

# TOWARDS ETHICAL STEWARDSHIP: BALANCING NATURAL AND HISTORIC CULTURAL RESOURCES IN NATIONAL PARKS

## NOTE

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*The grounding necessary for climbing a cliff or advancing a culture is to have your feet and one hand upon something tangible, specifically a place. Then you can reach for the broader context and the new perception. You can reach out to learn. Without place, specificity, and grounding, there is no continuous culture.*

- Roger G. Kennedy, Director National Park Service<sup>1</sup>

The National Park Service is a steward of American identity. They are tasked with protecting our most unique cultural resources, our landscapes, and our history. Their challenge is to strike a balance that will both protect these assets and provide for their use and enjoyment by this and future generations. To accomplish this, they have wide legal discretion in park resource management.

While both ecological conservationists<sup>2</sup> and historic preservationists emphasize resource protection over consumptive recreational access on parklands, the two camps diverge on what resources to protect. Conservationists have consistently pushed the Park Service to give primacy to nature in management decisions, and the Park Service has traditionally favored ecological conservation when management demands that a priority be established between nature and human history.

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<sup>1</sup> *Crampons, Pitons & Curators*, in PRESERVATION OF WHAT FOR WHOM? 19, 24 (Michael A. Tomilin ed. 1998).

<sup>2</sup> The term “ecological conservationist” in this Note is used interchangeably with “conservationist” to mean one primarily concerned with minimizing human impact, creating or preserving landscapes devoid of human impact, and/or promoting ecological diversity. This is meant to distinguish that political identity from “historic preservationist” or “preservationist,” meaning one primarily concerned with preventing the demolition of or restoring the anthropogenic remnants of our past.

Although this ecological favoritism is permissible, it is not, as some have argued, mandated by law. Further, this favoritism often appears unjust and unethical. As we look back on the first century of Park Service stewardship, it is worthwhile to consider how a greater balance between ecological conservation and historic preservation may be achieved.

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## I. INTRODUCTION

America's National Park System is celebrated for preserving the landscapes seminal to our history and cultural identity. There is a wide consensus in modern times that national parks are among the federal government's greatest and most influential achievements.<sup>3</sup> Year-after-year, millions of Americans reach out to the parks for what John Muir described as "fountains of life"—a source of refreshment, a sense of identity, and perspective.<sup>4</sup> But the establishment of the park system came at a cost. The unique landscape features that make these areas special also created discrete cultural enclaves. Parks were once home to people who defined and were defined by them. These discrete enclaves were displaced and often eliminated as national parks were established, particularly during the acquisition period. The cultural and historic resources that remain are more than evidence of a past way of life: they are the heritage of America—the cultural inheritance of the descendants of displaced communities, a source of identity for future generations, and an integral part of what makes national parks special. The Park Service became the steward of these cultural and historic resources when the parks were established. It is worthwhile to consider how they have done.

This Note argues that the Park Service's stewardship of unique cultural resources over the past century has not been ethically satisfying. In light of the Service's broad legal discretion to manage parklands as they see fit, stronger ethical guideposts are needed to meet statutory goals and preserve unique elements of American identity. These guideposts should arise first from considerations of justice and equity and are supported by a general stakeholder inability to protect historic resources as they might on private property. This Note reasons that a justice and representational ethic is missing from the social discrimination underlying early park establishment and the continuing elitism of the ecological conservationist movement. The ethical duty of the Park Service to preserve cultural resources also arises from a utilitarian rationale. This justification flows from changing popular views of historic significance and wilderness and is framed by the Park Service's legal mandates. The primacy given to ecological conservationism is unethical and has led to the gradual elimination of cultural resources on parklands. This Note ultimately concludes that the Park Service should seek to achieve more ethical stewardship in its management discretion by reconciling conflicts

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<sup>3</sup> See, e.g., *The National Parks: America's Best Idea* (PBS film broadcast Sept. 27, 2009); *National Parks, 100 Years In*, N.Y. TIMES, Aug. 24, 2016, <http://www.nytimes.com/interactive/2016/08/23/travel/24national-parks-collection.html>.

<sup>4</sup> See Nat'l Park Serv., Press Release, *America's National Parks: Record Number of Visitors in 2015* (Jan. 27, 2016); JOHN MUIR, *OUR NATIONAL PARKS I* (1901).

between ecological conservation and historic preservation. Through a comparative analysis of two national parks, this Note provides recommendations for cultural stakeholders, Park Service managers, and the courts considering resource management controversies.

This Note is laid out in five parts. Part II compares Shenandoah and Isle Royale National Parks by exploring their respective histories of park establishment, cultural displacement, and resource management. Part III examines the legal frameworks for Park Service management and how they have been used to prioritize ecological conservationism, arguably beyond what Congress intended. Part IV considers the justice and equity ethics of Park Service stewardship and argues that the on-going emphasis on ecological reclamation is unethical. Part V then considers evolving views of historical significance and the relationship of human history with nature. This Part provides recommendations to move the Park Service towards a more ethical stewardship within existing legal frameworks. Finally, Part VI concludes that such ethical resource management is imperative over the next century.

## II. TWO CONTRASTING HISTORIES OF PARK ESTABLISHMENT

National park creation began with the establishment of a public park at the headwaters of the Yellowstone River in 1872.<sup>5</sup> Public parks were originally established on land already claimed in fee by the federal government; however, park formation still required some displacement. At Yellowstone, for example, the government excluded the Crow, Shoshone, Bannack, and Sheepeaters by treaty; others were excluded by force.<sup>6</sup> At the end of the 19th century, the federal government also sought to reacquire ownership of lands formerly disposed to states and private actors. This movement was originally driven by the desire to preserve elements of American identity from exploitation,<sup>7</sup> and the popularity of parks in unsettled areas of the western United States led Congress to establish parks in the east through a process of state-led acquisition and subsequent transfer.<sup>8</sup> This period is referred to here as the acquisition era

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<sup>5</sup> Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (1872).

<sup>6</sup> U.S. DEPT. OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, 1880 (1880); U.S. DEPT. OF INTERIOR, ANNUAL REPORT OF SUPERINTENDENT OF YELLOWSTONE NATIONAL PARK, 1878 (1879). Tribal sovereignty and treaty issues that are beyond the scope of this paper complicate the preservation of the historic resources of displaced indigenous peoples. These issues are particularly acute in pre-acquisition era western parks.

<sup>7</sup> See *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 681–83 (1896) (upholding federal condemnation of Gettysburg battlefield on the grounds that preserving landscape resources from which a sense of American identity is derived is within Congress's legislative authority).

<sup>8</sup> For an overview of this feature of early park establishment, see JOHN ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* (1961).

of park establishment. For parks established in this era, the same geographic features that made particular, often isolated, lands special were intimately tied to the identity of the people who lived there—unique American cultural enclaves that remained static as industrial America rapidly developed.

The history and management of Shenandoah and Isle Royale National Parks provide case studies for evaluating Park Service stewardship and illustrate how park establishment displaced discrete communities from lands, separating them from their history and cultural heritage. The fifty-nine national parks are not only geographically distinct, but they also represent a discrete element within a broader national consciousness. These places chosen for national park status may be thought of as definitive landscapes. Prior to park establishment, they defined and were defined by the discrete communities that lived there because of their isolation and uniqueness. The uniqueness of National Parks means that comparative analysis of the ways they are managed is often of limited value. However, comparing the histories of Shenandoah and Isle Royale National Parks—both established during the acquisition era—reveals different approaches to park management and demonstrates the role of social influence in the Park Service's handling of cultural resources.

#### A. Shenandoah National Park

*In the old mountain home  
For six months more.  
Where then shall I go?  
Down in the valley  
To perish and to die.*<sup>9</sup>

##### 1. Establishment

Shenandoah National Park is comprised of the northern section of the Blue Ridge Mountains that separate the Shenandoah Valley from the Piedmont region of Virginia. The human history of the area began 8000–9000 years ago, while European settlement began in the 1750s.<sup>10</sup> By the beginning of the 20th century, the future park was home to thousands of Scotch-Irish and German descent homesteaders.<sup>11</sup>

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<sup>9</sup> JOHN T. NICHOLSON, *THE OLD MOUNTAIN HOME* (1934) reprinted in DARWIN LAMBERT, *THE UNDYING PAST OF SHENANDOAH NATIONAL PARK* 243 (1989).

<sup>10</sup> *History & Culture*, SHENANDOAH NATIONAL PARK, NAT'L. PARK SERV., <https://www.nps.gov/shen/learn/historyculture/index.htm> (last visited Nov. 21, 2016).

<sup>11</sup> DARWIN LAMBERT, *SHENANDOAH NATIONAL PARK, ADMINISTRATIVE HISTORY* (1924–1976) 73 (1979).

The genesis of the park is a well-documented story of political intrigue, loose deal-making, propaganda, and tragedy—only a small fraction of which is presented here. Most accounts of the park’s founding credit George Freeman Pollack, a well-connected resort owner, as the park’s earliest proponent.<sup>12</sup> Pollack established the Skyland Resort in the Blue Ridge at the end of the 19th Century as an upper-middle class vacation retreat for Washington, D.C. families.<sup>13</sup> Over the following decades, Skyland attracted federal policy-makers to vacation by providing unique entertainment and rustic adventure only hours from the nation’s capital.<sup>14</sup>

In 1924, a Skyland vacationer named Harold Allen sent Pollack a newspaper clipping reporting that the Department of the Interior, attempting to build on the success and popularity of western parks, was interested in establishing a park in the Eastern United States.<sup>15</sup> The two recognized the opportunity for a park in the Blue Ridge immediately. Allen and Pollack rallied support among Shenandoah Valley realtors and businessmen, as well as then Virginia state senator Harry F. Byrd, under the prospect of lucrative touristic revenues.<sup>16</sup>

Through the Shenandoah National Park Association, formed in 1925 by the Virginia Chamber of Commerce along with Pollack and his associates (acting as Shenandoah Valley, Inc.), park enthusiasts collected funds and donated land in a push to secure federal designation.<sup>17</sup> The Association and Shenandoah Valley, Inc. successfully garnered federal

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<sup>12</sup> Senator Harry F. Byrd wrote of Pollack as a friend who presciently saved the forest from destruction and took it upon himself to sell the idea of a park in Virginia. See Harry F. Byrd, Speech Delivered at the Dedication of Pollock Knob in the Shenandoah National Park (Oct. 14, 1951).

<sup>13</sup> GEORGE FREEMAN POLLACK, SKYLAND: THE HEART OF THE SHENANDOAH NATIONAL PARK 43–94 (1960) (recounting the early history of Skyland). See also Va. Dept. of Hist. Res., Skyline Drive Historic District (Boundary Increase) Nomination for the National Register of Historic Places, Sec. 8, pp. 38, 45 (Jul. 18, 2003) (explaining the historic significance of Skyland).

<sup>14</sup> Pollack produced a sporadic periodical known as “The Bugle” to advertise Skyland in Washington. See BUGLE CALL, July 2, 1898, at 4 (“Spend Your Vacation at Stoney Man Camp, The Most Elevated Resort in Virginia, At an Altitude of 4000 Feet Above Sea Level, The Cool Breezes Blow all the Summer.”); *The Unfortunate Ending of the Skyland Tournament*, THE BUGLE CALL, Aug 23, 1901, at 1–2 (recounting a medieval style joust event); *A Pointer for Young Men*, THE BUGLE CALL, July 25, 1898, at 1–2 (advising young men of the availability of bright and talented young women at the camp).

<sup>15</sup> POLLACK, *supra* note 13, at 213; Dennis Elwood Simmons, *The Creation of Shenandoah National Park and the Skyline Drive, 1924–1936* 1–4 (1978) (Ph.D. dissertation, University of Virginia).

<sup>16</sup> DARWIN LAMBERT, *THE UNDYING PAST OF SHENANDOAH NATIONAL PARK* 197–207 (1989); Margaret F. Boorstein, *The Wonders and Origins of Four National Parks of the Southern United States*, FOCUS, Winter 1992, at 26–31; Simmons, *supra* note 15, at 12–31; Letter from George Freeman Pollack to Skyland Guests (Oct. 15, 1925) (on file with Shenandoah National Park Association) (soliciting land donations for a park from associates and Skyland guests).

<sup>17</sup> Reed Engle, *Historical Overview of Shenandoah National Park*, NATIONAL PARK SERVICE, <https://www.nps.gov/shen/learn/historyculture/historicaloverview.htm> (last visited Nov. 15, 2016).

attention, and on May 22, 1926, President Calvin Coolidge signed into law legislation establishing Shenandoah National Park.<sup>18</sup> But the Virginians still had a long way to go. Congress stipulated that the park would only come into being if the United States was given the land by private or public donation, meaning that non-federal groups needed to acquire the approximately 521,000 acres recommended by the Secretary of Interior before a park could be created.<sup>19</sup> Taking over where Pollack left off, Governor Harry F. Byrd empowered the Virginia Commission on Conservation Development, chaired by William E. Carson, to take over acquisition efforts from the Shenandoah National Park Association and to continue them under state authority.<sup>20</sup>

From the outset, the Virginia Commission was stymied by the large number of Blue Ridge families who refused to sell. As a result, Carson and others lobbied the Secretary of the Interior to reduce the minimum acreage requirement for a new park, ultimately succeeding obtaining a reduction to 327,000 acres.<sup>21</sup> Carson also worked with state lawmakers to develop legislation that enabled the courts to cut down the condemnation process.<sup>22</sup> The result was the Public Park Condemnation Act<sup>23</sup>—a streamlined resident removal device that sped up the acquisition process in the Blue Ridge.

Immediately controversial, the Public Park Condemnation Act survived legal challenges relatively unscathed.<sup>24</sup> The Supreme Court of Virginia held that blanket condemnation was warranted by the difficulty of rapidly acquiring numerous tracts.<sup>25</sup> But the Court also held that a semblance of due process needed to be preserved—the State would at least need to offer each individual landowner some proof of value at the time of condemnation.<sup>26</sup> The legislation had a lasting impact on park

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<sup>18</sup> An Act to Provide for the Establishment of the Shenandoah National Park in the State of Virginia and the Great Smoky Mountain National Park in the States of North Carolina and Tennessee, and for other purposes, Pub. L. No. 69-268, 44 Stat. 616 (1926).

<sup>19</sup> With a minimum of 250,000 acres to comprise the park. *Id.* The practice of having a non-federal entity collect the land and then donate to the federal government was a politically acceptable route to displacement later repeated elsewhere. *See, e.g., infra* Section II.B.

<sup>20</sup> Simmons, *supra* note 15, at 45; LAMBERT, *supra* note 16, at 209–10, 218. The story of the state and federal intrigue surrounding park site selection and the fierce competition between Virginia, Kentucky, and North Carolina is a story unto itself too lengthy to explore here.

<sup>21</sup> LAMBERT, *supra* note 16, at 212; An Act to Establish a Minimum Area for a Shenandoah National Park, Pub. L. No. 70-33, 45 Stat. 109 (1928).

<sup>22</sup> Simmons, *supra* note 15, at 59–60.

<sup>23</sup> 1928 Va. Acts 1036 (1928); Katrina M. Powell, *Time to Leave*, VA. LIVING, (Nov. 22, 2010), <http://www.virginialiving.com/culture/time-to-leave/>.

<sup>24</sup> *See Rudacille v. State Comm'n. on Conservation & Dev.*, 155 Va. 808 (Va. 1931).

<sup>25</sup> *Id.* at 814.

<sup>26</sup> *Id.* at 824. In addition, the Court held that the Public Park Condemnation Act was a valid exercise of Virginia's police power because the park would benefit Virginia citizens—the fact that

acquisition methods, setting a preference for condemnation over negotiated purchase.<sup>27</sup> Even with an expedited process, the Virginia Commission continued to face financial shortfalls in acquisition, exacerbated by the stock market crash in 1929, and although Congress again lowered the minimum acreage to 160,000 acres,<sup>28</sup> Virginia did not acquire enough land to make a national park until 1935.<sup>29</sup>

Perhaps Pollack and Carson's most powerful ally during the acquisition was President Herbert Hoover. Carson reportedly induced President Hoover to vacation in the Blue Ridge by securing a fishing spot for the President on the upper Rapidan River.<sup>30</sup> Hoover's exposure to the scenery of the Blue Ridge led to his support for the highway project that would become Skyline Drive—an instrumental element in building late stage support for the park.<sup>31</sup> With the final transfer of land to the federal government, Shenandoah National Park was established in December, 1935.

## 2. Displacement

Estimates of Shenandoah's population prior to the park movement vary widely, ranging from 5000 residents to more than double that figure.<sup>32</sup> Approximately 2306 residents still lived on Shenandoah National Park land at the time of its transfer to the federal government.<sup>33</sup> With a park full of mountain families who refused to leave, the Roosevelt administration abandoned the Hoover-era precedent that residents should only be disturbed if necessary, by evicting and forcibly removing residents to resettlement camps outside the park.<sup>34</sup> Historian Katrina M. Powell has analyzed correspondence between park inhabitants and federal managers during this period that indicates the removal process was characterized by the dim view federal officials had of mountain

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it would be federally administered and provide incidental benefits to out-of-state citizens was irrelevant. *Id.* at 821. The law also survived a federal challenge. *Via v. State Comm'n. on Conservation & Dev.*, 9 F. Supp. 556, 562 (W.D. Va. 1935) (affirmed per curiam, 296 U.S. 549 (1935)). In *Via*, the Court held that the condemnations served a valid public purpose because Virginia's citizens would be among the beneficiaries of a federal park.

<sup>27</sup> LAMBERT, *supra* note 16, at 289–302.

<sup>28</sup> An Act to Establish a Minimum Area for Shenandoah National Park, etc., Pub. L. No. 72-10, 47 Stat. 37 (1932).

<sup>29</sup> LAMBERT, *supra* note 16, at 210–26.

<sup>30</sup> *Id.* at 218.

<sup>31</sup> *Id.* at 220–22.

<sup>32</sup> LAMBERT, *supra* note 11, at 73.

<sup>33</sup> LAMBERT, *supra* note 11, at 219.

<sup>34</sup> Engle, *supra* note 17. The camps were planned as homestead farming arrangements in valley areas and most residents moved out of them fairly quickly and dispersed; LAMBERT, *supra* note 16, at 252–55.



residents.<sup>35</sup> In the end, as many as 465 families were forcibly removed from their homes between 1935 and 1937.<sup>36</sup>

Although Park Service policy allowed for the granting of life estates, this approach was not widely used: 175 families were relocated to federal resettlement camps by 1938, but only forty-two elderly residents retained their residences as life estates.<sup>37</sup> The remaining residents dispersed after the forced evictions and subsequent burning of their homes; leaving a unique piece of American cultural heritage behind. Pollack and his associates fared better than the vast majority of families in the Blue Ridge. While the well-connected park enthusiast turned Skyland Resort over to public management in 1937, he was able to reserve life estate rights in the two structures comprising his summer home. He enjoyed the resort until his death in 1949.<sup>38</sup>

### 3. Resource Management

Shenandoah National Park has been managed under a general policy of ecological reclamation since its establishment. Early park managers oversaw the destruction of most of the remaining homes and structures and created an ecological narrative that eliminated mountain families from the park's history.<sup>39</sup> Recreational expansion and ecologically focused initiatives flourished with little consideration given to preserving mountain cultural and historic resources.

In 1976, the Park Service pursued wilderness designation in certain sections of the park in response to increasing demand for recreational facilities.<sup>40</sup> Congress designated wilderness areas within the park that same year,<sup>41</sup> following heated exchanges between former mountain families and environmental groups. These exchanges illustrate that little changed since the forced evictions four decades prior. For example, one former mountain resident, Dena Willcox Dean, testified that “there are

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<sup>35</sup> KATRINA POWELL, THE ANGUISH OF DISPLACEMENT, THE POLITICS OF LITERACY IN THE LETTERS OF MOUNTAIN FAMILIES IN SHENANDOAH NATIONAL PARK 80–91 (2009). Federal managers generally treated long-time residents as squatters, reflecting the place of mountain settlers in society at the time. This is discussed, *infra*, Section II.C.1.

<sup>36</sup> Engle, *supra* note 17; Lambert's figures count the number of federal community resettled families at 172. LAMBERT, *supra* note 11, at 252.

<sup>37</sup> Engle, *supra* note 17.

<sup>38</sup> POLLACK, *supra* note 13, at 259; LAMBERT, *supra* note 11, at 258.

<sup>39</sup> LAMBERT, *supra* note 16, at 265 (discussing park managers' early reluctance to respond to park visitor questions about the park's human history).

<sup>40</sup> Hearings before the Senate Subcommittee on Parks and Recreation, of the Committee on Interior and Insular Affairs, on Wilderness Additions to the National Park System (Feb 5, 1976) (statement of T. Destry Jarvis, National Parks and Conservation Association).

<sup>41</sup> An Act to Designate Certain Lands Within Units of the National Park System as Wilderness, Pub. L. No. 94-567, 90 Stat. 2692 (1976).

man-made features within proposed wilderness areas which are of greatly significant historical value [that] should not be allowed to deteriorate.”<sup>42</sup> Mrs. Dean critiqued the idea of natural wilderness as illusory due to the park’s ubiquitous man-made features, a point made by prominent academics today. But at the time her argument was derided by then Senator Harry F. Byrd, and summarily dismissed by representatives of the Wilderness Society for its presumed naivety.<sup>43</sup> Today, approximately 42 percent of the park is managed as a federally designated wilderness.<sup>44</sup>

### *B. Isle Royale National Park*

Located east-northeast of mainland Minnesota, Isle Royale National Park is surrounded by Lake Superior. The park is one of the least visited in the system, and it is promoted as a wilderness recreational experience for backpackers and boaters alike.<sup>45</sup> The Park Service’s acquisition of Isle Royale provides an interesting contrast to that of Shenandoah National Park, and reveals external influences affecting the way the Park Service balances its ecological objectives with historic preservation.

#### *1. Establishment*

The history of Isle Royale’s establishment as a park is a story of less maneuvering and intrigue than Shenandoah, and one much more intertwined with its human history. Park establishment had its roots in the island’s abundant fishery and copper resources. Native Americans, notably the Ojibwes, established fishing camps on the island prior to European settlement in the 19th century.<sup>46</sup> The Ojibwe camps eventually gave way to an influx of Scandinavian immigrants who rapidly established dominance over the fisheries of Northwest Lake Superior.<sup>47</sup>

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<sup>42</sup> Hearings before the Senate Subcommittee on Parks and Recreation, of the Committee on Interior and Insular Affairs, on Wilderness Additions to the National Park System (Feb 5, 1976) (statement of Dena Willcox Dean).

<sup>43</sup> *Id.*; Hearings before the Senate Subcommittee on Parks and Recreation, of the Committee on Interior and Insular Affairs, on Wilderness Additions to the National Park System (Feb 5, 1976) (statement of Arthur T. Wright, Wilderness Society). For an example of modern scholarship supporting Mrs. Dean’s view, see *infra*, notes 226–28 and accompanying text.

<sup>44</sup> NAT’L PARK SERV., SHENANDOAH NATIONAL PARK, BACKCOUNTRY AND WILDERNESS FACT SHEET, WILDERNESS DESIGNATION AND MANAGEMENT 1 (2008).

<sup>45</sup> *Isle Royale*, NAT’L PARK SERV., <https://www.nps.gov/isro/index.htm> (last visited Nov. 19, 2016).

<sup>46</sup> REBECCA S. TOUPAL ET AL., THE ISLE ROYALE FOLKEFISKERISAMFUNN: FAMILIER SOM LEVDE AV FISKE: AN ETHNOHISTORY OF THE SCANDINAVIAN FOLK FISHERMEN OF ISLE ROYALE NATIONAL PARK 21 (2002); Philip V. Scarpino, *Isle Royale National Park: Balancing Human and Natural History in a Maritime Park*, 28 GEORGE WRIGHT FORUM 182, 185 (2011).

<sup>47</sup> TOUPAL ET AL., *supra* note 46, at 26–35; TIMOTHY COCHRANE, MINONG: THE GOOD PLACE—OJIBWE AND ISLE ROYALE 105 (2009).

Scandinavian fishermen established settlements that were used by families in a seasonal pattern through the beginning of the 20th century.<sup>48</sup>

Isle Royale's association with copper mining and production also dates back hundreds if not thousands of years.<sup>49</sup> By the 1920s, copper mining companies owned most of the land on the island; the remainder consisted of fishing camps and a resort community of summer cabins and hotels.<sup>50</sup> As copper production began to decline, mining companies began to sell off their holdings to timber companies, inspiring summer residents and recreationalists to organize a conservation movement through the Isle Royale Citizens' Committee.<sup>51</sup>

The Citizens' Committee sought to have the bulk of Isle Royale designated as a state park and timber reserve to protect the landscape and community attributes that made the island a desirable retreat.<sup>52</sup> The park's strongest early proponent—an analogue to Shenandoah's Pollack—was an influential editor at the *Detroit News* named Albert Stoll, who shifted the local pro-park movement towards seeking national park status.<sup>53</sup> Stoll produced a regular conservationist column, and was instrumental in building political support for the park by painting a picture of looming ecological threat.<sup>54</sup>

Stoll found common cause with Michigan Congressman, Louis C. Crampton, who was chair of a congressional subcommittee tasked with assisting in oversight of the National Park Service budget.<sup>55</sup> Together they brought the island to the attention of Park Service Director Stephen Mather who was looking to expand the park system through acquisition. The two were able to convince Mather to visit the park in 1924.<sup>56</sup> Mather became an advocate for a park at Isle Royale, and used his influence to gain support from the Secretary of the Interior and the Sierra Club.<sup>57</sup>

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<sup>48</sup> TOUPALET AL., *supra* note 46, at 35–37.

<sup>49</sup> See COCHRANE, *supra* note 47, at 96–104; David P. Pompeani et al., *Copper Mining on Isle Royale 6500–5400 Years Ago Identified Using Sediment Geochemistry from McCargo Cove, Lake Superior*, 25 HOLOCENE 253, 255 (2015); NAPIER SHELTON, NAT'L PARK SERV., THE LIFE OF ISLE ROYALE 22 (1975).

<sup>50</sup> Scarpino, *supra* note 46, at 184. For a first-hand account of resort community life on the island, see SARAH BARR CHRISTIAN, WINTER ON ISLE ROYALE (1932).

<sup>51</sup> Scarpino, *supra* note 46, at 184.

<sup>52</sup> Scarpino, *supra* note 46, at 184; Patricia Zacharias, *The Campaign to Preserve Isle Royale*, DETROIT NEWS, Aug. 11, 1998; Timothy Cochrane, *Isle Royale: A Good Place to Live*, MICHIGAN HIST. (May/June 1990). See also NAT'L PARK SERV., THE GREENSTONE: YOUR GUIDE TO ISLE ROYALE NATIONAL PARK 3 (2015).

<sup>53</sup> Scarpino, *supra* note 46, at 184.

<sup>54</sup> PHILIP V. SCARPINO, CULTURAL RESOURCES ON ISLE ROYALE NATIONAL PARK: AN HISTORIC CONTEXT 3–4 (2010).

<sup>55</sup> *Id.* at 5–6.

<sup>56</sup> *Id.*; Scarpino, *supra* note 46, at 184.

<sup>57</sup> SCARPINO, *supra* note 54, at 6.

These alliances helped secure the support of Mather's successor, Horace M. Albright, but they shifted the narrative away from that of the Isle Royale Citizens' Committee and towards an image of Isle Royale as a rugged part of the lost American frontier.<sup>58</sup> Albright lobbied Congress to consider Isle Royale's ecological and archeological attributes—not the established Scandinavian fishing and recreational community—when he argued that the island was a uniquely desirable acquisition for the national park system.<sup>59</sup> With widespread support from the conservation community and donative pledges of land from copper mining companies, Crampton introduced legislation to establish Isle Royale.<sup>60</sup>

The enabling legislation for Isle Royale National Park was signed into law on March 3, 1931, and it authorized the Secretary of the Interior to accept title to the lands on behalf of the federal government using the same non-federal acquisition process as employed at Shenandoah.<sup>61</sup> The Isle Royale Commission was formed shortly thereafter by the Governor of Michigan to acquire title to lands on the island for federal transfer.<sup>62</sup> The State of Michigan eventually conveyed the land to the Secretary of Interior in 1940, and Isle Royale National Park was formally established.<sup>63</sup>

## 2. Displacement (or lack thereof)

At the time of the park's establishment, the Scandinavian fishing community was an integral cultural component of Isle Royale that local pro-park recreationalists sought to protect.<sup>64</sup> However, the Citizens' Committee's alliance with Stoll and Sierra Club shifted the narrative from protection to one that excluded the fishing community and summer residents<sup>65</sup> The subsequent treatment of landowners by the Isle Royale

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<sup>58</sup> *Id.* at 5–6.

<sup>59</sup> Horace M. Albright, Memorandum Regarding the Establishment of Isle Royale National Park, H. Cong. Rec. 6791–92 (Mar. 2, 1931), S. Cong. Rec. 7102–03 (Mar. 3, 1931).

<sup>60</sup> Isle Royale National Park, Mich., H. Cong. Rec. 6790–92 (Mar. 2, 1931).

<sup>61</sup> An Act to Provide for the Establishment of the Isle Royale National Park, etc., Pub. L. No. 71-835, 46 Stat. 1514 (1931).

<sup>62</sup> *Life Lease, Isle Royale National Park Cultural Resource Interactive Mapping Project*, MICHIGAN TECH UNIV., [http://iri.forest.mtu.edu/Summer\\_Cottages/Pages/Life\\_lease.htm](http://iri.forest.mtu.edu/Summer_Cottages/Pages/Life_lease.htm) (last visited Nov. 21, 2016); DAVE DEMPSEY, RUIN AND RECOVERY: MICHIGAN'S RISE AS A CONSERVATION LEADER 196 (2001). See also NAT'L PARK SERV., CULTURAL LANDSCAPES INVENTORY: TOBIN HARBOR, ISLE ROYALE NATIONAL PARK 49 (2011); TOUPALET AL., *supra* note 46, at 38. Some life leases were passed to children, some were not. Philip V. Scarpino, *Isle Royale National Park: History, Historic Preservation, and Land Management on Contested Terrain*, in STRUCTURING THE INTERNATIONAL DISCOURSE OF PUBLIC HISTORY PRACTICE AND SCHOLARSHIP 18, 21 (Nat. Council on Public Hist. Working Group 2009).

<sup>63</sup> Scarpino, *supra* note 46, at 183.

<sup>64</sup> TOUPALET AL., *supra* note 46, at 37, 39. See, e.g., CHRISTIAN, *supra* note 50.

<sup>65</sup> See *supra* note 57 and accompanying text.

Commission and the Park Service belies a resistance to the ecological narrative that is attributable to the influence of the Scandinavian community of Isle Royale and greater Michigan.

This treatment was also cost-effective. The Isle Royale Commission used life lease grants and special use permits, to reduce the costs of acquisition for the State of Michigan.<sup>66</sup> Lease terms were negotiated on an individualized basis in consideration of the number of individuals reserving rights, their age, living descendants, and the price paid by the commission for fee title to the property.<sup>67</sup> The process worked admirably well.

However, it is noteworthy that several landowners who could not come to an agreement on price were unable to negotiate a life lease or permit and had their land condemned. For example, the Tooker family favored park establishment, but because they could not come to an agreement on price, their cabin was condemned.<sup>68</sup> Similarly, the Newman cabin was condemned after the owner declined to negotiate a life lease because he felt that federal park managers would do a poor job managing the island's natural resources.<sup>69</sup> Condemnation proceedings on the island concluded in 1939.<sup>70</sup> After the State of Michigan conveyed the land to the Secretary of Interior, the Park Service honored, and in some cases extended, the life leases and special use permits granted to summer residents and fishermen.<sup>71</sup>

### 3. Management

Despite the ecologically focused narrative drummed up by Stoll and his allies, the Park Service showed an initial sensitivity to the Scandinavian community on the island that starkly contrasts with its attitude towards mountain residents in Shenandoah National Park. But

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<sup>66</sup> *Life Lease*, MICHIGAN TECH UNIV., *supra* note 62.

<sup>67</sup> *Id.*

<sup>68</sup> *Tooker Camp*, *Isle Royale National Park Cultural Resource Interactive Mapping Project*, MICHIGAN TECH, [http://iri.forest.mtu.edu/Summer\\_Cottages/Pages/RockHarbor/Tooker.htm](http://iri.forest.mtu.edu/Summer_Cottages/Pages/RockHarbor/Tooker.htm) (last visited Nov. 21, 2016).

<sup>69</sup> *Newman Camp*, *Isle Royale National Park Cultural Resource Interactive Mapping Project*, MICHIGAN TECH, [http://iri.forest.mtu.edu/Summer\\_Cottages/Pages/TobinHarbor/Newman.htm](http://iri.forest.mtu.edu/Summer_Cottages/Pages/TobinHarbor/Newman.htm) (last visited Nov. 21, 2016).

<sup>70</sup> *Completion of Last of Isle Royale Condemnations to Be Heard this Week*, IRONWOOD DAILY GLOBE, Oct. 11, 1939, at 7.

<sup>71</sup> TOUPALET AL., *supra* note 46, at 37–38. Note that the National Park Service Organic Act of 1916 does not appear to vest the Secretary of the Interior with the authority to enter into life lease arrangements, Pub L. No. 64-235, 39 Stat. 535 (1916), but as with the state acquisition of fee title and transfer process used in the acquisition of Shenandoah National Park, the life lease grants were unchallenged—perhaps in keeping with the discretion granted to the Secretary of the Interior by the two park enabling acts. *See infra*, Section III.A.

management has since followed a policy of ecological reclamation that is increasingly at odds with historic preservation on the island. At the outset, buildings not subject to a life lease were demolished by neglect or burned.<sup>72</sup> However, the Park Service honored life leases and tolerated the traditional fishing activities of the Scandinavian fisher folk by allowing them to apply for life-permits for continued operations.<sup>73</sup> Park Service officials later acknowledged the fisher folk as a cultural resource, and, once it became uneconomical for the fishermen to continue, the Park Service offered to subsidize fishing activity at Isle Royale as a means of preserving the history of the island.<sup>74</sup>

Ecological reclamation efforts on the island have helped demolish historic resources not protected by the Park Service, and in 1976 Congress designated the majority of Isle Royale National Park a wilderness area. Approximately 99 percent of the park is managed as federal wilderness today.<sup>75</sup>

The Park Service has allowed families to maintain some of their historic properties in wilderness areas under volunteer work agreements, but the constraints of wilderness designation create tension.<sup>76</sup> As of this writing, the Park Service is developing a cultural resources management plan with input and participation from community members and the public.<sup>77</sup> However, no alternatives currently under consideration contemplate a continuation of the current system of life lease, permit, or volunteer-work agreements to maintain historic properties.<sup>78</sup>

### C. Comparing Community and Cultural Influence

The different treatment of cultural and historic resources at Isle Royal and Shenandoah is likely a result of how the respective cultures that lived on the land prior to park establishment were viewed by those in power. The more discrete and unique the population, the less likely it was to be respected. Elements of community and cultural influence are relevant not

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<sup>72</sup> Scarpino, *supra* note 46, at 187.

<sup>73</sup> TOUPALET AL., *supra* note 46, at 37–38.

<sup>74</sup> *Id.* at 39–41.

<sup>75</sup> An Act to Designate Certain Lands Within the National Park System as Wilderness, Pub. L. No. 94-567, 90 Stat. 2692 (1976); Scarpino, *supra* note 46, at 187. *See also* *Isle Royale Wilderness*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/wildView?WID=268> (last visited Nov. 20, 2016).

<sup>76</sup> Dennis Hockman, *American Rustic: Balancing Historic and Wilderness Preservation on Lake Superior's Remote and Majestic Isle Royale*, PRESERVATION (Summer 2016), at 33–38.

<sup>77</sup> *Cultural Resource Management Plan*, NATIONAL PARK SERVICE, <https://parkplanning.nps.gov/projectHome.cfm?projectID=33691> (last visited Nov. 20, 2016).

<sup>78</sup> NAT'L PARK SERV., *CULTURAL RESOURCES MANAGEMENT PLAN: ISLE ROYAL NATIONAL PARK*, NEWSLETTER #24 (2013).

only to how the Park Service dealt with the displaced and managed resources in the past, but offers a compelling basis for increased protection in the future, particularly where—as in Shenandoah—the Park Service participated in the marginalization of communities and was complicit in a form of cultural extermination. In addition, the contrast between the influence of the Scandinavian community at Isle Royale and lack of influence of Blue Ridge mountain communities, suggests that local community participation in park management decisions may be a key element in promoting a more balanced stewardship of cultural resources.

### 1. Blue Ridge Mountain Communities

The poorer residents of Shenandoah not only lacked political influence, but they were also vilified in popular culture. Denigration of mountain culture traces its roots to the mid-19th century. In “A Tale of Ragged Mountains,” Edgar Allen Poe artfully demonized the “uncouth and fierce races of men who tenanted [the] groves and caverns” west of Charlottesville, Virginia as shrieking characters rising out of fever dreams.<sup>79</sup> At the beginning of the 20th century, a primitive trope had developed that cloaked itself in the language of eugenic science. By Pollack’s time, a narrative that mountain populations were either helpless drunks or wasteful simpletons had emerged.<sup>80</sup>

These stereotypes supported two paternalistic-class rationales that park advocates used to overcome the ethical failures of displacement. The first, employed by Pollack and others, reasoned that removing mountain residents from the land would be of great benefit to the residents themselves.<sup>81</sup> The logic was that the people comprising a backwards culture could, through reformation and assimilation, share in the economic benefits of the park.<sup>82</sup> The second rationale was employed by Park Service officials, who reasoned that ignorant rural communities should be stopped from wasting precious national resources.<sup>83</sup>

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<sup>79</sup> EDGAR ALLEN POE, A TALE OF RAGGED MOUNTAINS (1850).

<sup>80</sup> POLLACK, *supra* note 13, at 99–102, 135–37, 158.

<sup>81</sup> POLLACK, *supra* note 13, at 248 (“I felt pretty certain that a better day was coming . . . when the Shenandoah National Park was established and they would be moved to a civilized community”).

<sup>82</sup> William Porter McLendon, Economic Aspects of the Shenandoah Park Project 55–56, 70 (1930) (unpublished masters thesis, University of Virginia) (on file with University of Virginia).

<sup>83</sup> *Id.* National Park Service historian, Edward Steere, wrote that the Blue Ridge mountain farmers were a “destitute generation, bereft of the domestic arts and crafts of their ancestors and unable to accommodate themselves.” LAMBERT, *supra* note 11, at 5 (quoting EDWARD STEERE, REPORT ON PRESERVATION OF STRUCTURES IN THE SHENANDOAH NATIONAL PARK (1936)). Carson felt that removal fulfilled a patriotic duty, abhorrent as the means may be (citing WILLIAM

Both narratives employed a primitivist trope to marginalize Blue Ridge residents. The same isolation that made the lands desirable as a park was used to cast mountain society as an unfortunate victim of its separation from industrial society. In 1933's *Hollow Folk*, sociologists Mandel Sherman and Thomas Henry argued that certain families living in the soon-to-be parklands were a social blemish that should not be allowed to exist.<sup>84</sup> *Hollow Folk* is not an outlier; Sherman and Henry's contemporaries also argued that the people living in the Blue Ridge Mountains were uneducated hermits, without regard for law, government, or organized society.<sup>85</sup> Mountain farmers were dissonantly vilified, both as wasteful squatters and as industrious but helpless victims of isolation in need of government intervention.<sup>86</sup>

The denigration of mountain communities living on parklands at this time was in tension with reverence for unique cultural elements—namely the oral song and storytelling traditions of the Blue Ridge.<sup>87</sup> In addition, more accurate accounts from the pre-park period depict a complex reality for mountain residents,<sup>88</sup> a history increasingly supported by archeology, family records, and uncovered historical accounts.<sup>89</sup> Elements of mountain culture—such as the distinct alcohol distilling, culinary, and song traditions that flourished in Blue Ridge communities—continue to be a source of identity for many modern Virginians.<sup>90</sup> Although these

E. CARSON, STATE COMM'N ON CONSERVATION AND DEV., CONSERVING AND DEVELOPING VIRGINIA 25–31 (1934)).

<sup>84</sup> MANDEL SHERMAN & THOMAS R. HENRY, *HOLLOW FOLK* (1933).

<sup>85</sup> *Id.* at 5–8, 124–27, 214–15. See also McLendon, *supra* note 82, at 70, 72.

<sup>86</sup> SHERMAN & HENRY, *supra* note 84, at 124–27, 214–15; *The Ground Beneath Our Feet, Shenandoah National Park*, VA HISTORY.ORG, <http://www.vahistory.org/shenandoah.html> (last visited Nov. 15, 2016). Although Sherman and Henry advised that mountain isolation did not result in “feeble-mindedness” requiring eugenic intervention, it has been reported that several Corbin children were institutionalized after removal and likely subject to sterilization treatments. See Lisa Provence, *Shenandoah Secrets: Pork, Propaganda, and the Creation of a COOL National Park*, THEHOOK (Jul. 14, 2011). Years after the establishment of the park, Pollack continued to portray Blue Ridge residents as drunken children only occasionally brought to heel by justifiable violent force. POLLACK, *supra* note 13, at 135–58.

<sup>87</sup> See, e.g., SHERMAN & HENRY, *supra* note 84, at 124–27 (celebrating a rich oral history and song tradition).

<sup>88</sup> Darwin Lambert's account appears the most impartial, stating that a few mountain residents were well-educated and many were prosperous but others were less so. Lambert acknowledged that this was much like society elsewhere. LAMBERT, *supra* note 11, at 5–6.

<sup>89</sup> Compare SHERMAN & HENRY, *supra* note 84, at 5–8 (discussing Corbin and Nicholson Hollows—referred to as “Corvin” and “Needles” by the outsiders), with Audrey J. Horning, *Myth, Migration, and Material Culture: Archeology and the Ulster Influence on Appalachia*, 36 HIST. ARCHAEOLOGY 129, 132–38 (2002). See also Audrey J. Horning, *When Past is Present: Archeology of the Displaced in Shenandoah National Park*, NAT'L PARK SERV., <https://www.nps.gov/shen/learn/historyculture/displaced.htm> (last visited Nov. 15, 2016).

<sup>90</sup> See Tiffany W. Cole, *Moonshining in Rockingham County – A Case Study on Oral Traditions and Folkways* 18, 22–26 (May 2010) (unpublished M.A. thesis, James Madison University) (on file



elements are celebrated strands in American cultural pluralism, early park managers failed to connect them with the American identity they were charged with protecting.<sup>91</sup> Today, the story of Shenandoah's cultural heritage remains largely disconnected from modern views of Shenandoah National Park.

## 2. Scandinavian Fishing Communities

Compare Shenandoah's lost communities with counterparts at Isle Royale. The Scandinavian communities of the western Great Lakes were celebrated for their industriousness and were politically influential in northern Midwest states. Their origins can be traced back to economic turmoil in Norway and Sweden during the first half of the 19th century.<sup>92</sup> The majority of Norway's population had been engaged in agriculture and fishing for generations, but by the mid-19th century, the country faced strained fishing stocks and a dwindling supply of arable land due to population growth.<sup>93</sup> In Sweden, similar resource scarcity exacerbated political unrest and populations from both countries emigrated en masse to seek opportunities elsewhere, despite immense social pressure to remain.<sup>94</sup>

Because they were viewed as industrious people, Northern Midwestern territories were highly receptive to Scandinavian immigrants and actively worked to attract them. Minnesota and Wisconsin sent representatives to New York City, as well as abroad to Norway, and Sweden, and both states contributed to the publication of emigration periodicals in Europe—all to entice settlers to move to the northern Midwest.<sup>95</sup> Minnesota established a Commissioner of Emigration to provide rural Scandinavians with information on soil, climate, resources, and conditions in Minnesota,

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with Department of History, James Madison University); Horning, *Myth, Migration, and Material Culture*, *supra* note 89, at 144.

<sup>91</sup> See POWELL, *supra* note 35 and accompanying text.

<sup>92</sup> TOUPALET AL., *supra* note 46, at 27–29.

<sup>93</sup> *Id.* at 28.

<sup>94</sup> *Id.* at 28–29; DONALD HARMAN AKENSON, IRELAND, SWEDEN, AND THE GREAT EUROPEAN MIGRATION, 1815–1914 70 (2011). Scandinavian countries studied and took steps to stymie the flow of emigrants to retain a high population during this period. See A. LEWENHAUPT, AN OFFICIAL REPORT ON NORWEGIAN AND SWEDISH IMMIGRATION (1870).

<sup>95</sup> Livia Appel & Theodore C. Blegen, *Official Encouragement of Immigration to Minnesota During the Territorial Period*, MINN. HISTORY BULLETIN, Aug. 1923, at 167–76. See also Carlton C. Qualey, *Pioneer Norwegian Settlement in Minnesota*, MINN. HISTORY BULLETIN, Sept. 1931, at 247–60; TOUPALET AL., *supra* note 46, at 29.

information on how immigrants could reach the territory as quickly as possible, and assurances of protection once they arrived.<sup>96</sup>

As a result of territorial government encouragement, Scandinavian communities rapidly formed in the Midwest.<sup>97</sup> People continued to speak their own language, practice local customs, and teach the next generation in their cultural traditions. Family networks catalyzed immigration conduits through both personal letter writing and the publication of letters by influential Scandinavians that extolled the virtues of Midwestern resources to those in Europe.<sup>98</sup> By 1890, Scandinavians comprised at least half of Minnesota's population and had become incredibly influential in the affairs of the young state.<sup>99</sup>

As a result, the Scandinavian landowners of Isle Royale had connections to institutions in the northern Midwest that the Blue Ridge mountain residents lacked in Virginia. Crampton and the Isle Royale Commission were sensitive to the connections that their Scandinavian constituencies felt with the residents and fishermen of Isle Royale.<sup>100</sup> Scandinavian fishing techniques and folk customs, imported from Europe and sustained in the close knit northern communities, defined commercial fishing operations on Isle Royale during the early 20th century.<sup>101</sup> The sense of identity that fishing practices gave Scandinavian visitors to Isle Royale likely played a critical role in creating a path for dialogue with Isle Royale landowners that was closed to Blue Ridge mountain residents.

While Park Service treatment of Scandinavian cultural resources at Isle Royale is admirable in its sensitivity, it is noteworthy that the Ojibwes fared less well. Members of the Ojibwe tribe, along with other indigenous peoples, have a cultural history on Isle Royale that dates back hundreds if not thousands of years.<sup>102</sup> Despite unresolved treaty claims on the island, the Park Service has not recognized Ojibwe rights to fish in the

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<sup>96</sup> Minnesota Territory, *Laws*, 1856, p. 20 (reprinted in Appel & Blegen, *supra* note 95, at 177–79). The impact of territorial government encouragement was exponentially magnified by federal settlement programs, such as the Homestead Act, Pub. L. No. 37-64, 12 Stat. 392 (1862).

<sup>97</sup> *Nineteenth Century Migrations, Scandinavian Migration*, U.S. HISTORY IN CONTEXT, <http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/DocumentToolsPortletWindow?displayGroupName=Reference&jsid=4a357aacaea49ab408baece5f1ed877b&action=2&catId=&documentId=GALE%7CCX3436800020&u=beth65358&zid=d0ecf7a5b5315a8cb5effd29ddec5e> (last visited Nov. 21, 2016); TOUPALET AL., *supra* note 46, at 30–31.

<sup>98</sup> TOUPALET AL., *supra* note 46, at 29; Qualey, *supra* note 95, at 260–61.

<sup>99</sup> See CARLTON C. QAULEY, *NORWEGIAN SETTLEMENT IN THE UNITED STATES* 97–127 (1938).

<sup>100</sup> TOUPALET AL., *supra* note 46, at 33–34. Despite the implications of its geographic location, Isle Royale is technically in the State of Michigan.

<sup>101</sup> *Id.* at 35–37.

<sup>102</sup> See Pompeani et al., *supra* note 49; Brenda J. Child, *The Absence of Indigenous Histories in Ken Burns's The National Parks: America's Best Idea*, *PUB. HISTORIAN* 24, 26 (May 2011); TOUPALET AL., *supra* note 46, at 18–19.

park,<sup>103</sup> and unlike Isle Royale's Scandinavian population, the Ojibwes had no voice in park establishment.

The successful preservation of Scandinavian cultural resources on Isle Royale is due not only to how the culture was perceived, but how that perception allowed the community to influence Park Service management. Although Isle Royale has been subject to extensive ecological reclamation, the Park Service has, up to this point, managed historical resources with community input to balance wilderness creation and historic preservation. In contrast, the displaced communities of the Shenandoah have only recently found the Park Service receptive to considering their cultural resources as part of the story of the park.<sup>104</sup> This disparity is legally permissible because decisions regarding parkland cultural resources are well within the Park Service's broad management discretion.

### III. DISCRETION AND COMPETING MANDATES IN PARK MANAGEMENT

The National Park Service has wide management discretion under the law. This is because the Service is challenged with managing the unique resources comprising each distinct park under a legal framework that often fails to account for location specific factors. But this discretion is not exercised in a vacuum. Fundamentally, the legal framework surrounding Park Service resource management sets up a tension between ecological conservation and historic preservation. The Park Service must protect resources for future generations while at the same time providing access and enjoyment in the present. In addition, applicable federal law appears to substantively tip the balance in favor of ecological conservationism. This pressure, often magnified by vocal nationally mobilized conservation groups, often pushes the Park Service to give priority to ecology.

The priority given to ecological conservation in acquisition era parks, like Shenandoah and Isle Royale, manifests in policies of re-wilding or ecological reclamation that have a pragmatic momentum. Simply put, letting the forest grow is a cost-effective way to appease vocal conservationists. Despite this pressure, the applicable law should not be

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<sup>103</sup> Child, *supra* note 102, at 26. As mentioned at note 6, *supra*, and accompanying text: a full evaluation of Park Service obligations to displaced indigenous populations raises issues beyond the scope of this Note.

<sup>104</sup> Kane Kashouty, *Project Aims to Honor Those Displaced by SNP*, DAILY PROGRESS, Mar. 12, 2015 (the Blue Ridge Heritage Project has found the Park Service more receptive to their requests for information but has yet to take on memorial or cultural preservation efforts within the park).

understood as forcing the Park Service to favor ecological resources over the historical. Rather, the Park Service is directed to strike a balance.

#### A. *The Legal Framework for Managing National Parks*

The Park Service manages both ecological and historic or cultural resources within the National Park System with a high degree of discretion. The National Park Service, and the legal framework that guides its management priorities, was established in the Organic Act of 1916. The Park Service's legal management framework has been built out by subsequent environmental protection statutes, conservationist legislation, and historic preservation mandates. On top of this are location-specific federal management directives, contained either in park enabling acts or in congressional designations, that are often drafted in general terms. This framework is read as broadly supportive of ecological conservation, but can be understood to leave room for historical preservation.

##### 1. *The Organic Act of 1916*

The Organic Act of 1916 ("Organic Act") established the National Park Service to regulate the use of federal lands known as national parks within a greater National Park System.<sup>105</sup> Scholars have noted that the Organic Act appears to have pulled the Park Service in competing directions by establishing somewhat contradictory aims of conservation and preservation alongside recreation and access.<sup>106</sup> The stated purposes of the National Park Service in the Organic Act have been largely untouched since 1916: the Park Service must "conserve the scenery, natural and historic objects, and wild life" in the park system and "provide for the[ir] enjoyment . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>107</sup> Congress has modified this purpose only slightly over the last century to shift from consideration of individual park purposes to consideration of the system as a whole; however, Congress has reaffirmed the overarching goals of conserving scenery, natural and historic objects, and wildlife while providing for their enjoyment by the public.<sup>108</sup>

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<sup>105</sup> An Act to Establish a National Park Service, etc., Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 54 U.S.C. §§ 100101–4907 (2012)).

<sup>106</sup> See John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861, 863–66 (2015). *But see* Robin W. Winks, *Robin Winks on the Evolution and Meaning of the Organic Act*, 24.3 GEORGE WRIGHT FORUM 6, 7–18 (2007) (arguing that Congress did not intend to create a contradictory mandate).

<sup>107</sup> Pub. L. No. 64-235, 39 Stat. 535 (1916).

<sup>108</sup> National Park System General Authorities Act, Pub. L. No. 91-383, 84 Stat. 825 (1970).

There have been two minor modifications to the Organic Act of 1916 over the intervening years relevant to the issues presented in this Note. First, Congress authorized the National Park Service to make the necessary expenditures to remove “indigents” from parklands in 1930<sup>109</sup>—relevant to the subsequent treatment of residents in Shenandoah.<sup>110</sup> Second, Congress directed the Park Service to give precedence to legislation made specifically applicable to certain areas in 1970.<sup>111</sup> This latter change, when read in concert with statutes containing reciprocal language—such as the Wilderness Act—subordinates the Organic Act to any legislation attaching to the land with greater specificity.

The Supreme Court has never directly considered the management provisions of the Organic Act.<sup>112</sup> According to Professor John Nagle, the closest the Supreme Court has come was a First Amendment case in which the Court upheld the Park Service’s ban on camping next to the White House.<sup>113</sup> Thus, the discretion of the Park Service to balance the protection of scenery, natural and historic objects, and wildlife with access and use is seemingly absolute—barring arbitrary and capricious actions—unless otherwise limited by another federal statute.

## 2. Environmental Protections

Numerous environmental protection statutes create obligations for the Park Service in managing resources within the National Park System. These obligations shape the way that the Park Service procedurally and substantively manages resources on parklands, and some understand them as tipping the balance in favor of ecological conservationism wherever a conflict with historic preservation arises.

The National Environmental Policy Act (“NEPA”) is the Park Service’s strongest procedural environmental mandate. NEPA was enacted in 1970 with the broad purpose of encouraging a “productive and enjoyable harmony between man and his environment [and to] promote efforts which will prevent or eliminate damage to the environment . . . .”<sup>114</sup> This seemingly substantive purpose is interpreted

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<sup>109</sup> An Act to Facilitate Administration of the National Parks, etc., Pub. L. No. 71-255, 46 Stat. 381, 382 (1930).

<sup>110</sup> See *supra* Section II.A.2.

<sup>111</sup> Pub. L. No. 91-383, 84 Stat. 825 (1970).

<sup>112</sup> Nagle, *supra* note 106, at 862.

<sup>113</sup> *Id.* at 862 n.3 (discussing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

<sup>114</sup> National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–70h).

as merely aspirational.<sup>115</sup> The Park Service must discharge the procedural obligations of NEPA by analyzing potential environmental impacts, but afterwards it is free to proceed without the threat of judicial review.<sup>116</sup> Conservationists, however, have a track record of vigilantly litigating procedural lapses.<sup>117</sup>

The Endangered Species Act (“ESA”) was enacted in the 1970s to provide a means to conserve endangered and threatened species, as well as the ecosystems on which they depend.<sup>118</sup> The ESA creates a substantive prohibition on federal agency action that may jeopardize ESA listed species or their habitats regardless of costs.<sup>119</sup> In addition, the ESA contains procedural provisions that require the Park Service to conduct biological assessments for management actions whenever an ESA listed species may be present in the area.<sup>120</sup>

Other federal environmental protection statutes, such as the Clean Air Act (“CAA”),<sup>121</sup> Clean Water Act (“CWA”),<sup>122</sup> and Resource Conservation and Recovery Act (“RCRA”)<sup>123</sup> contain substantive and procedural provisions that may impose obligations on the Park Service with respect to specific management actions, but they are less likely to arise in the context of balancing use with the preservation of scenery, natural and historic objects, and wildlife. To the extent that they are relevant, they likely favor ecological conservationism because they inherently presuppose that mankind is apart from nature by establishing regimes meant to limit intrusion.<sup>124</sup>

### 3. Conservationist Mandates

Two robust statutory regimes—the Wild and Scenic Rivers Act (“WSDR”)<sup>125</sup> and the Wilderness Act<sup>126</sup>—appear to tip the balance substantively in favor of ecological conservationism and away from the preservation of historic objects on parklands that fall within specifically designated areas. The power of these statutes come from their specificity

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<sup>115</sup> Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 558 (1978).

<sup>116</sup> Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980).

<sup>117</sup> See Nagle, *supra* note 106, at 892–94 (suggesting that Park Service compliance and ecological tilt is due in large part to the threat of litigation).

<sup>118</sup> Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531–44 (2012)).

<sup>119</sup> 16 U.S.C. § 1536(a)(2); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978).

<sup>120</sup> 16 U.S.C. § 1536(c).

<sup>121</sup> 42 U.S.C. §§ 7401–671q (2012).

<sup>122</sup> 33 U.S.C. §§ 1251–388 (2012).

<sup>123</sup> 42 U.S.C. §§ 6901–92k.

<sup>124</sup> This supposition is criticized below. See *infra* Section V.A.2.

<sup>125</sup> 16 U.S.C. §§ 1271–87 (2012).

<sup>126</sup> *Id.* §§ 1131–36.

and their potential to reprioritize the values that govern how federal land managers fulfill their stewardship obligations.

Both the WSDR and the Wilderness Act allow Congress to designate specific areas for conservationist management by the applicable managing federal agency. The WSDR regime classifies rivers according to how much man-made impact is present on a three-tiered value system—ranging from “primitive” to “recreational”<sup>127</sup>—and mandates that a managing federal agency emphasize the values that led to the river’s inclusion in the WSDR system.<sup>128</sup> While the WSDR allows for river inclusion based on cultural or historic values, the conservationist tone in the act has pushed the Park Service away from use or enjoyment and towards ecological conservationism.<sup>129</sup>

The Wilderness Act is the more important of the two regimes, applying to 43.9 million acres within the National Park System.<sup>130</sup> The Wilderness Act established a National Wilderness Preservation System on federal lands where congressionally designated areas are managed for “the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness . . . to provide for the protection of these areas . . . [and] their wilderness character.”<sup>131</sup> The Act defines “wilderness” as an area “in contrast with those areas where man and his own works dominate the landscape . . . where the earth and its community of life are untrammelled by man . . . without permanent improvements or human habitation . . . .”<sup>132</sup> Some commentators have asserted that the Wilderness Act’s legislative history reveals that Congress sought to offer enhanced protections for ecological resources on federal lands. However, the more supported view is that wilderness advocates were concerned that federal managers would allow access-oriented development that would threaten conservationists’ favored forms of recreation.<sup>133</sup> Ultimately, all agree that area designation under the Wilderness Act narrows Park Service discretion.

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<sup>127</sup> *Id.* § 1273.

<sup>128</sup> *Id.* § 1281(a).

<sup>129</sup> Nagle, *supra* note 106, at 898–902. Due to narrower area designations than those under the Wilderness Act, conflicts between WSDR mandates and historic preservation are less common.

<sup>130</sup> *Wilderness Statistics Reports*, WILDERNESS.NET, <http://www.wilderness.net/NWPS/chartResults?chartType=acreagebyagency> (last visited Nov. 21, 2016). 40 percent of the National Wilderness Preservation System is located within the National Park System.

<sup>131</sup> Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964).

<sup>132</sup> 16 U.S.C. § 1131(c); 78 Stat. 891 (1964).

<sup>133</sup> Compare Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 851, 868 (2009), with Sandra B. Zellmer, *Wilderness Management in National Parks and Wildlife Refuges*, 44 ENVTL. L. 497, 500, 502–03 (2014), and Nagle, *supra* note 106, at 894.

Although the National Park Service has successfully fought off binding regulations on management of wilderness areas within the National Park System so as to preserve some of the discretion afforded under the Organic Act,<sup>134</sup> they have been less successful when challenged by conservationists in court.<sup>135</sup> As more fully explored in Section IV.B, the Wilderness Act creates a substantive hook for conservationists to attack the preservation of historic resources they see as aberrations rather than valued cultural resources by the Act's terms.

#### 4. Historic Preservation Law

The Park Service also has a legal mandate to consider the preservation of historic resources in management decisions, but in contrast to the WSDR and Wilderness Act, these statutes are primarily procedural. Foremost is the National Historic Preservation Act ("NHPA")<sup>136</sup>—created by Congress in part to ensure that our "cultural foundations" are "preserved as a living part of our community life and development in order to give a sense of orientation to the American people."<sup>137</sup> Through the NHPA, Congress expressed an explicit concern that assimilationist development threatened the ability of future generations to "enjoy the rich heritage of our Nation," and a fear that extant historic preservation programs offered inadequate protection.<sup>138</sup> A later amendment codified federal policy on this issue—agencies are to "administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations."<sup>139</sup>

The NHPA works by establishing the National Register of Historic Places, administered by the Secretary of the Interior, as the definitive list of federally protected historic resources.<sup>140</sup> Federal agencies have a procedural obligation to consider the impacts of any undertaking on resources listed on the National Register.<sup>141</sup> This obligation is triggered when an agency seeks to approve a "project, activity, or program funded

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<sup>134</sup> Zellmer, *supra* note 133, at 500, 524. Zellmer notes that the Park Service has been hostile towards wilderness designation in the past, viewing designation as a needless limitation on their management discretion.

<sup>135</sup> *E.g.*, *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004).

<sup>136</sup> 54 U.S.C. §§ 300101–7108 (2012).

<sup>137</sup> An Act to Establish a Program for the Preservation of Additional Historic Properties Throughout the Nation, Pub. L. No. 89-665 (1966), 80 Stat. 915.

<sup>138</sup> *Id.*

<sup>139</sup> National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515 94 Stat. 2987, 2988 (1980).

<sup>140</sup> 54 U.S.C. §§ 302101–08.

<sup>141</sup> *Id.* § 306107. This includes those properties that are found eligible because they meet the criteria for listing even if not formally listed. 36 C.F.R. § 800.16(l)(1) (2016).



in whole or in part under [their] direct or indirect jurisdiction.”<sup>142</sup> Known as the “Section 106 process,” the agency must gather information on historic resources and consider alternatives that would minimize adverse effects on those resources, unless it finds either that there is no undertaking or the “undertaking is the type of activity that does not have the potential to cause effects on historic properties.”<sup>143</sup>

Notably, the Section 106 process of information gathering provides two opportunities for preservationists to push historic significance into agency consideration. First, an agency should consult with a State Historic Preservation Officer who, in theory, represents local interests in the preservation of their cultural heritage.<sup>144</sup> The Department of the Interior, through the Advisory Council on Historic Preservation, oversees compliance with the Section 106 process,<sup>145</sup> and although this supervisory role allows them to terminate the process, State Officers may bring an action to continue Section 106 procedures where they disagree.<sup>146</sup> Second, the agency must provide an opportunity for public comment.<sup>147</sup> What Section 106 does not do is impose substantive requirements on federal agencies mandating a particular course of action once the procedural elements are fulfilled.<sup>148</sup>

The National Park Service, in addition to its Section 106 process obligations, must inventory historic properties and consider their suitability for heritage tourism as well as implement agency procedures that consider historic, archeological, and cultural values.<sup>149</sup> While the NHPA procedural obligations provide a hook for historic preservation advocates, similar to what the NEPA does for ecological conservationists, it creates no substantive mandate to preserve historic resources.<sup>150</sup>

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<sup>142</sup> 36 C.F.R. § 800.16(y).

<sup>143</sup> *Id.* § 800.3–13. “Historic properties” is defined as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior.” *Id.* § 800.16(l)(1).

<sup>144</sup> *Id.* § 800.2(c).

<sup>145</sup> *Id.* § 800.9.

<sup>146</sup> *See, e.g.,* Saylor Park Village Council v. U.S. Army Corps of Engineers, No. C-1-02-832, 2002 U.S. Dist. LEXIS 26208, at \*22–26 (S.D. Oh. 2002).

<sup>147</sup> 36 C.F.R. § 800.2(d).

<sup>148</sup> *See, Nat’l Mining Ass’n v. Slater*, 167 F. Supp. 2d 265, 286–88 (D.D.C. 2001) (rev’d on other grounds, 324 F.3d 752) (criticized by Saylor Park Village Council, 2002 U.S. Dist. LEXIS 26208, for finding that the ability of the Advisory Council to force a continuation of Section 106 process was substantive).

<sup>149</sup> Exec. Order No. 13287, Mar. 3, 2003, 68 Fed. Reg. 10,635. *See also* 54 U.S.C. § 306131 (2012).

<sup>150</sup> *See, e.g.,* Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999) (enjoining U.S. Forest Service action until procedural obligations of NEPA and NHPA were fulfilled); *Nat’l Trust for Hist. Preservation v. Blanck*, 938 F. Supp. 908, 922 (D.D.C. 1996) (Section 110 read in overwhelmingly procedural context of NHPA).

Under the Organic Act, the Park Service has a mandate to manage resources “by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>151</sup> This may be read to create a substantive hook for historic resource preservation on parklands.<sup>152</sup> However, the Park Service has interpreted the non-impairment mandate to prohibit only permanent impacts that threaten the integrity of specified park values.<sup>153</sup> Because park values are typically set out in generalized terms—barring Wilderness Act or WSDR designation—the substance of non-impairment is discretionary.

The Park Service’s guidelines on non-impairment create some procedural obligations (for example, a Park Service decision-maker must determine in writing whether or not an impairment will occur prior to seeking approval for an action), but the guidelines set a standard for impairment that leaves the Park Service with a high degree of discretion—actions must not be inconsistent with an established purpose, impede future attainment of plans, be unsafe, or unreasonably interfere with appropriate uses.<sup>154</sup> Additionally, courts have a track record of giving deference to Park Service impairment determinations.<sup>155</sup>

#### *B. The Wilderness Act and Historic Preservation*

The Organic Act’s dual mandates of protection and access provide legal support for Park Service discretion in how resources on parklands are managed, but other applicable law contains substantive ecological conservation mandates without equivalent protections for historic resources. The largest substantive limit on discretion is a Wilderness Act area designation. Predictably, conservation advocates have used wilderness designations to attack Park Service management decisions that do not completely align with an ecological agenda, and some courts have established a framework for evaluating challenged Park Service management actions that may constrain the Park Service’s ability to protect historic resources. But their analysis is not well-supported. The

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<sup>151</sup> Pub. L. No. 64-235, *supra* note 107, and accompanying text.

<sup>152</sup> E.g., Caitlin Brown, *The Legislative History of the National Park Service’s Conservation and Nonimpairment Mandate*, ENVTL. L. REV. SYNDICATE (Dec. 17, 2016), <http://www.velj.org/elrs/the-legislative-history-of-the-national-park-services-conservation-and-nonimpairment-mandate> (arguing that non-impairment requires primacy to conservation over use in interpreting the Organic Act).

<sup>153</sup> NAT’L PARK SERV., MANAGEMENT POLICIES 2006 11 (2006). *See also* Nagle, *supra* note 106, at 885–86 (discussing recent projects illustrating how the Park Service applies the impairment standard).

<sup>154</sup> NAT’L PARK SERV., *supra* note 153, at 12.

<sup>155</sup> Nagle, *supra* note 106, at 887–88.

Wilderness Act should not be understood to curb historic preservation, but rather to limit allowable forms of recreation in wilderness areas.

### 1. Wilderness Act and Purpose

The Wilderness Act's designation of areas within National Parks dramatically refocuses the management of their resources. Under the terms of the Act, the Park Service may not use motorized equipment of any kind nor allow any man-made structures or installations "except as necessary to meet minimum requirements of the administration of the area for the purpose" of the wilderness area.<sup>156</sup> However, "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and *historic use*" unless otherwise provided by the Act.<sup>157</sup>

There may soon be disagreement among federal circuit courts on whether these public purposes are ambiguous. The Eleventh Circuit first considered the issue of a purpose of "historic use" in *Wilderness Watch v. Mainella*.<sup>158</sup> Conservation advocates challenged a Park Service program where visitors could piggy-back on a Park Service vehicle when personnel made trips through a designated wilderness to maintain and preserve historic resources located outside the wilderness area.<sup>159</sup> The Eleventh Circuit held motorized vehicles could not be used within the wilderness area for the purpose of access to historic sites.<sup>160</sup> The court rejected the Park Service's argument that the motorized vehicle was necessary for the purpose of "historic use," finding that the Park Service was not entitled to deference because "historic use" unambiguously meant "natural" ecological history.<sup>161</sup> By substituting its interpretation of the Act for that of the Park Service, the Eleventh Circuit may have influenced subsequent lower court decisions, despite the fact that the court could have reached the same result on alternate grounds by emphasizing that the motorized transport was for the purpose of maintaining and providing access to places *other than* the wilderness area.<sup>162</sup>

Several courts have cited the Eleventh Circuit's reading of "historical use" as persuasive, but held that the challenged historic preservation

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<sup>156</sup> 16 U.S.C. § 1133(c).

<sup>157</sup> *Id.* § 1133(b) (emphasis added).

<sup>158</sup> *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1091–94 (11th Cir. 2004).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1091–92.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* ("[t]his appeal turns not on the preservation of historical structures but on the decision to provide motorized public access to them across designated wilderness areas"). The holding also ignores the specificity of designations.

action was impermissible in a wilderness area on other grounds. In *Olympic Park v. Mainella*, a federal district court found the reconstruction of structures impermissible because the NHPA does not require reconstruction, only preservation.<sup>163</sup> A similar result was reached on similar facts in *Wilderness Watch v. Iwamoto*, where a Washington court bolstered its injunction against the Park Service by emphasizing the extensive and disturbing use of helicopters in reconstruction efforts.<sup>164</sup> In *High Sierra Hikers v. Forest Service*, a federal district court in California supported its decision on historic significance grounds, finding that the historic dams the Forest Service sought to preserve were not sufficiently unique.<sup>165</sup> In a comment critical of these decisions, Nikki Carsley argued that these cases improperly apply the Eleventh Circuit's holding and ignore Wilderness Act carve-outs for predecessors of the NHPA.<sup>166</sup> While there is weight to this argument, a close reading of these cases reveals that the Eleventh Circuit's holding may not be so influential, and it should be considered limited to cases in which the Park Service's purported purpose is itself ambiguous, unnecessary, or impermissible.<sup>167</sup>

The Ninth Circuit has found the Wilderness Act to be more nuanced. In *Wilderness Watch v. U.S. Fish & Wildlife Service* (“Kofa”), the court held that “conservation” was ambiguous where wildlife recovery efforts required structural installations in wilderness areas.<sup>168</sup> In that case, an inter-Wilderness Act conflict arose when the Fish & Wildlife Service sought to protect wildlife populations in the Kofa Wilderness from drought by installing water basins. Because the term “conservation” was ambiguous as applied to agency action, the agency's interpretation of the statute was entitled to deference under administrative law.<sup>169</sup>

Recently, a federal district court in Washington held that “historic use” is ambiguous where the Park Service sought to intervene against demolition by neglect to preserve historic structures in wilderness

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<sup>163</sup> *Olympic Park v. Mainella*, No. C04-5732FDB, 2005 U.S. Dist. LEXIS 44230, at \*19 (W.D.W.A. 2005).

<sup>164</sup> *Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1075 (W.D.W.A. 2012).

<sup>165</sup> *High Sierra Hikers v. Forest Serv.*, 436 F. Supp. 2d 1117, 1136 (E.D. Cal. 2006).

<sup>166</sup> Nikki C. Carsley, Comment, *When the Old Becomes New: Reconciling the Commands of the Wilderness Act and the National Historic Preservation Act*, 88 WASH. L. Rev. 525, 551–52 (2013).

<sup>167</sup> In addition, Carsley's argument to restore statutory parity between Wilderness Act and NHPA is based on the language of Section 1133 of the Wilderness Act, which directs the Park Service to manage lands at standards no lower than provided by the Organic Act and Antiquities Act (where applicable). But this is better understood as setting a floor on management and preserving Park Service discretion to manage the unique features of specific parklands within wilderness areas, provided that such management is not contrary to the purposes of wilderness areas, rather than creating exceptions for the applicability of the Wilderness Act altogether.

<sup>168</sup> *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1032–34 (9th Cir. 2010).

<sup>169</sup> *Id.*

areas.<sup>170</sup> The court, following *Kofa*, found an ambiguity in the term “historic use” in light of the language and purpose of the Wilderness Act and properly deferred to the Park Service. The conservationist challengers, Wilderness Watch, have recently appealed to the Ninth Circuit.<sup>171</sup>

In an interesting case from the Sixth Circuit concerning management of Isle Royale, a group of boaters challenged a Park Service plan to demolish some docks and construct others in designated wilderness.<sup>172</sup> The Sixth Circuit held that the Park Service’s plan to remove some docks and add others within a wilderness area was not arbitrary and capricious because it furthered a Wilderness Act goal of providing a contrast to areas in which man’s works dominate the landscape.<sup>173</sup> Both this case and the cases from the Ninth Circuit indicate that *Wilderness Watch v. Mainella* does not represent the final word on whether historic preservation is a valid purpose for Park Service management of resources in wilderness areas.

Even if the Park Service’s purported purpose is valid, the terms of the Wilderness Act require that the action be (1) necessary to achieve the valid purpose and (2) only intrude to the minimum extent required.<sup>174</sup> In the case making its way through the Ninth Circuit, *Wilderness Watch v. Creachbaum*, the lower court determined that the Park Service—where it engaged in an information gathering process—made an adequately reasoned determination of necessity before acting on its planned preservation of historic structures.<sup>175</sup> Because the Park Service made a reasoned determination that maintaining the historic structures was necessary to preserve the history of the park, and reasonably determined the minimum tools and techniques required to preserve historic integrity, the court held that the Park Service’s preservation of man-made structures did not violate the mandates of the Wilderness Act.<sup>176</sup>

The upshot of the case law challenging Park Service actions in wilderness areas is that historic preservation in wilderness areas may be permissible, but the actions must be necessary for fulfilling a purpose of

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<sup>170</sup> *Wilderness Watch v. Creachbaum*, No. C15-5771-RBL, 2016 U.S. Dist. LEXIS 173056, at \*25 (W.D. Wa. 2016).

<sup>171</sup> As of the time of this writing, parties are briefing for argument. Time Schedule Order, *Wilderness Watch v. Creachbaum*, No. 17-35117 (9th Cir. Feb. 9, 2017); Order Granting Extension for Briefing, *Wilderness Watch v. Creachbaum*, No. 17-35117 (9th Cir. Aug. 15, 2017).

<sup>172</sup> *Isle Royale Boaters Ass’n v. Norton*, 330 F.3d 777, 783–84 (6th Cir. 2003) (holding that Park Service had discretion to decrease motor boat usage and place new structures in wilderness areas).

<sup>173</sup> *Id.*

<sup>174</sup> 16 U.S.C. § 1133(c) (2012).

<sup>175</sup> *Wilderness Watch v. Creachbaum*, 2016 U.S. Dist. LEXIS 173056, at \*29.

<sup>176</sup> *Id.* at \*26–40.

the area and are only allowed to the minimum extent necessary. Thus, while the refocusing of priorities accomplished by wilderness area designation is not fatal to historic preservation, the Park Service undoubtedly faces restrictive burdens when pursuing preservation goals in these areas.

## 2. Additional Challenges in Wilderness Areas

Additional challenges for historic preservation in wilderness areas also arise from the momentum of previous policy, the lack of substantive hooks to challenge Park Service management decisions, and the below-grade attributes of archeological historic resources in wilderness areas. First, while the policies of ecological reclamation require little action in wilderness areas beyond monitoring and evaluation, protecting historic resources generally requires some form of maintenance. In addition, the momentum of ecological reclamation can be difficult to slow because conservationists use the ESA and NEPA regimes to challenge contrary policy.<sup>177</sup>

Second, Park Service managers use several planning mechanisms that are not reviewable final agency action, and when they are reviewable, the Park Service is entitled to deference.<sup>178</sup> This means that historic preservation advocates often find it difficult to challenge planning mechanisms that provide for ecological reclamation to the detriment of historic resources. Finally, consider that many historic sites may exist below grade. As preservationist John Sprinkle has pointed out, National Register eligibility based on criterion “d” offers limited future protection.<sup>179</sup> Sprinkle argues that because the NHPA values archeological sites for their informational content, there is no longer a rationale for historic preservation once this information has been gleaned.<sup>180</sup> This seems problematic in acquisition era parks, like Shenandoah, where a policy of hands-off ecological reclamation has reduced the majority of mountain settlement historic resources to below grade.<sup>181</sup> These additional challenges make preservation advocacy in wilderness areas intimidating.

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<sup>177</sup> See *supra* Section IV.A.2.

<sup>178</sup> E.g., *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010); *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000).

<sup>179</sup> John H. Sprinkle, Jr., *Do Archaeologists Dig, Destroy, and Discriminate? The Historical Significance and Value of Archaeological Sites*, in *PRESERVATION OF WHAT FOR WHOM?* 169, 169–70 (Michael A. Tomilin ed., 1998).

<sup>180</sup> *Id.* at 170.

<sup>181</sup> NAT'L PARK SERV., SKYLINE DRIVE HISTORIC DISTRICT, NATIONAL REGISTER OF HISTORIC PLACES REGISTRATION FORM (2009).

However daunting the challenges for preservation advocates, the legal framework does leave room for historic resource management. Even in designated wilderness areas, the Park Service retains management discretion. Within that discretion, the Park Service should seek to exercise its authority over parkland cultural resources—both ecological and historical—in an ethical way. Locating the ethics of this stewardship requires an examination of the Park Service’s role in our society, the function of the National Park System, and the failings of our collective past.

#### IV. THE ETHICS OF PARK SERVICE CULTURAL STEWARDSHIP

The natural landscapes that constitute acquisition-era parkland contributed to unique cultural identities and played definitive roles in the histories of the people who lived there prior to modern federal ownership. Separating these people from their land not only compromised the integrity of their culture, but also deprived them of the means to protect their own heritage. Unfortunately, this is precisely why assimilationists have advocated forcibly removing discrete communities from culturally contributing environments throughout American history.<sup>182</sup>

The National Park Service was originally established to protect federal parklands from exploitation and over-recreation.<sup>183</sup> Its continuing mission is to provide for the use and enjoyment of park resources by this and future generations. The Park Service has an ethical obligation both to the displaced and the American people to preserve the cultural resources over which they have management discretion so that future generations may commune with the American past through these “fountains of light.”<sup>184</sup>

This ethical obligation is rooted in fundamental principles of our liberal democracy. Proceeding from a Rawlsian conception of justice, it is impossible to consider the past treatment of resources along class and cultural distinctions as ethical. This injustice is not vindicated by a sense of duty to nature because such a duty is misplaced in the context of acquisition era parks. Further, the Service’s ethical obligation is supported by pragmatic and utilitarian considerations. Federal control over cultural resources held for the benefit of Americans requires some level of stewardship. Evolving concepts of historical and cultural

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<sup>182</sup> This technique was most notably used to assimilate Native Americans and eliminate their cultural history. See Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 425–30, 434 (2002).

<sup>183</sup> Prior to the National Park Service, this task fell to the U.S. Army. *National Parks: America’s Best Idea*, *supra* note 3.

<sup>184</sup> MUIR, *supra* note 4.

significance bolster this conclusion: Communities want these resources protected and the Park Service is in the best position to do so.

#### A. *The Injustice of Conservationism*

American liberal democracy fundamentally depends on fair and equal treatment under the law. In the Rawlsian sense of “justice as fairness,” a just law—created through a process of equal representation and thereby facially neutral—is a normatively good law.<sup>185</sup> Supposing that Park Service management decisions are law because these decisions manifest the rational motions of our government, the Park Service is then obligated to representatively administer park resources in a just and fair way. This obligation extends beyond balancing recreation with protection; it also means balancing the demands of a vocal national minority with the needs of a less conspicuous local majority.

Throughout the history of the National Park System, the ecological conservation movement has largely been supported by wealthier politically connected elites. These elites were key drivers in acquisition era park establishment,<sup>186</sup> and continue to advance their favored forms of recreation and park use to the exclusion of others.<sup>187</sup> Beyond this representational problem, conservationists also achieved early goals through the disparagement and marginalization of other cultures—paradigmatically evicting the poor to create playgrounds for the rich.

As discussed in Section II.C, conservationists actively promoted government intervention in the Shenandoah through the marginalization of Blue Ridge culture, relying on a late 19th century narrative that the “other” would bring America to the brink of Hardin-esque tragedy.<sup>188</sup> For example, 19th century conservationists painted a picture of resource waste in the Adirondacks and Yellowstone to justify the exclusion of local populations from these areas.<sup>189</sup> This narrative is demonstrably false for pre-acquisition era parks. First, those lands were desirable to conservationists precisely because they had not been subject to gross exploitation. Second, it was the outsider recreationalists—not residents—that caused an immediate degradation in natural resource integrity. At bottom, the residents of these areas were easy to devalue because they

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<sup>185</sup> JOHN RAWLS, A THEORY OF JUSTICE 4–6, 11–16 (1971).

<sup>186</sup> For example, Pollock, Carson, and Byrd at Shenandoah or Stoll at Isle Royale.

<sup>187</sup> The frequent litigation discussed in the preceding Part is an example of this.

<sup>188</sup> See generally KARL JACOBY, CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION (2001). Cf. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

<sup>189</sup> JACOBY, *supra* note 188, at 19–20, 91. See also GEORGE PERKINS MARSH, MAN AND NATURE: OR, PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION (1864); Robert Underwood Johnson, *Attacks Upon Public Parks*, CENTURY MAGAZINE 43 (Jan. 1892).



were not associated with industrialized norms.<sup>190</sup> This class paternalism, revealed in early conservation efforts, remains an undercurrent of the ecological conservationism that advocates recreational exclusionism today.<sup>191</sup>

Ecological conservationists ostensibly displaced people in acquisition era parks for the purposes of saving nature, but the naturalist rationale does hold because these lands did not exist in the desired wilderness state at the time of establishment.<sup>192</sup> Perhaps this is why at Shenandoah conservationists pushed for an elimination of a historical narrative inconsistent with a wilderness myth. At Isle Royale today, the Park Service is at a crossroads. Park Service policies adopted when Isle Royale National Park was established have led to the preservation of family cabins and historic fishing camps.<sup>193</sup> One historic folk fishing camp, Edisen Fishery Fish House, has been listed on the National Register of Historic Places since 1977.<sup>194</sup> As the system of life-permits and life-leases expires, the Park Service is working with the community to determine how it can maintain cultural resources within the park cost-effectively.<sup>195</sup> However, vocal conservationists are driving the discussion towards demolition by neglect in order to “preserve” a wilderness that does not exist. How the Park Service will decide to fulfill its stewardship obligation at Isle Royale remains to be seen.

Just and fair park resource stewardship cannot legitimately value the creation of a false wilderness over the concerns of cultural heirs of the displaced. These determinations take place within a broader debate about what constitutes the American identity—vague concepts of nature versus concrete elements in the heritage of American cultural pluralism. The Park Service has an ethical obligation, rooted in equal representation, to reject management objectives that favor the privileged classes and to embrace park management for all Americans. To accomplish this, the Park Service must not participate in the elimination of cultural resources for the sake of wilderness creation. The unjust treatment of residents in the past cannot be undone, but the Park Service does have the ability to

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<sup>190</sup> JACOBY, *supra* note 188, at 19–20, 91. Ironically, this is precisely why these residents had not degraded the lands to the point that they were no longer be desirable for conservationists.

<sup>191</sup> See *infra* note 218 and accompanying text (discussing wilderness act cases in which conservationists attack pro-recreation park management actions).

<sup>192</sup> See *supra* Section II.C.

<sup>193</sup> See notes 76–78 and accompanying text.

<sup>194</sup> NAT'L PARK SERV., EDISEN FISHERY, NATIONAL REGISTER OF HISTORIC PLACES INVENTORY–NOMINATION FORM (1977).

<sup>195</sup> NAT'L PARK SERV., CULTURAL RESOURCES MANAGEMENT PLAN: ISLE ROYAL NATIONAL PARK, NEWSLETTER #1 1–2 (2011).

end the continuing process of cultural displacement by engaging in greater historic preservation.

### *B. Evolving Concepts of Significance*

Evolving concepts of historical significance support the Park Service having an ethical obligation to preserve the folk-cultural resources of the displaced. Traditionally, the perceived significance of a historic resource stemmed from its association with widely recognized power—grand architecture, association with famous figures, and the concept of “national significance.”<sup>196</sup> While the entertainment value afforded by these kinds of resources has appeal under the Park Service’s recreational mandate,<sup>197</sup> it allows for management decisions that privilege the few historic resources that are not culturally significant to displaced peoples.<sup>198</sup> The concept of historic significance has evolved to encompass the cultural landscapes and vernacular resources from which cultural groups derive a distinct identity and heritage.<sup>199</sup> Popular support for folk-cultural preservation warrants striking a greater balance in Park Service management of historic resources than has been previously achieved.

Shenandoah National Park illustrates how significance determinations influence stewardship. There, the Park Service has consistently shown a clear preference for historic resources that tell the story of the park’s former wealthy residents. The Skyline Drive Historic District, for example, overlaps the park and lists 219 contributing resources—none of which are remnants of the mountain farming communities.<sup>200</sup> Similarly, Skyland and similar resorts are meticulously documented.<sup>201</sup> Somewhat ironically, the Park Service has justified the historic significance of some walls along Skyline Drive by pointing to the architectural influence of mountain settlers<sup>202</sup> and has noted the presence of mountain family artifacts on resort properties but ignored the many other historic objects and structural remains that pepper the park today.<sup>203</sup>

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<sup>196</sup> See Howard L. Green, *The Social Construction of Historical Significance*, in PRESERVATION OF WHAT FOR WHOM? 85, 87 (Michael A. Tomilin ed., 1998).

<sup>197</sup> See *infra* Section IV.A.

<sup>198</sup> In addition, empirical research has indicated that people care as much about preserving vernacular history as sites associated with the rich and famous. See Laure Kuhfuss et al., *Should historic sites protection be targeted at the most famous? Evidence from a contingent valuation in Scotland*, 20 J. CULTURAL HERITAGE 682, 683–85 (2016).

<sup>199</sup> *Id.* (Green argues that the traditional concept—significance derived from association with privilege—merely alienates the public from their own history rather than allows them to connect).

<sup>200</sup> NAT’L PARK SERV., *supra* note 181.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 12.

<sup>203</sup> *E.g.*, *id.* at 38 (citing the presence of a moonshine still at Skyland). The history recited in the district registration form brushes quickly over the mountain settlement period. *Id.* at 7, 11.

Where Blue Ridge cultural resources have been preserved, it has often been for the recreational uses rather than to maintain the cultural resources of the displaced. For example, George Corbin's cabin—once decried as a destitute shack in *Hollow Folk*<sup>204</sup>—is available to rent. The cabin was restored and used as a recreational stop soon after the Corbin family was forcibly removed,<sup>205</sup> and it has been described in a visitors' guide as an idyllic mountain cabin of hand-hewn chestnut.<sup>206</sup> Compare this with the treatment of Aaron Nicholson's cabin, a unique example of mountain vernacular architecture having stone chimneys and walls forming two ends of a wood structure comprised of logs and vertical boards.<sup>207</sup> The cabin appears to have been in a location less convenient for hikers than Corbin's home. Thus, despite its unique architectural features, the Park Service has allowed the cabin to crumble into the advancing forest through a process of ecological reclamation.<sup>208</sup>

The preservation of resources significant because of their beneficial use by wealthier recreationalists no longer aligns with contemporary values. The modern view of significance is increasingly community derived, arising from meaningful local histories rather than contemporary entertainment values.<sup>209</sup> But communities have a hard time being heard. While the ability of communities to request an evaluation of significance provides one check on federal land managers who may wish maximize the recreational and entertainment value,<sup>210</sup> the reality is that federal land managers' discretion allows them to ignore community values.

In Shenandoah, the Park Service may have begun to pivot its resource management in light of shifting views of significance. For example, the Park Service began to take steps to restore resources in Nicholson hollow in the late 1990s, but was thwarted when a forest fire wiped out much of the remains in 2000.<sup>211</sup>

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<sup>204</sup> SHERMAN & HENRY, *supra* note 84, at 5–8 (describing “corvin” hollow). The cabin is significant for its association both with mountain culture and with the pro-removal movement.

<sup>205</sup> *Id.*

<sup>206</sup> EMILY REEDER & JACK REEDER, SHENANDOAH SECRETS: THE STORY OF THE PARK'S HIDDEN PAST 112 (1991).

<sup>207</sup> LAMBERT, *supra* note 16, at 249–50.

<sup>208</sup> *Id.*

<sup>209</sup> See Stephen C. Gordon, *Historical Significance in an Entertainment Oriented Society*, in PRESERVATION OF WHAT FOR WHOM? 49, 54–55 (Michael A. Tomilin ed., 1998). See also Green, *supra* note 196.

<sup>210</sup> See Elizabeth A. Lyon & Richard C. Cloues, *The Cultural and Historical Mosaic and the Concept of Significance*, in PRESERVATION OF WHAT FOR WHOM? 37, 43–44 (Michael A. Tomilin ed., 1998) (discussing how repeated requests for evaluation may alert professionals to community preservation interests).

<sup>211</sup> Horning, *Myth, Migration, and Material Culture*, *supra* note 89, at 132. See also Horning, *When Past is Present*, *supra* note 89.

The Park Service has also slowly begun to acknowledge that it has an ethical obligation to preserve Blue Ridge historical resources, and plans to work with community groups to document the past.<sup>212</sup> Local citizen advocates for increased recognition of the history of mountain farming communities have found the Park Service to be more cooperative.<sup>213</sup> Most recently, the Blue Ridge Heritage Project—an initiative to install memorials in each of the eight Virginia counties that contributed land to the park—has found support from the Park Service.<sup>214</sup> However, the historic resources of a complex mountain society remain unprotected within the park and continue to naturally degrade.<sup>215</sup> Budget concerns have also stymied efforts to allow visitors to connect with the culture that once existed in Shenandoah.<sup>216</sup> Because of the Park Service's policy of ecological reclamation, these historical resources are now scattered and largely consist of below-grade archeological remains.<sup>217</sup>

The Park Service, as sole steward of historic cultural resources located on parklands, is in the best position to protect them. They have the management discretion under the applicable management frameworks, and they have an ethical obligation to manage parklands in such a way as to preserve cultural resources *and* provide for the favored uses of conservationists. Admittedly, ecologically focused policies are pragmatic: Hands-off ecological reclamation is cost effective, and wealthy conservationists seem more likely to be benefactors of the National Park System. However, this narrow approach undermines the basic directive of the Park Service: To provide for this and future generations.

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<sup>212</sup> Laban West, *Park's Creation Changed Lives* (Apr. 6, 1997), <http://www.klein-shiflett.com/shiflettfamily/HHI/Shen/lwest.html> (quoting park historian, Reed Engle).

<sup>213</sup> Kane Kashouty, *Children of Shenandoah Meet*, DAILY PROGRESS, Mar. 12, 2015; Eddie Dean, *Appalachian Trail of Tears*, WASH. CITY PAPER, Feb. 28, 1997.

<sup>214</sup> Melissa Angell, *Shenandoah Sacrifices: Blue Ridge Heritage Project to Honor Displaced Families*, CVILLE WEEKLY, July 20, 2016; Sally James, *Albemarle-Blue Ridge Heritage Project Making Progress*, CROZET GAZETTE, June 3, 2016, <http://www.crozetgazette.com/2016/06/abrhp/>; *Blue Ridge Heritage Project Forms Albemarle Chapter*, CROZET GAZETTE, Apr. 8, 2016, <http://www.crozetgazette.com/2016/04/blue-ridge-heritage-project-forms-albemarle-chapter/>.

<sup>215</sup> *These Hills Were Once Home: A Shenandoah National Park Photo Diary* (May 27, 2009), <http://www.dailykos.com/stories/2009/5/27/735042/>. See also Horning, *Myth, Migration, and Material Culture*, *supra* note 89, at 132, 135, 138, 144.

<sup>216</sup> For example, Katrina Powell used a park archive of letters, made available to the public, in her research of the social effects of displacement. Budget cuts forced the closure of the archive, despite support from several descendants. Powell subsequently published her copies of letters in a curated volume. KATRINA M. POWELL, "ANSWER AT ONCE": LETTERS OF MOUNTAIN FAMILIES IN SHENANDOAH NATIONAL PARK 1934–38 xii (2009).

<sup>217</sup> Kristie Lynn Kendall, "Whoops and Whip O' Wills:" Re-Thinking the Preservation and Interpretation of Cultural Resources in Shenandoah National Park 59–60 (2010) (paper presented to faculty of the University of Maryland School of Architecture).

Conservationists continue to leverage legal frameworks to exclude others, particularly in wilderness areas, and in so doing, belie a form of elitism reminiscent of *Hollow Folk*.<sup>218</sup> The Park Service should resist this push and fulfill that part of its mission that protects park resources for future generations. These are public parks and the Service has an ethical duty to administer them fairly.

#### V. TOWARDS ETHICAL STEWARDSHIP

Ethical resource management requires the Park Service to take responsibility for its stewardship over the cultural heritage of those displaced by our national parks. Although the ability of the Park Service to engage in ethical resource management is challenged by policy momentum and the legal frameworks leveraged by conservationists, the Park Service should continue to pursue historic preservation. To understand how a better balance could be achieved, the concepts of landscape and wilderness must be carefully defined. Ethical management can be supported by two respective conceptualizations: First, of landscapes as historic cultural resources and second, of wilderness as including mankind. These conceptions allow the Park Service to ethically fulfill its stewardship obligations within existing legal frameworks. This is accomplished by understanding the role of park landscapes in defining the unique cultures that once inhabited them and preserving their legacy as part of the landscape within the story of the park itself. Additionally, these conceptions facilitate greater community and cultural stakeholder engagement to assist determinations of historic and cultural significance.

##### A. *Effecting Reconceptualization*

The reconceptualization of historic resources is already underway. As discussed in Section IV.B, evolving conceptions of significance have improved the Park Service's efforts to preserve previously ignored cultural resources. Historic preservation of cultural assets can be further enhanced through a reconceptualization of definitive landscapes as a historic resource and a reframing of wilderness that discards the false separation between the human and natural worlds. The literature exploring the concepts of cultural landscape and anthropogenic

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<sup>218</sup> For an example of the modern take on the trope of rural wastefulness in National Parks, see Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 851, 877–80, 917 (2009) (Antolini notes that her arguments for exclusion are subject to the criticism that they are elitist and inherently undemocratic).

wilderness is abundant, and a small glimpse is provided below as applied to park resource management.

### 1. Defining Cultural Landscapes

The concept of cultural landscape encompasses both physical elements—natural and man-made—and associative elements of how a particular population interacted with, shaped, and was shaped by the physical elements. Historian Richard Longstreth has credited the difficulty of defining exactly what comprises a cultural landscape with the general misunderstanding or outright rejection of the idea by the preservation community.<sup>219</sup> However, conceiving parklands as cultural landscapes of the displaced allows for a scoping of a significance inquiry that is valuable in dealing with lands peppered with below-grade historical resources. The concept of cultural landscape also helps place the story of the displaced people and their displacement within a greater story of park history, seeking to help visitors derive a sense of identity from natural features.<sup>220</sup>

The geographic elements of parklands, and their impacts on the displaced, demand these lands be considered as cultural landscapes. First, the uniqueness of displaced peoples was a product of the distinctive landscapes. Second, it was the concept of cultural landscape that legitimized historic preservation of American folk cultures in the first place. As historian Henry Glassie noted, geography is the key to study of rural culture because of its “major variation over space and minor variation through time . . . .”<sup>221</sup> Finally, landscapes provide historical insight into the treatment and representation of marginalized populations by establishing location relative to other resources, property values, and land-use patterns.<sup>222</sup> Thus, cultural landscape preservation facilitates an appreciation of the interplay between the natural elements and man-made

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<sup>219</sup> Richard Longstreth, *Introduction: The Challenges of Cultural Landscape for Preservation*, in *CULTURAL LANDSCAPES: BALANCING NATURE AND HERITAGE IN PRESERVATION PRACTICE* 1, 1–2 (Richard Longstreth ed., 2008).

<sup>220</sup> The *Creachbaum* court approved of this rationale when it held that the Park Service interpretation of “historic use”—meaning preservation of the history of wilderness area recreation—was a reasonable interpretation under *Skidmore* deference. *Wilderness Watch v. Creachbaum*, No. C15-5771-RBL, 2016 U.S. Dist. LEXIS 173056, at \*25 (W.D. Wa. 2016).

<sup>221</sup> Julie Riesenweber, *Landscape Preservation and Cultural Geography*, in *CULTURAL LANDSCAPES: BALANCING NATURE AND HERITAGE IN PRESERVATION PRACTICE* 23, 25 (Richard Longstreth ed., 2008) (quoting HENRY GLASSIE, *PATTERN IN THE MATERIAL FOLK CULTURE OF THE EASTERN UNITED STATES* 33–34 (1968)).

<sup>222</sup> Kenrick Ian Grandison, *Beyond Buildings: Landscape as Cultural History in Constructing the Historical Significance of Place*, in *PRESERVATION OF WHAT FOR WHOM?* 159, 160–68 (Michael A. Tomilin ed., 1998).

elements that provides a connection to the past for displaced cultures and the broader American public.

Two challenges to cultural landscape preservation should be considered. First, areas managed for natural attributes inevitably change and evolve with time.<sup>223</sup> The Park Service has typically only restored landscapes to a particular historically significant point in time when the landscape includes a national battlefield.<sup>224</sup> Second, there is a significance problem. It may be challenging to establish the integrity of an entire landscape in order to gain federal protection.<sup>225</sup> This is due in part to a fragmentation or layering of history in which the impacts of successive periods may be viewed as diminishing the integrity of former elements. One question this presents is whether the process of natural reclamation, favored in the National Park System, can be conceived of as acceptable due to the increased importance of geographic variation to the formation of discrete folk cultural identities. According to Park Service interpretation, this approach is an appropriate way to preserve cultural elements.

## 2. *Reconceptualization of Nature and Wilderness*

The Wilderness Act is overdue for a paradigm shift. The concept of an untrammled wilderness is illusory. A conservationist concept of limiting human intrusion into a pristine natural world presupposes a separation between mankind and nature that simply does not exist.<sup>226</sup> Further, this false separation is harmful to management strategies that would better achieve conservationist objectives. As Professor William Cronon put it: “Any way of looking at nature that encourages us to believe we are separate from nature as wilderness tends to do is likely to reinforce environmentally irresponsible behavior.”<sup>227</sup> Adhering to a belief in a natural world beyond human influence allows conservationists to escape

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<sup>223</sup> Bonnie Stepenoff, *Wild Lands and Wonders*, in CULTURAL LANDSCAPES: BALANCING NATURE AND HERITAGE IN PRESERVATION PRACTICE 91, 103 (Richard Longstreth ed., 2008).

<sup>224</sup> Cf., John H. Spiers, *Restoration and Interpretation of Monocacy National Battlefield*, in RESTORING LAYERED LANDSCAPES: HISTORY, ECOLOGY, AND CULTURE 183, 184–92 (Marion Hourdequin & David G. Havlick eds., 2015) (pointing out that attempting to freeze a landscape in time can actually damage historical interpretive efforts in light of evolving concepts of significance).

<sup>225</sup> Riesenweber, *supra* note 221, at 29 (discussing the relationship between integrity and significance in the National Register guidelines).

<sup>226</sup> Professor Paul Cruzten has termed our modern era the anthropocene in light of mankind’s inescapable impact on the world. *See generally* Paul J. Cruzten, *Geology of Mankind*, 23 NATURE 415 (2002).

<sup>227</sup> WILLIAM CRONON, UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 69, 80–81 (1996).

responsibility through a kind of moral hand-washing while at the same time limiting rational ecological decision-making.<sup>228</sup>

A better view recognizes that parklands generally, and designated wilderness areas in particular, are fragmented historical landscapes. Preservationists Anna Andrzejewski and Allison Rachleff describe fragmented landscapes as those that demonstrate a pattern of change that itself is historically significant enough to warrant preservation.<sup>229</sup> These cultural landscapes meet three criteria: (1) the presence of buildings, structures, or objects surviving from different historical periods on the land; (2) the existence of ruins or gaps in the landscape where historic buildings or structures formerly stood; and (3) the landscape's changes through time are reflected and revealed through combination of built and natural environment.<sup>230</sup> Meeting these criteria, the re-wilding of parklands is placed within a process of change that tells a valuable historical story. Preserving and telling this story is more challenging than a discrete historic object with significance limited in time and space, but it is more cohesive with park purposes and conservation. Once conservationists shed the myth of untouched wilderness, they are free to embrace these lands as fragmented historic landscapes. This approach accepts that national parks are reserves of American identity and would allow conservationists to better pursue ecological goals.<sup>231</sup>

### 3. Leveraging Reconceptualization

To bring concepts of community derived significance, cultural landscapes, and fragmented historic landscapes to bear on Park Service management decisions, cultural stakeholders—local community members or descendants with a cultural interest in the historic resources of displaced peoples—must work within available legal frameworks.<sup>232</sup> In addition, courts should protect the ability of the Park Service to ethically discharge its stewardship obligations by protecting management discretion.

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<sup>228</sup> See JED PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 240–51 (2015).

<sup>229</sup> Anna Vemer Andrzejewski & Allison Rachleff, *The Significance of Fragmentary Landscapes in Cultural Landscape Preservation*, in *PRESERVATION OF WHAT FOR WHOM?* 181, 182 (Michael A. Tomilin ed., 1998). Landscapes meeting the three criteria of a fragmented historical landscape arguably warrant preservation under significance criteria “A” or “C.” NAT’L PARK SERV., *NATIONAL REGISTER BULLETIN 15: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION* 5 (1990).

<sup>230</sup> Andrzejewski & Rachleff, *supra* note 229, at 181.

<sup>231</sup> As the *Kofa* case illustrates, discussed in Section III.B, *supra*, untouched is not always coherent with ecological conservation.

<sup>232</sup> Legal frameworks are described in Section IV.A.



First, cultural stakeholders should work with Park Service personnel and State Historic Preservation Officers to identify historic resources. The Park Service has been increasingly sensitive to shifting views of significance,<sup>233</sup> and the experience of groups like Children of the Shenandoah, the Blue Ridge Heritage Project, and Isle Royale Family and Friends Association demonstrate the impacts of varying degrees of community influence.<sup>234</sup> The organization of groups also facilitates an attribution of cultural meaning and coherence to resources by allowing shared meanings to be discovered and articulated.<sup>235</sup> Such organizations should work to identify discrete cultural resources and push for consideration of cultural and fragmented historic landscapes in significance determinations. Andrzejewski and Rachleff's argument that fragmented cultural landscapes should be considered in historic district determinations may be leveraged to get protections for below-grade historic resources beyond what is afforded by criteria "d."<sup>236</sup> Cultural stakeholder organizations should also advance their preservation efforts in national parks by seeking access and involvement in the Section 110 and 106 processes directly and through State Historic Preservation Officers.<sup>237</sup>

Second, the Park Service should consider using volunteer work agreements to reduce expenses and foster stakeholder involvement in historical preservation. These agreements have been highly successful in Isle Royale in maintaining historic resources at low cost.<sup>238</sup> Cultural stakeholders should pursue these types of arrangements to become actively involved in preserving structures, artifacts, and cemeteries on parklands and to reduce the impact of budget constraints on Park Service management efforts.<sup>239</sup>

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<sup>233</sup> See *supra* Section IV.B.

<sup>234</sup> For more information on these groups, see CHILDREN OF THE SHENANDOAH, <http://www.usgennet.org/usa/va/shenan/> (last visited Nov. 21, 2016); BLUE RIDGE HERITAGE PROJECT, <http://www.blueridgeheritageproject.com/> (last visited Nov. 21, 2016); ISLE ROYALE FRIENDS AND FAMILY ASSOCIATION, <http://www.isleroyalefamilies.org/> (last visited Nov. 21, 2016).

<sup>235</sup> See Barbara G. Anderson, *The Importance of Cultural Meaning in Defining and Preserving Sense of Place*, in PRESERVATION OF WHAT FOR WHOM? 127, 128–29 (Michael A. Tomlin ed., 1998) (arguing that shared cultural meanings are the most important factor in evaluation of historic properties under a community-based model).

<sup>236</sup> See *supra* notes 224–31 and accompanying text.

<sup>237</sup> See *supra* notes 144–47 and accompanying text.

<sup>238</sup> See Hockman, *supra* note 76 and accompanying text. For an example of Park Service direction of volunteer maintenance of historic structures, see NAT'L PARK SERV., A GUIDE TO REPAIR AND MAINTENANCE OF HISTORIC STRUCTURES WITHIN ISLE ROYALE NATIONAL PARK (2010). Unfortunately, the Park Service is likely heading the wrong direction by eliminating these agreements in the future. See *supra* note 78 and accompanying text.

<sup>239</sup> The concern being that ecological reclamation is cheaper than historic preservation.

Finally, courts should protect the Park Service's management discretion. Cases show that the Park Service may push its discretion too far.<sup>240</sup> However, where a legitimate historic preservation action is permitted by statute, either explicitly or by ambiguity, courts should defer to the Park Service. "Historic use" is an ambiguity in the Wilderness Act that courts should allow the Park Service to reasonably interpret as meaning historic use of the wilderness area,<sup>241</sup> allowing the Park Service to engage in community-involved stewardship of fragmented historic landscapes beyond the purely ecological.

### *B. Recommendations for Park Service Management*

Comparison of the respective treatment of historic resources at Isle Royale and Shenandoah National Parks suggests that community involvement is key to preserving cultural landscapes. There are several concrete steps that the Park Service can take to discharge its ethical obligations, facilitate community involvement, and operate within its governing legal frameworks: (1) engaging the local community, with greater attention given to descendants of the displaced, in significance determinations, (2) involving cultural stakeholders in planning decisions, and (3) establishing historic preservation programs with a dual educational and recreational value.

First, the Park Service should be receptive to cultural stakeholder efforts to involve themselves in significance determinations. The NHPA procedural obligations emphasize community involvement,<sup>242</sup> and although cultural stakeholders have no legal preference over other members of the public in having their voice heard, the Park Service has an ethical obligation to seek their involvement because of the public role in the displacement of these people and the Service's succession as steward of their cultural resources. The Park Service cannot ethically reconcile the seizure of definitive landscapes for the public good with an annihilation of its distinct cultural resources. It must work with stakeholders to identify and protect them.

Second, cultural stakeholders should be involved in planning decisions. The Park Service's effort to engage cultural stakeholders at Isle Royale is illustrative of good policy in this respect.<sup>243</sup> From the outset, the Isle Royale community was involved in planning decisions, and it had a voice in the preservation of its cultural resources. In contrast, mountain

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<sup>240</sup> See *supra* Section III.B.1

<sup>241</sup> See *Wilderness Watch v. Creachbaum*, No. C15-5771-RBL, 2016 U.S. Dist. LEXIS 173056, at \*25 (W.D. Wa. 2016).

<sup>242</sup> See *supra* Section III.A.3.

<sup>243</sup> See *supra* notes 74–76 and accompanying text.

residents were largely excluded from management decisions at Shenandoah National Park because they lacked the influence enjoyed by the Scandinavian community at Isle Royale.<sup>244</sup> Today, the Park Service continues to engage with cultural stakeholders at Isle Royale through its cultural resource management planning process<sup>245</sup> while no similar process exists for stakeholder participation in Shenandoah.<sup>246</sup> The Park Service should reconcile with the past by engaging displaced communities in management decisions.

Third, the Park Service should satisfy its use and enjoyment obligation in historic preservation programs by providing opportunities for visitors to have a dual educational-recreational visit. Presenting the history of marginalized or mistreated peoples presents a particular challenge for government managers who have a political interest in avoiding embarrassing historical moments. Historian Phillip Burnham has questioned whether any government can be trusted to provide an impartial or accurate account of its own history,<sup>247</sup> and site managers may find exploring the treatment of historically marginalized peoples makes them uneasy.<sup>248</sup> This is particularly challenging when dealing with a recreational mandate<sup>249</sup> and is easily evaded by an emphasis on conservation.<sup>250</sup>

Rather than shy from telling the story of marginalized or displaced communities, the Park Service should embrace the role of displaced peoples in the story of the park. Technology offers one way for visitors to explore historic sites in ecologically reclaimed park areas. One proposal for Shenandoah National Park is to create a GPS catalogue of remaining mountain culture resources with photographs and data collection to facilitate integrity and significance determinations,<sup>251</sup> similar

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<sup>244</sup> See Sections II.A.3, II.C.1.

<sup>245</sup> NAT'L PARK SERV., *supra* note 78.

<sup>246</sup> Note that Governor George Allen did work to establish a committee for communication with officials at Shenandoah National Park in the 1990s but his committee appears to have quickly shifted away from historic preservation and emphasized land use concerns of neighboring property owners. Memorandum from Sandy Rives to Acting Superintendent of Shenandoah National Park (Oct. 20, 1992) (on file with Children of the Shenandoah, *available at* [http://www.usgennet.org/usa/va/shenan/october\\_10\\_1992.htm](http://www.usgennet.org/usa/va/shenan/october_10_1992.htm)); Minutes of Meeting of the Blue Ridge Committee for Shenandoah National Park Relations (May 20, 1999) (on file with Children of the Shenandoah, *available at* [http://www.usgennet.org/usa/va/shenan/may\\_20\\_1999.htm](http://www.usgennet.org/usa/va/shenan/may_20_1999.htm)).

<sup>247</sup> PHILIP BURNHAM, *HOW THE OTHER HALF LIVED: A PEOPLE'S GUIDE TO AMERICAN HISTORIC SITES* 192 (1995).

<sup>248</sup> *Id.* at 68–71.

<sup>249</sup> DIANE BARTHEL, *HISTORIC PRESERVATION: COLLECTIVE MEMORY AND HISTORICAL IDENTITY* 48–52, 68–69 (1996) (discussing the propensity to engage in utopian myth creation when confronted with the grime of our history).

<sup>250</sup> See *supra* Section III.A.1.

<sup>251</sup> Kendall, *supra* note 217, at 59–60.

to the survey that the Park Service conducted for a historic Appalachian Trail segment within the park.<sup>252</sup> Visitors could virtually explore the cultural landscape of the lost Blue Ridge communities or use technology to guide a physical visit. Traditional methods of landscape interpretation, such as informative kiosk and visitor center materials, are another way to tell the story of displaced peoples that could compliment the preservation of remaining structures and archeological resources. The legal framework for Park Service management not only allows, but encourages these steps as a means to provide for the preservation of historic objects and their use and enjoyment by visitors.

## VI. CONCLUSION

The first century of Park Service stewardship reveals the hazards of management discretion. Rather than attempt to impose legal limits on Park Service discretion, we should encourage the Park Service to exercise its discretion ethically. Allowing the destruction of historic and cultural resources of displaced peoples for the sake of wilderness creation is unethical because it unjustly favors wealthy conservationist groups at the expense of American cultural identity without equal representation.

A comparison of Park Service management of resources at Shenandoah and Isle Royale National Parks reveals that community involvement in management planning is a critical element in preserving unique parts of our nation's history. The experience of displaced peoples at these two parks also highlights the roles of cultural influence and class bias in resource value determinations. These lessons counsel towards more conscious stewardship of our American cultural landscapes.

A shift towards ethical resource stewardship will only become more imperative in the future. Population growth and our changing climate will likely increase recreational demands on the national parks.<sup>253</sup> The Park Service has an obligation not just to this generation, but to the next, and not just to certain segments of the public, but to all Americans, to protect our unique American cultural landscapes so that we may all be able to reach out and locate our identities—not just in time, but in place.

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<sup>252</sup> *Id.*

<sup>253</sup> Caitlyn Kennedy, *Climate & the Crowds at National Parks* (July 22, 2015), <https://www.climate.gov/news-features/climate-and/climate-crowds-national-parks>. But see Thomas H. Stevens et al., *Declining National Park Visitation: An Economic Analysis*, 46 J. LEISURE RESEARCH 153 (2014) (suggesting that economic factors may counter demand on parks).