and the National Park Act*, 47 NAT. RES. J. 267, 270–71 (2007) (discussing the intersection of land conservation and historic preservation considerations in protecting Civil War battlefields). This relationship would continue as non-profit organizations became concerned about additional impacts to these resources. TOMLAN, *supra* note 23, at 87–88 (noting the National Trust's evolving role in battlefield preservation).

the conservation easement as an important tool for protecting the environment.

I. Securing Tax Incentives

In 1964, the IRS first concluded that donations of qualifying conservation easements could be entitled to charitable deductions through a revenue ruling, which led advocates to begin to explore whether the use of conservation easements could be expanded beyond governmental holders and utilized to greater effect.¹¹¹ This ruling was eventually clarified through revisions to the Internal Revenue Code, which expressly allowed donations of partial interests in real estate to qualify for the charitable deduction. In short, it confirmed the tax deductibility of, and set guidelines for, the modern tax-incentivized conservation easement.¹¹² As enacted, the Internal Revenue Code and the implementing treasury regulations expressly recognized the close linkages between historic preservation and land conservation in establishing the purposes or conservation values that a qualifying easement donation has to achieve in order to potentially qualify for the charitable deduction.¹¹³ Under the treasury regulations, there are four permissible conservation purposes that, if met, allow a charitable deduction to be claimed:

- (i) the preservation of land areas for outdoor recreation or education of the general public;
- (ii) the protection of a relatively natural habit of a fish, wildlife, or plant community or similar ecosystem;
- (iii) the preservation of certain open space (including farmland and forest land) . . . or

¹¹¹ Kingsbury Browne, Jr. & Walter G. Van Dorn, *Charitable Gifts of Partial Interests in Real Estate for Conservation Purposes*, 29 TAX. LAW. 69, 70–71 (1975) (discussing the impact of IRS Revenue Ruling 64-205 in recognizing charitable gifts of this form); see also STEVEN SMALL, *FEDERAL TAX LAW OF CONSERVATION EASEMENTS* 1, 1–10 (1990) (profiling the development of these tax incentives for both historic and conservation projects).

¹¹² Daniel Halperin, *Conservation Easements: New Perspective in an Evolving World: Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 LAW & CONTEMP. PROB. 29, 34–37 (2011) (charting this development); Theodore S. Sims, *Qualified Conservation Restrictions: Recollections of and Reflections on the Origins of Section 170(h)*, 2013 UTAH L. REV. 727, 732 n.25 (2011) (profiling the development of the partial interest provisions within existing historic preservation incentives); see also George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 204 (1977); Tersh Boasberg, *Federal Tax Problems Arising from Real Estate Activities of Non-Profit Preservation Organizations*, 8 URB. LAW 1, 51–52 (1976) (profiling issues associated with façade easement donations prior to 1976).

¹¹³ 26 U.S.C. § 170(h)(4)(A)(iv) (2006); Treas. Reg. § 1.170A-14(d)(5) (as amended in 2009).

(iv) the preservation of historically important land areas or certified historic structures.¹¹⁴

On the historic preservation side, certified historic structures have been further defined as “any building, structure or land area which is listed in the National Register, or located in a registered historic district.”¹¹⁵ Linking both historic and conservation considerations demonstrated the unity of interest in defending both attributes and essentially would tie the respective disciplines together to protect and potentially expand these important tax incentives going forward.¹¹⁶

2. *The Uniform Conservation Easement Act (UCEA)*

Once conservation easements became more established, many states began to explore the merits of utilizing this mechanism as a resource protection tool.¹¹⁷ Barred at common law, states needed to first implement legal reforms in order to allow perpetual easements to exist within their jurisdictions.¹¹⁸ In the late 1950s, Massachusetts implemented legislation

¹¹⁴ 26 U.S.C. § 170(h)(4)(A); Treas. Reg. § 1.170A-14(d)(1) (as amended in 2009).

¹¹⁵ 26 U.S.C. § 170(h)(4)(B); Treas. Reg. § 1.170A-14(d)(5)(iii)(A)–(B) (as amended in 2009). Individual properties qualify most easily, as listing alone will be sufficient for eligibility. Properties in districts are eligible if found to be contributing to a National Register Historic District, or if only within a local historic district, if the district is also certified by the National Park Service as a Certified Local Government (“CLG”). See *National Register of Historic Places Program: Fundamentals*, NAT’L PARK SERV., http://www.nps.gov/nr/national_register_fundamentals.htm (last visited Aug. 4, 2016) (discussing the requirements in order to qualify for listing/designation and certification, if required).

¹¹⁶ Browne, Jr. & Van Dorn, *supra* note 111, at 75–76 (discussing historic preservation and conservation easement deductions, and noting the early influence of Revenue Ruling 75-358 in allowing for this type of donation). Land and historic preservation interests have remained largely united in defense of the tax incentives, despite pressures caused by the IRS targeting abuses within the façade easement arena and the run-up to the enactment of the Pension Protection Act of 2006. See NANCY A. MCLAUGHLIN & STEPHEN J. SMALL, TRYING TIMES: IMPORTANT LESSONS TO BE LEARNED FROM RECENT FEDERAL TAX CASES 1–14 (2014) (discussing this history). Preservationists, however, were not alone in facing criticism. See Roger Collinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 23–25 (2011) (discussing criticisms of many forms of charitable donation generally).

¹¹⁷ Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1085–87 (1996) (charting state motivations for allowing for this form of property interest); see also Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENV’T L. J. 2, 3–4, 12–17 (1989) (profiling the common law obstacles to this protective mechanism).

¹¹⁸ MARILYN MEDER-MONTGOMERY, A LEGAL MECHANISM FOR PROTECTING CULTURAL RESOURCES 2–4 (1984); John A. Gose & Roberta R. Katz, *Historic Building—Law and Practice in the United States*, 19 REAL PROP. PROB. & TR. J. 577, 584–86 (1984) (profiling the movement of the law in this area); Russell L. Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROBS. 416 (1971); Marcia E. Hepford, Note, *Affirmative Obligations in Historic-Preservation Agreements*, 51 GEO. WASH. L. REV. 746, 750–58 (1982–1983) (discussing the challenges of enforcing affirmative maintenance obligations).

to allow government entities to hold conservation easements, and in 1969, the state expanded its enabling act to include non-profit organizations as qualified grantees.¹¹⁹ By the late 1970's, most states had already enacted or were considering some form of conservation easement enabling legislation.¹²⁰ Given its rapidly increasing popularity, additional states were exploring legislative action.¹²¹ Some effort at uniformity was considered desirable, particularly by federal agencies concerned with the enforceability and standardization of the various interests that they were beginning to acquire nationwide.¹²² It was also thought that some overall guiding principles would help to avoid the patchwork of legal requirements that was developing.¹²³

To address this issue, in 1978, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) began to develop a model law—the Uniform Conservation Easement Act (“UCEA”).¹²⁴ It would, however, ultimately take several years (1981) for the UCEA to be developed and approved by the various voting representatives for recommendation and distribution to the states.¹²⁵ In drafting the UCEA, historic preservation advocates played a strong role in shaping the end product and in making a number of important structural decisions that have influenced the current state of practice in the field.¹²⁶ While it is now largely known within the land conservation context, the early debates over the UCEA within NCCUSL “emphasized historic preservation throughout to a degree that might surprise . . .” the contemporary land trust community who was surprisingly absent from these early discussions.¹²⁷ For example, even “[t]he [Act’s] term ‘conservation’ was not initially acceptable to some commissioners [primarily] concerned with historic preservation.”¹²⁸ Some commissioners proposed that two

¹¹⁹ MASS. GEN. LAWS ch. 92, § 79 (2016); MASS. GEN. LAWS ch. 184, § 32 (2016).

¹²⁰ Fredrico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and Complicated Mosaic of Law*, 1 J.L., PROP. & SOC’Y 107, 116 (2015).

¹²¹ K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 3 UTAH L. REV. 773, 775 (2011).

¹²² King & Fairfax, *supra* note 73, at 82–83.

¹²³ *Id.* at 84–85.

¹²⁴ BYERS & PONTE, *supra* note 66, at 10–12 (discussing the development of state enabling legislation generally); *see also* Roderick H. Squires, *Introduction to Legal Analysis*, in PROTECTING THE LAND: CONSERVATION EASEMENTS, PAST, PRESENT AND FUTURE, *supra* note 4, at 69, 73.

¹²⁵ Unif. Conservation Easement Act, 12 U.L.A. 185 (2008); *see also* Nancy A. McLaughlin, *Perpetuity and Beyond*, 34 ECO. L. Q. 673, 684 (2007) (profiling these efforts).

¹²⁶ Approximately 20 states have adopted UCEA-like enabling legislation to date. *See Legislative Fact Sheet, Conservation Easement Act*, UNIFORM LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act> (last visited Feb. 28, 2016).

¹²⁷ King & Fairfax, *supra* note 73, at 83.

¹²⁸ *Id.* at 83, n.86.

versions of model legislation separately address conservation and historic values.¹²⁹ In the end, the commission recommended subsuming historic preservation interests within the larger conservation purposes as defined under the UCEA, thus largely mirroring the Internal Revenue Service's approach.¹³⁰ The debate over the UCEA proposal was influential in ordering the current state of easement practice nationwide, as it remains the basis for the enabling legislation in approximately half of the states.¹³¹ When one seeks to discuss easement-enabling legislation, the UCEA is still largely the frame of reference—and historic and conservation interests shared jointly in its framing.¹³²

3. Guidance Documents, Symposia, and Professional Crossover

Beyond efforts to develop model legislation, many of the formational documents in the fields of land conservation and historic preservation were created in relatively close collaboration.¹³³ For example, the first edition of *The Conservation Easement Handbook* involved input from a number of historic preservation organizations, including the National Trust for Historic Preservation, the L'Enfant Trust, the SPNEA, and the Philadelphia Historic Preservation Corporation.¹³⁴ The current version (published in 2005) retains a chapter on protecting historic properties (and now also includes sections on scenic and other more-tailored easement forms), but the majority of the more recent revisions have been driven by the extensive experience gained by land trusts over the 1990s and first half of the 2000s.¹³⁵

¹²⁹ Burton S. Kliman, *The Use of Historic Preservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVTL AFFAIRS 513, n.4 (1981). Additionally, although some states would ultimately utilize separate legislation for historic and conservation easements, the majority have adopted the UCEA's unified approach. See Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS, PAST, PRESENT AND FUTURE *supra* note 4, at 27–30 (discussing state enabling legislation generally). For an example of an alternative approach, Maine has adopted enabling legislation and differing requirements for conservation easements and “preservation interests.” See ME. REV. STAT. ANN. tit. 33, §§ 476–479-c (2007) (conservation easements); ME. REV. STAT. ANN. tit. 33, §§ 1551–55 (preservation interests).

¹³⁰ King & Fairfax, *supra* note 73, at 83.

¹³¹ Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 35 VT. L. REV. 261, 265 (2011); see also Alan D. Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 123–28 (1986) (discussing several of the decisions made by the drafting committee).

¹³² See, e.g., Nancy C. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 446–47 (2005) (discussing UCEA's approach in terms of modification and termination of conservation easements).

¹³³ Nicholas, *supra* note 15, at 8.

¹³⁴ CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS (Janet Diehl & Thomas S. Barrett eds., 1988).

¹³⁵ BYERS & PONTE, *supra* note 66, at 1.

Early joint symposiums also resulted in common gains and understandings of the role that real estate intervention could have as far as protecting important properties.¹³⁶ In 1981, an early gathering of resource advocates in Cambridge hosted by the Lincoln Institute for Land Policy focused on the need to protect important places with creative approaches, and profiled case studies from both land trust and historic preservation organizations.¹³⁷ These case studies were compiled and disseminated for replication in *Land-Saving Action*, which provided model preservation easement templates and commentary amongst its shared documents.¹³⁸ There was also considerable professional crossover between land conservation and historic preservation advocates. Russell Brenneman, for example, was involved in some of the earliest efforts within the land trust movement (including The Nature Conservancy and beyond) but also authored a white paper for the National Park Service on the feasibility of using easements to protect National Historic Landmarks, and frequently wrote on topics impacting both resource types.¹³⁹

To some extent, collaboration, information sharing, and professional crossover continues and there are certainly individuals and organizations involved in both arenas.¹⁴⁰ It is not uncommon for a session to be included at the annual Land Trust Alliance's Rally that focuses on protecting historic resources, or at the National Trust's National Preservation Conference on a landscape or conservation-related topic.¹⁴¹ Many advocates working in each space, however, recognize that a relatively large gap in practice has developed and that more could be accomplished if closer collaboration could be achieved.¹⁴² Overall, historic preservation and land conservation organizations have historically been linked and shared jointly in the development of the modern conservation easement

¹³⁶ LAND-SAVING ACTION, xi–xii (Russell L. Brenneman & Sarah M. Bates eds., 1984) (discussing the seminal 1981 land trust gathering which spurred this effort).

¹³⁷ *Id.*

¹³⁸ *Land-Saving Action* is notable in that it profiles successful case studies from both land conservation and historic preservation, but it also provides sample templates for future use and adoption. *Id.* (providing template documents utilized by the SPNEA and case studies for a variety of early land trust transactions). *Id.*

¹³⁹ RUSSELL L. BRENNEMAN, SHOULD “EASEMENTS” BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS?: A STUDY FOR THE NATIONAL PARK SERVICE I (1974).

¹⁴⁰ This also happens at a project level. *See, e.g.*, Thompson M. Mayes & Ross M. Bradford, *Combining Preservation and Conservation Values: Six Illustrative Examples*, FORUM J., Fall 2010, at 42, 42 (providing an overview of important collaborative projects that sprung from close partnerships between preservation and conservation advocates).

¹⁴¹ *See, e.g.*, SMART GROWTH PENNSYLVANIA, THE NATIONAL LAND CONSERVATION CONFERENCE BROCHURE AND REGISTRATION GUIDE 26 (2008) (providing program information for session entitled Preservation Perspectives on Conservation Easements with NTHP staff attorneys as panelists).

¹⁴² Lane, *supra* note 97, at 42 (exploring this professional siloing and offering thoughts on how the gap in practice could be partially closed).

as a resource protection tool. With that established, the following section will explore why its use has significantly diverged amongst the respective disciplines.

V. CURRENT CHALLENGES AND THE ORIGINS OF DIVERGENT PRACTICE

Within the area of affirmative resource protection, there are definite challenges as historic preservation advocates begin to confront arguments that historic district regulations restrict density, which in turn limit the availability of and raise the cost of affordable housing.¹⁴³ Advocates must also deal with a relative lack of private and public funding for new acquisitions¹⁴⁴ and the vast challenge associated with sea-level rise in historic coastal communities.¹⁴⁵ In addition, historic preservation law is being asked to accomplish an even greater variety of functions, as advocates work to identify the fuller range of the societal benefits that this field provides, in order to support additional efforts in this vein.¹⁴⁶ This is important work, to be sure, but it should force some consideration of whether the legal tools available are capable or are tailored to bridge this conceptual gap, and what role affirmative resource protection should play in the contemporary historic preservation movement.

To understand the role that resource protection plays or could play in addressing current challenges, it is instructive to explore or at least consider why land conservation and historic preservation approaches have diverged. This section will explore many of the reasons for this gap, which are broken down into three principal categories: (1) institutional; (2) structural; and (3) financial. This broad survey will admittedly be somewhat incomplete, as some factors, such as the presence of particularly charismatic and effective organizational leadership, and the possibility of a relative enthusiasm or messaging gap cannot be fully or

¹⁴³ See, e.g., EDWARD GLAESER, TRIUMPH OF THE CITY (2011) (challenging the merits of historic preservation regulation as a societal good as it imposes restrictions on land use, and in his view, raises housing costs and limits affordable housing). But see J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665 (2012) (challenging this progressive challenge to regulatory controls within the historic preservation field).

¹⁴⁴ *Historic Preservation Fund*, PRES. ACTION, <http://www.preservationaction.org/priorities/historic-preservation-fund> (last visited Feb. 28, 2016) (noting the challenges associated with obtaining funding for the HPF—a major funding component of state and local preservation programs).

¹⁴⁵ *National Treasure—Annapolis*, NAT'L TRUST FOR HISTORIC PRES., <http://savingplaces.org/places/annapolis> (last visited Feb. 28, 2016) (naming Annapolis, Maryland a targeted national treasure as a mechanism for drawing attention to the challenges historic coastal communities face in confronting sea-level rise).

¹⁴⁶ See, e.g., THOMPSON MAYES, WHY DO OLD PLACES MATTER?: HOW HISTORIC PLACES AFFECT OUR IDENTITY AND OUR WELLBEING (2015) (exploring the impact of historic sites and why historic preservation efforts have continuing societal value).

precisely measured.¹⁴⁷ There are also strong differences in regional and local practice that influence relative land conservation and historic preservation efforts, so this analysis will have to remain at the perspective of a high-level survey. At the end of the day, it is unlikely that there is a single answer to this question, but rather it is an evolving state of play shaped by various factors and influences.¹⁴⁸ Exploring these influences, however, provides a valuable lens into the challenges contemporary preservationists face in utilizing affirmative resource protection as a strategy as compared to their land conservation colleagues.

A. Institutional Factors

The structure of the various institutions involved in land conservation and historic preservation efforts necessarily has some bearing on the approaches utilized by various advocates. Three institutional factors are assessed in turn: (1) the relative date of formation; (2) the influence of early models; (3) the influence of the NHPA/SHPOs; and (4) the impact of the Land Trust Alliance as a clearinghouse/advocacy organization.

1. Date of Formation

In many areas, historic preservation organizations formed much earlier than land trusts, which impacted the design of entities operating in their respective fields.¹⁴⁹ For example, in Charleston, the oldest and largest historic preservation non-profits, the Historic Charleston Foundation and the Preservation Society of Charleston, were established some thirty to forty years earlier than most of the land trusts which later formed to protect the area's natural landscape.¹⁵⁰ As discussed in Section II, early historic preservation organizations were largely limited in scope to advocating for neighborhood preservation through regulatory means and caring for legacy historic house museums.¹⁵¹ Considerable existing

¹⁴⁷ Thompson Mayes, *Preservation Law in Public Policy: Balancing Priorities and Building an Ethic*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 14, at 157, 160–63 (discussing the need to develop a societal preservation ethic (akin to that which exists within the land use arena)).

¹⁴⁸ FAIRFAX ET AL., *supra* note 6, at 9–11 (exploring the complicated history of land acquisition and explaining its evolution as a mosaic influenced by various factors, rather than displaying a more linear or organic evolution).

¹⁴⁹ Mary Pope M. Hutson, *Our Moment to Build a Cultural Conservation Legacy*, FORUM J., Fall 2010, at 18, 18 (discussing the relative histories of historic/conservation organizations in the area). Literally thousands of local historical organizations formed during the period before the 1970s, but this movement has lost some of this early momentum—or at least the movement looks very differently than it has in the past. See Kliman, *supra* note 129, at 513 (discussing the early numbers of local historical organizations and their role in the preservation movement).

¹⁵⁰ Hutson, *supra* note 149, at 18.

¹⁵¹ See *infra* pp. 5–8.

resource commitments may have limited the ability of preservationists to expand as rapidly and broadly as the land trust community with regard to direct market intervention, at least on the conservation easement side of the equation.¹⁵² In short, by the time conservation easements were more widely available, the freedom of action of historic preservation advocates was already somewhat constrained by consequences of earlier institutional choices.

This is certainly a plausible explanation in some instances and for some institutions, but if the resource challenges were so limiting, one would expect that new institutions would have filled this gap or that existing institutions would have deleveraged their existing fee resources to take advantage of new flexibilities that easements presented. Other than a few isolated exceptions, however, such as the L'Enfant Trust in Washington, D.C. and the Landmarks Preservation Council in Illinois, new organizations were not able to use preservation easements to effectively target important local properties with any degree of comparative scale.¹⁵³ Some existing preservation organizations were able to effectively use revolving-fund strategies (buy, rehabilitate, protect, and sell) with some success, but overall this remained a secondary priority.¹⁵⁴

Further limiting the impact of date of formation as a primary factor in influencing relative strategy, many conservation-based organizations of similar vintage with large fee holdings were able to utilize easements to expand their impacts.¹⁵⁵ The Trustees of Reservations in the early 1970s, after some initial debate, began exploring the development of an

¹⁵² WHITEHILL, *supra* note 24, at 1, 18–19 (noting the resource constraints on local historical societies); Wolfe, *supra* note 29, at 18 (noting the expansion of historic house museums and the interaction of these entities with states).

¹⁵³ *History*, L'ENFANT TRUST, <http://www.lenfant.org/about-us/history.html> (last visited Feb. 28, 2016); *Preservation Easement Program*, LANDMARKS ILL., http://www.landmarks.org/easement_overview.htm (last visited Feb. 28, 2016).

¹⁵⁴ J. Myrick Howard, *Revolving Funds: In the Vanguard of the Preservation Movement*, 11 N.C. CENTRAL L.J. 256 (1980) (explaining how to establish a revolving fund using Preservation North Carolina as a case study); Peter H. Brink, *Experience of the Historic Galveston Foundation in Using Legal Tools to Support Historic Preservation*, 12 URB. L. 74 (1980) (explaining Historic Galveston Foundation's success with revolving funds); Alexis H. Shutt, *Models for Protecting Our Heritage: Alternatives for the Preservation of Public or Non-Profit Owned Resources* (Jan. 1, 1991) (unpublished M.A. thesis, Univ. of Penn.) (on file with author) (discussing deaccession as a resource strategy); see also Tom Mayes & Katherine Malone-France, *When Buildings and Landscape are the Collection*, FORUM J., Summer 2014, at 19, 19–24 (profiling some of the challenges institutions face within this context).

¹⁵⁵ Erin B. Gisler, *Land Trusts in the Twenty-First Century: How Tax Abuse and Corporate Governance Threaten the Integrity of Charitable Land Preservation*, 49 SANTA CLARA L. REV. 1123, 1144–47 (2009) (profiling the development of the Nature Conservancy and its associated challenges).

easement program.¹⁵⁶ By the mid-1970s, the Trustees would be utilizing conservation easements to protect important places across the state of Massachusetts, ultimately stewarding over 20,000 acres of privately-owned lands.¹⁵⁷ The Nature Conservancy had a similar evolutionary history, developing as an outgrowth of the earlier Ecological Society of America (founded in 1915).¹⁵⁸ Thus, while the date of formation may have impacted institutional development, it is not clear how much this would have shaped the state of play at a national level.

2. *The Influence of Early Models*

Beyond formation date, state and federal conservation-based agencies were experimenting with conservation easement and easement-like instruments more aggressively and earlier than most preservation organizations and preservation-related agencies.¹⁵⁹ Some of the earliest conservation easements involved the extensive projects seeking to protect scenic byways surrounding parkway projects during the 1930s, and even earlier with other forms of less than fee protection of significant land areas.¹⁶⁰ Having attained tangible results, such as with Wisconsin's experience with the Great River Road and the National Park Service's work on the Blue Ridge and Natchez parkways, these models could be disseminated widely as a case studies, which could have had outsized impacts on the directions that land conservation organizations eventually decided to pursue.¹⁶¹

While the conservation models may have been earlier comparatively, there were certainly some parallel efforts in the historic preservation arena during this period of evolutionary development.¹⁶² The NPS

¹⁵⁶ ABBOTT, *supra* note 98, at 135 (noting the organization's initial concerns and eventual use of the conservation easement and its formation of a separate entity to take on this liability); *see also* Bray, *supra* note 103, at 119 (discussing TTOR's formational role within the greater history of the land trust movement).

¹⁵⁷ *Conservation Restrictions*, TRUSTEES OF RESERVATIONS, <http://www.thetrustees.org/what-we-care-about/land/conservation-restrictions.html> (last visited Feb. 28, 2016) (noting the organization's easement holdings as of early 2016—393 easements, or conservation restrictions, as these interests are defined under Massachusetts law).

¹⁵⁸ *Our History*, THE NATURE CONSERVANCY, <http://www.nature.org/about-us/vision-mission/history> (last visited Feb. 28, 2016) (detailing this aspect of the organization's history; the first easement donated to The Nature Conservancy was in 1961).

¹⁵⁹ William Whyte, *Securing Open Space for Urban America: Conservation Easements* 1, 10–14 (Urban Land Inst. Tech. Bull. No. 36, 1959); John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENV'T'L L. 319, 333–34 (1997).

¹⁶⁰ FAIRFAX ET AL., *supra* note 6, at 11–16 (noting early examples of less than fee interests to protect important natural areas).

¹⁶¹ Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. U. L. REV. 167, 183 (1968).

¹⁶² BRENNEMAN, *supra* note 139, at 37.

experimented with conservation easements surrounding national parks during the 1930s to protect the context of its historic sites.¹⁶³ In the 1960s, the NPS recorded its first preservation easement, protecting historic Tudor Place (1815) in Washington, D.C.¹⁶⁴ This easement placed substantial restrictions on modifying the physical fabric of the historic resource, in addition to the more traditional site-based restrictions against development.¹⁶⁵ In the 1970s, the NPS went so far as to commission a study to consider expanding its use of the tool to protect National Historic Landmarks nationwide, but abandoned the effort due to concerns about the potential financial impacts this would have on agency funding for additional acquisitions and on the maintenance of its growing portfolio of historic sites.¹⁶⁶ This would be a continuing thread for historic resource advocates within NPS—concern over the impacts of diluting the acquisition-model for interpretative sites in favor of easement-based strategies largely frustrated a move towards more robust use of this tool.¹⁶⁷

While conservation easement examples may have been more developed initially, it is not clear that this gap was as wide as it might seem in retrospect. Preservation advocates, inside and outside of federal agencies, actively explored and occasionally utilized easements when appropriate and certainly did not lack for early models demonstrating the tool's viability.¹⁶⁸ In short, there were likely sufficient examples to guide advocates interested in utilizing preservation easements more aggressively, but this interest did not galvanize actual use on the ground.

3. *The Role of the NHPA and the SHPO Framework*

Although the National Historic Preservation Act (“NHPA”) is largely a procedural statute, its structure has profoundly influenced preservation

¹⁶³ Brenneman, *supra* note 118, at 416–17 (noting the need to protect the surroundings of historic resources, not just the historic structures).

¹⁶⁴ BRENNEMAN, *supra* note 139, at 2.

¹⁶⁵ NAT'L PARK SERV., EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS 6–7 (2010).

¹⁶⁶ BRENNEMAN, *supra* note 139, at 1. Despite the agency's decision to not to fully move in this direction, the agency did acquire a notable portfolio of preservations—protecting significant historic properties and thousands of acres in the Historic Green Springs area of Virginia during the late 1970s. *Id.*

¹⁶⁷ BARRY MACKINTOSH, NAT'L PARK SERV., THE HISTORIC SITES SURVEY AND THE NATIONAL HISTORIC LANDMARKS PROGRAM: A HISTORY 99 (1985) (discussing the impacts of the Brenneman report at the end of the Ford administration).

¹⁶⁸ *See, e.g.*, BRENNEMAN, *supra* note 139, at 1.

practice.¹⁶⁹ One of the primary ways that this has been accomplished is through the use of the state historic preservation officers (“SHPOs”) as the primary vehicle for the delivery of many of the federal programs.¹⁷⁰ For example, SHPOs have a large leadership role with regard to the section 106 consultation process, where they are involved in determining the impacts of federally-assisted undertakings on historic resources and working to find mitigation.¹⁷¹ This, coupled with existing regulatory controls already prevalent in the field, led to preservationists taking a regulatory lens, rather than focusing on other potential pathways.

In a way, much of the preservation framework that flowed out of the response to urban renewal and the large federal projects of the 1950s and 60s was designed to allow preservationists a chance to influence and shape these proposals and help to direct them into less impactful areas or to imagine alternatives to avoid adversely impacting heritage assets.¹⁷² It would be hard to overstate the impacts of the regulatory format and the influence of this institutional design on preservation. It shapes both public perception of the movement and the way that the advocates go about trying to save historic resources. Conversely, the regulatory scheme on the land conservation side is of secondary importance. Land conservation groups have spent considerable effort in making connections and building trust with targeted landowners—rather than applying regulatory pressure to achieve their gains. As a result, the devolved use of the SHPOs under the NHPA to administer regulatory schemes may have further pushed historic preservation down a regulatory, rather than a more acquisition-based, path.

4. *The Impact of the Land Trust Alliance*

Begun as the Land Trust Exchange in the early 1980s to disseminate information between land trust organizations, the Land Trust Alliance has played a strong leadership role in both promoting the use of conservation easements and in growing the number of land trusts working

¹⁶⁹ John M. Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Historic Preservation Law*, 12 WAKE FOREST L. REV. 31, 34–38 (1976).

¹⁷⁰ BRONIN & BYRNE, *supra* note 57, at 145 (profiling the various participants under section 106 and project review).

¹⁷¹ *Section 106*, NAT’L CONFERENCE OF STATE HISTORIC PRES. OFFICERS, <http://ncshpo.org/resources/section-106> (last visited Apr. 22, 2016) (discussing the role of the SHPOs under section 106).

¹⁷² Elizabeth A. Lyon & David L.S. Brook, *The States: The Backbone of Preservation*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 14, at 80-84.

nationwide.¹⁷³ This role has changed over time, as the organization no longer focuses on creating new land trusts but instead on improving the overall state of practice amongst its member institutions.¹⁷⁴ To this end, the Land Trust Alliance hosts annual conferences for land trusts and serves as an umbrella organization for lobbying efforts.¹⁷⁵ Additionally, the Land Trust Alliance focuses on initiatives that benefit the entire community, such as its recent efforts to create a captive insurance program—TerraFirma—to serve as a common pool legal defense fund;¹⁷⁶ and the creation of an accreditation commission.¹⁷⁷ Overall, the Land Trust Alliance has had a large impact on the structure and resiliency of the land trust movement and continues to serve an important role in this regard.¹⁷⁸

On the preservation side, no organization plays an equivalent role. The National Trust for Historic Preservation (NTHP) periodically convenes smaller gatherings of advocates and does disseminate important information through its publications and outreach, but this is one small part of the organization's overall mission.¹⁷⁹ Unlike the Land Trust Alliance, however, the NTHP also holds a limited number of easements, which gives the entity valuable experience and insight, but less of a purely clearinghouse/advocacy role.¹⁸⁰ While it is difficult to fully quantify the impact of the Land Trust Alliance on the land trust movement, the lack

¹⁷³ *About Us*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/about-us> (last visited Feb. 28, 2016) (discussing the organization's formation and its contemporary role on behalf of its 1,100 member land trusts); *see also* FAIRFAX ET AL., *supra* note 6, at 182–83 (profiling the development and early influence of the Land Trust Exchange/Alliance on the emerging field).

¹⁷⁴ FAIRFAX ET AL., *supra* note 6, at 209.

¹⁷⁵ *See, e.g.*, Sandra Tessel, *The Political Power of Land Trusts*, SAVING LAND, Fall 2010, at 33 (profiling the lobbying and political opportunities for land advocacy organizations and the alliance).

¹⁷⁶ *About*, TERRAFIRMA RRG LLC, <http://www.terrafirma.org/> (last visited Feb. 28, 2016).

¹⁷⁷ LAND TRUST ACCREDITATION COMM'N, <http://www.landtrustaccreditation.org/> (last visited Feb. 28, 2016).

¹⁷⁸ Jean Hocker, *The Land Trust Alliance and the Modern American Land Trust Movement*, FOREST HISTORY TODAY, Spring/Fall 2007, at 24–27 (providing overview of the entire developmental arc of the organization).

¹⁷⁹ *Preservation Issues*, N.Y. LANDMARKS CONSERVANCY, http://www.nylandmarks.org/advocacy/preservation_issues/conservancys_technical_services_director_takes_part_in_national_preservation (last visited Feb. 28, 2016) (profiling Trust's roundtable on easement issues and an easement-holding organization's participation); *see also* Roddewig, *Preservation Easement Law: An Overview of Recent Developments*, *supra* note 64, at 232–36 (profiling easement defense activities convened by the National Trust).

¹⁸⁰ *Preservation Easements*, NAT'L TRUST FOR HISTORIC PRES., <http://forum.savingplaces.org/learn/fundamentals/preservation-law/easements> (last visited Feb. 28, 2016). The National Trust's current easement acceptance policy largely defers to local, state, and regional holders—but the organization will accept donations where there is no other easement holder working in the area or if the property is a National Historic Landmark or is otherwise nationally significant. *Id.*

of a comparative entity on the preservation side is a noticeable difference in both practice and form.

Overall, while institutional factors have undoubtedly influenced the comparative use of conservation easements within the land trust and historic preservation movements, it is difficult to see institutional factors as a primary factor or reason for this gap in practice. This is perhaps not capable of ready analysis, but if the underlying environment or climate had been more conducive, one imagines that preservation advocates would have bridged this gap. The following sections then will focus on structural and financial considerations to examine the underlying conditions and the suitability of this tool to achieve the desired preservation ends.

B. Structural Factors

Beyond institutional considerations, there are potential structural factors that also influence comparative practice. Three factors are explored within this section: (1) the nature of the field; (2) comparative specialization; and (3) the comparative scale and availability of regulatory options to accomplish desired organizational objectives.

1. The Nature of the Field

Beyond institutional considerations, the nature of practice within the disciplines is relatively distinct. The roots of this separation go back to their formational period. Many of the early land trusts got their start doing pre-acquisition work for the NPS, United States Forest Service, and other federal agencies.¹⁸¹ These organizations could acquire targeted parcels much more quickly than the agencies could, due to time lags and appropriations issues.¹⁸² A land trust then would acquire a parcel targeted for acquisition by a federal or state agency, and resell this parcel once the funding was secured.¹⁸³ These public-private partnerships essentially built up a transactional infrastructure focused on facilitating this form of project.¹⁸⁴ When funding for additional federal acquisitions fell off during the early Reagan years, some of this transactional infrastructure shifted towards acquisition of tax-incentivized easements, as this was often the clearest remaining available path for accomplishing important

¹⁸¹ Eve Endicott, *Preserving Natural Areas: The Nature Conservancy and Its Partners*, in LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS 17, 17–30 (Eve Endicott ed., 1993).

¹⁸² FAIRFAX ET AL., *supra* note 6, at 152–55.

¹⁸³ VICTORIA M. EDWARDS, DEALING IN DIVERSITY; AMERICA'S MARKET FOR NATURE CONSERVATION 52 (1995) (discussing the Appalachian Trail Conference's pre-acquisition work for the NPS around the Appalachian Trail corridor).

¹⁸⁴ FAIRFAX ET AL., *supra* note 6, at 191.

conservation objectives.¹⁸⁵ The ebb and flow between public and private funding of land protection efforts fostered the growth of a robust transactional cohort focused on acquisition-based strategies.¹⁸⁶

During this same period, much of the attention in the historic preservation world went instead towards consolidating regulatory gains—primarily defending historic districts and the federal historic preservation infrastructure against periodic attack.¹⁸⁷ Reliance on pre-acquisition has not been a notable component of the relationship between NPS and historic preservation non-profits.¹⁸⁸ The primary reason for this is that NPS acquisitions have been comparatively limited due to the substantial carrying costs associated with museum operations. Thus, there has not been the need for the same form of interrelationships as those that exist within the land conservation arena.¹⁸⁹ This infrastructure gap, or at least gap in relative project structure, seems to be a logical outgrowth of the comparative use of affirmative resource protection as a preferred strategy. At the end of the day, however, it seems that there has to be a reason that the infrastructure even exists in the first place. While structural support underlies this gap to some degree, there seems to be insufficient cause and effect as to allow one to rely on this as a primary explanation for disparate practice within the relative disciplines.

2. Comparative Specialization

Unlike the land conservation arena, there are not many working in the historic preservation field with the type of expertise needed to carry out complex transactional projects (with the limited exception of the historic

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., Sheila McGrory-Klyza, *Land Trusts and Federal Agencies—A Mutually Beneficial Relationship*, *SAVING PLACES*, Fall 2012, at 7, 7–10 (exploring the bases for this relationship).

¹⁸⁷ Christopher J. Duerksen, *Local Preservation Law*, in *A HANDBOOK ON HISTORIC PRESERVATION LAW*, *supra* note 39, at 29, 30–31 (discussing preservation strategy in the early 1980s).

¹⁸⁸ JOHN H. SPRINKLE, JR., *CRAFTING PRESERVATION CRITERIA: THE NATIONAL REGISTER OF HISTORIC PLACES AND AMERICAN HISTORIC PRESERVATION* 35–41 (2014) (profiling the challenges NPS faced in approaching historic preservation issues post-WWII).

¹⁸⁹ For example, there are around 200 historical units of the NPS nationwide, many of which are limited to the immediate contextual setting of the property—which limits some of the need for pre-acquisition work. See John M. Fowler, *The Federal Government as Standard Bearer*, in *THE AMERICAN MOSAIC: PRESERVING A NATION'S HERITAGE* 35, 72–73 (Robert E. Stipe & Antoinette J. Lee eds., 1987). The more typical model on the preservation side is for a non-profit group to acquire a historic site and eventually have its operations federalized to support its interpretive and educational efforts. See Press Release, Dep't of Interior, Secretary Salazar Announces Formal Establishment of Clinton Birthplace Home National Historic Sites (Dec. 14, 2010) (explaining the donation of the Clinton birthplace to the National Park Service).

tax credit community).¹⁹⁰ Historic preservation generally somewhat remains the arena of the architectural historian, and although there has been a push to diversify the skillsets of preservation professionals, this has not been carried through to its logical conclusion.¹⁹¹ Given the continuing role of design review within both regulatory and procedural tools, it is not surprising that professionals involved in this area generally rely on different skillsets than those involved in facilitating transactions, which may influence continued reliance on existing non-acquisition based strategies.¹⁹²

Beyond the professions represented in the field, historic preservation is at its core a local endeavor, where the interest in preserving a resource should theoretically be strongest and advocates are best able to target significant historic resources.¹⁹³ Relatively few local communities or preservation organizations, however, have professional staff; instead, they rely heavily on volunteers.¹⁹⁴ This staffing gap is not addressed by national and regional organizations as these entities have generally limited interest in becoming involved in purely local issues, due to the sheer volume of these issues, which requires the use of considerable

¹⁹⁰ Talmage, *supra* note 2, at 11–12 (noting this capacity building issue and the challenges it presents—particularly when a project include both land and historic attributes). An additional example of this gap can be found in the financial sophistication of the larger land conservation organizations that have been able to quantify with some precision the amount of funding it would take to achieve their primary objectives. *See, e.g.*, Frank Casey, *Contours of Conservation Finance in the United States at the Turn of the Twentieth Century*, in *FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE* 183, 185 (James N. Levitt ed., 2005) (discussing the estimated costs of a comprehensive habit conservation system as of 2005). No similar analysis exists in the historic preservation context and it would be difficult to obtain even a common starting point of a shared goal/target for preservation activity.

¹⁹¹ *See, e.g.*, THOMAS F. KING, *PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT* 27–28 (2003); Tom King, *Where Did We Go Wrong?*, *TOM KING'S CRM PLUS* (Dec. 31, 2015, 4:49 AM), <http://crmplus.blogspot.com/2015/12/where-did-we-go-wrong.html> (discussing issues with SHPO staffing generally).

¹⁹² Jessica Owley & Adena R. Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Public Uses*, 51 *LAND USE POLICY* 76–84 (2016) (exploring how experience shapes the complexity of these transactions within easement transactions). *But see* CMTY. PRES. COAL., *AMES SHOVEL SHOP—EASTON*, <http://www.communitypreservation.org/successstories/community-housing/354> (last visited Feb. 28, 2016) (summarizing town's efforts to utilize diverse funding sources to save a threatened historic industrial works through real estate intervention).

¹⁹³ Julia H. Miller, *Historic and Cultural Resource Protection Under Historic Preservation Law*, in *HERITAGE RESOURCES LAW: PROTECTING THE ARCHITECTURAL AND CULTURAL ENVIRONMENT* 17, 25 (Sherry Hutt et al. eds., 1999) (noting the primacy of local authority in protecting heritage resources).

¹⁹⁴ Libby Bischof, *Who Supports the Humanities in Maine? The Benefits (and Challenges) of Volunteerism*, 24 *ME. POL'Y REV.* 111 (2015). This is also true within the land trust community to some degree, but many land trusts have hired professional staff as the field becomes increasingly mature. *See* Karen Bassler, *Thinking Strategically About Staff*, *SAVING LAND*, Winter 2012, at 10 (discussing the shift towards greater reliance on professional staff).

strategy in determining where to intervene with the greatest effect.¹⁹⁵ As a result, there is not a comparable group of historic preservation professionals involved in acquisition-based protection efforts as compared to the land trust community.¹⁹⁶

Despite this relative gap, there are a few ways to consider how this has actually impacted the use of acquisition as a comparative strategy. For instance, it is likely that the expertise available to support land trust efforts is an outgrowth of the financial models and the comparative infrastructure that has been built up to support federal, state, local and non-profit acquisition efforts nationwide. The fact that financial incentives for conservation projects are potentially more beneficial to owners certainly supports professional interest in entering this area, which further feeds into the degree of creativity utilized to fund new projects, both private and public.¹⁹⁷ There is also a certain confidence that has grown out of accomplishing increasingly sophisticated and complex projects that has further contributed to the expanded use of resource protection within the land trust arena.¹⁹⁸ While comparative specialization has likely shaped practice, the underlying environmental conditions have probably been more of the source of this overall dichotomy, a topic that will be explored in greater detail in below in Section VI.B.2.

3. Comparative Scale and the Relative Availability of Regulatory Options

The scale of projects and the relative ability of regulatory controls to accomplish their respective goals influence this differential practice.¹⁹⁹ Both factors relate to how advocates are impacted by the resource

¹⁹⁵ Thomas D. Visser, *The Status of Professional Career Openings in Historic Preservation in the United States*, 2 PRES. & RESEARCH J. 73, 74 (2008).

¹⁹⁶ Talmage, *supra* note 2, at 11.

¹⁹⁷ See, e.g., Phyllis Myers, *Direct Funding of Nonprofit Land Protection: A New Genre of State Land Conservation Programs*, in LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS 258, 258–60 (Eve Endicott ed., 1993).

¹⁹⁸ See, e.g., Deborah McDermott, *On the Heels of Rustlewood Farm Effort, KLT Tackles Brave Boat*, KITTERY LAND TRUST (Aug. 31, 2013, 2:00 AM), <http://www.kitterylandtrust.org/news-events.cfm> (noting that an earlier successful project gave land trust confidence to tackle thornier issues).

¹⁹⁹ This section admittedly generalizes to a great degree to note the typical differences in project structure between land conservation and historic preservation-based initiatives, which may or may not hold true for each individual project. For example, there may be historic preservation projects where a more substantial project area is targeted for protection, or a conservation project involving a small micro-habitat is targeted for protection. See, e.g., Stephanie Strom, *A Revolutionary War Widows' Estate Becomes Preservation Battleground*, N.Y. TIMES, Nov. 16, 2009, at C1 (profiling historic property protected by non-profit organization despite financial challenges which render the future of this effort unclear); BYERS & PONTE, *supra* note 66, at 216–17 (profiling several small garden easements held by North Carolina's Triangle Land Conservancy).

concerns they are seeking to address in tailoring a solution to address their various needs on a site-specific basis.

a. The Impact of Scale

Scale fundamentally shapes project design and the nature of the tools that can best achieve the goals of advocates working to address a given resource challenge.²⁰⁰ For example, when working with historic resources, an individual historic site may be relatively discrete—often limited to a comparatively narrow geographic footprint—such as a historic structure and its accompanying lot in an urban setting.²⁰¹ For preservationists, while protecting individual sites can be an important component of their work, this often is not the primary objective, as it is the protection of a larger geographic neighborhood that they are actually seeking to obtain.²⁰² Preservationists working to protect a historic urban neighborhood would have to deal with dozens, if not hundreds, of property owners. This renders assembling district-like protection through acquisition-based strategies almost impossible. Thus, it would certainly be possible to protect a single house on Boston’s Beacon Hill through acquisition, but not the entire historic district consisting of thousands of historic properties with a market valuation of millions of dollars.²⁰³

On the other hand, working at scale on the land conservation side is often facilitated by the fact that a single landowner typically owns a parcel of significant enough size to make more of an immediate impact.²⁰⁴ A single farm or forest parcel can range from several acres to thousands, which importantly is often under common or collective ownership.²⁰⁵

²⁰⁰ Jean David-Gerber & Adena R. Rissman, *Land Conservation Strategies: The Dynamic Relationship between Acquisition and Land Use Planning*, 44 ENV’T & PLANNING 1836, 1846 (2012).

²⁰¹ *What is an Historic Preservation Easement?*, PECONIC LAND TRUST, https://www.peconiclandtrust.org/pdf/HistoricEasement_FullFlyer.pdf (last visited Feb. 28, 2016) (describing various historic preservation easement projects—some of which feature both land and historic preservation objectives).

²⁰² Ignacio Laguardia, *Brookline Selectmen Back New Historic District*, BROOKLINE, Apr. 22, 2015, <http://brookline.wickedlocal.com/article/20150422/NEWS/150428848> (profiling goals as protecting larger number of historic properties).

²⁰³ See, e.g., Olivia Rassow, *Boston’s Most Expensive Parking Space Ever is Listed in Beacon Hill*, BOSTON MAGAZINE, Nov. 3, 2015, <http://www.bostonmagazine.com/property/blog/2015/11/03/beacon-hill-parking> (profiling a Beacon Hill parking spot listed for \$650,000; previous sales of parking spots have sold for up to \$390,000).

²⁰⁴ See, e.g., STEPHEN TRIMBLE, *BARGAINING FOR EDEN: THE FIGHT FOR THE LAST OPEN SPACES IN AMERICA 200* (2008) (describing the largest easement donation in U.S. history—a conservation easement protecting 762,000 acres in Maine).

²⁰⁵ See, e.g., Phyllis Ingersoll, *A 100 Year History of Bay End Farm*, WILDLANDS NEWS, Nov. 2014, at 5, available at http://www.wildlandstrust.org/Portals/0/Uploads/Documents/Public/2015/WT14%20NOV_web.pdf (discussing successful effort by family to protect a historic Massachusetts farm).

This allows land trusts to protect significant resources in a single transaction, rather than needing to work with assembled parcels or more diverse ownership.²⁰⁶ The relative value of these parcels is often considerably less than that of developed lands, which also impacts whether acquisition can be effective as a protective tool.²⁰⁷ Acquisition can work well in low cost areas or where undeveloped land is concerned, but not necessarily within densely packed high-value and developed urban cores where preservationists typically operate.²⁰⁸ Acquisition can also work where a property is comparatively unique (the last unit of urban open space or a historic property of transcendent importance), but it will be more difficult if the property is fairly ubiquitous—an isolated row house, for example, in Baltimore or Philadelphia.

Thus, on the conservation side, advocates are more frequently working at a larger scale by the sheer virtue of the nature of the resources that they are seeking to protect. This in turn allows for more effective use of acquisition-based strategies.²⁰⁹ Preservationists likely realized this early on in their drive to use regulatory tools, as they transitioned away from acquisition as a primary strategy.²¹⁰ In the end, the goals of a given project directly and necessarily impact its design. To the extent that the goals of preservationists and conservationists are shaped by scale, this is at least a partial explanation for the differential practice between the disciplines.

b. The Nature of Regulatory Options

Beyond scale and valuation, land use regulations impact the owners of historic properties differently than the owners of conservation lands. For owners of historic properties, the typical net impact of historic district regulations is that the owner will not be able to demolish their property

²⁰⁶ See, e.g., *OLT Protects Historic Stock Farm*, OSTEGO LAND TRUST, <http://otsegolandtrust.org/the-news/recent-news/330-olt-protects-historic-stock-farm> (last visited Feb. 28, 2016) (profiling donation protecting over 300 acres of farmland in rural New York).

²⁰⁷ David Newburn et al., *Economics and Land Use Change in Prioritizing Private Land Conservation*, 19 *BIOLOGICAL CONSERVATION* 1411, 1415–15 (2005); see also AM. FARMLAND TRUST, *COMMUNITY BENEFITS AND COSTS OF PURCHASE OF AGRICULTURAL CONSERVATION EASEMENTS* 18 (2005) (profiling the per acre costs associated with the purchase of an easement protecting a Massachusetts working farm).

²⁰⁸ See, e.g., Ross Netherton, *Environmental Conservation and Historic Preservation through Recorded Land-Use Agreements*, 14 *REAL. PROP. PROB. & TR. J.* 540, 542 (1979) (discussing the challenges associated with acquisition-based approaches).

²⁰⁹ Land conservation advocates also face some of the same issues that preservationists face with the parcelization of forest tracts—the transfer of larger owned units away from single owners to multiple owners. See JANE PROHASKA, *PROTECTING MINNESOTA FORESTS FROM PARCELIZATION WITH CONSERVATION EASEMENTS* (2010) (discussing this issue and advocating for the use of conservation easements as a partial solution to this threat to the state's forests).

²¹⁰ MORRISON, *supra* note 41, at 1 (profiling early efforts at regulatory controls within the built environment).

and will need to get approval before making certain modifications or repairs.²¹¹ Depending on zoning, this may not result in an extreme economic hardship,²¹² and is often described as a net neutral or even positive because of the similar restrictions placed upon adjacent property owners that work, in part, to protect the owner's investment and provide long-term stability.²¹³ For most regulated property owners, the net impact of historic district regulations is to lock in the status quo, which is not that dissimilar from other forms of zoning or land use controls that are not historic resource-based or oriented in nature.²¹⁴

Land use regulations impacting the owners of open space, however, have the potential to have a larger impact because they restrict more extensive development opportunities.²¹⁵ Properties targeted by conservationists are typically undeveloped and the land use preference that is being locked in is of comparatively low economic value, which has the potential for greater hardship, and helps to make the case that this burden should be widely distributed more compelling.²¹⁶ This greater need for burden sharing is augmented by the fact that land use regulations have less reciprocal benefit and center more on the harm and costs on an individual property owner, rather than a wider group or neighborhood as occurs under the typical local historic district regulation.²¹⁷ With regard to these impacts, it is more akin to a regulatory taking and the property rights considerations are more acute than in the realm of regulatory

²¹¹ BRONIN & BYRNE, *supra* note 57, at 271, *see also* Thompson Mayes, *Preservation Law in Public Policy: Balancing Priorities and Building an Ethic*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 14, at 157, 179–81 (discussing the impacts of regulation on historic property owners and the need for balance in these efforts).

²¹² Barbara McGrath et al., White Paper on Municipal Preservation Ordinances, April 2013, available at <http://ctrust.org/ctrust/page/white-paper> (last visited Feb. 28, 2016). Additionally, most historic preservation ordinances actually have economic hardship provisions that allow approval of a request that would otherwise be barred by the terms of the regulations if compliance would impose economic inequities to the owner of a covered property. *See, e.g.*, *City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996) (evaluating economic hardship claim).

²¹³ Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768, 775–76 (2007).

²¹⁴ Costonis, *supra* note 45, at 580–82; Paul E. Wilson & H. James Winkler, *The Response of State Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROBS. 329, 329–31 (1971) (discussing early state regulations designed to protect the built environment).

²¹⁵ Tony Prato, *Targeting Conservation Easements to Reduce Impacts of Private Land Development on Protected Areas*, 23 GEO. WRIGHT FORUM 13, 14–16 (2006) (exploring valuation issues and how this impacts targeting of conservation parcels); *see also* John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RES. & ENVTL L. 1, 2 (2005).

²¹⁶ Richard J. Roddewig, *Preservation Law and Economics*, in A HANDBOOK ON PRESERVATION LAW, *supra* note 39, at 427, 489–90.

²¹⁷ David Newburn et al., *Economics and Land Use Change in Prioritizing Private Land Conservation*, 19 BIOLOGICAL CONSERVATION 1411, 1415 (2005) (describing the difference between easement initiatives and land use controls as largely one of burden allocation).

preservation.²¹⁸ All told, these factors have focused the attention of land conservationists on how to best utilize acquisition to obtain the desired level of protection, rather than on regulatory options.²¹⁹

Thus, the nature of the regulatory impacts has a direct bearing on the respective strategies utilized within the fields. For preservationists, acquisition has generally been an afterthought, to the extent that a property fell outside a potential district (an isolated rural property where regulatory protection is impractical) or where more extensive protection (protection of interior elements) has been desired, either by the community or (more commonly) by the owner of the property.²²⁰ Within the land trust community, however, acquisition has become the normative practice as the cost and harm allocation has largely practically precluded more aggressive efforts to rely on land use regulation.²²¹

C. Financial Factors

In addition to the impact of scale and the comparative availability of regulatory mechanisms, the financial model of historic preservation projects varies substantially in form from most conservation projects. When one also considers the degree of involvement and control that the owner of a targeted property has in making the determination whether to pursue this course of action, it is vitally important to consider why so many property owners have been willing to restrict land but not historic

²¹⁸ See, e.g., Daniel R. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 500–01 (1981) (discussing takings considerations within the land use context generally). Situations where land use controls have been utilized to obtain conservation benefits have been more targeted to address specific and discrete resource concerns—such as wetlands and floodplain protection—rather than working lands or open space protections. *Id.*

²¹⁹ Jessica Owley & Stephen J. Tulowiecki, *Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program*, 33 PUB. LAND & RES. L. REV. 47, 48 (2012). But see Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORD. ENVTL L. REV. 273 (2007) (discussing this interaction and the potential for acquisition to dilute regulatory authorities). Land use conservation and historic preservation specialists also potentially vary in the respective roles that easements are intended to play. Land conservation advocates use easements to provide control beyond what regulation can typically offer in a given community. In the historic preservation context, easements are more likely to more closely replicate other historic preservation controls—which may add to the comparative willingness of land conservation proponents to pursue easements as it provides additional protection that that could otherwise be obtained.

²²⁰ J. MYRICK HOWARD, BUYING TIME FOR HERITAGE: HOW TO SAVE AN ENDANGERED HISTORIC PROPERTY 89–94 (2007).

²²¹ Talmage, *supra* note 2, at 16. Ironically, perhaps, it is when preservation easements were utilized out of this traditional zoning construct (e.g. to protect buildings already included in local historic districts) that some of the abuses noted by the IRS began to occur. See 2011 Fitch Forum: Part IV, *supra* note 73, at 292–95.

resources, at least to the same degree.²²² This section then will explore the relative transactional structures by assessing both the role of the financial value associated with this conveyance and the relative impacts on property owners in both disciplines.

1. Economic Value as a Structural Component of Project Planning

Protecting land through direct intervention in the real estate market can have meaningful differences from historic preservation-based models, owing to the relative value embodied in these transactions. Within the land conservation arena, if a land trust acquires a conservation easement, depending on the nature of restrictions and the development potential of the encumbered land, this can represent a considerable portion of the property's total value.²²³ For a property with high development potential, the before-and-after value of the parcel may be strikingly different.²²⁴ This loss in value can represent a considerable portion of the property's value; at times, it approximates the value of the parcel in fee.²²⁵ The value associated with this donation presents both opportunities and challenges. On the opportunity side, the considerable loss in value allows a donor to benefit from the loss in value as a charitable contribution to the extent allowed under the Internal Revenue Code and its implementing regulations.²²⁶ As for the challenges, conservationists face considerable transactional costs in acquiring their desired level of protection.²²⁷ To accomplish transactions within the conservation arena then, there is a strong incentive to have the property owner contribute some significant percentage of the property's value to the funding mix as a charitable donation, and the value of the land being restricted or protected helps to directly facilitate this transactional form.

²²² Jeffrey Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. ENVTL L. J. 257, 261–64 (2002) (profiling this flexibility).

²²³ Robert Wood, *Conservation Easements, Valuation, and Substantiation*, 37 REAL ESTATE TAX'N 132, 134 (2010) (exploring valuation issues in this context).

²²⁴ C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 148–50 (2008) (discussing donation valuation methodology).

²²⁵ Kate B. Deal, Note, *Incentivizing Conservation: Restructuring the Tax-Preferred Acceptance Process to Maximize Overall Conservation Value*, GEO. L.J. 1587, 1588–90 (2013).

²²⁶ See Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL L. REV. 47 (2011) (exploring why conservation easement donors have been so willing to make this form of donation—which largely can be boiled down to the fact that the donors are not planning to develop their resources so the large charitable value of the loss is adequate incentive to facilitate this transaction).

²²⁷ Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RES. J. 483, 484 (2004) (exploring the decision to use easements as a protective tool).

Within historic preservation projects, this model is somewhat reversed. If a preservation organization desires to acquire an easement or less than fee interest to protect the property, this may or may not have much of an impact on the value of the property.²²⁸ For example, consider a historic house in a residential neighborhood.²²⁹ An easement that restricts this house to residential development may not constitute any cognizable loss in value (particularly if in a regulated district), which is a position that the IRS has taken with regard to some recent donations.²³⁰ The ultimate valuation will hinge on a number of factors, including whether the property is protected by existing preservation regulations, the terms within the preservation easement, and the nature of the historic resource.²³¹ The impacts of preservation easements are fairly difficult to ascertain or assess in any sense of generalized isolation, but there may be guideposts. If, for example, a property is sufficiently unique and located in a desirable neighborhood, the terms of the restrictions may not have much of an impact since there is sufficient market demand for the resource.²³² If the property, however, is less compelling or is located in a rural area or in an area without similar demand, it might have outsized impact, as property owners will likely choose an unrestricted property if given the option between roughly comparable options. At one time, some argued that the donation of a typical preservation easement would generally result in an approximately ten percent loss in a property's value.²³³ The IRS has categorically rejected this bright-line approach, but it perhaps gives a working frame of reference at least purely for comparison purposes with conservation transactions involving land.²³⁴ Notably, other more recent evidence, however, has pointed to even lower

²²⁸ RODDEWIG, *supra* note 64, at 1 (exploring the issues associated with valuation).

²²⁹ Richard J. Roddewig, *Preservation Law and Economics*, in A HANDBOOK ON PRESERVATION LAW, *supra* note 39, at 427, 488–89 (profiling this type of donation as a case study and indicating that there may be no associated economic loss).

²³⁰ BRONIN & BYRNE, *supra* note 57, at 558 (noting that some donations may have no value and that Treasury Regulation § 1.170A-14(h)(3)(ii) expressly states this fact); *see also* Whitehouse Hotel P'ship v. Comm'r, 615 F.3d 321 (5th Cir. 2010) (vacating a tax court decision that upheld an IRS determination that donated easement had zero value).

²³¹ Roddewig, *supra* note 64, at 229 (noting the complexity involved with appraising preservation easements).

²³² Richard J. Roddewig, *Preservation Law and Economics*, in A HANDBOOK ON PRESERVATION LAW, *supra* note 39, at 488–89 (“[if] the area where the building is located has already attracted much renovation interest, the market may be paying a premium for older buildings with historic character. The imposition of an easement, therefore, probably will not decrease the building's value.”).

²³³ TOMLAN, *supra* note 23, at 193–94; *see also* 2011 Fitch Forum: Part IV, *supra* note 73, at 292–95.

²³⁴ Foster v. Comm'r, 2012 Tax Ct. Summary LEXIS, at *4–5 (T.C. Sept. 11, 2012) (rejecting safe harbor argument made by appraiser of restriction).

valuations for preservation easement donations.²³⁵ This relatively modest loss in value when compared to conservation transactions may counter-intuitively present a challenge for preservation advocates. The loss in property value associated with an easement donation is potentially insufficient to incentivize or facilitate preservation-focused transactions without a property owner with a strong preservation motivation. As a result, absent the ability to rely on an equivalent value proposition, a comparable financial model has not yet been established to secure protection through this structural form.²³⁶

2. *Relative Impacts on Property Owners*

Preservation advocates may also face an additional challenge in that the same degree of so-called “notational generosity” may not apply as directly in the context of efforts to use tax incentivized easements to protect the built environment.²³⁷ “Notational generosity” is the term Josh Eagle used to investigate why so many donors have been so willing to give comparatively generous charitable contributions when it comes to qualified conservation easements, which often far exceed other forms of charitable donations in both scale and magnitude.²³⁸ In Eagle’s view, the most likely explanation was that this generosity is driven largely by the fact that the value of the tax incentives often greatly exceeds the direct costs associated with this transaction.²³⁹ As the owners conveying conservation easements often have no plans to develop or alter their land (and in many instances are dispositionally uninclined ever to do so), there is no immediate negative impact to their financial well-being associated with the charitable gift.²⁴⁰ The conveyance does not alter her current use and enjoyment of the land, particularly as the owner is able to negotiate

²³⁵ 2011 Fitch Forum: Part IV, *supra* note 73, at 292–95; *see also* Nancy A. McLaughlin, *The Valuation Conundrum*, 19 FLA. TAX. REV. 225, 265 (2016) (profiling IRS cases challenging easement valuation and finding that the typical donation level resulted in a less than 5% of the property’s pre-donation value).

²³⁶ While uncommon, some communities have been able to establish programs to purchase easements—typically at a fraction of its value in fee. *See* Ellen Ishkanian, *Weston Residents Fight to Save 1887 Mansion*, BOSTON GLOBE, May 15, 2015 (exploring town effort to spend \$250,000 to purchase preservation restriction to protect historic mansion in prominent Boston suburb).

²³⁷ Eagle, *supra* note 226, at 47 (discussing inefficiencies in current public subsidies for acquiring conservation easements).

²³⁸ *Id.*

²³⁹ Leigh Raymond & Sally K. Fairfax, *The ‘Shift to Privatization’ in Land Conservation: A Cautionary Essay*, 42 NAT. RES. J. 599, 627 (2002) (explaining that “[c]onserved land thus comes under protection because it is available to a land trust, not necessarily because it is an appropriate parcel to preserve”).

²⁴⁰ Eagle, *supra* note 226, at 47; *see also* Colinvaux, *supra* note 116, at 1 (exploring this phenomenon).

and tailor her transaction to protect the desired use of the property.²⁴¹ This is particularly true in light of the fact that most conservation easements do not require public access, so it is even less likely to place a direct burden on an owner's immediate use and enjoyment of the land.²⁴² For example, the owner of a 100 acre parcel could donate a conservation easement on her land, retain a five acre building envelope for future expansion, restrict future development of the remainder of the property (thus locking in the status quo), and still garner a significant tax benefit. This is not necessarily a criticism of this financial model, as there are or should be substantial societal benefits associated with this transaction, but it serves to demonstrate the motivations that incentivize these transactions within the land trust arena.

Conversely, historic preservation easements limit an owner's ability to modify their home.²⁴³ Most owners are justifiably concerned about what this will do to the resale value of their home and their ability to comfortably enjoy the continued use of the resource. This literally impacts a property owner closer to home and has the potential for more direct interference with their future plans, not some abstract future development potential. While a purely façade easement in an established local historic district could have similar impacts on a property owner's motivation (i.e. not interfering with their current use), this is no longer the dominant model in the easement field given the legal issues associated with this form of donation and the questionable status of whether any charitable deduction is appropriate or can be claimed.²⁴⁴ Thus, the relative impacts that these transactions have on property owners often vary between land conservation and historic preservation projects.²⁴⁵ The disparate impacts associated with these transactions is one logical

²⁴¹ Owley & Rissman, *supra* note 192, at 81–82 (2016) (noting this flexibility and reviewing land trust perspectives on drafting); *see also* Deal, *supra* note 225, at 1588–90 (profiling this flexibility to the extent that it does not run afoul of IRS requirements).

²⁴² Bray, *supra* note 103, at 141–43 (examining the limited number of easements allowing public access in review of Massachusetts conservation easement transactions).

²⁴³ *See, e.g.*, Paul Edmondson, *The American Experience*, in HERITAGE COVENANTS AND PRESERVATION 35, 35–37 (2004).

²⁴⁴ Steinitz, *supra* note 87, at 2.

²⁴⁵ As a result of the differential impacts and differing organizational missions, it is not uncommon for a land conservation organization to carve out the historic resource from the protective scope of the project—which allows the land trust to avoid the “hassle” of the historic resource and the impacts to the property owner that might stem from the easement's application. *See* Talmage, *supra* note 2, at 16. In addition to the indirect costs, easement organizations often require a contribution (stewardship contribution) in association with the underlying easement transaction to offset their costs and provide funding for the future monitoring and enforcement of the terms of the restriction. Although there is not hard data to support this, it is likely that the preservation easement organization contribution requirements or levels are somewhat higher to defray the potential risks and operational costs that these projects entail.

explanation of why acquisition-based approaches have been substantially more popular within the land trust arena than in the historic preservation space.²⁴⁶

To briefly summarize, there are institutional, structural, and financial factors that impact each field's relative willingness to utilize acquisition-based strategies to fulfill their charitable missions. All of the factors explored above influence these decisions to a degree, but this divergence does not lend itself to a relatively simple explanation. It would, however, appear that the financial models strongly favor or facilitate the ultimate choice of which route to pursue, and shape the relative reliance to utilize acquisition-based strategies as a default operational model. To address this gap from a historic preservation perspective will require close consideration of why the existing acquisition models are less suited to their challenges, and how to tailor their approach to adapt to the unique environment they operate in.

VI. EXPLORING OPPORTUNITIES FOR GREATER INCORPORATION OF ACQUISITION-BASED STRATEGIES INTO CONTEMPORARY PRESERVATION PRACTICE

Despite the very real differences between contemporary historic preservation and land conservation practice, there are opportunities for preservationists to use the land trust experience as a model for expanding their impacts, by reevaluating the role that acquisition-based strategies play in their overall efforts. Historic preservation practice admittedly has many characteristics that will complicate this form of endeavor; thus, it is not going to simply be a matter of determining that it is a desirable policy preference to make this shift. Instead, it will be a matter of determining where and when acquisition-based strategies can serve to

²⁴⁶ Beyond the financial impacts to the donors, there are also financial impacts to the organizations that must be considered. Once an easement is signed, the costs do not end for the acquiring organization that has made a perpetual commitment to monitor and enforce the terms of that restriction. This imposes substantial direct costs and future risk upon the stewardship organization that must be accounted for in order to maintain the public's trust and support for this form of endeavor. There are potentially differing costs associated with monitoring and enforcing conservation easement versus historic preservation easements, but given the lack of relative information for comparison purposes, this can only be noted and not fully explored. Additionally, it is unclear how much direct impact these transactional costs have on organizational strategy, although, as noted above, to the extent that the organization requires an endowment contribution it could be a not insignificant barrier to entry. *See, e.g.,* Edmondson, *supra* note 243, at 50–52 (profiling the litigation challenges surrounding the Mar a Largo hotel in Palm Beach, Florida and the ongoing perpetual costs of acquiring a preservation easement generally); *see also Historic Preservation Easements*, PRESERVE RHODE ISLAND, <http://www.preserveri.org/#!historic-preservation-easements/dxyaj> (last visited Aug. 4, 2016) (discussing the need for stewardship funds and the required contribution amounts).

augment or support other forms of effort, as the existing tax incentive structure is not as well-suited for directly encouraging historic resource protection. Focusing on integrating protection into areas where historic preservation practitioners have existing experience and the financial model is already established seems to have particularly strong potential for increasing impacts across the field. To this end, this section will discuss a few potential pathways for accomplishing this goal in light of the relatively unique nature of preservation project planning, specifically: (1) modifying existing financial incentive programs to include affirmative resource protection; and (2) using options and real estate intervention methodologies more creatively to obtain resource protection.

A. Working with the Existing Incentive Structure

Given the relative challenges preservationists face in using acquisition as compared to their conservation counterparts, one of the most promising pathways to the more effective use of acquisition-based strategies is to reconsider the current tools for possible incorporation of resource protection attributes. The structural, financial, and institutional characteristics of historic preservation practice render the current incentives insufficient in some regards, and there is a need to develop project structures that are better tailored to take advantage of the relative strengths of preservation practitioners. Incorporating acquisition-based strategies into existing individual initiative and existing models is one option for a path forward, specifically as a component of the historic rehabilitation tax credit and grant-making activities.²⁴⁷

1. The Historic Rehabilitation Tax Credit

As discussed above, one of the most powerful tools for promoting preservation-focused redevelopment is the historic rehabilitation tax credit.²⁴⁸ Over the past three decades, tax credit financing has demonstrated the value of historic neighborhoods as an economic driver and has been responsible for the restoration and rehabilitation of tens of

²⁴⁷ Another option would be to simplify or alter the tax incentive structure to make it easier and less problematic for easement donors to access. This could be done by allowing a flat deduction (if substantiated by a larger appraisal) or any other model (for example, an easement appraisal review board) to provide more certainty and reduce the audit risk associated with the tax incentive structure. *See, e.g.*, Press Release, Murphy, Blumenthal Call on IRS to Modify Adversarial and Expensive Approach to Processing Conservation Easement Land Donations (Feb. 23, 2016), <http://www.murphy.senate.gov/newsroom/press-releases/murphy-blumenthal-call-on-irs-to-modify-adversarial-and-expensive-approach-to-processing-conservation-easement-land-donations>.

²⁴⁸ *See infra* Part II.C.1.

thousands of historic properties nationwide²⁴⁹ Whole communities have been transformed by the use of this tool and without the investment capital that it has provided, it is unclear whether the private market would have moved so aggressively into this area of real estate activity.²⁵⁰ The historic tax credit, however, while fostering critical direct investment into heritage infrastructure, does not provide for or include permanent resource protection.²⁵¹ The owner of a property who has utilized the historic tax credit is on the proverbial hook for maintaining the structure for a finite amount of time (five years) after receiving the credit in order to avoid recapture.²⁵² But once this limited recapture period has passed, there are no requirements in the tax code that these buildings remain intact.²⁵³ To some extent, this has a certain logic or is at least strongly shaped by the concerns which led to its creation.²⁵⁴ The idea behind the federal rehabilitation tax credit was to encourage the development community to engage as partners in preserving historic structures in what were neglected urban cores.²⁵⁵ Encouraging development means attracting new investment capital, which requires offering financing terms that are palatable to the investment community.²⁵⁶ Placing too many requirements or restrictions on accessing the historic tax credit could have rendered it less attractive when compared to other investment options, so when tax credits were relatively new, limiting the requirements was a logical policy decision.²⁵⁷

²⁴⁹ NAT'L PARK SERV., TAX INCENTIVES FOR PRESERVING HISTORIC PROPERTIES, <http://www.nps.gov/tps/tax-incentives.htm> (last visited Feb. 28, 2016); see also Erica Stewart, *The Historic Tax Credit: A Proven Community Revitalization Tool*, FORUM J., Spring 2013, at 35–39 (profiling the types of impact this tax credit program has in redevelopment activities).

²⁵⁰ NAT'L PARK SERV., *supra* note 249; Stewart, *supra* note 249.

²⁵¹ BRONIN & BYRNE, *supra* note 57, at 614–15.

²⁵² Mark Primoli, INTERNAL REVENUE SERV., REHABILITATION TAX CREDIT RECAPTURE, https://www.irs.gov/pub/irs-utl/tax_credit_recapture_brief.pdf (last visited Feb. 28, 2016) (discussing the application of recapture rules within the context of the rehabilitation tax credit).

²⁵³ Mark Primoli, INTERNAL REVENUE SERV., TAX ASPECTS OF HISTORIC PRESERVATION 3 (2000), available at <https://www.irs.gov/pub/irs-utl/faqrehab.pdf>.

²⁵⁴ 121 CONG. REC. 3004 (1975) (statement of principal sponsor J. Glenn Beall of Maryland regarding the purpose of the historic rehabilitation tax incentives); see also Eric Blumenauer, *Preserving Portland, Oregon: Support for the Credit Begins at Home*, FORUM J., Spring 2013, at 3–6 (discussing the early identity crisis of this tool—a financial and preservation mechanism).

²⁵⁵ Jonathan Flynn, *Productive Preservation and the Reinvention of Industrial America*, 39 URB. L. 123, 133 (2007).

²⁵⁶ Thomas W. Geigerich, *The Monetization of Business Tax Credits*, 12 FLA. TAX REV. 709, 724 (2012) (citing H.R. Rep. No. 95-1445, pt. 3 at 177 (1978)).

²⁵⁷ See, e.g., Harry K. Schwartz & Renee Kuhlman, *Refundable State Tax Credits for Historic Rehabilitation*, FORUM J., Winter 2014, at 29–39 (discussing the various factors which influence the relative effectiveness of state tax credit programs); see also Harry Schwartz, NAT'L TRUST FOR HISTORIC PRES., STATE TAX CREDITS FOR HISTORIC PRESERVATION 5–10 (2010).

²⁵⁸ 2011 Fitch Forum: Part IV, *supra* note 73, at 293. Although affirmative protection has not been a part of tax credit practice, at various points, investors were more inclined to use charitable

Perhaps, however, this degree of deference to the development community is no longer needed given the extensive investment that the tax credits represent and the relatively well-established track record of this incentive-based financial model.²⁵⁸ Affirmative resource protection could be added to the project mix, either through additional incentives or restrictions associated with use of the historic rehabilitation tax credits. Some other forms of historic resource investment, such as grants from many funding sources, which are discussed in the following sub-section, already require a term or perpetual easement as a condition of funding.²⁵⁹ Structuring tax credit deals to include this requirement would mirror this structural practice. Ultimately, given the significant levels of funding involved in rehabilitating properties through the federal and state tax credits, incorporating affirmative resource protection in the programmatic mix would strengthen as well as protect the value of this public investment.²⁶⁰ Whether this could be best accomplished through additional incentives (for example, raising the credit when permanent protection is included) or through statutory/regulatory changes is unclear, and it would be necessary to ensure that critical investment in this sector is not deterred.²⁶¹ To the extent that the state historic tax credits have already been the source of experimentation and innovation, this would be the logical starting point.²⁶² A shift in this direction would allow preservation organizations or state and local governments to have a more permanent role in safeguarding the value of the public's investment and allow preservation advocates to obtain resource protection through a path that is already fairly well established.

2. Adding Resource Protection as a Grant Condition

Grant-making practice could also be modified to place a greater emphasis on resource protection. Historically, and in their current iteration, one of the primary ways preservation organizations work is by

easement donations in conjunction with the historic tax credits, but for various reasons, this is no longer a frequently utilized mechanism. *Id.* at 293.

²⁵⁸ See, e.g., Elizabeth Byrd, *Developers Speak: Tax Credits Make Deals Possible*, FORUM J., Spring 2013, at 47–52 (profiling the role this tool plays in promoting preservation-focused projects); see also Listokin & Listokin-Smith, *supra* note 54, at 285 (placing the tax credits in their appropriate historic context and explaining the debate in this arena over their scale and function).

²⁵⁹ NAT'L TRUST FOR HISTORIC PRES., PRESERVATION EASEMENTS, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements> (last visited Feb. 28, 2016).

²⁶⁰ Andrew Gold, *The Welfare Economics of Historic Preservation*, 8 CONN. L. REV. 348, 353 (1976) (exploring preservation as a public good in need of financial support).

²⁶¹ 2011 Fitch Forum: Part IV, *supra* note 73, at 292–95.

²⁶² See Schwartz & Kuhlman, *supra* note 256, at 29–39 (discussing state historic tax credit structure).

providing grants to fund brick and mortar work on historic resources.²⁶³ These grants are typically made to resources owned by non-profit or governmental bodies and can supplement the often-scarce resources these organizations have to appropriately maintain and care for their heritage assets.²⁶⁴ In recent years, more and more preservation grants have been structured to include, as a condition of funding, the express requirement that the property owner convey a preservation easement to protect their historic structure for a specified period of time, typically thirty years or in perpetuity.²⁶⁵ From a funder's perspective this makes sense, as the organization has a strong motivation to protect the value of their investment and not see the historic resource demolished shortly after funding an extensive restoration.²⁶⁶ Many of the larger grant entities, including federal agencies, have moved in this direction.²⁶⁷ These efforts could be expanded even further to begin to target particularly important privately-owned historic resources and begin to think more in terms of using grants as a means towards acquiring resource protection; rather, using this funding stream more strategically to accomplish both protective and rehabilitation goals. The ability of funders to use preservation grants to acquire protective interests has strong potential for expanding the use of acquisition and resource protection-based strategies and would harness an existing relative strength of the preservation community.

²⁶³ See, e.g., Susan W. Montgomery, *This Fund Matters: The Historic Preservation Fund's Role in Saving Places*, FORUM NEWS, Winter 2010, available at <http://www.preservationnation.org/forum/library/public-articles/this-fund-matters-the.html> (discussing HPF as a funding source generally).

²⁶⁴ LAND & CMTY. HERITAGE INVESTMENT PROGRAM, <http://www.lchip.org/> (last visited Feb. 28, 2016) (detailing New Hampshire's LCHIP grant program—which includes open space and historic resources). One of the most resource-starved historic resource types is historic religious structures as concerns regarding the funding of religious institutions has restricted some governmental and foundational support. The more recent trend, in the governmental funding arena, is to allow these resources to be funded based upon their non-secular historical significance. See Laurie Goodstein & Richard W. Stevenson, *In Shift, U.S. to Offer Grants to Historic Churches*, N.Y. TIMES, May 28, 2003 (discussing Save America's Treasures grants to historic churches—including Old North Church in Boston).

²⁶⁵ See, e.g., MASS. HISTORICAL COMM'N, MASSACHUSETTS PRESERVATION PROJECTS FUND, <http://www.sec.state.ma.us/mhc/mhcmpf/mppfidx.htm> (last visited Feb. 28, 2016).

²⁶⁶ ROBERT PICKARD, *FUNDING THE ARCHITECTURAL HERITAGE: A GUIDE TO POLICIES AND EXAMPLES* 50 (2009) (noting the frequent inclusion of this requirement).

²⁶⁷ EDMONDSON, *supra* note 243, at 40–41. It is likely that some organizations or entities decline to apply for funding because of concerns regarding the impact of the preservation easement and their unwillingness to grant an interest of this nature. If, however, an organization has material concerns about whether or not they will keep their structure in a state of good preservation, it might not be the most desirable to fund from a foundational perspective and better to have determined this before the grant is even made. *Id.*

Overall, incorporation of resource protection within the incentive structures provided by various federal, state, local, and charitable actors has the potential to expand the types of resources protected against demolition and insensitive alteration. The appeal of this type of action is that it could be done without much additional direct expense to the preservation community and without much of a change in their current operational structures. The downside, however, is that it potentially locks in the policy preferences in favor of incentives and expands a growing public expectation of public financial support in favor of these initiatives.²⁶⁸ On the spectrum between acquisition and regulation, as far as shifting the relative costs between an individual owner and the greater public, this may represent an acceptable middle ground approach for preservationists, by providing a measure of compensation but not approximating the resource's actual value in fee.

B. Direct Real Estate Intervention

Beyond working with existing policies and frameworks, some within the preservation movement have begun to explore a return to some earlier forms of acquisition-based strategies and are reevaluating whether direct real estate intervention could play more of a role in their efforts to protect the built environment.²⁶⁹ One of the most promising developments is the retooling of acquisition-based historic revolving fund efforts.²⁷⁰ Acquisition-based revolving funds have been an important player in the preservation movement since the middle of the twentieth century, as these funds allowed preservationists to affirmatively intervene and take action to acquire and restore threatened properties, often those that the market was unwilling to invest in.²⁷¹ These programs, depending upon their focus, struggled as far as sustainability as the investment in the properties

²⁶⁸ See, e.g., Jessica Owley, *Cultural Heritage Conservation Easements: The Problem with Using Property Law Tools for Heritage Protection*, 50 LAND USE POL'Y 177, 180 (2015) (discussing the potential for commodifying historic and cultural resources when using incentive or real estate mechanisms to acquire resource protection).

²⁶⁹ Real estate intervention was a hallmark of earlier efforts to obtain house museums, but revolving funds established across the country from approximately the 1960s to 1980s were also working to acquire protection of historic properties through acquisition, restoration, and then resale of threatened properties. See, e.g., HISTORIC ANNAPOLIS, <http://www.annapolis.org/about-us/history> (last visited Feb. 28, 2016) (noting the establishment of the group's revolving fund in the early 1960s).

²⁷⁰ Tom Mayes & Alicia Leuba, *A Guide to Property Control Options for Saving Historic Buildings*, PRES. LEADERSHIP BLOG (Mar. 8, 2013, 1:35 PM), <http://forum.savingplaces.org/blogs/forum-online/2013/03/08/a-guide-to-property-control-options-for-saving-historic-buildings> (last visited July 21, 2016).

²⁷¹ J. Myrick Howard, *Nonprofits in the American Preservation Movement*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY *supra* note 14, at 313, 355–56.

exceeded their return upon resale.²⁷² This continuing need for financial infusion hampered their ability somewhat, but these programs were undoubtedly important in demonstrating that historic property redevelopment could play an important role in community development.²⁷³

Although there are a variety of intervention strategies currently being utilized, one of the more interesting is the use of option agreements as a cost-effective means of acquiring control of historic properties.²⁷⁴ To simplify this economic model, this type of project loosely centers on historic properties that have the potential for sale or transfer to a preservation-minded buyer. The preservation organization will provide the owner with funding (although not always) to cover their carrying costs, aggressively market the property, find a buyer, and then sell the property (exercising the option if needed).²⁷⁵ As a condition to the sale, the property will be subject to a preservation easement.²⁷⁶ This model has potential for greater replicability and this section will discuss several more recent strands of activity that have been involved in promoting this concept: (1) the 1772 Foundation (in promoting revolving fund efforts and real estate intervention); and (2) historic property redevelopment programs (utilizing many of these concepts on the ground).

1. *The 1772 Foundation*

The 1772 Foundation has become a major advocate and funder as far as encouraging traditional historic preservation organizations to consider how to better accomplish their objectives through the use of leveraged capital and direct intervention in the real estate market.²⁷⁷ Since the 1960s, there has been a critical mass of actors involved in this space generally.²⁷⁸

²⁷² See TOMLAN, *supra* note 23, at 82–83.

²⁷³ *Id.*

²⁷⁴ *Revolving Fund Basics*, FORUM J., Fall 2014, at 43 (providing overview of revolving fund techniques and tools); see also *Building Rehab Services*, PRESERVE RHODE ISLAND, <http://www.preserveri.org/building-rehab-services> (last visited Feb. 28, 2016) (discussing a range of techniques including bridge loans designed to expand their impact statewide).

²⁷⁵ See, e.g., *id.*

²⁷⁶ J. MYRICK HOWARD, *BUYING TIME FOR HERITAGE: HOW TO SAVE ENDANGERED HISTORIC PROPERTIES* 21 (2007).

²⁷⁷ THE 1772 FOUNDATION, <http://www.1772foundation.org/2014-grants-for-historic-properties-redevelopment-programs-revolving-funds> (last visited Feb. 28, 2016). The 1772 Foundation refers to efforts of this type as historic properties development for presumably the sake of simplicity.

²⁷⁸ I.R.S. General Counsel Memorandum, GCM 37305 (Oct. 31, 1977) (concluding that historic revolving funds have a charitable mission for tax purposes); see also Winslow Hastie & April Wood, *The Evolving Revolving Fund: Historic Charleston Revamps its Pioneering Program*, FORUM J., Fall 2014, at 10, 10–20 (discussing the origins and current practice of the organization's fund).

Any momentum in expanding real estate investment programs of this type, however, had been somewhat lost.²⁷⁹ Traditionally, acquisition-based revolving funds acquired historic properties, rehabilitated the resources, and then conveyed the restored structure to a third party, using the proceeds from the sale to fund additional projects (hence the “revolving”).²⁸⁰ This model allowed the non-profit organization to restore properties that the market would not be willing to take on and return the structures to productive use.²⁸¹ While there is a need for this form of capital-intensive work, the challenge of this transactional structure is that it ties up resources in both the acquisition and rehabilitation costs. Further, if the project is not successful on resale, the organization’s ability to fund additional projects is hampered going forward.²⁸² To replenish a working capital fund essentially requires another capital campaign, which in itself diverts more resources that could otherwise have been allocated towards protecting historic resources.²⁸³

To this end, the 1772 Foundation has been funding revolving fund work for the last several years, including hosting preservation finance and real estate trainings.²⁸⁴ Their primary focus is encouraging historic organizations to become more innovative in their use of capital to save historic places.²⁸⁵ To foster this movement, the foundation has also been providing seed capital to preservation organizations interested in moving

²⁷⁹ J. Myrick Howard, *Nonprofits in the American Preservation Movement*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY *supra* note 14, at 313, 355–56.

²⁸⁰ Julie L. Wilchins, *A Sense of Time and Place: The Past, Present and Future of the Seattle Landmarks Preservation Ordinance*, 17 VA. ENVTL L. J. 415, 421 (1998) (discussing Seattle’s use of a revolving fund); *see also* Bailey-Hudgins House, PRES. NEWS, June 1986, at 22 (discussing the Association for the Preservation of Virginia Antiquities’ (now d/b/a Preservation Virginia) efforts in this space and offering a historic property for sale under its program).

²⁸¹ J. Myrick Howard, *Nonprofits in the American Preservation Movement*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 14, at 313, 338–39.

²⁸² THE 1772 FOUNDATION, <http://www.1772foundation.org/2014-grants-for-historic-properties-redevelopment-programs-revolving-funds> (last visited Feb. 28, 2016) (discussing the foundation’s work in providing seed capital to revolving funds as a way to increase the organizational capacity of non-profits attempting to use this model).

²⁸³ *See, e.g.*, WEYENETH, *supra* note 32, at 146 (“Most revolving funds deplete themselves eventually, as properties are sold below cost. Consequently they require an influx of capital from time to time.”).

²⁸⁴ NAT’L TRUST FOR HISTORIC PRES., 1772 FOUNDATION’S HISTORIC REAL ESTATE FINANCE TRAINING PROGRAM, <http://forum.savingplaces.org/learn/conferences-training/plt/historical-finance-training#.V1xHp7srK70> (last visited Feb. 28, 2016) (providing overview of real estate training offered in conjunction with the National Trust).

²⁸⁵ THE 1772 FOUNDATION, 2014 ANNUAL REPORT 3, <http://www.1772foundation.org/wp-content/uploads/2015/08/Annual-Report-for-2014.pdf> (discussing the organization’s role in supporting the National Trust’s coordinator position for real estate revolving funds).

in this direction.²⁸⁶ This effort is starting to pay dividends in reorienting the thinking of local advocates and in fostering a new crop of historic property redevelopment programs.²⁸⁷ Overall, revolving funds have the potential to return to the forefront of historic preservation efforts through the creative and flexible use of capital to secure protection of threatened historic properties.²⁸⁸ Again, reliance on a well-established preservation model, with slight variation, will potentially allow preservationists to leverage their existing tools more effectively to protect greater numbers of historic properties.

2. *Revolving Funds and Historic Property Redevelopment Programs*

As far as examples of organizations using option agreements aggressively to obtain affirmative resource protection, the best example is perhaps the ongoing work of Preservation North Carolina.²⁸⁹ Preservation North Carolina, the statewide non-profit historic organization, realized that it would always be limited in what it could protect if it relied only on traditional preservation tools.²⁹⁰ The use of local historic districts, while laudable, was insufficient to protect many of the resources the organization was targeting, and it needed to focus on more creative approaches in order to be more effective.²⁹¹ The organization's solution was to become an active participant in the real estate market.²⁹² This approach allowed Preservation North Carolina to both protect structures and secure vitally needed funding for rehabilitation work on threatened properties from the private sector.²⁹³ Preservation North Carolina's approach to a given project is necessarily case-specific, as the nature of the resource and the funding mix help dictate the actual

²⁸⁶ THE 1772 FOUNDATION, FOUNDATION CENTER, <http://gis.foundationcenter.org/1772> (last visited Feb. 28, 2016).

²⁸⁷ *Id.* (profiling grants for new historic property redevelopment programs); NAT'L TRUST FOR HISTORIC PRES., THE IMPORTANCE OF REVOLVING FUNDS, <http://www.preservationnation.org/information-center/economics-of-revitalization/hprp/revolvingfunds.html> (last visited Feb. 28, 2016) (providing updated list of active historic property redevelopment programs).

²⁸⁸ *SCAD Measures Historic Revolving Fund Impacts*, FORUM J., Fall 2014, at 40 (profiling the impact and potential of this sort of endeavor).

²⁸⁹ See PRES. N. C., <https://www.presnc.org> (last visited Feb. 28, 2016).

²⁹⁰ Howard, *supra* note 154, at 256 (discussing the organization's use of revolving fund techniques). Preservation North Carolina has been operating a revolving fund for over twenty-five years and relies on a variety of financial tools, both public and private, to facilitate various projects.

²⁹¹ HOWARD, *supra* note 276, at 1–10 (discussing origins of the organization's efforts).

²⁹² *Id.* at 15–16 (distinguishing its efforts from more traditional revolving funds).

²⁹³ PRES. N.C., MISSION/HISTORY, <https://www.presnc.org/about/missionhistory> (last visited Feb. 28, 2016) (explaining that its endangered property program has protected over 700 buildings to date).

strategy.²⁹⁴ The most common model the organization utilizes is to acquire an option on a threatened property, and then use this option to buy time to market and ultimately convey the property to a sympathetic purchaser.²⁹⁵ This model, with a minimum of (and often no) capital at risk, allows the organization to ensure that a new owner takes on the property and maintains the historic resource in a state of appropriate repair.²⁹⁶ The ongoing stewardship obligations are shifted upon the new owner and are enforced through a targeted preservation easement, which allows the organization to quickly move on to its next project.²⁹⁷ The only downside risk that remains to the organization is that the new owner may disregard the terms of the preservation easement, which would require legal support to remedy any violation.²⁹⁸ By leveraging its financial resources in a highly efficient manner, chiefly by using its real estate experience to facilitate market transactions, Preservation North Carolina's model presents one possible path forward as far as resource protection efforts are concerned.

Preservation North Carolina, although one of largest players in terms of gross project numbers, is not the only organization using these techniques. Recently, Maine Preservation, the recipient of a 1772 Foundation grant, created a historic properties fund and has been able to protect several properties.²⁹⁹ Maine Preservation recently re-branded this program as its "protect and sell" program to clarify their mission and model in taking on targeted historic properties.³⁰⁰ The Preservation Trust

²⁹⁴ HOWARD, *supra* note 276, at 25–30 (discussing the various project pathways). For example, Preservation North Carolina indicates that some (but not many) properties are perhaps too important or fragile to be privately owned, and under those circumstances, the use of a museum model may be appropriate. This model, however, is not overly replicable, is highly resource intensive, and unfortunately, in the movement's history has likely been utilized far too often. *Id.* at 133–36.

²⁹⁵ *Id.* at 25.

²⁹⁶ *Id.* at 1–10. Frequently, the owner of the property will not charge for the option or will allow Preservation North Carolina a certain period of time to market the property as they are interested in seeing the property acquired by a sympathetic owner.

²⁹⁷ A distinction should be made between the form of exterior easement utilized by Preservation North Carolina and other non-profits and "façade" easements that were the subject of intensive IRS scrutiny in the early 2000s. Preservation North Carolina is typically using exterior easements—protecting an entire building, while some types of façade easements would only be focused on protecting the visible face of the building as it appears from a public way. *Id.* at 58–60.

²⁹⁸ See, e.g., Nancy McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1055 (2005) (discussing litigation risk within the easement context generally).

²⁹⁹ ME. PRES., HISTORIC REAL ESTATE, <http://mainepreservation.org/historic-real-estate> (last visited Feb. 28, 2016) (profiling current offerings and noting the recent sale of the James F. Crooker House (Norway) and the Robbins-Anderson Saltwater Farm (South Thomaston)).

³⁰⁰ ME. PRES., THE PROTECT AND SELL PROGRAM, <http://mainepreservation.org/programs-events/revolving-fund> (last visited Feb. 28, 2016).

of Vermont has similarly received funding from the 1772 Foundation and has begun a shift as well.³⁰¹ The goal of the Preservation Trust's program is to protect historic properties "that are threatened in one way or another and then to find new owners and new economic uses for them," which has already resulted in several success projects.³⁰²

Reliance on models such those utilized by Preservation North Carolina, Maine Preservation, and the Preservation Trust of Vermont demonstrate the potential for acquisition-based strategies to play a larger role in historic preservation practice. This practice, however, will need to rely on different approaches than those utilized by the land trust community in order to effectively secure protection for important historic structures.³⁰³ As with incentive programs, relying on existing frameworks and transactional structures has particular merit for incorporating acquisition-based approaches within work processes already utilized within the movement.

VII. CONCLUSION

In sum, historic properties remain under threat and the conventional models of regulation, advocacy, and financial support are insufficient on their own to address the growing challenges. Acquisition-based strategies have strong potential to expand the impact that preservation organizations already have as far as making their communities more livable and in fostering a larger sense of place. The historic preservation community, however, has placed secondary value on securing affirmative resource protection, in sharp contrast to the land trust community's focus on this line of endeavor. There are institutional, structural, and financial reasons for this gap in comparative practice that have to be bridged if acquisition-based strategies are to play a heightened role in future preservation initiatives. Understanding the root causes of this divide is important in shaping how to structure acquisition-based approaches that work for preservation advocates. Thus, if a limited realignment is to be fully accomplished, relying upon and expanding the existing pathways that the field already uses to achieve its goals presents the best framework for moving in this direction. Ultimately, it may take such an effort to give the

³⁰¹ PRES. TRUST OF VT., PRESERVATION TRUST ESTABLISHES REVOLVING FUND, <http://www.ptvermont.org/revolving/revolving.php> (last visited Feb. 28, 2016).

³⁰² In 2015, the Revolving Fund concentrated on protecting four historic properties (the Vermont Marble Museum (Proctor), Gilbert's Hall (Woodstock), Fox Hill (Poultney), and New Moran (Burlington)); see PRES. TRUST OF VT., <http://www.ptvermont.org/index.php> (last visited Feb. 28, 2016).

³⁰³ See, e.g., Elizabeth B. Wood, *Making the Affordable Housing—Historic Preservation Connection*, FORUM J., Fall 2014, at 21–30 (discussing the potential for aligning historic preservation activities with those of other housing advocates).

movement continued vitality as it continues to address the wider set of societal goals that are now appropriately valued within contemporary historic preservation practice.