

## **Bloody Foundation? Ethical and Legal Implications of (Not) Removing the Equestrian Statue of Theodore Roosevelt at the American Museum of Natural History**

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“Now the statue is bleeding. We did not make it bleed. It is bloody at its very foundation.”<sup>1</sup>

### **INTRODUCTION**

On October 26, 2017, protestors calling themselves the Monument Removal Brigade (“MRB”) splashed red paint on the base of a statue of Theodore Roosevelt outside the American Museum of Natural History (“AMNH,” “Museum,” or “Natural History Museum”) in New York City as a form of public protest art.<sup>2</sup> This 1939 sculpture by American artist James Earle Fraser (the “*Equestrian Statue of Theodore Roosevelt*” or “*Equestrian Statue*”) portrays the twenty-sixth president of the United States sitting upon a horse, flanked on either side by a standing African man and Native American man intended to represent their respective continents.<sup>3</sup> On its anonymous blog, MRB called for the statue’s removal and claimed, “[t]he true damage lies with patriarchy, white supremacy, and settler-colonialism embodied by the statue.”<sup>4</sup> The Mayoral Advisory Commission on City Art, Monuments, and

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1. *Prelude to the Removal of a Monument*, MONUMENT REMOVAL BRIGADE (Oct. 26, 2017), <https://perma.cc/3ULA-HQBE>.

2. Colin Moynihan, *Protesters Deface Roosevelt Statue Outside Natural History Museum*, N.Y. TIMES (Oct. 26, 2017), <https://perma.cc/F7TZ-2FCT>.

3. A.L. FREUNDLICH, *THE SCULPTURE OF JAMES EARLE FRASER* 123 (2001); MAYORAL ADVISORY COMM’N ON CITY ART, MONUMENTS, & MARKERS, REPORT TO THE CITY OF NEW YORK (Jan. 2018), <https://perma.cc/F63H-GSFN> [hereinafter REPORT TO THE CITY OF NEW YORK].

4. MONUMENT REMOVAL BRIGADE, *supra* note 1.

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Markers (the “Commission”) conducted a study of controversial monuments on public land in New York City and was unable to agree on an appropriate fate for the AMNH statue; for this reason, it has remained in place for the time being.<sup>5</sup> In July of 2019, the AMNH opened a special exhibition entitled *Addressing the Statue*.<sup>6</sup>

This AMNH protest occurred within a larger national conversation about the place of public monuments, especially those commemorating leaders of the Confederacy.<sup>7</sup> But the current debate often lacks scholarly rigor, with little consideration of the history, intention, or artistic merit of the monuments in question, or the federal, state, local, and administrative laws governing their removal or modification. This Article draws upon the disciplines of art history, museum studies, and the law to contextualize the AMNH *Equestrian Statue* and expand upon the Commission’s and AMNH’s analyses to develop a suggested framework for considering controversial monuments in the future.

### I. THEODORE ROOSEVELT (1858–1919): HERO TALE OR AMERICAN PROBLEM?<sup>8</sup>

There is an abundance of literature on Theodore Roosevelt and far too much information to summarize here.<sup>9</sup> Therefore, this Part is limited to the aspects of Roosevelt’s life most salient to the Article, namely his connection to the American Museum of Natural History and his theories on race. Familiar aspects of Roosevelt’s personality and activities may seem highly contradictory to a modern reader—scientist and eugenicist, hunter and conservationist, progressive and imperialist. However, Roosevelt grew up and came to power at a time when these attitudes were considered part of a coherent, rational worldview. This is not to shield his distasteful ideas from criticism, but rather to anchor them in a complex period of American history when the post-Civil War United States was struggling to come to terms with its violent treatment of formerly-enslaved and indigenous peoples. Museums and public monuments became an important tool to rationalize the past and create a positive sense of national identity going into the twentieth century.<sup>10</sup> Today,

are credited.

5. REPORT TO THE CITY OF NEW YORK, *supra* note 3. See also, e.g., Holland Cotter, *Half-Measures Won’t Erase the Painful Past of Our Monuments*, N.Y. TIMES (Jan. 12, 2018), <https://perma.cc/NQG5-P2MT>.

6. Nancy Coleman, *Angered by This Roosevelt Statue? A Museum Wants Visitors to Weigh In*, N.Y. TIMES (July 15, 2019), <https://perma.cc/7J7K-HBZG>; *Addressing the Statue*, AM. MUSEUM NAT. HIST., <https://perma.cc/T7G4-5YYP> (last visited Oct. 3, 2019).

7. See, e.g., Jacey Fortin, *The Statue at the Center of Charlottesville’s Storm*, N.Y. TIMES (Aug. 13, 2017), <https://perma.cc/C8JC-FMCC>; Liam Stack, *Charlottesville Confederate Statues Are Protected by State Law, Judge Rules*, N.Y. TIMES (May 1, 2019), <https://perma.cc/RD88-YPLD>.

8. This subtitle is derived from the titles of two books: HENRY CABOT LODGE & THEODORE ROOSEVELT, *HERO TALES FROM AMERICAN HISTORY* (1895); THEODORE ROOSEVELT, *AMERICAN PROBLEMS* (1910).

9. For the most comprehensive account of Roosevelt, see Edmund Morris’s three-volume biography, the first book of which was awarded both a Pulitzer Prize and a National Book Award. EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* (rev. ed. 2010); THEODORE REX (rev. ed. 2010); COLONEL ROOSEVELT (rev. ed. 2010).

10. See generally KIRK SAVAGE, *STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND*

however, the historical narrative embodied by these museums and monuments is being challenged—or defended—from many sides of an increasingly polarized and activist public, as evidenced by the controversy over the *Equestrian Statue of Theodore Roosevelt*.

#### A. THE BORN NATURALIST

The *Equestrian Statue* is the focal point of the larger Theodore Roosevelt Memorial, which forms the entrance to the American Museum of Natural History. After Roosevelt died in 1919, the New York State Legislature formed a Memorial Association, which determined that the most suitable location to honor the late president was the AMNH.<sup>11</sup> It is no exaggeration to say that Theodore Roosevelt grew up alongside the Museum, and he remained involved with the institution throughout his life. His affluent father was able to avoid service in the Civil War and instead focused on philanthropic endeavors in Manhattan, including the founding of museums. Indeed, the AMNH Charter was signed in the Roosevelt home on April 8, 1869.<sup>12</sup> As a sickly child, Roosevelt spent many hours poring over natural history books, and when he was able to, he explored the outdoors at the family summer home. Biographer Edmund Morris writes that, “[e]ven in these early years, [Roosevelt’s] knowledge of natural history was abnormal.”<sup>13</sup> At the age of seven, “Teedie” began what he and his cousins christened the “Roosevelt Museum of Natural History,” composed of any specimens that he could find.<sup>14</sup> In 1872, the AMNH acquired the first of many donations from Theodore: “one bat, twelve mice, a turtle, the skull of a red squirrel, and four bird eggs presented by TR, then a teenager active in taxidermy and collecting.”<sup>15</sup> In the following years, Roosevelt pursued natural history at Harvard University and began writing on the subject.<sup>16</sup>

#### B. FROM CABINETS OF CURIOSITY TO NATURAL HISTORY MUSEUMS

The heyday of American natural history museums and ethnographic collecting occurred during the second half of the nineteenth and first half of the twentieth centuries—a period encompassing Roosevelt’s entire life.<sup>17</sup> As described in a recent International Council of Museums publication, early museums were “the physical

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MONUMENT IN NINETEENTH-CENTURY AMERICA (1997).

11. LANDMARKS PRES. COMM’N, AMERICAN MUSEUM OF NATURAL HISTORY, MEMORIAL HALL, THEODORE ROOSEVELT MEMORIAL BUILDING, LP-0889 (July 22, 1975) [hereinafter AMNH LANDMARK DESIGNATION].

12. John A. Gable, *Theodore Roosevelt and the American Museum of Natural History*, 8 THEODORE ROOSEVELT ASS’N J., Summer 1982, at 2, 2.

13. MORRIS, THE RISE OF THEODORE ROOSEVELT, *supra* note 9, at 17.

14. *Id.* at 17–18.

15. Gable, *supra* note 12, at 2.

16. *Id.*

17. Anthony Alan Shelton, *Museums and Anthropologies: Practices and Narratives*, in A COMPANION TO MUSEUM STUDIES 64, 64–65 (Sharon Macdonald ed., 2011); *see also* Christopher A. Norris, *The Future of Natural History Collections*, in THE FUTURE OF NATURAL HISTORY MUSEUMS 13, 14 (Eric Dorfman ed., 2018).

manifestation of our species' attempt to integrate rational thought with the understanding of the natural and cultural worlds."<sup>18</sup> Scholars identify many precursors to the modern museum, but most apt for this Article are the "cabinets of curiosity" that began appearing during the Age of Discovery.<sup>19</sup> From approximately the sixteenth to seventeenth centuries, wealthy collectors arranged exotic natural specimens, art, and ethnographic material from around the world together in special display rooms.<sup>20</sup> It was not until the Enlightenment, when there was a newfound interest in creating rational systems by which to organize objects, that modern museological distinctions began to emerge.<sup>21</sup> As eclectic "cabinets of curiosity" gradually developed and stratified into natural history museums, ethnographic museums, zoos, botanical gardens, and art museums, the classification and placement of indigenous cultural property became laden with ideology.<sup>22</sup> In particular, the decision to display "non-Western" material culture as "artifacts" or "specimens" in natural history museums instead of as "art" in art museums both reflects and conveys attitudes about the value and standing of certain cultures over others.<sup>23</sup>

American natural history museums, including the AMNH, have tended to contain both scientific and ethnographic or artistic collections. The early AMNH promoted a theory of cultural evolution; that is, "an illustrative method by which external and internal colonial ideologies based on notions of tutelage over so-called inferior races could be legitimated."<sup>24</sup> A young Roosevelt read Charles Darwin's *On the Origin of Species* (1859), and in later life, was untroubled by the transfer of the scientific theory of evolution to the sociopolitical arena.<sup>25</sup> Although the theory of cultural evolution largely has been discarded as archaic pseudoscience, during Roosevelt's life "such racially based theories were not considered outside the scientific mainstream."<sup>26</sup>

18. Kirk Johnson, *Foreword* to THE FUTURE OF NATURAL HISTORY MUSEUMS, *supra* note 17, at xviii.

19. Anna Omedes & Ernesto Páramo, *The Evolution of Natural History Museums and Science Centers*, in THE FUTURE OF NATURAL HISTORY MUSEUMS, *supra* note 17, at 168, 169–70. The Age of Discovery, a period during which explorers sought new routes to foreign lands, extended from the mid-fifteenth to the mid-sixteenth century. Jean Brown Mitchell, *The Age of Discovery*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/W8JG-RCRF> (last visited Sept. 19, 2019).

20. Omedes & Páramo, *supra* note 19, at 168, 169–70.

21. The Enlightenment spanned the seventeenth and eighteenth centuries. Brian Duignan, *Enlightenment*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/WCJ9-D83C> (last visited Oct. 20, 2019).

22. Omedes & Páramo, *supra* note 19, at 170–72; Shelton, *supra* note 17, at 65.

23. *See, e.g.*, THE ANTHROPOLOGY OF ART: A READER (Howard Morphy & Morgan Perkins eds., 2006).

24. Shelton, *supra* note 17, at 69. The participation of museums like the AMNH in rampant "expeditions" to collect objects from outside of (and subsequently display within) Europe and the United States embodied such theories, in that they indicated a perceived dominance on the museums' part. *See id.* at 67.

25. Merriam-Webster dates the term "social Darwinism" to 1877 and defines it as "an extension of Darwinism to social phenomena; *specifically*: a sociological theory that sociocultural advance is the product of intergroup conflict and competition and the socially elite classes . . . possess biological superiority in the struggle for existence." *Social Darwinism*, MERRIAM-WEBSTER, <https://perma.cc/6P3Y-STU2> (last visited Sept. 19, 2019). *See also* DARRIN LUNDE, THE NATURALIST: THEODORE ROOSEVELT, A LIFETIME OF EXPLORATION, AND THE TRIUMPH OF AMERICAN NATURAL HISTORY 113 (2016).

26. Norris, *supra* note 17, at 14.

Arguably, these attitudes are still embodied by the AMNH, which, in addition to scientific exhibitions, maintains “Human Origins and Cultural Halls,” including a “Hall of African Peoples” and “Hall of Plains Indians.”<sup>27</sup> This context is particularly important when considering protests against the *Equestrian Statue* outside, which, as discussed *infra*, depicts African and Native American men below Roosevelt.

Natural history museums in their modern form were an outgrowth of not only “cabinets of curiosity,” but also nineteenth-century World’s Fairs, and often became permanent homes for the fairs’ temporary exhibitions.<sup>28</sup> The first international exposition was the 1851 Crystal Palace in London, which served as an opportunity for Britain to showcase its technological advancement as well as its colonial domination. In the United States, World’s Fairs became an important marker of continued progress in the wake of the Civil War.<sup>29</sup> These venues also housed the most disturbing exhibitions on record: human zoos. As described by the Musée du Quai Branly in Paris, which mounted a 2011 exhibition on the topic: “[W]omen, men and children [were] brought from Africa, Asia, Oceania and America to be exhibited in the Western world during circus shows, theatre or cabaret performances, fairs, zoos, parades, reconstructed villages or international and colonial fairs.”<sup>30</sup> The AMNH was complicit in this heinous practice. In 1904, Ota Benga, a Congolese pygmy, was brought to participate in a living anthropology exhibit at the St. Louis World Fair and then transferred to live in the AMNH.<sup>31</sup> The inhumanity and cruelty of living exhibitions would be unthinkable in a museum today, but these exhibitions demonstrate a strange combination of subjugation and Enlightenment desire to preserve for study a way of life perceived to be endangered by cultural evolution and the “inevitable” dominance of white, Western societies.<sup>32</sup>

### C. CONSERVATION THROUGH DESTRUCTION

Roosevelt’s interest in natural history was tied to hunting and westward expansion. Roosevelt had traveled to the Dakota Territory in the early 1880s to start a cattle ranch. Although the endeavor failed, it stoked Roosevelt’s lifelong interest in the region and inspired him to write *Winning of the West*, an ode to Manifest

27. *Permanent Exhibitions—Human Origins and Cultural Halls*, AM. MUSEUM NAT. HIST., <https://perma.cc/89RQ-AA64> (last visited Sept. 19, 2019). AMNH has recently taken a new approach to at least one problematic diorama in the Theodore Roosevelt Memorial Hall by overlaying the glass with text urging visitors to “reconsider[] this scene.” See Ana Fota, *What’s Wrong With This Diorama? You Can Read All About It*, N.Y. TIMES (Mar. 20, 2019), <https://perma.cc/9GHZ-EMSW>.

28. Robert W. Rydell, *World Fairs and Museums*, in A COMPANION TO MUSEUM STUDIES, *supra* note 17, at 136.

29. *Id.* at 135.

30. *Human Zoos: The Invention of the Savage*, MUSÉE DU QUAI BRANLY, <https://perma.cc/D8AX-BHSM> (last visited Sept. 19, 2019).

31. PHILIP DRAY, *THE FAIR CHASE: THE EPIC STORY OF HUNTING IN AMERICA 277–78* (2018); Rydell, *supra* note 28, at 147–48. See also PHILLIPS VERNER BRADFORD & HARVEY BLUME, *OTA BENGA: THE PYGMY IN THE ZOO* (1992); PAMELA NEWKIRK, *SPECTACLE: THE ASTONISHING LIFE OF OTA BENGA* (2016).

32. Shelton, *supra* note 17, at 69.

Destiny and his own experience on the frontier.<sup>33</sup> Upon returning to New York, Roosevelt formed the Boone & Crockett Club, a lobbying organization for the preservation of wild game. Although today hunting is often considered the antithesis of conservation, for Roosevelt and his fellow naturalists, the collecting and taxidermy of specimens were methods by which they could preserve and invoke national pride in the environment.<sup>34</sup> For some Club members, such philosophies also extended “to irresponsible pseudo-scientific speculation about the alleged inferiority of racial and ethnic categories of humans.”<sup>35</sup> Native Americans and formerly enslaved peoples were often perceived to be closer to a state of nature and thus superior hunters, and many served as guides for eager white sportsmen like Roosevelt. Morris describes Roosevelt’s attitude toward African Americans as “enlightened” for his time,<sup>36</sup> and, in fact, Roosevelt explicitly characterized the transport of African slaves to the United States as a “crime” in *Winning of the West*.<sup>37</sup> However, after his presidential terms, Roosevelt set out on an expedition to Africa in order to hunt big game for the AMNH and was reported to have treated his local guides with condescension—even as he was wholly dependent on them for his safety.<sup>38</sup>

Participating in the Boone & Crockett Club was, in a sense, Roosevelt’s first foray into politics. Thereafter, he helped establish the National Zoo in Washington, D.C., and pass the Forest Reserve Act.<sup>39</sup> During his tenure as president from 1901 to 1909, Roosevelt created five national parks, established the National Forest Service, and passed the Antiquities Act of 1906, which “obligates federal agencies . . . to preserve for present and future generations the historic, scientific, commemorative, and cultural values of the archaeological and historic sites and structures on these lands . . . [and] authorizes the President to protect landmarks, structures, and objects of historic or scientific interest . . . .”<sup>40</sup> Many consider the Antiquities Act the first step in a series of laws culminating with the Native American Graves and Repatriation Act of 1990, a landmark piece of legislation attempting to support indigenous communities.<sup>41</sup>

Roosevelt’s beliefs regarding Native Americans changed over the course of his

33. THEODORE ROOSEVELT, *WINNING OF THE WEST: FROM THE ALLEGHENIES TO THE MISSISSIPPI* (1889). Manifest Destiny refers to the “supposed inevitability of the continued territorial expansion of the boundaries of the United States . . . .” Jeanne T. Heidler & David S. Heidler, *Manifest Destiny*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/3932-NN7H> (last visited Sept. 19, 2019).

34. LUNDE, *supra* note 25, at 5–6, 106, 184, 226; MORRIS, *THE RISE OF THEODORE ROOSEVELT*, *supra* note 9, at 388.

35. DRAY, *supra* note 31, at 7.

36. MORRIS, *THE RISE OF THEODORE ROOSEVELT*, *supra* note 9, at 466.

37. ROOSEVELT, *WINNING OF THE WEST*, *supra* note 33, at 8.

38. DRAY, *supra* note 31, at 268.

39. MORRIS, *THE RISE OF THEODORE ROOSEVELT*, *supra* note 9, at 387–89.

40. *American Antiquities Act of 1906*, NAT’L PARK SERV., <https://perma.cc/6K6B-LLN9> (last visited Oct. 20, 2019).

41. See generally Lindee R. Grabouski, Thesis, *Smoke and Mirrors: A History of NAGPRA and the Evolving U.S. View of the American Indian* 1, 5 (May 2011) (unpublished M.A. thesis, University of Nebraska – Lincoln) (on file with the History Department, University of Nebraska – Lincoln), <https://perma.cc/FD8Z-G6ZJ>.

lifetime. As a rancher in the Dakotas, his attitude was, as Morris describes, “no more tolerant than that of any cowboy.”<sup>42</sup> His historical studies for *Winning of the West* appear to have transformed intolerance into paternalism: “[H]e looked on the red man not as an adversary but as a ward of the state, whom it was his duty to protect.”<sup>43</sup> What much scholarship has failed to point out, however, is that this view was deeply enmeshed with contemporaneous scientific and museological theories which were coopted in the creation of an American national identity in the wake of the Civil War. Morris characterizes Roosevelt’s philosophy thusly: “Once civilization was established, the aborigine must be raised and refined as quickly as possible, so that he may partake of every opportunity available to the master race—in other words, become master of himself, free to challenge and beat the white man in any field of endeavor.”<sup>44</sup> In short, Roosevelt adhered to the theory of cultural evolution; while he professed to believe in the inherent capacity of all races, he also believed that whites were farther along on the road of human development, in part due to their subjugation of others. The desire to document the “progress” of humanity was not unique to Roosevelt nor the United States, as is reflected in the ossified cases of ethnographic, anthropological, and natural history museums around the world.

Theodore Roosevelt left a complicated legacy, in his writings and his actions, of both preservation and exploitation that has not been resolved to this day. He can be seen as either a villain or a hero depending on the lens through which his impact on the American story is viewed.

## II. JAMES EARLE FRASER (1876–1953): “THE MOST FAMOUS UNKNOWN SCULPTOR”<sup>45</sup>

James Earle Fraser is hardly a household name, although students may have unknowingly come across reproductions of his oeuvre in history textbooks. Unlike Theodore Roosevelt, who has generated enormous amounts of scholarly and popular material, there is only one recent biography on Fraser and a few articles published during his lifetime. Yet Fraser was one of the most important American sculptors in the first half of the twentieth century. His work bridges the figurative monument tradition prominent in the decades after the Civil War, which promoted public sculpture to “uplift Americans,” and the modernist movement that arose in the wake of World War I.<sup>46</sup> In addition to securing numerous government commissions during his life—including some of the most well-known monuments in Washington, D.C.—Fraser was a teacher at, founder of, and contributor to many central arts organizations of the time.<sup>47</sup> Today, Fraser’s most familiar works include two representations of

42. MORRIS, *RISE OF THEODORE ROOSEVELT*, *supra* note 9, at 304.

43. *Id.* at 466.

44. *Id.* at 477.

45. JAMES A. PERCOCO, *SUMMERS WITH LINCOLN: LOOKING FOR THE MAN IN THE MONUMENTS* 170 (1st ed. 2008).

46. FREUNDLICH, *supra* note 3, at 99.

47. Joan M. Marter, *James Earle Fraser*, in *2 AMERICAN SCULPTURE IN THE METROPOLITAN MUSEUM OF ART: A CATALOGUE OF WORKS BY ARTISTS BORN BETWEEN 1865 AND 1885*, at 596 (Thayer Tolles ed., 2001).

Native Americans: the sculpture *The End of the Trail* and the Indian-Buffalo nickel.<sup>48</sup> In current discussions about the place of public monuments, Fraser serves as a reminder that sculptures were created by artists who brought to the process their own contexts and agendas, which were often lost over time or overshadowed by controversial subjects.

#### A. BORN ON THE FRONTIER

Fraser was born in Winona, Minnesota, on November 4, 1876. Shortly thereafter, his father moved the family to the Dakota Territory to oversee the expansion of railroads. “Jimmy” spent the first decade of his life on wide open land, amongst local frontier characters, wildlife, and Sioux populations. As his biographer A.L. Freundlich writes, Fraser always maintained “romantic longings [of] Indians of his youth,” and his childhood experiences would prove a significant artistic influence.<sup>49</sup> In 1890, the Frasers moved to Chicago, Illinois. At only thirteen, James apprenticed with a well-known sculptor working on commissions for the World’s Columbian Exposition of 1893. Romanticized representations of the West and American progress further inspired Fraser, and in 1897, he set off to France, capital of the art world, to pursue a career in sculpture.<sup>50</sup>

Although late-nineteenth century Paris was at the forefront of artistic innovation, Fraser took a more conservative path. Following academic tradition, he studied classical sculpture and the history of Western art. Nevertheless, exposure to such pioneers as Auguste Rodin would lead Fraser to imbue his subjects with more naturalism than the typical academic sculptor. In 1898, he was awarded the Wanamaker Prize at the American Art Association of Paris by James McNeil Whistler and Augustus Saint-Gaudens.<sup>51</sup> Saint-Gaudens invited the young Fraser to remain in Paris and assist with his last monumental commission, an equestrian portrait of Union hero William Tecumseh Sherman. When Saint-Gaudens was diagnosed with cancer and had to return to the United States, Fraser became chief assistant in the master’s New Hampshire studio. Among Saint-Gaudens’ last projects was a redesign of the ten- and twenty-dollar gold pieces by President Theodore Roosevelt, with whom he had been friends since at least the late 1880s.<sup>52</sup>

#### B. A SCULPTOR OF PRESIDENTS

No doubt Saint-Gaudens’s relationship with Roosevelt gave unusual access to Fraser, who considered the president a friend and sculpted him on more than one occasion. Even after moving to New York in 1902 to begin an independent career, Fraser remained loyally in touch with Saint-Gaudens until his mentor’s death in

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48. FREUNDLICH, *supra* note 3, at vii.

49. *Id.* at 6.

50. *Id.* at 4–6; Marter, *supra* note 47, at 596.

51. FREUNDLICH, *supra* note 3, at 13–20.

52. Thayer Tolles, *Augustus Saint-Gaudens (1848–1907)*, METROPOLITAN MUSEUM OF ART (Oct. 2004), <https://perma.cc/DQ3H-4B6C>.

1907. When Saint-Gaudens had to give up the opportunity to sculpt Roosevelt for the Senate in 1906, he passed the job on to his favorite apprentice. It was at this time that Roosevelt and Fraser became acquainted, which led to additional portraits. After sculpting Roosevelt, Fraser gained other prominent public commissions around the country, especially in Washington, D.C. and New York. He sculpted figures like Thomas Edison, Benjamin Franklin (unveiled by Roosevelt), Thomas Jefferson, and Alexander Hamilton. Perhaps the crowning achievement of his career was the sixty-one-foot temporary sculpture of George Washington created for the New York World's Fair in 1939.<sup>53</sup>

Before he became a giant among artists, Fraser set up a modest studio on MacDougal Alley, which backed up to Washington Square mansions. The original servants' quarters and carriage houses became what one writer at the time called an "artists' colony"—and this was the beginning of Greenwich Village as it is known today.<sup>54</sup> Fraser's neighbors included Gertrude Vanderbilt Whitney, a loyal patron who would later create the Whitney Museum of American Art. Her husband, Henry Payne Whitney, was also a philanthropist of the AMNH. Fraser made a celebrated bas-relief portrait of their children (their daughter Flora would grow up to be engaged to Roosevelt's son Quentin).<sup>55</sup> Social connections were extremely important for an emerging sculptor. For the first decade of his career in New York, Fraser made his living from portraits of prominent families. Among these subjects was Morris Ketchum Jessup, president of the AMNH.<sup>56</sup> Private portraits paid the bills, and the resulting contacts opened doors to more prestigious commissions.

### C. THE EQUESTRIAN STATUE OF THEODORE ROOSEVELT

Fraser was a natural choice for the sculptor of the New York State Roosevelt Memorial. Yet Fraser had less artistic license than one might imagine for an artist of his stature. The Memorial Association, AMNH Board of Trustees (which included Roosevelt's family), and New York State Legislature dictated the subject matter: "an equestrian statue of Roosevelt with two accompanying figures on foot, one an American Indian and the other a native African representing his gun bearers and suggestive of Roosevelt's interest in the original peoples of these widely separated countries."<sup>57</sup> The inclusion of a black African in the *Equestrian Statue* is particularly striking given the fact that black Americans were conspicuously absent from monuments after the Civil War (Native Americans were more common); the sculpture bypasses the issue of slavery by returning to a classicized allegorical

53. FREUNDLICH, *supra* note 3, at 20–23, 84, 132; Marter, *supra* note 47, at 596; *see also* C.L.J., *The Memorial to Ben Franklin*, 46 SCI. MONTHLY 484, 485 (1938).

54. Marter, *supra* note 47, at 596; *Value Conflicts*, in GERALD W. MCFARLAND, *INSIDE GREENWICH VILLAGE: A NEW YORK CITY NEIGHBORHOOD 1898-1918*, at 171 (2001); Helen Christine Bennett, *James Earle Fraser, Sculptor*, 1 ARTS & DECORATION 375, 375–76 (1911).

55. Bennett, *supra* note 54, at 375–76.

56. FREUNDLICH, *supra* note 3, at 33–36.

57. *Id.* at 123; George N. Pindar, *The New York State Roosevelt Memorial*, 42 SCI. MONTHLY 280, 280–84 (1936).

figure.<sup>58</sup>

The architect John Russell Pope simultaneously designed a new façade for the museum reminiscent of a classical triumphal arch, through which the sculpture of Roosevelt would appear to ride like a Roman emperor.<sup>59</sup> Once the design was finalized, sculpting and casting was a multi-year process that, in this case, took so long (a decade from its commission) that the State threatened to withdraw funding. Fraser was involved with each step: the small-scale clay model, subsequent enlargements, full-sized plaster model, expensive bronze casting in Rhode Island, and finally the transferring of heavy pieces to Manhattan. Once there, the sculpture was assembled, and engineers had to ensure the piece could securely rest above an underground subway.<sup>60</sup>

Despite the constraints inherent in commissioned public sculpture, Fraser imbued the figures with his own combination of classicism and naturalism. He had a long history of equestrian portraiture from which to draw inspiration. Placement of the central figure on a horse elevates the subject above the crowds and demonstrates power to subdue those below him. Consequently, one can very easily read into the pyramidal composition of the *Equestrian Statue* a hierarchy of racial authority. The practice of representing countries by using allegorical figures is, however, also a common trope in public monuments. For example, the corners of the *Albert Memorial* in London have four figures with symbolic attributes representing Africa, America, Asia, and Europe (Africa, the Camel; America, the Buffalo).<sup>61</sup> It should be noted that others, including members of the Mayoral Advisory Commission on City Art, Monuments, and Markers, proffered the alternate interpretation that the *Equestrian Statue* “was meant to represent Roosevelt’s belief in the unity of the races.”<sup>62</sup>

As a memorial erected in remembrance of Theodore Roosevelt, the *Equestrian Statue* is by definition a monument. But monument also means “a lasting evidence,” which aptly describes the goal of many artists representing Native Americans in the late nineteenth century.<sup>63</sup> During this period, there was a widespread perception that indigenous populations were dying out, a myth that lent itself to Romantic representations with varying degrees of offensiveness.<sup>64</sup> An 1855 *New York Times* review of the poem “Hiawatha,” by Henry Wadsworth Longfellow, illustrates the more egregious views:

[“Hiawatha” embalms] pleasantly enough the monstrous traditions of an uninteresting

58. See SAVAGE, *supra* note 10, at 5, 10 (“Slavery could hardly even be acknowledged in public space without exploding the myth of a democratically unified people from the very outset.”).

59. AMNH LANDMARK DESIGNATION, *supra* note 11.

60. FREUNDLICH, *supra* note 3, at 125–27.

61. *The Albert Memorial*, ROYAL PARKS, <https://perma.cc/GK5T-YPAJ> (last visited Nov. 8, 2019).

62. REPORT TO THE CITY OF NEW YORK, *supra* note 3, at 25.

63. *Monument*, MERRIAM-WEBSTER, <https://perma.cc/N52X-PUW9> (last visited Aug. 22, 2018).

64. See Brian W. Dippie, *This Bold but Wasting Race: Stereotypes and American Indian Policy*, MONT.: MAG. W. HIST., Winter 1973, at 2, 4 (“Although anthropologists, statisticians, government officials and a myriad of Indian experts have been denying the theory of the Vanishing Race since the middle of the nineteenth century, its principal tenets are deeply engrained in American thought and remain potent to this day in popular culture.”).

and, one may almost say, a justly exterminated race . . . Indian legends, like Indian arrow-heads, are well enough to hang up in cabinets for the delectation of the curious . . . [but] are too clumsy, too monstrous, too unnatural to be touched by the Poet.<sup>65</sup>

As described above, Fraser is best known for his sculpture *The End of the Trail*, which depicts a weary Native American atop a horse, spear and head pointing down.<sup>66</sup> In Fraser's own words, the pushing of the Indians farther West and destruction of the wild buffalo population were the "tragedy" of his boyhood. Although Fraser does not portray indigenous peoples in as pejorative a manner as many of his contemporaries, his work still betrays a naïve paternalism that took hold in the nineteenth century, lamenting the perceived loss of a people who represented a simpler way of life—a stereotype at the heart of the AMNH protests.

Just as this Article does not seek to defend the racial views of Theodore Roosevelt, it does not argue that the work of James Earle Fraser illustrates an enlightened view of cultural diversity: Both men evidently believed in white dominance as natural order. However, Roosevelt and Fraser also had sincere, if paternalistic, admiration for indigenous cultures and a desire to preserve images and artifacts in what was, *for the time*, a relatively respectful manner.<sup>67</sup> Additionally, it is undeniable that the *Equestrian Statue* has inherent artistic and art historical merit. While protesters focusing on the optics of the sculpture are rightly concerned with the narrative it conveys to Museum visitors and passersby, the historical context of the subject and artist cannot be forgotten when considering demands to remove, destroy, or alter any public monument.

### III. NEW YORK'S MEMORY WARS<sup>68</sup>

#### A. STATUE SUITS

The 1924 bronze equestrian *Statue of Robert E. Lee* (the "*Lee Statue*") in Charlottesville, Virginia, has been considered problematic for years. In 2015, protestors spray-painted its base with the words "Black Lives Matter."<sup>69</sup> One year later, a high school student petitioned the Charlottesville City Council (the "Council") to take down the Confederate monument; the Council considered relocating or adding historical information before voting to remove it altogether. Opponents of removal promptly sued Charlottesville, asserting that war memorials are protected under Virginia law and are not within the power of the Council to

65. *Longfellow's Poem*, N.Y. TIMES (Dec. 28, 1855), <https://perma.cc/J36F-48ZJ>.

66. Dippie, *supra* note 64, at 11.

67. See, e.g., Nicholas Lemann, *What to Do with Monuments Whose History We've Forgotten*, NEW YORKER (Nov. 26, 2017), <https://perma.cc/6LC5-CCYV> ("Ideas about the biologically determined ordering of the races were almost universal among the gentry of the day, and those who held them thought of themselves as benign in their intentions.").

68. The phrase "memory wars" is taken from debates about France's colonial past. See, e.g., DAVID RIEFF, IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES 12 (2016).

69. Fortin, *supra* note 7.

alter.<sup>70</sup> The statue remained in place. But on Friday, August 11, 2017, white nationalists marched upon Charlottesville to protest the potential removal and were met by determined counterdemonstrators. The rally turned violent; one person was killed, and many others were injured. In May 2019, Judge Richard Moore issued a letter concluding that the statue was a war “monument or memorial” under Virginia law, but declined to rule on other issues still pending in the case.<sup>71</sup>

In the wake of the Charlottesville protest, other American cities have revisited their controversial monuments. In Baltimore, Maryland, for example, the mayor ordered the removal of four Confederate memorials, two of which had already been protested against in the form of red paint and the words “Black Lives Matter.” The mayor argued she had authority to remove the monuments “under her power to safeguard the public.”<sup>72</sup> The Maryland Historical Trust (“MHT”), a state agency, disputed the mayor’s claim, citing a 1984 contract with the city authorizing MHT to make final decisions on changes to monuments. However, MHT has announced no plans to compel restoration, nor initiated legal action against the mayor or Baltimore.<sup>73</sup> A year after the removal, MHT was still working with the city to determine where best to place the memorials.<sup>74</sup> The cases of Charlottesville and Baltimore illustrate that, although legal structures governing removal decisions may vary from state to state, the problem of what to do with controversial public monuments is complex and rarely more heated than when the Civil War is involved.

As described by Kirk Savage in *Standing Soldiers, Kneeling Slaves*, the “history of slavery and its violent end was told in public space—specifically in the sculptural monuments . . . . Public monuments were at the center of this highly abstract, and yet terrifying, conflict—a conflict that lasted long after Reconstruction’s official demise.”<sup>75</sup> The primary philosophical divide embodied by post-Civil War monuments is the competing stories of North and South, which often chose to honor different historic figures. Robert E. Lee embodied the Confederate “Lost Cause” while Abraham Lincoln represented the victorious Union—these figures inevitably meant different things to those on either side of the war (and today mean different things to persons in different regions of the country). For those arguing Confederate memorials cannot—at the very least—remain as they are without added historical

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70. See, e.g., *Lawsuit to Stop Charlottesville from Moving Lee Statue Allowed to Go Forward*, WHSV (Oct. 4, 2017), <https://perma.cc/4GTX-U4HP>; *Charlottesville Judge: Council Members Don’t Have Immunity in Statue Lawsuits*, WHSV (June 15, 2018), <https://perma.cc/69YY-H3YA>.

71. Letter from Judge Richard Moore Ruling on Motion for Partial Summary Judgment, *Payne v. City of Charlottesville* (No. 17–145) (Va. Cir. Ct. Apr. 25, 2019); see also Letter from Judge Moore Ruling on Immunity and Revisiting Damages Issue, *Payne v. City of Charlottesville* (No. 17–145) (Va. Cir. Ct. June 13, 2018).

72. Ian Duncan, *Baltimore Lacked Authority To Take Down Confederate Statues, and State Says It Could—But Won’t—Order Them Restored*, BALTIMORE SUN (Oct. 26, 2017), <https://perma.cc/VC6N-9CKW>.

73. *Id.*

74. Jean Marbella, *One Year Since Baltimore’s Confederate Monuments were Removed in the Night, the Issues They Raised Remain*, BALTIMORE SUN (Aug. 16, 2018), <https://perma.cc/7ZC7-Y39Q>.

75. SAVAGE, *supra* note 10, at 3–4. “Reconstruction” refers to the decade of political changes after the Civil War. See, e.g., Eric Foner, *Reconstruction*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/MD89-TH24> (last visited Oct. 23, 2019).

context, such monuments heroize those who fought to maintain slavery and are an attack on egalitarian principles the country ought to embody.<sup>76</sup> To those who want to maintain the status quo, the sculptures are part of a history that should not be destroyed.<sup>77</sup> President Donald Trump falls in the latter camp, according to a series of tweets: “Sad to see the history and culture of our great country being ripped apart with the removal of our beautiful statues and monuments,” and, “Robert E [sic] Lee, Stonewall Jackson—who’s next, Washington, Jefferson?”<sup>78</sup> While President Trump is not renowned for his subtle analysis of complex problems, he does raise an interesting question regarding whether there is a bright line between acceptable and unacceptable subjects for public monuments. Few would equate Lee and Washington, but it must be acknowledged that the first president of the United States, pillar of democratic ideals, owned hundreds of slaves.<sup>79</sup> As Nicholas Lemann noted in the *New Yorker*: “The problem is that almost no long-ago white Americans’ views on race pass muster today.”<sup>80</sup> When do the positive contributions of a historic figure outweigh the negative, and who gets to decide?

## B. SYMBOLS OF HATE

In response to the events in Charlottesville, New York City mayor Bill de Blasio announced via Twitter on August 16, 2017, that the City would be “conduct[ing] a 90-day review of all symbols of hate on city property.”<sup>81</sup> He followed a minute later with another tweet: “The commemoration for Nazi collaborator Philippe Pétain . . . will be one of the first we remove.”<sup>82</sup> De Blasio quickly backtracked from the latter statement, clarifying that a new commission would determine which monuments would be subject to review.<sup>83</sup> The Mayoral Advisory Commission on City Art, Monuments, and Markers (“Commission”) was formed officially in September 2017, composed of members with experience in “history, art and antiquities, public art and public space, preservation, cultural heritage, diversity and inclusion, and education.”<sup>84</sup> City agencies provided additional expertise, although no lawyers are specifically mentioned—a notable omission considering the legal difficulties encountered by Charlottesville and Baltimore.<sup>85</sup> Before addressing the methods of

76. See Anna Dubenko, *Right and Left on Removal of Confederate Statues*, N.Y. TIMES (Aug. 18, 2017), <https://perma.cc/2FTD-SF5W>.

77. See *id.*

78. Jeremy Diamond, *Trump Calls Removal of Confederate Monuments ‘So Foolish,’* CNN (Aug. 17, 2017), <https://perma.cc/7LHY-SJC9>.

79. *Slavery*, GEORGE WASHINGTON’S MOUNT VERNON, <https://perma.cc/6NL2-E9N9> (last visited July 27, 2018).

80. Lemann, *supra* note 67.

81. Bill de Blasio (@NYCMayor), TWITTER (Aug. 16, 2017, 2:02 PM), <https://perma.cc/B2K3-8SKZ>.

82. Bill de Blasio (@NYCMayor), TWITTER (Aug. 16, 2017, 2:03 PM), <https://perma.cc/VM97-8WA7>.

83. William Neuman, *Ordering Review of Statues Puts de Blasio in Tricky Spot*, N.Y. TIMES (Aug. 30, 2017), <https://perma.cc/559D-DYE9>.

84. REPORT TO THE CITY OF NEW YORK, *supra* note 3, at 4.

85. *Id.*

the Commission in more detail, it is worth reproducing parts of the introductory statement from its January 2018 report, which encapsulates well the competing interests of diverse stakeholders:

New York City's current collection of monuments and markers celebrates some histories and erases others. Redressing this issue should be a process that moves beyond an all-or-nothing choice between keeping or removing monuments. We recognize that public dialogue, opportunities for engagement, and debate about history are essential for democracy . . . this report contemplates confronting or removing monuments . . . sometimes the best option will be to add new works of public art or new educational opportunities.<sup>86</sup>

The Commission proceeded to operate in a three-part process: (1) internal discussions to develop general principles and procedures for conducting monument reviews; (2) public hearings in each of the five boroughs affording residents the opportunity to testify orally and in writing (with additional online surveys); and (3) publication of recommendations to Mayor de Blasio.<sup>87</sup> In addition to suggestions for creating new content for the landscape of the city that would foster community engagement and give voice to previously underrepresented communities, the Commission laid out a three-step framework for assessing existing monuments on City property in preparation for recommendations to the mayor.

The Commission's first task was identifying monuments to prioritize for assessment, a process dependent on sustained community opposition.<sup>88</sup> The second and third parts of the review process involved conducting comprehensive historical reviews about the life of the subject and "time of memorialization" (including legal analysis of ownership or deed restrictions from that time), and then discussing the present and future based on public input.<sup>89</sup> For the Commission's first report, it applied these four steps to the *Dr. J. Marion Sims Monument* and *Christopher Columbus Monument* in addition to the Pétain Marker and *Equestrian Statue*.<sup>90</sup>

The *Equestrian Statue* was an appropriate subject for Commission review, as it has been protested for nearly fifty years. The first protest occurred on June 14, 1971, when "[s]ix young American Indians were arrested . . . and accused of defacing the state's memorial to President Theodore Roosevelt with several buckets of red paint."<sup>91</sup> In 2016, the organization Decolonize This Place ("DTP") published an open letter arguing not only for the renaming of Columbus Day, but for the removal of the *Equestrian Statue*.<sup>92</sup> DTP distributed over 200 free tickets to visitors that day in order to provide tours of the AMNH emphasizing "the history of white supremacy

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86. *Id.* at 2.

87. *Id.* at 5.

88. *Id.* at 13.

89. *Id.* at 14.

90. *Id.* at 19.

91. Lesley Oelsner, *Six Indians Accused of Defacing Theodore Roosevelt Statue Here*, N.Y. TIMES (June 15, 1971), <https://perma.cc/8VB5-MVNG>.

92. *Open Letter on Indigenous Peoples' Day*, DECOLONIZE THIS PLACE (Oct. 10, 2016), <https://perma.cc/E92W-AJJD>.

and colonialism in the institution's history and displays."<sup>93</sup> The tours culminated in a rally outside the museum, focused on the *Equestrian Statue*, which DTP describes as "the most hated monument in New York City."<sup>94</sup> The event was repeated in 2017, followed shortly by the MRB protest.<sup>95</sup>

### C. RECOGNITION OF DISCORD<sup>96</sup>

Debate among Commission members regarding the *Equestrian Statue* inevitably centered on Roosevelt's aforementioned problematic legacy regarding race and, more specifically, the fact that the sculpture might be said to physically embody that ideology. Most would likely agree that Robert E. Lee is the more egregious historical figure of the two, but if one removed knowledge of the identity of the central figure in the *Lee Statue*, the sculpture is simply a man on a horse. Conversely, even if one did not know that the rider of the *Equestrian Statue* was Theodore Roosevelt, its iconography still reads as racial hierarchy. In that sense, the artistic and compositional choices made by the Memorial Association and Fraser hold much more power in this sculpture than in other controversial monuments, which become problematic only when one knows the history of the main subject. The Committee claims this area of contention requires further research, but the *Equestrian Statue* visually embodies problems inherent to memorializing Roosevelt. Despite the admirable goal to avoid an "all-or-nothing choice," the Committee has perpetuated equivocation on the issue—the Memorial will remain in its current location for the time being without indication of if, when, and how future review might take place.<sup>97</sup>

The Commission's report did not address the issue of legal relationships between the *Equestrian Statue*, American Museum of Natural History, and City of New York. The Commission investigated the place of the sculpture within its larger artistic and architectural scheme, and some advocated for relocating the sculpture, either within the Museum, at a less prominent public location, or in another "historic collection, preferably on City property."<sup>98</sup> A smaller group advocated for "additional context on-site through signage and/or artist-led interventions that can offer multiple interpretations of the sculpture."<sup>99</sup> Yet the Commission failed to address in its report whether such changes could be made *legally* to the *Equestrian Statue*. As demonstrated by Charlottesville and Baltimore, that question is not one New York

93. Hrag Vartanian, *#DecolonizeThisPlace Demands Removal of Natural History Museum's Roosevelt Statue*, HYPERALLERGIC (Oct. 10, 2016), <https://perma.cc/77KJ-W9MB>.

94. *Open Letter on Indigenous Peoples' Day*, *supra* note 92.

95. Elena Goukassian, *Anti-Columbus Day Tour Attended by Hundreds at the American Museum of Natural History*, HYPERALLERGIC (Oct. 10, 2017), <https://perma.cc/D437-2SK3>.

96. For the source of this subtitle, see REPORT TO THE CITY OF NEW YORK, *supra* note 3, at 26 ("The debate stems from the recognition of discord between the significance of Roosevelt as a major figure in American history—a military leader, expansionist, New York State governor, environmentalist (founder of the United States Forest Service), Nobel Prize winner and US president—and the physical representation of the figures in the sculpture at the entrance of AMNH.").

97. REPORT TO THE CITY OF NEW YORK, *supra* note 3, at 25–27.

98. *Id.* at 27.

99. *Id.*

City can ignore.

The mundane property laws that govern alterations to controversial monuments often are overlooked in the heated debates taking place across the United States—but nothing can be (legally) accomplished without understanding these statutes. When Theodore Roosevelt Senior and his partners founded the AMNH, they developed what was, at the time, a unique public-private partnership. New York State allowed New York City to “construct a facility for the new [AMNH], and provided use of the City-owned property to the private nonprofit organization.”<sup>100</sup> Consequently, although the government does not operate the AMNH, the Museum rests upon City-owned land.<sup>101</sup> Additionally, the AMNH is a tax-exempt organization that receives city, state, and federal grants.<sup>102</sup> Any alterations to the Memorial therefore likely implicate local landmark laws.

The Landmarks Preservation Commission of New York City (“LPC”) was founded in 1965 and “is the largest municipal preservation agency” in the United States, tasked with safeguarding historically significant structures.<sup>103</sup> The LPC both designates landmarks and decides whether they may be altered, reconstructed, or demolished—subject to public hearings and consultation with relevant city agencies.<sup>104</sup> The law is primarily concerned with maintaining visual coherence of landmarks, and there are criminal and civil penalties for negligence or making such changes without LPC approval.<sup>105</sup> The Roosevelt Memorial Building at the AMNH was designated a Landmark Site in 1975. The Designation Report mentions the *Equestrian Statue* as an integral part of the Memorial but does not specify whether the sculpture itself constitutes an independent landmark or is part of the larger site.<sup>106</sup> Indeed, John Russell Pope included a description of the sculpture in his design submission to the Memorial Association. The New York City Administrative Code seems to indicate the *Equestrian Statue* is a “landscape feature” of the landmark site.<sup>107</sup> Thus, any changes would have to be submitted and reviewed by LPC. The primary question is whether alteration, relocation, or removal of the *Equestrian Statue* undermines the aesthetic and historic coherence of the Roosevelt Memorial, and the answer does not necessarily involve the content of the sculpture.<sup>108</sup>

100. *Funding and Initiatives for Cultural Organizations: City-Owned Institutions*, N.Y.C. DEP’T CULTURAL AFF., <https://perma.cc/VBA4-KXXV> (last visited Sept. 16, 2019).

101. *Id.*

102. See I.R.C. § 501(c)(3) (2017); *Annual Report 2018*, AM. MUSEUM NAT. HIST., <https://perma.cc/U77S-5V9W> (last visited Sept. 16, 2019).

103. *About LPC*, LANDMARKS PRES. COMM’N, <https://perma.cc/FKA7-D8XL> (last visited Oct. 23, 2019).

104. See generally NEW YORK CITY, N.Y., ADMIN. CODE §§ 25-301 to 25-322 (2019).

105. See generally *id.*

106. AMNH LANDMARK DESIGNATION, *supra* note 11. A “landmark site” is “[a]n improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.” NEW YORK CITY, N.Y., ADMIN. CODE § 25-302 (2019).

107. NEW YORK CITY, N.Y., ADMIN CODE § 25-302 (2019) (defining “landscape feature” to include “any . . . sculpture or other form of natural or artificial landscaping”).

108. It is beyond the scope of this Article to extensively address the question of moral rights as they

#### IV. A NEW FRAMEWORK

For centuries, public discourse has focused on either keeping or removing controversial monuments. Indeed, the sanctioned removal and destruction of public monuments has its roots in ancient Rome. By a process modern scholars call *damnatio memoriae*, senators could issue legal sanctions to erase an individual—generally an ousted emperor—from collective memory *and* direct the public to assist in the effort.<sup>109</sup> Erasure took the form of destroying images, excising names from public documents, burning books written by the condemned, and more. Similar processes have been repeated across the world over the centuries, into the modern era. We need only look to colonial statuary toppled in India and Angola and monuments to Lenin and Stalin torn down after the fall of the Soviet Union.<sup>110</sup> April 2018 marked the fifteenth anniversary of the destruction of the statue of Saddam Hussein at the hands of liberated Iraqis.<sup>111</sup>

In his 2016 book, *In Praise of Forgetting*, David Rieff controversially posits that society will forget most events in the long term and that short-term memory creates more violence. He argues against the age-old adage, “those who forget the past are doomed to repeat it,” and instead asks, “[w]hat if, over the long term, forgetfulness is inevitable, while even in the comparatively short term the memory of an instance of radical evil . . . does nothing to protect society from future instances of it?”<sup>112</sup> He further argues that “collective historical memory” can be misused politically, citing the Reconstruction South as an instance when memories of the Civil War were recast from a battle over slavery into one over states’ rights (allowing the heroization of figures like Lee).<sup>113</sup> The purposeful removal or destruction of monuments antithetical to their current communities’ beliefs proves a cathartic and often effective method for erasing controversial figures from the public eye.

Although protestors and scholars alike put forth strong arguments in favor of removing controversial sculptures from the public eye, the process of removal is far from simple in the case of most monuments. It seems unlikely the City or AMNH could demolish the *Equestrian Statue* without implicating landmark laws, even if that were what they wanted. Because the Memorial was designed to include the *Equestrian Statue*, the LPC would require a strong justification for permanently undermining the integrity of the façade. Moreover, the LPC is charged with

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would apply to the *Equestrian Statue*. Nevertheless, clarification is in order given that a recent *New York Law Journal* article questions whether moral rights exist in the alteration of Confederate monuments. Jana S. Farmer & Adam Bialek, *Where Moral Rights May Conflict With The Removal of Confederate Statues*, N.Y.L.J. (Dec. 12, 2017), <https://perma.cc/Z8XW-P6LQ>. The Visual Artists Rights Act of 1990 applies only during the lifetime of the artist. 17 U.S.C. § 106A(d)(1) (2018). None of the creators of the monuments discussed heretofore are living, and so there can be no violation of moral rights under American copyright law.

109. ERIC VARNER, *MUTILATION AND TRANSFORMATION: DAMNATIO MEMORIAE AND ROMAN IMPERIAL PORTRAITURE* 4 (Brill 2004).

110. RIEFF, *supra* note 68, at 51–52.

111. Andrea Miller, *15 Years Ago, Iraqis Rejoiced by Toppling Saddam Statue*, ABC NEWS (Apr. 9, 2018), <https://perma.cc/DR4J-ET9C>.

112. RIEFF, *supra* note 68, at 56.

113. *Id.* at 39.

preservation, and there is inherent artistic and historical value to Fraser's sculpture that would prevent its destruction.<sup>114</sup>

However, we cannot afford to leave controversial monuments in their current state, as demonstrated by the violence in Charlottesville. Often it is by creative interaction with such monuments that society can begin to redress historical wrongs. Based in part upon the Commission's recommendations and the responsive AMNH exhibition (described in further detail below), this Part outlines four methods for lawfully addressing controversial monuments and expands upon the philosophical justifications and legal requirements of each method, in addition to providing examples. These methodologies include: (1) explanatory material to provide context; (2) relocation; (3) addition of new permanent monuments; and (4) temporary, artistic interventions. This new framework discourages binary thinking about these monuments, and instead encourages dialogue about the nuances inherent in a sculpture like the *Equestrian Statue* while taking into account the practical legal implications of such measures.

#### A. PASSIVE CONTEXTUALIZATION: EXPLANATORY MATERIALS

The provision of explanatory materials, whether in a museum, in a government building, or even online, is the easiest and most-cost effective method of addressing controversial monuments, but also the least impactful. Such materials provide "passive context" to those who take the time to seek additional information about monuments but do not change a viewer's visual perception of a monument. Nevertheless, passive contextualization should be the minimum step for those institutions in possession of controversial monuments. In response to the controversy over the *Equestrian Statue*, the AMNH has engaged in three forms of passive contextualization: (1) placing placards on the base of the monument; (2) creating an exhibition inside the Museum; and (3) providing more information on its website.<sup>115</sup>

The small, laminated white placards placed by the AMNH on the base of the *Equestrian Statue* read: "This statue was unveiled to the public in 1940, as part of a larger New York State memorial to former N.Y. governor and U.S. President Theodore Roosevelt. Today, some see the statue as a heroic group; others, as a symbol of racial hierarchy. You can learn more about this statue inside the Museum and [online]." Although a succinct description of the controversy, the placards demonstrate the primary failing of passive contextualization, as they do not necessitate engagement. A passerby on the other side of the street could still see the *Equestrian Statue* without seeing these placards. Moreover, one cannot help but notice that these placards look temporary and out of place. A bronze plaque, for

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114. See NEW YORK CITY, N.Y., ADMIN CODE § 25-301 (2019) (charging the LPC with protecting landscape features of "special historical or aesthetic interest"). Note that legal destruction is distinct from unsanctioned vandalism. AMNH protesters have only temporarily damaged the sculpture; nevertheless, if an individual was caught doing this in New York City, he or she could be criminally convicted, imprisoned, put on probation, and fined. See N.Y. Penal Law § 145.00.

115. The following observations are based on the Author's visit to the AMNH on August 22, 2019.

example, would more strongly represent the museum's acknowledgement of the problematic nature of the *Equestrian Statue* (and likely interfere less with the visual integrity of the façade).

In addition to this external explanatory material, the AMNH also installed an exhibition entitled *Addressing the Statue* in the summer of 2019. After passing by the *Equestrian Statue*, one enters the Museum through Roosevelt Memorial Hall, to which the AMNH has made no changes despite the fact that the hall unabashedly celebrates Roosevelt and is adorned with similarly problematic murals and quotations. *Addressing the Statue* is installed in a back hallway of the first floor of the Museum. As with the exterior placards, the exhibition has an air of impermanence, as if after the debate dies down, the AMNH could quietly remove it.

That being said, *Addressing the Statue* does successfully capture the debate over the *Equestrian Statue* from both a historical perspective and the viewpoints of modern stakeholders. The exhibition consists of wall text, images, and video interviews with members of the Commission, artists, and museum visitors. The conclusion of *Addressing the Statue* comprises wall text and graphics under the header "What Should Happen To The Statue." The AMNH lists only three options for handling the sculpture: (1) "Keep It Up"; (2) "Take It Down"; and (3) "Provide Context." As described above, "Keep It Up" and "Take It Down" are not viable options for legal and ethical reasons. Although the AMNH properly installed placards and *Addressing the Museum* to "provide context" to the *Equestrian Statue*, there are more effective ways to engage with controversial monuments.

## B. RELOCATION

In the context of "take it down," the AMNH does not explicitly discuss relocation, which in some cases may be a viable alternative to the outright destruction or removal from public view of a monument. The same Commission that decided to leave the *Equestrian Statue* in place also decided to move the *Dr. J. Marion Sims Monument* in Central Park. Sims was "a pioneer in the field of gynecology . . . [whose legacy has been reassessed] because of his exploitation of female slaves, who he operated on without anesthesia."<sup>116</sup> The exterior structure of the monument was removed, and the statue was transferred to the cemetery where Sims is buried. The sculpture was not destroyed; rather, relocation "de-heroized" a problematic historical figure.<sup>117</sup>

As evidenced by the Baltimore case, removing and relocating enormous monuments intended for outdoor display is not as easy as the *Sims* case might make it seem. Even museums with enough space appear to be hesitant to take such sculptures.<sup>118</sup> In the AMNH case, the obvious choice for relocation would be within the Museum, specifically the large interior Roosevelt Hall, where there are already other tributes to the twenty-sixth president. This would seem to be an effective compromise; the Museum could still honor Roosevelt's contributions, but a blatant

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116. William Neuman, *City Orders Sims Statue Removed from Central Park*, N.Y. TIMES (Apr. 16, 2018), <https://perma.cc/US2P-SRVK>.

117. *Id.*

118. Duncan, *supra* note 72.

symbol of racial hierarchy would not be visible to passersby on the street without context. Nevertheless, this is likely an expensive undertaking, and it is unclear who would bear the cost. Additionally, relocation raises the same landmark issues as removal.<sup>119</sup>

### C. ADDITION OF NEW PERMANENT MONUMENTS

The permanent addition of new monuments in conversation with older ones may be a successful way to re-contextualize controversial public statues and honor previously underrepresented persons. This has been discussed in connection to Monument Avenue, a residential street in Richmond, Virginia, that is lined with Confederate memorials. In 1996, a sculpture of “black tennis hero Arthur Ashe, a Richmond native, was added . . . provoking a nationally publicized and racially charged dispute.”<sup>120</sup>

In 2017, as in New York, the mayor of Richmond formed a commission (the “Monument Avenue Commission” or “MAC”) to address these controversial public sculptures. One of the specific “recommended options and opportunities” published in the July 2018 MAC Report was to commission a new monument dedicated to soldiers of the United States Colored Troops, formerly enslaved men who made up more than ten percent of the Union Army and twenty-five percent of the Union Navy.<sup>121</sup> The proposal seeks to create a powerful juxtaposition.<sup>122</sup> As in the case of Charlottesville and New York City, the alteration of landmark sites does require permission by the appropriate government agency. Despite the appeal of this option—as demonstrated by testimony from interviewed artists and museum visitors included in the AMNH exhibition<sup>123</sup>—it would be difficult to add new monuments without drastically and permanently changing the front of the AMNH and thus would require LPC approval, just as removal or relocation would.

### D. ACTIVE RECONTEXTUALIZATION: TEMPORARY ARTISTIC INTERVENTION

Given the fact that any permanent changes to the Roosevelt Memorial would require LPC permission and perhaps unavailable funding, the most promising option is temporary interventions that give voice to other communities and provide a means for questioning, reinterpreting, and challenging the *Equestrian Statue*. As described by critical museologist Anthony Shelton, “[a]rtist interventions in ethnographic museums to expose their paradoxes, contradictions, and parodies have, with Fred

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119. See *supra* note 114 and accompanying text.

120. Sarah Rankin, *Richmond Panel Urges Removal of 1 Confederate Monument*, BUS. INSIDER (July 2, 2018), <https://perma.cc/E6JA-ZLEN>.

121. CHRISTY S. COLEMAN & GREGG D. KIMBALL, MONUMENT AVENUE COMMISSION REPORT 33 (2018), <https://perma.cc/24Y2-43ZS>; *USCT History*, AFR. AM. CIV. WAR MEMORIAL MUSEUM, <https://perma.cc/YUL5-H8HG> (last visited Aug. 22, 2019).

122. COLEMAN & KIMBALL, *supra* note 121, at 33.

123. *Perspectives on the Statue*, AM. MUSEUM NAT. HIST., <https://perma.cc/5R3X-F645> (last visited Nov. 8, 2019).

Wilson [and others] . . . become almost commonplace.”<sup>124</sup> Indeed, a 2012 installation by American artist Fred Wilson (b. 1954) serves as a prime example of creative reinterpretation of racially charged museum material. In his installation *Liberty/Liberté* at the New York Historical Society (just one block from the AMNH), Wilson selected specific pieces from the collection and juxtaposed them by the museum entrance:

[T]wo sculptures of George Washington . . . a cigar-store figurine of an African-American man holding a red French liberty cap; a bust of Napoleon Bonaparte; a miniature portrait of Haitian liberator Toussaint L’Ouverture; a wrought-iron balustrade from Federal Hall in New York, where Washington was sworn in as the first President; chains, shackles and slave badges (the metal tags that were used to label enslaved African Americans with the crafts they practiced); and a tag bearing Sojourner Truth’s famous question, “Ain’t I a woman?”<sup>125</sup>

The installation used existing and problematic historical materials already at the Historical Society to promote dialogue.<sup>126</sup>

Perhaps more akin to what an artistic intervention would be at the AMNH was *Discovering Columbus*, by Japanese artist Tatzu Nishi (b. 1960). In 2012, the Public Art Fund sponsored a temporary project surrounding the *Christopher Columbus Monument* in New York (also reviewed by the Commission). The thirteen-foot statue stands atop a seventy-five-foot column. Nishi created an “American” living room to surround the sculpture, and visitors could take an elevator up to the top of the column and interact with the *Columbus Monument* in a way never before possible.<sup>127</sup> Although not overtly political in the way of Wilson’s intervention, Nishi’s project demonstrated new ways by which the public can interact with and question monuments. Moreover, the temporary nature of such artistic interventions allows for the inclusion of a multitude of ever-changing perspectives to counter the monolithic one embodied by the *Equestrian Statue*.

## V. CONCLUSION: “HISTORY IS NOT A MENU”<sup>128</sup>

Protests about the *Equestrian Statue of Theodore Roosevelt* by James Earle Fraser at the American Museum of Natural History in New York City are part of a larger historical reckoning requiring a new framework for interacting with controversial monuments in the United States. It is no longer intellectually or ethically responsible to celebrate controversial American figures without also acknowledging their more troubling qualities. The Mayoral Advisory Commission on City Art, Monuments, and Markers did not reach a definitive answer as to what to do with the *Equestrian*

124. Shelton, *supra* note 17, at 64–65.

125. Louise Mirrer, *What “Liberty/Liberté” Tells Us About Slavery, Black History, and Raw Nerves*, HUFFINGTON POST (Feb. 8, 2012, updated Dec. 6, 2017), <https://perma.cc/XP7S-SDJE>.

126. *Id.*

127. The Public Art Fund also oversaw conservation of the *Christopher Columbus Monument* in conjunction with the exhibition. Tatzu Nishi: *Discovering Columbus*, PUB. ART FUND, <https://perma.cc/WJ5K-663N> (last visited Aug. 22, 2019).

128. RIEFF, *supra* note 68, at 39.

*Statue*, nor did it provide to the public adequate legal analyses of available options. The AMNH has thus far primarily addressed the statue *inside* the museum, yet it is the public-facing nature of the monument that renders it so problematic. This Article has provided new and relevant research to this debate and has proposed that, given the artistic value and legal status of the *Equestrian Statue*, the most effective and likely method for handling the sculpture is reinterpretation through the addition of artist-led temporary interventions.