

ARTICLES

Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing

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INTRODUCTION

Commentators have noticed a problem common to both historic preservation laws and the Endangered Species Act (“ESA”): the prospect of regulation encourages property owners to destroy the very resources that these laws seek to protect.¹ The likelihood or imminence of designation of a property as a historic

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1. See, e.g., Jonathan H. Adler & Joseph Tomain, *Conservation without Regulation: Property-Based Environmental Protection*, 10 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 21, 21-22 (2009); Andrew P. Morriss

landmark or within a historic district can lead the owner to demolish the building before preservation restrictions become legally binding. Similarly, a landowner may eradicate all members of a declining species or destroy the species' habitat before the species can be listed as threatened or endangered. Under current law, these property owner actions would be entirely legal, economically "rational," and profoundly antithetical to the goals of the respective laws.² Thus, historic preservation laws and endangered species protections share a structural problem: they create perverse incentives. They encourage property owners to frustrate statutory policies before they legally prohibit the identical behavior.

The common elements that generate this paradox seem clear. Both legal regimes impose severe regulatory restrictions on property owners, but only after a formal decision has been made that a specific historic property or species should be protected. Historic preservation laws, particularly at the local government level, frequently prohibit or delay demolition of designated buildings, landscapes, or other cultural properties, and require that alterations of, or additions to, such properties meet some test of stylistic compatibility.³ The ESA broadly prohibits any person to "take" an endangered species, which includes any action to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct."⁴ Significantly, the Supreme Court upheld the agency's interpretation of "harm" to prohibit alterations of species' habitats on private land that actually harm those species.⁵ Both legal regimes employ elaborate processes to identify the properties or species that should receive this legal protection. The process for designation of a historic landmark, for example, involves consideration by an appointed commission or legislative body of documentary evidence and expert opinion concerning the historic significance of the property.⁶ The listing of an endangered species requires the

& Richard L. Stroup, *Quartering Species: The "Living Constitution," the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 795 (2000) ("A landowner who discovers an endangered species on her land has the incentive to 'shoot, shovel, and shut up.'"); Robin Pogrebin, *Preservationists See Bulldozers Charging through a Loophole*, N.Y. TIMES, Nov. 28, 2008, at C1.

2. See, e.g., Adler & Tomain, *supra* note 1; Morriss & Stroup, *supra* note 1; Pogrebin, *supra* note 1. For further discussion of the issue, see also Jonathan Flynn, *Productive Preservation and the Reinvention of Industrial America*, 39 URB. LAW. 123, 141 (2007).

3. For a discussion of the standards governing demolition of historic structures, see Douglas B. Aikins, *Demolition of Historic Structures; CEQA Compliance and Tactics*, 30 CAL. REAL PROP. J. 19 (2012). For an overview of standards for exterior additions to historic structures, see ANNE E. GRIMMER & KAY D. WEEKS, U.S. DEP'T OF THE INTERIOR, NEW EXTERIOR ADDITIONS TO HISTORIC BUILDINGS: PRESERVATION CONCERNS (2010), available at <http://www.nps.gov/tps/how-to-preserve/preservedocs/preservation-briefs/14Preserve-Brief-Additions.pdf>.

4. Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (2013).

5. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 708 (1995) (reviewing 50 C.F.R. § 17.3 (1994)).

6. See National Historic Preservation Act of 1966, 16 U.S.C. §§ 470a(a)(1)(B), 470a(b)(1), *repealed by* National Park Service and Related Programs, Pub. L. No. 113-287, 128 Stat. 3094 (2014); see also N.Y.C. CHARTER § 3020(1)-(2), (5) (2004), available at http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf.

responsible federal agencies to make a series of findings, based on the best available scientific evidence, that a species is in danger of extinction.⁷ This process is notoriously slow and fraught with analytic and political obstacles.

Generally speaking, private parties are free from any legal restrictions regarding these resources before designation or listing. At common law, a landowner is free to use or demolish a building as he wishes, so long as it does not cause a nuisance.⁸ Other land use regulations, such as zoning regulations, do not prohibit demolition.⁹ Building codes or safety regulations may regulate the manner of building demolition but do not restrain the decision to do so, except that they may require the demolition of unsafe structures.¹⁰ Hunting regulations may restrict direct killing of some game animal, such as migratory birds, but they have no application to killing plants or invertebrates.¹¹ Regulatory constraints on rural landscape modification are virtually non-existent.

After designation or listing, however, historic preservation laws and the ESA impose strong restrictions on harm to the protected resources on private property. In cities with strong preservation ordinances, owners cannot demolish designated buildings in most instances and must persuade a review board that additions or alterations to such buildings meet a standard of appropriateness or compatibility.¹² The weight of the ESA is even heavier on private parties, as it prohibits

7. Endangered Species Act of 1973, 16 U.S.C. § 1533(a)-(b) (2013).

8. For further explanation, see Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005) (describing the right to destroy one's own property and its "ancient origins").

9. See, e.g., CYNTHIA M. BARR, BOSTON ZONING: A LAWYER'S HANDBOOK § 9.3.1 (5th ed. 2013). But see PATRICIA E. SALKIN, N.Y. ZONING LAW & PRACTICE § 11A:04 (4th ed. 2000).

10. See BLACK'S LAW DICTIONARY 235 (10th ed. 2014) (defining "building code" as "[a] law or regulation setting forth standards for the construction, maintenance, occupancy, use, or appearance of buildings and dwelling units"); Christine M.G. Davis et al., 10 OHIO JUR. 3D, *Buildings, Zoning, and Land Controls* § 340 (2015) (discussing demolition by municipality of dangerous nuisances); 1C ORDINANCE L. ANNOTATIONS, *Buildings* § 148 (2014) (discussing ordinances prohibiting repair).

11. See BLACK'S LAW DICTIONARY, *supra* note 10, at 793 (defining "game" as "[w]ild animals and birds considered as objects of pursuit, for food or sport; esp., animals for which one must have a license to hunt").

12. See, e.g., N.Y. DEP'T OF STATE, LEGAL ASPECTS OF MUNICIPAL HISTORICAL PRESERVATION 6-8 (2005), available at http://www.dos.ny.gov/lg/publications/Legal_Aspects_of_the_Municipal_Historic_Preservation.pdf (giving a historical overview of common New York state practices typically requiring review board approval for changes to a landmark); *Historical Preservation Manual*, CITY OF HOUSTON PLANNING & DEV. DEP'T, <http://www.houstontx.gov/planning/HistoricPres/HistoricPreservationManual/index.html> (last visited Apr. 7, 2015) ("Alterations to the exterior of a City-designated Landmark, Protected Landmark, or a property located in a City-designated Historic District require a Certificate of Appropriateness (COA) which are generally issued through the review and approval of a project by the Houston Archaeological and Historic Commission (HAHC). This includes restoration, rehabilitation, additions, exterior alterations, new construction in a historic district, relocation and demolition of contributing structures in a historic district, or demolition of a Protected Landmark."); *Making Changes to a Landmark*, SEATTLE DEP'T OF NEIGHBORHOODS, <http://www.seattle.gov/neighborhoods/preservation/makingchanges.htm> (last visited Apr. 7, 2015) ("The following changes require a Certificate of Approval before work can begin, even if no permit from the Department of Planning and Development (DPD) is required[:]. Any change to the exterior of any building or structure[:]. Installation of any new sign or changes to existing signs[:]. A change in the color the building or structure is painted[:]. New construction[:]. Demolition of any building or structure[:]. Changes to the interior that show from

them from “taking” a listed species, which includes significantly changing its habitat.¹³

The insight upon which this article is built is that the common structures of these two legal regimes create incentives toward destroying the resources they seek to protect. The shift from legal freedom to exploit resources to strict limitation on property modification and the lengthy and public process to designate or list specific resources for protection provide the motive and the opportunity to legally frustrate the application of the statutes. This article seeks to understand how these perverse incentives are created and how they can be lessened. The procedural and substantive provisions of both legal regimes have evolved to reduce the perverse incentives created by the formal precipice character of the regulatory structure.

This article compares the creation of such perverse incentives in the two legal regimes of historic preservation and endangered species protection. Although the incentives created by the ESA to “shoot, shovel, and shut-up” have been discussed extensively in the literature,¹⁴ much less has been written about the similar incentives in historic preservation, and no article has sought to compare the effects of these laws. This article contends that valuable insights can be gained through such a comparison. Pragmatically, efforts to lessen the perverse incentives under one legal regime can suggest reforms to the other that may also be beneficial. More generally, the comparison encourages one to abstract from these approaches to resource protection and to clarify the structural problem created by such a “precipice regulation.” It not only encourages destruction of the resource that the law seeks to protect, but also may prompt the owner to engage in wasteful expenditures that have no productive value other than freeing the owner from future regulatory restrictions.

This article defines a precipice regulation as a legal regime that moves from very low levels of property restriction to very high levels upon the completion of a regulatory consideration of a specific resource found upon private property. Any expected change in law can generate incentives to avoid ex ante the costs of the reform. A precipice regulation differs from ad hoc statutory amendments in that it adds preexisting restrictions to new resources. This article strives to clarify the structural problems with precipice regulations and suggests ways to lessen them. This article also considers important differences between historic buildings and endangered species, and reflects upon the public values pursued by

the street”); *What Does Landmark Designation Mean to Property Owners*, N.Y.C. LANDMARKS PRES. COMM’N, http://www.nycppf.org/html/lpc/html/faqs/faq_meaning.shtml (last visited Apr. 7, 2015).

13. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302-03 (1991); Endangered Species Act of 1973, 50 C.F.R. § 17.3 (2013); Doug Williams, *A Harder “Hard Case,”* 57 ST. LOUIS U. L.J. 931, 931 (2013).

14. Tony Hoch, *Tools for Managing Endangered Species on Private Lands*, 31 WYO. LAW. 30, 30 (2008); see also Christopher S. Mills, *Incentives and the ESA: Can Conservation Banking Live up to Potential?*, 14 DUKE ENVTL. L. & POL’Y F. 523, 528 (2004); Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. LAND RES. & ENVTL. L. 183, 192 (2005).

each. Historic buildings are easier to save than biologic species because historic buildings co-exist more comfortably with modern property development, but the mass extinction of species poses a greater threat to human welfare in the foreseeable future.

Extensive literature exists on legal transitions, which focuses on changes in tax law and pollution regulation.¹⁵ This literature has some bearing on the issues discussed here, but precipice regulations are significantly different from new tax legislation or pollution restrictions. The legal transition literature primarily considers whether transition relief, usually grandfathering, from new laws promotes efficient or fair outcomes.¹⁶ Grandfathering has little bearing on precipice regulations, which, by definition, extend established regulations to existing property arrangements. Designation and listing also should rarely upset reasonable investment expectations because the regulatory system and criteria for application exist long before application to any property. What the transition literature does suggest is the necessity to consider how precipice regulations shape property owners' incentives before designation or listing.¹⁷

This article proceeds as follows. Part I describes each regulatory regime and specifies the ways the regimes create incentives to destroy the resources they aim to protect. Part I also reviews the literature identifying such perverse incentives and what is known about the incidence of actual destruction. Part II addresses actual and suggested changes to the procedures for designation or listing the resources, while Part III looks at substantive changes in the laws that may have the purpose or effect of moderating negative incentives. Finally, Part IV concludes by considering the extent to which accommodation reforms further, or compromise, the values that historic preservation and biodiversity laws advance.

I. SCHEDULING RESOURCES FOR PROTECTION: DESIGNATION AND LISTING

This section explains the legal processes by which legal protection is extended to historic resources and to distressed species. This section also describes the scope and gravity of these new legal protections and contrasts them with the freedom enjoyed by the owner beforehand. This section shows how the public nature and length of the proceedings create the opportunity for affected property owners to destroy the targeted resources before regulatory protections become applicable. This section concludes by comparing the similarities and differences between the two regimes of historic protection and endangered species to suggest an abstract understanding of precipice regulations.

15. See, e.g., Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 NW. U. L. REV. 1581 (2011).

16. See Graetz, *supra* note 15; Kaplow, *supra* note 15; Revesz & Kong, *supra* note 15, at 1613-15.

17. See generally Graetz, *supra* note 15; Kaplow, *supra* note 15; Revesz & Kong, *supra* note 15, at 1615-21.

A. HISTORIC PRESERVATION

Historic preservation law seeks to preserve the significant buildings, landscapes, and other cultural resources that express the important events, persons, and accomplishments of our past.¹⁸ To advance this goal, different levels of government employ an impressive array of legal instruments. These include public and private ownership of historical properties; privately negotiated but tax supported preservation easements; requirements to collect and publish information; tax credits; substantive and procedural requirements placed upon government in dealing with historic resources; and regulation of historic private property.¹⁹ Public regulation of private owners of historic properties occurs primarily at the local government level.²⁰ This article focuses on that local regulation of privately owned historic buildings and landscapes.²¹ Such local ordinances are similar in outline but differ greatly in details. This article discusses most frequently the historic preservation law of Washington, D.C.²²

Not all old buildings can or should be preserved. Selection must be made so the more historically valuable ones can be preserved and put to new uses while the others can be replaced by needed modern structures expressing contemporary aesthetic notions. Thus, all historic preservation systems employ standards and procedures to identify the buildings and other properties to be protected. The

18. National Park Service and Related Programs, Pub. L. No. 113-287, §100101, 128 Stat. 3094, 3096 (2014).

19. Only recently have scholars sought to provide comprehensive overviews of historic preservation law. See generally SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION: CASES AND MATERIALS* (2012); SARA C. BRONIN & RYAN ROWBERRY, *HISTORIC PRESERVATION LAW IN A NUTSHELL* (2014).

20. BRONIN & BYRNE, *supra* note 19, at 268. Federal historic preservation law regulates the activities of the federal government itself in engaging in building projects and in regulating or funding private activities under other regulatory regimes. For example, when a natural gas supplier needs a permit from the Federal Energy Regulatory Commission ("FERC") to construct a natural gas pipeline, FERC must comply with section 106 of the National Historic Preservation Act to consider whether the proposed pipeline will damage any historic properties. National Historic Preservation Act of 1966, 16 U.S.C. § 470f (2012). On the other hand, Section 106 does not prohibit federal agencies from engaging in, or authorizing actions that, damage historic properties, although the process of consideration and consultation established by the regulations implementing the statute provide incentives for agencies to avoid or mitigate such damage. See 36 C.F.R. §§ 800.1-800.16 (2014); BRONIN & BYRNE, *supra* note 19, at 106-11, 144-67.

21. Like other local land use laws, such as zoning, local historic preservation laws are authorized by state grants of regulatory authority whether through specific state enabling statutes or through constitutional or statutory "Home Rule" provisions. See BRONIN & BYRNE, *supra* note 19, at 268-70. State-level historic preservation ordinances generally support local or federal preservation activities and regulations. A major exception is the California Environmental Quality Act, which has a major effect on private development in the Golden State. See *id.* at 197-211.

22. Washington, D.C. has one of the strongest and best-documented historic preservation laws in the United States. Researching local preservation laws is a frustrating task because decisions are poorly documented and spottily collected. The Georgetown University Law Library provides a website collecting D.C.'s ordinances, regulations, and judicial and administrative decisions implementing the law. See *D.C. Historic Preservation Decisions*, GEO. L. LIBR., <http://www.law.georgetown.edu/library/collections/histpres/index.cfm> (last visited Apr. 12, 2015).

public process at the local level for choosing properties to be subject to preservation regulations is called *designation*.²³

Localities have adopted various procedures for designation, but nearly all bear a strong family resemblance. Nearly all systems allow designation of individual properties, called *landmarks*, and of assemblages of buildings and other features, called *historic districts*.²⁴ Nearly anyone can propose to designate a landmark or district, and generally must submit documentary evidence about the property tending to show that it meets the criteria.²⁵ Such applications are reviewed by an appointed board composed of members who are supposed to possess relevant expertise in architecture, history, and law.²⁶ In larger cities, a professional staff capable of critiquing or contributing knowledge about the property will assist such a board.²⁷ The board holds a public hearing at which interested persons may speak and vote whether to designate the property.²⁸ In many jurisdictions, the elected legislative body plays a role to reject, approve, or ignore the action or recommendation of the board. In New York City, for example, the city council has 120 days to disapprove an action by the Landmarks Preservation Commission (“LPC”) to designate a property or district.²⁹ If it does so, the mayor can veto the disapproval.³⁰ In practice, political actions to upset commission designation are very rare.

Criteria for designation are phrased differently in different jurisdictions, but all nonetheless seem to embody the same values. In general, they test whether a property is historically “significant.”³¹ The fullest expression of this idea is found in the National Park Service’s regulations for eligibility for listing on the National Register of Historic Places (“National Register”), which has provided a model often imitated by local governments.³² The regulations do not define “significance” but weave the term through the criteria for listing:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and

23. See, e.g., Tracy Bateman Farrell et al., 12 N.Y. JUR. 2D, *Buildings* § 238 (2015).

24. Designation of a historic district regulates both the demolition and alteration of buildings and other structures that contribute to the character of the district, and it also regulates new construction even on vacant lots included within the district to foster development appropriate to the character of the district. See, e.g., *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979).

25. *National Register of Historic Places Program: Fundamentals*, NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, http://www.nps.gov/nr/national_register_fundamentals.htm (last visited Apr. 12, 2015).

26. See, e.g., N.Y.C. CHARTER § 3020(1) (2004), available at http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf (The Landmarks Preservation Commission shall include “at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor”).

27. See, e.g., *id.* § 3020(5).

28. See, e.g., *id.* § 3020(8).

29. *Id.* § 3020(9).

30. *Id.*

31. National Park Service and Related Programs, Pub. L. No. 113-287, §100507, 128 Stat. 3094, 3102 (2014); National Register of Historic Places, 36 C.F.R. § 60.4 (2014).

32. Katherine Ridley & Mark Silberman, 9A ENVTL. L. & REG. N.Y. 2D, *Designation of Landmarks and Historic Districts* § 14:37 (William R. Ginsberg & Philip Weinberg eds., 2009).

objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.³³

The National Register and all local ordinances require that a building have integrity in addition to significance; that is, it must retain enough of the original features that make it significant so that it can convey that significance to observers.³⁴ Thus, buildings that have been partially demolished or substantially remodeled may not qualify. Some designation ordinances require that a building have had significance for some minimum number of years—the National Register specifies fifty years—and some designation ordinances allow designation of more recent properties if they have “exceptional importance.”³⁵

Much can be said about these interesting criteria,³⁶ but for present purposes, note that they are broad and inclusive. Indeed, there have been persistent, although generally unsuccessful, attempts to persuade courts that such criteria are unconstitutionally vague. Courts rejecting such claims have relied on the supposed expertise of the members of preservation boards applying “professional standards which are generally accepted in the field of historic preservation.”³⁷ The breadth of the criteria does permit community members to argue for designation in order to employ historic preservation as a land use device to stop unwanted redevelopment. Carol Rose has argued that this collective push for community self-definition has become the dominant value in historic preservation.³⁸ While she offered a balanced assessment of this turn, others have critiqued

33. 36 C.F.R. § 60.4 (2012).

34. In furtherance of this goal, the National Register requires “integrity of location, design, setting, materials, workmanship, feeling, and association” and excludes “structures that have been moved from their original locations, reconstructed historic buildings, [and] properties primarily commemorative in nature” from designation under ordinary circumstances. *Id.*

35. *Id.* § 60.4(g).

36. The tautological character of these criteria has long been criticized by preservation professionals. *See, e.g.,* Joseph A. Tainter & G. John Lucas, *Epistemology of the Significance Concept*, 48 AM. ANTIQUITY 707, 709-10 (1983) (“[S]ignificant properties are defined, in part, as those that possess significance.”).

37. *Metro. Dade Cnty. v. P.J. Birds, Inc.*, 654 So. 2d 170, 177 (Fla. Dist. Ct. App. 1995); *see also* *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979). The glaring outlier is *Hanna v. City of Chicago*, where the court refused to dismiss a complaint challenging Chicago’s preservation ordinance as unconstitutional, remarking that the language of the ordinance was “vague, ambiguous, and overly broad.” 907 N.E.2d 390, 395 (Ill. App. Ct. 2009).

38. Carol Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

it as exclusionary NIMBYism impairing urban vitality.³⁹ Still others have argued that preservation has contributed substantially to recent urban revival.⁴⁰

Generally speaking, property owners are given an opportunity for a hearing on whether their properties will be designated, but they are not given the power to veto the designation.⁴¹ The only issues before the preservation board are whether the property has significance and whether it retains integrity. The owner has no necessary expertise on either issue and may not have any material facts to present on the issue of significance. Designation proceedings are considered quasi-legislative in character, not implicating the due process rights of the owner. As in a rulemaking proceeding, virtually anyone may comment, and testimony is restricted only to limit time.⁴² Nonetheless, designation can have serious consequences for affected property owners, which may stand in stark relief in the case of an individual landmark addressing the rights of a single property owner.

Designation subjects a property to the continuing jurisdiction of the preservation law and review board.⁴³ The owner will need a historic preservation permit to demolish, alter, or add to the designated building, or to build a new structure even on a vacant lot within a historic district.⁴⁴ Although the stringency of these permit systems varies greatly among U.S. cities, the most prominent permit systems, for example those of New York and Washington, D.C., largely prohibit demolition and require any changes to a property to be judged appropriate or compatible by the preservation review board.⁴⁵ At first blush, such restrictions appear to have enormous economic consequences. The owner of a small house in a historic district may wish to build a tall apartment building but cannot demolish the small house or get a permit for a building that would be incompatible in size with the surrounding houses.

The best-known example of the economic impact from historic preservation is the New York City LPC's rejection of a tall tower, permissible under applicable zoning, on top of the landmark Grand Central Station. That decision, of course, led to the Supreme Court's crucial *Penn Central* decision denying the station owner's claim of a regulatory taking constitutionally requiring "just compensa-

39. See Edward L. Glaeser, *Preservation Follies: Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich*, 20 CITY J., no. 2, 2010, at 62.

40. See J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Historic Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665 (2012).

41. See BRONIN & BYRNE, *supra* note 19, at 79. But see National Park Service and Related Programs, Pub. L. No. 113-287, § 302105(b), 128 Stat. 3094, 3193 (2014) ("If the owner of any privately owned property . . . object[s] to inclusion or designation, the property shall not be included on the National Register or designated as a National Historic Landmark until the objection is withdrawn."); *id.* chs. 3121, 3123, 128 Stat. at 3191-97.

42. See, e.g., N.Y.C. LANDMARKS PRES. COMM'N, *supra* note 12.

43. See, e.g., N.Y.C. CHARTER § 3020 (2004), available at http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf; Glaeser, *supra* note 39.

44. See, e.g., D.C. CODE § 6-1104(e) (2001).

45. See, e.g., N.Y.C. LANDMARKS PRES. COMM'N, *supra* note 12; N.Y. DEP'T OF STATE, *supra* note 12.

tion.”⁴⁶ Even those who approve the Court’s treatment of the constitutional claim recognize that the owner suffered a large loss in economic potential from the station, which could have been realized in the absence of preservation restrictions.⁴⁷ The owner did not obtain reciprocity of advantage because the station was an individual landmark rather than a contributing building in a historic district; thus, no corresponding restrictions on surrounding lots increased the value of Penn Central’s economic stake.⁴⁸

Property owners facing designation of their buildings can imagine themselves in the shoes of Penn Central. Before designation, they can legally demolish their old building and build within the entire zoning envelope. After designation, however, they would need to propose plans to the preservation board, which could be a long and expensive process, and they still face the possibility that any proposed demolition, alteration, or new addition would be rejected. To avoid designation of a landmark, they need only to demolish enough of their current buildings to deprive them of “integrity.” Property owners can then wait for market conditions to signal a propitious time for new construction, and they can be confident that their lots will not be subject to preservation jurisdiction. This scenario suggests, unfortunately, that owners have an incentive to demolish buildings that they otherwise might retain, at least for a while, in order to preclude designation and its attendant regulatory burdens. This is the perverse incentive at the heart of this paper.

Leading casebook authors in related fields have highlighted the owner’s incentive to demolish all or part of a building before designation as a perverse incentive created by preservation laws.⁴⁹ Professor Strahilevitz has stated the concern most completely:

46. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978).

47. William A. Fischel, *Lead Us Not Into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 *FORDHAM ENVTL. L.J.* 749, 754 (1995).

48. Justice Rehnquist made this point forcefully in his *Penn Central* dissent:

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby “secures an average reciprocity of advantage.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. [393, 415 (1922)]. It is for this reason that zoning does not constitute a “taking.” While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other “landmarks” in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people.

Penn Cent., 438 U.S. at 147 (Rehnquist, J., dissenting) (alteration in original) (footnote omitted). Today, New York City has more than 1300 individually designated landmarks, and it seems less clear that landmarks do not enjoy reciprocity of advantage.

49. ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 500 (3d ed. 2005); THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 1286 (2007).

[T]he owner of a building that has some historic or architectural merit – but that will not become eligible for landmark designation for ten more years – might maintain the exterior of the building poorly or remove the most architecturally interesting ornamentation in the years preceding landmark eligibility. These acts or omissions might substantially reduce the likelihood of costly government regulation in the not-too-distant future.⁵⁰

While he seems to bemoan the incentives that would cause an owner to demolish a property before the owner would otherwise rationally decide to do so, Professor Strahilevitz's celebration of the creative force of destruction suggests that he would not otherwise regret the loss of a structure that the community would have wanted to preserve through designation.⁵¹ These authors seem to recognize that the perverse incentives are the result of a disconnect between private costs and public benefits, but none seem to recognize that the designation process, shifting demolition at one moment from free to prohibited, creates the legal space where the owner can safely respond to the incentive to demolish.

Empirical evidence for the scale of demolition in anticipation of designation is virtually non-existent. Such research is very difficult because buildings are demolished for all sorts of reasons, and studying perverse incentives requires some insight into the subjective motivation of the owner. Theorists cite anecdotes in newspaper accounts, but these are subject to varying interpretations.⁵² Some evidence can be gleaned from a series of New York City cases where the LPC exercised its discretion not to schedule a hearing on designation while owners either demolished or substantially altered buildings.⁵³ To be sure, these are special cases that reflect a tacit agreement between the owner and the LPC to allow demolition or alteration to occur, rather than a unilateral exploitation of a structural weakness in the law. But they do illuminate an effort to fend off designation until the building could become ineligible. The context strongly suggests the motivation of the owner.

There is a clear case from Washington, D.C. of an owner demolishing a building to avoid the legal effects of designation. The creation of the Downtown Historic District in the 1980s stimulated a great deal of anticipatory demolition. Designation of a historic district then in the 1980s and today requires documentation about the age, style, history, and condition of every building within the

50. Strahilevitz, *supra* note 8, at 818.

51. *Id.* at 820-21 (“Denying owners the right to destroy property that becomes embarrassing, unfashionable, unproductive, or obsolete threatens the impulses that spur future creation.”).

52. Ellickson and Been cite a *New York Times* article on a related topic: owners letting their buildings deteriorate because they do not want to engage the legal process for a historic permit. ELLICKSON & BEEN, *supra* note 49, at 500 (citing Shawn G. Kennedy, *Landmarking's Double-Edged Sword: Sometimes It Works Against Preservation*, N.Y. TIMES, Jan. 13, 1991, at 1). But that article relied on after-the-fact statements by owners and described real estate conditions during an economic downturn where building deterioration could have had many causes.

53. Robin Pogrebin, *An Opaque and Lengthy Road to Landmark Status*, N.Y. TIMES, Nov. 26, 2008, at A1.

proposed district. From the time the Downtown Historic District was first proposed until 1984 when designation finally became legally complete, fifteen buildings were demolished.⁵⁴ The most notorious demolition was of the 1906 Ouray Building, which was actually demolished after the State Historic Preservation Officer (“SHPO”) had approved designation of the Downtown Historic District.⁵⁵ Apparently, the owners had filed for a demolition permit on January 30, 1984, the SHPO approved the district on February 10, and another District office issued the demolition permit on March 19 after having looked to see whether the building was protected on January 30.⁵⁶ After demolition began on March 30, a preservation organization secured a temporary restraining order to halt further work, but the D.C. Court of Appeals eventually held that the permit had been lawfully issued. The Court held that the SHPO’s designation did not become effective until notice was published in the D.C. Register, and that the owner’s actual knowledge of the designation decision was legally irrelevant.⁵⁷ The failure to effectively implement the designation of the Downtown Historic District probably reflected disagreement within the District government about the wisdom of creating a historic district in a downtown desperate for investment,⁵⁸ but the ultimate economic and urban success of D.C.’s downtown redevelopment fully vindicates the role of historic preservation in urban revival.

B. ENDANGERED SPECIES

The federal listing of species as endangered or threatened is a notoriously slow and fraught process. Section 4 of the Endangered Species Act directs the Secretaries of the Interior and Commerce to maintain by regulation lists of species at risk of extinction.⁵⁹ These duties are carried out by agencies within the respective departments. The Fish and Wildlife Service (“FWS”) administers the ESA for land animals, plants, and fresh water fish, and the National Marine Fisheries Service (“NMFS”) administers the Act for marine species.⁶⁰ Although the agencies can initiate a listing process themselves, it is far more common for agencies to respond to petitions filed by interested persons, usually an environmental organization. When a petition is filed, the agency must determine within

54. See Marcia A. Slacum, *D.C. Protects 200 Buildings in Downtown Historic Districts*, WASH. POST, Mar. 25, 1984, at B3.

55. See Bernhart Mingla, *City Authorizes Demolition of Protected Historic Building*, WASH. POST, Apr. 12, 1984, at 3.

56. See *id.*

57. See *Don't Tear It Down, Inc. v. The Morris and Gwendolyn Cafritz Found.*, No. 84-919, (App. D.C. July 20, 1984) (on file with author).

58. See Wendy Swallow, *D.C. To Rethink Downtown Historic District*, WASH. POST, Oct. 9, 1984, at B3.

59. Endangered Species Act of 1973, 16 U.S.C. § 1533(a)(2) (2013). A species is “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is “threatened” if it “is likely to become an endangered species within their foreseeable future.” *Id.* § 1532(20).

60. *Id.* § 1533(h); see JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 349 n. 1 (2d. ed. 2009).

ninety days whether it “presents substantial scientific or commercial information indicating that [listing] may be warranted.”⁶¹ If a positive determination is made, the agency then has twelve months to resolve the petition by either (1) listing the species as endangered, threatened, or neither; or (2) finding that listing is warranted but “precluded,” which means that listing will be delayed due to other listing processes for other species at a higher priority for preservation.⁶² If a species is listed, protections come into effect in thirty days.⁶³

Despite the apparently tight time schedules established in the ESA, delays are abundant. In addition to simple failures to meet deadlines, species for which listing is warranted, but precluded, are placed on a candidate list where they can languish for years.⁶⁴ Frequent litigation both creates judicially enforced timetables and complicates efforts by the agencies to comply. More discretionary designations of “critical habitat” for listed species rarely occur. Political opposition to listing in the executive branch, especially during the George W. Bush Administration, has brought listing to a near halt, and resistance in Congress has resulted in inadequate resources for the agencies to carry out their duties even when eager to do so.⁶⁵

The effects of listing a species as endangered can be dramatic for private property owners. Section 9 of the ESA prohibits any person to “take” an endangered species.⁶⁶ The Act defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁶⁷ FWS regulations interpret “harm” to include “significant habitat modification or degradation.”⁶⁸ The Supreme Court upheld the FWS interpretation in its important *Sweet Home* decision in 1995.⁶⁹ Such a prohibition makes sense within the terms and goals of the statute. “For decades, scientists have been warning that habitat loss is the single most important threat to biodiversity, and

61. 16 U.S.C. § 1533(b)(3)(A) (2015).

62. *Id.* § 1533(b)(3)(B).

63. 50 C.F.R. § 424.18 (2014). For a brief overview of the listing process, see U.S. FISH & WILDLIFE SERV., LISTING A SPECIES AS THREATENED OR ENDANGERED: SECTION 4 OF THE ENDANGERED SPECIES ACT (2015), available at <http://www.fws.gov/endangered/esa-library/pdf/listing.pdf>.

64. Gabriel Eckstein & Jesse Snyder, *Endangered Species in the Oil Patch: Challenges and Opportunities for the Oil and Gas Industry*, 1 TEX. A&M L. REV. 379, 393 (2013); K. Mollie Smith, *Abuse of the Warranted but Precluded Designation: A Real or Imagined Purgatory?*, 19 SE. ENVTL. L.J. 119, 123 (2010).

65. Davina Kari Kaile, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT’L ENVTL. L. REV. 441, 463 (1993); M. Lee Smith Publishers, *Service Seeks to Defer Action on Ten Critical Habitat Designations*, 17 CAL. ENVTL. INSIDER, no. 1, 2003, at 10.

66. 16 U.S.C. § 1538(a)(1)(B) (2015).

67. 16 U.S.C. § 1532(19) (2015).

68. Endangered Species Act of 1973, 50 C.F.R. § 17.3. The full definition limits the definition to habitat modification that “actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” *Id.*

69. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 708 (1995).

Congress was well-aware of this when it enacted the statute.”⁷⁰ Nonetheless, listing a species as endangered imposes a duty on a property owner upon whose land the species is found not to modify or degrade habitat, which can severely limit construction, draining, lumbering, or agriculture.⁷¹ Violations can result in criminal as well as civil penalties.⁷² While Congress must have understood that it was imposing stringent duties on the federal government, it is not clear that Congress understood that it was imposing a federal land use regulatory law on private owners.

The prohibition of habitat modification on private land makes the ESA the most powerful and pervasive federal land use regulation. Justice Scalia, in his dissent in *Sweet Home*, claimed that requiring the preservation of habitat on private land “imposes unfairness to the point of financial ruin – not just on the rich but upon the simplest farmer who finds his land conscripted to national zoological use.”⁷³ The ESA previously had earned the reputation of being “the pit bull” of environmental law, in that it mandated the preservation of species without balancing ecological values against economic or social priorities.⁷⁴ The Supreme Court’s famous decision in *Tennessee Valley Authority v. Hill*, halting construction of a multi-million dollar dam in order to protect the endangered snail darter, fomented widespread public awareness of the power of the ESA.⁷⁵ These, and all other provisions of the ESA, govern only how the federal government conducts its business or manages public lands. Not surprisingly, the subsequent application of the ESA to private lands, confirmed in *Sweet Home*, brought forth howls of complaints from property rights advocates and serious concerns from thoughtful scholars about whether, and how, to most effectively enlist private owners in species conservation.⁷⁶ Additionally, landowners have little hope of compensation under takings jurisprudence, as there have been very few successful takings claims based on ESA regulation of private land use.⁷⁷

70. Dave Owen, *Critical Habitat and the Challenges of Regulating Small Harms*, 64 FLA. L. REV. 141, 150 (2012).

71. James A. Adkins, Student Environmental Feature, *Ethical Treatment of Private Property Owners When Implementing Protection Measures for Rare and Endangered Species*, 26 N. KY. L. REV. 421, 423 (1999); see Hoch, *supra* note 14.

72. See 16 U.S.C. § 1540 (2015) (penalties and enforcement).

73. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 714 (1995).

74. See, e.g., RASBAND ET AL., *supra* note 60, at 364-65.

75. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

76. Adkins, *supra* note 71; Steven G. Davison, *The Aftermath of Sweet Home Chapter: Modification of Wildlife Habitat as a Prohibited Taking in Violation of the Endangered Species Act*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 541 (2003); Duane J. Desiderio, *Sweet Home on the Range: A Model for As-Applied Challenges to the “Harm” Regulation*, 3 ENVTL. LAW. 725 (1997); Murray D. Feldman & Michael J. Brennan, *Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property*, 32 LAND & WATER L. REV. 509 (1997); 2003 UPDATE: THE FEDERAL ENDANGERED SPECIES ACT AND HOW IT AFFECTS LAND USE, SJ015 ALI-ABA 383, 409 (2003).

77. Ira Michael Heyman, *Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation*, 25 PAC. L.J. 157, 162 (1994) (noting that “not one successful taking claim under the

The ESA provides no protections for any species before listing. The destruction of flora and fauna on one's own land generally is entirely unregulated. State law regulates the hunting of certain game animals and federal law of migratory birds.⁷⁸ Land use law has long been committed to local governments acting under delegated state authority.⁷⁹ Indeed, the Supreme Court has subsequently interpreted federal authority over wetlands narrowly on the ground that "[r]egulation of land use . . . is a quintessential state and local power."⁸⁰ It is rare for state or local law to concern itself with habitat on private land.

Because listing a species under the ESA applies dramatic new prohibitions to private land, the prospect of listing creates an incentive for private owners to avoid such regulation by excluding the species from their properties. This can take the form of direct extirpations, for example, through hunting or applying herbicides, or of indirect exclusion through the destruction of habitat. Such actions may be narrowly rational, in that the expenditures in excluding the species may be far lower than the costs imposed by the ESA through restricting the use of the land, the benefits of which are widely distributed over the entire community. Given the slow course of the listing process, property owners have a long and clear opportunity to destroy species on their properties before federal protections become effective. Moreover, such actions are likely entirely legal.

The ESA generates perverse incentives for landowners at several points. If a species is listed and resides on the owner's land, the owner may resort to the method of "shoot, shovel, and shut up."⁸¹ Although this phenomenon often is referred to in literature,⁸² little data understandably exists about such blatantly illegal conduct. An easier manifestation of perverse incentives to study occurs when a listed species is nearby but not yet on the owner's property. Formal studies have found owners destroying habitat to prevent endangered species not yet resident on their properties from migrating to their properties.⁸³ The perverse

[Endangered Species] Act has been prosecuted in any Federal Court"). *But see* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319-20 (2001) (water use restrictions imposed under ESA constituted taking requiring compensation under the Fifth Amendment).

78. Migratory Bird Hunting, 50 C.F.R. § 20 (2014) (federal regulations governing migratory bird hunting); *Hunting*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/hunting/> (last visited Apr. 12, 2015).

79. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 389-90 (1926) (upholding the constitutionality of local zoning).

80. *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

81. Ronald Bailey, *Shoot, Shovel, and Shut Up: Celebrating 30 Years of Failing to Save Endangered Species*, REASON (Dec. 31, 2003), <http://reason.com/archives/2003/12/31/shoot-shovel-and-shut-up>. shovel-and-shut-up. *See generally* Gardner M. Brown Jr. and Jason F. Shogren, *Economics of the Endangered Species Act*, 12 J. ECON. PERSPECTIVES 3, 7 (1998).

82. *See* PROTECTING ENDANGERED SPECIES IN THE UNITED STATES: BIOLOGICAL NEEDS, POLITICAL REALITIES, ECONOMIC CHOICES 16 (Jason F. Shogren & John Tsihchart eds., 2001); WILDLIFE AND SOCIETY: THE SCIENCE OF HUMAN DIMENSIONS 217 (Michael J. Manfredo et al. eds., 2009).

83. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J. L. & ECON. 27 (2003); John A. List et al., *Is the Endangered Species Act Endangering Species?* 1-2 (Nat'l Bureau of Econ. Research, Working Paper No. 12777, 2006).

incentives of the ESA are no secret. The press regularly documents the negative responses of private landowners to listing proposals.⁸⁴ Conservative talk radio hosts froth over supposed injustices to landowners.⁸⁵ Scholars have written many articles discussing these incentives and proposing suggestions to reduce them.⁸⁶ Both conservationists and property rights advocates have focused on the unintended consequences of the Act in their efforts to make the legislation more effective and to reduce the land use controls it imposes. Even the federal agencies responsible for the Act's implementation have recently asked for suggestions on how to improve incentives under the Act to enhance private landowner participation.⁸⁷

C. SIMILARITIES BETWEEN DESIGNATION AND LISTING

This article asserts that historic preservation law and the ESA create similar perverse incentives and that comparison of the two legal regimes will generate both practical and theoretical insights. This subsection highlights the several similarities between the two in the service of identifying the elements that create these perverse incentives. A later section turns to consider the differences between the two legal regimes.

Several parallels are fairly obvious and have already been alluded to. Each places strong new prohibitions on private property upon the administrative identification of a specific resource to be protected. The sharp distinction between the levels of restriction on property dominion, before and after designation, justifies describing such laws as employing "precipice regulations." Such a dramatic change may upset an owner's settled expectations about how the law shapes its property rights, increasing the likelihood that the owner will view the change as unfair or disproportionate.⁸⁸ In these cases, moreover, the instant change in legal rights will be preceded by a long and public regulatory proceeding that enables concerned owners to anticipate the sharp change—to

84. In North Carolina, landowners began clearing timber from their property while the FWS mapped the location of Red Cockaded Woodpecker nests, fearing more land would be placed off limits to logging or development. Mayor Joan Kinney explained, "People are just afraid a bird might fly in and make a nest and their property is worth nothing. . . . It is causing a tremendous amount of clear-cutting." Wade Rollins, *Woodpecker Mapping Gets Chain Saws Buzzing*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 7, 2006, at A1.

85. See, e.g., Elizabeth Shogren, *Richard Pombo and the Endangered Species Act*, NAT'L PUB. RADIO (Oct. 24, 2005), <http://www.npr.org/templates/story/story.php?storyId=4971014>.

86. See, e.g., Jonathan H. Adler, *Money Or Nothing: The Adverse Environmental Consequences Of Uncompensated Land Use*, 49 B.C. L. REV. 301, 320-32 (2008); J.B. Ruhl, *The Endangered Species Act And Private Property: A Matter Of Timing And Location*, 8 CORNELL J.L. & PUB. POL'Y 37, 46 (1998); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study In Takings And Incentives*, 49 STAN. L. REV. 305 (1997).

87. Endangered and Threatened Wildlife and Plants; Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act, 77 Fed. Reg. 15,352 (proposed Mar. 15, 2012) (to be codified at 50 C.F.R. pts. 13, 17, & 402).

88. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1235 (1967).

stare up at the precipice (perhaps inducing vertigo). Finally, the owner may be able to take timely and cost-effective measures to avoid the increase in regulatory burden that are entirely lawful, even if they directly frustrate the goals of the prospective legal regulation. These common features describe the problem of precipice regulations in the abstract and provide a first look at how they create perverse incentives.

There are additional similarities between historic preservation and the ESA that exacerbate the perverse incentives in each case. Both pursue widely diffused public benefits while imposing concentrated costs on affected private land. In the case of historic preservation, the benefits are those that derive from keeping buildings and other structures in our midst that embody our architectural and cultural heritage. Whether these benefits are described as increased bonding with our nation or locality, aesthetic pleasure, or opportunities for community voice, they are public goods enjoyed by all. For landmarks (as opposed to historic districts), owners bear economic costs, without reciprocal benefits, which are spread throughout the community. In the case of preventing extinctions, the benefits may be even more widespread. Preserving biodiversity may contribute to the long-term health of the planet as well as its beauty and spiritual power.⁸⁹ More practically, it preserves biological resources that may have valuable human uses in the future for medical and other applications. Both legal regimes aim to protect the currently conceived interests of future generations. The costs of each come from the restrictions placed on the land hosting the protected resource.

As the prior paragraph suggests, the benefits pursued by these laws are not only widely distributed, but they are also difficult to articulate, and they are contestable. Both emerged from the political goals of the 1960s and early 1970s to improve the quality of collective life in an economy producing widespread individual prosperity.⁹⁰ Both laws were offered as responses to land development, seen as causing crises of mass destruction to historic resources and extinctions. Few or none of these benefits are obtainable in markets and are therefore amenable to even a moderately precise cost-benefit calculation. Proponents of historic preservation and species protection often disagree among

89. EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (2d ed. 1992).

90. 16 U.S.C. § 470(b)(4)-(5) (2013):

[T]he preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans[.] [I]n the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation . . .

See also S. COMM. ON COMMERCE, *ENDANGERED SPECIES ACT OF 1973*, S. REP. NO. 93-307, at 2 (1973) (Conf. Rep.), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990 (commenting on the proposed ESA: “Consideration of this need to protect endangered species goes beyond the aesthetic. In hearings before the Subcommittee on the Environment it was shown that many of these animals perform vital biological services to maintain a ‘balance of nature’ within their environments.”).

themselves about the values promoted.⁹¹ Nonetheless, both laws evoke strong emotional support among proponents who are sometimes deeply committed to the goals. Both laws also frequently invoke ethical convictions that everyone has a moral duty to protect dwindling species or historic sites, which draw on long cultural traditions. Not all landowners may share these values, at least with the same intensity, even though they bear costs for realizing them. Indeed, they may strongly reject these values in favor of more individualistic norms, for example, Lockean notions of property as essential to liberty. Such ethical gulfs exaggerate perceptions of the steepness of the precipice.

Both historic preservation laws and the ESA have taken on far larger roles in resource management than was predictable at their births. Until the mid-1960s, historic preservation law involved primarily the voluntary preservation and rehabilitation of a few noteworthy buildings from the distant past, usually associated with some highly significant figure in American history, such as George Washington, or of exceptional aesthetic quality.⁹² Public regulation of private property was restricted to a few urban backwaters, such as Charleston, South Carolina and Georgetown in Washington, D.C., enjoying a high degree of local support.⁹³ Today, preservation plays a central role in real estate development and the protection of neighborhoods in many major cities. In Washington, D.C., for example, historic protection covers nearly twenty percent of the buildings, and historic districts cover important parts of the downtown as well as a majority of the most attractive residential areas.⁹⁴ In Manhattan, preservation laws apply to sixteen percent of the land south of 96th Street, the most valuable real estate in the nation.⁹⁵ Understandably, such growth has generated criticism, both that preservation on such a scale has deleterious effects and that the original enactors never anticipated such a large role.⁹⁶

Similarly, the ESA plays a much larger role in resource management than could have been anticipated in 1973. In a recent paper, J. B. Ruhl characterized the growth of the ESA this way:

91. For further discussion on the changing perspective of environmental preservation, see J. PEYTON DOUB, *THE ENDANGERED SPECIES ACT: HISTORY, IMPLEMENTATION, SUCCESSES, AND CONTROVERSIES* 204-08 (2013); W.H. "Buzz" Fawcett, *Refocusing the Endangered Species Act*, in *ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES* 394, 394-411 (Donald C. Baur & W.M. Robert Irvin eds., 2d ed. 2010). For further discussion on the changing perspective on historical preservation, see BRONIN & BYRNE, *supra* note 19, at 17-35.

92. See AN OVERVIEW OF FEDERAL HISTORIC PRESERVATION LAW, 1966-1996 (ADVISORY COUNCIL ON HISTORIC PRESERVATION, 1996), SJ 015 ALI-ABA 57, 61 (2004). See generally Rose, *supra* note 38.

93. Hunter S. Edwards, *The Guide for Future Preservation in Historic Districts Using a Creative Approach: Charleston, South Carolina's Contextual Approach to Historic Preservation*, 20 U. FLA. J.L. & PUB. POL'Y 221, 223 (2009).

94. Byrne, *supra* note 40, at 670 n. 42.

95. See Glaeser, *supra* note 39.

96. See, e.g., *id.*

[T]he ESA was seen as the odd bird among environmental laws in the 1970s, capable of stopping a federal dam but seemingly posing no broad regulatory constraints on private landowner and business interests. Over time, however, changes in agency implementation of the ESA gave the statute the qualities of the “big” pollution control statutes, with expansive jurisdiction over land use, complex regulations, expensive and time-consuming permitting, and a gristmill of environmentalist litigation.⁹⁷

The extension of Section 9 to habitat modification of private land, the key enlargement of the ESA, occurred through administrative interpretation of a vague word rather than through deliberative political choice.

Without that extension, the ESA would directly regulate land use only on federal land; it would only indirectly limit other land use choices. For example, under Section 7, federal agencies must “insure” that any actions that they undertake, fund, or permit “are not likely to result in the destruction or adverse modification of [the critical] habitat of such species.”⁹⁸ If the land use regulatory reach of the ESA had been limited to federal actions, it would resemble the key federal historic preservation provision, Section 106 of the National Historic Preservation Act.⁹⁹ Section 106 requires federal agencies to consider the effects of the undertakings, including awarding federal money and issuing permits, on properties eligible for listing on the National Register of Historic Places.¹⁰⁰ How the federal government conducts its own business will both touch fewer cases and generate less rabid criticism than federal regulation of private land use.¹⁰¹ The ESA’s regulation of private land use also remains anomalous within our federal structure because it is the only federal law to directly prohibit otherwise normal land development.¹⁰²

97. J.B. Ruhl, *The Endangered Species Act’s Fall from Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 492 (2012).

98. 16 U.S.C. § 1536(a)(2) (2013).

99. Section 106 provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

National Historic Preservation Act of 1966, 16 U.S.C. § 470f (2012).

100. See generally BRONIN & BYRNE, *supra* note 19, at 106-67.

101. Of course, section 106 of the NHPA does not impose a substantive duty on federal agencies, only duties to consider and consult. See 16 U.S.C. § 470f (2012). Section 7 of the ESA does impose substantive duties on agencies not to contribute to the degradation of critical habitat or “jeopardize” the existence of a listed species. See 16 U.S.C. § 1536(a)(2) (2012). Nonetheless, section 106 pushes agencies toward preservation, while agencies frequently elude the broad duties created by section 7. See 16 U.S.C. §§ 470f, 1536(a)(2) (2012).

102. In contrast, for example, wetlands permits are permissive. See Clean Water Act, 33 U.S.C. § 1344 (2013).

The common nature of listing and designation proceedings may also aggravate property owners' views of injustice. In both local historic preservation decisions (usually) and in listings of endangered species, administrative officials make decisions based solely on historic or scientific criteria, respectively.¹⁰³ Historic preservation designation turns on the historic significance and integrity of a property.¹⁰⁴ Determinations of the status of a species must be based on best available scientific evidence.¹⁰⁵ Such inquiries render the concerns or goals of the property owner irrelevant. Such proceedings are legislative rulemakings, in which owners do not have party status.¹⁰⁶ Not surprisingly, owners retain no veto over designation or listing.¹⁰⁷ The decision to designate a property or list a species disempowers affected property owners.

These similarities reinforce the common problem of perverse incentives under local historic preservation laws and the ESA. The laws impose new limitations on land use that owners may perceive as onerous and lacking in legitimacy. They also afford disgruntled owners lawful opportunities for destroying the resource intended to be protected while the decision to protect is pending. Culturally, the laws also advance communitarian values based on cultural or ethical values actually contested. These strong similarities suggest that the remedies for perverse incentives under one legal regime may also be useful in the other.

II. PROCEDURAL FIXES

Given the problems of perverse incentives previously described, one would expect to find that both local historic preservation laws and the ESA have failed to achieve their purposes. In fact, both can be credited with significant successes. Historic preservation has been a conspicuous contributing element in the most lively and sought-after cities and neighborhoods in our current urban revival.¹⁰⁸

103. Many local designation ordinances retain some role for the local legislative body to approve or disapprove the actions of the appointed preservation board, but such powers seem rarely exercised in leading jurisdictions. *See, e.g.*, N.Y. DEP'T OF STATE, LEGAL ASPECTS OF MUNICIPAL HISTORIC PRESERVATION 6-9 (2011), available at http://www.dos.ny.gov/lg/publications/Legal_Aspects_of_the_Municipal_Historic_Preservation.pdf.

104. *See* National Register of Historic Places, 36 C.F.R. § 60.4 (2014).

105. 16 U.S.C. § 1533(b)(1)(A) (2013).

106. *See id.* § 1533(b)(5) (2013); *see also* N.Y.C. LANDMARKS PRES. COMM'N, *supra* note 12.

107. Some cities do require owner consent for landmarking and positive majorities of owners for designating historic districts. CITY OF HOUSTON PLANNING & DEV. DEP'T, *supra* note 12. Under the NHPA, owners can object to and prevent the listing of their properties on the National Register. National Historic Preservation Act of 1966, 16 U.S.C. § 470(a)(6) (2012). This may be the most illusory right conferred by any federal statute. Under section 106, federal agencies consider the effects of their undertaking on properties *eligible for* listing on the National Register. Blocking formal listing has no effect on the regulatory process. Failure to list the property formally, however, will prevent the owner from obtaining benefits, such as federal historic preservation tax credits. *See* BRONIN & BYRNE, *supra* note 19, at 69, 594.

108. *See* Ryan Howell, *Throw the "Bums" Out? A Discussion of the Effects of Historic Preservation Statutes on Low-Income Households through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 541-42 (2008).

The ESA, despite many difficulties, has saved species that otherwise would have become extinct and has placed habitat protection within crucial resource planning processes, such as that for California water.¹⁰⁹ Both legal regimes have evolved to cope with their expanded roles.

This section of the article, as well as the next, considers innovations under both legal regimes that have ameliorated the perverse incentives previously identified. When similar innovations are found, these similarities are compared to see how their characters are suited. When innovations have emerged under only one legal regime, this article considers whether they could be successfully deployed under the other. This section considers procedural devices to prevent perverse incentives, assuming that other elements of the statute remain constant, and the subsequent section examines substantive evolutions that have lessened the perverse incentives by emphasizing benefits for owners.

A. REACHING BACK

Some historic preservation ordinances have managed an aspect of the perverse incentive to demolish a building before designation by extending interim protection to a building before designation. One straightforward device to accomplish this is by prohibiting demolition of a building while the petition to designate it is pending before the preservation review board.¹¹⁰ If the board then designates the building, it will be saved.¹¹¹ If it decides not to designate the building, the owner can proceed with demolition.¹¹² The owner's burden of procedural delay can be minimized by requiring the board to promptly decide the designation issue.

Washington, D.C.'s Historic Landmark and Historic District Protection Act provides interim protection through its definition of a historic landmark to include a "building . . . and its site . . . for which an application for [designation] is pending with the Historic Preservation Review Board."¹¹³ The Act specifies that the Historic Preservation Review Board ("HPRB") must schedule a hearing and decide upon the designation issues within ninety days of the filing of the application.¹¹⁴ The functioning of this interim protection was clarified and is

109. See generally Sandra K. Dunn, *Endangered Species Act Versus Water Resources Development: The California Experience*, 25 PAC. L.J. 1107 (1994); Eric M. Yuknis, *Would a "God Squad" Exemption under the Endangered Species Act Solve the California Water Crisis?*, 38 B.C. ENVTL. AFF. L. REV. 567 (2011).

110. See BRONIN & BYRNE, *supra* note 19, at 97-105, 144 (discussing Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent for Historic Pres., 944 A.2d 1036 (D.C. 2008)); cf. Brian Uzdavinis, *To Save or Not to Save: Historic Preservation in New Jersey—Justifications, Hindrances, Future*, 4 RUTGERS J.L. & PUB. POL'Y 649, 692-94 (2007) (explaining New Jersey laws that allow for anticipatory demolition and arguing for changes in the law that would prevent anticipatory demolition in the way described here).

111. BRONIN & BYRNE, *supra* note 19, at 97-105, 144.

112. *Id.*

113. D.C. CODE § 6-1102(6)(B) (2001).

114. *Id.*

illustrated by a D.C. case locally referred to as the *Italian Embassy* case.¹¹⁵ A developer planned to convert the former Italian embassy building and complex into condominium residences; the plan involved demolition of part of the main building and the construction of a tower adjacent to it.¹¹⁶ In September 2005, the developer applied to the Department of Consumer and Regulatory Affairs (“DCRA”) for a series of construction permits.¹¹⁷ Although DCRA issued two preliminary permits in December, applications for most, including those to alter and renovate the existing buildings and build the new one, had not yet been issued when the D.C. Historic Preservation Office filed an application in January 2006 to landmark the complex.¹¹⁸ DCRA then issued the additional alteration and construction permits in early February, and the HPRB voted to designate the property later that month.¹¹⁹ The HPRB also determined that DCRA had issued the final permits in error because a designation permit was pending and that the permits should not issue because the planned redevelopment was inconsistent with the purposes of the Act.¹²⁰ The Mayor’s Agent, a peculiar administrative official to whom the HPRB’s determinations are recommendations, accepted this understanding and application of the Act.¹²¹ The D.C. Court of Appeals upheld the administrative interpretation of the statute and the judgments of the HPRB and Mayor’s Agent.¹²² In so holding, the court found:

The agency’s regulations create a logical continuum that balances the interest of property owners and the public interest in historic preservation . . . where a landmark designation application is filed after a permit application, the HPRB must both hold a hearing and decide whether to make the designation within ninety days, counted from the date the designation application is official.¹²³

It might be objected that D.C.’s interim protection merely moves back in time the point at which an owner might demolish a property in order to avoid regulation to some earlier time, well before a designation application would be filed. While this risk cannot be completely eliminated, the structure of the D.C. process provides a safeguard against it. As is common, an owner needs construction permits in order to demolish or substantially alter the exterior of any building.¹²⁴ Applications for these permits are matters of public record.¹²⁵ Advocacy groups

115. *Embassy Real Estate Holdings*, 944 A.2d at 1036.

116. *Id.* at 1040-42.

117. *Id.* at 1042-43.

118. *Id.*

119. *Id.*

120. D.C. CODE § 6-1105(a) (2001).

121. The author currently serves as the Mayor’s Agent, although he did not serve at the time of the case.

122. *Embassy Real Estate Holdings, LLC v. D.C. Mayor’s Agent for Historic Pres.*, 944 A.2d 1036, 1044-45 (D.C. 2008).

123. *Id.* at 1048.

124. D.C. MUN. REGS. tit. 12-A, § 105.1 (2013); *see also* D.C. CODE § 6-1102(1)(A) (2012).

125. D.C. MUN. REGS. tit. 12-A, § 105.1.7 (2013):

or, as in the *Italian Embassy* case, the historic preservation staff itself, can monitor these applications and may be able to file designation applications before the construction permits are issued.¹²⁶ The owner's vested right to proceed with construction does not ripen until (at least) the construction permits are issued.¹²⁷ D.C.'s approach allows the designation application to stay the issuance of construction permits until designation is decided.¹²⁸ Thus, alert preservationists can always get a determination of historic protection before demolition can proceed, so long as they quickly assemble a designation application.

The power of this approach to diminish the perverse incentive can be highlighted by comparing it with the process in New York City. There, a citizen application to designate a building does not stay the issuance of demolition construction and permits.¹²⁹ Moreover, the chair of New York's LPC has wide discretion whether to schedule a hearing on such a designation request.¹³⁰ On several occasions, the LPC chair refused to hold a hearing while owners demolished or substantially remodeled noteworthy buildings that probably merited designation under applicable criteria.¹³¹ In one instance, a new owner largely replaced the façade of 2 Columbus Circle, the well-known, if aesthetically controversial, "lollipop" building designed by Edward Durrell Stone while New York cultural celebrities like Tom Wolfe and Herbert Muschamp denounced LPC's passivity.¹³² In D.C., the owner could not have proceeded while the application was pending, and the HPRB would have to give a ruling within ninety

Before a raze permit is issued, the *owner* of the *building* or other *structure* to be razed, or the *owner's* agent, shall post and maintain a notice furnished by the *code official* on the façade fronting on the public street of the *building* or other *structure* as designated by the *code official*, so as to be visible from the public way. The raze permit shall not be issued by the *code official* until at least 30 days after the date the notice is posted on the *building* or other *structure*.

See also *Track Status of Building Permit Application*, D.C. DEP'T OF CONSUMER AND REG. AFFAIRS, <http://pivs.dcrs.dc.gov/OBPAT/Default.aspx> (last visited Apr. 12, 2015). The status of any building project in D.C. can be tracked either by address or by application number.

126. D.C. MUN. REGS. tit. 10-C, § 203 (2012).

127. Zoning law generally affords vested rights to an owner after a construction permit is issued and substantial expenditures have been made toward the project. See PACE UNIV. SCH. OF LAW, BEGINNER'S GUIDE TO LAND USE LAW, available at <http://www.law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf>.

128. D.C. MUN. REGS. tit. 10-C, § 209.1 ("Immediately after an application is officially filed, the staff shall provide written notification to the Permit Processing Division of DCRA."). "Within five (5) days of receipt of a notice of a filed historic landmark application, the owner of the property shall notify the staff if there is a permit application for the property pending at DCRA." *Id.* § 209.6; see also D.C. MUN. REGS. tit. 12-A, § 105.1.7.1 ("Prior to issuing a raze permit, the *code official* [DCRA] is authorized to require the *applicant* to submit clearances and/or information, including, but not limited to . . . historic preservation."). While the historical board is not explicitly authorized to stop a demolition permit, it is required to immediately notify the permitting agency of an application.

129. See, e.g., Pogrebin, *supra* note 1.

130. See *In re Citizens Emergency Comm. to Preserve Pres. v. Tierney*, 896 N.Y.S.2d 41 (N.Y. App. Div. 2010).

131. See, e.g., Tom Wolfe, *The 2 Columbus Circle Game*, N.Y. MAG., July 4-11, 2005, at 22.

132. *Id.*

days.¹³³

The monitoring of all demolition permit applications in order to identify efforts to demolish a historically significant building can be burdensome for preservation groups. Some cities require that applications for demolition permits for all buildings over fifty years old be forwarded to the preservation board.¹³⁴ The ordinance in Cambridge, Massachusetts, for example, has such a process. The Cambridge Historical Commission reviews all such applications, and if its staff finds that a building may be significant, the Commission must hold a public hearing and decide whether to designate it within forty-five days of its receipt of the application.¹³⁵ This approach simplifies the monitoring of demolition applications and shifts the burden of reviewing applications to public officials in order to protect significant buildings.¹³⁶

Could this approach help protect a dwindling species before it is listed as endangered? At first blush, this approach seems promising. Recall that when citizens file an application to list a species, the FWS and NMFS have ninety days to determine whether the petition is “warranted.”¹³⁷ The agencies might adopt regulations applying Section 9 to any warranted species until the agency completes its determination of whether the species should be listed as endangered or threatened, or not listed.¹³⁸ If listing is warranted, the species needs help, and

133. One might see a parallel in the virtual refusal to list new species during the George W. Bush administration. Political appointees repeatedly interfered in listing decisions to derail scientific assessments of risk to species. See Juliet Eilperin, *Since '01 Guarding Species is Harder*, WASH. POST, Mar. 23, 2008, at A1.

The listing of species slowed to a crawl during the eight years of the Bush administration, which listed a mere 62 species, all under court order, for a rate of seven species per year. In contrast, the Clinton administration listed 522 species for a rate of 65 species per year and the Bush Sr. administration listed 231 species for a rate of 57 species per year. Meanwhile, literally hundreds, if not even thousands, of species await protection.

Listing Species Under the Endangered Species Act, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/programs/biodiversity/endangered_species_act/listing_species_under_the_endangered_species_act/index.html (last visited Apr. 13, 2015); see also *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007).

134. See, e.g., CAMBRIDGE, MASS., CODE § 2.78.090 (Supp. 5 2012), available at https://www.municode.com/library/ma/cambridge/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.78HIBULA_ARTIIDEBUDEBEHISI_2.78.090PRDE&codeArchiveDate=2012-12-21; REDLANDS, CAL., CODE § 15.44.070 (current through Redlands, Cal., Ordinance 2807 (Oct. 7, 2014)), available at http://sterlingcodifiers.com/codebook/index.php?book_id=550§ion_id=292710; CITY OF SEATTLE DEP'T OF NEIGHBORHOODS, HISTORIC PRESERVATION AND SEPA REVIEW (2012), available at http://www.seattle.gov/neighborhoods/preservation/documents/CAM3000_002.pdf.

135. CAMBRIDGE, MASS., CODE § 2.78.090.

136. Section 106 of the NHPA requires an agency to consider the effects of its undertakings on any property eligible for the National Register. This can be understood as another form of reaching back in affording a resource protection *before* listing. Section 106, however, does not restrict what private owners may do with their property, creating only duties on the part of the federal agency to consider and consult about effects. It does not generate perverse incentives of the magnitude of local preservation laws. This analysis highlights that the ESA would generate much weaker perverse incentive if it was restricted to federal actions, as under section 7 of the ESA, or at least if section 9 had been interpreted not to prohibit habitat degradation.

137. See 16 U.S.C. § 1533(b)(3)(A) (2013).

138. However, the section 4 listing procedures permit the agencies to issue regulations to protect species in

this approach would provide interim protection until a more complete study is undertaken. Environmentalists might argue that the burden of inertia while a determination is pending should not fall on a dwindling species and that such a rule would lessen the incentives for officials to delay ruling on the listing application.

Yet there are reasons to doubt such a broad interim rule would have constructive results. Some candidate species are widely distributed even though their numbers are dwindling, and their habitats cover a wide range.¹³⁹ Providing the species interim Section 9 protection against habitat modification would suddenly introduce new federal land use prohibitions that would likely be poorly understood and that could have dramatic economic consequences for farmers and other economic sectors.¹⁴⁰ Enforcement would also be difficult. Unlike the case of building demolition permits, there is no general permitting system for rural landscape modification in which species conservation measures could intervene. Section 9 has to be enforced through litigation, which is slow, expensive, and deeply contentious. A more limited interim prohibition against direct takes through hunting and fishing, however, could be beneficial and enforceable through mandates to existing state hunting and fishing regulations.

The benefits of an interim protection rule seem fewer for species conservation than for building preservation. Even large, famous buildings can be destroyed quickly. Demolition need only destroy the elements that express the building's significance to preclude designation. Designation battles, like that over the Italian Embassy, resemble sprints in which there will be clear winners and losers depending on whether the buildings receive preservation protection before the wrecking ball swings (or the permits are issued). Preservation in its most basic sense is simply the prevention of destruction of an inert structure. Conservation of an endangered species is a far more difficult and longer-term task. Preservation of a species requires a thorough understanding of its biology and ecology, and planning to protect or restore the habitat upon which it depends. Even the best planning may be unsuccessful. The challenges of saving species will be even greater due to accelerating climate change.¹⁴¹ Moreover, it is an unusual case

the case of emergencies. *Id.* § 1533(b)(7). At a minimum, this provision allows the agencies to prohibit taking a warranted species when there is a reasonable concern that actors will take the species while the listing procedure is going forward.

139. For a discussion on how opposition to a candidate affects duration of the application process, see Amy Whritenour Ando, *Waiting to be Protected under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29 (1999).

140. Other expansions of Section 9 through the courts has already been seen as confusing and controversial. See, e.g., Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 228 (1995); Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L.J. 423, 432 (2000).

141. See, e.g., Patrick Parenteau, *Species and Ecosystem Impacts*, in THE LAW OF ADAPTATION TO CLIMATE CHANGE 307 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012); J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 2 (2008) ("The pika is

where the killing of one small group of animals or the destruction of a single grove of trees will make the difference between extinction and survival. Thus, time is less crucial, making interim protection less essential. At the same time, the quality of the longer-range conservation plan for an endangered species, and the resources devoted to carrying it out, are central to avoiding extinction.

The time limits that force the preservation boards in D.C. and Cambridge to decide on designation are not likely to work for the FWS and NMFS listing processes. The federal agencies already have statutory timetables for listing decisions, which they frequently violate.¹⁴² Litigation has resulted in judicial orders for the resolution of certain candidate species, but litigation causes delay in addressing other petitions.¹⁴³ The potential scope of agencies' work is mind boggling, and Congress refuses to give the agencies sufficient resources to administer the ESA out of a combination of political hostility and competing priorities.¹⁴⁴ On the other hand, creating interim prohibitions on direct takes may encourage the political overseers to allow the listing process to move in a more timely manner. One might, for example, require states to seek approval for state hunting regulations for any candidate species. Any such interim procedures would, of course, only add to the agencies' workload, potentially slowing final listings further.

It is difficult to identify a single, simple rubric about the decline of a species that would trigger a listing process with interim protection in the way a building being fifty years old does in Cambridge. Calculating the risk to a species of extinction involves many factors, and it amounts to a prediction about the future of the species. Broadly speaking, that risk depends both on the number of individuals and on the amount of present and prospective quality habitat for the species. This distinction points to a significant difference between the two legal regimes. Historic structures are preserved because of their "significance," their capacity to convey important themes about our history to people today. While practically significant in the timing of petitions, the imminence of risk of destruction plays no role in the criteria for designation.¹⁴⁵ Indeed, designations as

toast.").

142. See, e.g., *Or. Natural Res. Council, Inc. v. Kantor*, 99 F.3d 334, 340 (9th Cir. 1996); *Ctr. for Biological Diversity v. Norton*, 208 F. Supp. 2d 1044, 1049 (N.D. Cal. 2002); *Biodiversity Legal Found. v. Badgley*, No. Civ. 98-1093-KI, 1999 WL 1042567, at *7 (D. Or. Nov. 17, 1999), *aff'd in part, rev'd in part*, 309 F.3d 1166 (9th Cir. 2002).

143. See, e.g., *Or. Natural Res. Council*, 99 F.3d 334; *Ctr. for Biological Diversity*, 208 F. Supp. 2d at 1049; *Biodiversity Legal Found.*, 1999 WL 1042567, at *7.

144. Compare M. LYNNE CORN, CONG. RESEARCH SERV., R42466, FISH AND WILDLIFE SERVICE: FY2013 APPROPRIATIONS AND POLICY 3 (2012) (Congress appropriated \$20.8 million to FWS for listing and critical habitat activities during fiscal year 2012), with, e.g., *Rashard Lewis*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/players/l/lewisra02.html> (last visited Apr. 13, 2015) (the Washington Wizards paid Rashard Lewis \$21.1 million for the 2011-2012 season).

145. See 16 U.S.C. § 1533 (2013) (referencing presence of a threat, but not imminence of that threat). *But see* U.S. FISH & WILDLIFE SERV., CANDIDATE SPECIES: SECTION 4 OF THE ENDANGERED SPECIES ACT (2014), *available*

landmarks and as historic districts are denied for lack of integrity when too few of the features that convey significance remain. By contrast, species are protected without regard to their significance to people's value of nature. Rats and flies are protected as well as polar bears when they are in danger of extinction. Dwindling numbers make listing more likely, and listing will not be denied because too few individuals remain.¹⁴⁶ Thus, the ESA uses a qualitatively different inquiry to determine listing from historic preservation, which does not lend itself to objective triggers for listing inquiries.

B. STAYING DESIGNATION OR LISTING

A quite different possible procedural wrinkle to dampen the perverse incentive to destroy resources may be to stay the listing in exchange for a credible commitment by property owners to protect the resource. Property owners often negotiate preservation easements with non-profit preservation groups when they wish to preserve their properties and obtain tax benefits.¹⁴⁷ The owners in the *Italian Embassy* case discussed above made a similar attempt.¹⁴⁸ Being aware that the property was "clearly eligible for designation," the owner entered into an agreement with a leading preservation group thought most likely to petition for designation.¹⁴⁹ That agreement committed the owner to preserve many elements of the building, including interior features that could not be reached by the D.C. Act.¹⁵⁰ The agreement, however, did not bind the D.C. Historic Preservation Office, which itself petitioned the HPRB to designate the property as a landmark.¹⁵¹

This raises the question of whether a local ordinance might authorize the preservation board or its staff to negotiate preservation agreements with develop-

at <http://www.fws.gov/endangered/esa-library/pdf/listing.pdf>:

Candidate species receive no statutory protection under the ESA . . . [Official c]andidate species are assigned a listing priority from 1 to 12 based on the magnitude of threats they face, the immediacy of the threats, and their taxonomic uniqueness . . . The species' listing priority dictates the relative order in which proposed listing rules are prepared, with the species at greatest risk (listing priority 1 through 3) being proposed first.

146. U.S. FISH & WILDLIFE SERV., *supra* note 63:

Because of the number of candidates and the time required to list a species, we developed a priority system designed to direct our efforts toward the plants and animals in the greatest need. In our priority system, the degree or magnitude of threat is the highest criterion, followed by the immediacy of the threat and the taxonomic distinctiveness of the species . . . The ESA gives no preference to popular species or so-called 'higher life forms.'

147. See Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453 (2002); see also, e.g., Earl T. Redding, *The Preservation of Civil War Battlefields: Preserving Our History and Culture*, 8 ALB. L. ENVTL. OUTLOOK J. 237, 262 (2004).

148. *Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent for Historic Preservation*, 944 A.2d 1036, 1041-43 (D.C. 2008).

149. *Id.*

150. *Id.*

151. *Id.*

ers, under which owners would commit to providing certain preservation enhancements in exchange for not designating the property. The availability of such arrangements would diminish an owner's incentive to demolish a building to avoid regulation because an agreement might flexibly permit profitable development projects. Of course, some boards refuse to designate properties in order to not frustrate development, as is demonstrated by the New York City examples discussed above, but such decisions wholly sacrifice preservation values.¹⁵² Various forms of development agreements and contract zoning make such agreements common in urban land use law more generally.¹⁵³ However, I am unaware of any preservation ordinance providing preservation boards with a comparable power. Why?

The chief reason may be that historic permitting of development projects involving designated properties already allows for substantial discretion. Owners are not prohibited from altering or adding to historic properties. Rather, they must persuade preservation boards that the changes from a development project will be appropriate or compatible.¹⁵⁴ This article discusses the importance of this at greater length in Part III. For now, note that preservation boards do bargain with owners after designation about the scope of changes proposed for development.¹⁵⁵ Designation brings such projects under the jurisdiction of preservation law and preservation boards.¹⁵⁶ Other land use laws are different: all land in a jurisdiction would already be subject to zoning regulation, giving a planning office or elected officials the leverage to negotiate a development plan by amending the zoning for the specific property.¹⁵⁷ Municipal officials trade away

152. See Wolfe, *supra* note 131.

153. Miral Alena Sigurani, *Protecting Property Preserving Nature: The Benefits of Conservation Easements*, ARIZ. ATT'Y, Nov. 2003, at 34, 35 ("Conservation easements are one of the most effective and commonly used land protection tools available to private landowners."); *State Requirements for Valid Conservation Easements*, 50 STATE STATUTORY SURVEYS, available at 0140 SURVEYS 46 (Westlaw) (conservation easement laws are present in nearly every state).

154. See Byrne, *supra* note 40, at 670-71.

155. See, e.g., Andres Viglucci, *Miami-Dade Protects Two Historic Surfside Buildings, Puts Bay Harbor Island in its Sights*, MIAMI HERALD (Dec. 18, 2014, 9:14 PM), <http://www.miamiherald.com/news/local/community/miami-dade/article4651344.html> (buildings were saved because of a "unique compromise" between developer and city); Shawndrea Thomas, *Developer Gets to Keep Brick Steps after Compromising with City*, FOX 2 NOW NEWS (Sept. 23, 2013), <http://fox2now.com/2013/09/23/developer-gets-to-keep-brick-steps-after-compromising-with-city/>.

156. See, e.g., *City of Indianapolis Historic Preservation Commission*, CITY OF INDIANAPOLIS, IND., <http://www.indy.gov/egov/city/dmd/ihpc/pages/home.aspx> (last visited Apr. 13, 2015) ("The Indianapolis Historic Preservation Commission (IHPC) is a nine-member board appointed by the executive and legislative body of the consolidated city, with design and zoning review jurisdiction in the locally designed historic districts and conservation districts."); *Historic Preservation Board*, CITY OF PORTLAND, ME., <http://www.portlandmaine.gov/210/Historic-Preservation-Board> (last visited Apr. 13, 2015) ("The Historic Preservation Board has the jurisdiction to review and approve applications for a certificate of appropriateness for exterior alterations, site improvements, and new construction affecting: Designated landmarks, Buildings and sites within historic districts, [and] Historic landscape districts.").

157. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agree-*

onerous restrictions on a parcel in exchange for public amenities, such as transportation enhancements.¹⁵⁸ Analogous leverage comes to the preservation board only after designation.

The ESA makes more use of negotiated stays against listing. Property owners can avoid the weight of the ESA by supporting species abundance as well as by extirpating the species from their land.¹⁵⁹ The former approach can prevent listing by reducing the danger of extinction. Landowners thus also have a positive incentive for conservation, consistent with the goals of the ESA, at least within certain cost parameters. Property owners can take socially beneficial steps to avoid listing under the ESA, where owners of historic properties, by contrast, really cannot avoid designation by being good stewards.

Individual landowners, however, generally cannot protect a species because they very rarely will own enough habitat that they can leave undisturbed (or restore) to help the species thrive. Thus, landowners face a sort of prisoner's dilemma, where their conservation efforts will go for naught unless other landowners cooperate to conserve enough habitat. In the absence of assurance of such cooperation, individuals can have little confidence that their conservation measures will protect the species enough to defeat listing.

What appears to be the case is that state governments have stepped in to coordinate conservation activities to stave off ESA listing.¹⁶⁰ States have the motivation to do this both to satisfy important constituencies, such as ranchers or drillers, and to maintain state control over wildlife management and land use regulation. States have the capacity to do this through their ownership of state lands and their plenary regulatory authority over property.¹⁶¹ Constituents that normally would oppose state regulation may be motivated to support it as less

ments, and the Theoretical Foundations of Government Land Use Deals, 65 N.C. L. REV. 957, 977-78 (1987).

158. *Id.* This is how Arlington, Virginia, transformed its transit corridor and overall character in the past half century. *Planning and Development History*, ARLINGTON CNTY. GOV'T, <http://projects.arlingtonva.us/planning/history/> (last visited Apr. 13, 2015).

159. *See, e.g.*, Bailey, *supra* note 81; Morriss & Stroup, *supra* note 1, at 795-96; Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PROP. & ENV'T RESEARCH CTR., <http://perc.org/articles/endangered-species-act-1> (last visited Apr. 13, 2015).

160. *See, e.g.*, ERIK M. MOLVAR & MEGAN MUELLER, WILD EARTH GUARDIANS, TOO LITTLE AND TOO LATE: INADEQUATE REGULATORY MECHANISMS AND THE PLIGHT OF THE GUNNISON SAGE GROUSE 6 (2014), available at http://www.wildearthguardians.org/site/DocServer/Inadequate_Regulatory_Mechanisms_and_the_Pligh_of_GSG_R.pdf; Harriet Hensley, *The Role of State Conservation Plans in the Listing of Endangered and Threatened Species*, ADVOCATE (Boise, Idaho), Oct. 1999, at 8; Melissa Savage & Douglas Shinkle, *Keeping it Wild: Preserving Wildlife and Habitat While Allowing Development and Outdoor Recreation is a Tough Balancing Act*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 2010), <http://www.ncsl.org/research/environment-and-natural-resources/keeping-it-wild.aspx>; *see also* KAUSH ARHA & BARTON H. "BUZZ" THOMPSON, WOODS INST. FOR THE ENV'T, STANFORD LAW SCH., POLICY PAPER: ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE SPECIES CONSERVATION THROUGH GREATER STATE COMMITMENT 2 (2005), available at <https://woods.stanford.edu/sites/default/files/files/Endangered-Species-Act-Policy-Paper-20050224.pdf>.

161. ARHA & THOMPSON, *supra* note 160, at 9; Jessica Bennett Wilkinson, *The State Role in Biodiversity Conservation*, ISSUES SCI. & TECH., Spring 1999, at 71.

onerous or oppositional than federal regulation, particularly under Section 9.

The FWS has embraced such cooperation as providing means to garner greater cooperation in species conservation, which includes, but goes beyond, reducing perverse incentives.¹⁶² Cooperation also may lessen political hostility to the ESA. During the Clinton Administration, Secretary of the Interior Bruce Babbitt oversaw a great burst of creativity in devising and implementing various cooperative strategies.¹⁶³ Candidate Conservation Agreements between FWS and other federal agencies, state and local governments, and private property owners exchanged specific commitments for conservation according to a negotiated plan for a federal commitment not to list the species.¹⁶⁴ An important example is the 1996 Barton Springs Salamander Conservation Agreement and Strategy, under which the FWS agreed with various Texas state departments on a conservation plan for the tiny aquatic salamander that lived only in the Austin Park containing the city's famous and delightful spring-fed swimming pool.¹⁶⁵ Secretary Babbitt then withdrew a proposed FWS rule listing the salamander as endangered, expressly based upon the commitments in the agreement.¹⁶⁶ The federal court, however, held that such reliance on the conservation agreement violated the ESA, which mandated that listing decisions be made on the "best available science" and not on political considerations.¹⁶⁷ The court might have reached a different conclusion if the plan had not seemed so speculative about whether it would be effective or even carried out, and if the political pressures on the Department of Interior had not been so blatant.¹⁶⁸

The FWS continues to enter into Candidate Conservation Agreements but does not promise to not list species, even though avoiding listing is the primary motivation for most state and private parties to agree.¹⁶⁹ Currently, there are a

162. See, e.g., Allyson Barker, et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RES. & ENVTL. L. 67, 87 (2003); Kendra Womack, Factors Affecting Landowner Participation in the Candidate Conservation Agreements with Assurances Program 37-50 (Dec. 1, 2008) (unpublished graduate thesis, Utah State University), available at <http://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1028&context=etd>.

163. See, e.g., Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation within the Terms of the Act*, 24 ENVTL. L. 355 (1994).

164. See generally Martha F. Phelps, Comment, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. ENVTL. AFF. L. REV. 175 (1997).

165. *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 742 (W.D. Tex. 1997); Proposal to List the Barton Springs Salamander as Endangered, 59 Fed. Reg. 7968 (proposed Feb. 17, 1994) (to be codified at 50 C.F.R. pt. 17), *withdrawn by* 61 Fed. Reg. 46,608 (Sept. 4, 1996); Hensley, *supra* note 160.

166. *Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered*, 61 Fed. Reg. 46,608 (Sept. 4, 1996).

167. *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739; see also *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121 (D.D.C. 2001); *Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139 (D. Or. 1998).

168. *Save Our Springs v. Babbitt*, 27 F. Supp. 2d at 745 ("The Court finds that strong political pressure was applied to the Secretary to withdraw the proposed listing of the salamander.")

169. U.S. FISH & WILDLIFE SERV., CANDIDATE CONSERVATION AGREEMENTS (2011), available at <http://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf>; Womack, *supra* note 162, at 10-11, 37-45, 71-76, 84-86, 98-100.

series of agreements concerning conservation measures for the greater sage grouse, the listing that FWS decided was warranted but precluded in 2010, thus making it a candidate species.¹⁷⁰ A lawsuit settlement involving the many candidate species languishing in that status required the FWS to decide by 2015 whether to list the sage grouse or remove it from the candidate list.¹⁷¹ Congress muddied the waters in late 2014 by adding a rider to an omnibus spending bill preventing the FWS from mandating new protections for the birds for a year.¹⁷² The agency, nonetheless, has been actively working with state and private partners, as well as the federal Bureau of Land Management, to devise voluntary plans for sage grouse habitat conservation.¹⁷³ The effort aims to restore sage grouse enough to avoid listing the species as endangered.¹⁷⁴ Such a decision might be sustained if implementation of habitat protection commitments contained in the plan offered a realistic likelihood that the species would not become extinct.

The FWS finesses its legal inability to promise not to list a species as a condition of securing conservation commitments by providing private landowners with Candidate Conservation Agreements with Assurances (“CCAA”).¹⁷⁵ Under such an arrangement, the FWS and a private landowner agree on habitat preservation measures for private land.¹⁷⁶ In return, the FWS issues an “Enhancement of Survival Permit,” which promises that “if the species is subsequently listed and no other changes have occurred, the FWS will not require the permittee to conduct any additional conservation measures without [the permittee’s] consent.”¹⁷⁷ The owner is issued an incidental take permit under Section 10 of the ESA to exempt any such takings from Section 9.¹⁷⁸ FWS also employs programmatic CCAs, under which the FWS enters into conservation agreements with

170. An account of the FWS efforts regarding the sage grouse can be found on the FWS website. *Greater Sage-Grouse*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/mountain-prairie/species/birds/sagegrouse> (last modified June 30, 2014).

171. Stipulated Settlement Agreement, *Ctr. for Biological Diversity v. Salazar*, No. 10-cv-377, consolidated, *In re* Endangered Species Act Section 4 Deadline Litig., MDL No. 2165, Misc. Action No. 10-377 (EGS) (D.D.C. July 12, 2011), ECF No. 42-1.

172. See Erik Molvar, *Congress’s Hostile Takeover of Endangered Species Efforts*, THE HILL, (Dec. 15, 2014, 7:30 AM), <http://thehill.com/blogs/pundits-blog/energy-environment/227096-congress-launches-hostile-takeover-of-sage-grouse>.

173. MOLVAR & MUELLER, *supra* note 160; *Frequently Asked Questions*, BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently_asked_questions.html (last updated Jan. 22, 2015).

174. MOLVAR & MUELLER, *supra* note 160.

175. U.S. FISH & WILDLIFE SERV., *supra* note 169; *Candidate Conservation/Candidate Conservation Agreements*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/what-we-do/cca.html> (last updated June 16, 2014).

176. U.S. FISH & WILDLIFE SERV., *supra* note 169; *Candidate Conservation/Candidate Conservation Agreements*, U.S. FISH & WILDLIFE SERV., *supra* note 175.

177. U.S. FISH & WILDLIFE SERV., *supra* note 169.

178. *Id.*

state, local, or tribal governments, which in turn can provide legal assurances of limited duties to private owners who enter into the CCAA.¹⁷⁹ This gives non-federal government actors the authority to overcome barriers to agreement among private parties.¹⁸⁰

Central to all of these efforts to address habitat preservation while permitting development is the Habitat Conservation Plan (“HCP”). Congress amended the ESA in 1982 to authorize the Secretary of the Interior to permit the “incidental take” of an endangered species when “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”¹⁸¹ Such a permit is issued only in connection with an approved HCP, which should “minimize and mitigate” the impacts of the development.¹⁸² HCPs can apply to both listed and non-listed species, including those that are candidates for listing. FWS seeks to use HCPs as early as possible before a species is in danger of extinction; obviously doing so leaves open the greatest range of approaches and offers the best chances for conservation of the species. An HCP may be entered into simply between the FWS and the property owner, but some result from negotiation among many affected parties, including local governments and the FWS.¹⁸³ The Secretary attempted to make HCPs more attractive to property owners by adopting a “No Surprises” policy, which promises owners who enter into HCPs that they will not be required to provide more money or land during the life of the plan, even if the needs of the species change.¹⁸⁴ This landowner protection has been controversial with conservationists, but is somewhat mitigated by the use of adaptive management plans in HCPs, which allow for flexibility in the face of changes in the species’ prospects.

HCPs have become central to the administration of the ESA. As of 2005, the FWS had approved over 430 HCPs.¹⁸⁵ Use of HCPs has substantially lessened political pressure for major legislative reform of the ESA. Plainly, they have lessened the precipice effect of listing under the ESA by providing property

179. *Id.*

180. Michael Bean observed, “Both safe harbor agreements and CCAAs are examples of administratively created ideas to avoid some of the conservation disincentives that were unintentionally created by the regulatory requirements of the Endangered Species Act.” Michael Bean, *Landowner Incentives and the Endangered Species Act*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 206, 213 (Donald C. Baur & W.M. Robert Irvin eds., 2d ed. 2010).

181. 16 U.S.C. § 1539(a)(1)(B) (2013); see Douglas P. Wheeler & Ryan M. Rowberry, *Habitat Conservation Plans and the Endangered Species Act*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES*, 220, 222 (Donald C. Baur & W.M. Robert Irvin eds., 2d ed. 2010).

182. 16 U.S.C. § 1539(a)(2)(A)(iii) (2013).

183. U.S. FISH & WILDLIFE SERV., *HABITAT CONSERVATION PLANS: WORKING TOGETHER FOR ENDANGERED SPECIES* 3 (2005), available at <http://www.fws.gov/endangered/esa-library/pdf/HCPsWorkingTogether5-2005web%20.pdf>.

184. Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859, 8859 (Feb. 23, 1998) (to be codified at 50 C.F.R. pt. 17).

185. U.S. FISH & WILDLIFE SERV., *HABITAT CONSERVATION PLANS: SECTION 10 OF THE ENDANGERED SPECIES ACT* 1 (2005), available at http://www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf.

owners a means to continue development activities after listing. At the same time, it is not yet clear that HCPs will achieve the success of which they are capable because the FWS lacks the means, and perhaps the will, to include all stakeholders in negotiations of HCPs, monitoring compliance, and employing adaptive conservation management.¹⁸⁶

A prominent example of the use of an HCP to protect a vulnerable species involves the coastal California gnatcatcher, a songbird whose habitat is the coastal scrub vegetation of southern California and northern Baja California in Mexico. By the early 1990s, the gnatcatcher's numbers had declined primarily because of habitat destruction due to massive urban development.¹⁸⁷ After commencing the process to consider listing the gnatcatcher as endangered or threatened, FWS entered into discussions with the state of California and numerous private and local government parties to establish an HCP.¹⁸⁸ The process was substantially aided by California's enactment in 1991 of its Natural Community Conservation Planning Act ("NCCP Act"), which authorized the California Department of Fish and Game to enter into an "agreement with any person or public entity for the purpose of preparing a natural community conservation plan, in cooperation with a local agency that has land use permit authority over the activities proposed to be addressed in the plan, to provide comprehensive management and conservation of multiple wildlife species."¹⁸⁹ The NCCP Act thus promoted ecosystem-wide habitat planning supported by the regulatory powers of local governments. The resulting HCP incorporated ten planning processes under the NCCP, which has set aside in perpetuity more than half of all gnatcatcher habitat—organized in large parcels with connecting corridors—while also allowing urban development to proceed on other sites under the regulation of local governments.¹⁹⁰ The FWS implemented the HCP by listing the gnatcatcher as threatened rather than endangered, and by issuing an incidental take permit pursuant to Section 10(a).

The FWS five-year review in 2010 found that the HCP had at least halted the decline of the gnatcatcher:

Together, the ongoing and anticipated implementation of the State's NCCP process and the Federal HCP process (pursuant to section 10 of the Act) are making substantial contributions to the conservation of the gnatcatcher by creating a network of managed, core-and-linkage preserves within the areas of

186. See Alejandro Camacho, *Can Regulation Evolve? Lessons From A Study in Maladaptive Management*, 55 UCLA L. REV. 293, 329 (2007).

187. Determination of Threatened Status for the Coastal California Gnatcatcher, 58 Fed. Reg. 16,742, 16,751 (Mar. 30, 1993) (to be codified at 50 C.F.R. pt. 17) (listing the gnatcatcher as threatened).

188. U.S. FISH & WILDLIFE SERV., COASTAL CALIFORNIA GNATCATCHER, FIVE YEAR REVIEW: SUMMARY AND EVALUATION 12 (2010), available at http://www.fws.gov/ecos/ajax/docs/five_year_review/doc3571.pdf.

189. CAL. FISH & GAME CODE § 2810(a) (2015).

190. U.S. FISH & WILDLIFE SERV., *supra* note 188, at 12.

the range of the gnatcatcher in the United States with the largest populations of gnatcatchers. Implementation of section 7 of the Act has also been effective in reducing the amount of incidental take on the gnatcatcher.¹⁹¹

It remains to be seen whether such cooperative arrangements will prove successful in saving species and protecting habitats long-term.

Through these regulatory approaches, the federal government bargains away its coercive power under Section 9 in exchange for cooperative measures by private landowners.¹⁹² In doing so, it seeks to convert the perverse incentives presented by the prospect of listing into wholesome incentives for conservation, providing inducements and collective action that may overcome the prisoner's dilemma. Why does the withholding of listing play a larger role in the ESA than in historic preservation law?¹⁹³ At this point, this article can offer only tentative suggestions. First, preserving biodiversity is a far more difficult task than preserving historic structures. We may not know enough to save some dwindling species.¹⁹⁴ More fundamentally, preserving biodiversity at high levels may simply not be compatible with growing human populations eager for economic prosperity. Broad cooperation and buy-in to affirmative conservation measures seem essential for any chance of success.¹⁹⁵ Historic preservation can be accomplished largely by restricting demolitions and inappropriate alterations.¹⁹⁶

191. *Id.* at 31.

192. See U.S. FISH & WILDLIFE SERV., USING EXISTING TOOLS TO EXPAND COOPERATIVE CONSERVATION FOR CANDIDATE SPECIES ACROSS FEDERAL AND NON-FEDERAL LANDS 1 (2008), available at <http://www.fws.gov/endangered/esa-library/pdf/CCA-CCAA%20%20final%20guidance%20signed%20Sept08.pdf>; Womack, *supra* note 162, at 2-12.

193. Professor Bill Buzbee has pointed out to the author the structural similarity of these CCAAs to the evolution of negotiated Brownfields agreements in the shadow of massive liability under CERCLA. See William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Development*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1 (1997). CERCLA created sterile urban real estate, not through precipice regulations, but through broad and dramatic retroactive liability for anyone ever having had a substantial interest in property currently contaminated. Reform developed through state and local governments seeking to accommodate local property owners and their own needs for development of blighted spaces with CERCLA's liability scheme. Federal law eventually recognized and embraced negotiated solutions, providing safe harbors from liability to developers who carried through approved plans for remediation and redevelopment. 1 ENVIRONMENTAL REGULATION OF LAND USE § 9:14 (2014).

194. Owen, *supra* note 70, at 156 (Professor Dave Owen has cogently written: "Uncertainty pervades implementation of the ESA. The services do not always know the extent to which a proposed action will affect a species' viability. They are also often uncertain about species' status and population trends.").

195. Landowners' fear of economic loss causes them to not even cooperate with gathering information on their land. See Stephen Polasky & Holly Doremus, *When the Truth Hurts: Endangered Species Policy on Private Land with Imperfect Information*, 35 J. ENVTL. ECON. & MGMT. 22 (1998).

196. See, e.g., JULIA H. MILLER, NAT'L TRUST FOR HISTORIC PRES., PROTECTING POTENTIAL LANDMARKS THROUGH DEMOLITION REVIEW (2006), available at http://www.preservationnation.org/information-center/sustainable-communities/creating/teardowns/demolition_review.pdf; Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69, 71 (1997) (buildings featuring significant architecture but which are too "young" to qualify for historic preservation statutes "are all in danger of being destroyed or altered (which for most architectural purposes is tantamount to being destroyed)"); Barbara Ditata, *The Use of Criminal Sanctions in the Enforcement of Historic*

Moreover, even when burdensome for an individual landmark owner, it does not threaten overall economic welfare, as can be seen from the fact that cities with the highest property values (New York, Washington, D.C., and San Francisco) also have the most aggressive preservation regulations.¹⁹⁷ Designation under a strong ordinance very likely will save a historic building, even if resources and ingenuity are needed to adapt it to current uses.

Second, the ESA has generated far more political opposition than has historic preservation.¹⁹⁸ Some of this opposition is related to the issues grouped under the first point. But it is also significant that the ESA is a federal statute administered by federal agencies that displaces state authority. It may also bear more heavily on regions whose economies are more committed to resource extraction or where human economic activity places more strain on natural systems. Thus, representatives to the federal government and important constituencies have come to oppose the administration of the ESA, leading to a search for devices to lessen opposition.¹⁹⁹ Withholding listing accommodates development interests and states in which these interests wield decisive political power. Historic preservation of private property, by contrast, occurs at the local level. Although sometimes highly controversial, preservation battles occur in smaller, more homogenous communities. Those jurisdictions that do not value it as highly simply have less of it. There is far less of a sense of a distant power imposing onerous regulations on localities that would not adopt them by their own political wills. Overall, political conflict is avoided by devolution.

C. RETROACTIVE LIABILITY

Some legal regimes attempt to counter perverse incentives by providing for retroactive liability. They make persons liable for certain actions that were legal when taken but which become actionable when they occur during some period of time before a triggering event.²⁰⁰ The most straightforward example may be

Preservation Laws, WESTCHESTER B.J., Spring 1995, at 103.

197. See, e.g., Glaeser, *supra* note 39; Edward L. Glaeser et al., *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices* 1-6, 18-21 (Harvard Inst. of Econ. Research, Working Paper No. 2020, 2003).

198. For a discussion of some of the political opposition to the Endangered Species Act, see, e.g., DOUB, *supra* note 91, at 208-34; Holly Doremus, *Adaptive Management, The Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 50-51 (2001); Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993); Walter Rusinek, *Balancing Competing Interests: A Natural Resources Law Primer*, ARIZ. ATT'Y, Mar. 1995, at 24; Michael A. DiSabatino, Annotation, *Validity, Construction, and Application of Endangered Species Act of 1973 (16 U.S.C.A. §§ 1531-1543)*, 32 A.L.R. FED. 332 (1977). For an examination of cases and legislative history regarding historic preservation law, see *Federal Historic Preservation Case Law, 1966-2000*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/pubs-caselaw.html> (last updated July 15, 2008).

199. DOUB, *supra* note 91, at 208-34; U.S. FISH & WILDLIFE SERV., *supra* note 169; *Candidate Conservation/Candidate Conservation Agreements*, U.S. FISH & WILDLIFE SERV., *supra* note 175.

200. *Black's Law Dictionary* defines "retroactive law" as "a legislative act that looks backward or

preferential payments in bankruptcy: a bankruptcy trustee can recover any payments by the debtor made on valid debts within ninety days prior to the filing of a bankruptcy petition.²⁰¹ The purpose of avoiding preferences is to enforce bankruptcy law's policy of equal treatment among creditors by preventing debtors from preferring some creditors in anticipation of bankruptcy.²⁰² There are other examples of statutes imposing retroactive liability on actions that were legal when made in order to protect statutory policies fully in play after some triggering event.²⁰³

What would retroactive liability look like for historic preservation or endangered species protection? For historic preservation, it would attach liability for demolition occurring some time before designation. This seems to not offer much preservation benefit. Preservation law is far more interested in preventing demolition than attaching liability for demolition; money will not adequately compensate the public for the loss of a historic structure. Moreover, serious enforcement of retroactive liability, say through heavy fines, would probably deter too much demolition because owners would not know which buildings might later be designated.²⁰⁴ Such an approach would be inferior to the system employed by Cambridge, Massachusetts, discussed above, where no demolition permit is issued for any building over fifty years old without consideration by the preservation board whether to designate it for protection.²⁰⁵ That approach takes advantage of the broader system for issuing permits for any demolition and actually prevents destruction of valuable cultural resources.

Moreover, the Cambridge prophylactic approach is fairer to the property owner. Retroactive liability always raises serious issues of fairness because of the lack of notice prior to the conduct upon which liability is based. Of course, legislatures might avoid such unfairness by adding a specific intent element to the offense, but it would be difficult to prove that the defendant anticipated designation. The Cambridge system avoids retroactive liability by merely adding another criterion to the standard for issuing a demolition permit.²⁰⁶ It also sets time limits

contemplates the past, affecting acts or facts that existed before the act came into effect." BLACK'S LAW DICTIONARY, *supra* note 10, at 1511.

201. 11 U.S.C. § 547(b)(4)(A) (2013).

202. Morris W. Macey, *Preferences and Fraudulent Transfers under the Bankruptcy Reform Act of 1978*, 28 EMORY L.J. 685, 690 (1979).

203. For example, in some states, property acquired and owned by one spouse may, upon divorce, be considered marital property subject to equitable distribution to the other spouse. *See, e.g.*, N.Y. DOM. REL. LAW §236(B) (McKinney 2010).

204. An alternate development might be changing the designation criteria to be narrower and more rigid, so as to aid clarity. But that might well preclude designation of valuable resources.

205. CAMBRIDGE, MASS., CODE § 2.78.090(A) (Supp. 5 2012), available at https://www.municode.com/library/ma/cambridge/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.78HIBULA_ARTIIDEBUDEBEHISI_2.78.090PRDE&codeArchiveDate=2012-12-21.

206. The added criterion is requiring consideration by the preservation board before any demolition permit can be issued for a building more than fifty years old. *Id.*

to avoid serious delay.²⁰⁷ Thus, it is not surprising that retroactive liability provisions are not found in local historic preservation ordinances.

There might be a stronger case for retroactive liability for those harming a species later listed as endangered. Generally, the damages recovered from those who harm such species can be employed to protect remaining species members and their habitat.²⁰⁸ Also, there is no general system of permitting before actors harm fauna or flora analogous to the issuance of building demolition permits; thus, there is no good alternative to retroactive liability to “move up” starting points for protection of potentially endangered species. As such, some regime of retroactive liability may have conservation value.

On the other hand, the problem of notice of which species are protected may be even greater than for historic structures. Nothing visible or otherwise apparent to the senses would inform a person that a species is declining in number and is thus a candidate for listing; persons would need to know contextually how common the species is within their range. By contrast, the visible age of buildings (confirmable in real estate records) does provide at least some notice that a building is a candidate for historic designation. Arguably, one need not be too concerned about excessive deterrence against harming flora and fauna, given the overwhelming physical effects of human activity on natural systems. Such lack of notice makes attaching liability to otherwise lawful conduct impossibly unfair.

There may be a good argument for liability for harming any species with the specific intent of avoiding coming under the jurisdiction of the ESA. A statutory amendment could attach liability for harm to any species, including habitat modification, undertaken with the purpose of preventing application of ESA limitations to any specific property, either through listing a species or designating critical habitat. Such a scienter requirement would eliminate concerns about notice. While such specific intent violations are difficult to prove, even a few successful cases could provide general deterrence against willful episodes of “shoot and shovel.” It is hard to see a downside, given the limited reach of liability to purposeful destruction. Even if such a law generated uncertainty among landowners about their exposure to liability, it would amount to a modest

207. *Id.* § 2.78.090(D):

If the Building Commissioner shall not receive advice of [an initial determination that the building may be significant] . . . within five business days of the date that a copy of the application is submitted to the Commission staff, then, subject to Section 2.78.130 of this article, the Building Commissioner may grant the [demolition] permit applied for unless prior to such grant he is advised that such an initial determination has been made.

208. See Gardner M. Brown Jr. & Jason F. Shogren, *Economics of the Endangered Species Act*, J. ECON. PERSP., Summer 1998, at 8, 14-15 (describing how federal funds are allocated to endangered species); Davison, *supra* note 140, at 170 (stating ESA violations are subject to steep fines both criminally and civilly, which are allocated to federal and state agencies). *But cf.* Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 227, 250 (1998) (describing why in the particular case of extinction, the collection of monetary damages is an ineffective tool for preservation).

breach of the presumption that any destruction of nature is permissible unless specifically prohibited.²⁰⁹

D. LACK OF ENFORCEMENT

Both local historic preservation laws and the Endangered Species Act are notoriously under-enforced against private owners due to a lack of resources or fear of political fallout from confrontation. Local historic preservation laws are primarily enforced by restrictions on granting building and demolition permits.²¹⁰ Local governments have very limited resources to see that work is carried out in accord with issued permits. Washington, D.C. has two historic preservation inspectors for the entire city. Neighborhood activists may report unpermitted work, but such private oversight is inconsistent and can generate unwelcome social conflict. The FWS also suffers from chronic understaffing.²¹¹ Moreover, the task of monitoring whether private owners across the nation are directly harming endangered species or modifying habitats is inherently daunting. Local governments, which are closer to new development, may not be understanding of, or sympathetic to, species conservation given other more immediate goals.

It may well be that the lack of resources for enforcement of these laws reflects ambivalence by legislatures about their goals or their regulatory costs. In any event, practically speaking, lack of enforcement acts as a device to lessen the perverse incentives of the regulatory structure. Rather than destroy the resource before formal protection, private owners can ignore the regulation and gamble that they will not suffer any penalty. This illegal but practical option also lessens the political pressure to formally gut the laws. A weak enforcement strategy might also be attractive to supporters of the law concerned about repeal because it entails no formal surrender of substantive criteria, preserving them as ideals to be realized in the future.

But weak enforcement is, on balance, a terrible means to lessen perverse incentives. It actually multiplies them by offering another pathway to undermine the goals of the respective laws. It also is opaque to public accountability, as it drives behavior into secret channels. It makes evaluation of the law's value

209. One may recall that when the Department of the Interior proposed a National Biological Survey in 1993, Congress strongly resisted it on the ground that it would amount to a search for endangered species to justify more federal regulation. See Diane Krahe, *The Ill-Fated NBS: A Historical Analysis of Bruce Babbitt's Vision to Overhaul Interior Science*, in *RETHINKING PROTECTED AREAS IN A CHANGING WORLD: PROCEEDINGS OF THE 2011 GEORGE WRIGHT SOCIETY BIENNIAL CONFERENCE ON PARKS, PROTECTED AREAS, AND CULTURAL SITES* 160 (Samantha Weber ed., 2012). Ignorance about the presence of ecologically valuable resources on land has supported owners' freedom to pursue development with immediate economic rewards.

210. See, e.g., D.C. MUN. REGS. tit. 10-C, § 303.2 (2004) ("Historic preservation review shall be part of the sequence of zoning and code reviews conducted before issuance of construction permits and subdivision plats by the Department of Consumer and Regulatory Affairs.").

211. See, e.g., RASBAND ET AL., *supra* note 60, at 364-65.

difficult because non-complying owners may simply be avoiding legal requirements that could work well if enforcement leaks in the system were plugged. That makes it much harder to reform the laws to obtain greater net benefit. Thus, while weak enforcement may have helped blunt perverse incentives created by historic preservation and species conservation laws, they have undermined the laws in other ways and hindered reliable evaluation of how well they are otherwise crafted to meet their goals in a politically acceptable manner.

III. SUBSTANTIVE ADJUSTMENTS

The procedural fixes discussed above have substantive implications. Environmentalists' opposition to withholding the listing of species as endangered stems from concern that the conservation plans will not provide as rigorous protection as will listing itself.²¹² This section more explicitly considers adjustments to the substantive protections offered to designated or listed resources. It considers both compensating owners for the private losses such regulation may impose and adjusting the regulatory structure to allow the owner to retain more value. To the extent that such substantive changes reduce—and are seen as reducing—burdens on landowners, they will lessen perverse incentives. Such changes may otherwise hamper conservation of historic properties and species at risk, weakening regulation under the guise of improving it. However, if the changes actually protect critical habitats and encourage restoration of historic buildings through a combination of sound government regulation or management and private owner cooperation, they could advance important public goals at less cost to individuals.

A. COMPENSATION

The loudest and most long-standing complaint of landowners is that they should be compensated for the economic losses imposed on them to achieve widespread public benefits of historic preservation and species conservation.²¹³ This is not the place to delve into the justice of such claims in depth, which have been the subject of extensive literature.²¹⁴ Suffice it to say here that such arguments have merit only in the most extreme circumstances where owners innocently bear crushing burdens and derive little or no benefit from regulation.²¹⁵ The inquiry here is how compensation might induce greater success at a

212. See, e.g., Molvar, *supra* note 172.

213. DOUB, *supra* note 91, at 208-12; Bean, *supra* note 180, at 206-18; John D. Echeverria & Glenn P. Sugameli, *The Endangered Species Act and the Constitutional Takings Issue*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 292, 292-315 (Donald C. Baur & W.M. Robert Irvin eds., 2d ed. 2010).

214. See, e.g., DOUB, *supra* note 91, at 208-12; Desiderio, *supra* note 76; Susan Shaheen, *The Endangered Species Act: Inadequate Species Protection in the Wake of the Destruction of Private Property Rights*, 55 *OHIO ST. L.J.* 453 (1994); Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 *CUMB. L. REV.* 1 (1993).

215. While several cases have been brought alleging an unconstitutional "taking" of property under the

reasonable cost by overcoming owner hostility.

1. The Takings Clause

Efforts by property owners to obtain compensation for regulatory burdens from historic preservation and the ESA have been spectacularly unsuccessful.²¹⁶ The *Penn Central* decision, discussed above, rejected a regulatory taking claim for preservation controls on an isolated landmark, analogizing it to zoning.²¹⁷ In his dissent, Justice Rehnquist accepted that historic district regulations ordinarily do not create a taking because there is an “average reciprocity of advantage”; that is, each owner is both burdened by limitations on its own property and benefitted by the limitations on neighboring properties.²¹⁸ Thus, any continuing arguments about takings through preservation have focused entirely on individual landmarks where such reciprocity is more attenuated.²¹⁹

Subsequent to *Penn Central*, regulatory takings claims against historic preservation regulations have largely disappeared. In a study I conducted in 2004, only two reported decisions finding a taking could be identified, and none have been reported since.²²⁰ At the same time, designations of individual landmarks have proliferated in cities with strong preservation ordinances.²²¹ Plainly, the law is discouraging for owners of designated landmarks after *Penn Central*. But other

Endangered Species Act, such claims are almost never successful. See Echeverria & Sugameli, *supra* note 213, at 293:

In the 35-year history of the Endangered Species Act (ESA), property owners have filed over a dozen lawsuits claiming that the Act resulted in a “taking” of private property under the Takings Clause of the Fifth Amendment to the U.S. Constitution. In only one instance, however, has such a claim succeeded, in the controversial case of *Tulare Lake Basin Water Storage District v. United States*. . . . But six years later, in a similar case, *Casitas Municipal Water District v. United States*, the same court (indeed the same judge) repudiated the ruling in *Tulare Lake*. Thus, there is no surviving, final legal authority supporting the argument that ESA restrictions result in constitutional takings.

Id. at 293; see also ROBERT MELTZ, CONG. RESEARCH SERV., RL31796, THE ENDANGERED SPECIES ACT (ESA) AND CLAIMS OF PROPERTY RIGHTS “TAKINGS” (2013).

216. See Echeverria & Sugameli, *supra* note 213.

217. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 134 (1978).

218. *Id.* at 140 (Rehnquist, J., dissenting).

219. See, e.g., *Dist. Intown Props. Ltd. v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999); *Rector of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990); *Embassy Real Estate Holdings, LLC v. D.C. Mayor’s Agent for Historic Pres.*, 944 A.2d 1036 (D.C. 2008); *City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996).

220. J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 *FORDHAM ENVTL. L. REV.* 313 (2004).

221. See, e.g., Heather Saucier, *Historical Preservation Accelerating*, *HOUS. CHRON.*, Jan. 3, 2002, at 1 (“[M]ore people are grabbing their calculators and finding that preserving historical structures makes good economic sense, as the number of applications for historic designations continue to increase, said Robert Fiederlein, chief of staff for District H City Councilman Gabriel Vasquez, whose district houses multiple landmarks.”); Justin Rocket Silverman, *Landmarking Lollapalooza*, *NEWSDAY*, Oct. 31, 2007, at A14 (“In fiscal year 2005, only 46 buildings were landmarked. In fiscal year 2007, 1,158 buildings received protection, the highest number since 1990.”).

factors also seem significant. The reality of historic preservation has seeped into the consciousness of developers in cities with strong ordinances so they are likely to buy property with the likelihood of designation in mind, which should affect price.²²² Moreover, designation does not prohibit development; it only requires that changes to the exterior appearance of designated buildings be compatible or appropriate. Thus, sophisticated architects and preservation boards can collaborate on plans that permit substantial new development on many landmark sites. Finally, historic features have purchase in the marketplace. Conversions of old structures to new uses have contemporary consumer appeal.²²³ All this means that the losses to property owners from landmark designation have never been as great as had been feared in the early days of preservation.

Property owners also have not prevailed in regulatory takings litigation based on the ESA. “[N]ot one successful taking claim under the Act has been prosecuted in any Federal Court.”²²⁴ In the one takings decision of which I am aware where a court found a taking under the ESA, the trial judge applied a peculiar legal theory that he later rejected in a subsequent case.²²⁵ The reasons for this absence of judgments are more elusive. The federal agencies have been cautious in their enforcement of Section 9 of the ESA against private owners.²²⁶ The rise of bargained habitat regulation through HCPs, discussed below, concur-

222. See JONATHAN MABRY, CITY OF TUCSON DEP’T OF URBAN PLANNING & DESIGN, BENEFITS OF RESIDENTIAL HISTORIC DISTRICT DESIGNATION FOR PROPERTY OWNERS (2007), available at http://www.preservationnj.org/site/ExpEng/images/images/pdfs/Historic%20District%20benefits_Mabry_%206-7-07.pdf; PRES. CHI., HOW DOES LANDMARK DESIGNATION AFFECT PROPERTY VALUES? (2003), available at <http://www.preservationchicago.org/userfiles/file/Policy-Initiatives-Creating-Landmark-District-Property-Values-Study.pdf>.

223. There is a certain market appeal to things that are “vintage” and “re-purposed.” An internet search for “historic buildings converted” will return multiple examples of private historic conversions. See, e.g., *Ten Spectacular Projects Featuring Unusual Buildings Converted Into Private Homes*, HOMEDIT, <http://www.homedit.com/10-spectacular-projects-featuring-unusual-buildings-converted-into-private-homes/> (last visited Apr. 14, 2015). One realtor selling homes in a historic neighborhood stated, “The people who are buying are buying for the convenience of a quality vintage home with access to downtown.” See, e.g., Jim Harger, *Buyers Snatch up Mayor Heartwell’s Historic Condo in One Day*, MLIVE (Dec. 24, 2014), http://www.mlive.com/business/west-michigan/index.ssf/2014/12/buyer_snatches_up_mayor_heartw.html.

224. Heyman, *supra* note 77, at 162. For a more recent study, see Echeverria & Sugameli, *supra* note 213, at 292.

225. *Compare* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319-20 (2001) (holding that the ESA requirement to leave water in streams for endangered salmon is a physical taking of the water), *with* Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (2007). The subsequent history of *Casitas* is complicated and still unresolved.

226. See Frederico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act*, 62 U. COLO. L. REV. 109, 111 (1991):

Section 9 of the Act is a statutory provision with teeth, a law intended to be a powerful tool in a national effort to ‘avoid further diminution of national and worldwide wildlife resources.’ [Tenn. Valley Auth. v. Hill, 437 U.S. 153, 177 (1958).] Unfortunately, section 9 may have had too many teeth for its own good. It has never been fully enforced. A variety of historical conditions and an apparently general reluctance, on the part of both the federal government and citizens’ groups, to invoke the far-reaching language of the section 9 taking prohibition have relegated it to a subsidiary role in Endangered Species Act litigation, a satellite to the more limited substantive prohibitions embodied in

rent with *Sweet Home*, also has provided breathing room for agencies to pursue their goals without total bans on habitat degradation.²²⁷ Also, I suspect that much destruction of habitat goes entirely undetected and therefore unchallenged. Much tree cutting, meadow plowing, or stream diversion requires no permits and no public notice at the state or local levels.

2. Regulatory Market

The absence of a constitutional right to compensation for regulatory losses does not mean that property owners do not, or should not, receive some economic betterment to address costly restraints on development. Historic preservation abounds in indirect tangible benefits for owners of designated property. As in *Penn Central*, some properties are eligible for transferable development rights ("TDRs").²²⁸ TDRs allow the owner of a property in an area with development density restrictions to build at greater density in another designated area.²²⁹ Most modern systems allow the owner to convey TDRs to a willing buyer.²³⁰ Generally, the TDR-receiving area is where additional development is either desirable or neutral.²³¹ This allows the property owner to retain some of the economic potential constrained by the historic preservation (or other) restraint in the sending area. TDRs thus make landmarking less onerous for property owners because they retain market value by virtue of their ownership of the designated property, which they can realize through development on a receiving site.²³² It is questionable how much TDRs are used in historic preservation now that such regulation has become more common.

Owners of designated property also can obtain federal historic preservation tax credits for qualified renovation projects.²³³ In addition, some states have tax benefit programs that apply to a more extensive list of project types.²³⁴ Many states propose to use these tax incentives as carrots to induce owner cooperation

Endangered Species Act section 17. The unwillingness to enforce the section 9 taking prohibition fully has distorted the law of endangered species, creating a system of unequal justice

See also W. Parker Moore, *Back to the Drawing Board: A Proposal for Adopting a Listed Species Reporting System under the Endangered Species Act*, 24 UCLA J. ENVTL. L. & POL'Y 105, 171 (2006).

227. For further explanation, see Richard J. McDonald, *The Endangered Species Act: A Primer for Kansas General Practitioners*, J. KAN. B. ASS'N, Apr. 2000, at 26.

228. RICK PRUETZ, BEYOND TAKINGS AND GIVINGS: SAVING NATURAL AREAS, FARMLAND AND HISTORIC LANDMARKS WITH TRANSFER OF DEVELOPMENT RIGHTS AND DENSITY TRANSFER CHARGES 40 (2003); Byrne, *supra* note 220, at 314.

229. Michael Kruse, *Constructing the Special Theater Subdistrict: Culture, Politics, and Economics in the Creation of Transferable Development Rights*, 40 URB. LAW. 95, 95-96 (2008).

230. *Id.* at 96.

231. RICK PRUETZ, PUTTING TRANSFER OF DEVELOPMENT RIGHTS TO WORK IN CALIFORNIA 8 (1993).

232. See generally JOHN J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE (1974).

233. See BRONIN & BYRNE, *supra* note 19, at 592-620.

234. *Id.* at 618-19.

for habitat protection under the ESA.²³⁵ Tax benefits of various sorts have supported substantial private efforts to purchase land and conservation easements for habitat.²³⁶ Farm programs pay farmers to maintain habitat (although not primarily for endangered species).²³⁷ But public money will always be inadequate to “purchase” sufficient amounts of biodiversity.

Buzz Thompson, among others, have argued for employing TDRs for habitat set aside on private land.²³⁸ This effort seeks to restructure the market so that private parties will pay for conservation benefits. The FWS now has embraced a variant of a TDR program through conservation banks.²³⁹ These are permanently protected lands managed for supporting “species that are endangered, threatened, candidates for listing, or are otherwise species-at-risk.”²⁴⁰ The owner of the conservation bank then sells credits to property owners seeking to mitigate the development of land as part of HCPs, discussed below.²⁴¹ The purpose of this approach is to allow development to proceed in some areas while providing economic return to owners of better managed conservation for the same species at another location. As such, conservation banking lessens the perverse incentive for developers by creating a path through the ESA for profitable projects, while providing positive economic incentives for conservation to the owner of the bank. Conservation banking has its conceptual origins in wetland mitigation banking under the Clean Water Act.²⁴² The FWS issued Guidance in 2013 for the Establishment, Use, and Operation of Conservation Banks.²⁴³ The FWS has approved more than 100 conservation banks.²⁴⁴

Conservation banks, like TDRs, seek to structure duties and powers so that private money provides incentives for conservation.²⁴⁵ It may create a profession

235. Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems and Promising Incidents*, 27 ENVTL. L. 803, 836 (1997); Karen L. Smith, *Habitat Protection for the New Millennium: An Analysis of Domestic and International Regimes in North America*, 13 GEO. INT’L ENVTL. L. REV. 509, 522 (2001).

236. *State and Local Tax Incentives*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives> (last visited Apr. 14, 2015).

237. See *Conservation Programs: Conservation Reserve Program*, FARM SERV. AGENCY, U.S. DEP’T OF AGRIC., <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp> (last updated Dec. 11, 2014).

238. Thompson, *supra* note 86.

239. See U.S. DEP’T OF THE INTERIOR, GUIDANCE FOR ESTABLISHMENT, USE AND OPERATION OF CONSERVATION BANKS 4-6 (2003), available at https://www.fws.gov/endangered/esa-library/pdf/Conservation_Banking_Guidance.pdf.

240. U.S. FISH & WILDLIFE SERV., CONSERVATION BANKING: INCENTIVE FOR STEWARDSHIP (2012), available at http://www.fws.gov/endangered/esa-library/pdf/conservation_banking.pdf.

241. U.S. DEP’T OF THE INTERIOR, *supra* note 239, at 2-4; J.B. Ruhl et al., *A Practical Guide to Habitat Conservation Banking Law and Policy*, NATURAL RES. & ENV’T, Summer 2005, at 26, 26-27, 30.

242. U.S. DEP’T OF THE INTERIOR, *supra* note 239, at 2-3.

243. *For Landowners: Conservation Banking*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/landowners/conservation-banking.html> (last updated Nov. 12, 2013).

244. *Id.*

245. *Id.*

of biodiversity farming. Just as humans long ago turned to agriculture to provide food for themselves, conservation banking employs habitat and species management to provide for the ecological services of biodiversity, such as ecological stability and genetic diversity. Of course, the problem with protecting ecological services has long been understood to be that they are not purchased in the market, as foodstuffs are.²⁴⁶ Conservation banks provide such an economic incentive, but only because they provide a shield against the heavy hand of the ESA. Thus, creative accommodation to a precipice regulation has the potential to convert perverse incentives to wholesome incentives.

B. ACCOMMODATE DEVELOPMENT

Historic preservation law accommodates alterations and new construction to an extent far beyond what many outsiders to the process realize. Review boards in every jurisdiction permit alterations and additions to historic buildings, and they permit new construction in historic districts when they are “compatible” or “appropriate.” Some cities with the most development activity have the most active historic preservation regimes. Washington, D.C. has the most extensive historic preservation jurisdiction of any large city in the United States: approximately twenty percent of its properties are covered by preservation regulation.²⁴⁷ Yet, Washington, D.C. is experiencing an extraordinarily dynamic real estate market.²⁴⁸ One aspect of its success has been the balance in implementation of its preservation regulations, which both protect essential historical fabric and also permit profitable contemporary new development. This balance is inherent in the 1978 Historic Landmark and Historic District Protection Act, which includes within its stated purposes “to retain and enhance historic landmarks . . . and to encourage their adaptation for current use.”²⁴⁹ Administration of the Act by a diverse HPRB (aided by an excellent professional staff) has sustained retention, rehabilitation, and adaptation with few major political confrontations.²⁵⁰

Experience with historic preservation regulation has lessened concerns about how burdensome compliance is with its provisions. Don’t Tear It Down was

246. See, e.g., James Salzman, *Creating Markets for Ecosystem Services: Notes From the Field*, 80 N.Y.U. L. REV. 170, 175-76 (2005).

247. Byrne, *supra* note 40, at 670.

248. *Compare Market Reports: District of Columbia Overview*, M SQUARED REAL ESTATE, <http://msquare.com/research/> (last visited Apr. 14, 2015) (tab “Average Days on Market,” then tab “List”) (average Washington, D.C. home spent 55 days on the market), with *January 2015 Real Estate Data: Monthly Housing Summary*, REALTOR.COM, <http://www.realtor.com/data-portal/realestatestatistics?source=web> (last visited Apr. 14, 2015) (average American home spends 103 days on the market).

249. D.C. CODE § 6-1101(b)(2)(A) (2001).

250. *HPRB Members*, D.C. OFFICE OF PLANNING, <http://planning.dc.gov/node/601362> (last visited Apr. 14, 2015). But see Lydia DePillis, *Failed Historic Preservation Review Board Nominations Endanger the Whole Shebang*, HOUSING COMPLEX (Jan. 6, 2012, 5:27 PM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2012/01/06/failed-historic-preservation-review-board-nominations-endanger-the-whole-shebang/>.

formed in the early 1970s as a scrappy, activist citizens' preservation organization to save the Old Post Office on Pennsylvania Avenue.²⁵¹ Today, as the D.C. Preservation League, it is a sophisticated preservation organization, with its annual meeting funded by developers, lawyers, and architects that have come to embrace preservation as part of the development process and as a means to secure economic value.²⁵² One might say that preservation has been coopted by developers and their allies, but influence here is multi-lateral. If the HPRB is sympathetic to development projects that respect preservation priorities, architects and developers have come to learn how to design and build effectively within these constraints.²⁵³ The essence of this approach is to preserve the important visible features of historic buildings on a site and design additions that, while recognizably modern in flavor, are compatible in size and rhythms with the historic fabric. Developers have found that the market likes these structures.²⁵⁴ The federal government also has become a major preservation developer. While people differ on the aesthetic and historic assessments of different projects, there is a general sense that preservation is woven into the development process.²⁵⁵ Each case presents a question of judgment and degree that challenges the HPRB to make sensible and sensitive judgments.

The D.C. Historic Landmark and Historic District Protection Act also contains a helpful "safety-valve" provision, the "special merit" provision, which permits projects of exceptional public worth to be permitted, even if they are otherwise inconsistent with normal preservation prohibitions.²⁵⁶ The Act defines special merit as "a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services."²⁵⁷ The Mayor's Agent will permit demolition or alteration of a protected building or site if the agent finds that the project has special merit, that

251. *A Brief History—1970s*, D.C. PRES. LEAGUE, <http://www.dcpreservation.org/about-us/history/1970s/> (last visited Apr. 14, 2015).

252. *2014 Annual Membership Meeting*, D.C. PRES. LEAGUE (Oct. 30, 2014), <http://www.dcpreservation.org/2014/09/2014-annual-membership-meeting-belmont-mansion-international-headquarters-order-eastern-star/>.

253. D.C. HISTORIC PRES. REVIEW BD., *DESIGN GUIDELINES FOR HISTORIC COMMERCIAL BUILDINGS* (2010), available at http://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/HPO_commercial_guidelines_revis_08_2010.pdf.

254. DONOVAN D. RYPKEMA & CAROLINE CHEONG, PLACEECONOMICS, *MEASURING THE ECONOMICS OF PRESERVATION: RECENT FINDINGS* (2011), available at http://www.placeeconomics.com/wp-content/uploads/2011/03/economic-impacts-of-hp_findings.pdf.

255. See, e.g., Byrne, *supra* note 40.

256. The statute permits demolition or alteration of a landmark or contributing building in a historic district if the Mayor's Agent finds that such demolition or alteration is "necessary in the public interest." D.C. CODE § 6-1105(f) (2001). The phrase, "necessary in the public interest," is specifically defined as "consistent with the purposes of this act as set forth in § 6-1101(b) or necessary to allow the construction of a project of special merit." *Id.* § 6-1102(10).

257. *Id.* § 6-1102(11).

damage to the historic resource is “necessary” to construct the project, and that the project’s special merit outweighs preservation values.²⁵⁸ This creates a legal mechanism through which the preservation values can be balanced against other important public values in individual cases. Judicial and administrative decisions have clarified the statutory language so that it is now well-established, for example, that the ordinary incidents of development, such as increased property tax revenue, cannot qualify for special merit.²⁵⁹ On the other hand, enhanced preservation or restoration beyond what the Act requires can help provide special merit in the right circumstances, either as exemplary architecture or land planning.²⁶⁰

The operation of the special merit inquiry can be seen in a recent decision by the Mayor’s Agent. The District of Columbia Department of Housing and Community Development (“DHCD”) and its developer partner sought a permit to move two historic, but dilapidated, houses from a site on a main artery on the boundary of the Anacostia Historic District to another site well within the historic district in order to construct a new five-story building with 114 units of subsidized housing and ground floor Class A retail.²⁶¹ The HPRB had found that moving the houses would not be consistent with the purposes of the D.C. Historic Landmark and Historic District Protection Act because it would destroy their integrity of location and diminish the historic district.²⁶² After a lengthy hearing, the Mayor’s Agent granted the permit, holding that affordable housing and attractive retail space in that location met the threshold for special merit as high priority community needs that outweighed the harm to the historic resources because of the DHCD’s well-thought-out and well-funded plan to relocate and restore the two historic houses.²⁶³ The decision relied on D.C.’s Comprehensive Plan, which was enacted by the District Council, to find that the project met high priority community needs. The HPRB also demanded that the new building be modified in various design elements to be more compatible with the character of the historic district.²⁶⁴

The special merit provision explicitly recognizes that the preservation of a historic building is not an absolute value, but it can be fairly weighed against the

258. See, e.g., *In re QC 369 LLC*, Nos. 14-460 & 10-461 (D.C. Historic Pres. Office Jan. 27, 2015), http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=239&display=text.

259. See *Comm. of 100 on the Fed. City v. D.C. Dep’t of Consumer & Reg. Affairs*, 571 A.2d 195 (D.C. 1990).

260. For example, in *In re Square 452 Limited*, the Mayor’s Agent permitted the demolition of a building of limited integrity as part of a project that would fund restoration of a historic church not otherwise required by the Act. *In re Square 452 Ltd.*, No. 06-530 (D.C. Historic Pres. Office Sept. 27, 2007), <http://apps.law.georgetown.edu/library-hp/decisions/hpa06-530.pdf>.

261. *In re 2228 MLK LLC*, Nos. 14-221 & 14-222 (D.C. Historic Pres. Office Oct. 28, 2014), http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=237&display=text.

262. *Id.* at 2.

263. *Id.* at 10.

264. *Id.* at 2.

accomplishment of other important public development values. Of course, from a historic preservation perspective, the risk in such an approach is that this balancing provision can become a loophole that undermines preservation goals. The D.C. ordinance guards against this risk by specifying the grounds upon which special merit can be found by requiring that special merit decisions be made based upon a record developed in a “contested case,” and by subjecting the decisions to review by the D.C. Court of Appeals.²⁶⁵ The integrity of the decisions has been further bolstered by entrusting the decisions to an official with substantial independence from political actors and by the commitment of the Georgetown University Law Library to collect and publish all of the Mayor’s Agent’s decisions on a website, enhancing their use as precedents and thus building a body of largely consistent rulings.²⁶⁶ Having a balanced and reasonably predictable special merit process protects the historic preservation law from political outrage at frustrating, but nonetheless important, public projects. More systematically, the special merit process reduces anxiety over designation because designation does not permanently preclude substantial changes to every designated building. At the same time, the high standard for a special merit finding incentivizes applicants to maximize public value and minimize damage to historic resources.

The closest analog to historic preservation’s special merit provision in endangered species law seems to be the exemption process, administered by the Endangered Species Committee—popularly known as the “God squad.”²⁶⁷ This process was added to the ESA in 1978²⁶⁸ in reaction to the Supreme Court’s decision in *Tennessee Valley Authority v. Hill*.²⁶⁹ The Court in this case held that the plain meaning of Section 7 of the ESA prohibited completion the Tellico Dam, given the uncontested findings that doing so would render extinct the snail darter. Congress sought to rescue the dam by creating the exemption process, by which a high-level special committee composed of cabinet-level officials could determine that a project was sufficiently important to allow it to go ahead despite anticipated harm to an endangered species.²⁷⁰ Like the special merit provision, the exemption process applies demanding criteria, including that there be no reasonable and prudent alternatives to the agency action, that the benefits of the action “clearly” outweigh the harms entailed in pursuing other courses of action, and that the action must be in the public interest and be of national or regional significance.²⁷¹ Moreover, if an exemption is allowed, the committee must impose mitigation

265. *See, e.g.*, Comm. of 100 on Fed. City v. D.C. Dep’t of Consumer & Regulatory Affairs, 571 A.2d 195 (D.C. 1990).

266. GEO. L. LIBR., *supra* note 22.

267. 16 U.S.C. § 1536(g) (2013).

268. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978).

269. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

270. The members are the Secretaries of Agriculture, Army, and Interior, the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, the Chair of the Council of Economic Advisors, and a seventh member chosen by the President to represent the affected state. 16 U.S.C. § 1536(e)(3).

271. *Id.* § 1536(h).

measures to minimize the adverse effects on the endangered species.²⁷²

Viewed superficially, the exemption process might be expected to create a sensible safety valve mechanism, like the special merit provision, to accommodate important public projects and biodiversity, but this has not been the case. Only six exemption applications have been filed, three of which were withdrawn.²⁷³ The committee flatly rejected an exemption for the Tellico Dam.²⁷⁴ It later became mired in a legal and political disaster regarding federal logging affecting the northern spotted owl, which brought the process into disrepute because of political strong-arming and judicial invalidation.²⁷⁵ In just one case an exemption was awarded and implemented, but in that case it incorporated, as mitigation, a settlement establishing an ongoing, successful mechanism to a manage species habitat.²⁷⁶ Not surprisingly, after a thorough review of the exemption process, Professor Parenteau concluded that “the exemption provision [was] basically a non-factor in the administration of the ESA.”²⁷⁷

The exemption provision probably has been a failure because it was concocted as a political compromise in the high-tension atmosphere following *TVA v. Hill*, rather than developed from shared goals for harmonizing human activity and biodiversity.²⁷⁸ Entrusting the decision to such high-level federal officials is both cumbersome and seems to ensure politically tumultuous decision-making. Perhaps, most fundamentally, allowing a project to proceed at the point where there is a substantial risk that doing so will render a species extinct contravenes the most basic policy of the ESA: to avoid jeopardizing and to conserve every known species for future generations. Accommodation must occur long before a species becomes endangered. Professor Parenteau identified as the chief reason for the unimportance of the Endangered Species Committee the mechanisms for accommodation before listing developed in the Clinton Administration.²⁷⁹

As previously discussed, endangered species law has moved away from the flat prohibitions of Section 9 to a regulatory approach that is more accommodating to private development. The chief mechanism for this shift has been the HCP²⁸⁰ and associated efforts to develop planning alternatives to accommodate habitat protection with development planning as early as possible before a species is actually listed as endangered. This points to a crucial difference between historic

272. *Id.* § 1536(h)(1)(B).

273. See Patrick A. Parenteau, *The Exemption Process and the “God Squad,”* in ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES 143 (Donald C. Baur & W.M. Robert Irvin eds., 2d ed. 2010).

274. See ZYGMUNT J.B. PLATER, *THE SNAIL DARTER AND THE DAM* 288-89 (2013).

275. See *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

276. Parenteau, *supra* note 273, at 145-46.

277. *Id.* at 151.

278. The political context surrounding the creation of the exemption process is memorably described in PLATER, *supra* note 274, at 270-80.

279. Parenteau, *supra* note 273, at 151.

280. See U.S. FISH & WILDLIFE SERV., *supra* note 185.

preservation and species conservation: conserving a living species requires greater resources of time, space, and study than does preservation of an inert structure. Accommodation of development and historic preservation can occur long after designation because designation does not necessarily imply any increased threat of destruction. But accommodation of development and species conservation requires long-term, science-based planning to ensure adequate habitat and other supports, as well as ongoing adaptation to changing circumstances, such as climate change, that may increase the threat to the species.

CONCLUSION

This article has explained how both local historic preservation laws and the ESA employ precipice regulations that move from a state of essentially no regulation to one that can appear to impose stringent regulations on private property owners. Both extend protection only to specific resources, which essentially embody public goods, only after an individualized investigation into the respective criteria for special protection. The prospect of, and subsequent procedure for, the designation of a historic building or an endangered species provides notice and an opportunity for affected property owners to destroy the resource on their properties before the designation or listing become effective, thus avoiding the additional regulation. Such behavior is generally legal and may be rational, at least in the short-term. As such, both legal regimes seem to create perverse incentives to destroy the very resource that they seek to protect.

This article argues that these perverse incentives can be minimized both by procedural reforms and by greater accommodation of the interests of regulated property owners. It has examined specific innovations that seem to have overcome the perverse incentives in some cases, but also has considered why others have failed. It should be emphasized that this article argues for accommodating the interests of property owners when feasible, and not for their own sakes or out of a sense of justice to them (although either could be compelling in an individual case), but rather to better achieve the goals of historic preservation and biodiversity conservation. Sophisticated accommodation blunts political opposition to these laws and may help them survive repeated assaults. The risk of such an approach is that it will water down the public values or undermine actually fulfilling them through concession to self-interested opponents or those holding other higher values, such as liberty. Laws like the ESA and the D.C. Historic Landmark and Historic District Protection Act are public markers that manifest and shape public values. It is understandable that those who fought for their enactment would not want to surrender the Maginot Line of strict enforcement. The test for whether accommodation is appropriate is whether it in fact contributes to a world closer to that envisioned by these laws than would strict enforcement of the precipice regulation.

Measuring whether accommodation gives up too much requires that we have a clearer sense of what goals historic preservation law and the ESA should be understood to pursue. These laws are complex, and their goals are multiple and contested. Both legal regimes embrace strongly felt and under-articulated values. Historic preservation laws seek to preserve important physical representations of the past to promote cultural memory, to maintain the urban scale of a pre-automotive time, and to give communities a say about the look of new development. Not every resource justifies the same level of preservation, and other values may demand precedence. Analogously, the ESA seeks to halt the mass extinctions that characterize our time, but it also provides a tool to address ecological sustainability in a broader context. Use of the ESA to drive land use planning to more ecologically sophisticated preservation of habitat and related resources will, in some cases, be a legitimate tradeoff for strict prohibitions on “taking” members of a struggling species. Blunt laws can become more nuanced and comprehensive, as well as more accommodating. However, too thin notions of preservation or biodiversity protection threaten to destroy what these laws contribute to a richer sense of humanity.²⁸¹ Both require a balance of idealism and pragmatism.

Accommodation reforms have the virtue of blending human activity with conservation of ecological systems and species. They move past traditional opposition between a human realm devoted primarily to economic activity and natural reserves set aside as if nature could flourish there without regard to humans.²⁸² Rather, they impel efforts at reaching some kind of harmonious coordination of human activity within nature. At their best, they seek to overcome the traditional legal oppositions between humans and nature that give rise to precipice regulations in the first place.

In the end, it may well be that uncertainty or normative disagreement about the amount of historic preservation or biodiversity that law should insist on, in light of the costs placed on property owners, must relegate such questions to ongoing political dispute. In such cases, effective procedures for reaching balanced accommodation in specific cases may be all that can be accomplished. True precipice regulations may not be politically sustainable. Procedures for negotiated accommodation may allow for practical solutions and may be instructive on how we can more effectively harmonize nature and human activity. But such harmonization will not be easy.

281. Ecologist David Haskell stated: “It’s not true that every species that goes extinct is like another rivet off the plane and the plane’s going to crash.” James Gorman, *Finding Zen in a Patch of Nature*, N.Y. TIMES, Oct. 23, 2012, at D1.

282. Thoughtful reflections on the inevitable and fruitful roles that humans can play in managing natural systems are given in William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE, 69-90 (William Cronon ed., 1996); MICHAEL POLLAN, *SECOND NATURE: A GARDENER’S EDUCATION* 176-201 (1991).