

2020

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Recommended Citation

Levinson, Sanford (2020) "Written in Stone: The Meaning of Public Monuments and Whether They Remain or Go," *Kentucky Law Journal*: Vol. 108: Iss. 4, Article 5.

Available at: <https://uknowledge.uky.edu/klj/vol108/iss4/5>

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WRITTEN IN STONE: THE MEANING OF PUBLIC MONUMENTS AND WHETHER THEY REMAIN OR GO

Sanford Levinson*

I begin my remarks with a recent story from Minneapolis concerning the renaming of Lake Calhoun (named after John C. Calhoun) to Bde Maka Ska, described by the *Minneapolis Star Tribune* as “its original Dakota name.”² Although it sounds paradoxical to describe a lake as “written in stone”—the kind of statuary monument that is the central focus of my book by that title—the lake certainly exemplifies the larger topic of the book (and of this symposium), which is the politics of memorialization in general. I am especially interested in decisions made in the name of public bodies, whether cities, states, nations, or indeed, state universities, all of which figure quite prominently in contemporary debates about the subject. And, of course, there are also such private bodies, including great universities like Harvard, Yale, or Princeton that are featured in the revised and vastly extended edition of my 1998 book that came out just last year. And it is not irrelevant that I have had only half-kidding conversations with my editor at the Duke University Press about bringing out a third edition on its twenty-fifth anniversary, in 2023, to follow the second twentieth anniversary edition published only in 2018, because new illustrations of often bitter controversies emerge almost every day.

A lengthy story in the print edition of the October 25, 2019 *New York Times*—the week before our gathering in Lexington—was tellingly titled *New York’s Monument Wars, Built on Bronze and Outrage*.³ And the same issue features a story about the exhumation and reburial of former Spanish dictator Francisco Franco, removed from his former place of honor in a basilica and mausoleum known as “the Valley of the Fallen” that ostensibly honors those who died on both sides of the brutal Spanish Civil War in the 1930s.⁴ Franco, who became dictator following the victory of his Nationalist forces, obviously did not die then, and his removal was sought by Republican Veterans and the Socialist Party as a final repudiation of the dictatorship that he led.⁵ Those honoring Franco’s memory, however—and there remain some—were outraged by what they almost certainly correctly perceived as this attempt by the Spanish government to dishonor Franco.⁶ One can certainly see this as confirmation of David Rieff’s mordant assertion in his own tellingly titled book, *In Praise of Forgetting: Historical Memory and Its Ironies*, that “we have entered a

* Prepared for the *Kentucky Law Journal* Symposium, *American Monuments and Monument-Protection Laws*, on November 1, 2019. I am extremely grateful for both the hospitality provided by the editors of the *Journal* and the contributions of all of the other participants in the unusually fine symposium.

² Stephen Montemayor, *Lake Calhoun or Bde Maka Ska? Minnesota Supreme Court Will Decide*, STAR TRIB. (Minneapolis) (July 25, 2019, 5:32 AM), <http://www.startribune.com/lake-calhoun-or-bde-maka-ska-minnesota-supreme-court-will-decide/513162462/> [<https://perma.cc/V95E-XR2E>].

³ Robin Pogrebin & Zachary Small, *New York’s Monument Wars, Built on Bronze and Outrage*, N.Y. TIMES, Oct. 25, 2019, at A24.

⁴ Raphael Minder, *Spain Exhumes and Reburies Remains of Franco*, N.Y. TIMES, Oct. 25, 2019, at A8.

⁵ See *id.*

⁶ *Id.*

world in which the essential function of collective memory is one of legitimizing a particular worldview and political and social agenda, and delegitimizing those of one's ideological opponents."⁷ This is obviously at odds with the aspiration that a "collective memory" should unite all members of the collectivity, however defined.

That being said, let us return to Minnesota, the land of 10,000 lakes, all of which presumably need names. I confess being surprised upon my very recent discovery that Minnesota has a lake named after John C. Calhoun. It is less surprising, of course, that there is a Calhoun, Kentucky or, even less so, that there is a Calhoun Falls State Park in his home state of South Carolina. But perhaps Lake Calhoun is simply further evidence of the true national import and prestige, at an earlier time, of the South Carolina Representative and Senator, Vice President under two presidents, and Secretary of both War and State.⁸ He was, of course, also the primary defender in the Senate of slavery and a figurehead of Nullification and its close cousin, secessionism,⁹ that bore fruit in 1860–61 and cost 750,000 lives to refute.¹⁰ His relevance to Minnesota may well be that he had also supported Indian removal as federal policy; one suspects that earned him the admiration of at least some important white Minnesotans. Still, times change, and in 2018 Minnesota's Department of Natural Resources ("DNR"), at the behest of city and county officials in Minneapolis and Hennepin County, exercised its jurisdiction over the state's lakes by announcing that Lake Calhoun would disappear, as it were, replaced by the Dakota name that apparently translates as "White Earth Lake."¹¹

It should occasion no surprise, in our divided and litigious country, that the decision was not accepted with acclamation, even in the northern climes of Minnesota. An organization calling itself "Save Lake Calhoun" filed suit, claiming that the decision by the DNR violated a Minnesota law prohibiting the renaming of lakes after forty years.¹² Because "[t]he lake was known as Lake Calhoun for 40 years when the DNR commissioner changed the name,"¹³ a Minnesota appellate court ruled that the renaming was invalid.¹⁴ Democrats in the Minnesota state legislature attempted to pass a bill that would authorize the change, but it was blocked by Republicans for reasons that are unclear.¹⁵ The Minnesota Supreme Court

⁷ DAVID RIEFF, IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES 63–64 (2016). For an interesting collection of essays on the general topic, see LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2017). The rise of the modern nation-state has led, they suggest, to history being "represented as the struggle of citizens for the glory of imagined civic communities, embraced by states. It has thus played a strong didactic function in setting role models, prescribing mourning for victims and assigning a dichotomist sense of guilt to all the rivals of a nation state." *Id.* at 5.

⁸ See *John C. Calhoun, 7th Vice President (1825–1832)*, U.S. SENATE, https://www.senate.gov/about/officers-staff/vice-president/VP_John_Calhoun.htm [<https://perma.cc/4SBS-VDNM>].

⁹ See MARK O. HATFIELD, VICE PRESIDENTS OF THE UNITED STATES 1789–1993 98 (Wendy Wolff ed., 1997).

¹⁰ See Rachel Coker, *Historian Revises Estimate of Civil War Dead*, DISCOVER-E BINGHAMTON RES. (Sept. 21, 2011), <https://discovere.binghamton.edu/news/civilwar-3826.html> [<https://perma.cc/8WPX-T5DM>].

¹¹ Montemayor, *supra* note 2.

¹² *Save Lake Calhoun v. Strommen*, 928 N.W.2d 377, 380–82 (Minn. Ct. App. 2019).

¹³ *Id.* at 389.

¹⁴ "[T]he DNR lacks authority to change a lake's name which has been in existence for 40 years." *Id.*

¹⁵ See *Minnesota House Votes to Rename Lake Calhoun as Bde Maka Ska*, FOX9 (Apr. 30, 2019), <https://www.fox9.com/news/minnesota-house-votes-to-rename-lake-calhoun-as-bde-maka-ska>

in July 2019 agreed to hear the case.¹⁶ It may be worth noting that at present the name of the lake is truly ambiguous. That is, the Minneapolis Park and Recreation Board continues to call it Bde Maka Ska,¹⁷ as does, interestingly enough, the United States Board of Geographic Names;¹⁸ neither seems to accept the appellate decision as determinative even in the short run. So far, according to the *Minneapolis Star Tribune*, the state has spent \$30,000 defending the name change;¹⁹ one doesn't know how much the members of Save Lake Calhoun have spent. But, if money talks, it says that feelings run quite deeply about the propriety of effacing Calhoun's name from Minnesota's state maps.

So why do I begin with this episode, seemingly far from Lexington, Kentucky and its own interesting examples of the general topic? Part of the reason is simply to underscore that the great contemporary debate, specifically over the degree of honor to be accorded "heroes" of Southern secessionism and defenders of the system of race-based chattel slavery that undergirded secessionism, is not limited to one region of the country. John C. Calhoun was a truly national figure, however sectional his most fundamental commitments. I will also be adverting to an illuminating controversy over "naming" that occurred at Yale University, which recently stripped Calhoun's name from one of its residential colleges and renamed it after Grace Hopper, among some of the earliest women to receive a Ph.D. from Yale and, as it happens, a major contributor to the development of modern computers.²⁰ It is worth noting that San Francisco, overlooking the Pacific Ocean, includes a street named after Calhoun, perhaps in recognition that he was an architect of the so-called "Compromise of 1850" that included, along with a strengthened Fugitive Slave Act, the admission of California to the Union.²¹ That being said, he stood by the courage of his malign convictions to oppose the Compromise inasmuch as it also included some limits on the expansion of slavery into the territories recently conquered in the Mexican War, including the admission of California as a free State without slavery, as well as abolishing the slave trade within the District of Columbia itself.²² Perhaps his recalcitrance explains the fact that Calhoun Terrace is quite different in its lack of prominence from two other thoroughfares in San Francisco named after the two primary architects (and supporters) of that Compromise, Henry Clay and Daniel

[<https://perma.cc/4EPU-D95H>].

¹⁶ Associated Press, *Minnesota's Top Court to Hear Lake Calhoun-Bde Maka Ska Case*, TWINCITIES.COM: PIONEER PRESS (July 24, 2019, 2:13 PM), <https://www.twincities.com/2019/07/24/supreme-court-will-take-up-lake-calhoun-bde-maka-ska-dispute/> [<https://perma.cc/FB2Z-W95X>].

¹⁷ *Bde Maka Ska, Lake Calhoun Parkway*, MINNEAPOLIS PARK & RECREATION BOARD, <https://www.minneapolisparcs.org/venue/bde-maka-ska-lake-calhoun-parkway/> [<https://perma.cc/WM4V-NBGD>].

¹⁸ Miguel Otárola, *Is it Bde Maka Ska or Lake Calhoun? Official Name of Minneapolis Lake Still Unsettled*, STAR TRIB. (Minneapolis) (June 2, 2019, 7:37 AM), <http://www.startribune.com/is-it-bde-maka-ska-or-lake-calhoun-official-name-of-minneapolis-lake-still-unsettled/510713592/> [<https://perma.cc/9QHU-Y4TW>].

¹⁹ Montemayor, *supra* note 2.

²⁰ See Karen N. Peart, *Yale Changes Calhoun College's Name to Honor Grace Murray Hopper*, YALE NEWS (Feb. 11, 2017), <https://news.yale.edu/2017/02/11/yale-change-calhoun-college-s-name-honor-grace-murray-hopper-0> [<https://perma.cc/D5MS-3USZ>].

²¹ See HATFIELD, *supra* note 9, at 98.

²² *Id.*

Webster,²³ not to mention the fact that one of the best-known streets in San Francisco, because a famous rock venue was located there, is named after the president who signed the Compromise, Millard Fillmore.²⁴ That is almost certainly the most prominent memorial to the otherwise eminently forgettable and undistinguished thirteenth president.

Moreover, it is easy to grasp why Calhoun remains an important figure in our contemporary debates. Unlike many of the recipients of local honors, he is in fact a major figure in our history, continuing to feature in contemporary scholarship on the era, where one recent book describes him as a “giant” among the second generation of American politicians.²⁵ He received an honorary doctor of laws degree from his alma mater Yale in 1822, only eighteen years after his graduation in 1804.²⁶ By 1822, he had already been an important member of the United States House of Representatives and was currently serving as United States Secretary of War in the administration of James Monroe.²⁷ Debates about effacing Calhoun’s name from lakes, buildings, or colleges almost naturally lead to similar questions about other major figures of the time, including, for starters, Thomas Jefferson and Andrew Jackson or even George Washington. Why should *any* slaveowner—legal academics might ponder the importance of recent revelations about John Marshall in this regard²⁸—or proponent of the forced resettlement of Native Americans, our particular form of “ethnic cleansing,” receive public honor in the twenty-first century? As a practical matter, there are few Americans who could identify John C. Breckenridge, let alone John Hunt Morgan, the worthies displaced from their previous places of honor in Lexington, Kentucky. These other individuals, however, have not faded into similar oblivion and *their* exile from places of honor raise what might be viewed as more fundamental existential questions about whether *any* of our ostensible national “heroes” should continue to be treated as such or, perhaps more accurately, what we must be willing to overlook and even defend in order to maintain them as common symbols of heroism or achievement whose lives should serve as examples especially to the young.

It has been said that no man is a hero to his valet, who simply knows too much to accept the kind of public adulation that might be directed by those who know only the carefully presented public persona of an individual. Bill Cosby, for example, was legitimately one of the most respected persons in America because of his extraordinary philanthropy, until he lost his halo because of disclosures about what

²³ See *id.*

²⁴ See Dan Rosenbaum, *The History Behind San Francisco's Street Names*, SAN FRANCISCO TRAVEL ASS'N (Sept. 12, 2014), <https://www.sftravel.com/article/history-behind-san-francisco%E2%80%99s-street-names> [https://perma.cc/98P9-W66Y].

²⁵ See H. W. BRANDS, *HEIRS OF THE FOUNDERS: THE EPIC RIVALRY OF HENRY CLAY, JOHN CALHOUN AND DANIEL WEBSTER, THE SECOND GENERATION OF AMERICAN GIANTS* (2018).

²⁶ See Peart, *supra* note 20.

²⁷ HATFIELD, *supra* note 9, at 84–86.

²⁸ See PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 1–10* (2018) (demonstrating that Marshall owned, bought, and sold slaves and that all of his relevant decisions were tilted toward maintaining the rights of slaveowners).

had been carefully maintained as his hidden “private” life.²⁹ More common, though, is what might be termed the social transvaluations attached to the ways we treat one another, as has clearly been the case with the treatment of women, for example. But, equally, there are similar changes in the ways we assess well-known past conduct, including, in Calhoun’s case, vigorous and unending support for chattel slavery and racial subordination. There was nothing “private” about that; Yale decisionmakers had ready access to everything they needed to know in 1931, when they created Calhoun College.³⁰ That is equally true about Robert E. Lee, who very publicly turned his back on the United States and violated his oath as a graduate of West Point, instead casting his lot with what he considered his true “home” of Virginia and then the Confederacy that it joined.³¹ What has taken place is not the discovery of new facts, but instead, the waning of the former willingness, even by people who would describe themselves as unsympathetic to slavery or the Confederacy, to overlook the implications of well-established old facts. One might offer a variety of explanations for this waning, including the full-scale entry into American public life of groups who had formerly been successfully marginalized and who, therefore, had no effective say in the allocation of public honor. Whatever the explanation, though, Lake Calhoun, perhaps, will be no more, and a variety of statues, including those of Robert E. Lee, have been removed from their former places of civic honor.³²

Should we necessarily rejoice in the demise of Lake Calhoun, if it in fact is upheld by the Minnesota Supreme Court or legitimated by an act of the Minnesota legislature? I would, in fact, be quite happy with that conclusion, as is true of my reaction to Yale’s decision regarding Calhoun College or the removal of Robert E. Lee from what had been Lee Circle in New Orleans, a picture of which takes up the cover of the new edition of *Written in Stone*. But I have come to believe that how we react to such events is equivalent to asking what we think is the meaning of our original national motto, inscribed on our coins, “*E Pluribus Unum*,” “out of many, one.”³³ One might regard this as an aspiration of the founding generation that professed to believe, for example, that there was in 1776, “one people” that could declare independence from the British. As an empirical matter that was debatable, if not out-and-out preposterous. Hector St. John de Crevecoeur, a French immigrant, famously asked “‘What then is the American, this new man?’ [and] he answered ‘a

²⁹ See Gene Demby, *When What Was Good for Bill Cosby Was Good for Black America*, NPR (Apr. 26, 2018, 3:38 PM), <https://www.npr.org/sections/codeswitch/2017/06/12/532242734/when-what-was-good-for-bill-cosby-was-good-for-black-america> [<https://perma.cc/2L4V-B477>] (describing some of Cosby’s philanthropic endeavors as well as the multiple allegations made towards him).

³⁰ Peart, *supra* note 20.

³¹ See Robert Bateman, *The Meaning of Oaths and a Forgotten Man*, *ESQUIRE* (Aug. 14, 2013), <https://www.esquire.com/news-politics/news/a24208/what-an-oath-means/> [<https://perma.cc/R9YL-VUVF>].

³² See Brit McCandless Farmer, *Behind the Decision to Remove a Statue of Robert E. Lee*, *CBS NEWS* (Mar. 11, 2018), <https://www.cbsnews.com/news/behind-the-decision-to-remove-a-statue-of-robert-e-lee/> [<https://perma.cc/8TSB-MZ9K>].

³³ This was supplanted in 1954 by “In God We Trust.” Andrew Glass, *‘In God We Trust’ Becomes Nation’s Motto, July 30, 1956*, *POLITICO* (July 30, 2018, 12:01 AM), <https://www.politico.com/story/2018/07/30/in-god-we-trust-becomes-nations-motto-july-30-1956-741016> [<https://perma.cc/MDK4-3Y8Z>].

mixture of English, Scotch, Irish, French, Dutch, Germans, and Swedes[.]”³⁴ Not only had many of these particular groups, with their quite different religious backgrounds, been engaged in war with one another in Europe; they might well have not have felt completely comfortable with one another in the New World either.³⁵ Indeed, these antagonisms might well be an explanation for the insistence on a *federal* form of government given the mistrust that the groups had in one another.³⁶ Far more important, as Eric Foner has recently reminded us, is that de Crevecoeur might have been anticipating Roger B. Taney by denying the obvious fact that in the new United States at the time he was writing, one-fifth of the population were persons we today call African Americans, most of them enslaved but some of them treated as free persons and even citizens of a few of the Northern states.³⁷

Nor, for similar reasons, can one necessarily identify the singular “People” in whose name the Constitution of 1787 was purportedly ordained. But many persons, especially today, might reject the motto even as an aspiration if it is thought to require “assimilation” to a dominant culture or even a particular kind of “melting pot” that would by stirring us into one soup also be removing the genuine distinctiveness of each ingredient. They might argue that the proper course in a multicultural, multinational society like that of the United States is the affirmative embrace of our plurality, an American mosaic, and realization that our complex “oneness” is precisely the rejection of any singular answer to the question “what is an American?” The United States is certainly a state inhabited by over three hundred million people, but whether it is—or even *should* be—a *nation* as well remains an object of contentious debate.³⁸

“I contain multitudes,” Walt Whitman famously proclaimed, even if the result, as he also stated, was that “I contradict myself.”³⁹ Part of that contradiction, at a national level, is precisely that the actual multitudes of existing Americans—those whom, paraphrasing Donald Rumsfeld’s famous comment about armies, we are forced to live and share social space with instead of those we might necessarily wish to have as political neighbors—will have quite different notions of what constitutes American identity and who therefore is worthy of honor.⁴⁰ The extreme version of this reality is the oft-quoted expression that one man’s terrorist is another person’s

³⁴ ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 3 (2019).

³⁵ See *European Wars*, PRECEDEN, <https://www.preceden.com/timelines/71548-european-wars> [<https://perma.cc/6PMU-6UCZ>].

³⁶ See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 100–10 (2008) (locating origins of federalism in geographically distributed groups who fundamentally mistrust one another).

³⁷ See FONER, *supra* note 34, at 3–14.

³⁸ See recent books by JILL LEPORE, *THIS AMERICA: THE CASE FOR THE NATION* (2019) (exploring the definition of the United States as a “nation”); RICH LOWRY, *THE CASE FOR NATIONALISM: HOW IT MADE US POWERFUL, UNITED, AND FREE* (2019) (providing an explanation of how nationalism in the United States has changed over time).

³⁹ Walt Whitman, *Song of Myself (1892 Version)*, POETRY FOUND., <https://www.poetryfoundation.org/poems/45477/song-of-myself-1892-version> [<https://perma.cc/65MN-VF8D>].

⁴⁰ See Helmut Sonnenfeldt & Ron Nessen, *You Go to War with the Press You Have*, BROOKINGS (Dec. 30, 2004), <https://www.brookings.edu/opinions/you-go-to-war-with-the-press-you-have/> [<https://perma.cc/QSA6-B3WV>].

freedom fighter. Think of this within the context, say, of describing and then honoring those who took part in the Battle at Little Bighorn, once known more popularly as Custer’s Last Stand, where the Sioux scored a decisive, albeit only transitory, victory over the United States Army who were aided, it should be noted, by allies from the Crow Nation, traditional enemies of the Sioux.⁴¹ Or it may be that one groups patriots will be another groups traitors, as was true, for example, of the cleavage between those who led the secession from the British Empire in 1776 as against those loyal to His Majesty King George III, or, of course, the later cleavage between Grant and Lee, both educated at West Point,⁴² and Jefferson Davis, a former Secretary of War of the United States,⁴³ and the Kentucky-born Abraham Lincoln married to a Kentucky-born wife whose family owned slaves.⁴⁴

Justice Brennan once described the First Amendment as instantiating a general commitment to a vision of America that emphasized “uninhibited, robust, and wide-open” debate that would inevitably include what many might describe as its “vehement, caustic, and sometimes unpleasant[.]” aspects.⁴⁵ Although this was written in an opinion explaining why anyone entering public life should expect and be willing to accept the slings and arrows of outraged critics who will, to put it mildly, not always be fair, or even accurate, in their criticism, its vision equally applies to sometimes raucous debate about our shared history and the dispensation of public honor. One possible response to cleavage is silence. A recent book on public memory begins by quoting Title II of the 1648 Treaty of Westphalia; it provides “[t]hat there shall be on the one side and to others a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning [thirty years earlier] of these Troubles, in what place, or what manner soever the Hostilits have been practis’d.”⁴⁶ One might describe this as the “Thanksgiving strategy,” when politically or religiously divided families come together and agree to talk only about sports (assuming, of course, that they are not divided between fans of the Kentucky Wildcats and Duke, my own alma mater). Silence is sometimes golden and necessary for the preservation of peace. There is a reason we often accompany the notion of “forgiveness” with “forgetting.” But few societies, and certainly not our own, have committed themselves to “Oblivion” when it comes to valorizing those selected out as heroes or condemning their enemies. Whatever might happen at (some) Thanksgiving tables does not describe our public culture.

Perhaps it’s relevant to analogize this also to the fact that part of what is sometimes labeled American exceptionalism may be the degree to which

⁴¹ *Context and Story of the Battle*, NAT’L PARK SERV. (Aug. 8, 2019), <https://www.nps.gov/libi/learn/historyculture/battle-story.htm> [<https://perma.cc/436C-QD3R>].

⁴² Louisa Woodville, *Common Bonds: The Duty and Honor of Lee and Grant*, HUMANITIES, July–Aug. 2007, at 24, 25.

⁴³ Hudson Strode, *Jefferson Davis*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/biography/Jefferson-Davis/Capture-and-imprisonment> [<https://perma.cc/6P6S-9T9B>].

⁴⁴ Kimberly J. Largent, *The Life of Mary Todd Lincoln*, EHISTORY, THE OHIO STATE UNIVERSITY, <https://ehistory.osu.edu/articles/life-mary-todd-lincoln> [<https://perma.cc/6E6D-X99X>].

⁴⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴⁶ Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias, *Introduction: Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in *LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY*, *supra* note 7, at 3.

believers—in any given set of what they believe to be religious truths—are totally unprotected from having those beliefs denounced in the public square, perhaps by missionaries from one or another religious group trying to convert heathens into their version of the one true religion. Think only of the fact that many of our earliest and most fundamental “free exercise” opinions protect the rights of Jehovah’s Witnesses to denounce the Roman Catholic Church as the Whore of Babylon.⁴⁷ Some countries, of course, have established religions, with concomitant illegality of questioning the status of the established religion and its beliefs. This was true, for example, in Greece, which lost a case before the European Court of Human Rights brought against a Jehovah’s Witness who denounced the Greek Orthodox Church as ungodly.⁴⁸ Russia has been similarly inhospitable to those challenging the hegemony of the Russian Orthodox Church.⁴⁹ Nor should one dare to challenge the status of Islam in Saudi Arabia or Pakistan. Other religiously pluralistic countries might try to dampen such religious controversies simply in the name of preserving civil peace, as is true in the sharply divided state of Israel. But, for better or, some might even think, for worse, that is not the American way. *All* of us are subject to “robust” intellectual, and attached emotional, assault from those who believe that our religious beliefs, or lack of same, are evidence of our literally damned state, even if the good news is that salvation is possible if only we accept, say, the message of John 3:16.⁵⁰

So why shouldn’t a notably fractious society like that of the United States feature equally robust debate about who is worthy—or decidedly unworthy—of public honor? What would it say about the United States—or, in fact, any other society—if there were no such public debates? When we read, for example, that some tyrant has been returned to office with a 99% share of the purportedly popular vote, most of us are properly disinclined to take that seriously as a genuine measure of popular approval (or disapproval). By the same token, it is unsurprising that one of the major features of the Baghdad public landscape, prior to 2003, was a giant statue of Sadaam Hussein; perhaps it was equally unsurprising that almost literally the first act of conquering American troops that year, ostensibly in support of a spontaneous uprising by grateful Iraqis, was the demolition of that statue, similar, say, to the symbolically important taking down of a statue of Joseph Stalin by Hungarian revolutionaries in 1956.⁵¹

A major theme of my book *Written in Stone* is that one way to measure what is sometimes called “regime change” is by looking at changes in the public landscape: Which statues come down, or buildings, streets, schools, airports, or even capital cities renamed, and what do the replacements look (and sound) like? I have quoted

⁴⁷ See *Cantwell v. Connecticut*, 310 U.S. 296, 307–09 (1940).

⁴⁸ See *European High Court Upholds Right to Preach in Greece*, WATCH TOWER BIBLE & TRACT SOC’Y PA., <https://wol.jw.org/en/wol/d/r1/lp-e/1993646> [https://perma.cc/9Q8P-JZPW].

⁴⁹ See *The European Court of Human Rights Upholds the Right of Jehovah’s Witnesses in Russia to Meet for Worship*, WATCH TOWER BIBLE & TRACT SOC’Y PA. (July 1, 2014), <https://www.jw.org/en/news/legal/by-region/russia/echr-judgment-freedom-of-religion/> [https://perma.cc/7KBU-G26J].

⁵⁰ “For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life.” See *John 3:16* (English Standard Version).

⁵¹ SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* xiii, 9 (20th ed., 2018).

the famed catchphrase of the economist Joseph Schumpeter about the “creative destruction” attached to the relentless displacement in capitalist societies of older ways of doing things and suggested that similar destruction, “creative” or not, is attached to regime change or even less drastic changes in public sensibility, shifts in what is deemed “politically correct.”⁵²

But, of course, regime changes themselves are complex. Complete effacement is rare, especially in the absence of violence and significant displacement of the losers. One example of the latter, which we are often hesitant to see as such, is the secession from the British Empire (what we call the American Revolution), where most of the Loyalists were kind enough after 1783 to leave the country and go to Canada, Great Britain, or the West Indies.⁵³ This allowed, among other things, the unproblematic renaming of King’s College, which we now know as Columbia University.⁵⁴ Though consider that William and Mary continues to be one of Virginia’s distinguished colleges! There is also the victory by Bolsheviks in what used to be called the Soviet Union and the presence of Leningrad and, later, Stalingrad, as two of its major cities. But, of course, they, like the Soviet Union itself, are no more, save as fading memories, and one will instead find St. Petersburg and Volgograd.⁵⁵ In the absence of such total victories—and the power of the victors to redraw maps and the more general public landscape—one has to learn to live with what may be disgruntled losers and to decide to what extent we (that is, the winners) will agree to allow them to maintain some visible presence in the public square consisting of statues, buildings, place-names, and the like.

South Africa is especially interesting in this regard. No one could (or should) have expected the Daniel F. Malan Airport in Cape Town to survive, but what about statues of Cecil Rhodes, a subject of contemporary ongoing controversy? A major figure in the story of British imperialism in Africa, he did, after all, give his name to Southern Rhodesia, now known as Zimbabwe.⁵⁶ And many of the monuments to Rhodes are coming down, even if the Rhodes Scholarships continue to be among the highest markers of scholastic achievement.⁵⁷ But consider the quite deliberate decision of Nelson Mandela to leave undisturbed the Voortrekker Monument, constructed to commemorate—and celebrate—the Afrikaans settlers who had come

⁵² See Sanford Levinson, *Political Change and the ‘Creative Destruction’ of Public Space*, in CULTURAL HUMAN RIGHTS 341–51 (Francesco Francioni & Martin Scheinin eds., 2008).

⁵³ See, e.g., *United Empire Loyalists Reach Canada*, HISTORY (July 27, 2019), <https://www.history.com/this-day-in-history/united-empire-loyalists-reach-canada> [<https://perma.cc/RR2T-JHP5>]; *What Happened to British Loyalists After the Revolutionary War?*, NPR (July 3, 2015, 4:28 PM), <https://www.npr.org/2015/07/03/419824333/what-happened-to-british-loyalists-after-the-revolutionary-war> [<https://perma.cc/E4PE-7DPK>]. For a brilliant general depiction of Loyalists and their fate, see MAYA JASANOFF, *LIBERTY’S EXILES: AMERICAN LOYALISTS IN THE REVOLUTIONARY WORLD* (2011).

⁵⁴ See *Columbia University*, BRITANNICA, <https://www.britannica.com/topic/Columbia-University> [<https://perma.cc/3K92-AYDM>].

⁵⁵ See Serge Schmemann, *Leningrad, Petersburg and the Great Name Debate*, N.Y. TIMES, June 13, 1991, at A18; see also *Volgograd*, BRITANNICA, <https://www.britannica.com/place/Volgograd-Russia> [<https://perma.cc/YPG3-QJ5U>].

⁵⁶ Justin Parkinson, *Why is Cecil Rhodes Such a Controversial Figure?*, BBC NEWS (Apr. 1, 2015), <https://www.bbc.com/news/magazine-32131829> [<https://perma.cc/JEL3-B6YP>].

⁵⁷ *Id.*

to the country from the Netherlands a century earlier.⁵⁸ Indeed, it was declared in 2011 an official National Heritage Site by the South African Resource Historical Agency.⁵⁹ The equivalent, I suppose, would be a decision by a Native American state within the United States, if one existed, to leave in place a monument to Andrew Jackson in order to assuage the feelings of a now-politically-displaced settler community.

All of these examples present what might be called “first-order” questions. All of us *can*, and increasingly *are*, engaging in a variety of debates, some of them public, some of them carried out over the dinner table or in heated classroom discussions, about the complex issues surrounding public honor. And we should not be under any illusions that those debates will abate even if we perhaps come to some provisional decision about, say, Lee or Calhoun. Instead, they are a function of the fact that we are an ever-more pluralistic society that is defined at least in part by the existence of groups that want public acknowledgment of their own heroes (and, for that matter, villains) and, therefore, to be included in any definition of “Americanism” circa 2020. So, first-order debate will continue to be robust, contentious, and often rancorous. To expect otherwise is to wish for a different society from the one we in fact occupy. However, the Minnesota contretemps raises another extremely important question, one which will occupy most of the rest of this essay. *Who* exactly should be tasked with resolving the vigorous debates surrounding the allocation of public honor?

Much of political theory and, therefore, law is devoted to trying to figure out decision procedures by which the first-order debates can be settled, at least for a while, and more to the point, peacefully. It is one thing to remove a statue backed with the legitimacy of a public body; it is another if, as at the University of North Carolina, a group of students decide to engage in what might be termed “self-help” and without any authorization take down “Silent Sam,” a statue commemorating the Confederate soldier.⁶⁰ So even if we can’t (or, empirically, won’t) agree on our first-order solutions regarding statues, lakes, or whatever, can we at least agree on second-order solutions as to who ought to be entitled to make decisions that the rest of us will be bound to respect even if not to agree with? What if, for example, there are conflicting “public bodies,” as is the case in Minnesota, each claiming legal authority? Can we necessarily agree on who should prevail, and is *that* debate a first-order or second-order question?

In contemplating my necessarily provisional answers to this question, I have been much benefitted by two articles by University of Kentucky law professor Zachary Bray. The titles themselves are illuminating. The first is *Monuments of Folly: How*

⁵⁸ *Experience It*, VOORTREKKER MONUMENT, <https://www.vtm.org.za/> [<https://perma.cc/J6YG-6EC9>]; see also *Voortrekker Monument*, SA-V, <https://www.sa-venues.com/attractionsga/voortrekker-monument.htm> [<https://perma.cc/53DE-4F6Z>] (explaining how Nelson Mandela visited the monument despite criticism).

⁵⁹ Anton van Vollenhoven, *The Changing Meaning of the Voortrekker Monument: Heritage Gain or Heritage Loss?*, LITNET (July 19, 2017), <https://www.litnet.co.za/changing-meaning-voortrekker-monument-heritage-gain-heritage-loss/> [<https://perma.cc/3VPN-VWYN>].

⁶⁰ Amir Vera, *UNC Protestors Knock Down Silent Sam Confederate Statue*, CNN (Aug. 21, 2018, 2:21 PM), <https://www.cnn.com/2018/08/20/us/unc-silent-sam-confederate-statue/index.html> [<https://perma.cc/TK3S-QLPU>].

*Local Governments Can Challenge Confederate “Statue Statutes”*⁶¹ and the second, a forthcoming article in the *William and Mary Law Review*, is *We Are All Growing Old Together: Making Sense of America’s Monument-Protection Laws*.⁶² A central theme of both articles is the pointed struggle between local municipalities and state governments over who is authorized to make relevant decisions. For lawyers, this is just another example of the problem of “preemption,” that is, the desire (and presumed power) of a “superior” government to negate regulations issued by governments lower down the pecking order. The basic meaning of the Supremacy Clause of Article VI is that valid laws passed by Congress can displace any state laws—or, indeed, state constitutions—to the contrary.⁶³ And that is true as well within states in general. That is, given that the national constitution gives no recognition at all to cities as such—they are entirely creatures of state law, having only such rights as their state governments choose to respect—an important feature of contemporary American politics is the attempts by state legislatures to limit the autonomy of cities to make a variety of important decisions. Or, within the institution that is the likely major focus of most readers of this article, state legislatures may be equally eager to impose their own views on state universities.

Such conflicts can easily be linked to the social reality that a major divide in contemporary American politics is between what might be termed “urbanites,” increasingly clustered in large cities or, for that matter, state universities, wherever they might be located, and Americans who quite consciously reject what they consider to be values attached to “urban cosmopolitanism” and intellectual iconoclasm—which recall, is literally the taking down of religious icons—in favor of what are described as more “traditional” values, including an unreflective patriotism.⁶⁴ Thus my own state of Texas is best described as a deeply blue state, consisting of four of the eleven largest cities in the United States, with a total population nearing ten million people, and an equally deep red state dominated by the remaining sixteen million people who live elsewhere and tend to disdain “blue Texans.”⁶⁵ So, it is not surprising that the Texas legislature, firmly controlled by the latter, devotes much of its energy to limiting the power of Austin, the state capital in which they meet, to engage in actual self-government. I can *describe* Texas (and other) state law, but the question ultimately is whether one endorses it, which ultimately appears to call for a first-order normative response. Nor is it surprising, incidentally, as Professor Bray’s articles note, that such attempts at preemption bring in their wake not only litigation, as in Minnesota, but also—and to a lawyer, at least equally interestingly—attempts by cities to find loopholes in what might be poorly

⁶¹ Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes”*, 91 TEMP. L. REV. 1 (2018).

⁶² Zachary Bray, *We Are All Growing Old Together: Making Sense of America’s Monument-Protection Laws*, 61 WM. & MARY L. REV. (forthcoming 2020).

⁶³ U.S. CONST. art. VI, cl. 2.

⁶⁴ See JONATHAN RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 72 (2019).

⁶⁵ See *Estimates of the Total Population of Counties and Places in Texas for July 1, 2018 and January 1, 2019*, TEX. DEMOGRAPHIC CTR. (Oct. 2019), https://demographics.texas.gov/Resources/TPEPP/Estimates/2018/2018_txpopest_msa.pdf [<https://perma.cc/UM6T-K8XJ>].

(or at least ambiguously drafted) state legislation that can be used to justify local decision-making.⁶⁶ If state legislation prohibits removing monuments located on “public property,” what is to prevent a city council, as in Memphis, Tennessee, from selling its parkland (and monuments) to a private party committed to removing the monuments?⁶⁷

This second-order question is, of course, raised by the Lake Calhoun case. Will the DNR be found, by the Minnesota Supreme Court, to be subservient to a law passed years ago by the Minnesota legislature, making permanent place-names given lakes more than forty years ago, or will the Court decide, by what some might call imaginative statutory interpretation, that the DNR has the powers after all, to submit to the strong desire of the Minneapolis and county officials today to leave John C. Calhoun behind? There is nothing at all unusual about this litigation or about the second-order issue of decision-making authority it presents. Robert Dahl titled a famous book some half-century ago, *Who Governs?*, about political decision-making in New Haven.⁶⁸ He was writing as a political scientist, not as a lawyer. But the question remains central, and various political contestants are eager to invoke any legal authority they can in order to strengthen their own position. To govern, it has been said, is to choose and, therefore, to generate groups who are distinctly unhappy with the choices being made, perhaps by relative newcomers to the arena of political power.

In Lexington, I presume I need not tell anyone in this audience that the removal of statues of John Hunt Morgan and John C. Breckinridge from the grounds in front of the historic Courthouse, which was about to become Lexington’s new visitor center, was the subject of significant first-order controversy. It was readily predictable, for example, that someone, in this case Ron Bryant, would offer the classic slippery slope argument: “Once you start taking down public monuments, it never stops because someone somewhere is always going to be offended by something.”⁶⁹ If John C. Breckinridge, then why not (fill in the blank), though the question often ends with the slave-owning George Washington or the arguably racist Abraham Lincoln? As I argued in my book, one cannot automatically dismiss such questions. How, after all, does one draw lines when discussing public honor? And, if truth be known, I am extremely skeptical that a satisfactory philosophical solution

⁶⁶ Bray, *supra* note 61, at 20–23.

⁶⁷ See Henry Grabar, *How Memphis Toppled Its Confederate Statues*, SLATE (Dec. 28, 2017, 4:06 PM), <https://slate.com/business/2017/12/how-memphis-outsmarted-tennessee-to-remove-its-confederate-monuments.html> [<https://perma.cc/9PHD-NQJZ>]; see also Phillip Jackson, *Court of Appeals Backs City of Memphis in Lawsuit over Confederate Statues Sale*, MEMPHIS COM. APPEAL (June 5, 2019, 7:23 AM), <https://www.commercialappeal.com/story/news/2019/06/04/confederate-statues-removed-memphis-chancery-court/1345203001/> [<https://perma.cc/Z3SN-DAWW>].

⁶⁸ ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY v–vii (1961).

⁶⁹ *Kentucky Historian: Removing Statues Was ‘Wrong Thing to Do’*, WKYT (Feb. 6, 2018, 2:10 PM), <https://www.wkyt.com/content/news/Kentucky-historian-says-officials-made-a-mistake-in-removing-statues-451494533.html> [<https://perma.cc/4HAW-SS7T>] (stating that Bryant did not think the statues were meant to promote racism but rather to simply remember the lives of fallen confederate soldiers); see also WKYT, *Ron Bryant, Kentucky Historian*, YOUTUBE (Sept. 18, 2017), <https://www.youtube.com/watch?v=kaoatsWSPsk> [<https://perma.cc/KF8V-ZVJT>]. I am grateful to my research assistant, Welles A. Mathison, for tracking down this and other valuable material on Kentucky and a number of other states.

can be reached. My own answers to such questions tend to be heavily context-dependent and thus devoid of any genuinely abstract “neutral principles” that can readily be applied in other situations.

From one perspective though, what is striking about the Lexington controversy, or similar debates in Louisville (and, no doubt, elsewhere in Kentucky) is the extent to which the solutions were truly “political,” i.e., the outcome of political arguments and the existing political process, rather than transformed, as Tocqueville (falsely) predicted, into legal arguments settled by courts. To be sure, there was a suggestion that the Kentucky Military Heritage Commission, created by statute in 2002, might be relevant to the decision-making process inasmuch as any object designated by it as a “Military Heritage Object” could be prevented from being “destroyed, removed or significantly altered” absent the Commission’s approval.⁷⁰ It appears that the Attorney General, however, determined in an opinion that the statues had not been properly registered with the Commission as military heritage objects, so that Lexington retained its own autonomy.⁷¹ Perhaps tellingly, the statues were removed on October 17, 2017, the evening that the Attorney General’s opinion was issued.⁷² I gather that C. Wesley Morgan, a member of the Kentucky House of Representatives, proposed in 2018 a new Kentucky Memorial Preservation Act of 2018 designed to place such decisions in the hands of a Committee on Kentucky Monument Protection, but it has not been passed.⁷³ And, for what it is worth, the Attorney General who issued the removal-friendly opinion is now the Governor of Kentucky.⁷⁴

Or consider as well the controversy at the University of Kentucky, akin to a much more widely covered debate in San Francisco, concerning murals painted by artists in the 1930s that are thought to include disturbing images relating to slavery or the treatment of Native Americans.⁷⁵ Although there was a striking presentation *about* the murals (and the controversy) at the symposium, participants were not able to walk almost literally next door to observe the murals *in situ*, because they are now covered up, apparently via a presidential decision acknowledging the presence (and

⁷⁰ *Military Heritage: Kentucky Military Heritage Commission*, KY. HERITAGE COUNCIL, <https://heritage.ky.gov/historic-places/military-heritage/Pages/overview.aspx> [<https://perma.cc/V6XE-97MW>].

⁷¹ Morgan Eads et al., *In a Surprise Move, Lexington Removes Controversial Confederate Statues*, LEXINGTON HERALD-LEADER (Oct. 17, 2017, 6:46 PM), <https://www.kentucky.com/news/local/counties/fayette-county/article179392076.html>.

⁷² *Id.*

⁷³ Jack Brammer, *Lawmaker Was ‘Sick’ When Confederate Statues Moved. His Bill Would Make It Harder.*, LEXINGTON HERALD-LEADER (Jan. 12, 2018, 12:29 PM), <https://www.kentucky.com/news/politics-government/article194378369.html>.

⁷⁴ Daniel Desrochers, *Beshear Declares Victory in Race for Kentucky Governor. Bevin Refuses to Concede.*, LEXINGTON HERALD-LEADER (Nov. 5, 2019, 9:57 PM), <https://www.kentucky.com/news/politics-government/election/article237022459.html>.

⁷⁵ For the Kentucky controversy, see Sarah Ladd, *UK to Cover Memorial Hall Mural After Student Sit-in*, KENTUCKYKERNEL (Apr. 2, 2019), http://www.kykernel.com/news/uk-to-cover-memorial-hall-mural-after-student-sit-in/article_6e5b19ae-5597-11e9-b72f-2bd8a2030a53.html [<https://perma.cc/D4SV-2FE8>]. For an overview of the San Francisco controversy, see *San Francisco Mural Controversy: Perspectives and Updates*, NAT’L COALITION AGAINST CENSORSHIP (Aug. 26, 2019), <https://ncac.org/news/san-francisco-mural-controversy-perspectives> [<https://perma.cc/S8MH-HD4Z>].

presumed validity) of student protests.⁷⁶ In both Kentucky and San Francisco, a key question concerned whose views should ultimately be taken into account (and prevail). In Kentucky, for example, there was some vigorous faculty opposition to the de facto, even if not literal, erasure of a valuable entry point into considering the history and heritage of the Commonwealth, the theme of the 1934 mural.⁷⁷ Although it may be tempting to join Kentucky with the other “slave states” within the Union, it is crucial to remember that Kentucky of course did not secede and join the Confederate States of America.⁷⁸ It was a “border state,” which signified, among other things, the presence, both then and now, of sharp divisions over basic issues of state identity. Someone quoted Mark Twain at the symposium saying that Kentucky was the only state that seceded *after* the conclusion of the Civil War. Consider the fact, for example, that Kentucky, which was not subject to military Reconstruction, is the only state to have refused initially to ratify the Thirteenth, Fourteenth, or Fifteenth Amendments to the U.S. Constitution,⁷⁹ inasmuch as Kentucky was not forced, as were the secessionist states, to ratify the Fourteenth Amendment as a condition of having its representatives seated in Congress.

Kentucky’s neighbor Tennessee passed its own Heritage Protection Act initially in 2013.⁸⁰ It is probably worth noting that the vote in the House of Representatives split very much along partisan lines: sixty-four of the sixty-nine affirmative votes were cast by Republicans; Democrats provided twenty-one of the twenty-two votes in opposition.⁸¹ Without going through the entirety of the complex statute, it is most relevant that it applies primarily to statues erected prior to 1970.⁸² Similarly, the Alabama Memorial Preservation Act of 2017, passed in reaction to the national conversation generated by the Charleston Massacre of 2015, provides that “[n]o architecturally significant building, memorial building, memorial street, or monument which is located on public property and has been so situated for 40 or more years may be relocated, removed, altered, renamed, or otherwise disturbed.”⁸³ I note for the record that the Minnesota case also uses a forty year cutoff; I can’t help but wonder if this relates to the number of years Israelites spent in the wilderness! In any case, though I have no idea why Minnesota decided that forty years is the key dividing line between changeability and permanence, it seems quite obvious that Alabama’s very recent legislation is designed to protect Confederate monuments from the winds of change that might be found in such cities as Birmingham or

⁷⁶ See Ladd, *supra* note 75.

⁷⁷ Lee Gardner, *At U. of Kentucky, Faculty Look to Deepen a Campus Conversation on Race*, CHRON. HIGHER EDUC. (Dec. 10, 2015), <https://www.chronicle.com/article/At-U-of-Kentucky-Faculty/234553> [<https://perma.cc/T79P-KVZ5>].

⁷⁸ Tim Talbott, *Kentucky’s Neutrality during the Civil War*, KENTUCKYHISTORICALSOCIETY (July 31, 2013), <http://history.ky.gov/landmark/kentuckys-neutrality-during-the-civil-war/> [<https://perma.cc/Z2P6-SBW8>].

⁷⁹ FONER, *supra* note 34, at 38.

⁸⁰ TENN. CODE ANN. § 4-1-412 (2013).

⁸¹ *Roll Call: TN HB0553, 2013–2014, 108th General Assembly*, LEGISCAN, <https://legiscan.com/TN/rollcall/HB0553/id/236713> [<https://perma.cc/5ZV5-HGFV>].

⁸² TENN. CODE ANN. § 4-1-412 (2013).

⁸³ S.B. 60, Reg. Sess. (Ala. 2017); see also 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/CDV9-XWXX>].

Montgomery as they become both more urbane and, of course, more African American in terms of those who possess political power and wish to exercise that power by choosing to transform public space and redistribute public honor.⁸⁴

Here, the issue seems quite clear: Should decisions be made by state officials, even if they are members of duly appointed Commissions ostensibly devoted to heritage preservation and the like, or by localities? Interestingly enough, there is ongoing litigation in Alabama around the role of “home rule.”⁸⁵ In Birmingham, local authorities, following the Charleston massacre in 2015, decided to place a plywood box around the base of a Confederate statue in a local park.⁸⁶ Mayor William Bell indicated a desire to remove the monument, though he also expressed doubt on what legal powers municipalities actually had to do that.⁸⁷ Alabama’s Attorney General then sued the City for violating the Act.⁸⁸ Jefferson County Circuit Judge Michael Graffeo, however, apparently during his last day of service, declared the law unconstitutional inasmuch as it is the right of Birmingham, now a 70% African American city,⁸⁹ “to speak for itself, to say what it wishes, and to select the views that it wants to express.”⁹⁰ According to Graffeo, “[t]he state has placed a thumb on the scale for a pro-confederacy message,” which he also described as a “message of white supremacy.”⁹¹ The now-former Mayor Bell described the monument in question as “a monument to segregation. It’s a monument to human bondage. It’s a monument to sedition and the breakup of the United States of America.”⁹² Not surprisingly, perhaps, the state Attorney General was successful in

⁸⁴ It is worth noting that both Birmingham and Montgomery now possess impressive civil rights museums and, in Montgomery, thanks to Bryan Stevenson, a breath-taking monument to the literally thousands of lynching victims in the nineteenth and twentieth centuries. Campbell Robertson, *A Lynching Memorial is Opening. The Country Has Never Seen Anything Like It.*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html> [https://perma.cc/2M7H-DG4N]. I think it is fair to say that Montgomery especially, is now trying to market itself as the birthplace of the Civil Rights Movement, given the location of Martin Luther King’s Dexter Avenue Baptist Church literally within blocks of the Alabama State Capitol building. Needless to say, it is, as yet, a mistake to confuse the sentiments found in these two major cities with those of the rest of Alabama.

⁸⁵ Albert P. Brewer, *Home Rule*, ENCYCLOPEDIA ALA. (Oct. 6, 2009), <http://www.encyclopediaofalabama.org/article/h-1153> [https://perma.cc/38NV-E9RS].

⁸⁶ P.R. Lockhart, *Supporters of Confederate Monuments Had a Very Bad Week*, VOX (Jan. 18, 2019, 4:50 PM), <https://www.vox.com/identities/2019/1/18/18185501/confederate-monuments-birmingham-alabama-north-carolina> [https://perma.cc/D7MF-JHEF].

⁸⁷ Erin Edgemon, *Birmingham Covers Confederate Monument as City Considers Removal*, AL.COM (Mar. 7, 2019), https://www.al.com/news/birmingham/2017/08/defy_state_law_and_remove_conf.html [https://perma.cc/QEC3-XCKU].

⁸⁸ Ian Stewart, *Judge Throws Out Alabama Law that Protects Confederate Monuments*, NPR (Jan. 15, 2019, 5:52 PM), <https://www.npr.org/2019/01/15/685672038/judge-throws-out-alabama-law-that-protects-confederate-monuments> [https://perma.cc/25SK-9UYF].

⁸⁹ Kathryn Rubino, *Alabama Judge Takes Bold Stance Against Confederate Monuments*, ABOVE THE LAW (Jan. 16, 2019, 2:00 PM), <https://abovethelaw.com/2019/01/alabama-judge-takes-bold-stance-against-confederate-monuments/> [https://perma.cc/3T8T-65VY].

⁹⁰ Stewart, *supra* note 88.

⁹¹ *Id.*

⁹² *Id.*

obtaining a stay of Judge Graffeo's opinion, and nothing further has yet been reported.⁹³

Similar litigation is going on in other states, including, most notably, Virginia. The statue of Robert E. Lee that provoked the Charlottesville March in August 2017 remains *in situ*, regardless of the wishes of the Charlottesville City Council, because a local judge reads Virginia state law to prohibit local autonomy regarding the movement of "war memorials."⁹⁴ The judge did not necessarily reject the plaintiff's view that Lee and Stonewall Jackson, another honored Confederate hero, are symbols of slavery.⁹⁵ Instead, he wrote that "there is no other reasonable conclusion but that these statues are monuments and memorials to Lee and Jackson as Generals of the Confederate States of America, and that as such they are monuments or memorials to veterans of one of the wars listed" in the relevant state statute.⁹⁶ One might view this simply as a triumph of legal positivism—a clear state statute trumps municipal policy to the contrary—rather than an endorsement of the ideology that undergirds continued devotion to Lee and Jackson. Still, as Richard Schragger argued in his own contribution to this Symposium and elsewhere, the clear wishes of the Charlottesville political community, as measured by their local government, are being disregarded in favor of control by the state.⁹⁷

But I want to direct your attention to Judge Graffeo's reference to Birmingham's ostensible right "to speak for *itself*" or to engage more generally in "select[ing] the views that *it* wants to express."⁹⁸ The pronoun, I think, is absolutely central, and it raises a host of fundamental questions relevant to my overall inquiry. It has become almost a cliché among political scientists, when discussing such institutions as, say Congress or the Supreme Court for example, to remind readers that the given institution "is a '[t]hey' and not an '[i]t.'"⁹⁹ Surely what is true of the Senate or even the nine-member Supreme Court is true as well of Birmingham (or Lexington), let alone Alabama or Kentucky. The pluralism that I have generally been speaking of is found all the way down: think only of newspaper articles (or perhaps personal experience) where families are bitterly divided between pro and anti-Trumpists. Moreover, I cannot escape some of the events of my youth, when those condemned as "outside agitators" were overwhelmingly likely to be members of the Civil Rights Movement attempting to disrupt the complacent white hegemony in the South, and even, if truth be known, in such places as Chicago or Boston. As one might

⁹³ Chip Brownlee, *Birmingham Opposes Stay of Judge's Confederate Monuments Ruling*, ALA. POL. REP. (Feb. 15, 2019), <https://www.alreporter.com/2019/02/15/birmingham-opposes-stay-of-judges-confederate-monuments-ruling/> [<https://perma.cc/FJQ9-AC4K>].

⁹⁴ Paul Duggan, *Charlottesville's Statue Defenders Win Partial Victory in Lawsuit*, WASH. POST (Apr. 30, 2019, 6:24 PM), https://www.washingtonpost.com/local/public-safety/charlottesvilles-statue-defenders-win-partial-victory-in-lawsuit/2019/04/30/18979542-6b6d-11e9-a66d-a82d3f3d96d5_story.html [<https://perma.cc/UAY5-GM62>].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58 (Jan. 23, 2018), <https://virginialawreview.org/volumes/content/when-white-supremacists-invade-city> [<https://perma.cc/VL8F-HMM6>].

⁹⁸ Stewart, *supra* note 88 (emphasis added).

⁹⁹ See Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

paraphrase *Ecclesiastes*, there is a time for localism, there is a time for external intervention and agitation. And, I strongly suspect, there are no “neutral principles” that counsel one or the other.

So even if one decides, for whatever reason, to prefer local decision-making to that emanating from statewide agencies, whether legislatures or commissions, that scarcely decides the issue of who, at the local level, should be entrusted with authority. For example, consider only the difference between placing such authority in the hands of elected officials, whether a mayor or city council; an appointed “special commission;” presumptive “experts” such as a City Planning Commission; or even a city-wide referendum that, by definition, gives every voting member of the local polity the equal formal opportunity to participate in the ultimate decision. It is not unlikely that different results would be generated by the process chosen; perhaps more importantly, there are distinctly different political theories underlying the various possibilities.

Inasmuch as placement of public monuments touches on basic values, one might believe that they should be decided by the public generally in a referendum-type vote rather than being left to any sub-group, even those sometimes labeled as “representatives.” Yet allowing what some might want to describe as “the community as a whole” to make the decision would require ignoring the fact that the community is not in fact a genuine whole and that there might be a deep conflict going on between marginalized members of the community and its majority. After all, one might support the replacement of certain monuments or the renaming of certain buildings, like those devoted to partisans of slavery and the Lost Cause of the Confederacy, specifically because they operate as assaults on the consciousness of a minority of the community who view them as yet more evidence of exclusion from the wider body.

Writing in the Duke Alumni Magazine about the decision to change the name of a building named after Julian Carr, a prominent nineteenth century donor who was also an unusually vehement racist, Scott Huler asks, “[w]ould you ask a Jewish student to sign up for classes in the Himmler Building, [or] a Native American student to meet you in the Andrew Jackson Center?”¹⁰⁰ The first is, to my knowledge, entirely hypothetical. But the second is certainly a reality in American society. It took only an exceedingly brief search to discover a story from Salt Lake City detailing changing the name of an elementary school that had honored our seventh president.¹⁰¹ And Mitch Landrieu, in his extraordinary speech as New Orleans’s

¹⁰⁰ Scott Huler, *Is Changing a Name Erasing History?*, DUKE MAG. (Feb. 8, 2019), <https://alumni.duke.edu/magazine/articles/changing-name-erasing-history> [<https://perma.cc/4247-FV4S>] (paraphrasing a speech made by Christine Kinyua).

¹⁰¹ Avery Anapol, *Utah School Changes Name to Honor NASA Engineer Instead of Andrew Jackson*, HILL (Feb. 8, 2018, 8:14 AM), <https://thehill.com/blogs/blog-briefing-room/372886-utah-elementary-school-changes-name-honoring-nasa-engineer-instead> [<https://perma.cc/P4LU-KDCX>]. An article about the recent discovery that members of the Old North Church in Boston, the church from which the lanterns guiding Paul Revere were famously hung, were much involved in the slave trade, including Newark Jackson, a parishioner and ship captain. Brian MacQuarrie, *Old North Church, a Cherished Symbol, Opens Up About Its Link to Slavery*, BOS. GLOBE (Oct. 26, 2019, 7:27 PM), <https://www.bostonglobe.com/metro/2019/10/26/old-north-church-cherished-symbol-opens-about-link-slavery/tOKwIqLkBgaujRLyWELPfj/story.html> [<https://perma.cc/RZ82-XS6S>]. Captain Jackson gave

mayor explaining his decision to remove Confederate icons from places of honor, stated that “in the second decade of the 21st century,” we should not continue to “ask African Americans—or anyone else—to drive by property that they own” as, at long last, full citizens, and be forced to observe public monuments to those who had oppressed their ancestors.¹⁰² Similar arguments have been made with regard to preserving monuments of Cecil Rhodes in South Africa,¹⁰³ or retaining the name of John Henry Boalt, a noted nineteenth century anti-Chinese bigot, as the titular figure for the state law school located at the University of California at Berkeley.¹⁰⁴

It is all too easy to interpret some of the recent desire, as in Alabama, to move decision-making to the state level as a transparent attempt by basically unreconstructed devotees of the Lost Cause to maintain their hegemony over the more progressive enclaves found in cities. In this case, granting the Alabama legislature, or those appointed by the authority to speak for some fictive (or, at the very least, socially constructed) “Alabama community” is in effect to endorse the de facto hegemony of conservative whites who resent the attacks on their former dominance. Similarly, it takes little effort to interpret the march on Charlottesville, Virginia in August 2017 as the display of such resentment and, therefore, to be justifiably appalled at President Trump’s attempt to identify “good people” on both sides of that event or even, almost uniquely, to praise Confederate statues as having aesthetic merit.¹⁰⁵

But, of course, that is a doubly contingent argument. The first one involves giving preference to those we identify as having compatible views on the matter under question; the second is that we find those enlightened people in one definition of the “political community” rather than another. The first is patently normative; the second rests on the empirical location of those whose views we find compatible. “Neutral principles” have little or nothing to do with the choice in either case. From my own perspective, this is not meant to be a devastating observation; I am skeptical of the genuine existence of “neutral principles” as a constitutive feature of law or legal judgment. Context is all, and the key difference, as law students quickly learn, between “rules” and “standards” is that the latter resist any rote application. That

his name to “Captain Jackson’s Historic Chocolate Shop,” operated by the Old North Foundation and which opened in 2013. *Id.* One might well wonder if simply adding some clarifying information about the full reality of Captain Jackson’s work will allow the Shop to continue without renaming. The situation might be different if it were Paul Revere’s Chocolate Shop and new information emerged about Revere, a figure truly central to the fame and symbolic importance of the Church. But why should Captain Jackson be entitled to any further honor, even as the name of a chocolate shop?

¹⁰² LEVINSON, *supra* note 51, at 190, 193.

¹⁰³ See Tyler Stiem, *Statue Wars: What Should We Do with Troublesome Monuments?*, GUARDIAN (Sept. 26, 2018, 7:00 AM), <https://www.theguardian.com/cities/2018/sep/26/statue-wars-what-should-we-do-with-troublesome-monuments> [https://perma.cc/X9FE-F4SW].

¹⁰⁴ See Sonali Kohli, *Berkeley Law School Removes Boalt’s Name from Building, Citing His Anti-Chinese Legacy*, L.A. TIMES (Jan. 30, 2020, 11:40 AM), <https://www.latimes.com/california/story/2020-01-30/berkeley-boalt-hall-taken-down> [https://perma.cc/Y8YZ-RGAS].

¹⁰⁵ See Joshua Barajas, *In 3 Tweets, Trump Defends ‘Beautiful’ Confederate Monuments*, PBS NEWSHOUR (Aug. 17, 2017, 10:56 AM), <https://www.pbs.org/newshour/politics/in-3-tweets-trump-defends-beautiful-confederate-monuments> [https://perma.cc/B685-TVYF] (reporting President Trump’s tweet: “Sad to see the history and culture of our great country being ripped apart with the removal of our beautiful statues and monuments.”).

being said, it is certainly true that for many “neutral standards” and even “rules” do play a central role, and law students especially are subjected to being given often acontextual hypotheticals that take the form of “what about ___?” Indeed, “whataboutism” has become a standard reference point of contemporary, and rancorous, political debate inasmuch as one tries to expose proponents of an ostensibly high-minded political position as mere partisans by evoking comparisons that will be at least embarrassing to confront.¹⁰⁶

“Who Governs,” for those other than professional, and often quite detached, political scientists, often translates into “Who *Should* Govern,” and the answer to that question is rarely if ever independent of one’s own commitment to the values of the group one suggests as proper governors. This is why, incidentally, proponents of Critical Legal Studies were skeptical of the attempt to create sharp lines between procedural rules and substantive preferences. All practicing lawyers inevitably become adepts in gaming the legal system, including its procedural aspects. Proponents of “majority rule,” especially in a culture like our own, which obsesses about the problem of “tyranny of the majority,” must always be careful to delineate limitations on majority rule, and these limitations always involve substantive arguments. Ironically or not, it was John C. Calhoun himself who wrote the great critique of unimpeded majority rule in the name of what he called the “concurrent majority,” which in his case was essential to protecting the rights of slaveholders.¹⁰⁷ But, as a matter of fact, one can find evocations of Calhounian thought in many other writers with quite different ideological commitments, such as Harvard Law Professor Lani Guinier or Yale Law School Dean Heather Gerken, both of whom are also wary of rule by a majority willing to run roughshod over the preferences (or rights) of one’s favorite (or even, on occasion, unfavorite) minorities.¹⁰⁸

So I confess, by way of concluding these necessarily provisional remarks, that I have become wary of most references to “the community” as the locus of decision-making authority with regard to deciding who is worthy of public honor or the particular dishonor of losing one’s place on a public pedestal. Part of the problem, as should already be obvious, is the very problem of defining who is, and who is not, a member of the relevant “community.” Minimal familiarity with the role that “community standards” were presumed to play with regard to regulating sexually-explicit literature or movies teaches the practical problems in the way of defining a singular community with agreed-upon values on such matters even within relatively small cities, let alone larger entities like large metropolises or states.

All arguments for local autonomy, for example, necessarily presume that “outsiders,” even those living in the same state, have a diminished capacity, as it were, with regard to making decisions for the locality in question. But a state trying to establish itself as tolerant and inclusive can be embarrassed by localities that continue to adhere to less enlightened visions. Consider, in this context, the fact that

¹⁰⁶ *What About 'Whataboutism'?*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/whataboutism-origin-meaning> [<https://perma.cc/42U9-CDXM>].

¹⁰⁷ JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT 28–29 (Richard K. Cralle ed., 1943) (1851).

¹⁰⁸ See, e.g., LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

a much vandalized seventy-foot statue honoring the Confederate war dead at the University of Louisville was seemingly gladly bought by the residents of Brandenburg, Kentucky and relocated there.¹⁰⁹ One might applaud this as exemplifying the diversity of political sentiment, regarding public memory, in Kentucky, or bemoan the refusal to accept the reality of the moral hollowness undergirding the Lost Cause ideology.

But there is no necessary reason to believe that an entire—even if unusually homogeneous—state provides the answer to defining an authoritative community. After all, its values may be at odds with those of the wider, national polity, including one's view of the value of preserving tangible manifestations of public memory themselves. Thus, for example, national "historic preservation laws" play a sometimes important role in preventing at least some displacement by localities of artifacts created many years before. This was notably true, for example, in New Orleans, where the city government after 1981, when Ernest Morial became the first African American mayor of that city, was eager to move a monument dedicated in 1891 to the memorialization of the aptly named White League and its violent attempts to overthrow the Reconstruction government in that state and to restore white supremacy.¹¹⁰ Indeed in 1934, a plaque was added to the memorial offering what might be viewed as the predominant white Louisianan view of Reconstruction and the ensuing battles within the state: "United States troops took over the state government and reinstated the usurpers but the national election in November 1876 recognized white supremacy and gave us our state."¹¹¹ For many years, the Klan and other supremacists annually marched to its site at the foot of Canal Street.¹¹² It was successfully moved from there to a nearby parking lot behind the Westin Hotel, in order to comply with the national law forbidding its removal from the downtown area in which it had been located.¹¹³ It also had added to it the names of the Municipal Police who died at the hands of the White League and a new plaque presumably offering the new public meaning of the monument: "IN HONOR OF THOSE AMERICANS ON BOTH SIDES OF THE CONFLICT WHO DIED IN THE BATTLE OF LIBERTY PLACE: A CONFLICT OF THE PAST THAT SHOULD

¹⁰⁹ See Phillip M. Bailey, *Confederate Monument Gets New Home*, COURIER J. (Nov. 15, 2016, 6:46 PM), <https://www.courier-journal.com/story/news/politics/metro-government/2016/11/15/confederate-monument-going-brandenburg/93929972/> [<https://perma.cc/J9KX-PK8Z>].

¹¹⁰ Levinson, *supra* note 51, at 39–43.

¹¹¹ *Id.* at 40; see CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008) (detailing the wanton slaying of African Americans by Klansmen and others in 1873 as an effort to restore white supremacy). See also Matt LaRoche, *Tributes to Terror: The Mis-Monumentation of the Colfax Massacre*, GETTYSBURG COMPILER: ON FRONTLINES HIST. (Mar. 27, 2015), <https://gettysburgcompiler.org/2015/03/27/tributes-to-terror-the-mis-monumentation-of-the-colfax-massacre/> [<https://perma.cc/67AE-ASE9>], for a discussion on two monuments still found in Colfax, one a cemetery marker erected in 1921 dedicated to "the memory of the heroes . . . who fell in the Colfax Riot fighting for white supremacy, April 13, 1873," the other a highway marker put up only in 1950, which, after noting that "three whites and up to one hundred and fifty freedmen lay dead" died during the "Colfax riot," describes it as marking the end of "carpetbag misrule in the South." *Id.*

¹¹² See Levinson, *supra* note 51, at 40.

¹¹³ See *id.* at 41–42.

TEACH US LESSONS FOR THE FUTURE.”¹¹⁴ What those lessons might be, and why we should wish to honor “Americans on both sides of the conflict,” murderous racists, and defenders of Reconstruction alike is left unexplained. As a matter of fact, the monument was moved in 2017, along with the monuments to Lee and other Confederates, and the Fifth Circuit Court of Appeals upheld the removal against inevitable judicial challenges,¹¹⁵ though as a technical matter it held only that the plaintiffs had not demonstrated “irreparable harm” that would warrant an injunction against removal.¹¹⁶ The three-judge panel appeared to go out of its way to emphasize that “the ultimate determination made here, by all accounts, followed a robust democratic process” and that the plaintiffs had demonstrated no reason for the judiciary to “interfere with this local political process, which required consideration of heated and disagreeing viewpoints.”¹¹⁷

But should “local political process[es]” always prevail, even if they meet the criteria one would want for the vigor of arguments and deliberation? Consider the heated recent debate about the potential destruction of a mural in a San Francisco school that included depictions of slavery and a dead Native American. It took place not only among San Franciscans, but also among national artists and cultural critics who claimed a right to participate in such discussions. Thus, Artnet News published an article titled *Nearly 400 Writers and Academics Are Protesting the Planned Destruction of a Controversial Mural Depicting the Life of George Washington*.¹¹⁸ Some did not take seriously the notion that the decision should be left exclusively to San Franciscans, beginning with the school board that had initially voted to destroy the offending murals.¹¹⁹ Because of the negative response, they relented; it appears that the murals will now be covered with drapes and made available, on occasion, to scholars who demonstrate a need to look at the originals.¹²⁰ A similar “solution” has been adopted at the University of Kentucky regarding its own controversial mural.¹²¹ But consider as well the almost universal condemnation visited upon the Taliban for

¹¹⁴ *Id.* at 42–43.

¹¹⁵ See Bill Chappell, *New Orleans Can Remove Confederate Statues, Federal Appeals Court Says*, NPR: TWO-WAY (Mar. 7, 2017, 10:15 AM), <https://www.npr.org/sections/thetwo-way/2017/03/07/518986603/new-orleans-can-remove-confederate-statues-federal-appeals-court-says> [<https://perma.cc/ZZ2Y-YE73>].

¹¹⁶ *Monumental Task Comm., Inc. v. Chao*, 678 F. App’x 250, 251–52 (5th Cir. 2017).

¹¹⁷ *Id.* at 252.

¹¹⁸ Taylor Dafoe, *Nearly 400 Writers and Academics Are Protesting the Planned Destruction of a Controversial Mural Depicting the Life of George Washington*, ARTNET NEWS (July 8, 2019), <https://news.artnet.com/art-world/george-washington-mural-san-francisco-1594663> [<https://perma.cc/HQG9-K5UX>].

¹¹⁹ Carol Pogash, *San Francisco School Board May Save Controversial George Washington Mural*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/arts/san-francisco-murals.html> [<https://perma.cc/BQK4-8M2G>].

¹²⁰ See Carol Pogash, *San Francisco School Board Votes to Hide, but Not Destroy, Disputed Murals*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/arts/san-francisco-murals-george-washington.html> [<https://perma.cc/Q77M-8MM7>].

¹²¹ Nick Anderson, *Some Saw a University of Kentucky Mural as Racially Offensive. Here’s the School’s Solution*, WASH. POST (Aug. 24, 2018, 10:00 AM), <https://www.washingtonpost.com/news/grade-point/wp/2018/08/24/some-saw-a-university-of-kentucky-mural-as-racist-so-the-school-found-a-solution/> [<https://perma.cc/PP9A-NPLB>].

destroying thousand-year-old Buddhist statues in Afghanistan, not least because they had formally been listed as a “world heritage site.”¹²²

For better or worse, few people today genuinely assert the reality of a “world community,” even if it remains an aspiration for some. But the skepticism that is critical of a “world community” applies downward as well, as it were. There is, and has never been, a singular “American community,” or, for that matter, singular “Jewish” or “African American” or even “jazz-fan” communities. There may be moments when such communities might come into existence; perhaps there was a united American community immediately after the attacks at Pearl Harbor in 1941 or, for most Americans today, September 11, 2001. Jews might have been united in opposition to the genocidal Holocaust promoted by Nazi Germany, or African Americans by the specter of lynch mobs. And perhaps the United Nations really *would* become indicative of a world community if one standard plot line in science fiction were realized, that is, an attack by aliens who wish to destroy us.¹²³ But, for better and, most certainly, for worse, our “natural state” seems to be disunity and heterogeneity, as suggested by James Madison in his canonical *Federalist No. 10*, which is full of anguish about the “factions” that are generated by differences of religion, wealth, and other attributes that, alas, cannot be eliminated save through an unacceptable quashing of basic liberty.¹²⁴

Similar problems are found when one tries to make facile reference to, say, the “Yale community” or any that of any other academic institution, including, no doubt, the University of Kentucky. So I conclude as I began, with some reflections on how to proceed when confronted with existing honors to John C. Calhoun and the demands that they be removed because Calhoun is thought to be unworthy of such honor. Universities are especially useful with regard to such controversies because they have the maximum motive and opportunity to engage in a more-or-less transparent deliberative process rather than engage in fiat decision making. So, this returns us to Yale University. The twelve members of the committee appointed by the President of Yale University to offer him advice on the renaming of Calhoun College included several distinguished academics from Yale, alumni, and Yale undergraduates.¹²⁵ The committee took care to consult with a far wider body of individuals, including those who worked at Yale, including Calhoun College.¹²⁶

¹²² Rod Nordland, *2 Giant Buddhas Survived 1,500 Years. Fragments, Graffiti and a Hologram Remain.*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/world/asia/afghanistan-bamiyan-buddhas.html> [<https://perma.cc/V3Q3-KSMK>].

¹²³ It may be worth noting that these comments were written prior to the great pandemic generated by the Covid-19 virus, which is, in its own way, offering a test of the proposition that an “alien invasion” against the entire world would in fact serve to unite us instead of heightening various divisions. The desire of many countries—and many states within the ostensibly United States of America—to close their borders and to hoard medical supplies only for “insiders” does not auger well for the standard science-fiction script. It is, of course, too early to tell what morals we will end up drawing from the ravages of Covid-19, let alone predict who might be memorialized as genuine “heroes” or condemned as villains with blood on their hands.

¹²⁴ THE FEDERALIST NO. 10 (James Madison).

¹²⁵ Peart, *supra* note 20.

¹²⁶ Letter from the Committee to Establish Principles on Renaming, to President Salovey, Yale Univ. President 6–8 (Nov. 21, 2016), http://president.yale.edu/sites/default/files/files/CEPR_FINAL_12-2-16.pdf [<https://perma.cc/PQ2J-M7TN>].

Indeed, an African-American worker in the Calhoun dining hall had earlier engaged in a form of direct action by breaking a stained glass window of Calhoun in his role as slave master.¹²⁷ As the committee wrote, “[n]o part of the University community spoke with a single voice.”¹²⁸ It is unclear what the term “community” means in this context other than some sociological or demographic classification. The term “community” conveys a different meaning from that of, say, “interest group,” but sometimes it can be hard to tell the difference.

Moreover, as one might expect, given the visibility of Calhoun as an historical figure and the prestige of Yale University, those with apparently no formal connection to Yale at all felt authorized to weigh in with their own commentaries.¹²⁹ At the end of the day, though, one can ask how much the decision was or should have been, based on purely theoretical criteria, as against more “political” judgment. Former Yale Law School Dean Anthony Kronman, for example, was bitterly critical of the Yale President’s decision, arguing that it was indeed “political” and therefore, repudiated the University’s basic commitment to being guided by principled decision-making.¹³⁰ He makes his own version of a slippery-slope argument, noting, altogether accurately, that the eponym of another one of Yale’s residential colleges, Samuel F. B. Morse, known primarily as inventor of the telegraph, was also “an outspoken anti-Catholic.”¹³¹ Indeed, says Kronman, he also “defended the institution of slavery as a positive good in much the same terms that John Calhoun did.”¹³² So why is Calhoun erased and not Morse? Is the answer only that Morse has not (yet) become the object of a sustained political movement? Kronman agrees that in fact “[n]o one today would propose naming a college”—or, perhaps, even a lake—“in Calhoun’s honor.”¹³³ But he distinguishes between a new naming and keeping established namings intact. That “can be defended not as an homage to the controversial statesman who, among other things, touted slavery as a positive good, but as a recognition of Yale’s own commitment to shine a bright and public light on its morally compromised past[,]”¹³⁴ including its decision in 1931 to honor its decidedly flawed alumnus. I am skeptical of Kronman’s critique, including the reliance he places on pure reason. I am inclined to think, among other things, that the overwhelming number of persons seeing the name, or a statue to an eminence, will presume that the person is indeed honor-worthy instead of viewing it as a “teachable moment” generating a conversation of the form “why in the world have we named an airport after Ronald Reagan?”

¹²⁷ See *id.* at 7–8.

¹²⁸ *Id.* at 6.

¹²⁹ See Garland Tucker, *Changing the Name of Yale College Erases Our Complex History*, FIN. TIMES (Feb. 16, 2017), <https://www.ft.com/content/8feb050c-f1cc-11e6-95ee-f14e55513608>.

¹³⁰ Anthony Kronman, *Politics by Another Name*, YALE DAILY NEWS (Sep. 4, 2019, 12:33 AM), <https://yaledailynews.com/blog/2019/09/04/kronman-politics-by-another-name/> [<https://perma.cc/9LUL-T8AK>]; see also ANTHONY KRONMAN, *THE ASSAULT ON AMERICAN EXCELLENCE 193, 195–200* (2019) (providing an extended discussion of the Calhoun College renaming).

¹³¹ Kronman, *supra* note 130.

¹³² KRONMAN, *supra* note 130, at 195.

¹³³ Kronman, *supra* note 130.

¹³⁴ *Id.*

Still, once one agrees, as I think one must, that “politics,” in a variety of senses of that term, enters into any such decision, one can ask whose politics should prevail, and why. Should alumni preferences—that is, the voice of the past—count as much as those of present undergraduates—the voice of the future—or those of more permanent residents of the university, whether faculty or those who provide necessary services like cleaning the buildings or preparing and serving the food? And does one necessarily have to take cognizance of racial or ethnic differences within these groups, so that African American alumni are counted more heavily than their white counterparts? Are “mere” residents of New Haven entitled to wonder why the chief employer in their city is named after someone Kronman describes as having “participated profitably in the slave trade”?¹³⁵ And we can, of course, simply keep widening the circle of potential “stakeholders” in all such decisions. In any event, are such exercises of measuring opinion evidence of “community” or “community-building” or instead simply further evidence of the extent to which evocations of “community” are often equivalent to whistling past the graveyard and hoping for the best?

So let me conclude by returning briefly to the earlier mentioned article in the *New York Times*, which involved intense and heated controversies not only about what particular women should be chosen to complement the now-overwhelmingly male honorees in New York’s public parks, but also who should make those decisions and on what basis. For example, a decision was made to include Sojourner Truth within a group of white women as advocates of women’s suffrage although a group of academics objected that the inclusion “could obscure the substantial differences between white and black suffrage activists, and would be misleading.”¹³⁶ It turns out, of course, that some things are often deemed more important than “mere” historical accuracy. There is, after all, the denouement of the great American film *The Man Who Shot Liberty Valance*: “When the legend becomes fact, print the legend” and, one might add, reinforce its inaccuracy among impressionable youth and other consumers of the attempts to maintain the legend.¹³⁷ Moreover, debates include matters of style, of aesthetics: should a large bronze portrait honoring the poet Maya Angelou be abstract in style or “a more traditional, figurative statue?”¹³⁸ Ultimately, the sculptor who had been chosen by a designated committee to create the former withdrew in favor of the sculptor chosen by the community.¹³⁹ A comment by the de facto winner—i.e., the sculptor with more community support—concluded the *New York Times*’s article: “Public art is an expression of the values of a community The community always has the last say.”¹⁴⁰ How exactly would one determine the empirical accuracy or normative desirability of this statement? And, finally, should we feel embarrassed or even paralyzed by the genuine difficulty of such questions and the inevitably partial and all-too-often unsatisfactory explanations offered to those who disagree with us?

¹³⁵ KRONMAN, *supra* note 130, at 194.

¹³⁶ Pogrebin & Small, *supra* note 3.

¹³⁷ THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962). See Movieclips, *Print the Legend - The Man Who Shot Liberty Valance (6/7) Movie CLIP (1962) HD*, Youtube, <https://youtu.be/363ZAmQEA84?t=44> [<https://perma.cc/V4E5-A7VA>] to hear the delivery of this quote.

¹³⁸ Pogrebin & Small, *supra* note 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.*