

# WHAT CAN THE APPLE TEACH THE ORANGE? LESSONS U.S. LAND TRUSTS CAN LEARN FROM THE NATIONAL TRUST IN THE U.K.

LAUREN GWIN,\* JESSICA OWLEY,\*\* AND SALLY K. FAIRFAX\*\*\*



*The Great Debate (2019) – Jacob Pfeiffer*

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\* Associate Professor; Associate Director, Center for Small Farms & Community Food Systems, College of Agricultural Sciences, Oregon State University.

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\*\*\* Henry J. Vaux Distinguished Professor of Forest Policy, Department of Environmental Science, Policy, and Management, College of Natural Resources University of California—Berkeley.

*The National Trust in England, Wales, and Northern Ireland is one of the oldest and most revered private land conservation organizations in the world. While the private land conservation movements in the United States and the United Kingdom began at a similar time and with similar tools, conservation attitudes and methods in the two countries diverged. Today, the National Trust dominates land conservation in the U.K. while the strength of the U.S. movement is the energy of over 1,500 smaller organizations operating at different scales across the country. Despite the differences, this project looks to the National Trust in England and concludes that three elements of the National Trust's experience provide important insights for U.S. land trusts rethinking their programs as political and environmental change engulfs the planet. First, the National Trust has gone through several iterations in its understanding of general public benefit and public access to protected properties in a way that most U.S. land trusts have yet to do. Second, National Trust experience suggests that U.S. land trusts could become more engaged in land-use regulations rather than presenting themselves primarily as an alternative (private, compensated, voluntary) thereto. Finally, the National Trust's approaches to balancing agricultural productivity with sustainability provide useful models to study and emulate in the management of working landscapes. Many of the lessons learned by the National Trust could enrich private land conservation in the United States in an era of government withdrawal from environmental protection and growing impacts of climate change.*

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## I. INTRODUCTION

Several factors make improving private efforts to protect land increasingly important. First and foremost, environmental problems are severe. Loss of species, habitats, and ecosystem services is growing.<sup>1</sup> Climate disruption is a game changer and the need to redouble efforts to protect land is incontrovertible.<sup>2</sup> Second, government deregulation and withdrawal from the environmental protection sphere is making private actors more important.<sup>3</sup> Where governments do not officially remove regulatory limitations on environmentally destructive activities, they cause just as much harm by removing funding for conservation.<sup>4</sup> Third, a growing understanding of the environment

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1. See, e.g., Natalia Ocampo-Peñuela et al., *Incorporating Explicit Geospatial Data Shows More Species at Risk of Extinction than the Current Red List*, SCI. ADVANCES, Nov. 9, 2016, at 1, 3, <http://advances.sciencemag.org/content/2/11/e1601367> (assessing extinction risk and conservation priorities for endemic birds and noting that “habitat loss and degradation are the biggest threat to most of the species in the world’s most biodiverse places”).

2. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICYMAKERS 7–10 (2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf) (listing the severe impacts of climate change likely to occur in the near future).

3. See *Tracking Deregulation in the Trump Era*, BROOKINGS INST., <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> (last visited Oct. 31, 2019) (showing deregulation of environmental laws and other areas, updated continuously); Michael Greshko et al., *A Running List of How President Trump is Changing Environmental Policy*, NAT’L GEOGRAPHIC, <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/> (last visited Oct. 30, 2019) (tracking deregulation, cabinet appointments, and other events effecting the environment).

4. See *What Trump Proposed Cutting in his 2019 Budget*, WASH. POST (Feb. 16, 2018), <https://www.washingtonpost.com/graphics/2018/politics/trump-budget-2019/?noredirect=on> (listing budget cuts under the Trump Administration).

highlights the fact that many significant environmental resources and ecosystems appear solely on private lands.<sup>5</sup>

This increasing turn to private action invites us to look for ways to improve current practice. To do so, we take a look back at the development of the two largest private land conservation efforts: the National Trust in the United Kingdom and the land trust movement in the United States.<sup>6</sup> We focus particularly on the development of the National Trust whose emergence coincides with the birth of the American land trust movement. Since those initial days, however, there has been a clear divergence in tools, approaches, and attitudes. We outline the development of the National Trust and follow up with a briefer outline of the U.S. land trust phenomenon. Although it has had ups and downs, the National Trust has been an incredibly successful entity. We therefore ask whether the National Trust can offer guidance for the U.S. land trust movement. We easily answer in the affirmative.

Lessons from the National Trust arise from several areas. Over the years, the National Trust has shifted its focus in three successful ways. First, in reassessing what it means to provide for public benefit, the National Trust has expanded beyond its early protection of public footpaths and country houses to focus on nature conservation, education, and urban areas. Second, in its protection of working landscapes, the National Trust recognizes a need to become involved in details of agricultural operations to maximize environmental benefit. Third, and most significantly, the National Trust has realized that acquisition is no longer the game of the day. It is moving past acquiring important landscapes to work more with local governments and other nonprofit organizations.

All of these are good lessons for the U.S. land trust movement. First, U.S. land trusts should reassess their goals, particularly who they are serving. Land trusts have focused on a narrow set of properties. Much private land conservation started either with one particular place that spurred the formation of the land trust or with landowners seeking tax benefits. Land trusts have begun to think more holistically about their acquisition strategies and the larger benefits to be gained in terms

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5. See Michael A. O'Connell & Reed F. Noss, *Private Land Management for Biodiversity Conservation*, 16 *ENVTL. MGMT.* 435, 435 (1992) (noting that many native communities and ecosystems remain on privately held land); Robin L. Cox & Emma C. Underwood, *The Importance of Conserving Biodiversity Outside of Protected Areas in Mediterranean Ecosystems*, *PLOS ONE*, Jan. 2011, at 1, 4 (same).

6. As a threshold matter, we must point out that the idea of private land protection predates even these giants and that private land protection is not and has never been fully private.

of environmental and public benefit. Land trusts who have begun this journey should continue and those who have not should evaluate first steps with the National Trust's evolution as a cautionary guide.

Second, many land trusts hold conservation easements over working landscapes, including forest, rangeland, and farmland. Yet those conservation easements with prohibitions on conversion to other uses (plus annual monitoring) rarely maximize environmental and public benefits. In the face of emerging climate and environmental crises, land trusts must consider more prescriptive actions and hands-on involvement in their landholdings. Finally, and again most significantly, land trusts need to supplement their acquisition activities with meaningful policy work and coordination with other landowners. While land trusts have impressively conserved millions of acres, they focus overmuch on the number of acres and sites. More effective land conservation will come when their acres are working in concert with other public and private efforts to improve outcomes.

Stories about the National Trust's experiences in these areas are interesting. They do not suggest that the National Trust has all the answers, or that the U.S. movement does not have a few lessons it could send across the pond. This Article should therefore be seen as part of broadening the conversation about how land conservation movements across the planet can learn and improve from each other's experiences.

## II. THE NATIONAL TRUST

It is difficult for Americans, even those aware of the scope and scale of The Nature Conservancy<sup>7</sup> and The Conservation Fund,<sup>8</sup> to comprehend the extent to which the National Trust<sup>9</sup> dominates British conservation and, indeed, British life. More people carry National Trust cards than regularly worship as members of the Church of England.<sup>10</sup> On the occasion of the National Trust's centennial in 1995, historian David Cannadine observed:

The National Trust is the most important and successful voluntary society in modern Britain. There is no other conservation body remotely like it. Here are some indications of its importance and success. Its present membership is substantially above two million,

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7. THE NATURE CONSERVANCY, <http://nature.org/> (last visited Nov. 3, 2019).

8. THE CONSERVATION FUND, [www.conservationfund.org/](http://www.conservationfund.org/) (last visited Nov. 3, 2019).

9. This Article examines the National Trust, which covers land in England, Wales, and Northern Ireland. The National Trust for Scotland is a separate organization with separate legislation.

10. David Cannadine, *The First Hundred Years, in THE NATIONAL TRUST: THE NEXT HUNDRED YEARS* 11, 26 (Howard Newby ed., 1995).

which is more than the Conservative, Labour and Liberal Democratic parties combined. This means that The National Trust Magazine has a readership approximately equal to that of the Daily Telegraph, The Times, the Guardian and the Independent added together.<sup>11</sup>

In 2019, the National Trust cares for 250,000 hectares of land in England, Wales, and Northern Ireland, with more than 780 miles of coastline.<sup>12</sup> This is an estimated 21% of protected land in the United Kingdom, only outpaced by land owned by the Forestry Commission of England and Scotland.<sup>13</sup> The National Trust also owns almost 2% of farmland in England.<sup>14</sup> The National Trust roster includes 25,000 buildings and gardens and 2,000 tenant farms.<sup>15</sup> Many of these National Trust holdings are open to visitors.<sup>16</sup> The National Trust has almost 5 million dues-paying members,<sup>17</sup> 10,000 permanent staff, and 61,000 volunteers, many of them full time, who contribute more than 4.9 million hours of work a year.<sup>18</sup> Its expenditures in 2015 totaled nearly £500 million.<sup>19</sup>

#### *A. On the Shoulders of Dwarves and Giants: Pre-Cursors to the National Trust*

Even with all that, the National Trust was not the first nor is it the only important British conservation organization. The evolution of the National Trust began with nineteenth century movements focused on

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11. *Id.* at 11.

12. *Land & Landscape*, NAT'L TR., <https://www.nationaltrust.org.uk/land-and-landscape> (last visited Nov. 3, 2019).

13. Interview with Paul Boniface, Sec'y, Nat'l Land Tr., in Swindon, Eng. (Aug. 16, 2018). The Forestry Commission split in 2018 following Scotland's 2018 Land Management Act. SCOTTISH GOV'T, SG/2019/19, A REPORT SETTING OUT THE ADMINISTRATIVE ARRANGEMENTS THAT THE SCOTTISH MINISTERS INTEND TO MAKE FOR THE CARRYING OUT OF THEIR FUNCTIONS UNDER THE FORESTRY AND LAND MANAGEMENT (SCOTLAND) ACT 2018, at 2 (2019).

14. Interview with Harry Bowell, Chief Operating Officer, Nat'l Tr. (Aug. 29, 2018).

15. *Prospective Tenants*, NAT'L TR., <https://www.nationaltrust.org.uk/features/prospective-tenants> (last visited Nov. 3, 2019); *see Farm Lettings*, NAT'L TR., <https://www.nationaltrust.org.uk/features/farm-lettings> (last visited Nov. 3, 2019) (noting that 60% of National Trust holdings are tenant farms).

16. *See generally* NAT'L TR., NATIONAL TRUST HANDBOOK (2019) (describing sites that are open to the public).

17. NAT'L TR., ANNUAL REPORT 2015/16, at 5 n.3 (2016) [hereinafter 2015/16 ANNUAL REPORT], <https://www.nationaltrust.org.uk/documents/annual-report-201516-pdf-version.pdf>.

18. *The People Behind our Places*, NAT'L TR., <https://www.nationaltrust.org.uk/features/the-people-behind-our-places> (last visited Nov. 3, 2019); *Volunteer*, NAT'L TR., <https://www.nationaltrust.org.uk/volunteer> (last visited Nov. 3, 2019).

19. 2015/16 ANNUAL REPORT, *supra* note 17, at 22.

birding and walking.<sup>20</sup> Public access to the countryside was the major foundational issue for British conservation.<sup>21</sup> As urban development ate up rural land at an unprecedented rate beginning in the 1820s and 1830s, opportunities for recreational walking, known as rambling, became severely restricted. In response, ramblers clubs and associations formed to protect access.<sup>22</sup>

The 1800s also saw the loss of many bird species.<sup>23</sup> The great crested grebe was nearly extinct in Britain by 1860, and slaughter for plumage continued despite the 1876 passage of the Wild Birds Protection Act, weak on both enforcement and penalties.<sup>24</sup> Collection of birds along with their nests and eggs was common practice.<sup>25</sup> In response to the carnage, activist Emily Williamson founded the Fur and Feather Group in 1889.<sup>26</sup> The group became the Royal Society for the Protection of Birds (“RSPB”) in 1891 and received a royal charter in 1904.<sup>27</sup> It remains one of the most prominent British conservation organizations.<sup>28</sup>

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20. See DAVID EVANS, *A HISTORY OF NATURE CONSERVATION IN BRITAIN* 35–40 (2d ed. 1997) (discussing movements to protect birds and ensure access to the countryside).

21. See *id.* at 38–39 (discussing the evolution of the Open Spaces Society).

22. *Id.* at 58. These footpath preservation societies challenged landowners who closed public footpaths. The organizations tended to be urban-based and working class, with the first societies forming in Manchester and York in the 1820s. Chad Bryant, Arthur Burns & Paul Readman, *Introduction: Modern Walks*, in *WALKING HISTORIES, 1800–1914*, at 1, 24 (Chad Bryant et al. eds., 2016); PEAK & N. FOOTPATHS SOC’Y, *A CENTURY OF FOOTPATH PRESERVATION: THE CENTENARY OF THE PEAK & NORTHERN FOOTPATHS SOCIETY* 6 (1994), [www.peakandnorthern.org.uk/about-us/documents/ACenturyOfFootpathPreservation.pdf](http://www.peakandnorthern.org.uk/about-us/documents/ACenturyOfFootpathPreservation.pdf).

23. See *id.* at 31–33 (discussing the extinction and near extinction of several bird species in the U.K.).

24. See Kieren Puffett, *Great Crested Grebe: Bird of the Week*, NAT’L GEOGRAPHIC (Mar. 12, 2018), <https://www.nationalgeographic.co.uk/animals/2018/03/great-crested-grebe-bird-week> (explaining that that the bird was hunted for its feathers during the Victorian era and had been nearly extinct in 1860 when there were only fifty remaining pairs). This Wild Bird Protection Act was extended and modified in 1888, 1896, 1902, and 1904. EVANS, *supra* note 20, at 35.

25. EVANS, *supra* note 20, at 35–36.

26. *Id.* at 41.

27. JANET DWYER & IAN HODGE, *COUNTRYSIDE IN TRUST: LAND MANAGEMENT BY CONSERVATION, RECREATION AND AMENITY ORGANISATIONS* 138 (1st ed. 1996). A brief history of the RSPB is available at *Our History*, RSPB <https://ww2.rspb.org.uk/about-the-rspb/about-us/our-history/> (last visited Nov. 3, 2019). The RSPB currently owns or manages 218 nature reserves in Britain covering 158,283 hectares. RSPB, *TRUSTEE’S REPORT AND ACCOUNTS* 14 (2018), <https://www.rspb.org.uk/globalassets/downloads/documents/aboutthrspb/annual-review-archive/trustees-report-and-accounts.pdf>. Like the National Trust, RSPB is a membership organization with over 1 million members. *Id.* at 7. Its net operating income is over £100 million. *Id.* at 4.

28. PETER MARREN, *NATURE CONSERVATION: A REVIEW OF THE CONSERVATION OF WILDLIFE IN BRITAIN 1950–2001*, at 59–60 (2002).

These ramblers and birders focused on both pressing for protective legislation and working with private landowners. At first, efforts centered “on preserving rare or distinctive” species through legislation that established a few scattered private nature reserves.<sup>29</sup> When they succeeded, preservation in this manner happened in an ad-hoc, site-by-site way.<sup>30</sup> The groups did not initially think of acquiring private land. Early protected sites, when they did occur, were the result of actions by individuals. They were often the result of benevolent, wealthy landowners willing to set aside parts of their property for scenic views, wildlife, and recreational access.<sup>31</sup>

Simultaneously, in the nineteenth century, opportunities for outdoor recreation and access to the countryside were declining.<sup>32</sup> As large parcels broke up, landowners sold off previously open areas for development.<sup>33</sup> The public commons began to fade away, with lords converting their land into either agricultural land or building development.<sup>34</sup> Loss of access to commons led to a movement to preserve open lands, “for the health and recreation of the people” and led to the creation of the Commons Preservation Society in 1865.<sup>35</sup>

Neither the Commons Preservation Society nor RSPB had the right to buy lands (or “common rights”) without corporate status.<sup>36</sup> Moreover, the idea of buying land to protect nature was not well established in the 1890s.<sup>37</sup> Reserves were considered a subsidiary or

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29. JOHN SHEAIL, *NATURE IN TRUST: THE HISTORY OF NATURE CONSERVATION IN BRITAIN* 196 (1976).

30. *See id.* at 196–97 (discussing the operation of nature reserves prior to the establishment of the Nature Conservancy in 1949).

31. *Id.* at 173.

32. *Id.* at 59.

33. *Id.* at 69.

34. *Id.* at 59.

35. *Id.* (citing G. SHAW LEFEVRE (LORD EVERSLEY), *ENGLISH COMMONS AND FORESTS: THE STORY OF THE BATTLE DURING THE LAST THIRTY YEARS FOR PUBLIC RIGHTS OVER THE COMMONS AND FORESTS OF ENGLAND AND WALES* (1894)). The Lefevre book is available for free online at <https://archive.org/details/englishcommonsfo00ever>. Based on a concern for the health and morals of the working class, preservation organizations encouraged workers to visit the countryside and thus improve their health (and therefore their efficiency to work) and their morals (based on a growing idea of ‘rational recreation’ as an alternative from the pub or other urban pleasures). Personal Communication from Katrina Navickas, Reader in the History Dep’t, Univ. of Hertfordshire, to Jessica Owley (Oct. 29, 2019).

36. SHEAIL, *supra* note 29, at 59.

37. Today, RSPB is the 5<sup>th</sup> largest landowner in the U.K. *The UK’s 50 Biggest Landowners Revealed*, LOVE MONEY, <https://www.lovemoney.com/gallerylist/72713/the-uks-50-biggest-landowners-revealed> (last visited Nov. 3, 2019) (ranking RSPB as 5<sup>th</sup> with 324,000 acres); WHO OWNS ENGLAND?, <http://map.whoownsengland.org/> (last visited Nov. 3, 2019) (showing 332,812 acres including some lands in Scotland and Wales).

supplement to legislation prohibiting harmful acts, mostly because land was expensive.<sup>38</sup> In a very few cases, eager preservationists did raise money to buy the land.<sup>39</sup> But they then confronted a problem of who would be the landowner of the newly acquired conservation areas.

Accordingly, amongst most conservationists, the favored strategy was to modify private behavior and to prohibit environmentally destructive practices rather than bring lands under direct control for conservation.<sup>40</sup> One exception was the Commons Preservation Society's pro bono solicitor, Robert Hunter, who believed that a new organization or "statutory body" that could acquire land was essential.<sup>41</sup>

### *B. National Trust Founding*

Hunter soon became one of three National Trust Founders. The founders—highly revered by the organization to this day—were all social radicals concerned not only with birds and walking, but also with the living conditions of the poor. While most citizens of the expanding British Empire conflated growth and progress, National Trust founders, Octavia Hill, Hardwicke Rawnsley and Robert Hunter, "were among the minority who did not."<sup>42</sup>

The National Trust was not Octavia Hill's (1838–1912) first passion or major accomplishment. She was a prominent housing reformer, educator, and advocate for the poor, and had a long activist and organizing career.<sup>43</sup> Hardwicke Rawnsley (1851–1920), a childhood friend of botanist and children's author Beatrix Potter, avidly pushed for land protection in the Lake District.<sup>44</sup> Robert Hunter (1844–1913), a solicitor most famous for his success in organizing the British Post Office, became involved in land protection after winning the Commons Preservation Society essay contest on "means of preserving common lands for the enjoyment of the public."<sup>45</sup> His

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38. SHEAIL, *supra* note 29, at 55.

39. *See id.* ("The National Trust struck a compromise, acquiring areas of natural history interest . . .").

40. *See id.* at 55 ("But other naturalists were skeptical of the value of such sanctuaries. They believed the cost of acquiring and guarding the land would be prohibitive, and the very act of making a sanctuary would attract the attention of collectors.").

41. *Id.* at 59.

42. PAULA WEIDEGER, *GILDING THE ACORN* 8 (1994).

43. *See generally* PETER CLAYTON, *OCTAVIA HILL* (2012).

44. Cannadine, *supra* note 10, at 14 (explaining that Rawnsley was driven by his love of the Lake District and his desire to protect it from day trippers).

45. GRAHAM MURPHY, *FOUNDERS OF THE NATIONAL TRUST* 33 (2002).

proposal for creation of a Land Company in his speech garnered the support of Octavia Hill and led to the founding of the National Trust.<sup>46</sup> They viewed owning land as crucial for environmental protection, which required a new legal entity.<sup>47</sup> Robert Hunter became convinced that the most appropriate step would be to form a “specially created corporate company under the Joint Stock Companies Act.”<sup>48</sup> These three were able to come together with their three interests: Hill’s urge to bring the urban poor into the countryside to improve their spiritual well-being, Hunter’s desire to ensure public access to the commons, and Rawnsley’s drive to protect the Lake District from “development and spoliation.”<sup>49</sup>

Historian John Sheail suggests it was a meeting in the autumn of 1893 when the three decided to establish the ‘National Trust for Historic Sites and Natural Scenery’ to be a “perpetual custodian for property given to the nation.”<sup>50</sup> At that meeting, the three drafted a constitution and afterward Hunter drew up a memorandum and articles of association.<sup>51</sup> That the three were prominent *social* activists was not a barrier to their starting a conservation organization. While social and environmental movements started separately in the United States, the National Trust demonstrates how the connection between humans and environment was part of the conservation movement from the very beginning. The founders called a larger meeting in February 1895, at which the National Trust was born.<sup>52</sup> The original stated objective of the organization (which continues to govern its operations today) was “to promote the permanent preservation, for the benefit of the Nation, of lands and tenements (including buildings) of beauty or historic interest; and as regards land, to preserve (so far as practicable) their natural aspect, features, and animal and plant life.”<sup>53</sup>

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46. SHEAIL, *supra* note 29, at 59.

47. EVANS, *supra* note 20, at 42–44 (further describing the difference between a society and a trust regarding land holding).

48. MERLIN WATERSON, *THE NATIONAL TRUST: THE FIRST HUNDRED YEARS* 28 (1995).

49. Cannadine, *supra* note 10, at 14. If poked at, Rawnsley’s ambitions seem at odds with those of the other two founders. While they all shared a liberal but paternalistic outlook of nature conservation, he was worried about the very users Hill was seeking to attract to the lands. Cannadine suggests that they were united in their view of the Industrial Revolution as bringing about human suffering and environmental degradation. *C.f. id.* at 12–14 (“As the economic importance of the rural world diminished, its cultural importance increased.”).

50. SHEAIL, *supra* note 29, at 59.

51. *Id.* at 59–60.

52. See WATERSON, *supra* note 48, at 37 (discussing the February meeting to purchase the first National Trust property).

53. SHEAIL, *supra* note 29, at 60.

Within a month of the founding meeting, the group organized as a charitable corporation and obtained its first property.<sup>54</sup> Soon the National Trust was collecting donations—property and funds to acquire property—throughout England. It enjoyed the assistance of Queen Victoria’s daughter and of Beatrix Potter, but remained true to its goal of providing, as National Trust Founder Octavia Hill stated (and the National Trust frequently reiterates), properties that would constitute “open air sitting rooms for the poor.”<sup>55</sup>

Soon, the National Trust held twenty-four properties “and had an urgent need to regulate public access to them.”<sup>56</sup> In 1907, Hunter led the board of the National Trust in successfully seeking legislation that provided a statutory definition of the National Trust.<sup>57</sup> The 1907 Act did two significant things. First, it created a remarkable exception to the common law of property, enabling the National Trust (and only the National Trust) to hold land inalienably.<sup>58</sup> Second, it set forth a statutory mission for the National Trust that continues to guide its operations today and identifies the beneficiaries of the National Trust not as its members, but as the people as a whole.<sup>59</sup>

While permissible to hold land as a joint stock company, the National Trust wanted to be able to place enduring restraints on the property. The backbone of the 1907 Act—which makes the National Trust unique—is the provision that allows the Trust to declare its property inalienable, limiting the National Trust’s ability to dispose of land.<sup>60</sup> Property law favors the free development and marketability of land and disfavors restraints on alienation. Put simply, the common law does not like to limit a landowner’s ability to transfer or sell land. But in the conservation context, the ability to hold land inalienably is key; once the National Trust declares a property inalienable, it cannot sell, mortgage, develop, or donate it, without the express permission of Parliament.<sup>61</sup> The restriction on transfer of land gives donors and

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54. WATERSON, *supra* note 48, at 37–38.

55. *Id.* at 57.

56. SHEAIL, *supra* note 29, at 60.

57. *See* National Trust Act 1907, 7 Edw. 7 c. 136 (“The National Trust’ means the National Trust for Places of Historic Interest or Natural Beauty incorporated by this Act.”).

58. *Id.* § 21.

59. *See id.* § 4(1) (“The National Trust shall be established for the purposes of promoting the permanent preservation for the benefit of the nation . . .”).

60. ROBIN FEDDEN, *THE CONTINUING PURPOSE: A HISTORY OF THE NATIONAL TRUST, ITS AIMS AND WORK* 164 (1968); National Trust Act 1907, 7 Edw. 7 c. 136, § 21.

61. This has only happened once when Parliament took the land for a public use. It has never happened or been proposed at the request of the National Trust. Interview with Paul Boniface, *supra* note 13.

sellers confidence that the National Trust will retain and maintain the properties designated inalienable, although it can lease property with the permission of the Charity Commission.<sup>62</sup>

The 1907 Act also set forth language that governs the operations and goals of the National Trust. It echoed the National Trust founding statements:

The National Trust shall be established for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings: of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life.<sup>63</sup>

This passage is notable for three reasons. First, it states that the National Trust is to work for the benefit of the nation, distinct from benefiting donors, landowners, or its members. Second, the goals are broad enough that many activities can fit under its purview. Hence, the National Trust can be responsive to changes in the land. The choice of the word “promoting” further suggests that National Trust activities need not be tied solely to landownership. Third, it calls out protection of both land and buildings, a combination that has been a key part of the National Trust’s efforts throughout its history.<sup>64</sup> The 1907 Act further instructed that the National Trust was to manage its resources “as open spaces or places of public resort and buildings for purposes of public recreation resort or instruction . . . and make all such provisions as may be beneficial for the property or desirable for the comfort or convenience of persons resorting to or using such property.”<sup>65</sup>

In its early years, many members were dissatisfied with the pace of protection. The National Trust’s wide-ranging mission—which included protection of natural areas (with a focus often on specific plants and animals over ecosystems or landscapes) and protection of architectural and archaeological sites—was also a challenge.<sup>66</sup> Those championing nature reserves felt that the National Trust’s process was *ad hoc* and random “with apparently little regard for the national

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62. The National Trust also owns and sells property that it manages for investment purposes and that it does not declare inalienable. *Id.*

63. National Trust Act 1907, 7 Edw. 7 c. 136, § 4(1).

64. *See id.* (“[P]reservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life.”).

65. WATERSON, *supra* note 48, at 52–53.

66. SHEAIL, *supra* note 29, at 60.

significance of their plants and animals.”<sup>67</sup>

The National Trust’s responsibilities were also expensive. In the 1920s, the National Trust owned one hundred properties, which were so demanding that it decided to narrow its activities.<sup>68</sup> Responsive to member criticisms, the National Trust made a critical decision “to limit its public intervention” on other matters and focus solely on acquisition and land management, withdrawing from advocacy, lobbying, and other political efforts.<sup>69</sup> As a result, the National Trust left “broader campaigning” to other groups—a move it later shifted course on.<sup>70</sup>

Conservation came to a standstill during World War I.<sup>71</sup> The interwar era was marked by suburban sprawl, growth of the automobile, and tax pressure that accelerated the erosion of large landholdings.<sup>72</sup> During this period, the leadership of the National Trust was closely connected to the upper classes and “the highest echelons of public and political life.”<sup>73</sup> While the National Trust has always remained ostensibly nonpartisan, the leadership and thrust of its activities began to swing away from the open air sitting rooms toward protecting the interests of the landed gentry.<sup>74</sup> The general sentiment of the British public was that the countryside was a “repository of spiritual values” and as such was a “necessary antidote to the base materialism of the age.”<sup>75</sup> The National Trust began to expand at an unprecedented rate based on its goal of protecting natural heritage for the good of the masses. Historian David Cannadine describes this era of the National Trust’s history as “elitist, paternal, and culturally and politically conservative.”<sup>76</sup>

### *C. Public Access and Country Houses*

The National Trust should have wrestled harder with finding an appropriate balance between its original goals of giving people, particularly poor people, access to properties (and allowing them to be

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67. *Id.*

68. Philip Lowe, *The Countryside*, in *THE NATIONAL TRUST: THE NEXT HUNDRED YEARS* 87, 88 (Howard Newby ed., 1995).

69. *Id.*

70. *Id.*

71. Cannadine, *supra* note 10, at 15.

72. *Id.* at 16.

73. *Id.* at 17.

74. *Id.* at 17–18.

75. *Id.* at 18. Specifically, this referred to base materialism in the form of movies, telephones, and tabloid newspapers.

76. *Id.* at 19.

enjoyed) versus protecting properties and working for nature conservation. Forced to consider who it would define as “the public” and what types of benefits it would provide, the National Trust rapidly became a repository of elegant country homes. During the 1920s and 1930s, the combination of the Depression and the advent of inheritance taxes (death duties)<sup>77</sup> made it difficult for private owners in England to maintain country estates.<sup>78</sup> Beginning around 1935, changing economic and social conditions combined to increase interest in “the great historic country houses which for long had been the comfortable concern of a few privileged families.”<sup>79</sup> The National Trust sniffed the wind and all but abandoned its radical beginnings and early emphasis on open spaces for poor people. When selecting a new chair, it turned to “a great landowner in touch with the potential donors” of large country estates.<sup>80</sup> Lawrence Zetland, Second Marquess of Dundas, became the first aristocrat National Trust chair in 1931 and remained in office until 1945.<sup>81</sup> It soon became obvious to Zetland that “the only effective way of preserving the country houses permanently [would] be getting them transferred to the National Trust.”<sup>82</sup>

In 1937 the National Trust helped draft a statute to start what

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77. Death duties are taxes on estates, lands, and house contents paid at the death of one holder as the property is transferred to the next. They began in England in the early 20<sup>th</sup> century and, beginning in the 1920s, increased rapidly. See WEIDEGER, *supra* note 42, at 75. Taxes can range as high as seventy-five percent of the value of an estate. For their impact on Chatsworth, the stately home of the Cavendish family seat that is not held by the National Trust, see Ben Truslove, *Dowager Duchess of Devonshire Drove Chatsworth House Success*, BBC NEWS (Sept. 25, 2014), <http://www.bbc.com/news/uk-england-derbyshire-29350138>.

78. See WATERSON, *supra* note 48, at 97 (discussing Lord Lothian’s plea for the National Trust to “rescue country houses and their owners in distress”). Chapter 5 of Waterson’s book is devoted to the often-told story of the Country Houses Scheme. It is common to associate the emphasis within the trust with James Lees-Milne, Secretary of the Trusts Country Houses Committee from 1936 to 1951. See JAMES LEES-MILNE, *PEOPLE AND PLACES: COUNTRY HOUSE DONORS AND THE NATIONAL TRUST* (1992) (focusing on the donors and the houses, but also describing the scheme generally); see also FEDDEN, *supra* note 60, at 28, 120 (discussing the loss of country houses following the Great Depression and the new program to divert property to the National Trust in lieu of death duties).

79. James Lees-Milne, *The Country House*, in *THE NATIONAL TRUST: A RECORD OF 50 YEARS’ ACHIEVEMENT* 61 (James Lees-Milne ed., 1945). In its 1931 budget, the British government had offered strapped estate owners the option of offering houses or land to the government in lieu of paying death duties. That was not particularly attractive to estate owners as the Inland Revenue (the United Kingdom’s version of the IRS) valued the houses well below market and did not really want to hold and manage them. Thus, while the Parliament created an option of conveying properties in lieu of payment, the government agency in charge of the process did not endorse it, perhaps explaining the roadblocks erected. *Id.*

80. FEDDEN, *supra* note 60, at 27.

81. *Id.*

82. WATERSON, *supra* note 48, at 108.

commentators later referred to as the “Country Houses Scheme.”<sup>83</sup> The 1937 Act altered the law on taxes and tenancies to allow the National Trust to accept endowments with properties it was given, provided these properties were declared inalienable.<sup>84</sup> The Act was adjusted further in 1939 and 1953 to allow the landowners to donate or bequeath the contents of their donated houses to the National Trust, also in lieu of death duties.<sup>85</sup> The Act put the National Trust in line to become the repository of great British piles, but the National Trust added its own layer of interpretation that favored the wealthy and circumvented the clear expectations of British tax law.

First, the National Trust developed a process for working with donor-occupants in the Country Houses Scheme. The 1937 Act allowed any Trust member to become a tenant in National Trust-held properties, at no rent.<sup>86</sup> Taking advantage of this provision, people donated their homes to the National Trust and then continued to live in them rent free for the remainder of their lives.<sup>87</sup> Indeed, the occupants were even able to pass down the right of rent-free occupancy to heirs and beneficiaries.<sup>88</sup>

Next, to avoid the tax implications, the National Trust and donors framed pre-conditions as a “wish” list, informally stated in a memorandum.<sup>89</sup> The Memorandum of Wishes, still in use today, lists pre-conditions on a possible donation of an estate.<sup>90</sup> As wishes, the

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83. FEDDEN, *supra* note 60, at 30; *see also* WATERSON, *supra* note 48, at 108–09 (describing the establishment of “A Country Houses Committee” in March 1936 with James Lee-Milne appointed Secretary and the 1937 legislation that facilitated acquiring country houses); Lees-Milne, *supra* note 79, at 61 (assessing the first ten years of the National Trust’s work in protection of country houses).

84. *See* WATERSON, *supra* note 48, at 109 (stating that the 1937 Act included a “provision for donors to provide endowments in these forms in the knowledge that once the gift to the Trust was completed, no further tax could be payable”).

85. *Lothian’s Gift to the Nation*, NAT’L TR., <https://www.nationaltrust.org.uk/blickling-estate/features/lothians-gift-to-the-nation> (last visited Nov. 9, 2019); National Trust Act 1939, 2 & 3 Geo. 6 c. 86; National Trust Act 1953, 1 & 2 Eliz. 2 c. 7.

86. All of this is explained, complete with wonderful characters and sagas, in WEIDEGER, *supra* note 42, at 40–49.

87. *Id.* at 47–48.

88. *Id.*

89. *Id.* at 51–52. English property law of gifts prohibits conditional gifts. That is, if you give someone something with strings attached (you can have this car but only for driving to work), the English courts do not consider that to be a “gift” and instead it falls under the category of a contract and contract law applies. While there are tax benefits associated with making gifts (or donations), there are no similar benefits for making contracts. Thus, an agreement that contains contract-like preconditions will have tax implications. But if the pre-conditions were contract terms, they could be considered constraints on the gift and expose parts of the gift to taxation. *Id.*

90. *Id.*

conditions are not legally binding on the recipient (the National Trust); instead the statements are aspirations or hopes for the land.<sup>91</sup> Although the National Trust was not legally bound by the Memorandum of Wishes, the agreement effectively defined the terms of the donor's continued occupancy of what had become publicly accessible property and a responsibility of the National Trust.<sup>92</sup> It was not in the organization's interest to flout a Memorandum of Wishes because other landowners would not donate if the National Trust developed a reputation for abjuring the wishes of earlier donors.<sup>93</sup>

With these moves, the National Trust shifted its understanding of general public benefit way to the side of tax benefits for the upper class. The 1937 Act did not lead to many immediate acquisitions because of the advent of World War II and the practice of requisitioning great houses for the war effort.<sup>94</sup> But the high tax levels post-war led to a huge increase in the number of houses going to the National Trust.<sup>95</sup>

In a further illustration of the special role of the National Trust, the 1937 Act also dramatically expanded the National Trust's unique authority over land by making an adjustment in the common law of covenants.<sup>96</sup> British law in the 1930s, dictated that the benefits of a covenant had to be tied to the land or as courts put it, had to "touch and concern" the land.<sup>97</sup> Effectively, this meant that the landowners entered into an agreement based on their status as landowners and both the burden and the benefit of the agreement had to be something pertaining to the lands owned by the two parties.<sup>98</sup> The 1937 revision in

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91. *Id.*

92. *Id.* at 52.

93. *Id.* at 49–53.

94. Cannadine, *supra* note 10, at 19–20.

95. *Id.* at 20; WEIDEGER, *supra* note 42, at 49.

96. Stated in terms familiar to American law students, the 1937 Act eliminated the requirement of appurtenance. In that sense, it is similar to the Uniform Conservation Easement Act and related statutes that accompanied the rise of the U.S. land trust movement in the 1980s. See Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 91–93 (2006) (discussing the Uniform Conservation Easement Act's removal of the appurtenance requirement in the United States). G.M. Trevelyan, longtime Chair of the National Trust Estates Committee, discussed the importance of covenants in 1945. G.M. Trevelyan, *Introduction*, in THE NATIONAL TRUST: A RECORD OF 50 YEARS' ACHIEVEMENT ix, ix–xii (James Lees-Milne ed., 1945). The amount of land the National Trust could buy outright, he noted, was "pitifully small." *Id.* Covenants, which he described as the ability to veto or control building or possible development on a site, were cheaper. *Id.* at ix–x.

97. King & Fairfax, *supra* note 96, at 90.

98. This generally meant an agreement between two adjacent or neighboring landowners because it was hard to show that a restraint on one person's land would benefit other land unless

the British law of covenants did something radical by lessening this requirement specifically for the National Trust and authorizing it to enter into binding covenants without owning adjacent land.<sup>99</sup> This provision allows the National Trust to enter into agreements similar to U.S. conservation easements. The National Trust is the *only* private organization in England so authorized.<sup>100</sup> Covenants rapidly became an important element in National Trust programs. By 1945, the National Trust owned 110,000 acres in fee and held 40,000 acres under covenant.<sup>101</sup>

#### *D. Summary of the First 50 Years*

In its first thirty years, the National Trust pursued protection of open space amenities in the spirit of its founders: to enhance the living conditions of the urban poor by providing access to the countryside.<sup>102</sup> From its birth, however, the National Trust began to forge a peculiar relationship with the government and the landed aristocracy that came to dominate its programs. The 1907 rules of inalienability gave the National Trust unique powers over land, allowing the fledgling organization to assure landowners that it would abide by their aspirations for the long-term protection of their property.

Within a few decades, the National Trust became increasingly conservative, focusing on land transactions and specifically abjuring the active role in general land-use issues that it had originally sought.<sup>103</sup> The Country Houses Scheme intensified that conservatism.<sup>104</sup> Indeed, the National Trust had transitioned rapidly from fighting the aristocracy to being led by it.<sup>105</sup> Unquestionably, the Country Houses

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it was nearby.

99. National Trust Act of 1937, 1 Edw. 8 & 1 Geo. 6 c. 57, § 8.

100. *But see* DEP'T FOR ENVIRONMENT FOOD & RURAL AFFAIRS, CONSULTATION OUTCOME: SUMMARY OF RESPONSES AND GOVERNMENT RESPONSE, <https://www.gov.uk/government/consultations/conservation-covenants/outcome/summary-of-responses-and-government-response> (last updated July 23, 2019) (illustrating that the U.K. government is considering expanding the number of entities that can enter into restrictive covenants for conservation purposes in England and Wales). Since 2003, a number of private bodies in Scotland have also obtained this privilege in relation to conservation burdens. *See generally* Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, (ASP 453) (as amended).

101. Trevelyan, *supra* note 96, at ix.

102. *See* Cannadine, *supra* note 10, at 12–15 (discussing discontent with urban living conditions and interest in preservation of rural areas).

103. *See id.* at 15–19 (discussing changes in the National Trust's interests and priorities).

104. *See id.* at 21 (asserting that the Country Houses Scheme gave the Post War National Trust a new purpose just when it needed one but that it was still dominated by aristocrats).

105. *See id.* at 21–23 (describing this stage of the National Trust as “a self-perpetuating,

Scheme saved extraordinary properties for the nation. There is no quibbling about the importance of the resources that the National Trust acquired; indeed, these stately homes frequently came with entire villages and thousands of hectares of surrounding farmland.<sup>106</sup> But National Trust leadership had removed its voice from critical land-use issues and was slow to recognize its role in the agricultural and environmental management that was essential to those landholdings. Indeed, most observers concur, the country houses “altered the nature of the National Trust” in three fundamental ways.<sup>107</sup>

First, the country houses seriously constrained the organization’s resources and flexibility.<sup>108</sup> The National Trust kept acquiring estates, but the estates brought financial and administrative burdens.<sup>109</sup> The houses passed to the National Trust were often in rough condition, with the really wealthy holding onto their homes or deciding to parcel up and sell the land.<sup>110</sup> In the twenty years after World War II, the National Trust added an average of 11,000 acres and five historic houses each year.<sup>111</sup> That put enormous pressure on the National Trust’s resources and inevitably, as Philip Lowe notes, it “became ever more preoccupied with the management of its own estate.”<sup>112</sup> Campaigning for the poor was out.<sup>113</sup> Indeed, the country houses drew the Trust into the implementation of government programs designed by the aristocracy to protect their own interests.<sup>114</sup> The privileges granted to the landowner-donors were considerable. For many decades following World War II, property donors were able to avoid death duties, live rent-free in their ancestral homes, and maintain control

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aristocratic oligarchy”).

106. Gerald Cadogan, *Buildings, in* THE NATIONAL TRUST: THE NEXT HUNDRED YEARS 117, 122 (Howard Newby ed., 1995); *see* Lowe, *supra* note 68, at 88 (noting the National Trust was “adding an average of 11,000 acres (4,452 ha) as well as five historic houses each year”).

107. WEIDEGGER, *supra* note 42, at 63.

108. *See* Lowe, *supra* note 68, at 88 (“With the number of properties in its ownership having passed a hundred . . . the Trust . . . found that the care of these and acquisition of more presented as much work as the organisation could manage.”). The National Trust vastly underestimated its maintenance and management needs at the time of the transactions and continued to bear an enormous financial burden as a result. *See* Cannadine, *supra* note 10, at 23 (noting that “expenditure on maintenance and administration consistently outstripped income”).

109. Harry Batsford, *Country and Coast, in* THE NATIONAL TRUST: A RECORD OF FIFTY YEARS’ ACHIEVEMENT 9, 23 (James Lees-Milne ed., 1945).

110. Cannadine, *supra* note 10, at 22.

111. Lowe, *supra* note 68, at 88.

112. *Id.*

113. *See id.* (noting that the campaigning role was passed on to other groups).

114. *See id.* (observing the decision “to limit public intervention to matters which affected either what it already owned or expected to acquire”).

over their estates while passing the costs of maintenance onto the National Trust. They enjoyed these privileges while frequently providing minimal public benefit in terms of access.

Second, the personnel and priorities of the National Trust were redefined by the new properties. While the National Trust vastly expanded its landholdings under the Country Houses Scheme, the emphasis shifted away from the open air sitting rooms for the poor that initially aroused Octavia Hill's passion. As National Trust critic Paula Weideger observed, "[t]here was a change in the sort of people who worked for and with" the organization.<sup>115</sup> She noted that the "big country houses often filled with exquisite objects created a magnetic field into which were drawn chaps who would have been repelled by talk of footpaths, common land, public rights of way."<sup>116</sup>

Third, as a result of the first two changes, the National Trust's priorities shifted. There is no question that the membership and number of visitors to Trust properties steadily increased.<sup>117</sup> Yet, the National Trust's idea of public benefit began to stray from how the founders would have defined that term. The flexibility of the National Trust's charter and the broad phrasing of 1907 Act enabled the National Trust to head in a new direction.

### *E. Changing Countryside Changes the National Trust Following World War II*

Following World War II, England awoke to many of the same pressures that defined conservation and recreation policy during the late 1940s and 1950s in the United States.<sup>118</sup> Rapid urban development, rising incomes, and increased leisure time all changed the countryside and urban dwellers' relationships with it.<sup>119</sup> Three elements of that change are particularly important to the unfolding National Trust

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115. WEIDEGER, *supra* note 42, at 63.

116. *Id.*

117. Cannadine, *supra* note 10, at 22–23 (“The growth in membership was . . . sensational . . . [a]nd . . . the number of visitors . . . increased beyond the wildest expectations.”).

118. See generally MARION CLAWSON & JACK L. KNETSCH, *ECONOMICS OF OUTDOOR RECREATION* (1967); ADAM ROME, *THE BULLDOZER IN THE COUNTRYSIDE SUBURBAN SPRAWL AND THE RISE OF AMERICAN ENVIRONMENTALISM* (Donald Worster & Alfred W. Crosby eds., 2008); SAMUEL P. HAYS & BARBARA B. HAYS, *BEAUTY, HEALTH AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955–1985* (Donald Worster & Alfred Crosby eds., 1987).

119. See SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004*, at 133–35 (2005) (“World War II GIs came home to a shortened workweek, paid vacations, and greater disposable income, and the nation headed outdoors in an explosion of demand for outdoor recreation.”).

story: an intensifying national preoccupation with access to the countryside; the nationalization of many industries and programs, including land-use planning; and the emergence of subsidized industrial agriculture. Not unexpectedly for an organization dominated by the upper classes and their piles, the National Trust missed—or ignored—these major shifts in national priority until the 1960s and 70s, initially continuing its preoccupation with the artifacts of the landed gentry.

### 1. Nature and Countryside Gain Traction as National Issues

Following the war, the grip of the aristocracy on British social and political life began to loosen.<sup>120</sup> One area in which this was manifest was in access to outdoor recreation and the countryside with a reversion to Octavia Hill's idea taking hold: "All that was best about Britain would be made available to the masses. The landscape would be theirs to enjoy, returned into the hands of the common man from those who had annexed it over the years."<sup>121</sup> In the post-war era, programs slowly evolved to protect the countryside, both for recreation and ecology.

At the fiftieth anniversary of the National Trust, its leaders remarked that there had been an increase in appreciation of "natural beauty and historic buildings" on the part of the British people.<sup>122</sup> People wanted holidays in unspoiled countryside. They began looking for youth hostels and more hiking opportunities.<sup>123</sup> In describing their holdings and the strengths of the National Trust in 1945, National Trust proponents dedicated only eight pages (out of 125) to discussing protection of ecological amenities.<sup>124</sup> In doing so, Sir William Beach Thomas reminded members of the National Trust that one of its main

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120. See generally DAVID CANNADINE, *THE DECLINE AND FALL OF THE BRITISH ARISTOCRACY* (1990) (providing a lengthy but useful discussion on this subject).

121. EVANS, *supra* note 20, at 60. This may be overstated, but enormous political changes engulfed Britain. A labour government established the British version of a welfare state, nationalized major industries, and began to disassemble the British Empire. See *1945–51: Labour and the Creation of the Welfare State*, *GUARDIAN*, <https://www.theguardian.com/politics/2001/mar/14/past.education> (Mar. 14, 2001) (discussing these events).

122. Trevelyan, *supra* note 96, at ix.

123. *Id.*

124. The National Trust's 8-page chapter by William Beach Thomas is the only discussion of nature conservation in its 125-page book, *THE NATIONAL TRUST: A RECORD OF FIFTY YEARS' ACHIEVEMENT*, that addresses ecological protection. See generally William Beach Thomas, *Nature Reserves*, in *THE NATIONAL TRUST: A RECORD OF FIFTY YEARS' ACHIEVEMENT* 113, 113–22 (James Lees-Milne ed., 1945).

stated purposes was “preservation of natural beauty and wildlife” and asserted the National Trust could achieve that goal without narrowing its sense of nature reserve or sanctuary.<sup>125</sup> As he noted, even National Trust properties that appear focused on “recreation and refreshment of mind and body for the general public” still appeal to naturalists.<sup>126</sup> The National Trust must not have seemed environmentally inclined. If it had, Sir Thomas would not have found it necessary to assert the National Trust’s bona fides in this area, stating “the National Trust is more definitely naturalist than most people think.”<sup>127</sup>

## 2. The Nationalization of Land-Use Planning

A radical change to land conservation in Britain came from increasing government involvement in land-use planning. Early land-use planning laws in 1919 and 1925 recognized the inadequacy of nuisance law in shaping healthy, developing communities. By 1932, Parliament extended land-use planning from urban to rural communities and acknowledged the value of protecting “places of natural interest or beauty.”<sup>128</sup>

To most Americans, the 1944 Town and Country Planning Act is startling: it “generally (and uncritically) accepted that the . . . [l]arge cities were no longer to be allowed to continue their unchecked sprawl over the countryside.”<sup>129</sup> Under the Act, development plans were to be created for every area of the country, and the central government became the main land development authority.<sup>130</sup> Things went even further when the Act was amended in 1947; it gave powers to urban authorities to compulsorily acquire land and buildings for historic preservation.<sup>131</sup> But as in the United States, local governments in the U.K. had to compensate landowners—limiting the reach of the Act based on both available funding and political will.<sup>132</sup> However,

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125. *Id.* at 118.

126. *Id.*

127. *Id.* at 121.

128. SHEAIL, *supra* note 29, at 78. The 1932 Act was particularly important for nature conservation because it recognized the ability of local authorities to make voluntary agreements with private landowners to prevent building development. *See* Town and Country Planning Act 1932, 22 & 23 Geo. 5, c. 48, §1.

129. BARRY CULLINGWORTH & VINCENT NADIN, *TOWN AND COUNTRY PLANNING IN THE UK* 21 (13th ed. 2002).

130. *Id.* Although nominal control over the process was given to county councils, each strategic plan was approved by a new national Ministry of Town and Country Planning and the central government exercised decisive control. *Id.*

131. S.A. de Smith, *Town and Country Planning Act, 1947*, 11 MOD. L. REV. 72, 73 (1948).

132. *See* SHEAIL, *supra* note 29, at 201 (“[T]he effectiveness of the of the 1944 Act and other

“compulsory purchase for development has always been fairly insignificant in practice, [and] the big impact of the legislation was the imposition of the general need for planning permission for any development.”<sup>133</sup>

Compared to what else was happening in Britain at the time—the government nationalized the railways and other basic industries and established the National Health Service—the 1947 Act could be considered moderate. The Act did not nationalize private land, but it did authorize the government—not the landowner—to decide whether land would be developed. When development value was nationalized, developers were initially required to pay a fee of 100% of the increase in land value resulting from development.<sup>134</sup> Stated another way, landowners only owned the as-of-1947 rights in, and value of, the land and the state then owned the rest.<sup>135</sup> No development was allowed without first getting permission from local authorities.<sup>136</sup> Local authorities, however, seemed little inclined to engage in nature preservation, focusing almost solely on providing and protecting recreational opportunities.<sup>137</sup> Lack of government action on land conservation between the wars likely helped promote voluntary conservation actions and the development of private conservation entities.

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legislation was limited by the chronic problems of compensating those adversely affected by planning decisions and the need to offset costs by levying a betterment charge on those benefiting from the decisions.”). The 1947 amendments confirmed no changes in land use without the consent of county councils. Stated beneficiaries had to pay development charges (for increases to the value of their land, also called betterment charges) and the government could acquire land as necessary for “completion of a redevelopment plan” by paying “existing-use value, plus the cost of disturbance.” *Id.* at 203.

133. Personal correspondence from Colin Reid, Professor of Law, Univ. of Dundee, (Oct. 15, 2019).

134. SHEAIL, *supra* note 29, at 203.

135. CULLINGWORTH & NADIN, *supra* note 129, at 161–62. This is how it worked: The government calculated the fair market value of the land in 1947, the day before the act went into effect. *Id.* Then it set out where one could or could not develop. The development rules changed the fair market value of the lands. Where land value increased, the landowner had to pay the government. *Id.* In 1953, Parliament scrapped the developer charge and private house building boomed—but only within the limits of established areas. Interview with Philip Lowe, Professor, Newcastle Univ., in Newcastle upon Tyne, Eng. (Apr. 18, 2003). Compensation for those development rights, when extinguished by compulsory purchase, was paid out of a national fund. *Id.* By the 1960s and 1970s, planning began to shift out from under state domination, and private development came into favor. *Id.* This basic shift is also reflected in the compulsory purchase proceeds. When land is acquired through condemnation, government compensation is based on the *existing use* value, rather than market value, which reflects potential future value. *Id.*

136. CULLINGWORTH & NADIN, *supra* note 129, at 161.

137. See SHEAIL, *supra* note 29, at 178–79 (discussing lack of support from local authorities and their focus on recreational projects).

Critics of land-use planning always say that too much land gets developed, while builders complain that they are ridiculously constrained. All this is familiar and may lead to some changes, but even noted privatizer Margaret Thatcher did not touch the statute, which continues to protect the nation's revered countryside. Constraints on development are well-established and an important part of the context in which the National Trust operates. Unlike American land trusts, the National Trust does not have to acquire land to prevent urban sprawl. Instead, it relies on nationally defined land-use regulation to do so. That is, prevention of sprawl is not one of the goals or projects of the National Trust because the government is already effectively working in that area. This contrasts with the United States where many land trusts got their start expressly working to stop the sprawl that they feel the local, state, and federal governments have too freely allowed or encouraged.<sup>138</sup>

### 3. Industrialization of Agriculture

The British countryside is the creation—culturally and biophysically—of 2,000 years of agriculture, with an overlay of Jane Austen-style eighteenth century English aristocrats recasting it slightly as an upper-class pleasure ground. However, agriculture's emotional and political importance to British citizens of all classes is almost beyond calculation.<sup>139</sup> The goal of U.K. nature conservation, then, is to maintain the wildlife and biodiversity that has evolved *with* farming, that is, the generally artisanal agriculture of the pre-World War II era rather than the industrial agriculture of the post-war era. The 1947 Agriculture Act established a subsidy system to end food shortages and continues to direct British agricultural policy toward intensification long after those shortages ended.<sup>140</sup> This long-term trend has tremendous implications for the National Trust as a major owner of

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138. Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV'T 244, 247 (2001).

139. See generally HOWARD NEWBY, GREEN AND PLEASANT LAND?: SOCIAL CHANGE IN RURAL ENGLAND (1979); HOWARD NEWBY, COUNTRY LIFE: A SOCIAL HISTORY OF RURAL ENGLAND (1987); HOWARD NEWBY, THE COUNTRYSIDE IN QUESTION (1988).

140. See Robert A. Robinson & William J. Sutherland, *Post-War Changes in Arable Farming and Biodiversity in Great Britain*, 39 J. APPLIED ECOLOGY 157, 158 (2002) (“[M]odern agriculture is largely a consequence of the 1947 Agriculture Act, which to attain self-sufficiency in food production.”); see also Agriculture Act 1947, 10 & 11 Geo. 6 c. 48, § 1 (“[T]his Act shall have effect for the purpose of promoting and maintaining, by the provision of guaranteed prices and assured markets for the produce mentioned in the First Schedule to this Act, a stable and efficient agricultural industry capable of producing such part of the nation's food and other agricultural produce as in the national interest . . .”).

agricultural land.

In contrast to many other sectors in the post-war era, agriculture in Britain was essentially exempt from planning regulations and the nationalization of development rights.<sup>141</sup> The 1947 Agriculture Act ramped up the pre-war production subsidies to bring back into cultivation the significant amount of farmland that had been fallowed.<sup>142</sup> Aided by Marshall Plan funds, British and European governments poured money into agriculture intensification and industrialization to feed a hungry country.<sup>143</sup> Food shortages had bedeviled England both during and after World War II and rationing did not end until 1954.<sup>144</sup> As shortages eased after World War II, Brits regarded farmers as national heroes and wise stewards of the land.<sup>145</sup> But as with the Planning Act, the Agriculture Act did not address agricultural practices; the intensification and industrialization came at a tremendous environmental cost, discussed below.

#### *F. Winds of Change*

The National Trust appears to have missed two decades of enormous changes in its social and political environment. The National Trust's major legislative sortie in the late 1940s added muscle to the Country Houses Scheme.<sup>146</sup> Hence, in the post-World War II period, while the nation went through a major social shift in agriculture,

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141. See EVANS, *supra* note 20, at 84 (“Agriculture was allowed to develop separately from amenity and nature conservation.”). Forestry developed in the same way. *Id.*

142. *The Cabinet Papers, Farming and the Agricultural Acts*, NAT'L ARCHIVES, <http://www.nationalarchives.gov.uk/cabinetpapers/themes/farming-agriculture-acts.htm> (last visited Nov. 3, 2019).

143. *Marshall Plan*, ENCYCLOPEDIA BRITANNICA (last updated Apr. 26, 2018), <https://www.britannica.com/event/Marshall-Plan>.

144. *What You Need to Know About Food Rationing in the Second World War*, IMPERIAL WAR MUSEUMS <https://www.iwm.org.uk/history/what-you-need-to-know-about-rationing-in-the-second-world-war> (last visited Nov. 1, 2019); see CLIVE POTTER, *AGAINST THE GRAIN: AGRI-ENVIRONMENTAL REFORM IN THE UNITED STATES AND EUROPEAN UNION 9–34* (2008) (tracking changes in the United Kingdom and simultaneous and similar changes in the United States). Despite Britain's free market orientation, global economic depression in the 1920s led the British government, along with the governments in the rest of Europe and the United States, to assist farmers with price supports, such as deficiency payments, marketing assistance, and import restrictions to increase production. *Id.* at 10–11. By 1942, 2.23 million hectares were in arable (row) crops, which was a huge increase from a low of 1.5 million in 1930. EVANS, *supra* note 20, at 82–84.

145. SHEAIL, *supra* note 29, at 56.

146. See WEIDEGER, *supra* note 42, at 103 (noting how in 1946, the government established a war memorial to purchase “exceptional properties—landscape, coastline and houses—as memorials to the country's war dead”). Once the government acquired the properties, it turned them over to an appropriate agency for management—frequently, the National Trust. *Id.*

nature/countryside management, and town planning, the National Trust moved further into its preoccupation—philosophical and financial—with country houses. Unlike the earlier death-duties-based program, these later acquisitions came to the National Trust with no endowment. Over the next twenty years, the National Trust was obliged to divert £650,000 from its own funds to support properties received from the government.<sup>147</sup>

When change did come to the organization, it came from within. Oddly perhaps, the growing environmental movement did not play much of a role.<sup>148</sup> Describing the National Trust as out of touch with the times, Philip Lowe explained that the “[t]he environmental radicals of the time . . . saw it as elitist and smug and contributing little to the environmental cause beyond protecting its precious 1 per cent of England, Wales and Northern Ireland.”<sup>149</sup> Accordingly, the environmental activists did not embrace the National Trust as an environmental organization. Instead, a new generation of National Trust members forced change from within the organization. National Trust membership began to grow right after the War ended, and those members wanted something different from the Trust.

The growth in membership occurred as the British public’s new phase of its love affair with the countryside exploded. That love was expressed in vastly increased visitation at National Trust properties, with an accompanying increase in National Trust membership.<sup>150</sup> New members sought access that the deferential-to-occupying-donors’ ground rules established under Memoranda of Wishes seemed to thwart. More broadly, the new members slowly forced the organization to catch up with the reorientation underway in British social and political life.

Change did not come easily or instantly. At first, the new members were viewed by the National Trust organization as a threat to its properties. The National Trust staff was initially unwilling to sacrifice its responsibilities to future generations by turning properties into “popular playgrounds,” despite the initial framing of the organization as providing open air sitting rooms for the poor.<sup>151</sup> In addition, concerned that a growing membership might force it to alter its

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147. DWYER & HODGE, *supra* note 27, at 228.

148. See Lowe, *supra* note 68, at 89 (“[T]he Trust seemed quite out of touch with the new wave of environmentalism.”).

149. *Id.*

150. *Id.* at 90.

151. *Id.* at 89.

priorities, National Trust leadership was “emphatically against any positive steps to enlarge the membership.”<sup>152</sup> The National Trust “disdained publicity and was reluctant to appeal [to the public] for funds.”<sup>153</sup> The organization was soon forced to change its attitude.

Membership growth turned out to be a mixed blessing for the plummy cohort that presided over the post-war National Trust. Tensions were first manifested in a dispute that precipitated when the National Trust fired employee Conrad Rawnsley, the grandson of National Trust founder Hardwicke Rawnsley, in 1966.<sup>154</sup> In a public campaign, Conrad Rawnsley accused the National Trust of being “undemocratic and inefficient.”<sup>155</sup> His contention that the National Trust was “too oligarchic and exclusive in its organization” resonated with the new members.<sup>156</sup> Rawnsley further asserted that the organization provided “insufficient public access to many of its country houses,” and that the “former owners had been treated too deferentially.”<sup>157</sup> Rawnsley kicked up enough of a fuss that his supporters called the first Extraordinary General Meeting in National Trust history to discuss the issues he raised.<sup>158</sup>

As a result of the meeting and the bitter debate that followed, the National Trust convened an internal inquiry chaired by a National Trust outsider, Sir Henry Benson.<sup>159</sup> Two years later, this Committee recommended major reforms, most of which were adopted.<sup>160</sup> The restructuring had three basic elements. First, the management

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152. *Id.*

153. *Id.*

154. National Trust employee and advocate, Robin Fedden, addressed the conflict as an attack, without mentioning Rawnsley by name. FEDDEN, *supra* note 60, at 70–73; see WEIDEGER, *supra* note 42, at 120–54 (discussing the Rawnsley saga in the chapter “A Poisoned Trident”); Cannadine, *supra* note 10, at 25–27 (giving the dispute two compact pages); WATERSON, *supra* note 48, at 170–72 (giving a lengthier and insightful treatment in “A Chapter of Disasters”).

155. Cannadine, *supra* note 10, at 25.

156. *Id.*

157. *Id.* Rawnsley also lamented the handling of the Enterprise Neptune endeavor. *Id.*

158. WEIDEGER, *supra* note 42, at 148. This may sound more compelling than the details allow. Under National Trust rules adopted in the early 20<sup>th</sup> century, when membership was around 550, only thirty members were required to call an extraordinary meeting. FEDDEN, *supra* note 60, at 71. Rawnsley successfully locating thirty supporters among the National Trust’s 170,000 members in 1966 does not evince a major uprising. Most of the 4,500 members who attended the Extraordinary General Meeting rejected the majority of Rawnsley’s proposals. *Id.* See generally WEIDEGER, *supra* note 42, at 136–54 (discussing the circumstances leading to the Extraordinary General Meeting).

159. Cannadine *supra* note 10, at 25 (describing the formation of a committee led by Sir Henry Benson).

160. *Id.*

structure of the National Trust was decentralized. Professionals replaced patricians,<sup>161</sup> and the organization took on a less aristocratic, less exclusive air.<sup>162</sup> Second, it adopted a more commercial orientation. The National Trust established shops on its properties and in big towns and cities.<sup>163</sup> Third, the Committee urged that the Trust become more responsive to, and appreciative of, its membership, which included a more regional orientation and devolved administration.<sup>164</sup> The National Trust began to change internally, “from an amateurish oligarchy into a responsible business enterprise.”<sup>165</sup> And membership kept growing.

The reforms from the Benson Committee represent another shift in the National Trust’s interpretation of public benefit. It returned to a broader idea of serving the country as a whole and sought to bring in more members and volunteers. The National Trust began “a concerted drive to increase members.”<sup>166</sup> The re-orientation of its purposes apparently resonated with many as its membership began increasing dramatically in the 1970s.<sup>167</sup> By 1990, the National Trust had 2 million members, who contributed 34 percent of the Trust’s annual operating income, and by 2002 had enrolled its three millionth member.<sup>168</sup> In 2019, it reached 5.5 million.<sup>169</sup>

### G. The Modern National Trust

Three examples of how the National Trust operates today indicate

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161. *Id.* A similar process was underway at the Trustees of Reservations in Boston, Massachusetts, the group with which National Trust founders consulted in the early 1890s. See FAIRFAX ET AL., *supra* note 119, at 157–58 (“[T]he group gradually began a reorganization.”).

162. Cannadine, *supra* note 10, at 25. The new professionals did not always find the National Trust environment supportive, and many reforms were hampered by foot dragging. *Id.*

163. *Id.* at 26. When the new Director of Public Relations suggested that the organization “might also consider offering for sale a few well-designed tea towels,” he was greeted with open downright hostility throughout the old organization. WATERSON, *supra* note 48, at 177. The rear guard endorsed a Committee of Taste to review merchandise to make sure it was up to National Trust snuff. In three years, it did not approve a single article. *Id.*

164. Cannadine, *supra* note 10, at 25.

165. *Id.*

166. *Id.* at 26.

167. See *Our History: 1945–2000*, NAT’L TR. (Nov. 3, 2019), <https://www.nationaltrust.org.uk/lists/our-history-1945-2000> (describing membership milestones in the 1970s).

168. *National Trust Membership Soars to Four Million*, BBC NEWS (Oct. 6, 2011), <https://www.bbc.com/news/uk-15187147>; see also *Our History: 1945–2000*, NAT’L TR., <https://www.nationaltrust.org.uk/lists/our-history-1945-2000> (last visited Nov. 3, 2019) (describing membership history for 1945 to 2000).

169. *National Trust Membership Tops 5.5 Million*, GUARDIAN (Sept. 1, 2019), <https://www.theguardian.com/uk-news/2019/sep/02/national-trust-membership-tops-55-million>.

the depth of the organization's reform. Harry Bowell, director of operations and conservancy for the National Trust, describes the changes in the direction of the National Trust as rooted in a reassessment of the 1907 Act establishing the purpose of the organization: "to promote the permanent preservation, for the benefit of the Nation, of lands and tenements (including buildings) of beauty or historic interest; and as regards land, to preserve (so far as practicable) their natural aspect, features, and animal and plant life."<sup>170</sup> Focusing on the words "promote" and "preservation," the National Trust has been changing its approach to this charge.<sup>171</sup> With a look at "promote," Bowell suggests that the duties of the National Trust must go beyond land acquisition and management to include other ways of engaging the nation in environmental protection.<sup>172</sup> This could include lobbying for new laws, working with other nongovernmental groups, increasing education and outreach efforts and the like. With the term "preservation," he indicates a need to focus on nature conservation efforts in all of the National Trust activities.<sup>173</sup> Our three examples below echo these sentiments and illustrate how the National Trust is changing. Despite this work, however, the National Trust continues to struggle in shifting its image from that of "a day out at a country house" to an organization of real environmental change.<sup>174</sup>

First, we look at the emergence of nature conservation as a meaningful policy priority. In Britain, nature conservation necessarily occurs as part of agricultural policy. The National Trust has changed its approach to managing its agricultural lands. After decades of using farm receipts to support its country houses, the National Trust has begun to view itself as an environmental organization. It takes a lead role in supporting sustainable agriculture, both as an advocate and as a practitioner. Second, we address the National Trust's current approach to land acquisition. Today, the National Trust relies on and supports land-use planning and regulation instead of focusing on acquisition. It acquires land only in areas where it already owns land or where it believes acquisition is critical. Third, we look at the shifting ideas of who National Trust holdings should benefit accompanied by a move

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170. National Trust Act 1907, 7 Edw. 7 c. 136, § 4(1).

171. Interview with Harry Bowell, *supra* note 14.

172. *Id.*

173. *Id.*

174. Legal scholar Colin Reid explains "the overriding public image is still of posh country houses where nice (white) middle-class families go for a pleasant day out to enjoy the sights, the café and the shop. They are trying hard to change this in many ways, but this sort of thing is difficult to shift." Personal correspondence from Colin Reid, *supra* note 133.

toward protecting urban and industrial sites as well as developing more partnerships with local groups.

### 1. Nature Conservation

To explain the National Trust's changing approach to agriculture, it is necessary to briefly describe the evolution of two national policy tools the National Trust began to use on its lands: Environmentally Sensitive Areas ("ESA") and the Countryside Stewardship Scheme ("CSS").

For many decades after the passage of the 1947 Agricultural Act, "[w]ildlife and habitat conservation remained irrelevant to the food factory of the British countryside."<sup>175</sup> But pressure for agricultural change was building, especially after the threat of food shortages had faded. By the late 1970s, hedgerows—removed to facilitate larger areas of intensive, monocultural crop production—were disappearing at a rate of 28,000 kilometers per year.<sup>176</sup> Pesticides aided the decline of raptor populations as well as other species.<sup>177</sup>

In 1984, the British government developed an alternative approach to agricultural subsidies that arguably drew the National Trust into a leadership position for subsequent agri-environmental policy. Farmers planned to drain and plow the Halvergate Marshes, a major wetland in the Norfolk Broads, to plant winter wheat—crystallizing a major debate.<sup>178</sup> The then-existing policy solution, to use Wildlife and Countryside Act funds to compensate farmers for not draining the marsh, would have consumed more than a third of the Countryside Commission's budget.<sup>179</sup> In an irony familiar to American taxpayers, funds would be spent to prevent ecological destruction caused by increasing acreage of a subsidized crop already in surplus nationally.<sup>180</sup> Thus, public funds were needed to solve a problem being caused by other public spending.

The local authority and the Countryside Commission hatched an

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175. EVANS, *supra* note 20, at 173.

176. POTTER, *supra* note 144, at 28; *see also* Robinson & Sutherland, *supra* note 140, at 162 (noting that field size increased by removing hedgerows).

177. *See* POTTER, *supra* note 144, at 29 (noting that "U.K. ecologists were among the first to identify a link between the application of persistent organochlorines and declines in populations of raptors and other species.").

178. *Id.* at 49. An estuary in Roman times, the marsh had been drained in the 1600s but its value as wetlands endured. TOM WILLIAMSON, *THE NORFOLK BROADS: A LANDSCAPE HISTORY* 4 (1997). It would not have survived the drainage planned in the 1980s.

179. *See* POTTER, *supra* note 144, at 49.

180. *Id.*

alternative plan: pay a smaller amount to all of the farmers within the contested area to protect the marsh, whether they planned to drain or not.<sup>181</sup> In so doing, the government moved from paying off farmers that threatened environmentally damaging practices to incentivizing non-damaging farming practices in ecologically sensitive areas.<sup>182</sup> This new approach was codified in the 1986 Agriculture Act.<sup>183</sup> Areas of “recognized importance from an ecological and landscape point of view” were to be designated “Environmentally Sensitive Areas,” within which agricultural practices had to be compatible with conservation, and for which farmers were paid.<sup>184</sup> Within ten years, 15,000 British farmers had signed ESA management agreements, covering 1.3 million hectares.<sup>185</sup> This included many of the National Trust’s tenant farmers.

In 1991, another incentive program, the Countryside Stewardship Scheme was added to the bouquet of agricultural subsidies.<sup>186</sup> The CCS gave the government more choice in selecting which farmers to include in programs and gave participating farmers choices about which practices to adopt.<sup>187</sup> It added discretion to the mix of agri-environmental policy, such as paying to achieve particular products or

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181. *Id.*

182. *Id.* The marshes are now managed, as before, as traditional pasture.

183. *See* Agriculture Act 1986, c. 49, § 18 (Eng.) (outlining the framework for the “designation and management of environmentally sensitive areas”). Because the United Kingdom was now part of the European Economic Community (“EC”), any farm subsidies, even for environmental reasons, had to be approved EC-wide for “harmonization,” i.e., to keep the playing field level. In response to the marshland experiment, the EC adopted Regulation ECC 797/85 in 1985, inspiring Member States to fund agri-environmental schemes in environmentally sensitive areas. Council Regulation (EEC) 797/85, art. 19, 1985 O.J. (L 93) 10. In 1992, as part of wider Common Agricultural Policy reform, this was amended to require all Members to implement agri-environmental programs, which could apply everywhere, not just on designated lands, and would be eligible for EU co-funding. Council Regulation (EEC) 2078/92, 1992 O.J. (L 215) 85–92.

184. JOHN MARTIN, THE DEVELOPMENT OF MODERN AGRICULTURE: BRITISH FARMING SINCE 1931, at 179 (2000); *see* Agriculture Act 1986 § 18 (discussing designation and management of environmentally sensitive areas).

185. Uwe Latacz-Lohmann & Ian Hodge, *European Agri-environmental Policy for the 21st Century*, 47 AUSTRALIAN J. AGRIC. & RESOURCE ECON. 123, 129 (2003). This approach is also reflected in the EU’s Common Agricultural Policy, based on the goal of supporting agricultural areas to “meet the wide-range of economic, environmental, and societal challenges.” *Second Pillar of the CAP: Rural Development Policy*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/factsheets/en/sheet/110/second-pillar-of-the-cap-rural-development-policy> (last visited Nov. 3, 2019).

186. POTTER, *supra* note 144, at 94.

187. *See id.* at 94–95 (noting that priority was given to land managers with certain types of land and that the scheme reflected a more “entrepreneurial approach to countryside management”).

outcomes, like conserving marshes, rather than paying to impose sustainable farming practices on recalcitrant farmers.<sup>188</sup> This program gave the farmers discretion in managing their operations as long as they met their conservation targets. With the CCS, market-based principles arrived in British agri-environmental policy and “focusing on outputs rather than processes offered a means of achieving a more decisive decoupling of environmental support from agricultural objectives.”<sup>189</sup>

As late as the 1980s, the National Trust had remained on the sidelines during discussion of agri-environmental matters. It followed the national pattern of encouraging production on its agricultural holdings, using them as a source of income for other activities, particularly the large estates in its care. But, by the 1990s, the Trust changed its approach to its more than half-million acres of agricultural land. An internal planning process, plus new leadership and changes in key staff, led to Strategic Plans that outlined environmental principles for management of National Trust lands. For example, the 1998 Strategic Plan expresses a goal of “becom[ing] better known as a body involved in the conservation of the environment,” and working under three main environmental principles:

- prevent avoidable damage caused by human impact on the environment;
- protect the National Trust’s long-term interests from environmental damage;
- be an exemplar of good environmental practice.<sup>190</sup>

Preserving nature in the British countryside requires that farmers, tenants, and land managers adjust their practices to provide conservation benefits while surviving economically. Farming in Britain is profitable only to the extent that it is subsidized.<sup>191</sup> The National Trust now believes that conservation of agricultural lands requires active, environmentally conscious management of working landscapes, not business as usual for farmers.<sup>192</sup> This approach requires the National Trust to “devise a farming aesthetic that is not twee, not a

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188. *See id.* at 93–95 (discussing “the discretionary principle” promoted by the Countryside Commission).

189. *Id.* at 94. This does not alter the fact that conservation is achieved by paying farmers, which presupposes that, uncompensated, they have the right to destroy marshes or habitat. Nevertheless, given the structure of post-1947 British agricultural policy, these incentives remain a way to prevent the destruction of countryside to produce surplus and unneeded crops.

190. NAT’L TR., STRATEGIC PLAN 4, 8 (1998).

191. Interview with David Riddle, Dir. of Land Use, Nat’l Tr., in Swindon, Eng. (April 21, 2003).

192. Interview with Paul Boniface, *supra* note 13.

form of decorative play-acting, but one capable of an authentic, self-sustaining existence”—recognizing that it will still need to be subsidized.<sup>193</sup> The National Trust promotes traditional farming, not the intensive agriculture of the last fifty years, though it recognizes that even traditional farming practices can be damaging.<sup>194</sup> For example, while grazing can be essential to the survival of upland meadows, overgrazing can have severe impacts. The National Trust works with its tenants to minimize that damage.

In practice, improving environmental conditions on farmlands means creating markets and educating both farmers and consumers. Perhaps surprising to Americans, the National Trust lacks the authority to impose new restrictions on most of its own farmland. Lessees or tenants enjoy enormous rights in Britain, derived from centuries of practice and inscribed in 1949 legislation. They include the right for tenants, not the landowner, to make virtually all farm management decisions on leased lands.<sup>195</sup> In the 1980s, existing leases were statutorily extended for three generations.<sup>196</sup>

In 1995, national legislation reflecting agri-environmental priorities gave landowners—including the National Trust—more leeway to negotiate with tenants regarding practices, but only with leases signed after the legislation passed.<sup>197</sup> The National Trust is now able to impose conservation requirements on new leases, but turnover is slow.<sup>198</sup> The vast majority of National Trust leases are based on the pre-1995 rules, so the National Trust must rely primarily on persuasion and incentives. It tries to use its persuasive power to encourage better practices, provide education and other resources, and of course the National Trust pays farmers to engage in preferred practices.<sup>199</sup> Instead of trying to include environmental requirements in the leases themselves, the National Trust engages in contracts with farmers afterwards paying them for results achieved.<sup>200</sup> This may better

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193. Jane Shilling, *Around the National Trust's Great Work of Preservation and Environmental Care There Lingers the Taint of Tweeness*, TIMES (London), May 31, 2001, at 7. According to Michael Quinion, “twee” means “excessively or affectedly quaint, sentimental or mawkish, sometimes coupled with words like *nauseatingly*. It’s a strongly negative word, and a very useful one, that is in common British use.” Michael Quinion, *Twee*, WORLD WIDE WORDS (Jan. 6, 2001), <http://www.worldwidewords.org/qa/qa-twe1.htm>.

194. Interview with David Riddle, *supra* note 191.

195. Interview with Paul Boniface, *supra* note 13.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

guarantee results or at least avoid wasted payments.

Negotiating with farmers is typically done through whole farm planning.<sup>201</sup> Though predictably skeptical at first, most of the National Trust's tenant farmers are now keen on whole farm planning, seeing in it an opportunity to keep their farms economically viable.<sup>202</sup> In the process, the National Trust provides environmental audits on its lands and makes covenants with tenants to restrict farm practices, as well as separate management agreements, for example regarding public access and tree protection.<sup>203</sup>

The whole farm planning process is accompanied by a wide range of strategies to encourage environmentally sound farming. First, the National Trust acts like an extension service, employing a corps of more than sixty specialists who provide tenants (and National Trust staff) information and guidance on agriculture and the environment, promoting new technology and practices.<sup>204</sup> The National Trust is now more focused on incentivizing soil health, pollinators, and clean water, and is encouraging "carbon farming" approaches that will pay farmers for using them. Also, the National Trust is calling for government to commit to these priorities as a long-term strategy via the Agriculture Act.

Second, the National Trust provides financial and technical assistance to tenants. For example, it helps pay for organic conversion and certification, and it helps tenants find other non-farm sources of income, including part-time work with the National Trust.<sup>205</sup> Third, the

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201. See *What is Whole Farm Planning?*, VA. TECH, [https://www.vabeginningfarmer.alce.vt.edu/planning/whole\\_farm\\_planning.html](https://www.vabeginningfarmer.alce.vt.edu/planning/whole_farm_planning.html) (last visited Nov. 20, 2019) ("The whole farm plan . . . is a process for short-term and long-term decision making and evaluation that takes into consideration of the whole farm."); cf. NATIONAL TRUST, RESPONSE TO THE CONSULTATION ON THE FUTURE FOR FOOD, FARMING AND THE ENVIRONMENT IN A GREEN BREXIT BY THE NATIONAL TRUST 22–26 (May 8, 2018), <https://nt.global.ssl.fastly.net/documents/defra-future-of-farming-consultation-may-2018--nt-response.pdf> ("We believe that farmers will continue to have a critical role in producing safe and sustainable supplies of food, and they will have a crucial part to play alongside other land managers in improving biodiversity, protecting vulnerable and finite natural resources upon which our economy depends, caring for our landscapes and heritage, looking after the welfare of livestock, helping to address growing challenges like climate change and flooding, and providing opportunities for recreation and reconnection with the natural world and food production by the public.").

202. Interview with Ian Hodge, Professor of Rural Econ., Univ. of Cambridge, in Cambridge, U.K. (April 18, 2003).

203. *Id.*

204. *Id.*

205. As of 2009, seven percent of National Trust farm operations were certified organic. NAT'L TR., APPETITE FOR CHANGE 11 (2009), <https://nt.global.ssl.fastly.net/documents/view-the-appetite-for-change-report.pdf>.

National Trust has special programs to train young farmers in farming and countryside management skills, including marketing, to help them break into the local food economy. For example, it assisted tenants in Somerset to set up a butcher's room and farm shop, for a meat business called "From the Moor to your Door," and it sources an increasing amount of meat and produce for its own restaurants and tea rooms from local tenant farms.<sup>206</sup> The National Trust promotes a "buy local, buy seasonal" approach to its members and the public, advertising products available from National Trust farms.<sup>207</sup> To create agri-tourism opportunities and support rural businesses, the National Trust offers assistance to farmers for farm diversification, such as adapting farm buildings into bed and breakfasts.<sup>208</sup> Finally, the National Trust has created programs that incentivize farmers to adopt practices that enhance soil health, protect pollinators, improve water quality, and sequester carbon. They also actively advocate for government to do the same on a larger scale, through the Agriculture Act.<sup>209</sup> In these ways, the National Trust has taken an active role in trying to improve environmental conservation and profitability of agriculture even where it has little ability to put such elements into its leases.

The National Trust does not restrict itself to working with its farmers. Importantly, it has become active in policy debates around agriculture and the environment, taking positions on regional, national, and international issues. During World Trade Organization

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206. Janet Murray, *Back to the Garden*, INDEPENDENT (Sept. 3, 2004), <https://www.independent.co.uk/life-style/food-and-drink/features/back-to-the-garden-551555.html>; see also *Farm Fresh Meat Boxes*, NAT'L TR., <https://www.nationaltrust.org.uk/features/farm-fresh-meat-boxes> (last visited Oct. 31, 2019) (listing National Trust farms that produce meat boxes).

207. See *Food*, NAT'L TR., <https://www.nationaltrust.org.uk/food> (last visited Oct. 31, 2019) (containing electronic version of information also periodically available in brochure form). See generally NAT'L TR., APPETITE FOR CHANGE, *supra* note 205 (highlighting National Trust farmers and food production).

208. *Grants and Funding*, NAT'L TR., <https://www.nationaltrust.org.uk/features/grants-and-funding> (last visited Oct. 31, 2019); see *Find a Bed and Breakfast*, NAT'L TR. <https://www.nationaltrust.org.uk/features/find-a-bed-and-breakfast> (last visited Nov. 1, 2019) (noting that "[m]ore than 80 of [the National Trust's] tenants offer bed and breakfast accommodation in some of the special places [they] care for").

209. See *New Research Shows that at Least £3bn is Needed for Nature-Friendly Farming*, NAT'L TR. (Sept. 19, 2019), <https://www.nationaltrust.org.uk/press-release/new-research-shows-that-at-least-3bn-is-needed-for-nature-friendly-farming> ("If the government wants farmers to get on board with restoring nature it must provide the certainty and security of long-term funding, backed by first class and first-hand advisory services. . . . We hope that Ministers will take it on board and guarantee this money for farmers not just for the next one or two years, but at least the next decade. The Agriculture Bill must also be reintroduced to the next session of Parliament, so we don't lose the progress that's already been made.").

negotiations over the restructuring of agricultural subsidies and the parallel EU-level discussions of Common Agricultural Policy reform,<sup>210</sup> the National Trust advocated for more government-funded environmental grant programs for farms, such as Countryside Stewardship Schemes and still continues to encourage its tenants to use these programs.<sup>211</sup> But it has also argued, more locally, for regulatory and inspection regimes that will allow the survival of infrastructure necessary for small-scale, sustainable food production, e.g. small, local abattoirs and processing plants.<sup>212</sup>

The upshot is that on its agricultural lands, the National Trust is limited by what it can make its tenants do and the costs of doing it. However, the National Trust is much better regarded now on environmental matters and is considered a serious player.<sup>213</sup>

## 2. Land Acquisition is So Passé

While it has gone seriously into environmentally sensitive land management and agricultural policymaking, the National Trust has mostly gone out of the business of acquiring land to protect it.<sup>214</sup> When it does acquire land, the focus is not on adding country houses, but on Britain's ecologically sensitive coastline and to provide green spaces close to urban areas.<sup>215</sup> While the National Trust still does acquire occasional country houses, the projects are increasingly justified by the grounds, not the homes or objects.<sup>216</sup> Moreover, the National Trust will acquire new properties only in areas where they already own a critical mass of related resources.<sup>217</sup> And, the National Trust now treats

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210. Within this debate, the National Trust aligned itself with the British government's stance on agricultural policy: that farmers should rely on the market rather than subsidies, and that to receive subsidies, they must produce public benefits, i.e. conservation values. Hodge, *supra* note 202; John Vidal, *National Trust Calls for Complete Reform of British Farm Subsidies*, GUARDIAN (Aug. 4, 2016), <https://www.theguardian.com/environment/2016/aug/04/national-trust-calls-for-complete-reform-of-british-farm-subsidies>.

211. Ian Hodge, *supra* note 202.

212. *Id.*

213. *Id.*

214. See WEIDEGER, *supra* note 42, at 248–49 (“[F]rom the beginning of the 1990s, the Trust has entered a phase where it doesn't yearn for country houses as it did in the 1940s”).

215. Personal Communication from Harry Bowell, Chief Operating Officer, Nat'l Tr., to Jessica Owley (Nov. 6, 2019) (explaining that the term acquisition is now used broadly to include fee ownership, lease agreements, and U.S.-style conservation covenants).

216. See WATERSON, *supra* note 48, at 218–20 (discussing the Trust's acquisition of Calke Abbey in 1982 for its surrounding lands).

217. Interview with Paul Boniface, *supra* note 13; Interview with Harry Bowell, *supra* note 171.

potential property donors less deferentially.<sup>218</sup>

When coastal acquisition became a focused program, the National Trust already owned 187 miles of coast.<sup>219</sup> The acquisition effort solidified in 1965 following a coastal survey from which the National Trust identified 900 miles of undeveloped coastline as worthy of acquisition.<sup>220</sup> With HRH Duke of Edinburgh in nominal charge, the National Trust launched the coastal protection program with a goal of raising £2 million.<sup>221</sup> The program ground to a halt in the 1960s and 1970s but was relaunched in 1985 as Enterprise Neptune and became the National Trust's most popular and successful program in history.<sup>222</sup> By 2015, it had raised "tens of millions" and secured more than 740 miles of coastline.<sup>223</sup>

But acquisition itself is not the only arrow in the modern National Trust's quiver. The Enterprise Neptune<sup>224</sup> treasury includes funds to go beyond acquisition and to do the work of conserving, and in many instances, dramatically improving coastal areas.<sup>225</sup> The work includes funding research, such as a study to help the National Trust understand how coastal change, erosion, sedimentation, and global warming will affect its properties.<sup>226</sup> Based on study results, it has cooperated with

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218. See Cannadine, *supra* note 10, at 26 (noting that the preservation of country homes is no longer as important of a priority to the Trust and stating that the houses "are now being treated less deferentially and more historically").

219. WATERSON, *supra* note 48, at 191; see also *id.* at 183–236 (discussing the importance of "Binding Together" rather than a "Patchwork" approach that characterized many of the National Trust acquisitions).

220. An earlier proposal by G.M. Trevelyan in the 1930s foundered on lack of funds. See *id.* at 77–78, 165.

221. WEIDEGER, *supra* note 42, at 138.

222. Keith Clayton, *The Coast*, in *THE NATIONAL TRUST: THE NEXT HUNDRED YEARS* 70, 72–73 (Howard Newby ed., 1995); see also Harry Batsford, *Country and Coast*, in *THE NATIONAL TRUST: A RECORD OF 50 YEARS' ACHIEVEMENT* 9, 9–28 (James Lees-Milne ed. 1945) (discussing the coast). Cannadine describes the original launch of the program in 1965 as part of the National Trust's renewed role in protecting natural beauty. Cannadine, *supra* note 10, at 24–25.

223. Patrick Barkham, *How the National Trust Saved our Coastline*, TELEGRAPH (Mar. 31, 2015), <https://www.telegraph.co.uk/travel/destinations/europe/united-kingdom/articles/How-the-National-Trust-saved-our-coastline/>.

224. This was renamed in 1999 to the Neptune Coastline Campaign. See *Telling Neptune's Story 50 Years On*, NAT'L TR., <https://www.nationaltrust.org.uk/features/fifty-years-of-neptune-coastline-campaign-> (last visited Nov. 1, 2019) (referring to the program as the Neptune Coastline Campaign).

225. *Neptune Coastline Campaign: Land Use 1965*, NAT'L TR. OPEN DATA (Oct. 19, 2015), [https://uk-nationaltrust.opendata.arcgis.com/datasets/64c3e911034f40829d288e1cd908415a\\_0](https://uk-nationaltrust.opendata.arcgis.com/datasets/64c3e911034f40829d288e1cd908415a_0).

226. See NAT'L TR., *SHIFTING SHORES* 14 (2015), <https://nt.global.ssl.fastly.net/documents/shifting-shores-report-2015.pdf> (discussing National Trust research and programs to protect the coastline).

U.K. Climate Impacts Programme, Welsh Government, Department of Environment, Food, and Rural Affairs, and the Environment Agency to develop a Coastal Risk Assessment that will help it direct its management activities.<sup>227</sup>

### 3. The Future is Local and Urban

In a push for broader ideas of heritage protection and to involve more people in its conservation efforts, the National Trust has begun looking beyond the English countryside for special places to protect. It has increased its industrial and urban sites, for example,<sup>228</sup> and its theme for 2019 is the “Peoples’ Landscapes.”<sup>229</sup> This fits in with its new effort to devote £25,000 to acquisition of land at the urban fringes.<sup>230</sup>

Beyond changing the physical location of its efforts, the National Trust is also seeking to work more with local organizations. Recognizing that benefits can come not just where the National Trust is a landowner but also where it can work with other landowners, the National Trust has developed outreach programs and a consultancy service.<sup>231</sup> The National Trust’s strategic plan emphasizes growing these efforts and recognizing more opportunities to move into new areas both geographically and philosophically.<sup>232</sup>

The National Trust got started very shortly after the earliest U.S. land trusts, but it became much bigger much faster. Surrounded by similarly situated private organizations (like RSPB) and in the absence of dominant government action on conservation, the National Trust rapidly became not simply *a* force in land conservation but *the* force.

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227. *Id.*; NAT’L TR., SHIFTING SHORES – ADAPTING TO CHANGE 4 (2014), <https://nt.global.ssl.fastly.net/documents/shifting-shores-report.pdf>; NAT’L TR., SHIFTING SHORES – PLAYING OUR PART AT THE COAST (2015) <https://nt.global.ssl.fastly.net/documents/shifting-shores-report-2015.pdf>.

228. *National Trust to Focus on Cities and Towns in a “Radical” New Urban Approach*, TELEGRAPH (Apr. 20, 2018), <https://www.telegraph.co.uk/news/2018/04/20/national-trust-focus-cities-towns-radical-new-urban-approach/>. The National Trust began protecting “industrial monuments” in 1963. Cannadine, *supra* note 10, at 24.

229. The People’s Landscape theme seeks to highlight social and political changes, bringing in research and history that goes beyond protecting open space and places to hike. *Unearthing Stories of Passion and Protest*, NAT’L TR., <https://www.nationaltrust.org.uk/features/unearthing-stories-of-passion-and-protest> (last visited Nov. 3, 2019).

230. Personal Communication from Harry Bowell to Jessica Owley, *supra* note 215.

231. *External Partnerships Team*, NAT’L TR., <https://www.nationaltrust.org.uk/lists/external-partnerships-team> (last visited Nov. 3, 2019); Interview with Paul Boniface, *supra* note 13.

232. See NAT’L TR., PLAYING OUR PART 21 (2015), <https://nt.global.ssl.fastly.net/documents/national-trust-playing-our-part.pdf> (“We will explore and give support to local authorities, charities and communities in how to manage local heritage and green space, drawing on our own experience of the day-to-day maintenance of green spaces and heritage.”).

That said, it has been far less consistent in its nearly a century of prominence than the United States' expanding array of organizations has been since the 1980s. Two world wars and a global depression led to major upheavals in patterns of landownership, authorities for land-use planning, and agricultural intensity in the U.K. That in turn led the National Trust to wander from its early commitment to protecting access to the countryside for the poor into the dual grasp of government largesse and protection of the landed gentry and their piles. The pushback was gradual but decisive. It is a shift that so changed the public perception of the National Trust that it will never be fully thought of as an environmentalist organization. This shifting on the National Trust's position on major issues—its relationship to government, government support, and political advocacy; its priorities and view of the public beneficiaries it serves; and its role in land and landscape management—have been epic and instructive.

The U.S. conservation movement will adapt in the coming decades to upheavals in government and environmental crises no less severe than the twentieth century's two world wars and depression. Still in its adolescent stages, even though America's oldest land trusts are actually older than the National Trust, the U.S. movement has barely begun to adjust to the changes foisted upon us all. But the issues that have driven reform in the National Trust are clearly on the agenda for U.S. organizations, and the National Trust experience could provide useful food for thought in seeking the necessary change.

### III. THE U.S. LAND TRUST MOVEMENT

Although private land conservation in the United Kingdom and the United States emerged around the same time, their paths and legal tools differ. This section gives broad contours of the U.S. land trust movement to highlight these similarities and differences. Thereafter, we rehearse some of the main critiques of the more contemporary U.S. private land conservation movement. This sets the stage for our contention that despite the differences, the National Trust still has something to teach us Yanks. We conclude by contemplating how the three patterns in the National Trust's journey offer guidance for the over 1,500 land trusts that dot the United States along with the Land Trust Alliance, the umbrella organization that seeks to unite them.

### A. *Early Days—Private Land Conservation and the Founding of a Nation*

Federal authority over land within states was originally regarded as quite limited.<sup>233</sup> Initially, states had to consent to any federal acquisitions within their boundaries and then formally cede the land to Congress.<sup>234</sup> Second, and toothier in the long run, the purposes for which land may be acquired were confined to provision of “needful buildings” such as forts and arsenals.<sup>235</sup> States passed general statutes consenting to federal acquisitions and ceding land to the central government.<sup>236</sup> But more general federal land acquisition authorities that would enable land conservation were slow to emerge.

Early acquisitions of private land for conservation purposes were small and almost uniformly undertaken by private parties. Individuals and small groups protected particular sites that now seem irrefutably of national importance: George Washington’s and Andrew Jackson’s homes were acquired by associations of civic-minded women, after both the state and federal government debated and declined to protect the properties.<sup>237</sup> Thomas Jefferson’s home was protected through purchase by a private individual.<sup>238</sup> Major revolutionary war sites, including sites of the Battle of Bunker Hill, the Battle of Yorktown, and Fort Ticonderoga were acquired for protection by private action.<sup>239</sup>

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233. Constitutional provisions authorizing federal acquisition of private land within states are separate from and different from Congressional authorities over the public domain. Nevertheless, they are frequently conflated by lawyers, courts, and students. But the distinctions, particularly regarding legitimate federal purposes for acquiring private land within states, continue to have weight. *See generally* Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy*, 39 NAT. RESOURCES J. 649, 703–709 (1999) (discussing federal authority to acquire and retain land); David E. Engdahl, *State and Federal Power over Federal Property*, 19 ARIZ. L. REV. 283 (1976) (same).

234. *See* U.S. CONST. art. 1 § 8, cl. 17 (“[T]o exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”).

235. *Id.*

236. That has not kept states from complaining about the extent of federal land within their borders, or from exacting an enormous price in federal dollars for tolerating the “burdens” of federal land ownership. *See* SALLY K. FAIRFAX & CAROLYN E. YALE, *FEDERAL LANDS: A GUIDE TO PLANNING, MANAGEMENT, AND STATE REVENUES* 4–5 (1987) (discussing the states’ “increasingly aggressive stance” on land management).

237. FAIRFAX ET AL., *supra* note 119, at 1–2; Debby Patterson Koch & Emily J. Reynolds, *How Ladies’ Hermitage Association Proved Vital to Preserving Andrew Jackson’s Legacy in Nashville*, TENNESSEAN (Mar. 14, 2019), <https://www.tennessean.com/story/opinion/2019/03/15/ladies-hermitage-association-andrew-jackson/3148853002/>.

238. *See generally* MARC LEEPSON, *SAVING MONTICELLO: THE LEVY FAMILY’S EPIC QUEST TO RESCUE THE HOUSE THAT JEFFERSON BUILT* (2002).

239. Discussed with appropriate brevity in FAIRFAX ET AL., *supra* note 119, at 30–35.

In the Western territories, soon to become states, federal resource protection programs evolved in the context of withholding public domain land from disposition to states or private parties.<sup>240</sup> Beginning in 1832 (when Congress set aside Hot Springs in what would become Arkansas the following year)<sup>241</sup> and culminating in 1891<sup>242</sup> (with a grant of general authority to “set apart and reserve” public domain lands “wholly or in part covered with timber or undergrowth, . . . as public reservations”), Congress gradually evolved programs and federal agencies for retaining and managing public domain land. With this move, the federal government became and remains the dominant force in land conservation.

### *B. Post-Civil War Federal Authority to Acquire and Manage Land*

The law of federal acquisitions (as opposed to retention) was clarified significantly in the context of protecting the Civil War battlefield in Gettysburg from construction of a railroad.<sup>243</sup> The aggrieved railroad challenged the condemnation of the historic battlefield.<sup>244</sup> In *United States v. Gettysburg Electric Railway Company*, the Supreme Court considered two basic questions: first, did the

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240. The history of the U.S. West is littered with hissy fits by western states and resource developers—more recently the Sagebrush Rebellion of the Reagan era and the occupation of the Malheur Wildlife Refuge in January 2016 by disgruntled grazing lessees and others. However, the question of authorities was resolved early in the 20<sup>th</sup> century in a series of cases. See *Camfield v. United States*, 167 U.S. 518, 525 (1897) (holding that the federal government has police powers akin to a state on federal public lands); *Light v. United States*, 220 U.S. 523, 536 (1911) (“The United States can prohibit absolutely or fix the terms on which its property may be used.”); *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (“Congress exercises the powers both of a proprietor and of a legislature over the public domain.”). Basically, “[t]he power over the public lands thus entrusted to Congress is without limitations.” *United States v. San Francisco*, 310 U.S. 16, 29 (1940). Neither the constitutional provision nor subsequent case law has stopped advocates from using more political processes, particularly in the U.S. Senate, to keep the management weak and manipulatable.

241. SHARON SHUGART, *HOT SPRINGS NATIONAL PARK: A BRIEF HISTORY OF THE PARK* (2003), <http://npshistory.com/publications/hosp/bathhouse-row-brief-history.pdf>.

242. FAIRFAX ET AL., *supra* note 119, at 58–59; Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1095. Both reservations and acquisition of timberlands actually began late in the 18<sup>th</sup> century when Congress authorized funds to support the Navy. FAIRFAX ET AL., *supra* note 119, at 26–27.

243. President Lincoln’s famous address dedicated a private cemetery. FAIRFAX ET AL., *supra* note 119, at 53. A single individual began purchasing key sites almost literally before the smoke cleared. Over the next thirty years, private and state efforts to protect the Gettysburg battlefield were overwhelmed by growth and development in the area. As a railroad planned developments on key sites, Congress directed the Secretary of War to acquire the vulnerable land by purchase or condemnation. *Id.* at 55.

244. *Id.* at 55 (citing RONALD F. LEE, *THE ORIGIN AND EVOLUTION OF THE NATIONAL MILITARY PARK IDEA* 14–15 (Nat’l Park Serv. ed., 1973), <http://npshistory.com/publications/nmp-idea.pdf>).

federal government have authority to condemn private property; and second, was the action in pursuit of an authorized public purpose?<sup>245</sup> Although the first question was, by that time, relatively easily answered in the affirmative, finding an authorized federal purpose was more difficult. The Court's resolution of the railroad case had little to do with federal authority over land; instead, it turned on the General Welfare clause and war powers, holding congressional action to "enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them . . . must be valid."<sup>246</sup> The decision did not include—and, indeed, appeared to reject—condemnations for aesthetic or land conservation purposes.<sup>247</sup> That vexed and complicated conservation acquisition efforts for another half century. Indeed, it appeared as though land acquisition for conservation by the federal government was not authorized by the Constitution.

Around the same time as the *Gettysburg* case, and primarily in the East, a new type of private conservation organization emerged. One exemplar of this new breed of organization is The Trustees of [Public] Reservations ("The Trustees"), founded in 1891.<sup>248</sup>

While public land protection emerging in the West centered on retained lands, the East (with no public lands to speak of) was largely left out.<sup>249</sup> Looking around his hometown of Boston, Landscape Architect Charles Eliot saw rapid industrialization with no provisions being made for open space or parkland.<sup>250</sup> For a few years, Eliot had been exploring ideas for private land conservation. Eliot had learned of Robert Hunter's 1884 proposal for a landholding society and when Eliot traveled to Europe in 1885–1886 to study the landscape, he went to the Lake District to meet with Hardwicke Rawnsley.<sup>251</sup> There was regular correspondence at that time among American and British land

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245. 160 U.S. 668, 679 (1896).

246. *Id.* at 681.

247. See Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 19 (1980) (noting that "[t]he most controversial class of governmental takings probably reflects the general tenor in property law against allowing governments too much latitude to enforce 'esthetic' purposes").

248. *Trustees History*, TRUSTEES OF RESERVATIONS, <http://www.thetrustees.org/about-us/history/> (last visited Sept. 22, 2019). 'Public' dropped from the name in 1954 to avoid any implications of government ownership of land. *Id.*

249. *Id.*

250. *Id.*

251. Melanie Hall, *Octavia Hill and the National Trust*, in OCTAVIA HILL, SOCIAL ACTIVISM, AND THE REMAKING OF BRITISH SOCIETY 209, 215–16 (Elizabeth Baigent & Ben Cowell eds., 2016), [https://www.jstor.org/stable/j.ctv4w3whm.17?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/j.ctv4w3whm.17?seq=1#metadata_info_tab_contents).

conservationists.<sup>252</sup>

Shortly after returning home, Eliot wrote a letter to *Garden and Forest* calling for the preservation of special places.<sup>253</sup> Specifically, he proposed a new type of nonprofit organization that could hold land for the public to enjoy without the burden of having to pay taxes on the land.<sup>254</sup> Eliot and colleagues petitioned the Massachusetts legislature to charter an organization to acquire and preserve scenic and historic properties “for the benefit of the public.”<sup>255</sup> The charter was granted in 1891 and within a decade “The Trustees” had acquired four properties.<sup>256</sup> The organization began to work with city officials to develop a system of parks and beaches throughout the Boston area, citing the need to protect land in order to protect Boston’s water supply.<sup>257</sup> “The Trustees’ continue to thrive as a major force in private land conservation and probably the “first” land trust.”<sup>258</sup>

“The Trustees” model was widely replicated throughout New England.<sup>259</sup> For example, a similarly situated group of “wealthy

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252. *Id.* at 215. Some suggest that the National Trust was influenced by the formation of the Trustees and others that the Trustees were influenced by the National Trust founders. *See, e.g.,* E. Lynn, *Charles Eliot*, NATIONAL ASSOCIATION FOR OLMSTED PARKS, <http://www.olmsted.org/the-olmsted-legacy/charles-eliot> (last visited Sept. 22, 2019) (“Within two years [of founding the Trustees], Eliot’s concept was used to establish Britain’s National Trust.”). We believe both of these statements to be true. These activists were in communication with each other and influenced one another. Rawnsley, Hunter, and Hill helped motivate Eliot in the founding of the Trustees. The existence of the Trustees was in part a model for the National Trust. It may be that the idea was originally British but the more nimble Americans moved faster. We may not be able to ever answer the “who came first question,” nor do we think it an important one.

253. *Trustees History*, TRUSTEES OF RESERVATIONS, <http://www.thetrustees.org/about-us/history/> (last visited Sept. 22, 2019).

254. *See id.* (comparing such an organization to a library or museum).

255. FAIRFAX ET AL., *supra* note 119, at 50 (citing GORDON ABBOTT, *SAVING SPECIAL PLACES* (1993)). The Land Trust Alliance is inconsistent regarding the “first” land trust, in one place asserting that the oldest [unnamed] land trust was founded in 1843, which strikes us as unlikely, *National*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/census-map/#National> (last visited Sept. 22, 2019), and elsewhere citing 1891, which sounds like The Trustees, which makes eminent sense.

256. FAIRFAX ET AL., *supra* note 119, at 51. They now hold about 25,000 acres in more than 100 properties. *Tools and Techniques*, TRUSTEES OF RESERVATIONS, <http://www.thetrustees.org/what-we-care-about/land/how-we-work.html> (last visited Sept. 22, 2019).

257. *See generally* Karl Haglund, *Emerald Metropolis*, 53 *ARNOLDIA* 2 (1993) (discussing the protection of Boston’s natural environment).

258. FAIRFAX ET AL., *supra* note 119, at 157–58. ABBOTT, *supra* note 255 remains the best general source on The Trustees.

259. FAIRFAX ET AL., *supra* note 119, at 51. The Trustees are frequently referenced in connection with the founding of the National Trust in England.

Bostonians who summered on the coast of Maine” (also led by Eliot), formed themselves into the Hancock County Trustees of Public Reservations and began acquiring private land on Mt. Desert Island.<sup>260</sup> Eventually their land was donated to the National Park Service to incubate Acadia National Park.<sup>261</sup>

### *C. Depression and Wars Shift Conservation Efforts*

In the land conservation field, the decades immediately following World War II were dominated by discussions of recreation: briefly summarized, the public recreation lands were in the Western states while the people were in the east.<sup>262</sup> Moreover, and not entirely coherently, the parks were vastly overused, “loved to death,” and in need of maintenance, expansion, and more facilities.<sup>263</sup> Indeed, these concerns echo the ones voiced by the National Trust around the same time: How can we provide access to these lands while protecting them? In 1964, recreation and conservation advocates missing the New Deal urgency and funding for federal conservation acquisitions succeeded in convincing Congress to create a Land and Water Conservation Fund (“LWCF”) to continue the pace of federal land acquisition.

The Land Water Conservation Fund Act of 1965 established a fund for acquiring land (state or federal) for outdoor recreation

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260. *Id.* at 83.

261. *Id.* Although not complaining about the park itself, the National Park Service nevertheless grumped characteristically that “the idea of wealthy property owners deciding which local properties would constitute a national park and retaining private parcels included in the protected area raises significant concerns about equity and public accountability.” *Id.* The transaction also reflects the National Park Service’s limited acquisition authorities and early reliance on private donations, which include parts of Shenandoah, Great Smoky Mountain, Grand Teton, and Cape Hatteras, among others.

262. See generally SAMUEL T. DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY* 190–206 (1980).

263. See *OUTDOOR RECREATION RES. REVIEW COMM’N, OUTDOOR RECREATION FOR AMERICA: A REPORT TO THE PRESIDENT AND TO THE CONGRESS*, 25–53 (1962) (discussing increase in demand for outdoor recreation areas). A list of the Outdoor Recreation Resources Review Commission reports is available at *The Online Books Page*, *OUTDOOR RECREATION RES. REVIEW COMM’N*, <http://onlinebooks.library.upenn.edu/webbin/book/lookupname?key=United%20States%2e%20Outdoor%20Recreation%20Resources%20Review%20Commission> (last visited Nov. 1, 2019); Dayton Duncan, *Are We Loving Our National Parks to Death?*, N.Y. TIMES (Aug. 6, 2016), <https://www.nytimes.com/2016/08/07/opinion/sunday/are-we-loving-our-national-parks-to-death.html>. But see Douglas Scott, *You Should Stop Saying “We are Loving National Parks to Death,”* *OUTDOOR SOC’Y* (May 15, 2018), <http://outdoor-society.com/you-should-stop-saying-we-are-loving-national-parks-to-death/> (arguing that media titles claiming that National Parks are being “loved to death” wrongly put the blame on visitors rather than lack of government funding).

purposes.<sup>264</sup> Although LWCF appropriations never met advocates' aspirations, it has encouraged state-level recreation planning and continued to provide a relatively small but stable fund for state and federal land acquisitions.<sup>265</sup> Perhaps as significant, it provided a context in which regional and national groups emerged to lobby for acquisition funding, identify specific parcels, organize advocates to support acquisition priorities, and assist the land management agencies in landowner relations and appraisals required by the statute. Three national groups—The Nature Conservancy, The Trust for Public Land, and the Conservation Fund—gained stature and stability in the early days of LWCF related advocacy.<sup>266</sup> However the inadequacy of the LWCF in the face of resource loss accompanying post-war suburbanization and urban sprawl contributed to the emergence of the modern land trust movement.

#### D. 1980–2019

What we now think of as the land trust movement took off as the Reagan Administration (1981–1989) embraced deregulation and the contracting out of basic government functions; land trusts emerged at center stage.<sup>267</sup> Land trusts were not, of course, new in the 1980s. Nevertheless, when they began forming in large numbers, many regarded them as a major innovation in fields as diverse as ecological and historic conservation and protection of family farms. Further, as was appropriate to Reagan-era emphases on downsizing, outsourcing, and deregulating, the land trusts promoted themselves as a private

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264. The Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, § 1(b) 78 Stat. 89, 89 (1964).

265. Jessica Owley & Jess Phelps, *Federal Land Conservation in Rural Areas*, 5 TEXAS A&M J. PROP. L. (forthcoming 2020) (describing the mechanics of the Land Water Conservation Fund).

266. Of these, one group stands apart from the recreation and “parks for the people.” The Nature Conservancy evolved out of the Ecological Society of America. Emphasizing direct action by identifying and acquiring land to protect rather than scholarly study and publication, The Nature Conservancy was incorporated in 1951 and made its first purchase a year later. It developed a revolving loan fund for supporting transactions—the Land Preservation Fund, which remains a major acquisition tool. *Our History*, NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/our-history/> (last visited Sept 15, 2019); see also FAIRFAX ET AL., *supra* note 119, at 153–55 (discussing The Nature Conservancy, The Trust for Public Land, and The Conservation Fund). The Trust for Public Land broke away from The Nature Conservancy in 1973 to emphasize just the recreation, people, and urban priorities that The Nature Conservancy abjured. The Conservation Fund emerged last in 1985 and focused more on creating partnerships and funding sources for public/private acquisitions. Of the three, only The Nature Conservancy retains title to a significant portion of the land it acquires.

267. See Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1047 (2006) (discussing deregulation and the rise of market-based “regulation”).

alternative to federal government action, preferable to government exercise of eminent domain and/or equally heavy-handed state and local land-use regulation.<sup>268</sup>

Although the U.S. land trust movement is not monolithic, as is the National Trust, some basics are decidedly national. The Land Trust Alliance (“LTA”), an umbrella group that most land trusts are members of, conducts censuses of land trusts roughly every five years.<sup>269</sup> The LTA’s 2015 census identifies 1,362 active land trusts operating in the United States and lists 56 million acres as protected.<sup>270</sup> The LTA identifies conserving natural areas and wildlife habitats, maintaining water quality, and preserving working farms or ranchlands as the major priorities for its approximately 1,000 member land trusts (not all land trusts are members of the LTA).<sup>271</sup>

Land trusts differ from other conservation NGOs in that they rely primarily on land acquisition to meet their goals. Most of them focus on conserving land in its natural state, but they increasingly protect working landscapes like farms, rangeland, and forestland. Conservation easements are their favorite tool. The census reports show a steady increase in land trust landholdings and a consistent pattern of land conserved by conservation easements outstripping land held in fee simple.<sup>272</sup>

Land trusts are landowner-oriented, and some explicitly so. They work closely with landowners to determine and then oversee conservation rules. With smaller community-based organizations, the restricted landowners are likely to be neighbors and friends (if not donors or board members). But, the benefits largely accrue to the wealthy and, although the LTA reports high levels of public access, other research questions that conclusion.<sup>273</sup> They are facilitators of tax

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268. *See id.* (noting the preference in the Reagan years of market-based approaches).

269. It has done so since 1981, when the UCEA was passed, a year before the LTA was actually established. LAND TR. ALL., 2015 NATIONAL LAND TRUST CENSUS REPORT 2 (2015), <http://s3.amazonaws.com/landtrustalliance.org/2015NationalLandTrustCensusReport.pdf> [hereinafter 2015 CENSUS REPORT].

270. This is down from 1,699 in the previous census and is the first time that the number of land trusts has gone down. *National Land Trust Census*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/about/national-land-trust-census> (last visited Nov. 1, 2019). Note that from this website, users can download the data from the 2005, 2010, and 2015 censuses. Protected acres continue to increase at a steady rate. 2015 CENSUS REPORT, *supra* note 269, at 6.

271. 2015 CENSUS REPORT, *supra* note 269, at 19.

272. *Id.* at 5.

273. *Compare National*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/census-map/#National> (last visited Nov. 1, 2019) (stating that 72% of acres have public access) *with* Jessica Owley & Adena Rissman, *Trends in Private Land Conservation: Increasing Complexity*,

donations and development in their process of protecting the landscape. The landscape that they do protect tends to be rural or suburban. In fact, the 2015 census shows only 19 percent of land trusts even listing urban areas as within their important priorities.<sup>274</sup>

As in the U.K., major legal changes were required to enable the land trust movement. One was a change to state property law and the other a change in federal tax law. Early on in the movement, conservationists realized both that federal land acquisition would be inadequate and that fee simple purchase would be too expensive, too cumbersome, and not always available.<sup>275</sup> The solution was to tweak the law of servitudes to enable private land conservation groups (which we began calling land trusts) to protect conservation values of land and without having to own and manage the whole thing.<sup>276</sup> While these arrangements existed in advance of state laws that officially condoned them, their enforcement was uncertain and parties were not eager to push them too far.<sup>277</sup>

Although the first conservation-easement-like agreement appears to have been written in the late 1880s to protect the parks and parkways of Boston designed by Frederick Law Olmsted,<sup>278</sup> Massachusetts did not actually pass a law permitting conservation easements (which it labels conservation restrictions) until 1956.<sup>279</sup> States slowly followed

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*Shifting Conservation Purposes and Allowable Private Land Uses*, 51 LAND USE POL'Y 76, 81 tbl. 3 (2016) (showing that 22.4% of the conservation easements in a study granted public access and noting that this level appeared to be decreasing over time). Note that the LTA number (72%) is based on acreage and the other study (22.4%) is based on number of conservation easement agreements. As conservation easements increasingly encumber working lands, the percentage of properties with public access is likely to increasingly go down.

274. 2015 CENSUS REPORT, *supra* note 269, at 19.

275. See Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L. J. 121, 127–31 (2011) (discussing the limitations of federal ownership and fee simple ownership).

276. *Id.* at 137–38.

277. *Id.* at 137.

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

279. 1956 Mass. Acts ch. 631. Urban planner William H. Whyte is generally credited with coining the term conservation easement in 1959. Owley, *supra* note 267, at 1044 (citing William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BULL. 1 (1959)). As negative in-gross nonpossessory perpetual restrictions on property, conservation easements are not generally permitted under state servitude laws. While the 1959 Massachusetts law was the first, California soon followed suit. Other states followed adopted statutes similar to either the California or Massachusetts law until the National Conference of Commissions on Uniform State Laws published a model law in 1981. The 2007 version as amended is available on the web at <https://www.uniformlaws.org/HigherLogic/System/>

suit, with a flurry of legislation following the 1981 Uniform Conservation Easement Act (UCEA). The UCEA provided both solid recognition of the land trusts' emergence as a national movement and a coherent platform for expanding on its momentum. By 2004, every state had a conservation easement enabling statute with the exception of North Dakota,<sup>280</sup> which allows non-perpetual conservation easement-like arrangements under its law of servitudes.<sup>281</sup> It became possible to speak with some clarity about conservation easements across the nation, and, perhaps more importantly, for individual state programs to fit themselves into the requirements for donated conservation easement deductions evolving at the federal level.

Conservation easements really took off with the advent of tax benefits. The IRS began authorizing income tax deductions for donations of conservation easement in 1964, before most states even had state laws authorizing the tool.<sup>282</sup> In 1976, Congress added what is now section 170(h) to the Internal Revenue Code and, in doing so, launched the growth of conservation easements and land trusts by enabling large tax deductions for donations of conservation easements to land trusts and government agencies.<sup>283</sup> There can also be significant property and estate tax benefits for landowners.<sup>284</sup>

These changes to U.S. tax law spurred the growth of land trusts and led to an incredible increase in the number of conservation easements held by land trusts and government agencies. While the conservation movement has supported the tax deductions, the deduction is also embraced by wealthy landowners, including President Donald Trump.<sup>285</sup>

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DownloadDocumentFile.ashx?DocumentFileKey=95e58042-e8d2-2051-1868-617b5d89a7f9&forceDialog=0. For more than you will ever want to know about the debates, see King & Fairfax, *supra* note 96.

280. C. Timothy Lindstrom, *Changes in the Law Regarding Conservation Easements: An Update*, 5 WYO. L. REV. 557, 557 n.5 (2005).

281. N.D. CENT. CODE § 47-05-02.1 (2019).

282. See Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10225 (2004) (noting that only a few states had easement-enabling statutes prior to the IRS authorizing a federal charitable income tax deduction for the donation of a conservation easement protecting land adjacent to a federal highway in 1964).

283. 26 U.S.C. § 170(h) (2018).

284. *Estate Tax Incentives for Land Conservation*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/topics/taxes/estate-tax-incentives-land-conservation> (last visited Nov. 3, 2019); *Taxes*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/topics/taxes> (last visited Oct. 15, 2019).

285. See Richard Rubin, *Senators Start Tax Investigation of Land Conservation Deals*, WALL STREET J. (Mar. 27, 2019), <https://www.wsj.com/articles/senators-start-tax-investigation-of-land->

Over the years, “[t]he IRS has seen abuses of this tax provision that compromise the policy Congress intended to promote.”<sup>286</sup> The IRS noted that they had “seen taxpayers, often encouraged by promoters and armed with questionable appraisals, take inappropriately large deductions for conservation easements.”<sup>287</sup> The IRS also noted that taxpayers “claimed deductions when they [were] not entitled to any deduction at all” and even “used or developed these properties in a manner inconsistent with section 501(c)(3).”<sup>288</sup> Sometimes, the charity would allow the property owners “to modify the conservation easement or develop the land in a manner inconsistent with the conservation easement’s restrictions.”<sup>289</sup> Increasingly, the IRS has scrutinized conservation easements and disallowed tax deductions, even imposing penalties.<sup>290</sup>

Despite these concerns however, Congress has not only renewed the provision but also increased the allowable tax benefit for making a conservation easement donation. Before 2006, qualified conservation contributions were treated as donations of capital gain property and up

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conservation-deals-11553702520 (“President Trump has used conservation easements on his properties in at least four states.”).

286. One hiccup in growing federal and government support of land trusts was a series of articles in *The Washington Post* in 2003 to 2004, telling of controversial conservation easement deals made by The Nature Conservancy. *The Washington Post* articles apparently caught the attention of the Joint Committee of Taxation, who launched an investigation. See Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC’Y 107, 125–27 (2015) (citing David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST, May 4, 2003, at A1; Joe Stephens & David B. Ottaway, *How a Bid to Save a Species Came to Grief*, WASH. POST, May 5, 2003, at A1; Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks with Few Curbs on Land Use*, WASH. POST, May 6, 2003, at A1; Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, at A1; Joe Stephens, *For Owners of Upscale Homes, Loophole Pays; Pledging to Retain the Facade Affords a Charitable Deductions*, WASH. POST, Dec. 12, 2004, at A1; Joe Stephens, *Local Laws Already Bar Alterations; Intervention by Trusts Is Rare for Preservation*, WASH. POST, Dec. 12, 2004, at A15; Joe Stephens, *Tax Break Turns Into Big Business*, WASH. POST, Dec. 13, 2004, at A1).

287. *Conservation Easements*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/conservation-easements> (last updated Mar. 26, 2019).

288. *Id.*

289. *Id.*

290. See *IRS Increases Enforcement Action on Syndicated Conservation Easements*, IRS, IR-2019-182, (Nov. 12, 2019), <https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements> (announcing a “significant increase in enforcement actions for syndicated conservation easement transactions”); see also Peter Elkind, *The Billion-Dollar Loophole*, FORTUNE (Dec. 20, 2017) (discussing some of the controversial uses of conservation easements); Dominic Parker, *The Conservation-Easement Conundrum*, PERC (Feb. 12, 2019), <https://www.perc.org/2019/02/12/the-conservation-easement-conundrum/> (discussing the tax problems arising from conservation easements).

to 30% of the donor's adjusted gross income was deductible.<sup>291</sup> Anything remaining after that 30% could be carried over and apply to any of the following five tax years.<sup>292</sup> The 2006 amendments increased the deduction limit from 30% to 50% for conservation contributions.<sup>293</sup> The 2006 amendments also allowed donors to carry over excess deductions for fifteen tax years, compared to only five years prior to the amendment.<sup>294</sup>

The federal tax code will likely remain the major factor in the pace and scale of both organizational growth and land trust transactions. The continual reports of abuses have done little to injure the land trust movement. Indeed, the strengthening of tax benefits suggests that there will not be a public outcry that will slow this gravy train for large landowners.

The land trust movement has succeeded in numerous ways. Its data suggests that it has protected a significant amount of land throughout the country and its political successes suggest that by serving a well-heeled and powerful group of landowners, they are not going to be forced by aggrieved members of the public or Congress to change their way of doing business.

This history has left some easily identified thumbprints on privately conserved land. To begin with, land trusts have largely protected smaller, isolated parcels that are less well integrated into protected ecosystems than government holdings are. The general critique is that land conservation has been both piecemeal and *ad hoc*.<sup>295</sup>

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291. Anson H. Asbury, *Understanding the Conservation Easement Tax Deduction*, FED. LAW., Mar. 2016, at 26, 29; *Income Tax Incentives for Land Conservation*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation> (last visited Nov. 3, 2019). See generally ADAM LOONEY, BROOKINGS INST., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS (2017), [https://www.brookings.edu/wp-content/uploads/2017/05/looney\\_conservationeasements.pdf](https://www.brookings.edu/wp-content/uploads/2017/05/looney_conservationeasements.pdf) (highlighting many concerns with conservation easements).

292. Asbury, *supra* note 291, at 29.

293. *Id.*; see Pension Protection Act of 2006, Pub. L. No. 109-280, § 1206, 120 Stat. 780, 1068 (2006); *Income Tax Incentives for Land Conservation*, LAND TR. ALLIANCE, *supra* note 291 (explaining how the 2006 tax incentives applied to donors).

294. Asbury, *supra* note 291, at 29; *Income Tax Incentives for Land Conservation*, LAND TR. ALLIANCE, *supra* note 291.

295. See NETWORK FOR LANDSCAPE CONSERVATION, PATHWAYS FORWARD: PROGRAMS AND PRIORITIES IN LANDSCAPE CONSERVATION 3 (2018), [http://landscapeconservation.org/wp-content/uploads/2018/08/Pathways-Forward\\_2018\\_NLC.pdf](http://landscapeconservation.org/wp-content/uploads/2018/08/Pathways-Forward_2018_NLC.pdf) ("People are moving beyond piecemeal conservation and embracing a conservation approach that includes the entire private-public land continuum and the broader ecological systems we now know are essential to sustain all life on Earth.").

Private land conservation tends to serve elite interests.<sup>296</sup> Conserved land tends to be far more accessible to elites and frequently not open to the public in any meaningful sense of the term ‘open.’<sup>297</sup> The tax benefits further foster this elitism. One must have a certain level of wealth before large income tax deductions are meaningful. Land trusts tend to focus on suburban land held by wealthy landowners, who the land trusts view as the constituents, recalling the pre-1960s National Trust and its deferential attitude towards landowners. Not only do wealthy landowners have the most to gain in these transactions, but the removal of land value from income tax rolls changes the tax base.<sup>298</sup> When land is held in fee by a land trust, the land is often exempt from property tax.<sup>299</sup> When a land trust encumbers properties with conservation easements, it often lowers the property tax liability.<sup>300</sup> Either avenue results in less money available for schools and other community needs.

It is not clear that land trust investments are the best bang for our conservation buck. There are many examples of conservation easements encumbering properties of questionable conservation value, as well as money going to lands and properties that were not really at threat of conversion or destruction.<sup>301</sup> Moreover, it is donor/seller priorities—not public preference, ecological or cultural priorities, or

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296. Cf. Jessica Owley, *Neoliberal Land Conservation and Social Justice*, 3 IUCN ACAD. ENVTL L. E-JOURNAL 6, 12–13 (2012) (noting that “many of the specific benefits associated with conservation easements go to wealthier sectors of society”); Amy Wilson Morris, *Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism*, 29 GEOFORUM 1215, 1217 (2008) (“[W]ealthy developers are actually much more likely to be able to take full advantage of the income tax benefits of donating conservation easements than farmers and ranchers with limited incomes.”).

297. For the many scenic easements, we also wonder who the chief beneficiaries are and ponder the wisdom of looking to the IRS to define what should qualify as a scenic landscape worthy of a protection (and therefore a tax donation).

298. See Johnathan R. King & Christopher M. Anderson, *Marginal Property Tax Effects of Conservation Easements: A Vermont Case Study*, 86 AM. J. AGRIC. ECON. 919, 920 (2004) (showing how conservation easements can reduce the local tax base).

299. ROBERT J. DESIDERIO, 1 PLANNING TAX-EXEMPT ORGANIZATIONS § 5.01 (2019), LexisNexis (“Many, if not most, states exempt an organization from state income, sales, and property taxes if the organization has received an IRC Section 501(c)(3) exemption.”).

300. King & Anderson, *supra* note 298, at 920.

301. See, e.g., *Conservation Easements, Background-Abusive Transactions Involving Charitable Contributions of Easements*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/conservation-easements> (last visited Nov. 1, 2019) (demonstrating the IRS’s concern with the value of some conservation easements); Jessica Owley, *The Future of the Past: Historic Preservation Easements*, in 35 ZONING L. & PRAC. REP. NO. 10, Nov. 2012, at 1, 1–12 (examining cases involving façade easements); Peter Elkind, *The Billion-Dollar Loophole*, FORTUNE (Dec. 20, 2017) (discussing the over-valuation of conservation easements).

even the land trust's priorities—that define what is available for conservation and how much protection and public benefit will be achieved.<sup>302</sup> Yet, as with the National Trust's activities, there is no question that land trusts have protected important and beautiful landscapes. We simply believe that they can improve. Just as the National Trust is working to escape its elitist past to be more inclusive and achieve greater levels of environmental protection, so should U.S. land trusts. We close by pointing out some of the National Trust patterns that could serve as guideposts to American land trusts.

#### IV. APPLE LESSONS FOR THE ORANGES

With the recognition that conservation easements and land trusts are not only here to stay but are also likely to grow, we ask what the private land conservation movement can do to both reach a broader audience (and dispel reputations of elitism and inequity) and to improve their environmental benefits. The lessons of the National Trust are illustrative. The National Trust has been working to shed its reputation as a creator of playgrounds for the wealthy. It does so largely by revisiting the goals of the organization and thinking about how it could provide public benefits to a larger portion of the population. The National Trust also acknowledged that you get more bang for your environmental buck when you take a hand in actually thinking about the environmental benefits the protected areas can provide. Notably, this may mean active management. Finally, the National Trust's shift to thinking beyond its own property boundaries and, indeed, beyond acquisition is a model that could also help U.S. land trusts improve land conservation outcomes.

A goal of the land trust movement was to create a nimble and responsive structure for land conservation. Pursuing land conservation privately would be less offensive than government intrusion yes, but also faster and more flexible. No longer would one have to wait for a legislative process: take the money spent on lobbying for conservation and put those dollars directly into the land.

Land trusts view and describe themselves as protecting the land and nature. Sometimes they also mention preserving communities, special places, or the cultural composition of a community, but their major goal, based on their own websites and brochures, is protecting nature. The private property tools they use, however, focus more on

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302. Adina Merelender et al., *Land Trusts and Conservation Easements: Who is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 70 (2004).

promoting the interests of the landowners than the land. What might have been a well-intentioned choice by conservation advocates has led to conservation only where landowners are willing to engage in conservation.

As to be expected in a landowner-centered process, it is the landowners who have the most power in deciding which lands are protected and what the rules regarding those lands will be. In this sense, we should not be surprised by the direction that conservation easements have taken. Conservation easement fraud, questionable conservation easements, and syndicated conservation easements are perhaps logical outgrowths of a conservation approach built on private property rights and significant tax benefits. The very structure of the tool suggests that the beneficiaries will be wealthy.

We need to reassess what role conservation easements should play and the legal framework governing them. Two significant legal structures support conservation easements. The first is the IRS code that enables significant tax deductions for donations of conservation easements. The second are the many state conservation easement enabling acts that facilitate the creation of conservation easements and permit changes to common law property rules. Why do these laws exist? Supposedly Congress and state legislatures wanted to create incentives for protection of private lands. The state and federal laws emphasize that the reason for these long-held legal exceptions is the goal of creating conservation benefits. How can we move this conservation benefit from the individual level to the community? Such a change could happen at the level of the law with changes to statutes that are more specific in the types of benefits, pulling back on the tax breaks, and requiring re-visitation and reassessment of the conservation value over time.

More importantly perhaps, land trusts themselves can play a role in re-evaluating who they view as the beneficiaries of their efforts. Expanding into urban areas and increasing access and educational opportunities will bring more people to the land. Additionally, expanding to environmental benefits that go beyond protecting open space and preventing development to more focused environmental impacts will benefit a broader array of people. Land trusts should move away from counting their number of acres and think about the actual environmental benefit. Too often we see time and energy put into lands that were not in danger of conversion or that serve to facilitate development. If land trusts think of the broader community as their constituency instead of their landowners, they may shift their focus.

We see promising indications of such a shift in the Land Trust Alliance's 2018–2022 strategic plan, which recognizes that land trusts are primarily supported by and engage with a small, largely elite “sliver of the American populace.”<sup>303</sup> The LTA then calls for creating a more diverse and inclusive movement that makes land trusts and their goals more relevant to more people.<sup>304</sup> We suggest that as land trusts try to achieve this, the National Trust has much to offer.

Related to these points, land trusts might also consider protecting other landscapes or being more prescriptive with lands already in their portfolios. For example, National Trust experience suggests that land trust involvement in management of eased lands might enhance environmental benefits. Land trusts have largely been reluctant to get involved in the details of the working lands they hold conservation easements on. Some land trusts have very pointedly said that it is not their business to look at what is planted or how.<sup>305</sup> Perhaps that posture is designed to assuage farmers' fears about becoming involved in a land trust transaction. But, a land trust community willing to consider becoming more involved and, indeed, willing to insist upon being so in appropriate circumstances, could reestablish expectations that would possibly increase the environmental benefits from eased lands.

Similarly, a land trust community that does not focus primarily or exclusively on acquisition transactions seems already in view. In some regions this may occur because all of the available parcels are already encumbered. But the expansion also occurs as land trusts shift their ideas about goals.<sup>306</sup> Viewing the sessions held at the annual meetings of the Land Trust Alliance show an increase in panels on lobbying and

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303. “Perhaps one of the biggest challenges is that most Americans have never heard of land trusts. Land and land conservation play little or no role in their lives, at least as far as they are aware. Land trusts continue to rely upon the support and engagement of a sliver of the American populace— a sliver that is far too uniform in terms of race, ethnicity, age, affluence and other characteristics.” LAND TR. ALL., STRATEGIC PLAN 2018–2022: EXECUTIVE SUMMARY 3 (2018), <https://s3.amazonaws.com/landtrustalliance.org/LandTrustAlliance-StrategicPlan-Executive%20Summary-2018-2022.pdf>.

304. *Id.*; Joan Campau, *The Conservation and Diversity Program*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/success-story/conservation-and-diversity-program> (last visited Nov. 3, 2019).

305. See, e.g., Jessica Owley, *Unforeseen Land Uses: The Effect of Marijuana Legalization on Land Conservation Programs*, 51 U.C. DAVIS L. REV. 1673, 1706 (2018) (discussing the example of the Colorado West Land Trust declining to engage in debates over crop selection with its farmers).

306. See Rob Aldrich, *More Conservation for More People*, SAVING LAND (Spring 2016), <https://www.landtrustalliance.org/news/more-conservation-more-people> (explaining the new concept of “community conservation”).

working with partners.<sup>307</sup> Land Trusts have fallen so in love with conservation easements that it has become their default mode of operation. It took the National Trust many years to learn that it could do more with its time and money when it was not focused solely on increasing their holdings. The American land trust movement can build on that experience. The National Trust experience suggests that U.S. land trusts should consider their current general posture. Nonparticipation in politics and planning is a bad idea. Land conservation requires leadership in policy, not abjuring the process and ostensibly embracing the market.

With 1,500 different organizations in different cultural economic and environmental settings, there are likely at least a million ways to adopt National Trust experiences to the American context. Our analysis suggests that reconsideration of public benefit and access, involvement in policy, and involvement in agricultural and working land management are the most salient for the U.S. landscape. Moreover, these changes already seem to be on the horizon, even if a bit slower than one might hope. The National Trust's history, sometimes painful, sometimes uplifting, provides fodder for shifting the culture of and expectations regarding the movement, and improving the practice of individual organizations however situated.

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307. *Rally 2019*, LAND TR. ALLIANCE, <https://alliancerally.org/schedule/> (last visited Nov. 3, 2019) (including a panel called "Land Trusts Can Lobby Too: A Guide to Lobbying and Other Advocacy").