

WE ARE ALL GROWING OLD TOGETHER: MAKING SENSE  
OF AMERICA'S MONUMENT-PROTECTION LAWS

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ABSTRACT

*Monuments and the laws that protect them divide Americans today as never before. American attitudes toward monuments have always been a blend of affection, insecurity, and suspicion. But Americans are now more invested in the built and natural monuments that surround us: to be for, or against, protecting certain monuments has now become a shorthand for one's stance on a host of cultural and political issues. These changing attitudes have thrown American monument-protection laws into sharp relief. And many local, state, and federal legislators and executive officials have taken advantage of this opportunity to exploit America's patchwork of monument-protection laws, exacerbating already-fraught monument conflicts for short-term political gain.*

*Contemporary conflicts over American monuments are particularly difficult to resolve for a number of reasons. Part of the problem is a lack of agreement about what does or should count as a monument, which is compounded by both the extreme diversity of American monument-protection laws and a persistent rural-urban divide that helps fuel many contemporary American monument conflicts. In addition, American monument-protection laws too often are considered*

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*in isolation, which undermines the possibility for achieving any kind of consensus or settled outcome after individual monument conflicts.*

*These factors complicate public discourse about monuments, monument-protection laws, and the conflicts that inevitably arise from both. They also complicate every effort to study American monuments and the laws that protect them. The absence of any meaningful shared discourse, let alone consensus, makes American monument conflicts particularly difficult to resolve, as the losing side tends to find the application of American monument-protection laws to be profoundly arbitrary. But in fact, many recent conflicts arising from America's diverse monument-protection laws follow similar patterns—even though the political coalitions shift dramatically, depending on what sort of monuments are at stake. This Article reframes the debate over American monument-protection laws by considering Confederate statue statutes, the National Historic Preservation Act, and the Antiquities Act of 1906 together. It analyzes recurring patterns of conflict that arise out of each statutory and regulatory system and proposes repeal of the statue statutes and reforms to the Antiquities Act.*

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## INTRODUCTION

In the past few years, monuments and the laws that protect them have become one of the most persistent sources of conflict in America. Shortly after the deadly violence triggered by Confederate monuments in Charlottesville, Corey Stewart, a candidate in Virginia's 2018 senatorial elections, defended the monuments against "the lunacy of taking them down."<sup>1</sup> According to Stewart, monuments and monument-protection laws represent "the new social issue of the twenty-first century," providing him and others with a political opportunity because monument protection creates "the same amount of guttural reaction and concern that the pro-life movement generated forty years ago."<sup>2</sup>

The intensity of Stewart's enthusiasm for using violent monument conflicts as an opportunity for political gain is unusual—even unsettling—but many more thoughtful observers also have noted the growing significance of monuments and monument-protection laws in American public life. Like Stewart, Cornel West saw something new emerging from the turmoil over the Charlottesville monuments and the laws that protect them from removal.<sup>3</sup> For West, who participated in demonstrations against the Charlottesville monuments, the distinctive feature of the conflict was a "raw hatred" expressed by the extremists who marched and fought to celebrate the monuments, a hatred that he had never seen "coming from so many people."<sup>4</sup> What Stewart and West both saw in Charlottesville was a particularly acute example of a broader trend. Across America, a wide range of natural landmarks, historic memorials, and the laws that protect them have become focal points for demonstrations, threats, and occasional violence from monument opponents and supporters alike.<sup>5</sup>

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1. Benjamin Wallace-Wells, *The Fight Over Virginia's Confederate Monuments*, NEW YORKER (Nov. 27, 2017), <https://www.newyorker.com/magazine/2017/12/04/the-fight-over-virginias-confederate-monuments> [<https://perma.cc/VJP4-BXC8>] (internal quotations omitted).

2. *Id.* (internal quotations omitted).

3. *See id.*

4. *Id.* (internal quotations omitted).

5. *See, e.g.*, Jeremy B. White, *Trump Greeted by Protesters Chanting "F\*\*\* You!" After He Slashes Utah National Monuments*, INDEPENDENT (Dec. 5, 2017, 12:32 AM), <https://>

Although battles over American monuments have grown particularly sharp in recent years, American attitudes toward monuments have always been a blend of affection, insecurity, and suspicion. In an 1843 address at Brown University, Rhode Island's Chief Justice, Job Durfee, gave voice to the American yearning for monuments in a relatively young country, urging his audience, "O! let us build monuments to the past."<sup>6</sup> Durfee thought that what America needed was a host of new monuments to "tower on mound and mountain ... and in our public squares" as tangible reminders of the country's "social mind."<sup>7</sup> And filling up the country with monuments was only the beginning of the job. As Durfee reminded his audience, the network of monuments he envisioned would need to be carefully protected against alteration or "sacrilegious violence" that might disrupt the transmission of "*our* idea of liberty and law" to future generations.<sup>8</sup> Other Americans in the mid- to late nineteenth century echoed Durfee's sentiments, expressing similar enthusiasm for natural as well as built monuments. For example, Oliver Wendell Holmes noted that the huge elm trees in public squares or village greens were often the most significant monuments for many American communities.<sup>9</sup> Indeed, his own first sense memories were bound up with the monumental elms on Cambridge Common, which

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[www.independent.co.uk/news/world/americas/us-politics/trump-protest-national-monuments-shrink-parks-utah-announcement-latest-a8092076.html](http://www.independent.co.uk/news/world/americas/us-politics/trump-protest-national-monuments-shrink-parks-utah-announcement-latest-a8092076.html) [https://perma.cc/PCW8-2S65]; see also Joe Johnson et al., *Protesters Clash at UNC-Chapel Hill, Less than a Week After Silent Sam Was Toppled*, HERALD-SUN (Aug. 25, 2018, 10:53 AM), <https://www.heraldsun.com/news/local/counties/orange-county/article217286120.html> [https://perma.cc/4GP7-5XNX] (noting multiple arrests for assault and violent clashes between protesters, days after a Confederate monument was destroyed in earlier protests); Kevin Sullivan & Juliet Eilperin, *In the Nevada Desert, Bundy Family Warns of Another Standoff*, WASH. POST (Nov. 1, 2016), [https://www.washingtonpost.com/national/2016/11/01/c45bdf4e-a04c-11e6-a44d-cc2898cfab06\\_story.html](https://www.washingtonpost.com/national/2016/11/01/c45bdf4e-a04c-11e6-a44d-cc2898cfab06_story.html) [https://perma.cc/CW6B-HSEJ] (quoting a number of sources threatening armed resistance to President Obama's planned monument in Gold Butte, Nevada).

6. Job Durfee, *The Influence of Scientific Discovery and Invention on Social and Political Progress* (Sept. 6, 1843), in THE COMPLETE WORKS OF THE HON. JOB DURFEE, LL. D. 315, 344-45 (1849) (quoting from an oration delivered to the Phi Beta Kappa Society of Brown University).

7. *Id.* at 345.

8. *Id.*

9. Oliver Wendell Holmes, *Introduction* to LORIN L. DAME, TYPICAL ELMS AND OTHER TREES OF MASSACHUSETTS 7, 8 (1890).

had “entered into [his] young life as truly as the milk that made its blood.”<sup>10</sup>

But for some Americans, especially early in the country’s history, these monumental impulses were an un-American distraction from the commitment to industry and innovation responsible for the country’s character and good fortune.<sup>11</sup> In an 1825 memoir commissioned to celebrate the completion of the Erie Canal, congressman and former mayor of New York Cadwallader D. Colden wrote that communal infrastructure improvements like canals would be the “proudest monuments” in America, rather than natural objects or ruins of the past.<sup>12</sup> Colden believed that America was uniquely capable of producing great works like the Erie Canal because it was free from “scenes indicating present decay, and foreboding constant deterioration.”<sup>13</sup> Instead of focusing on the built or natural landscape as something to be preserved, Colden and many others thought that “every object” in American life should remain “new, youthful, and vigorous,” directing the country forward to “the promised sunshine of the future.”<sup>14</sup>

While American attitudes toward monuments have long been mixed, in the past few decades enthusiasm for monuments has had the upper hand.<sup>15</sup> Thanks to recurring waves of both monument designation and monument-protection laws, we have fulfilled Justice Durfee’s vision: now we have monuments, and lots of them.<sup>16</sup> Our landscapes and lives are freighted with the weight of these

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10. *See id.* (recalling the impression of waving elm trees on his infant “retina[s]”).

11. DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* 110 (1985); *see also* MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 42 (1991) (noting that unlike many other societies, “for much of American history the inhabitants of this continent clearly indicated that they did not want power to reside in pastness”).

12. Cadwallader D. Colden, *Memoir Prepared at the Request of a Committee of the Common Council of the City of New York and Presented to the Mayor of the City, at the Celebration of the Completion of the New York Canals*, in 2 *THE HISTORY AND TOPOGRAPHY OF THE UNITED STATES OF NORTH AMERICA* 350, 374, 376 (John Howard Hinton ed., 3d ed. 1852).

13. *Id.* at 376.

14. *Id.*

15. *See, e.g.*, Dell Upton, *Why Do Contemporary Monuments Talk So Much?*, in *COMMEMORATION IN AMERICA* 11, 11-13, 19, 21 (David Gobel & Daves Rossell eds., 2013).

16. Part I.B of this Article will delve into the growth of monuments and the laws that protect them.

monuments, the laws that protect them, and the conflicts that inevitably arise from both.<sup>17</sup>

A few short examples show how contemporary fights over monuments in America are often intertwined with laws originally designed to protect monuments from modification or removal. In New York, shortly before his reelection in the fall of 2018, Governor Andrew Cuomo moved to protect the monument in Columbus Circle—a monument which has been the subject of several protests and studied for potential removal by a city commission.<sup>18</sup> Across several southwestern states, prayer runners from a number of Native American tribes united to protest President Trump’s 2017 reduction of the Bears Ears National Monument,<sup>19</sup> while large corporations called the monument reduction an “illegal” theft of protected land.<sup>20</sup> In 2016, an Oregon sheriff threatened armed conflict with federal authorities if President Obama designated the Owyhee Canyonlands as a national monument.<sup>21</sup> And in some southern states, monuments to the Confederacy and protective “statue statutes” have provided flashpoints for violent demonstrations by racist extremists,<sup>22</sup> harking back to the eras in which many of these monuments were originally constructed.<sup>23</sup>

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17. See SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 26 (1st ed. 1998) (noting that “it is almost literally impossible to pick up any issue of a newspaper or magazine without finding examples” of conflicts over American monuments).

18. Katie Honan, *Cuomo Moves to Protect the City’s Columbus Statue as He Marches in Parade*, WALL ST. J. (Oct. 8, 2018, 5:47 PM), <https://www.wsj.com/articles/cuomo-moves-to-protect-citys-columbus-statue-as-he-marches-in-parade-1539035256> [<https://perma.cc/R2G2-YJ9P>].

19. *Native Tribes Unite in Prayer Run to Support Bears Ears National Monument*, NAVAJO-HOPI OBSERVER (Jan. 2, 2018, 9:40 AM), <https://www.nhonews.com/news/2018/jan/02/native-tribes-unite-prayer-run-support-bears-ears/> [<https://perma.cc/UT7J-XQZ7>].

20. Christine Hauser, *Patagonia, REI and Other Outdoor Retailers Protest Trump’s Decision to Shrink Utah Monuments*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/business/patagonia-trump-utah.html> [<https://perma.cc/87XB-F8RV>].

21. Andrew Selsky, *Sheriff Warns Monument Could Spark Standoff*, MAIL TRIB. (May 23, 2016), <https://mailtribune.com/news/state-news/sheriff-warns-monument-could-spark-standoff> [<https://perma.cc/3L9X-A7SL>].

22. See, e.g., Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 59-64 (2018) (discussing the “statue statute” at the center of the white supremacist rally in Charlottesville, Virginia).

23. Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes,”* 91 TEMP. L. REV. 1, 12-15 (2018).

Of course, not every American monument is a source of controversy. Many are sources of community pride or distinction,<sup>24</sup> touchstones of collective memory,<sup>25</sup> or merely part of the visual and mental backdrop of their neighbors' daily lives.<sup>26</sup> Moreover, it would be wrong to suggest that fights over monuments are an entirely new feature of American life: as Part I will show, the history of American monument conflicts is older than the history of the United States. But the frequency, intensity, and visibility of conflicts over monuments in America today is something new in our history, as participants in these conflicts have observed. To be for, or against, protecting certain types of monuments has now become a shorthand for one's stance on a host of cultural and political issues.

Part of the problem with contemporary American monument conflicts is not particularly legal, but is simply the result of the nature of many American monuments. As Part I will show, Americans have lots of monuments that were built or acquired relatively recently, as two great waves of enthusiasm for monuments washed over the country in the last century plus. Many of these monuments were built or acquired without much deliberation, and some are protected even though they now appear to be mistakes.<sup>27</sup> For example, take Abraham Lincoln's birthplace in Kentucky, a national historical park whose significance has been repeatedly recognized by protective legislation.<sup>28</sup> Visitors to Lincoln's Birthplace must

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24. See, e.g., Lorraine Boissoneault, *Why an Alabama Town Has a Monument Honoring the Most Destructive Pest in American History*, SMITHSONIAN (May 31, 2017), <https://www.smithsonianmag.com/history/agricultural-pest-honored-herald-prosperity-enterprise-alabama-180963506/> [https://perma.cc/8S3P-SUEC] (discussing the monument in Coffee County, Alabama, erected "[i]n profound appreciation of the boll weevil and what it has done as the herald of prosperity" (internal quotations omitted)).

25. See, e.g., Upton, *supra* note 15, at 26-31 (discussing the process of memorialization in the contemporary monumental process through a variety of monuments created to commemorate September 11, 2001).

26. See, e.g., Suzannah Smith Miles, *Castle Pinckney: Silent Sentinel in Charleston Harbor*, MOULTRIE NEWS (Nov. 27, 2012), [https://www.moultrie.com/archives/castle-pinckney-silent-sentinel-in-charleston-harbor/article\\_aef80ee9-21a1-5486-bdb1-434c8f701f45.html](https://www.moultrie.com/archives/castle-pinckney-silent-sentinel-in-charleston-harbor/article_aef80ee9-21a1-5486-bdb1-434c8f701f45.html) [https://perma.cc/M2HU-N85G] (describing Castle Pinckney, once a national monument, as "an abandoned, silent sentinel in Charleston's harbor").

27. See, e.g., Michael Kammen, *The American Past Politicized: Uses and Misuses of History*, 617 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 46 (2008).

28. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 7114, 123 Stat. 991, 1202 (codified as amended at 16 U.S.C. § 217b (2012)) (redesignating Lincoln's



climb fifty-six stairs and then enter a building designed like an ancient Greek temple or a nineteenth-century American bank that houses a log cabin.<sup>29</sup> The cornerstone of the stone shrine was laid by President Theodore Roosevelt in 1909.<sup>30</sup> At the dedication, Roosevelt told the audience that “th[is] rude log cabin ... has come to mean to ... Americans what the humble stable in Bethlehem means to ... Christians[, and] so the American people have ennobled the birthplace of Lincoln by housing it within a marble Temple of Fame.”<sup>31</sup> But the cabin within this shrine is a replica with no connection to the former President other than that dreamed up by nineteenth-century showmen who passed the cabin off as authentic, more or less, despite widespread skepticism even before the stone shrine was created.<sup>32</sup> In other words, the heart of the monument to Honest Abe’s birthplace is a fake, but that has proved no bar to the monument’s creation or continued preservation, like so many other legally protected American monuments that remain in place long after the original justification for their preservation has deteriorated.<sup>33</sup>

Lincoln’s Birthplace shows that any monument is essentially a window into past perspectives on the significance and value of certain people, places, or events—especially the perspectives of those in the community who were empowered to make such decisions at the times the monuments were created, altered, or protected from change.<sup>34</sup> And thus every decision about preserving an object, built

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Birthplace as a national historical park); Act of Sept. 8, 1959, Pub. L. No. 86-231, 73 Stat. 466 (codified as amended at 16 U.S.C. § 217 (2012)) (redesignating the park as a national historical site); Act of July 17, 1916, Pub. L. No. 64-160, 39 Stat. 385 (codified at 16 U.S.C. §§ 211-214 (2012)) (designating the site as a national park).

29. *The First Lincoln Memorial*, NAT’L PARK SERV., <https://www.nps.gov/abli/bicentennial-commencement-event.htm> [<https://perma.cc/CVZ3-N58D>].

30. *Id.*

31. Zach Klitzman, *Remembering Lincoln’s Birthplace*, PRESIDENT LINCOLN’S COTTAGE (Feb. 12, 2011), <https://www.lincolncottage.org/remembering-lincolns-birthplace/> [<https://perma.cc/W8FU-EMQG>].

32. *See, e.g., Did Abraham Lincoln Sleep Here?*, CBS NEWS (Feb. 11, 2018, 10:21 AM), <https://www.cbsnews.com/news/did-abraham-lincoln-sleep-here/> [<https://perma.cc/9GPK-D77X>] (describing both recent efforts to date the cabin and the 1890s hucksters who passed off the replica as having some connection to Lincoln).

33. *See* Kammen, *supra* note 27, at 46.

34. *See, e.g.,* J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENVTL. L.J. 203, 268 (2009) (noting that “[d]ecisions about [the] preservation and presentation of a historic site” bear witness to the perspectives of “those

or natural, involves some measure of judgment about the object's significance which may, and likely will, become outdated, at least in part.<sup>35</sup> Moreover, decisions about protecting monuments, like many other decisions about preserving physical objects or places, necessarily involve open-ended and elastic values.<sup>36</sup> This invocation of open-ended and elastic values, in turn, makes decisions about monument creation and preservation extraordinarily hard to justify to those who disagree with them.<sup>37</sup> To the losers of monument fights, the winners seem to be exercising authority that is almost entirely arbitrary, in order to change or preserve a set of values that may well become outdated in what is inherently at least a lasting if not entirely permanent way.<sup>38</sup> And sometimes the losers are right. Even the term "preservation" is an ambiguous term and concept whose meaning in almost any specific situation is subject to contestation: depending on the context, it can mean simple maintenance, or restoration, or even some forms of adaptation in the face of changed conditions.<sup>39</sup>

Difficulties associated with the arbitrary nature of monument creation and preservation, and the occasionally bizarre nature of American monuments, are compounded by many American monument-protection laws. For example, most of the statue statutes that protect Confederate monuments are ostensibly designed to protect monuments depicting a wide range of historic events or past American conflicts.<sup>40</sup> Moreover, many of the statutes' defenders argue that statutes are intended to protect the general "history" or "heritage" of their states, not Confederate monuments in

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with power" when the decisions were made); *see also* Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 3 (arguing that the landscape "inscribes selective and misleading versions of the past in solid, material forms").

35. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 476 (1981).

36. *Id.* at 476-77.

37. *See id.* at 476-79.

38. *See id.*

39. *Id.* at 476-77.

40. *See, e.g.*, VA. CODE ANN. § 15.2-1812 (2019) (protecting all "monuments or memorials" that appear on the statute's list of fifteen wars, conflicts, or "any engagement of" same, ranging from the "Algonquin" conflict to "Operation Iraqi Freedom," and including "Confederate or Union monuments or memorials of the War Between the States").

particular.<sup>41</sup> But this is not true, and opponents of the statue statutes know that it is not true.<sup>42</sup> The statue statutes were not designed to protect the general history or heritage of their states, but rather to protect Confederate monuments from alteration or removal; moreover, that is how they have been applied since they were enacted, almost without exception.<sup>43</sup> This disconnect makes the statue statutes seem particularly arbitrary to those who wish to alter or remove Confederate monuments but are frustrated by these statutes.

To take another example, national monuments are governed by the Antiquities Act of 1906, which states that these monuments should “be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>44</sup> Many students of the legislative history of the Act agree that it was originally intended to protect relatively small chunks of land surrounding discrete and vulnerable archaeological sites or natural wonders, especially in the American southwest.<sup>45</sup> But almost immediately after the Act was passed, President Theodore Roosevelt proclaimed monuments that were tens and even hundreds of thousands of acres large.<sup>46</sup> His successors followed suit, and in recent years some presidents have proclaimed monuments that dwarf even Roosevelt’s dreams.<sup>47</sup>

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41. See Joe Sterling, *A New Alabama Law Makes Sure Confederate Monuments Are Here to Stay*, CNN (May 26, 2017, 5:19 PM), <https://www.cnn.com/2017/05/26/us/alabama-confederate-monuments-bill-trnd/index.html> [<https://perma.cc/RKR6-95CK>] (referring to comments made by Alabama State Senator Gerald Allen, one of the sponsors of Alabama’s statue statute).

42. See, e.g., *id.* (quoting State Senator Hank Sanders, an opponent of Alabama’s statue statute, who like the Southern Poverty Law Center, argued that the law “is clearly about Confederate memorials”).

43. See *infra* Part II.A; see also Bray, *supra* note 23, at 19-44 (reviewing the legislative history and enforcement history of statue statutes).

44. 54 U.S.C. § 320301(b) (2012).

45. See, e.g., Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 477 (2003).

46. See *infra* notes 326-29 and accompanying text.

47. See, e.g., Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017) (President Obama’s proclamation establishing Bears Ears National Monument, approximately 1.35 million acres in size); Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 12, 2009) (President George W. Bush’s proclamation establishing the Marianas Trench Marine National Monument, over approximately 95,216 square miles of submerged lands and waters).

There may be good reasons for this expansive interpretation of the Antiquities Act—and these good reasons will be explored at length later in this Article.<sup>48</sup> But the apparent disconnect between the statute’s narrow text and its expansive application makes national monuments hard to justify to their opponents—especially opponents who live near the monuments.<sup>49</sup> Here, too, the perceived disconnect between the stated purpose of the monument-protection law and its application exacerbates the pain associated with contemporary American monument conflicts, at least for those on the losing side.

In addition, many contemporary American monument conflicts are particularly fraught because of their connection with the growing divide between rural and urban areas in America. This rural-urban divide is both cultural and structural: it reflects substantial differences between how Americans in different areas feel about each other and a variety of issues,<sup>50</sup> but it is also created by differences in power between state and local governments inherent in the American federal system.<sup>51</sup> This divide grows from both long-standing historical roots as well as relatively recent economic developments,<sup>52</sup> and it impacts a host of different issues, often in dynamic and counterintuitive ways.<sup>53</sup>

In the case of contemporary conflicts over monuments and the laws that protect them, the rural-urban divide tends to drive the

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48. See *infra* Part III.

49. Cf. Rob Bishop, *President Trump’s Courageous Decision to Shrink Utah Monuments Places Principle Ahead of Politics*, NAT’L REV. (Dec. 7, 2017, 9:00 AM), <https://www.nationalreview.com/2017/12/utah-national-monuments-donald-trump-downsizing/> [<https://perma.cc/L2M5-BCJQ>].

50. See, e.g., Jose A. DelReal & Scott Clement, *Rural Divide*, WASH. POST (June 17, 2017), <https://www.washingtonpost.com/graphics/2017/national/rural-america/> [<https://perma.cc/PEP8-R5QM>] (exploring survey results that track the growing divide across a range of personal and cultural values between people who live in rural areas and people who live in or near cities).

51. See Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1167 (2018) (concluding that “structural anti-urbanism” in America “reflects and reinforces the widening political gap between American cities and other parts of the country”).

52. See, e.g., Eliza Griswold, *The Historical Roots of the US Rural-Urban Divide Run Deep*, GUARDIAN (July 4, 2018, 12:59 PM), <https://www.theguardian.com/us-news/commentisfree/2018/jul/04/us-rural-urban-divide-historical-roots> [<https://perma.cc/DFG8-QFUL>].

53. See, e.g., Richard Florida, *Wages Are Higher in Urban Areas, but Growing Faster in Rural Ones*, CITYLAB (Oct. 23, 2018), <https://www.citylab.com/life/2018/10/wages-are-higher-urban-areas-growing-faster-rural-ones/571534/> [<https://perma.cc/BT26-63BE>].

residents of urban communities against the residents of rural and exurban communities, state governments against local governments, and federal authorities against both state and local governments. The rural-urban divide is consistent across these different types of monument conflicts, even though rural and urban interests often find themselves on opposite sides of the divide, depending on what types of monuments are at stake.

In other words, conflicts over American monuments tend to involve relatively stable coalitions, but the rhetoric deployed by these coalitions shifts dramatically depending on where the monument is located. To take just one example, this is why President Trump deplores the potential loss of Confederate monuments in civic spaces but celebrates the potential removal of national monuments in rural places.<sup>54</sup>

More is at stake here than the appearance of political opportunism. America's patchwork of monument-protection laws work a toxic alchemy with the current rural-urban divide and our complicated historical attitudes toward monuments, which together give many contemporary American monument conflicts their particularly poisonous nature.<sup>55</sup> For example, conflicts over national monuments created pursuant to the Antiquities Act frequently involve protections over natural or historic resources that are located in rural areas.<sup>56</sup> The protections created for a national monument under the Antiquities Act may be popular with the general public, especially in urban areas that are some distance away from the protected land.<sup>57</sup> But these monuments are often profoundly unpopular, at least in the short term, with nearby rural populations who often

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54. See, e.g., Eugene Scott, *Trump Argued for Keeping Confederate Monuments. Then He Scaled Back Those of Native Americans*, WASH. POST (Dec. 6, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/12/06/trump-argued-for-keeping-confederate-monuments-then-he-scaled-back-those-of-native-americans/> [<https://perma.cc/2SJV-FJUG>].

55. See, e.g., Carrie Kaufman, *Gold Butte, the Bundy Family, and Desecration of Sacred Artifacts*, KNPR (May 2, 2016), <https://knpr.org/knpr/2016-05/gold-butte-bundy-family-and-desecration-sacred-artifacts> [<https://perma.cc/82JZ-BW67>] (describing the desecration of monumental petroglyphs and burial sites on what became Gold Butte National Monument).

56. See, e.g., Kathryn Schulz, *Why Two Chefs in Small-Town Utah Are Battling President Trump*, NEW YORKER (Sept. 24, 2018), <https://www.newyorker.com/magazine/2018/10/01/why-two-chefs-in-small-town-utah-decided-to-sue-president-trump> [<https://perma.cc/CW2W-8YSV>] (describing the "spectacular, desolate, and extreme" landscape in remote southern Utah around the Grand Staircase-Escalante National Monument).

57. See, e.g., White, *supra* note 5.

view monument protections as a check on economic activity and a threat to their previous way of life,<sup>58</sup> and who argue that the creation and preservation of national monuments is an exercise in federal tyranny over state and local rights, unsupported by the text or legislative history of the governing statute.<sup>59</sup>

A similar set of arguments is deployed in conflicts over monuments protected by statue statutes, although the coalitions involved essentially switch sides. In fights over statue statutes, local control is often less important to state governments influenced or controlled by residents of rural and exurban areas than in fights over national monuments. In this context, state governments argue that the statue statutes should preempt local efforts to alter or remove the monuments in question.<sup>60</sup> On the other hand, local governments and activists in relatively diverse large urban areas or university towns argue that statue statutes represent an abridgement of constitutionally protected individual rights and an unmerited intrusion by the state into matters that should be under local control.<sup>61</sup> For those who wish to alter or remove Confederate monuments in their own neighborhood, the absence of any concern for local control over these monuments by state legislators and officials may seem hypocritical at best.<sup>62</sup>

In summary, America's monument-protection laws have combined with Americans' complicated historical attitudes toward monuments and the present rural-urban divide to intensify the

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58. See, e.g., Louise Liston, *Sustaining Traditional Community Values*, 21 J. LAND, RESOURCES & ENVTL. L. 585, 585 (2001) (describing how President Clinton's proclamation of the Grand Staircase-Escalante National Monument transformed "[a] once proud and peace-loving people ... into a hostile, antagonistic, suspicious, and distrustful community").

59. See James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 483-86 (1999).

60. See, e.g., Complaint at 2, *State v. City of Birmingham*, No. 01-CV-2017-903426.00 (Ala. Cir. Ct. Aug. 16, 2017).

61. See, e.g., Ariel Worthy, *Birmingham Confederate Monument: City Leaders Weigh Steps to Remove Landmark*, BIRMINGHAM TIMES (Aug. 16, 2017), <https://www.birminghamtimes.com/2017/08/city-leaders-weigh-steps-to-remove-confederate-monuments/> [<https://perma.cc/CFN3-455K>] (noting statements made by Birmingham's mayor and city council president).

62. See, e.g., Lisa Provence, *Confederates Win: Subcommittee Kills Bill to Give Localities Control of Statues*, C-VILLE WKLY. (Jan. 30, 2019, 5:26 PM), <https://www.c-ville.com/confederates-win-subcommittee-kills-bill-to-give-localities-control-of-statues/> [<https://perma.cc/FAU6-REV5>] (quoting University of Virginia professor Frank Dukes, who argued that state legislators' defenses of Virginia's statue statutes were "so hypocritical from people who constantly talk about local control").

inherently arbitrary nature of monument conflicts, fueling a near-constant storm cycle of controversy and violence. Unfortunately, American monument-protection laws are rarely considered together, in part because the problems arising under discrete types of monument-protection laws have proven to be so significant in recent years. For example, scholars who have considered Confederate statue statutes have focused on the vulnerability that these statutes impose on local governments, or the flaws inherent in the statutes that may provide opportunities for some local governments to act against protected Confederate monuments.<sup>63</sup> Similarly, much recent scholarship about the Antiquities Act has focused on relatively narrow but pressing issues, particularly whether the President has the authority to abolish or reduce an existing national monument.<sup>64</sup>

In addition, American monument-protection laws are rarely considered together because natural and built monuments themselves are rarely considered together in legal scholarship. This is symptomatic of a larger issue: a deep-seated schism between the way we talk about and regulate “wild” natural and “tamed” cultural resources as if they are and ought to be fundamentally different categories.<sup>65</sup> This is a mistake that must be removed in order to improve the way Americans protect and fight about monuments and the laws that protect them.

This Article seeks to reframe the debates over some of the most important monument-protection laws in America by considering them together, analyzing their common problems, and providing suggestions for reform where possible. Part I explores the evolution of both built and natural monuments in America, showing that both types of monuments, as well as laws that protect them, evolved on parallel tracks and at roughly similar times. Part I also directly addresses the category mistake that too often divides our discourse

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63. See, e.g., Bray, *supra* note 23, at 20-44, 50-52; Schragger, *supra* note 22, at 61-67.

64. Compare Jedediah Britton-Purdy, *Whose Lands? Which Public? The Shape of Public-Lands Law and Trump's National Monument Proclamations*, 45 *ECOLOGY L.Q.* 921, 924-25 (2019), and Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 *VA. L. REV. ONLINE* 55, 56 (2017), with John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 *YALE J. REG.* 617, 619-20 (2018).

65. See Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 *CORNELL L. REV.* 1333, 1336 (2002).

over natural and built monuments and the hodgepodge of laws that protect them. Part II provides a comparative examination of the statue statutes and the National Historic Preservation Act (NHPA), providing additional reasons to get rid of the statue statutes beyond those advanced in previous work,<sup>66</sup> while highlighting problematic aspects of the NHPA that can echo aspects of the statue statutes. Part III examines the Antiquities Act and national monuments, compares the Antiquities Act to the NHPA and the statue statutes, and suggests reforms of the Antiquities Act and the designation of future national monuments.

### I. THE EVOLUTION OF AMERICAN MONUMENTS AND THE BIRTH OF AMERICAN MONUMENT-PROTECTION LAWS

There are lots of monuments in contemporary America, and lots of laws that protect such monuments, but the ordinary usage of “monument” is somewhat imprecise,<sup>67</sup> so much so that many of the laws that protect American monuments leave “monument” undefined.<sup>68</sup> Some of the fuzziness around the term is the irreducible consequence of changing ideas about what can and should count as a monument. For example, as a walk around the National Mall will

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66. See Bray, *supra* note 23, at 12-19. In this previous work cited here, I surveyed the constitutional arguments made by others against the statue statutes; later on in this previous work, I provided a detailed review of the statue statutes along with a set of suggestions about how local governments might comply with the statue statutes while removing or altering Confederate monuments. See *id.* at 20-44; see also *infra* notes 174-76 (reviewing these arguments in more detail here). In this work, I compare the NHPA to the statue statutes, in part to provide an entirely different set of arguments to get rid of the statue statutes beyond those advanced in previous work.

67. Leaving out archaic and obsolete entries, *Merriam-Webster* defines “monument” as: “a written legal document or record;” “a lasting evidence, reminder, or example of someone or something notable or great;” “a distinguished person;” “a memorial stone or a building erected in remembrance of a person or event;” “a boundary or position marker;” “a national monument;” and finally as “a written tribute.” *Monument*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/monument> [<https://perma.cc/V456-DM3M>]. *Merriam-Webster* separately defines “national monument” in part as a “place of historic, scenic, or scientific interest set aside for preservation.” *National Monument*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/national%20monument> [<https://perma.cc/MB7Z-2F93>].

68. See, e.g., GA. CODE ANN. § 50-3-1(b)-(c) (2019) (protecting certain “monument[s]” as well as memorials, plaques, and markers without defining the terms); see also RONALD F. LEE, NAT’L PARK SERV., THE ANTIQUITIES ACT OF 1906, at 75 (1970) (reviewing the legislative history of the Antiquities Act and finding no real definition for the term “monument” therein).



reveal, American public spaces contain many old statues of dead men on horses or pedestals, even though Americans now recognize many different forms of built memorials as similarly monumental.<sup>69</sup> As used in this Article, the term “monument” refers to any specific physical landmark, object, or place, which may be built or natural, and which is set aside from ordinary use for special attention, regard, or study. A monument may be public or privately owned, but it tends toward at least some limited display or shared use.<sup>70</sup> All monuments, whether natural or built, are an attempt to fix a certain set of values and messages in a physical place.<sup>71</sup>

Monuments need not be protected by law, but many monuments in the United States are so protected, sometimes by laws that allow little local input about whether the monuments can be altered or removed. For the purposes of this Article’s definition, any relevant legal terminology is suggestive but not determinative: in other words, a million-acre marine national monument may have fewer conventionally “monumental” characteristics than a stone shrine at a former President’s birthplace, even if the latter is called a park or preserve. As a result, this Article’s definition of a “monument” is somewhat ambiguous at the margins, like most people’s working understanding of the term.

Whether monuments are shaped by human hands or natural forces, once recognized they become “a kind of natural fact, as if [they] had always been meant to be.”<sup>72</sup> The process of creating or recognizing a monument sets a part of the world apart from at least some types of everyday change and ordinary human interactions. Put another way, once their special place in a landscape is recognized, monuments, whether built or natural, become “imbued” with an aura of “permanence,” and the public develops an “instinctual aversion” to their alteration or removal.<sup>73</sup>

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69. See, e.g., KIRK SAVAGE, *MONUMENT WARS: WASHINGTON, D.C., THE NATIONAL MALL, AND THE TRANSFORMATION OF THE MEMORIAL LANDSCAPE* 2 (2009).

70. Cf. Upton, *supra* note 15, at 13 (noting that even private monuments “stand toward the public end of a public-private axis”).

71. See, e.g., LEVINSON, *supra* note 17, at 6-8.

72. KIRK SAVAGE, *STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND MONUMENT IN NINETEENTH-CENTURY AMERICA* 7 (2018).

73. Cheryl Jiménez Frei, *Towards Memory, Against Oblivion: A Comparative Perspective on Public Memory, Monuments, and Confronting a Painful Past in the United States and Argentina*, *PUB. HISTORIAN* (Sept. 2017), <http://tph.ucpress.edu/content/special-virtual-issue->

This aura of permanence surrounds both built and natural monuments; indeed, it is striking how often built and natural monuments are compared, especially when their permanence is at stake. For natural monuments, once their monumental characteristics are recognized, these most natural of “natural facts” frequently are described in terms that echo built monuments or significant buildings, especially when the importance of their preservation is at issue.<sup>74</sup> Similarly, a built monument carries layers of weight beyond its physical presence. It becomes a “landmark of power” in its built setting,<sup>75</sup> taking on something like the aura of permanence that surrounds a great tree or geological formation. This is no accident: built monuments are sited and designed to discourage even imagination about their alteration, evoking the permanence of natural landmarks even when their original messages fall silent.<sup>76</sup>

Beyond these implicit messages of stability and resistance to change, all monuments are meant to evoke and reinforce various specific values or stories presently important to at least some members of a community. After all, part of their purpose is to reinforce and transmit these stories and values into the future.<sup>77</sup> But in addition to the specific messaging associated with any individual monument, the simple work of creating, recognizing, and protecting monuments—whether built or natural—also involves processes of communal mental manipulation that help these built objects or natural places resist change. These multiple layers of manipulation create the potential for conflict everywhere that monuments and laws that protect them are found, even when the original messages associated with the monuments may have dimmed over time.

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monuments-memory-politics-and-our-publics [<https://perma.cc/K5U4-9B8Q>].

74. See, e.g., JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 196 (1911) (comparing the beauty of nature to that of a cathedral); see also James R. Rasband, *Antiquities Act Monuments: The Elgin Marbles of Our Public Lands?*, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 137, 137 (David Harmon et al. eds., 2006).

75. See Catherine W. Bishir, *Landmarks of Power: Building a Southern Past in Raleigh and Wilmington, North Carolina, 1885-1915*, in WHERE THESE MEMORIES GROW: HISTORY, MEMORY, AND SOUTHERN IDENTITY 139, 139 (W. Fitzhugh Brundage ed., 2000).

76. Robert Justin Lipkin, *Down with Flags, Statues, and Monuments: Cultural Memory in a Deliberative Democracy*, 7 U. CHI. L. SCH. ROUNDTABLE 239, 258 (2000).

77. See, e.g., DAVID RIEFF, IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES 11 (2016); see also LEVINSON, *supra* note 17, at 1-11 (gathering examples).

For example, a Spanish statute passed in 2007 provided for the removal of many monuments connected with the Spanish Civil War and the Francoist regime,<sup>78</sup> but disputes remain over monuments that have been removed as well as those that have been left in place for their alleged architectural merit or some other reason.<sup>79</sup> In South Africa, a statute passed in 1999 provides for the protection *and* the potential modification of natural, historical, and archaeological monuments and other “heritage resources.”<sup>80</sup> Due to its flexibility and comprehensive scope, the South African National Heritage Resources Act is frequently hailed as a potential model for monument conflicts elsewhere.<sup>81</sup> Nevertheless, conflicts remain over South African monuments—ranging from an almond hedge, to a monolith built to commemorate a colonial battle, to an agricultural archaeological site—all charged in various ways with the country’s colonial and apartheid past.<sup>82</sup> And throughout central and eastern Europe, monuments tied to the Communist Era and World War II remain divisive despite a wide and varied range of legal protections.<sup>83</sup>

In other words, many places besides the United States are also marked by bitter fights over monuments and controversial monument-protection laws, including countries that take a more integrated legal approach to both built and natural monuments. But

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78. Ley de la Memoria Histórica art. 15 (B.O.E. 2007, 310) (Spain).

79. See, e.g., Rodrigo Casteleiro García, *El Arco de la Discordia*, EL PAÍS (Jan. 3, 2017, 5:45 PM), [https://elpais.com/ccaa/2017/01/02/madrid/1483370786\\_958217.html](https://elpais.com/ccaa/2017/01/02/madrid/1483370786_958217.html) [<https://perma.cc/7TFH-LMKF>] (discussing ongoing conflict over Francoist monuments including the Valley of the Fallen and the Victory Arch).

80. National Heritage Resources Act 25 of 1999 § 3(1)-(2) (S. Afr.).

81. See, e.g., Deborah Douglas, *In Dealing with Confederate Monuments, South Africa Provides a Model*, CHI. REP. (Aug. 18, 2017), <https://www.chicagoreporter.com/in-dealing-with-confederate-monuments-south-africa-provides-a-model/> [<https://perma.cc/D3H9-JW75>].

82. Andrea Durbach, *Cultural Heritage as Transformation: A Study of Four Sites from Post-Apartheid South Africa*, in HERITAGE, CULTURE AND RIGHTS: CHALLENGING LEGAL DISCOURSES 205, 212-17 (Andrea Durbach & Lucas Lixinski eds., 2017).

83. Matthew Luxmoore, *Poles Apart: The Bitter Conflict over a Nation’s Communist History*, GUARDIAN (July 13, 2018, 1:00 PM), <https://www.theguardian.com/news/2018/jul/13/poles-apart-the-bitter-conflict-over-a-nations-history-poland-monuments-communism-soviet-union> [<https://perma.cc/V765-LYHT>]; see also Rick Lyman, *Political Rage over Statues? Old News in the Old World*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/world/europe/european-monuments-statues-communism.html> [<https://perma.cc/S7FL-3BHD>] (discussing monument conflicts and legal changes relevant to these conflicts in a number of European countries).

American monument conflicts are unusual in many ways, as Part I of this Article will show. Part of what makes American monument conflicts unusual is the distinctively American ambivalence about protecting monuments in general—a pendulum that swings between the desire to pick out natural and historic spaces as special to the narrative of a relatively young country, and the desire to build over that which is old or received from others in order to focus on a relatively young country's present and future. Part I.A discusses the origins of American attitudes about monuments, describing pre-Revolutionary monument conflicts and the broad suspicion of monumental impulses in the history of the young Republic. Part I.B tracks changing attitudes about monuments in America in the nineteenth century through the origins of America's first monument-protection laws, which will be analyzed in greater depth in Parts II and III.

*A. Revolutionary Skepticism and Early Conflicts over American Monuments*

Americans may fight about monuments more frequently than ever before, but the history of conflict over American monuments dates back to the earliest days of the American Revolution. In April 1770, a gilded lead statue of King George III on a horse was dedicated at the Bowling Green at the southern tip of Manhattan in order to memorialize “the deep Sense this Colony has of the eminent and singular Blessings received from him during his most auspicious Reign.”<sup>84</sup> At the time it was built, the monument to King George was the only equestrian statue in what would become the United States.<sup>85</sup> Notwithstanding the deep sense of devotion noted at the dedication, the statue was subject to vandalism almost as soon as it was erected, and a wrought iron fence marked with the royal insignia was installed around it in 1771.<sup>86</sup> Despite the fence, an antigraffiti and antidesecration ordinance passed in 1773 to protect the statue, and despite sporadic nearby demonstrations in

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84. Arthur S. Marks, *The Statue of King George III in New York and the Iconology of Regicide*, 13 AM. ART J. 61, 61 (1981).

85. SAVAGE, *supra* note 69, at 37.

86. Marks, *supra* note 84, at 65.

support of the monument and George III's continued reign by the "better sort of people," vandalism of the monument continued to occur in the following years.<sup>87</sup>

On July 9, 1776, soon after the Declaration of Independence was read publicly in New York, a crowd of citizens with revolutionary impulses marched down to the Bowling Green, defaced and then scaled the fence, dragged the statue to the ground, smashed and sawed it to bits, and then melted down most of the bits.<sup>88</sup> Three days later, Ebenezer Hazard, who had been appointed postmaster of New York by the Continental Congress, wrote to General Horatio Gates of the Continental Army. In his letter to Gates, Hazard included a copy of the newly signed Declaration of Independence along with the news about the statue's destruction.<sup>89</sup> In particular, Hazard wrote Gates that the King's statue had been pulled down and destroyed "to make musket ball of, so that [the King's] troops will probably have melted Majesty fired at them."<sup>90</sup>

While the original statue is gone, the wrought iron fence that was constructed to protect the statue remains—albeit still scarred from the forcible removal of the royal insignia that originally decorated it.<sup>91</sup> Like the statue of Christopher Columbus that now stands in the middle of Columbus Circle, the scarred fence around Bowling Green is currently listed on the National Register of Historic Places and as a New York state landmark.<sup>92</sup> It bears witness to the longstanding suspicion of, and occasionally destructive impulses toward, monuments that have simmered away throughout American history, even

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87. HOLGER HOOK, *EMPIRES OF THE IMAGINATION: POLITICS, WAR, AND THE ARTS IN THE BRITISH WORLD, 1750-1850*, at 49-51 (2010) (quoting *MORNING CHRON.*, Feb. 4, 1775).

88. Marks, *supra* note 84, at 65-66. Similar monuments to royal authority were destroyed with similar sentiments throughout the thirteen colonies in the summer of 1776. *See, e.g.*, HOOK, *supra* note 87, at 52.

89. Letter from Ebenezer Hazard to General Gates (July 12, 1776), in *AMERICAN ARCHIVES: CONSISTING OF A COLLECTION OF AUTHENTICK RECORDS, STATE PAPERS, DEBATES, AND LETTERS AND OTHER NOTICES OF PUBLICK AFFAIRS* 227, 227-28 (1843); *see also* Fred Shelley, *Ebenezer Hazard: America's First Historical Editor*, 12 *WM. & MARY Q.* 44, 52 (1955).

90. Letter from Ebenezer Hazard to General Gates, *supra* note 89, at 228.

91. David W. Dunlap, *Greening Ye Olde Manhattan*, *N.Y. TIMES* (July 9, 2004), <https://www.nytimes.com/2004/07/09/arts/greening-ye-olde-manhattan.html> [<https://perma.cc/ZH69-3M3T>].

92. Honan, *supra* note 18; *see infra* notes 193-94 and accompanying text (discussing records of listings).

as their survival and present protection reveal the strength of monumental impulses in America today.

The brief life and abrupt end of George III's Manhattan statue show that American monuments have always provided a cauldron for conflict, and that legal efforts to protect controversial monuments are older than the Republic. But American ideas about what counts as a monument, whether monuments are worthy of protection, and how monuments should be protected have changed a great deal since George III's statue was melted down for munitions—as the much longer story of the statue's now-monumental fence shows.

For a number of reasons, including but not limited to their rejection of the trappings and memorials to the British monarchy, many in the Revolutionary generation were hostile to many kinds of civic memorials or any kind of public monuments, seeing them as an obstacle to the new Republic's proper orientation toward the immediate needs of the present and an idealized conception of the future.<sup>93</sup> Early America's widespread skepticism about the value of historic monuments was perhaps best articulated by James Madison, who suggested that it was part of “the glory of the people of America” that they did not suffer a “veneration for antiquity, for custom, or for names” to contradict “the suggestions of their own good sense” or “the lessons of their own experience.”<sup>94</sup> More bluntly than Madison, at the beginning of the nineteenth century North Carolina Congressman Nathaniel Macon stated that “monuments are good for nothing,” arguing that it would be far better to devote public funds to educate the poor rather than to build a public memorial to George Washington.<sup>95</sup>

A few decades later, Missouri's future senator and governor Benjamin Gratz Brown<sup>96</sup> celebrated the fact that history's lessons were lost on Americans in equally direct terms. “With the Past we have literally nothing to do,” Brown claimed, because for Americans,

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93. See, e.g., KAMMEN, *supra* note 11, at 41-45 (gathering sources and noting that “[t]he vehemence with which the past was rejected” in the United States, even seventy years after the Revolution, “is astonishing”).

94. THE FEDERALIST NO. 14, at 52 (James Madison) (Jacob Gideon ed., 1847).

95. 6 ANNALS OF CONG. 803-04 (1800).

96. See *Brown, Benjamin Gratz, (1826-1885)*, BIOGRAPHICAL DIRECTORY U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=b000905> [<https://perma.cc/CA6W-UDEQ>].

“[p]recedents have lost their virtue and all their authority is gone.”<sup>97</sup> Brown was not alone in these views. For many Americans, focusing on the past, or seeking to memorialize it through monuments, could only sap the young nation’s unique vitality. It was “for other nations,” lost in their “garrulous” old age, to “muse over the history of their youthful exploits.”<sup>98</sup> Writing as a critical observer of this early American tendency—which he thought was a great and “incurable ... vice of democracy”—John Quincy Adams tried to sum up the skeptical attitudes of many early Americans, writing that “[d]emocracy has no monuments” because “its very essence is iconoclastic.”<sup>99</sup> In particular, Adams believed that his country was too “swallowed up in the present” to worry about creating markers commemorating the past.<sup>100</sup>

*B. The Growth of American Monuments and the Roots of American Monument-Protection Laws*

Nothing better illustrates the enduring suspicion of built memorials to historical figures in early America than the prolonged debates over where to bury George Washington, and whether some sort of monument should be connected with his burial site. Washington himself approved a plan to have his remains buried underneath an equestrian statue in the middle of the Capitol building at the exact center of Washington, D.C.<sup>101</sup> After his death, Federalists sought to bury him outside the Capitol, in a mausoleum modeled after an Egyptian pyramid that was designed to be taller than the height of the Capitol itself.<sup>102</sup> But all of these ideas were rejected by Congress after the watershed election of 1800.<sup>103</sup> The proposed mausoleum was rejected as a “useless pyramid,” and for many years

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97. FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 355 (1921) (quoting Brown at length).

98. James Kirke Paulding, *The American Naval Chronicle*, 6 ANALECTIC MAG. 231, 249 (1815); see also LOWENTHAL, *supra* note 11, at 188-92 (gathering sources).

99. 8 MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 433 (Charles Francis Adams ed., 1876) [hereinafter MEMOIRS OF JOHN QUINCY ADAMS].

100. *Id.*

101. SAVAGE, *supra* note 69, at 38.

102. *Id.* at 39-42.

103. *Id.* at 43.

the only monument to Washington in the nation's capital was the city itself, "a Living, Intelligent Monument of Glory" to the first President.<sup>104</sup>

Congress's rejection of the initial plans for Washington's mausoleum did not stop the conflict over whether and how to honor Washington in the nation's capital. For example, in 1841 Horace Greenough's statue of Washington, seminude in a toga and seated on a throne like a god from classical antiquity, was installed in the Capitol—it was, in fact, the first completed federal monument of any sort.<sup>105</sup> The statue was originally installed in the center of the Capitol, but it was so widely hated that it was later moved to a less conspicuous site,<sup>106</sup> and today it is widely regarded as one of the most mocked public monuments ever erected in America.<sup>107</sup>

At a certain point, however, the deliberate repudiation of the past created during the Revolutionary Era and fostered during the early nineteenth century began to turn on itself, and a desire for historical monuments began to spread throughout the American public, along with a renewed interest in history as a civic good.<sup>108</sup> But the progress of this new monumental enthusiasm was fitful. For example, the Washington Monument on the National Mall was not begun until 1848, and not completed until almost two decades after the Civil War in 1884: its sluggish progress and lukewarm reception reflected Americans' lingering ambivalence about lasting monuments.<sup>109</sup>

Beyond the narrow debate over whether and how to commemorate Washington, this gradual shift in American attitudes toward monuments can also be tracked through the growth of rural cemeteries with monumental art throughout the country.<sup>110</sup> This boom in

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104. *The Memory of Gen. Washington*, WASH. CITY WKLY. GAZETTE, Nov. 25, 1815, at 4; see also MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 99, at 433 (deploring the absence of a monument to Washington).

105. SAVAGE, *supra* note 69, at 49-50.

106. See Letter to the Editor, *Washington*, CIN. WKLY. HERALD & PHILANTHROPIST, Jan. 31, 1844 (calling the monument "a ridiculous affair" that "only excites laughter" rather than admiration).

107. See, e.g., SAVAGE, *supra* note 69, at 49-50.

108. See KAMMEN, *supra* note 11, at 65, 69-71 (describing the emerging "crisis of identity" in mid-nineteenth-century America caused by the ongoing "repudiation of the past").

109. SAVAGE, *supra* note 69, at 54-60, 134.

110. See Alfred L. Brophy, "These Great and Beautiful Republics of the Dead":



American monument construction in the nineteenth century was due in part to the aging Revolutionary and Civil War generations seeking to commemorate both the most memorable events of their lives and the most significant events in the early history of the country.<sup>111</sup> But more was at work in the growth of public monuments than a combination of nostalgia and generational intimations of mortality.

For example, as Al Brophy has shown, the nineteenth-century wave of rural monumental cemeteries was designed to inculcate republican virtues of patience, order, devotion, and patriotism in a changing nation.<sup>112</sup> These “monuments of the dead” were intended to “keep watch for the living,” thereby providing indelible markers of exemplary behavior and collective memory and “binding together the fabric of society.”<sup>113</sup> But frequently these new monumental cemeteries were created with more loaded messages in mind as well. Many were intended to evoke an idealized conception of the country’s agricultural past, and some were dedicated to act as counterweights to the perceived moral messages broadcast by the “mammon-serving and tumultuous cit[ies]” growing rapidly across the country.<sup>114</sup> Over time, the messaging associated with some of these new cemeteries became more overt, political, and specific, ranging from the promotion of both Whig and Republican constitutional ideals<sup>115</sup> to the cultivation of an enduring attachment to the Confederacy and the promotion of the Lost Cause mythology.<sup>116</sup>

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*Constitutionalism and the Antebellum Cemetery* 13, 27-28 (UNC Legal Studies Research Paper No. 2304305, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2304305](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304305) [<https://perma.cc/68MD-QW8J>] (noting that the “era of the creation of the rural cemetery was also the era of monuments to the American revolutionary generation” and that the nineteenth-century growth of rural cemeteries was “closely linked to the erection of monuments to the past”).

111. KAMMEN, *supra* note 11, at 115.

112. See Brophy, *supra* note 110, at 19-46.

113. See *id.* at 19, 29-30 (quoting DEDICATION OF THE BELLEFONTAINE CEMETERY: ADDRESS OF PROFESSOR POST, AND OTHER PROCEEDINGS ON THAT OCCASION (St. Louis, T.W. Ustick 1851)); see also KAMMEN, *supra* note 11, at 274 (noting that new American cemeteries “often were regarded as shrines where local history ... might be reflected upon”).

114. Brophy, *supra* note 110, at 25-31 (quoting *Ornamental Cemeteries*, 21 YALE LITERARY MAG. 45, 50 (1855)).

115. See generally *id.* (reviewing seventy cemetery dedication addresses from 1831 to 1863).

116. See, e.g., CAROLINE E. JANNEY, BURYING THE DEAD BUT NOT THE PAST: LADIES’ MEMORIAL ASSOCIATIONS AND THE LOST CAUSE 199 (2008).

Like the monumental character of Washington, D.C., the expansion of new monumental cemeteries in the nineteenth century tracked the changing nature of American attitudes toward built monuments. By the second half of the nineteenth century, public spaces around the country began to fill up with statues and other memorials to war dead and historical figures important to the nation's changing conception of itself.<sup>117</sup> The period from roughly 1880 through 1920 saw an unprecedented burst of monument construction—it was during this period, along with the last few decades, that Americans built most of the monuments that fill the country's civic spaces today.<sup>118</sup> Indeed, prior to the second half of the nineteenth century, Americans largely lacked a well-defined conception of public space—and still less did they see public spaces in their cities as places well-suited for built monuments.<sup>119</sup>

By the second half of the nineteenth century, the sentiment expressed by Justice Durfee was much more widely shared than at the time of the Revolution. Many felt that the country needed more monuments to bind the nation together and express a distinctively American view of its history and culture. Jared C. Markham, who designed a monument for Saratoga Battlefield that was erected during this period, captured these attitudes in a long pamphlet that he wrote to accompany the monument's dedication.<sup>120</sup> Instead of building on past models, Markham believed that America's democratic character meant that American monuments had a special charge: like the country's constitution and its laws, they should grow out of the "history and spirit" of the American people rather than their rulers, expressing a "high tone and spirit, a pride of nationality, and a pure and lofty patriotism."<sup>121</sup>

Just as Americans' attitudes toward built monuments were changing, Americans' attitudes toward natural and archaeological

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117. See, e.g., Sally Greene, *Judge Thomas Ruffin and the Shadows of Southern History*, 17 S. CULTURES 66, 67 (2011) (noting that in the last two decades of the nineteenth century, the focus of built monuments "shifted from cemeteries ... to public spaces, as dutiful citizens heeded a more partisan call").

118. Upton, *supra* note 15, at 19-20.

119. SAVAGE, *supra* note 69, at 64-66.

120. JARED C. MARKHAM, NATIONAL ART MONUMENTAL (1886) (unpaginated, on file with author); see also KAMMEN, *supra* note 11, at 163-64 (discussing Markham's work and situating it among other American theorists working with monuments from 1870-1915).

121. MARKHAM, *supra* note 120.

monuments went through a similar transformation during the mid-to late nineteenth century. In colonial America and through the early decades of the nineteenth century, many of the natural landmarks, ecological resources, and historic sites now protected as national monuments would not have been recognized as monumental at all. Indeed, many of today's national monuments would not even have been recognized as valuable in the early Republic.<sup>122</sup>

To be sure, during the Revolution and for decades thereafter, Americans frequently drew favorable contrasts between the natural resources and wild places of their new country and the man-made monuments of Europe.<sup>123</sup> Americans have always had an affinity for certain natural features—for example, the history of monumental trees in this country dates back to colonial times.<sup>124</sup> Indeed, whether they served as monuments to specific events in the past or as a monumental connection with a mythic or idealized America, monumental trees in this country were seen as a substitute, in part, for the dearth of built monuments in nineteenth-century America.<sup>125</sup> Although Americans “have neither old castles nor old associations,” wrote a famous nineteenth-century architect and landscape designer, “we have at least ... old trees that can teach us lessons ... not less instructive and poetical than the ruins of a past age.”<sup>126</sup>

But despite the longstanding resonance of monumental trees and certain other types of natural landmarks, colonial Americans and Americans in the early Republic frequently saw nature as a hostile, even demonic, other—something to be tamed by the forces of agriculture and industry. In the eighteenth and early nineteenth centuries this left little room for recognizing natural wonders as

122. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA: THE SOCIAL INFLUENCE OF DEMOCRACY* 78 (Henry Reeve trans., 1840) (“[T]he Americans ... are insensible to the wonders of inanimate nature” but are instead focused solely on “subduing nature.”).

123. See, e.g., KAMMEN, *supra* note 11, at 44-45 (gathering sources and noting that Americans “repeatedly insisted that natural wonders and antiquities in the United States were superior to their man-made counterparts in the Old World”).

124. SAVAGE, *supra* note 69, at 91-94; see also *supra* notes 9-10 and accompanying text (discussing the importance of monumental trees in America).

125. See SAVAGE, *supra* note 69, at 91-94.

126. A.J. DOWNING, *RURAL ESSAYS* 164-165 (George William Curtis ed., 1853); see also SAVAGE, *supra* note 69, at 91-94 (discussing the work of Downing and others and noting the “special resonance” of memorial trees in America, which have always carried “much of the formal power of columns, obelisks, or pyramids”).

anything but obstacles, let alone preserving them as monuments.<sup>127</sup> Beyond seeing unusual natural features as potential obstacles to material progress, certain aspects of the natural world also had sinister symbolic significance, and therefore many early Americans saw spiritual value in transforming the nature's rugged features into cultivated land.<sup>128</sup> By the mid-nineteenth century, however, attitudes towards the distinctive natural features of the American landscape had begun to change. From the widespread sale of popular prints of landscape paintings and dime novels emphasizing undeveloped nature, to the growing popularity of the work of Thoreau and Emerson, nineteenth-century Americans began to celebrate the distinctive features of American nature as substitutes for the built monumental landscapes of older countries.<sup>129</sup>

A similar transformation in attitudes towards Native American history and the continent's pre-conquest past occurred in the mid-nineteenth century.<sup>130</sup> Prior to the mid-nineteenth century, the value of archaeological sites was at least as remote as the value of natural wonders to many Americans.<sup>131</sup> Public art such as the original reliefs in the Capitol Rotunda, and literature such as Longfellow's *Hiawatha*, helped kindle interest in Native American and early colonial histories—albeit in selective, highly stylized, one-sided, and frequently racist versions of those histories—while a few nineteenth-century scholars began to express an interest in understanding Native American cultural traditions and preserving Native American artifacts.<sup>132</sup> By the late nineteenth century, the Archaeological Institute of North America was founded, and historical

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127. See, e.g., DE TOCQUEVILLE, *supra* note 122, at 78 (suggesting that Americans in the eighteenth and early nineteenth centuries did not notice natural wonders because “[t]heir eyes [were] fixed upon” the march of their own progress).

128. See, e.g., RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* 24-25, 31-35 (5th ed. 2014).

129. See, e.g., KAMMEN, *supra* note 11, at 44-45 (gathering sources and tracing the origins of the national parks and monuments system to this emerging mid-nineteenth-century interest in natural wonders and historic sites).

130. See *id.* at 184-88.

131. See, e.g., Robert L. Schuyler, *The History of American Archaeology: An Examination of Procedure*, 36 *AM. ANTIQUITY* 383, 384-85 (1971) (noting that systematic study of and interest in archaeological sites in America did not emerge until the mid-nineteenth century).

132. See, e.g., KAMMEN, *supra* note 11, at 82-87.

societies began lobbying Congress to preserve vulnerable American archaeological sites.<sup>133</sup>

Many of the monument-protection laws that still affect American lives and landscapes date to this first great period of monument creation that stretched around the turn of the twentieth century. For example, in 1904 Virginia passed the first version of its state statue law,<sup>134</sup> and in 1906 Congress passed the Antiquities Act<sup>135</sup>—both of which will be discussed at greater length below—and Americans continued to develop monument-protection laws throughout the twentieth and twenty-first centuries.<sup>136</sup> As a result, Americans' evolving attitudes toward monuments have become inseparable from the laws that Americans have established to protect them.

While American enthusiasm for monuments crested at the turn of the twentieth century, it did not remain static. In the mid-twentieth century, a gradual backlash to these widespread monumental impulses emerged, which drew upon both the long-standing tradition of American skepticism about monuments<sup>137</sup> as well as anger about how the new monument-protection laws were being used.<sup>138</sup> By the late twentieth century the pendulum had swung back again. As noted above, Americans today are living through a second great wave of enthusiasm for monuments, built and natural, even if the forms of these monuments are sometimes different than those that have come before, and even though monuments and the laws that protect them generate more intense controversy than ever before.<sup>139</sup>

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133. *Id.* at 184-85; *see also* LEE, *supra* note 68, at 4-7 (discussing the founding of the Archeological Institute of North America).

134. Act of Feb. 19, 1904, 1904 Va. Acts 62.

135. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 54 U.S.C. §§ 320301-320303 (2012)).

136. *See infra* Part II (discussing the evolution of the statue statutes, the NHPA, and its predecessor statutes).

137. *See, e.g.*, Lewis Mumford, *The Death of the Monument*, in CIRCLE: INTERNATIONAL SURVEY OF CONSTRUCTIVE ART 263, 263-270 (J. L. Martin et al. eds., 1937).

138. *See, e.g.*, LEE, *supra* note 68, at 98, 105 (detailing the bitter opposition to President Roosevelt's proclamation of the Jackson Hole National Monument in 1943 and President Eisenhower's proclamation of the Chesapeake and Ohio Canal National Monument in 1961).

139. *See* Upton, *supra* note 15, at 21 (tracing the beginnings of "[t]he current monument-building era" to the dedication in 1982 of the Vietnam Veterans' Memorial in Washington, D.C.).

While Americans remain of two minds about monuments, what has changed since the nineteenth and early twentieth centuries is the number of laws that protect monuments—many of which date back to this first era of monumental enthusiasm. This means that any understanding of contemporary American monument conflicts depends on understanding these laws. Parts II and III below focus on some of the most important and controversial monument-protection laws, paying particular attention to the state statue statutes, the NHPA, and the Antiquities Act.

## II. THE POWER OF PASTNESS: BUILT MONUMENTS IN AMERICA AND THE LAWS THAT PROTECT THEM

By the turn of the twentieth century, Americans held very different attitudes toward built monuments than previous generations—instead of rejecting such memorials, many Americans decided that they wanted their civic landscapes to reflect the presence of valued historical figures and the power of pastness.<sup>140</sup> The public spaces of American cities began to fill up with statues and pedestals, and Congress and state legislatures began crafting legislation to protect the new monuments.<sup>141</sup> Two statutory schemes are particularly important to understand the past and present of American laws that protect built monuments.

Part II.A begins by examining the statue statutes, a series of state laws designed to protect Confederate monuments in some southern states. As will be seen below, these laws are constitutionally suspect because they are intertwined with the same history of racial oppression that surrounds the monuments they protect.<sup>142</sup> While the oldest statue statute dates back to the turn of the twentieth century, most are of more recent vintage, and all have proven to be particularly controversial in recent years.

The second statute that is critically important to understand the history and present status of American monument-protection laws

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140. Cf. KAMMEN, *supra* note 11, at 42 (discussing changing American attitudes about how much power should reside in “pastness”).

141. See *supra* Part I.B.

142. See, e.g., Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 599 (2002) (“[L]egislation that codifies the display of monuments” to the Confederacy “sends an exclusionary social message.”).

is the NHPA. The NHPA is a statute that stretches far beyond monument protection alone: it is the keystone of American historic preservation law more generally,<sup>143</sup> and in addition to conventional monuments, its ambit covers everything from historic houses to battlefields to radio telescopes to narrow-gauge railroads high in the mountains.<sup>144</sup>

Part II.B explores the history of the NHPA and its application to monuments, while Part II.C compares the NHPA to the statue statutes—a valuable comparison for a number of reasons. First, a comparison of the statue statutes with the NHPA reveals that the statue statutes have many other defects beyond their potential constitutional weaknesses and their troubling history, which may be useful to convince those who are not willing to confront this troubling history. Moreover, a comparison of the NHPA with the statue statutes shows that the NHPA can be used in problematic ways that echo, even if they do not equal, the problems caused by the statue statutes. In other words, the statue statutes can serve as a cautionary example for future action taken by federal, state, and local actors under the NHPA.

### *A. The Many Fatal Flaws of the Statue Statutes*

The oldest American monument-protection laws predate the Revolution,<sup>145</sup> but many of the most controversial monument-protection laws are of relatively recent vintage. The statue statutes that attempt to protect Confederate monuments in a number of southeastern states represent both sides of this history. The first statue statute was passed over a century ago,<sup>146</sup> before every other monument-protection law discussed in detail in this Article, but most of the other statue statutes are of much more recent vintage.<sup>147</sup>

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143. See, e.g., SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 17 (2012) (noting that the NHPA “is a sweeping federal law that forms the heart of our federal preservation regime”).

144. See 36 C.F.R. § 60.3 (2018) (providing examples of locations protected by the NHPA).

145. See *supra* notes 88-92 and accompanying text (discussing colonial New York City’s monument-protection law).

146. Act of Feb. 19, 1904, 1904 Va. Acts 62.

147. See, e.g., Alabama Memorial Preservation Act of 2017, 2017 Ala. Laws 1109 (codified at ALA. CODE §§ 41-9-230 to -237 (2017)).

Eight states have statue statutes on the books: Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.<sup>148</sup> While the statue statutes were drafted at different times and in response to different events, each shares many of the following characteristics.<sup>149</sup>

First, most of the statue statutes were drafted to protect a wide range of monuments throughout their respective states, with little or no opportunity for local input, and little or no consideration of individual local circumstances, history, or impact. For example, Georgia's statute protects all publicly owned monuments associated with Confederate or United States military service, regardless of the public entity that owns them, and it expressly prohibits any local government official from attempting to remove or conceal such a monument.<sup>150</sup> The exclusion of any local input or nuance is particularly noteworthy in Georgia's statute because it also singles out the massive state-owned monument to the Confederacy at Stone Mountain for special protection<sup>151</sup>—even though the statute makes no provision for diverse or changing local circumstances for other Confederate monuments.

In addition, enforcement of the statue statutes has reinforced this disregard for local concerns. States have articulated sweeping intrastate preemption arguments in an attempt to exclude all local efforts to modify or alter protected monuments, even efforts that comply with the letter of the statue statutes.<sup>152</sup> In sum, both the design and the attempts to enforce the statue statutes deliberately exclude local governments, community groups, and individual citizens, focusing instead on protecting an entire class of monuments regardless of how they affect those around them.<sup>153</sup>

A second characteristic shared by most of the statue statutes relates to the disconnect between their facial language and their

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148. ALA. CODE §§ 41-9-230 to -231; GA. CODE ANN. § 50-3-1 (2019); KY. REV. STAT. ANN. §§ 171.780-.788 (West 2019); MISS. CODE ANN. § 55-15-81 (2019); N.C. GEN. STAT. § 100-2.1 (2018); S.C. CODE ANN. § 10-1-165 (2019); TENN. CODE ANN. § 4-1-412 (2019); VA. CODE ANN. § 15.2-1812 (2019).

149. See Bray, *supra* note 23, at 23-44 (providing a comprehensive survey of the statue statutes).

150. GA. CODE ANN. § 50-3-1(b)(1)-(2).

151. See *id.* § 50-3-1(c).

152. See, e.g., Complaint, *supra* note 60, at 2.

153. See Bray, *supra* note 23, at 6-8, 11.



true purpose. All of the statue statutes ostensibly protect a wide range of built monuments ranging across American history. For example, in addition to protecting monuments built to commemorate the “War Between the States,” Tennessee’s statue statute also protects monuments built to commemorate military conflicts ranging from the French and Indian War to Operation El Dorado Canyon.<sup>154</sup> Yet there can be no doubt that these statutes were designed and passed in order to protect Confederate monuments in particular,<sup>155</sup> for a host of reasons that go beyond the general dearth of American monuments and American monument conflicts over the 1755 Battle of the Monongahela or the 1986 bombing campaign in Libya.

In Tennessee, for example, the statue statute was hailed by the Tennessee Division of the Sons of Confederate Veterans (SCV) as “one of the greatest documents in modern history” because it was “clearly” designed to protect Confederate monuments throughout the state.<sup>156</sup> The enthusiasm expressed by the Tennessee SCV for the statue statute was no coincidence, because the statue statute bill was introduced into both houses of the Tennessee legislature by members of the Tennessee SCV.<sup>157</sup> Moreover, despite the wide range of monuments that they ostensibly protect, the statue statutes have been invoked almost without exception to protect Confederate monuments.<sup>158</sup> And these rare exceptions serve only to prove the general rule: South Carolina’s statue statute was invoked to protect other types of monuments, but only once, and then only to prevent changes to racially segregated monuments to fallen soldiers from World War I and II.<sup>159</sup>

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154. See TENN. CODE ANN. § 4-1-412(a)(2), (b)(1).

155. See Bray, *supra* note 23, at 23-41 (reviewing the legislative history behind each statue statute).

156. Chuck Demastus, *Tennessee Passes Heritage Protection Act*, S. HERITAGE NEWS & VIEWS (May 11, 2013, 11:09 AM), <http://shnv.blogspot.com/2013/05/tennessee-passes-heritage-protection-act.html> [<https://perma.cc/G7QT-K65Q>].

157. See *id.*; see also Liliana Segura, *Forrest the Butcher: Memphis Wants to Remove a Statue Honoring First Grand Wizard of the KKK*, INTERCEPT (Sept. 2, 2017, 8:00 AM), <https://theintercept.com/2017/09/02/memphis-wants-to-remove-statue-honoring-kkk-grand-wizard-nathan-bedford-forrest/> [<https://perma.cc/3KYJ-LQR3>] (quoting the authors of the bill).

158. See Bray, *supra* note 23, at 7-8.

159. Alan Blinder, *Change to a Segregated Monument Is Stymied by a Law Protecting It*, N.Y. TIMES (Apr. 30, 2015), <https://www.nytimes.com/2015/05/01/us/south-carolina-city-would-remove-segregated-war-memorial-but.html> [<https://perma.cc/NQU8-6YP2>].

These enforcement patterns suggest a third common characteristic: these statutes are intertwined with the same painful history of racial segregation, intimidation, and violence that infuses many of the monuments that the statutes are designed to protect. All monuments can become charged with troubling meaning over time, and many other monuments beyond the Confederate memorials discussed here may have carried offensive characteristics that were obscured by imperfect historical understanding and education.<sup>160</sup> But the history of Confederate monuments in this country is unusually tragic, and even a cursory examination of their history reveals a deliberate association with both slavery and the systematic and violent racial discrimination that survived the Civil War.<sup>161</sup> As a recent comprehensive report from the Southern Poverty Law Center shows, Confederate monuments were erected in two distinct periods. The first occurred from 1900 through the 1920s, as Jim Crow laws were enacted and the Ku Klux Klan was reborn, and the second began after the Supreme Court's decision in *Brown v. Board of Education*, as southern states went through massive resistance to desegregation.<sup>162</sup> Although the connection between Confederate monuments and institutionalized discrimination and violence has become ever clearer, thoughtful observers have always understood that much of this country's public commemoration to the Confederacy was designed to help perpetuate the work of Jim Crow and the Klan.<sup>163</sup>

Most, though not all, of the statue statutes were enacted decades after the monuments they seek to protect, but their true focus on Confederate monuments means that they are inextricably intertwined with this troubled history—so much so that many scholars have argued that these statutes are unconstitutional.<sup>164</sup> One of these

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160. See BOOTH GUNTER ET AL., S. POVERTY L. CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY 5-6 (Booth Gunter ed., 2016).

161. See, e.g., Tsesis, *supra* note 142, at 598 (arguing that “statues dedicated to the Confederacy’s chief ideologues” support the “attitudes and deeds of the Old South” and “its entrenched separatism between races”).

162. See GUNTER ET AL., *supra* note 160, at 8-9, 17-35 (documenting all public spaces dedicated to the Confederacy, including when they were created).

163. See, e.g., W.E.B. DuBois, *Postscript*, 40 CRISIS 278, 279 (1931) (noting the connection between Confederate monuments, “the rules of ‘Jim-Crow,’” and the “custom” of vigilante racist murder).

164. See Bray, *supra* note 23, at 13-14, 16-19 (reviewing several of the arguments about the

arguments focuses on the exclusionary social message that the statue statutes provide,<sup>165</sup> a message that both amplifies and adds an official imprimatur to the exclusionary messages represented by the monuments themselves. For some, the message presented by the statutes is so powerfully exclusionary and stigmatizing that it is unconstitutional because it directly undermines the Thirteenth Amendment's abolition of slavery and involuntary servitude.<sup>166</sup>

Other scholars argue that the statue statutes are unconstitutional because the statutes compel local governments to voice a problematic and exclusionary message, often against their own wishes, thereby violating the First Amendment rights of these communities and their citizens.<sup>167</sup> Still others claim that the statue statutes are unconstitutional on First Amendment grounds because, much like unconstitutional flag-burning ordinances, they constrain the free speech acts of those who might wish to protest Confederate monuments' continued existence.<sup>168</sup> Finally, some scholars argue that the statue statutes are unconstitutional because they force local governments into exclusionary expressive conduct that violates the Equal Protection Clause of the Fourteenth Amendment.<sup>169</sup> These arguments are currently working their way through a number of courts. It is too early to judge how effective these arguments may be— although at least one court thus far has been receptive to some of these arguments, and that decision was reversed on appeal.<sup>170</sup>

The constitutional infirmity that attaches to many of the statue statutes is connected to a fourth shared characteristic: many of these statutes were passed or amended in haste, especially those that were passed shortly after the alteration or removal of other

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constitutionality of the statue statutes).

165. See Tsesis, *supra* note 142, at 599.

166. See *id.* at 599-600.

167. See Aneil Kovvali, *Confederate Statute Removal*, 70 STAN. L. REV. ONLINE 82, 83 (2017).

168. See Ira C. Lupu & Robert W. Tuttle, *The Debate over Confederate Monuments*, TAKE CARE (Aug. 25, 2017), <https://takecareblog.com/blog/the-debate-over-confederate-monuments> [<https://perma.cc/7793-ZKYY>].

169. See Micah Schwartzman & Nelson Tebbe, *Charlottesville's Monuments Are Unconstitutional*, SLATE (Aug. 25, 2017, 9:07 AM), <https://slate.com/news-and-politics/2017/08/charlottesvilles-monuments-are-unconstitutional.html> [<https://perma.cc/ZZG2-ADUU>].

170. *State v. City of Birmingham*, No. 01-CV-2017-903426.00, slip op. at 3-7 (Ala. Cir. Ct. Jan. 14, 2019), *rev'd*, No. CV-17-903426, 2019 WL 6337424 (Ala. Nov. 27, 2019).

Confederate symbols, and thus their constitutional implications were not fully considered.<sup>171</sup> For example, North Carolina's statue statute was passed just weeks after Confederate flags and other symbols were removed from state capitols of neighboring states following the June 2015 Charleston church massacre.<sup>172</sup> In addition to the potential constitutional issues outlined above, North Carolina's rush to pass its statue statute has since been condemned by local governments, community groups, and university officials who have argued that it stripped them of discretion to resolve subsequent monument conflicts without property destruction and violence.<sup>173</sup>

North Carolina's example is far from isolated: many other statue statutes were passed or amended in haste in recent years.<sup>174</sup> The hasty passage and amendment of many statue statutes leads to a fifth shared characteristic: many of these statutes were passed so quickly that they contain many practical flaws, providing local governments with the ability to remove or alter protected monuments while complying with the statutes.<sup>175</sup> In other words, in addition to their suspect constitutional foundation and the undue burdens they place on many local governments, many of the statue

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171. See, e.g., Sterling, *supra* note 41 (quoting Alabama State Senator Hank Sanders, an opponent of Alabama's statue statute, who criticized the legislation as being too hasty and "not thought through").

172. The June 2015 massacre at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, was committed by a gunman who draped himself in the Confederate flag and other Confederate memorabilia on social media. See, e.g., Nick Corasaniti et al., *Church Massacre Suspect Held as Charleston Grieves*, N.Y. TIMES (June 18, 2015), <https://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html> [<https://perma.cc/6YGM-2MJA>]; see also Bray, *supra* note 23, at 7-8, 41 (discussing the Charleston massacre and gathering sources connecting South Carolina's subsequent flag removal to North Carolina's statue statute).

173. See, e.g., *Statement from Former Members of UNC-Chapel Hill Board of Trustees*, HIGHER ED WORKS (Jan. 23, 2019), <https://www.higheredworks.org/2019/01/unc-board-of-trustees/> [<https://perma.cc/VG5B-GKRX>] (condemning North Carolina's "hastily passed" statue statute).

174. See Bray, *supra* note 23, at 23-44 (gathering sources and describing the rushed passage of statue statutes in other states after threats of monument removal or racist violence).

175. See, e.g., *Sons of Confederate Veterans Nathan Bedford Forrest Camp 215 v. City of Memphis*, No. 18-29-III, slip op. at 2-4, 14 (Tenn. Ch. Ct. May 16, 2018), *aff'd*, No. M2018-01096-COA-R3-CV, 2019 WL 2355332 (Tenn. Ct. App. June 4, 2019), *appeal denied*, (Tenn. Oct. 14, 2019) (concluding that Memphis's conveyance of protected monuments to a private entity that then removed them was lawful under Tennessee's statue statute).

statutes are so shoddily drafted that when put to the test, they do not protect Confederate monuments nearly as effectively as their supporters may have hoped.<sup>176</sup> Through a comparison with the NHPA, Part II.C below will explore additional deficiencies in the statue statutes beyond their troubling history, constitutional infirmities, and the many practical deficiencies pointed out by previous work. But first it will be necessary to explore the NHPA in Part II.B.

### *B. Historical Monuments and the NHPA*

Confederate statues and the statutes that protect them are just one example of the many recent conflicts over built monuments and monument-protection laws in America. Across the country, a host of monuments to historic figures built in the late nineteenth and early twentieth centuries have been altered or removed in recent years,<sup>177</sup> while other monuments protected by local, state, or federal law have remained in place, despite some interest in their alteration or removal.<sup>178</sup> Aside from Confederate memorials, statues honoring

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176. Space does not permit a full examination of these practical flaws here. For such an examination, see Bray, *supra* note 23, at 20-44.

177. See, e.g., Dominic Fracassa, *SF's Controversial "Early Days" Statue Taken Down Before Sunrise*, S.F. CHRON. (Sept. 14, 2018, 4:52 PM), <https://www.sfchronicle.com/politics/article/Controversial-S-F-Early-Days-statue-taken-13229418.php> [<https://perma.cc/XML6-EX3R>]; see also Danny Lewis, *Controversial Central Park Statue Will Be Moved*, WNYC (Apr. 16, 2018), <https://www.wnyc.org/story/controversial-central-park-statue-will-be-moved/> [<https://perma.cc/39T6-K3DY>] (discussing New York's decision to remove a statue honoring Dr. J. Marion Sims); Julissa Treviño, *Monument to a Historic Black Woman Will Replace Racist Statue in Pittsburgh*, SMITHSONIAN (Mar. 20, 2018), <https://smithsonianmag.com/smart-news/pittsburgh-replace-racist-statue-monument-black-woman-180968524/> [<https://perma.cc/6M2D-3Y77>] (discussing Pittsburgh's decision to remove a statue honoring composer Stephen Foster).

178. See, e.g., Honan, *supra* note 18 (discussing the monument to Christopher Columbus in New York's Columbus Circle, which is now designated in the National Register of Historic Places); see also Julia Glum, *Lincoln Memorial Sprayed with Paint, Profanity Days After Charlottesville Protests*, NEWSWEEK (Aug. 15, 2017, 4:01 PM), <https://www.newsweek.com/lincoln-memorial-vandalized-red-graffiti-651154> [<https://perma.cc/2WPR-ETJ4>] (describing repeated protests and damage to the Columbus Memorial Fountain in Washington, D.C., which is also on the National Register of Historic Places); Shaun Towne, *Christopher Columbus Statue Vandalized in Providence*, WPRI.COM (Oct. 9, 2017, 8:34 PM), <https://www.wpri.com/news/crime/christopher-columbus-statue-vandalized-in-providence> [<https://perma.cc/5NKG-7C9R>] (describing protests around and damage to the Columbus monument in Providence, Rhode Island, which is also on the National Register of Historic Places); *Columbus Day Brings Protests to Downtown Pueblo*, KRDO.COM (Oct. 9, 2018, 1:09 PM), <https://www.krdo.com/news/2018/10/09/columbus-day-brings-protests-to-downtown-pueblo/>

Christopher Columbus are probably the most frequent specific flashpoint for monument-related controversy in America today.<sup>179</sup> Part B.1 below explores these controversies in connection with Columbus monuments protected by the NHPA, while Parts B.2 and B.3 explore the structure and function of the NHPA in more detail, showing that the Columbus monument controversies are an exception—though a significant exception—to the way that the NHPA usually works, and the types of monuments and other historic properties that it tends to protect.

### *1. Contemporary Monument Controversies and the NHPA*

In addition to the federal holiday associated with Columbus, monuments to Columbus and place names incorporating his name are ubiquitous across the country. But in recent decades knowledge of Columbus's advocacy and practice of slavery and indiscriminate violence has become more widespread.<sup>180</sup> The oldest monument to Christopher Columbus in the United States dates back to the late eighteenth century.<sup>181</sup> But most American Columbus monuments were built in the late nineteenth and throughout the twentieth centuries with the financial and political support of Italian-American

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[<https://perma.cc/2F6F-T5E8>] (discussing protests and counterprotests over Pueblo, Colorado's Columbus monument, which is also on the National Register of Historic Places). The objects, sites, districts, and other properties designated in the National Register or as National Historic Landmarks are available from the National Park Service's National Register Database, and spreadsheets current through October 2018 are on file with the author.

179. See, e.g., Steve Hendrix, *The Columbus Day Holiday Is Under Attack, and So Are Statues Honoring the Famed Explorer*, WASH. POST (Oct. 9, 2017, 6:00 AM), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/09/the-columbus-day-holiday-is-under-attack-and-so-are-statues-honoring-the-famed-explorer/> [<https://perma.cc/D6MA-V9EV>].

180. See, e.g., Karim Doumar, *Goodbye, Columbus Day: How Cities Turned Against a Controversial Holiday*, CITYLAB (Oct. 8, 2018), <https://www.citylab.com/life/2018/10/why-cities-turned-against-columbus-day/572338/> [<https://perma.cc/4ZKC-GXRG>]; see also ANDRÉS RESÉNDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA* 22-28 (2016) (quoting extensively from Columbus's correspondence and describing his involvement in and promotion of slavery and indiscriminate violence).

181. See Pamela Wood, *Christopher Columbus Monument Vandalized in Baltimore*, BALTIMORE SUN (Aug. 21, 2017, 4:05 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-columbus-monument-20170821-story.html> [<https://perma.cc/C98Z-T8Z2>] (noting that the Columbus monument currently located in Herring Run Park in Baltimore, Maryland was originally erected at another site in 1792).

organizations as a way to combat the ethnic and religious discrimination their members faced.<sup>182</sup>

For example, the monument in New York's Columbus Circle, built in 1892 to commemorate the 400th anniversary of Columbus's arrival in the Americas, was conceived by the owner and editor of *Il Progresso*, the first American daily newspaper in Italian, funded by many small donations from recent immigrants, and then given to the city to commemorate the "lasting friendship between Italy and the United States."<sup>183</sup> In the late twentieth century, as awareness of Columbus's violence and enslavement of Native Americans became more widespread, a reaction emerged against the many place names and the federal holiday associated with him,<sup>184</sup> and monuments to Columbus became flashpoints for this larger conflict.<sup>185</sup>

The statue of Columbus that stands on a pedestal high above Columbus Circle is only one of at least six Columbus monuments in New York, though it is by far the most prominent Columbus monument in the city<sup>186</sup> and probably the entire country. As a result, it has always attracted special attention and controversy, even as other monuments in New York have become part of the national controversy over Columbus in recent years.<sup>187</sup> Controversy around

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182. See, e.g., Lakshmi Gandhi, *How Columbus Sailed into U.S. History, Thanks to Italians*, NPR (Oct. 14, 2013, 10:15 AM), <https://www.npr.org/sections/codeswitch/2013/10/14/232120128/how-columbus-sailed-into-u-s-history-thanks-to-italians> [<https://perma.cc/57M5-KR83>].

183. *Conservancy Helps Preserve a Piece of Italian-American History*, N.Y. LANDMARKS CONSERVANCY, <https://myemail.constantcontact.com/Landmark-News---Monthly-Update.html?soid=1129404286471&aid=xzchkey7Sw4> [<https://perma.cc/YQ4U-SXTR>].

184. See, e.g., Jourdan Bennett-Begaye, *It's a Good Day to Be Indigenous! A List of Indigenous People's Day Events*, INDIAN COUNTRY TODAY (Oct. 5, 2018), <https://newsmaven.io/indiancountrytoday/news/it-s-a-good-day-to-be-indigenous-a-list-of-indigenous-people-s-day-events-6q820YDFykOi9igt00JURQ/> [<https://perma.cc/5QNT-MW6B>] (listing the sixty cities and four states that have declared the second Monday of October to be Indigenous People's Day).

185. See, e.g., Cleve R. Wootston Jr., *Why Police Have to Guard a Statue of Christopher Columbus in New York Around the Clock*, WASH. POST (Oct. 7, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/10/07/why-police-have-to-guard-a-statue-of-christopher-columbus-in-new-york-around-the-clock/> [<https://perma.cc/FJ7H-DKCK>].

186. *Columbus on a Pedestal*, N.Y. TIMES (Oct. 14, 1991), <https://www.nytimes.com/1991/10/14/opinion/columbus-on-a-pedestal.html> [<https://perma.cc/9TC8-F3LN>].

187. See, e.g., Sarah Maslin Nir & Jeffery C. Mays, *Christopher Columbus Statue in Central Park Is Vandalized*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/ny-region/christopher-columbus-statue-central-park-vandalized.html> [<https://perma.cc/AP4Z-QUVF>].

the Columbus Circle monument dates at least as far back as the 1930s, when Columbus Day celebrations around the monument attracted some who vocally supported Mussolini's fascist regime in Italy.<sup>188</sup> Indeed, some objected to the monument when it was erected in 1892, arguing that Columbus was "cruel, and guilty of many crimes."<sup>189</sup>

Despite these initial objections, the Columbus Circle monument generated little controversy for much of the twentieth century. But by the late 1980s and 1990s, protests against the continued presence of the monument became commonplace, and in recent years calls for its alteration and removal have steadily increased, though support for the monument also remains strong.<sup>190</sup> In 2017, in the wake of violent protests across the country over built monuments, New York's mayor called for a commission to review the potential alteration or removal of built monuments throughout the city, including the statue at Columbus Circle.<sup>191</sup> Although the commission ultimately decided in early 2018 that the Columbus Circle monument should remain in place, supporters of the monument believed that the city would target the monument for removal at a future date.<sup>192</sup>

In response to these concerns, in October 2018 New York's Governor added the monument to the state register of historic places and nominated the monument to the National Register of Historic Places in a deliberate attempt to protect the monument from removal in the future.<sup>193</sup> And just a few months later, the Columbus Circle monument was added to the National Register of Historic Places,<sup>194</sup> along with several other Columbus monuments

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188. Jacey Fortin, *Columbus Day Has Drawn Protests Almost from Day 1*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/us/columbus-day-protest.html> [<https://perma.cc/KFG8-G7ZS>].

189. *Id.*

190. *See* Hendrix, *supra* note 179.

191. William Neuman, *Ordering Review of Statues Puts de Blasio in Tricky Spot*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/nyregion/ordering-review-of-statues-puts-de-blasio-in-tricky-spot.html> [<https://perma.cc/4ZAP-DXNN>].

192. Mara Gay, *Christopher Columbus Statue Will Stay in Columbus Circle*, WALL ST. J. (Jan. 12, 2018, 2:16 PM), <https://www.wsj.com/articles/christopher-columbus-statue-will-stay-in-columbus-circle-1515777407> [<https://perma.cc/XAN9-YAB5>].

193. Honan, *supra* note 18.

194. Kenneth Lovett, *Columbus Monument Goes from Endangered to the National Register of Historic Places*, N.Y. DAILY NEWS (Dec. 6, 2018, 5:05 PM), <https://www.nydailynews.com/>



across the country from Pueblo, Colorado, to Providence, Rhode Island, both of which have also attracted protests and calls for alteration or removal.<sup>195</sup> To understand what sorts of protections inclusion on the National Register and equivalent state registers might bring protected monuments, it will be necessary to examine the NHPA in more detail below.<sup>196</sup>

## 2. *The Development of the NHPA and Its Protected Monuments*

As the story of the Columbus Circle monument suggests, the most frequently invoked federal statute that protects built monuments is the National Historic Preservation Act.<sup>197</sup> The NHPA will be discussed in detail below, but first a few predecessor statutes are also important and must be considered, at least briefly, as well. The NHPA is most accurately seen as the conclusion of a statutory and regulatory process that began decades earlier, and many of these earlier statutes remain relevant today.<sup>198</sup> Of particular importance are the Historic Sites Act of 1935,<sup>199</sup> and the 1949 legislation that created the National Trust for Historic Preservation.<sup>200</sup> The Historic

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news/politics/ny-pol-columbus-monument-national-register-of-historic-places-20181206-story.html [https://perma.cc/KEC4-Y3L8].

195. See *supra* notes 184-85 and accompanying text (discussing these controversial Columbus monuments).

196. Space does not permit a detailed examination of state laws written following the NHPA's model. Fortunately, most of these state laws use the NHPA as something more than a template; they are essentially state law counterparts of the federal statute, designed to reaffirm the role of State Historic Preservation Officers, and to commit state agencies to the same procedural review as their federal counterparts under the NHPA. See, e.g., N.Y. PARKS REC. & HIST. PRESERV. LAW § 14.09 (McKinney 2019). For a good review of New York's law and its relation to the NHPA, see J. Langdon Marsh & Judith Green Simon, *The Protection of Historic Resources in New York State: An Overview of Federal, State and Local Laws*, 10 FORDHAM URB. L.J. 411, 417-27 (1982).

197. Act of Oct. 15, 1966, Pub. L. No. 89-665, 80 Stat. 915 (originally codified at scattered sections of 16 U.S.C., repealed and reenacted at scattered sections of 54 U.S.C.).

198. See, e.g., JOHN H. SPRINKLE, JR., CRAFTING PRESERVATION CRITERIA: THE NATIONAL REGISTER OF HISTORIC PLACES AND AMERICAN HISTORIC PRESERVATION 6 (2014) (describing the NHPA as "the logical conclusion" in a process "that began with the Historic Sites Act of 1935").

199. ch. 593, 49 Stat. 666 (1935) (originally codified at 16 U.S.C. §§ 461-467 (2012), repealed and reenacted at 54 U.S.C. §§ 320101-320106 (2012)).

200. ch. 755, 63 Stat. 927 (1949) (originally codified at 16 U.S.C. §§ 461-468, repealed and reenacted at 54 U.S.C. §§ 312102-312106).

Sites Act of 1935 gave rise to the National Historic Landmarks (NHL) program and planted the seeds for the National Register.<sup>201</sup>

Both the NHL program and the National Trust are important in their own right for monument protection and historic preservation more generally. For example, the NHL program, which was originally developed by the National Park Service (NPS) pursuant to the Historic Sites Act and later incorporated into the NHPA in the early 1980s,<sup>202</sup> essentially makes up the “honor roll” of the National Register.<sup>203</sup> And the National Trust, once too small to take on the NHL program, now supports substantial legal, technical, and financial assistance programs for preservation efforts in communities around the country, and no longer depends on federal funding as a result of its membership and fundraising efforts.<sup>204</sup> Equally important, the Trust and what later became the NHL program helped set the stage for passage in 1966 of the NHPA.<sup>205</sup> Passage of the Historic Sites Act, the creation of the Trust, and the beginning of the NHL program helped demonstrate the importance of preservation. Indeed, one of Congress’s primary motivations behind the NHPA was to enlarge the survey of vulnerable landmarks originally contemplated by the Historic Sites Act, and to go beyond the National Trust’s efforts in designating and helping to preserve vulnerable historic sites.<sup>206</sup>

Today, the NHPA is the bedrock of federal historic preservation protection and the foundation of many related state and local

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201. SPRINKLE, *supra* note 198, at 20.

202. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 201, 94 Stat. 2987, 2988-2993 (codified as amended at 54 U.S.C. §§ 320301-320303); *see also* 36 C.F.R. § 65.4 (1995) (implementing the 1980 statutory requirements). For a good review of the evolution of the NHL, the development of the National Trust and the NHPA, and the role of the Park Service, *see* BARRY MACKINTOSH, *THE HISTORIC SITES SURVEY AND NATIONAL HISTORIC LANDMARKS PROGRAM: A HISTORY* 4-6, 113-15 (1985); and SPRINKLE, *supra* note 198, at 17-19.

203. Jess R. Phelps, *Preserving National Historic Landmarks?*, 24 N.Y.U. ENVTL. L.J. 137, 163 (2016); *see also* Neighborhood Ass’n of the Back Bay, Inc. v. Fed. Transit Admin., 463 F.3d 50, 63-64 (1st Cir. 2006) (discussing the compliance requirements of the NHPA that are invoked when National Historic Landmarks are at issue).

204. *See, e.g.*, BRONIN & BYRNE, *supra* note 143, at 54-55.

205. Pub. L. No. 89-665, 80 Stat. 915 (1966) (originally codified at scattered sections of 16 U.S.C., repealed and reenacted at scattered sections of 54 U.S.C.).

206. *See, e.g.*, BRONIN & BYRNE, *supra* note 143, at 57-58.

historic preservation controls.<sup>207</sup> Like the National Trust and the Historic Sites Act, the NHPA's focus has always been broader than simple monument protection. The original language of the statute addressed the need to preserve the "historical and cultural foundations of the Nation" and provide "a sense of orientation to the American people."<sup>208</sup> The current statutory language seeks to help preserve "historic property," whether or not it is owned by the federal government, so that it "can exist in productive harmony" with modern society while "fulfill[ing] the social, economic, and other requirements of present and future generations."<sup>209</sup> Preserving at least some specially designated historic monuments is a part of that larger mission, but only a part; the NHPA is so central to American historic preservation more generally that it arguably embodies whatever national consensus exists about whether and how we should preserve the past in public spaces.<sup>210</sup>

The core of the NHPA is the National Register, a list of properties protected by the statute as "significant" to American history as well as other areas of scientific or cultural activity.<sup>211</sup> According to the relevant implementing regulations, the "significance" required for inclusion in the Register is primarily historical, arising out of events, persons, methods of work or art that have been significant "to the broad patterns of *our* history" or past.<sup>212</sup> In other words, significance is defined in terms that would be familiar to many early proponents of built monuments in America.<sup>213</sup> The plural definitions and communal nature of significance under the NHPA allow states, local governments, and even neighborhoods or cultural associations

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207. *Id.* at 17; see also Antoinette J. Lee, *Historic Preservationists and Cultural Resources Managers: Preserving America's Historic Places*, in PUBLIC HISTORY: ESSAYS FROM THE FIELD 129, 130 (James B. Gardner & Peter S. LaPaglia eds., 1999) (noting that despite the efforts of the NPS, preservation efforts did not really take off until the mid-1960s, with the passage of the NHPA); *supra* note 143 and accompanying text.

208. Act of Oct. 15, 1966, Pub. L. No. 89-665, 80 Stat. 915.

209. 54 U.S.C. § 300101 (2012).

210. See Rose, *supra* note 35, at 475-76 (noting that "[h]istoric preservation, [once] the erstwhile preserve of patriotic organizations and academic architecture buffs," now attracts a wide range of institutional and individual interests).

211. 54 U.S.C. § 302101; see also 36 C.F.R. § 60.3 (1995) (providing definitions of many of the statutory terms quoted above); *id.* § 60.4 (setting forth criteria for evaluation for the National Register).

212. 36 C.F.R. § 60.4 (emphasis added).

213. See, e.g., *supra* notes 6-8, 112-13, 120-21 and accompanying text (gathering examples).

to argue that a very diverse range of places are significant to their identity, and therefore eligible for designation on the National Register.<sup>214</sup> Under the relevant regulations, the plural and localized nature of this necessary “quality of significance” is further defined as “integrity of location, design, setting, materials, workmanship, feeling, and association”<sup>215</sup>—concepts that are rooted in a protected property’s relationship to a particular place.<sup>216</sup>

The categories of significant property eligible for designation in the National Register—namely, “sites, structures, and objects”<sup>217</sup>—are not intended to be independent or exclusive, nor are their boundaries entirely precise.<sup>218</sup> Instead, as the examples in the regulatory definitions demonstrate, the boundaries of these categories are fuzzy and overlapping.<sup>219</sup> Taken collectively they encompass virtually everything that one might want to preserve, including but certainly not limited to the types of monuments analyzed in this Article.<sup>220</sup>

Some confusion can arise from the relevant regulatory exclusions of commemorative property, which upon a first reading would seem to prohibit many monuments from designation. More specifically, the regulations provide that property that is “primarily commemorative in nature” should be excluded from the National Register, including but not limited to “cemeteries, birthplaces, or graves of historical figures.”<sup>221</sup> Yet this exclusion also contains several exceptions, and these exceptions mean that lots of monuments, as the term is used in this Article, can be and are included as objects (or as other categories of eligible property) on the National Register despite the exclusion of many “commemorative” properties.<sup>222</sup> For

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214. BRONIN & BYRNE, *supra* note 143, at 61.

215. 36 C.F.R. § 60.4.

216. See PATRICK W. ANDRUS, NATIONAL REGISTER BULLETIN: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 44-45 (1997), [https://www.nps.gov/subjects/national-register/upload/NRB-15\\_web508.pdf](https://www.nps.gov/subjects/national-register/upload/NRB-15_web508.pdf) [<https://perma.cc/2RGB-6KYL>] (describing how to evaluate the integrity of a property under the regulations).

217. 54 U.S.C. § 300101 (2012).

218. See, e.g., *Neighborhood Ass’n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 58 (1st Cir. 2006) (noting that “[p]recision of expression is not the hallmark of either” the NHPA or the regulations that implement it).

219. See generally 36 C.F.R. § 60.3.

220. See, e.g., *supra* note 144 and accompanying text.

221. 36 C.F.R. § 60.4.

222. See *id.*

example, commemorative property can be included if its “design, age, tradition, or symbolic value has invested it with its own exceptional significance,” or if it is associated with persons of “outstanding” or “transcendent” importance.<sup>223</sup>

These exclusions cover most of the built monuments in America, and as a result, lots of monuments, as the term is used in this Article, can be and are included in the National Register.<sup>224</sup> For the purposes of monument protection, “objects” are the most relevant category of protected property in the National Register. The categories of “districts, sites, buildings, [and] structures”<sup>225</sup> all may have some relevance to monuments as defined in this Article,<sup>226</sup> but it is “objects” under the statute and regulations that is most relevant for monument protection. The implementing regulations define “objects” as “material thing[s]” of some “functional, aesthetic, cultural, historical or scientific value,” which should be “related to a specific setting or environment” even if they could be altered or relocated.<sup>227</sup> This term is elastic enough to include things such as steamboats and historic mining equipment,<sup>228</sup> which lack many of the key features of monuments as the term is used here and conventionally understood.

But the statutory term “objects” also clearly encompasses the definition of monuments used in this Article, whether the objects are representative statues of human figures or more abstract memorials to groups of people, historic periods, or ideas. For example, the implementing regulations single out the Adams Memorial in Washington, D.C.’s Rock Creek Cemetery—a bronze

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223. *Id.*; see also *infra* notes 228-29 and accompanying text (providing an example of a gravesite designated as an object in the National Register).

224. See ANDRUS, *supra* note 216, at 5 (listing monuments as an example of the types of objects that can be listed in the National Register); see also 36 C.F.R. § 60.3(j) (listing the Adams Memorial in Washington, D.C. as a monument included in the National Register); *supra* Part II.B.1 (identifying a number of monuments listed in the National Register).

225. 36 C.F.R. § 60.4.

226. For example, the controversial Columbus monument in Pittsburgh’s Schenley Park is part of a historic district listed on the National Register. See Anya Sostek, *Columbus Statue in Schenley Park Defaced*, PITT. POST-GAZETTE (Oct. 14, 2010, 12:00 AM), <https://www.post-gazette.com/local/city/2010/10/14/Columbus-statue-in-Schenley-Park-defaced/stories/201010140309> [<https://perma.cc/8JHQ-2EJL>].

227. 36 C.F.R. § 60.3(j).

228. See *id.* (using the Delta Queen Steamboat and the Sumpter Valley Gold Dredge as examples of designated objects, along with the Adams Memorial discussed below).

statue serving as a gravesite monument in a public park—as a good example of an object worthy of designation on the National Register and protection under the NHPA.<sup>229</sup> Other examples of monuments designated as objects on the National Register include the controversial Columbus monuments discussed above in Colorado, Rhode Island, Washington, D.C., and New York’s Columbus Circle, as well as many others that are far less controversial.<sup>230</sup> Part B.3 below looks at how the NHPA protects monuments (and other types of property) that are listed on the National Register.

### 3. *Monument Protection and the NHPA Today*

The process of designating property for the National Register under the NHPA involves substantial input about each property from potentially affected parties at the state and local level. This means that the NHPA works very differently than the statue statutes, which aim to protect large classes of monuments without any consideration of their individual qualities or the specific communities in which they are located.<sup>231</sup> Responsibility for designation and inclusion on the National Register has been delegated to the National Park Service, and the Park Service official who ultimately decides about eligibility for the National Register is called “Keeper of the National Register of Historic Places” (Keeper).<sup>232</sup> The NHPA also provides for the creation of an Advisory Council on Historic Preservation (ACHP),<sup>233</sup> which plays a role in federal agency actions that may affect properties included on or eligible for the National Register.<sup>234</sup>

Participation by state and local officials is baked into the text of the NHPA and the governing regulations, and community groups and interested citizens have won relatively large roles in preservation under the NHPA through the application of the regulations and

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229. *Id.*

230. *See supra* note 178; *supra* Part II.B.1.

231. *See supra* Part II.A.

232. 36 C.F.R. § 60.3(f), (h).

233. 54 U.S.C. § 304101 (Supp. V 2012) (establishing and describing the composition of the ACHP).

234. *See infra* notes 250-51 and accompanying text.

decades of practice.<sup>235</sup> More specifically, the NHPA provides standards for the Secretary of the Interior to approve a State Historic Preservation Program in each state, which is administered by a State Historic Preservation Officer (SHPO) responsible for nominating properties for possible inclusion on the Register.<sup>236</sup> While the SHPO bears formal responsibility for the decision to nominate properties to the Keeper for designation, these decisions usually are based on local government or private recommendations and the state's own evolving preservation priorities.<sup>237</sup> Delisting follows a similar process, as do reconsiderations of eligible property held by private owners who object to its inclusion on the National Register.<sup>238</sup> Although the Keeper is the final decision maker and can remove a listed property on her own motion, most delistings pass through the relevant SHPO first.<sup>239</sup>

Although the statute describes the roles of SHPOs and the Keeper in detail, in practice it is local governments, community groups, and interested citizens who frequently start the nomination process, focusing on potential threats to monuments and other types of property eligible for the National Register.<sup>240</sup> And it is also individual citizens and community groups who frequently keep the nomination process moving even after a particular property's eligibility is taken up by an SHPO or submitted to the Keeper.<sup>241</sup> This diffuse, localized interest is indispensable for the entire process of inclusion on the National Register.<sup>242</sup> In addition to the role that state and local governments and individual members of the relevant communities

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235. See, e.g., JULIAN CONRAD JUERGENSMEYER ET AL., LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 553 (4th ed. 2018) ("Most properties find their way onto the Register through state or tribal nomination spurred by local initiative.").

236. 54 U.S.C. §§ 302301, 302303; 36 C.F.R. § 60.3(m), (n). SHPOs are appointed by the state's governor and must employ a staff qualified in archaeology and historic preservation. 36 C.F.R. § 61.4.

237. See JUERGENSMEYER ET AL., *supra* note 235, at 554 ("In reality, the local public or local tribe numbers actually survey the properties and draft nominations for the SHPO or THPO to review."). Tribal Historic Preservation Officers (THPOs) play similar roles to SHPOs where relevant. *Id.*

238. See 36 C.F.R. §§ 60.14-.15; see also BRONIN & BYRNE, *supra* note 143, at 71-73 (citing and discussing same).

239. See BRONIN & BYRNE, *supra* note 143, at 73.

240. Rose, *supra* note 35, at 531-32.

241. *Id.*

242. See *id.* at 532 ("[T]he entire review process depends on the alertness of local groups.").

play during the nomination and review process, any person or local government who is disappointed in the SHPO's decision may appeal it to the Keeper.<sup>243</sup> This means that community groups and individual interested citizens are often active in National Register decisions even after the SHPO has made a determination about whether to nominate a property to the Keeper's consideration.

Beyond the nomination process, the diffused and localized interest that is so important to eligibility decisions for the National Register plays a significant role in how the NHPA actually protects monuments and other property. This is particularly easy to see through some of the NHPA's funding mechanisms. For example, the NHPA provides for the establishment of a National Historic Preservation Fund,<sup>244</sup> which draws on monies collected from offshore drilling leases and other federal oil and gas royalties to carry out the purposes of the NHPA through matching grants to states.<sup>245</sup> These funding provisions have been one of the most important drivers of preservation activity at the state and local level.<sup>246</sup>

In addition to these funding provisions, the core provisions of the NHPA also involve substantial participation by state and local actors as well. These core provisions are provided in what has traditionally been known as section 106 of the NHPA,<sup>247</sup> which focuses on federal agency actions that the statute broadly refers to as "undertaking[s]."<sup>248</sup> More specifically, section 106 requires federal agencies to consider the potential impacts and adverse effects of any undertaking on any property that is either included or eligible for inclusion on the National Register.<sup>249</sup> Section 106 also requires federal agencies to allow the ACHP a reasonable opportunity to comment on an undertaking that might affect such property.<sup>250</sup> In

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243. 54 U.S.C. § 302104(d) (Supp. V 2012); 36 C.F.R. § 60.12.

244. 54 U.S.C. § 303101.

245. *Id.* (citing Outer Continental Shelf Lands Act, 43 U.S.C. § 1338 (2012) and 10 U.S.C. § 7433(b) (2012)).

246. *See* JUERGENSMEYER ET AL., *supra* note 235, at 554.

247. 54 U.S.C. § 306108.

248. *Id.*; *see also* 54 U.S.C. § 300320 (defining undertakings as any "project, activity, or program" that is funded in whole or in part under a federal agency's jurisdiction).

249. 54 U.S.C. § 306108; *see also id.* § 300308 (defining historic property, as used in section 106, as any property included or eligible for inclusion on the National Register).

250. *Id.* § 306108; *see also id.* § 304101 (defining the composition of the federal Advisory Council on Historic Preservation discussed in section 106).



addition to consulting with the ACHP, the implementing regulations require federal agencies to consult about the potential impact of their undertakings with SHPOs, Tribal Historic Preservation Officers (THPOs) where relevant, representatives of local governments with jurisdiction over the area in which the effects of an undertaking may occur, and applicants for federal permits, licenses, assistance, or other approvals relevant to the undertaking.<sup>251</sup>

Although consultation with the public at large is not required to the same degree as with SHPOs and local government representatives, the implementing regulations note that public opinion is “essential” to the section 106 process.<sup>252</sup> Accordingly, the implementing regulations provide that the acting federal agency should consider the public’s views in a way that reflects the “complexity” of both the undertaking and its effects on the protected property at issue.<sup>253</sup> The acting federal agency does not have to obtain the endorsement of all interested members of the public—indeed, this would often be impossible—but the consultation provisions in the statute and regulations give members of the public an opportunity to influence section 106 decisions by influencing the position of the SHPO (or, where relevant, the THPO).<sup>254</sup>

The protections afforded by section 106 are, therefore, essentially procedural. Section 106 requires that agencies “stop, look, and listen” before they act in a way that might affect a property on or eligible for the National Register, but it does not compel a particular outcome.<sup>255</sup> This means that section 106 is frequently compared to the National Environmental Policy Act (NEPA).<sup>256</sup> The core provisions of both NEPA and section 106 impose procedural requirements of analysis and documentation on federal agencies prior to actions that might affect statutorily protected resources.<sup>257</sup>

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251. 36 C.F.R. § 800.2(e) (2018).

252. *Id.* § 800.2(d).

253. *Id.*

254. BRONIN & BYRNE, *supra* note 143, at 147.

255. *See, e.g.*, *Bus. & Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 590-91 (2d Cir. 2005) (citing *Ill. Commerce Comm’n v. Interstate Commerce Comm’n*, 848 F.2d 1246, 1260-61 (D.C. Cir. 1988)).

256. *See, e.g.*, *Nat’l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 919 (D.D.C. 1996) (noting that “many courts fruitfully compare” NEPA and section 106). *See generally* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h (2012).

257. *See* 36 C.F.R. § 800.8 (encouraging federal agencies to coordinate their efforts to

The parallels between NEPA and section 106 grow deeper upon closer inspection. For example, NEPA's procedural and disclosure requirements allow the public to exert pressure on the acting federal agency,<sup>258</sup> just as the procedural and consultation provisions of section 106 allow the public to pressure the SHPO or the acting agency.<sup>259</sup> Moreover, in practice, the enforcement of NEPA's requirements has come through legal actions filed pursuant to the Administrative Procedure Act (APA) by individual citizens and interest groups.<sup>260</sup> Similarly, interest groups or individual members of the public may attempt to influence section 106 decisions through litigation, by arguing, for example, that deficient consultation and an inadequate record rendered the acting agency's decision about its undertaking "arbitrary and capricious" under the APA.<sup>261</sup> Indeed, like the practical enforcement of NEPA's requirements, pressure and litigation from individual citizens and civic groups is essential to enforce section 106's requirements.<sup>262</sup> The procedural focus and concern for local interests embedded in the NHPA are just two of the many differences between it and the statue statutes. These and other differences are examined at length in Part II.C immediately below.

### *C. A Critical Comparison of the NHPA and the Statue Statutes*

The statue statutes should be repealed for a number of reasons. For starters, they are constitutionally suspect, thanks to the monumental messages of exclusion and discrimination that they echo and emit. They also poison public discourse about Confederate monuments, making it harder for local communities to reckon with both the longstanding negative impacts and recent crises around these memorials. But despite the basic repugnance of the statue statutes,

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comply with both section 106 and NEPA); JUERGENSMEYER ET AL., *supra* note 235, at 554-55 (discussing the guidance documents used by federal agencies to coordinate NEPA and section 106's requirements).

258. See JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POLICY* 291 (2d ed. 2009).

259. See BRONIN & BYRNE, *supra* note 143, at 147.

260. See, e.g., RASBAND ET AL., *supra* note 258, at 260.

261. BRONIN & BYRNE, *supra* note 143, at 147.

262. See Rose, *supra* note 35, at 531-32 (noting that "[p]rivate litigation is especially important" under section 106 and suggesting that the linchpin of the NHPA essentially depends on litigation by civic and neighborhood organizations).

their many pathologies have much to teach us about how American monument-protection laws have worked and how they ought to work.

As shown above, the evolution of American attitudes toward monuments has been marked by communitarian impulses. For example, Justice Durfee dreamed of replacing America's monumental skepticism with a new network of monuments that would bind together the country's collective consciousness and preserve a particular conception of democracy and freedom for the future.<sup>263</sup> Justice Holmes and others cherished monumental trees not merely for the pleasant memories they evoked but because these natural monuments provided a locus for significant events in the local community's life along with the transmission of the community's values.<sup>264</sup> Moreover, as attitudes toward monuments thawed in the nineteenth century, Washington, D.C. was filled with memorials and rural monumental cemeteries spread across the country, all designed to bind together the immediate community and perpetuate republican ideals across generations.<sup>265</sup>

It is important not to overstate the case: for example, the rural-urban divide that currently bedevils America's national consciousness is at least as old as the country, and it has always haunted how Americans have thought and fought about monuments in ways that have little to do with fostering communities of interest or memory.<sup>266</sup> And many American monuments have been intertwined with a darker narrative of exclusion, discrimination, and racist violence.<sup>267</sup> But at least until recently, America's seesaw evolution into a monument-friendly country has been substantially motivated by a desire to bind communities large and small closer together, even at the risk of enshrining monuments that are anodyne or baloney.<sup>268</sup>

In general, American historic preservation law is also motivated by a fundamentally communitarian spirit. For example, local

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263. See DURFEE, *supra* note 6, at 345.

264. See Holmes, *supra* note 9, at 9.

265. See *supra* notes 108-18 and accompanying text.

266. See, e.g., SAVAGE, *supra* note 69, at 41-43 (describing the heightened resistance to monuments to George Washington by Republican legislators).

267. See *supra* notes 160-64 and accompanying text.

268. See, e.g., *supra* notes 28-33 and accompanying text (discussing Lincoln's birthplace and other spurious monuments).

historic district designations that include architectural controls take on a substantive communitarian focus insofar as they recognize and attempt to shape the relationship between the physical character of a place and its political aspect.<sup>269</sup> And they are procedurally communitarian insofar as they provide multiple points of focus for neighborhoods and local interest groups to organize, educate their members, and gain leverage within the larger community.<sup>270</sup>

The NHPA embodies both strands of this communitarian focus in American historic preservation law. Its communitarian focus has been baked in from the outset: its original version sought to provide a sense of “orientation” to the American people by preserving the country’s “historical and cultural foundations,”<sup>271</sup> and the current version seeks to integrate monuments and other protected property in “productive harmony” with the needs of modern society.<sup>272</sup> The statute’s implementation is marked by the same focus. At almost every turn, the statute and its implementing regulations make SHPOs and THPOs, local governments, community groups, and individual interested citizens key actors in the nomination and consultation processes.<sup>273</sup> Section 106 is designed for community groups, interested citizens, and local governments to play essential roles—providing multiple points of focus for education, organization, lobbying, and even litigation that are absolutely essential for the system to function.<sup>274</sup>

In contrast, the statue statutes attempt to preserve all types of monuments, regardless of their effects on communities of geography, memory, or interest. Indeed, the facial language of these statutes simply seeks to preserve certain types of monuments without any interest at all in the effects of this preservation. And the procedural aspects of the statue statutes are even more antithetical to the communitarian turn in American attitudes toward monuments and monument-protection laws. Many of the statue statutes entirely eschew any role for community self-determination or the participation of affected citizens in determining what monuments

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269. Rose, *supra* note 35, at 522-24, 533-34.

270. *Id.*

271. Act of Oct. 15, 1996, Pub. L. No. 89-665, 80 Stat. 915.

272. 54 U.S.C. § 300101 (2012).

273. *See supra* notes 235-46 and accompanying text.

274. *See supra* notes 253-62 and accompanying text.

should be protected—they simply protect all monuments of a certain type and age, full stop.<sup>275</sup>

Another fundamental difference between the NHPA and the statue statutes concerns the nature of the protections they are designed to provide. As discussed above, the core protections of the NHPA are essentially procedural: they force the relevant federal agencies to consider the effects of actions they take on properties of historical significance listed on the National Register, much like NEPA in the environmental context.<sup>276</sup> But section 106 does not mandate a particular outcome in the same way as the statue statutes, most of which seek to protect Confederate monuments unaltered in their present sites indefinitely.<sup>277</sup> Moreover, the NHPA's essential procedural protections can be reversed by essentially the same steps that are required to include properties on the National Register.<sup>278</sup>

In contrast, it is much harder to modify the substantive protections that the statue statutes seek to provide. In fact, the facial language of some of the statutes precludes any such modification.<sup>279</sup> As other work has identified, there are opportunities under many statue statutes for local governments and others to challenge the statute's protections, but these opportunities are best understood as mistakes made by the statue statutes' drafters,<sup>280</sup> rather than the deliberate opportunities for revision incorporated into the NHPA. Beyond these unintended "flaws," the absolute protections that many of the statue statutes seek to provide are intended to be essentially permanent. Even when a statue statute does include some formal provision for amending or withdrawing protections in certain cases, these provisions are generally designed to be as difficult as possible, and, in any case, removing the protections is far more difficult than the instantaneous protection granted by most statue statutes.<sup>281</sup>

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275. See *supra* notes 150-53 and accompanying text.

276. See *supra* notes 256-57 and accompanying text.

277. See *supra* notes 152-53 and accompanying text.

278. See *supra* notes 238-39 and accompanying text.

279. See *e.g.*, ALA. CODE §§ 41-9-232(b)-(c), 41-9-235(a)(1) (2019) (providing a waiver process, but only for monuments that have been in place for twenty to forty years).

280. Bray, *supra* note 23, at 19-22, 47.

281. For example, South Carolina's statute provides that a monument's protections can

A final difference between the NHPA and the statue statutes concerns the length of time and deliberation involved under each for protecting monuments. It can take a long time for a property to be included on the National Register after its initial nomination, given the number of state and federal officials and local participants who may be involved. As a rough guide, the Park Service suggests that SHPOs review of proposed nominations will take at least ninety days, and that the Park Service and Keeper's decision about the nomination will take another forty-five days.<sup>282</sup>

In contrast, many of the statue statutes were passed extremely hastily, even as they provide sweeping consequences for a huge number of monuments within a particular state. For example, the bill that became Tennessee's statue statute was introduced in late January 2013<sup>283</sup>—drafted, as noted above, by members of the Tennessee SCV in the Tennessee legislature.<sup>284</sup> The specific impetus for the bill seems to have been the city of Memphis's removal of a sign installed by the Tennessee SCV near a monument to Nathan Bedford Forrest in December 2012.<sup>285</sup> After the bill was introduced, Memphis hurriedly renamed several parks, which in turn led to demonstrations by the Klan and counterprotests by local residents,<sup>286</sup> all before the bill was enacted on April 1, 2013.<sup>287</sup> In short, only sixty-one days elapsed between the introduction of the bill and its passage. Indeed, no more than 107 days elapsed between Memphis's removal of the SCV's sign and the passage of a bill purporting to protect all Confederate monuments in Tennessee—less than the usual minimum time required for listing a single monument on the National Register.

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only be waived by a two-thirds vote of the state legislature. S.C. CODE ANN. § 10-1-165(B) (2019).

282. *How to List a Property*, NAT'L PARK SERV., <https://www.nps.gov/subjects/national-register/how-to-list-a-property.htm> [https://perma.cc/4C9R-QAVA].

283. *See, e.g.*, Tennessee Heritage Protection Act of 2013, 2013 Tenn. Pub. Acts ch. 75, H.B. 553 (introduced on Jan. 31, 2013).

284. *See supra* notes 156-57 and accompanying text.

285. Jackson Baker, *Sign of the Times?*, MEM. FLYER (Jan. 10, 2013), <https://www.memphisflyer.com/memphis/sign-of-the-times/Content?oid=3326642> [https://perma.cc/HP5P-Q83F].

286. Kevin M. Levin, *The Ku Klux Klan Protests as Memphis Renames a City Park*, ATLANTIC (Feb. 27, 2013), <https://www.theatlantic.com/national/archive/2013/02/the-ku-klux-klan-protests-as-memphis-renames-a-city-park/273560/> [https://perma.cc/97JX-JQRL].

287. 2013 Tenn. Pub. Acts ch. 75 (enacted on April 1, 2013).

The haste with which the statue statutes were passed is particularly problematic given their anticomunitarian character, as well as the permanent protections that their facial language purports to provide. All of these characteristics tend to undermine the legitimacy of the statue statutes, especially with local communities who object to monuments that they appear to be saddled with indefinitely. Of course, the NHPA can also be used in haste to protect monuments that are historically objectionable and locally distasteful.<sup>288</sup> But these are exceptions to the general thrust of the NHPA. There are many safeguards, procedural and substantive, built into the statute and implementing regulations that make it hard to protect historically objectionable monuments that are or become unwanted by their neighbors. In contrast, the statue statutes are designed to preserve monuments condemned by history which local communities might wish to remove.

Comparing the statue statutes and the NHPA reveals many truths about both. It helps to highlight some problematic uses of the NHPA, but it also shows how much of an outlier the statue statutes are, for reasons that go beyond their objectionable history. Part III below takes a close look at the Antiquities Act and the monuments that it protects before comparing it to the statue statutes and the NHPA.

### III. UNSURPASSED IN WONDERS FROM EARTH TO SKY: AMERICAN NATIONAL MONUMENTS AND THE ANTIQUITIES ACT

The usual process for creating national monuments is much more abrupt than the process for adding monuments or other protected property to the National Register, and the statute that provides the framework for national monuments is far briefer than the NHPA and many of the statue statutes. National monuments are proclaimed by the President pursuant to the Antiquities Act of 1906, which was passed in the middle of the first great era of American enthusiasm for both natural and built monuments.<sup>289</sup> Since its passage, over 150 national monuments have been dedicated by

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288. *See supra* Part II.B.

289. Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified as amended at 54 U.S.C. § 320301 (2012)).

presidential proclamation.<sup>290</sup> Many of these monuments are just a few acres in size or even smaller, but several are hundreds of thousands of acres in size or larger, and many, though certainly not all, of the largest national monuments are among the most recently created.<sup>291</sup>

A fierce debate about presidential authority to reduce previously designated national monuments has been the most pressing controversy related to the Antiquities Act in recent months. As noted in the Introduction, in December 2017, President Trump attempted to reduce both the Bears Ears and Grand Staircase-Escalante national monuments by a total of almost two million acres, which led to a number of legal challenges that are currently working their way through the courts.<sup>292</sup> President Clinton proclaimed the Grand Staircase monument in 1996,<sup>293</sup> and almost immediately sparked intense controversy.<sup>294</sup> Over twenty years after its creation, the monument enjoys substantial support throughout the state and the nation,<sup>295</sup> but it remains deeply resented by many of its immediate neighbors.<sup>296</sup> The Bears Ears monument was created much more recently, at the end of President Obama's term,<sup>297</sup> but it sparked intense support and opposition that coalesced in

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290. See *Antiquities Act 1906-2006: Maps, Facts, & Figures*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> [<https://perma.cc/N37U-6AP6>].

291. See *id.* (providing a list of all national monuments with their original sizes, dates and sizes of any expansions, and dates of redesignation as a national park or transfer to state ownership where relevant).

292. See, e.g., Josh Dawsey & Juliet Eilperin, *Trump Shrinks Two Huge National Monuments in Utah, Drawing Praise and Protests*, WASH. POST (Dec. 4, 2017), [https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581\\_story.html](https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581_story.html) [<https://perma.cc/8DM5-DUV3>]; see also *supra* notes 5, 64-65 and accompanying text (discussing the reaction to President Trump's attempt to reduce these monuments).

293. Proclamation No. 6920, 61 Fed. Reg. 50223 (Sept. 24, 1996).

294. See *supra* notes 58-59 and accompanying text.

295. See, e.g., Dawsey & Eilperin, *supra* note 292; see also *supra* note 5 (describing protests against Trump's monument reduction).

296. See, e.g., Juliet Eilperin, *A Diminished Monument*, WASH. POST (Jan. 15, 2019), <https://www.washingtonpost.com/graphics/2019/national/environment/will-anyone-mine-after-grand-staircase-escalante-reduction-by-trump/> [<https://perma.cc/6P2T-K5WJ>] (gathering local sources).

297. See Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017) (noting that “[f]rom earth to sky,” the protected monument “is unsurpassed in wonders”).



coalitions very similar to those that arose around the Grand Staircase monument.<sup>298</sup>

These monuments, and the controversy surrounding President Trump's attempt to reduce their size, have attracted a great deal of controversy, making them good vehicles to begin an examination of the Antiquities Act. Part III.A below studies the Antiquities Act and the narrow but important issue around the President's contested authority to reduce or abolish a previously designated monument. Part III.B provides a comparison of the Antiquities Act with the NHPA and the statue statutes and proposes a reform of the Antiquities Act.

#### *A. The Evolution of National Monuments and the Antiquities Act*

The Antiquities Act was passed after several years of debate, informed by a growing concern that vulnerable prehistoric structures were being looted or destroyed,<sup>299</sup> a desire to protect important scenic and scientific resources on the public lands,<sup>300</sup> and a belief that sometimes threats to these resources might be so pressing that requiring specific legislation to protect them would be too time-consuming and uncertain.<sup>301</sup> This idea—that national monument proclamations could be emergency measures to preserve irreplaceable and monumental natural, scenic, or archaeological resources—has been borne out by subsequent history. Many of America's best-loved national parks were originally protected as national monuments, including Acadia, Bryce Canyon, Death Valley, Glacier Bay, the Grand Canyon, Grand Teton, Olympic, and Zion.<sup>302</sup> Congress has changed some national monuments in a different way. Rather than being converted into national parks through specific legislation, they have been transferred by Congress out of federal hands and

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298. See, e.g., Dawsey & Eilperin, *supra* note 292.

299. See Britton-Purdy, *supra* note 64, at 946-48.

300. See LEE, *supra* note 68, at 45-57.

301. See Lisa Raffensperger, *The Highs and Lows of the Antiquities Act*, NPR (May 23, 2008, 12:00 PM), <https://www.npr.org/templates/story/story.php?storyId=90631198> [<https://perma.cc/ELK3-HBGT>].

302. See, e.g., Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 W. HIST. Q. 281, 281 (1989).

into state ownership.<sup>303</sup> Castle Pinckney, discussed in the Introduction, is one such former national monument.<sup>304</sup> But many more national monuments have never been converted into national parks or transferred to the states. They continue to be managed by the National Park Service or other federal agencies pursuant to their specific presidential proclamations and the general authority granted by the Antiquities Act.

The statute responsible for protecting so much federal land was and remains remarkably brief; the core substantive provisions of the Antiquities Act comprise just two sentences.<sup>305</sup> First, the Antiquities Act gives the President discretionary authority to “declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are” on federal land “to be national monuments.”<sup>306</sup> And second, the Act provides that the limits of any parcels of land reserved as part of these national monuments “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>307</sup> Despite its brevity, the Antiquities Act and national monuments have always been controversial—in fact they are best understood through their controversies.

President Trump’s attempt to reduce the size of Grand Staircase and Bears Ears is best understood as the latest episode in an ongoing drama. It has proven to be highly controversial, including for reasons that have little to do with the Antiquities Act specifically. It is, for example, the largest reduction of protection for public lands in American history.<sup>308</sup> But it has also focused attention on the following question: Does the Antiquities Act impliedly authorize a President to reduce or abolish national monuments in the same way that it expressly authorizes a President to create them?<sup>309</sup>

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303. NAT’L PARK SERV., *supra* note 290.

304. *Id.*; see *supra* notes 24-26 and accompanying text. Congress, of course, retains the ability to ratify, create, alter, transfer, or abolish monuments. For a list of such congressional actions and related monuments, see NAT’L PARK SERV., *supra* note 290.

305. See Squillace, *supra* note 45, at 476-77 (“Perhaps the most remarkable feature of the Antiquities Act ... is its brevity.”).

306. 54 U.S.C. § 320301(a) (2012).

307. *Id.* § 320301(b).

308. Dawsey & Eilperin, *supra* note 292.

309. See, e.g., Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 555 (2018).

Defenders of President Trump's attempt to reduce the size of these monuments point out that previous presidents have acted to reduce the boundaries of national monuments many times since the Antiquities Act was passed (although prior to 2017 the last such modification occurred in 1963) and none of these previous efforts were challenged in court.<sup>310</sup> They also argue that an implied presidential power to reduce or revoke previous monument proclamations is inherent given the nature of the modern administrative state.<sup>311</sup> Given that most other executive orders and administrative actions taken by a president are not one-way ratchets, but rather can be modified or reversed by future presidents, presidential proclamations under the Antiquities Act so too can be altered by future presidential actions—or so the argument in support of President Trump's reduction goes.<sup>312</sup>

On the other hand, the many critics of Trump's attempt to reduce Bears Ears and Grand Staircase point out that since the last presidential reduction of a national monument in 1963, Congress passed the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>313</sup> These critics point out that aside from the Antiquities Act, FLPMA removed most of the President's unilateral authority to withdraw lands from development or resource extraction,<sup>314</sup> and FLPMA also appears to suggest that only Congress may modify or revoke withdrawals made under the Antiquities Act by a previous president.<sup>315</sup> In addition, critics of the proposed monument reductions point to the Constitution's Property Clause, which gives Congress plenary power over public lands.<sup>316</sup> Given this plenary power, any delegation of congressional power over public lands should be construed narrowly, and since the text of the Antiquities Act only grants the power to reserve national monuments, these critics argue that it is

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310. *Id.* at 575.

311. Yoo & Gaziano, *supra* note 64, at 640-41.

312. *Id.*

313. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified primarily at 43 U.S.C. §§ 1701-1782 (2012)).

314. *See, e.g.*, Squillace et al., *supra* note 64, at 59-60 (citing FLPMA § 704(a), 90 Stat. 2792).

315. *See, e.g., id.* at 60-64 (discussing in detail FLPMA § 204, 43 U.S.C. § 1714, its legislative history, and the anomalous drafting error that has complicated previous analyses of same).

316. U.S. CONST. art. IV, § 3, cl. 2.

a mistake to read any implied presidential authority to modify or revoke into the Antiquities Act.<sup>317</sup> Finally, critics of President Trump's attempt to reduce these monuments also argue that giving any future president authority to reduce or abolish a previous president's monument designation would be inconsistent with the fundamental goals of the Antiquities Act, which was ultimately intended as a check against the "opportunistic" expropriation of unique resources from vulnerable and irreplaceable public sites.<sup>318</sup>

This important issue has been thoroughly ventilated in the existing literature, and the present court challenges may provide at least a temporary resolution of the issue in the near future—although readers can judge for themselves how the current or future Supreme Court is likely to resolve these pending challenges. But as long as the Antiquities Act remains in something like its current state, controversies like this present fight will remain because they are essentially supervenient on an underlying debate about the democratic legitimacy of national monuments proclaimed under the Antiquities Act.

As noted above, it has always been extraordinarily difficult to justify the Antiquities Act and a president's authority to designate monuments to people disappointed by those monuments.<sup>319</sup> Indeed, this sentiment is never far from the surface even when a president attempts to reduce existing monuments. For example, immediately after the attempted reduction of Bears Ears and Grand Staircase, the Speaker of Utah's State House of Representatives cheered the action, claiming that the president had finally "listened" to Utahns and proved that they were not merely living in "a flyover state"<sup>320</sup>—feelings similar to those that the statue statutes evoke in local communities. Part III.B provides an analysis of this larger debate and a comparison of the Antiquities Act with the statue statutes and the NHPA.

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317. Mark Squillace, *The Looming Battle over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), <https://blog.harvardlawreview.org/the-looming-battle-over-the-antiquities-act/> [<https://perma.cc/79DK-6RVF>].

318. Britton-Purdy, *supra* note 64, at 948-49, 954-55; *see also* Squillace et al., *supra* note 64, at 70-71 (arguing that granting presidents the authority to reduce or abolish previously designated monuments threatens the Antiquities Act's "remarkable success").

319. *See supra* notes 48-50, 57-59, 293-98 and accompanying text.

320. Dawsey & Eilperin, *supra* note 292 (quoting Utah House Speaker Gregory Hughes).

*B. A Critical Comparison of the Antiquities Act, the NHPA, and the Statue Statutes*

The Antiquities Act is not laden with the troubling history of the statue statutes, and the monuments it seeks to protect are incomparably more valuable than the monuments shielded by the statue statutes. But comparing the Antiquities Act to the statue statutes and the NHPA can help put the recurring controversies of the Antiquities Act in context and, perhaps, suggest some avenues for reform.

The perceived haste associated with many monument designations leads many monument opponents to believe that they are motivated by political opportunism, especially when they are hastily proclaimed near the end of an administration.<sup>321</sup> This, in turn, causes many state and local opponents of new national monuments to argue that the monuments are unjustified or even democratically illegitimate,<sup>322</sup> much like local opponents of the statue statutes, who understand that these statutes were passed in haste and for bad reasons that were not ventilated in either the text of the statutes or their related legislative debates.<sup>323</sup> There is an important fundamental difference: the statue statutes really were passed in haste and without good reasons, whereas many national monuments, especially recent monuments, are the product of years of careful work.<sup>324</sup> But for local opponents of specific national monuments, “midnight” monument proclamations late in a presidential term can appear to

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321. See, e.g., Rasband, *supra* note 74, at 138 (describing the reaction to President Johnson’s final monument proclamations, which took place ninety minutes before he left office).

322. See, e.g., Mark Matthews & Greg Hanscom, *Babbitt’s Monument Tour Blazes On*, HIGH COUNTRY NEWS (June 19, 2000), <https://www.hcn.org/issues/181/5873> [<https://perma.cc/8Q6U-NKJE>] (quoting Senator Slade Gorton, among others, who argued that President Clinton’s monument proclamations were hasty and unjustified).

323. See *supra* notes 42-43, 171 and accompanying text.

324. See, e.g., Squillace, *supra* note 45, at 474-75, 502-14 (describing Presidents Jimmy Carter and Bill Clinton’s establishment of large national monuments under the Antiquities Act); see also Patrick Reis, *Interior Releases More of Leaked List of Potential National Monuments*, N.Y. TIMES (Aug. 11, 2010), <https://archive.nytimes.com/www.nytimes.com/gwire/2010/08/11/11greenwire-interior-releases-more-of-leaked-list-of-poten-87178.html> [<https://perma.cc/FH4F-VB3Q>] (detailing complaints about multiple potential national monuments).

be politically opportunistic, regardless of the work and expertise involved prior to the monument's proclamation.<sup>325</sup>

Opponents of relatively large national monuments also argue that they are illegitimate because they cannot be justified by the limited scope of the Antiquities Act. It is a mistake, they argue, to construe the brief and arguably ambiguous language of the Antiquities Act so broadly as to support national monuments hundreds of thousands of acres in size or larger. They also argue that the Antiquities Act as it has been applied is dangerously anticommunitarian—and here, too, they argue that it is a mistake to construe the Antiquities Act in such a way as to amplify its anticommunitarian tendencies. Each of these arguments will be briefly reviewed in turn.

It is hard to argue that Congress in 1906 clearly intended the expansive interpretation of the Antiquities Act that we live with today, even for those who, like the author of this Article, believe that most if not all of the monuments so designated have been an invaluable boon for the nation.<sup>326</sup> For example, beyond the statute's narrow language, the creation of Mesa Verde National Park provides additional evidence of a relatively limited scope for the Antiquities Act. The park was created by specific legislation in 1906, the year the Antiquities Act was passed and the first national monument was proclaimed.<sup>327</sup> Yet soon after the Antiquities Act was passed, President Theodore Roosevelt designated monuments substantially larger than Mesa Verde National Park,<sup>328</sup> including the

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325. See, e.g., Larry D. Curtis, *Bears Ears National Monument Designated by President Obama in Utah*, KUTV (Dec. 28, 2016), <https://kutv.com/news/local/bears-ears-national-monument-designated-by-president-obama> [<https://perma.cc/N64Z-8GK3>].

326. See, e.g., Klein, *supra* note 65, at 1336 (defending modern interpretations of the Antiquities Act based on years of congressional acquiescence but conceding the “apparently limited intentions of the 1906 Congress”). Klein also points out that previous drafts of the legislation that originally became the Antiquities Act expressly limited the size of monuments, but that such express limitations were removed from the final version of the statute. *Id.* at 1341-42. This deletion, along with the insertion of the statutory language referring to objects of historic or scientific interest—relied upon by President Theodore Roosevelt in his proclamation of the Grand Canyon National Monument—suggest that the Antiquities Act may not necessarily be quite as limited as some readers of its legislative history have suggested. *Id.*

327. LEE, *supra* note 68, at 80-82.

328. See, e.g., Proclamation No. 809, 35 Stat. 2247 (1909) (Mount Olympus National Monument); Proclamation No. 697, 34 Stat. 3266 (1906) (Petrie Forest National Monument).

Grand Canyon National Monument, which is more than 800,000 acres.<sup>329</sup> Still larger monuments were to come. For example, in 1925 President Coolidge proclaimed the Glacier Bay National Monument, at over 1.3 million acres.<sup>330</sup>

In its 1920 decision in *Cameron v. United States*, the Supreme Court upheld such expansive monument proclamations. The Court concluded that the Grand Canyon itself directly fit the statute's language of "unusual scientific interest," in part because of its monumental nature as "one of the great natural wonders" that "annually draws to its borders thousands of visitors."<sup>331</sup> And much more recently, courts have held that "lyrical" descriptions of "magnificent groves of towering giant sequoias" and "an enormous number of habitats" are sufficiently specific to satisfy the statutory limits of the "smallest area" sufficient to protect the proclaimed monument, even for a monument of over 325,000 acres.<sup>332</sup> In short, arguments that the Antiquities Act's sweeping application is inconsistent with its statutory text and stated purpose have consistently lost, almost from the instant that the Act was passed. They have been met, in effect, with a vast national shrug, based on Congress's acquiescence in the face of the Act's broad application,<sup>333</sup> and a sense that the treasures protected by the Act are worth the disquiet caused by its broad application. Although (to date) they have consistently lost in court and in Congress, arguments about the Act's illegitimacy have never gone away,<sup>334</sup> because presidential proclamations of enormous and permanent national monuments without any subsequent specific legislative validation continue to feel illegitimate to many who live nearby.<sup>335</sup>

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329. See Proclamation No. 794, 35 Stat. 2175 (1908).

330. See Proclamation No. 1733, 43 Stat. 1988 (1925).

331. *Cameron v. United States*, 252 U.S. 450, 455-56 (1920).

332. *Tulare County v. Bush*, 306 F.3d 1138, 1140-41 (D.C. Cir. 2002) (internal quotations omitted).

333. Klein, *supra* note 65, at 1336-37, 1342, 1355-60.

334. See, e.g., Erin Hawley, *Trump Gets It Right on Antiquities Act Rollback*, THE HILL (Dec. 9, 2017, 10:00 AM), <https://thehill.com/opinion/white-house/364011-trump-gets-it-right-on-antiquities-act-rollback> [<https://perma.cc/7EX3-MW4Y>] (arguing that the Antiquities Act has been interpreted in abusive and illegitimate ways, decimating already-struggling rural communities).

335. See *supra* notes 48-50, 58-59, 294-98, 319-20 and accompanying text.

Like the statue statutes, and unlike the NHPA, the Antiquities Act as drafted and as it has often been applied is anticomunitarian, often profoundly so, and its anticomunitarian nature is often highlighted in arguments about the Act's supposed fundamental illegitimacy.<sup>336</sup> Unlike the substantial role that local communities, interest groups, and state officials always play in decisions about inclusion on the National Register, local opponents of national monuments frequently feel ignored.<sup>337</sup> While the reforms initiated in the 1990s under Secretary of the Interior Bruce Babbitt created substantially more interaction with local groups than the statue statutes provide,<sup>338</sup> these reforms have not fundamentally altered presidential authority under the Act, nor have they re-balanced the relationship between federal, state, and local actors as monuments are being considered. As a result, those whose lives and communities have been most affected by some very recent national monument designations have continued to raise objections, in terms that echo the complaints of those who live near monuments protected by the statue statutes.<sup>339</sup>

Much recent scholarship has acknowledged some or all of these concerns, while ultimately defending the Antiquities Act's expansive application because of the need for executive action over the resources that make up most national monuments, and on the president's legitimacy as the chief executive in a representative democracy.<sup>340</sup> This argument is given some added force by the popularity of national monuments with the general public, as well as the fact that many national monuments tend to become acceptable, even

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336. See, e.g., *Exclusive: Utah Delegation's Joint Response to Obama's Bears Ears Monument Designation*, DESERET NEWS (Jan. 24, 2017, 12:15 AM), <https://www.deseret.com/2017/1/24/20604616/exclusive-utah-delegation-s-joint-response-to-obama-s-bears-ears-monument-designation> [<https://perma.cc/S9FR-PRN9>] (arguing that President Obama ignored local residents and state and local officials in proclaiming this monument); see also Rasband, *supra* note 74, at 1 (arguing that the Antiquities Act has repeatedly "been wielded by presidents without any regard for the local rural communities and the state and county governments most impacted").

337. See Rasband, *supra* note 74, at 5-6.

338. Squillace, *supra* note 45, at 539-40 (describing Babbitt's reforms in detail).

339. See, e.g., Liston, *supra* note 58, at 585-86 (describing the destructive effects of monument decisions determined entirely "by people who do not have to live with the direct results of their decisions").

340. See, e.g., Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 *ECOLOGY L.Q.* 707, 737-38 (2002).



beloved, by nearby communities within a few years of their proclamation.<sup>341</sup> This is a powerful argument, given still more weight by the following: without the Antiquities Act as it has been applied over the past century plus, the Grand Canyon might be partially flooded or pockmarked by mines. Is this worth the sense of alienation and loss that local communities have felt in the face of monument proclamations, which they have been essentially powerless to affect, much less stop? For many, including the author of this Article, the answer has been yes.

But like all such tests, this essential balancing—between the costs and the benefits of the Antiquities Act as it has been applied since shortly after its passage—should be subject to rebalancing as conditions change. And the increasing virulence that surrounds all sorts of monument conflicts in this country, along with the rise of the statue statutes, provide good reasons to consider such a rebalancing. If we continue to focus on national monuments only as part of public lands or natural resources law, then the debate over the Antiquities Act is likely to proceed along familiar lines, whatever the result of the current litigation over President Trump's attempted monument reduction. But if we shift our focus and consider national monuments along with built monuments protected by statue statutes and the NHPA—breaking through the artificial dichotomy that separates cultural and natural artifacts<sup>342</sup>—then we may be able to reframe our fractured monumental debates.

Without statutory reform, the fundamentally anticomunitarian nature of the Antiquities Act will likely persist. Providing an opportunity for presidents to protect threatened monuments without waiting for Congress or local communities is, in fact, the central purpose of the Act. The Act's core contains an irreducible disregard for both legislative deliberation and local consultation. But there may be ways to reform the Antiquities Act to ameliorate its anticomunitarian nature, and to allow local communities and their representatives more opportunities to influence the process, without subjecting monument management to the uncertainty that

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341. See, e.g., *id.* But see Rasband, *supra* note 74, at 2-3 (arguing that the popularity and praiseworthy preservation effects of national monuments do not fully redeem democratic deficiencies in their creation).

342. Klein, *supra* note 65, at 1365-67, 1369-71.

President Trump's proposed reductions pose, and without crippling the Act's ability to protect new monuments in the future.

In the past, many legislators have introduced a flood of failed legislation to ostensibly "reform" the Antiquities Act. Most of these bills essentially seek to undo the President's ability to proclaim monuments in certain areas of the country without some sort of congressional action, or without state and local participation, or some combination thereof.<sup>343</sup> With few exceptions, these efforts have failed—the Act has displayed substantial resilience, despite its intense unpopularity in certain parts of the country, because it has successfully protected what most Americans have come to recognize as national treasures.<sup>344</sup>

As part of these efforts to hamstring the Antiquities Act, legislators sometimes propose extremely short time limits for national monuments. For example, one recent bill would terminate national monuments one year after they are designated by presidential proclamation.<sup>345</sup> Of course, a one-year time limit eviscerates rather than reforms the Antiquities Act<sup>346</sup>—it does not provide any meaningful security for vulnerable objects covered by the monument designation, nor does it provide a realistic window for congressional action. But substantially longer time limits on future monuments designated by presidential proclamation might have a different effect.

Consider, for example, a reform of the Antiquities Act that imposed an initial limit of thirty-two years on new national monuments designated by presidential proclamation (the "initial term").<sup>347</sup> At any point within the last twelve years of any new monument's initial term, but not before that time, a subsequent President could renew the designation by proclamation for another twenty years (the "renewal term"). Any proclamation that expanded

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343. See, e.g., *id.* at 1389-91 (discussing examples).

344. *Id.* at 1391.

345. National Monument CAP Act, H.R. 3990, 115th Cong. § 2 (2018).

346. See, e.g., Elizabeth Miller, *The "No More Parks Act" Could End National Monuments as We Know Them*, BACKPACKER (Dec. 22, 2017), <https://www.backpacker.com/news-and-events/national-monuments-house-bill-rob-bishop> [<https://perma.cc/W7KV-KMVS>] (referring to the National Monument CAP Act as the "No More Parks Act").

347. I refer to "new monuments" to make clear that preexisting monuments should be unaffected by the proposed reform.

a monument's boundaries, or that designated a new monument adjacent to a previously proclaimed monument, would be treated as if it had been made with the original proclamation. In other words, such an expansion or adjacent monument would not operate under a different clock for either the initial or the renewal term. Every initial term and renewal term proclamation would have to be preceded by at least 180 days' notice to the governor and congressional representatives of any state directly affected by the monument, as well as a visit to such states by either the President or the Secretary of the Interior—essentially incorporating Secretary Babbitt's "no surprises" policies into the statute as a baseline for state and local consultation.<sup>348</sup> And finally, the reformed Antiquities Act would expressly provide that no future President could reduce or abolish either an initial or renewal term designation.

Such a reform would not please everyone—indeed, it likely would upset many current critics and supporters of the Antiquities Act alike. But it would preserve the core of the Act, allowing monuments to be created by executive action for substantial lengths of time without congressional involvement. And it would remove the uncertainty that now exists and that may remain after resolution of the currently pending litigation about whether future presidents have the unilateral authority to reduce or abolish a predecessor's monuments. In place of this uncertainty, the Park Service and other management agencies would have a relatively predictable timeline, at least for the first two decades, to develop management plans for any new monument. Moreover, the time periods of the initial term and the renewal term would provide significant protection to such a new monument, plenty of opportunity for Congress to protect the monument with specific legislation, and abundant incentive for compromise that would take into account state and local concerns.

At the same time, the 180-day notice and consultation provision would force at least a minimal level of federal executive consultation with state officials and an opportunity for locally affected groups to influence the decision. In addition, this provision would address

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348. See *supra* note 338 and accompanying text; see also Rasband, *supra* note 74, at 2-10 (arguing that the Antiquities Act should be reformed to require notice to state and local governments, and discussing the consultation requirements and time limits on FLPMA's withdrawal provisions at 43 U.S.C. § 1714).

concerns about midnight monument proclamations because it would require a monument-designating President's party to face at least one election after she declared her intentions but before the end of her term. In other words, even if a future president were to proclaim a monument in the last ninety minutes of her term, she would have had to declare her intentions by the preceding July at the latest. Moreover, the time periods of the initial term and the renewal term would provide many opportunities for monument opponents to express their views to their representatives, and multiple validating (or invalidating) elections in which those representatives and the underlying views could be tested. For example, if President Clinton's 1996 monuments had been created pursuant to the revisions outlined here, they would be well within the period in which they would need either validating legislation or a renewal term before expiring in 2028.

This raises a final and critically important point. By putting an expiration date, even a distant one, on any new monument proclaimed by the President alone, the reformed statute would undermine the arguments raised by many monument opponents about the democratic legitimacy of the Antiquities Act as it has been applied. To survive beyond the initial term, a national monument under the revised Act would have to be renewed by a subsequently elected President, and in order to survive indefinitely, a national monument would have to be protected by a subsequently elected Congress—although the initial term would protect the monument for decades even without renewal. These changes would not stop debates about future national monuments. But they would undermine some of the force of complaints about the Antiquities Act, potentially encourage compromise and productive legislation about future monuments, and, perhaps, improve our national conversation about how and why we should protect our most irreplaceable heirlooms.

The Antiquities Act and the statue statutes are fundamentally different. The former protects national treasures that cannot be repaired or replaced, while the latter protect national embarrassments that should be altered or removed. In addition, the statue statutes reinforce and reiterate the racially discriminatory and exclusionary messages associated with the monuments they protect.

But this truth about the statue statutes is not easy for everyone to accept.

Another truth may be more acceptable to those who defend the statue statutes and do not or cannot see their discriminatory character. Like the Antiquities Act, the statue statutes are deeply anticomunitarian, putting them at odds with other monument-protection and more broadly historic-preservation laws. And like some proclamations taken under the Antiquities Act, the statue statutes often appear to have been created in great haste, without sufficient forethought for the indefinite protections they purport to provide.

But here is a crucial difference: the Antiquities Act can be reformed, to remove even the appearance of hasty decision-making that sometimes attaches to national monuments, to decrease its anticomunitarian tendencies, and to provide more opportunities for specific national monuments to be validated by subsequent elections for President and Congress. The statue statutes are beyond repair, but the Antiquities Act should be reformed along the lines suggested here—these reforms are good in themselves, but they would also isolate the statue statutes, while improving the quality of our public discourse about monuments and how we should protect them.

## CONCLUSION

A little more than a century ago, the writer, critic, and newspaper editor Louis Howland wrote about a rural-urban divide in his country, and the role that a growing appreciation for the nation's built and natural monuments seemed to be playing in addressing this divide.<sup>349</sup> Howland loved the history and the natural beauty of his country, but he was a critical consumer of the influence that tradition and the monumental weight of history could play. Even as he celebrated America's monumental heritage, he also worried that his country might "develop a spirit of caste, a narrow outlook, a distaste for travel, and a slavish adherence to old traditions and customs," devolving into a settled, fixed, and sadly uniform

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349. Louis Howland, *Provincial or National?*, 43 SCRIBNER'S MAG. 450, 453 (1908). Excerpts from Howland's work are discussed in KAMMEN, *supra* note 11, at 270, 274-75.

society.<sup>350</sup> But citing as an example Walt Whitman's evocative appreciation for the Colorado mountains now protected as a national landmark, as well as the growing affection throughout the nation's cities for the "great historic background" that "is more and more coloring our life," Howland saw more reasons for hope than fear in this awakening.<sup>351</sup> "[W]e are gradually opening our eyes to the splendor of our heritage," Howland wrote—a heritage rich with lessons of poise, quietness, and wisdom—"and we are all growing old together."<sup>352</sup>

Nearly as much time separates our own moment from Howland's as separated Howland's moment from the nation's founding. Today, some of the monument-protection laws discussed in this Article are almost as old as Howland's country. We have already grown old—older, anyway—but we have not grown more together, at least not as Howland hoped. Instead, the monumental guideposts that he and others hoped would teach us tolerance and patience have been transformed into lightning rods for bitter and recurring conflict and anchors for an ever-widening rural-urban divide.

But these trends are not irreversible—no more so than the hopeful trends that Howland identified and celebrated. To change our present course, we should consider monument conflicts and the laws that protect them together, breaking through the false dichotomy between cultural and natural significance.<sup>353</sup> When we do this, we will see that some of our monument-protection laws need to go away, along with the monuments they protect. Some should stay, but they should be rewritten; others may not need statutory revision, but we should be more careful in how we apply them. Above all, we should remember the essential futility of expecting our monuments to last forever unchanged,<sup>354</sup> and the greater futility of expecting the same from the laws that protect them.

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350. Howland, *supra* note 349, at 453.

351. *Id.* at 453-54.

352. *Id.* at 453.

353. Klein, *supra* note 65, at 1365-71.

354. See, e.g., LEVINSON, *supra* note 17, at 6-8 (noting that "[a]ll monuments are efforts, in their own way, to stop time," but "[h]istory, of course, moves relentlessly to mock" these efforts).