

CANYONS, CASTLES & CONTROVERSIES: A COMPARISON OF PRESERVATION LAWS IN THE UNITED STATES & IRELAND

*Joseph C. Pettygrove**

I. INTRODUCTION

The mere mention of places such as Gettysburg, the Grand Canyon, or the Statue of Liberty evoke a sense of patriotism and pride in American national heritage. Although a relatively young nation,¹ the United States has joined more established countries across the world in the realization that its cultural treasures must be cherished and protected.² “[The Abbe] Gregoire argued that the quintessence of a nation is demonstrated by the genius of its individual citizens and that the heritage of a nation is embodied in the artifacts of its citizens’ achievements. A nation that neglects its cultural artifacts robs itself of its defining heritage.”³ Understandably, few societies or governments are content to be accused of that type of thievery.⁴ Yet, for all their

* J.D. 2005, Indiana University School of Law – Indianapolis; B.S. Business Management 2002, Ball State University. My love and thanks go to my wife, Jamie, and my son, Joseph, for their patience and support during the many hours I spent holed away researching and writing this Article. I am also deeply indebted to Professor L.T. Wilson for his advice on this Article as well as law and life in general. Should this ever see the light of day beyond the editorial boards’ offices, it will be more a testament to these cherished peoples’ efforts than mine. This Article is dedicated to the memory of George J. “Joe” & Lois E. O’Malia.

¹ Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 560 (1995). “The idea of the United States as a ‘new’ nation founded upon pristine land, a new experiment in liberty and democracy, is perhaps the most central notion in our political consciousness and our understanding of our own history.” *Id.*

² See generally Kathryn R. L. Rand, Note, *Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law*, 27 U. MICH. J.L. REFORM 277, 283-95 (1993) (describing the development of the United States and Americans’ concurrent growing realization of the importance of preservation).

³ *Id.* at 281.

⁴ Evidence of this hesitancy can be seen in some of the more transparent excuses that have been offered for the destruction of cultural property. See, e.g., Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cul-*

admiration and devotion, instances in which their cultural heritage is threatened almost inevitably take Americans by surprise.⁵ This seems true both for attitudes toward cultural preservation generally and for the legal regime governing the area specifically.⁶

Is this tendency to put cultural preservation issues on the back burner until exigencies prompt the American people to do otherwise unique, or is it common among cultures that a laundry list of more pressing societal concerns naturally takes center stage? This article examines these issues in the comparative context of the United States and Ireland and their major cultural heritage laws as applied to specific preservation controversies. As it turns out, the piecemeal American approach is not unique. While the outcomes of specific American controversies may mark the United States as aberrational, the root causes of the controversies spring from common, perhaps universal, human impulses such as the desire to preserve natural heritage while simultaneously advancing economically. Even though the legal system of a given nation has a role to play in regulating these impulses, political

tural Heritage During Peacetime, 28 YALE J. INT'L L. 183, 243-57 (2003). For example, in 2001 the Taliban Regime announced its plans to destroy Afghanistan's revered Bamiyan Buddha statues, purportedly in accordance with Islamic law, to prevent people from worshipping them as "false idols." *Id.* at 245. However, the Taliban specifically rejected offers from, among others, the Iranian government to purchase the statues and remove them from Afghanistan. *Id.* at 250. The Afghani Foreign Minister explained the rejection by saying such a sale "might make it appear that there is no place for [the statues] in Afghanistan, but that is not so . . . Islam says one Muslim should not give to another Muslim what he does not want to have." *Id.*

⁵ Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, *supra* note 1, at 586.

⁶ *Id.* at 565. Variations in our treatment of cultural property "also result from the largely reactive nature of our cultural property policies." *Id.* at 671.

A brief glimpse at the Antiquities Act of 1906 bears out Gerstenblith's assertion that U.S. law is primarily reactive. The government's approach as manifested in one of the United States' primary statutory vehicles for cultural preservation mirrors that of the general populace. The heart of the act is brief and broadly framed in § 431:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the . . . United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

U.S. Antiquities Act, 16 U.S.C. § 431 (2000).

Following this core statutory provision, there are no fewer than 140 specific provisions for specific monuments enacted in response to specific circumstances in section 431-32 of the U.S. Antiquities Act (2000).

pressures and attention to basic rules of human interaction may be more successful.

A few preliminary considerations are worthy of attention. Definitions of cultural property or heritage are many, diverse, and occasionally conflicting.⁷ The overarching idea is intuitively familiar, but a single definition encompassing all aspects of cultural heritage is difficult to find. Kanchana Wangkeo, in her article on cultural heritage preservation published in the *Yale Journal of International Law* suggests that *cultural heritage* refers to objects that should be cherished and preserved.⁸ This definition is purposefully broad and is used herein to encompass both man-made monuments (e.g., Stonehenge, the Eiffel Tower, and St. Peter's Basilica) and natural monuments identified with a particular people (e.g., America's Grand Canyon, Ireland's Hill of Tara, and the Swiss Alps). Natural monuments necessarily entail a number of distinct environmental and other concerns,⁹ such as land management policies¹⁰ and ecosystem issues.¹¹ Similarly, man-made monuments raise a host of sub-issues such as the mainte-

⁷ See Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, *supra* note 1, at 567-70.

⁸ Wangkeo, *supra* note 4, at 188. As in Wangkeo's article, the terms cultural heritage and cultural property are used interchangeably herein for stylistic purposes only. Wangkeo received her B.A. in Psychology and History from Duke University and a J.D. from Yale Law School. Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Kanchana Wangkeo, http://www.cmht.com/attorneys_wangkeo.php (last visited April 10, 2006). As a Fulbright Scholar, she conducted political science research in Thailand. *Id.* She was with a top defense law firm in New York, as well as, a judicial clerk to the Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York. *Id.*

⁹ Rand identifies cultural preservation as "an expansive and difficult-to-define concept involving a spectrum of issues ranging from tax advantages to environmental concerns." Rand, *supra* note 2, at 277.

¹⁰ See generally Colin Foley, Comment, *The Grand Staircase-Escalante National Monument: Balancing Public and Private Rights in the Nation's Lands*, 25 B.C. ENVTL. AFF. L. REV. 743 (1998) (exploring public land law with an emphasis on mining and takings jurisprudence); see generally Cynthia Heideman, Note and Comment, *Multiple Use Policies in the Grand Staircase-Escalante National Monument: Is Clinton's Promise Legitimate or Mere Political Rhetoric?*, 16 BYU J. PUB. L. 37, 39, 45-50 (2001) (examining the conflict between the Bureau of Land Management's development-friendly Multiple Use-Sustained Yield Policy and the Antiquities Act's preservation goals).

¹¹ Sanjay Ranchod, Note, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 568-582 (2001) (describing the "paradigm shift" recognizable under President Clinton's national monument designations towards protecting entire ecosystems rather than mere archaeological curiosities).

nance requirements of fixed monuments (e.g., Eiffel Tower, Trafalgar Square, and other large permanent fixtures) and portable artifacts (e.g., paintings, documents, and archaeological finds).¹² Each category of cultural property raises a number of seemingly disparate concerns;¹³ however, Wangkeo's broad definition remains appropriate here because professionals in each area of expertise are linked by a desire to ward off the negative effects of modern day development on cultural treasure. This article treats cultural preservation, environmental conservation, and their related sub-fields as one because of that common goal.¹⁴

In order to understand a society's current attitude towards cultural preservation, it is important to first examine past approaches. Following the introduction, Part II of this Article traces the history of cultural preservation legislation in the United States with particular emphasis on the U.S. Antiquities Act of 1906 (Antiquities Act),¹⁵ including major applications of the Antiquities Act in conjunction with or instead of other preservation-oriented legislation. Part II culminates with a detailed examination of President Clinton's controversial 1996 invocation of the Antiquities Act to create the Grand Staircase-Escalante Na-

¹² See, e.g., *infra* note 233 (discussing the possible dispositions of archaeological discoveries).

¹³ See, e.g., Scott Y. Nishimoto, *President Clinton's Designation of the Grand Canyon-Parashant National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act*, 17 J. ENVTL. L. & LITIG. 51 (2002) (comparing four classes of national monuments: prehistoric, historic, geologic, and biologic). Cf. Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, *supra* note 1, at 569 (distinguishing "art" as a designation of aesthetic and monetary value within an imperialist categorization, transcending the limits of time and place to speak of the human condition whereas "cultural objects" are valued as works of a distinct collectivity and incomprehensible outside of cultural context). But see Rand, *supra* note 2, at 277 (comparing the preservation experiences of the United States and Italy without distinguishing between moveable and fixed cultural treasures).

¹⁴ This treatment is also largely necessitated by the U.S. Antiquities Act examined herein, which protects both "the remnants of historic human cultures" and "the landscapes that supported them." Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1339 (2002). Hence, for purposes of this Article's examination of the tendency for such unassuming legislation to take segments of the public by surprise, the terms "conservation law" and "preservation law" are used interchangeably. While the two fields can be, and are, marked by myriad distinctions, it is this common characteristic that makes them relevant here; both are rooted in "reactions against the unrestrained exploitation of natural resources." *Id.* at 1371.

¹⁵ 16 U.S.C. §§ 431-33 (2000).

tional Monument in Utah.¹⁶ This incident is used in Part IV to typify the arguments and policies common to domestic cultural preservation debates.

Part III undertakes an examination of similar legislation in Ireland, primarily the National Monuments Act of 1930 and its amendments.¹⁷ The National Monument Act is traced through a number of substantial revisions, with what some thought was a high point in 1994¹⁸ after preservationists lost their battle to prevent construction of a government complex over Viking ruins at Wood Quay.¹⁹ Part III concludes with an examination of the recently revived debate in Ireland, brought about by preservationists' unsuccessful attempt to prevent the National Transport Authority's use of the newly amended Irish Act to build a major highway through ancient Viking ruins at Carrickmines.²⁰

Part IV compares and contrasts each nation's approach to preservation as manifested in the Grand Staircase and Carrickmines controversies. Though the results of each approach seem directly opposite, they fall in line with Wangkeo's international norm for the destruction of heritage sites during peacetime solely for economic purposes.²¹ Compliance with the norm results primarily from the factual differences of each case. However, there are enough similarities between the two controversies, particularly in the arguments made in court and in the media, to question why conformance with the international norm and domestic law still fails to settle the fights without such bitter-

¹⁶ Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996) [hereinafter Proclamation].

¹⁷ National Monuments Act, 1930 (Ir.).

¹⁸ "A decade ago, the National Monuments (Amendment) Act, 1994, was universally applauded. This amendment was meant to assure citizens that Wood Quay would never happen again." Editorial, *An Act Designed to Facilitate Roads and Real Estate*, IRISH TIMES, Aug. 17, 2004, at 14.

¹⁹ See generally THOMAS FAREL HEFFERNAN, WOOD QUAY: THE CLASH OVER DUBLIN'S VIKING PAST (1988).

²⁰ *An Act Designed to Facilitate Roads and Real Estate*, supra note 18, at 14. The plaintiff in the most recent lawsuit appealed the Irish High Court's decision upholding the constitutionality of the amendments. *M50 Castle Bid in Ruins*, MIRROR (Ir.), Sept. 9, 2004, at 8. However, one of the most prominent groups fueling the movement has accepted the Carrickmines result and is attempting to apply what it learned during the dispute to other sites threatened by road construction plans. Posting of Vincent Salafia to <http://groups.yahoo.com/group/carrickmines/message/1044> (Oct. 5, 2004, 00:09 EST) [hereinafter Salafia].

²¹ See Wangkeo, supra note 4, at 264-74.

ness,²² or why such showdowns are not prevented in the first place. Part IV concludes by recognizing that the negative aspects of future preservation controversies will be best minimized by forces outside any given legal regime.

II. PRESERVATION LAW IN THE UNITED STATES

A. General Policies & Attitudes

Context is key when it comes to the public's interest in preservation.²³ "Once objects are removed from the ground, they can be appreciated for their aesthetic appeal, but only if they are excavated scientifically can they also be appreciated for their scientific, historic and cultural values. It is particularly crucial that artifacts be excavated together and in association with architectural features"²⁴ This logical link between artifacts and the land on or in which they are located is reflected in the link between conservation policy and land management policy; the former is more readily understood in the context of the latter.²⁵

The initial American approach to public lands centered mainly on the government's view of "the vast public domain as a tremendous resource it could use for the growth and development of the nation, as well as an excellent source of revenue."²⁶ Legislation characteristic of this posture includes the Homestead Act of 1862, which granted 160

²² See James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 484-85 (1999); see also *infra* text accompanying note 100.

²³ Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 197-201 (2001).

²⁴ *Id.* at 199.

²⁵ "Cultural resources policies form an important adjunct to federal public land policy, and in many cases land management authority is structured around the need to protect cultural resources." Rebecca Tsosie, *Symposium: The Indian Trust Doctrine After the 2002-2003 Supreme Court Term: The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TUL. L. REV. 271, 284 (2003). Historically, America's pro-conservation policy arose after and in response to a period of more extractive land-use policy. See Foley, *supra* note 10, at 750. Thus, just as a given monument is more fully understood in the context of its physical surroundings, this Article endeavors to maximize appreciation for the American conservation movement by demonstrating its historical and temporal context.

²⁶ Foley, *supra* note 10, at 747.

acres of free federal land to each western settler²⁷ and made it easy for railroads to acquire federal lands. Each new state received federal land upon joining the Union,²⁸ and the federal government freely granted rights to exploit the natural resources of the land, particularly hard rock minerals.²⁹ "By 1890, 1.26 billion acres of the public domain were disbursed to individuals, states and private industry."³⁰

With a number of the federal government's goals achieved, the close of the nineteenth century coincided with the closing of the American frontier.³¹ This period witnessed the "birth of the conservation movement" and "public land law began its slow move toward the policy of retention."³² Both environmental and cultural rationales for preservation began to surface simultaneously in the 1890s, as the nation recognized that its historic objects, cultural objects,³³ and natural resources "were limited and in need of preservation."³⁴

²⁷ Homestead Act, 43 U.S.C. §§ 161-64 (repealed 1976); see also Foley, *supra* note 10, at 748.

²⁸ Foley, *supra* note 10, at 748.

²⁹ Homestead Act, 43 U.S.C. §§ 161-64 (repealed 1976).

³⁰ Heidi Biasi, *The Antiquities Act of 1906 and Presidential Proclamations: A Retrospective and Prospective Analysis of President William J. Clinton's Quest to "Win the West,"* 9 BUFF. ENVTL. L.J. 189, 195-97 (2002). "Some have described the era of disposition of federal lands from the Civil War on as the 'Great Barbecue – a generation's unparalleled plunder of the Nation's natural resources.'" Foley, *supra* note 10, at 750-51.

³¹ Foley, *supra* note 10, at 751.

³² *Id.* at 750. Biasi describes the legislative reaction as a "paradigm shift from expansionism and manifest destiny to preservation." Biasi, *supra* note 30, at 196.

³³ Rand, *supra* note 2, at 284. This confluence of cultural and environmental preservation also coincided with a "golden age in American archaeology and anthropology." John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archaeological and Anthropological Theory*, 70 UMKC L. REV. 1, 9 (2001). "[S]cience began to examine the ancient roots of contemporary remnant societies that were regarded as ends or objectives in themselves, rather than displaced links in an evolutionary chain, or losing contestants in a social contest for survival and advancement." *Id.* One of the archaeologists Ragsdale cites as participating in this movement, Edgar Hewett, became the chief architect of the U.S. Antiquities Act. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 482 (2003). Cf. Rand, *supra* note 2, at 284 (tracing the development of preservation as it relates to objects of cultural and historical significance through three periods, "each marked by a particular view of the purpose of . . . preservation: patriotic inspiration, aesthetic merit, and community").

³⁴ Foley, *supra* note 10, at 751.

B. Law, Legislation, and Executive Action

Since the early 1900s, as “the importance of the public lands to the growth of the nation dwindled,”³⁵ each branch of the government has taken up the conservationists’ mantle in varying forms and degrees.³⁶ Congress passed several pertinent pieces of legislation, including the Antiquities Act of 1906,³⁷ the Taylor Grazing Act of 1934,³⁸ the Historic Sites Acts of 1935 (HSA),³⁹ and the Federal Land Policy and Management Act of 1976 (FLPMA).⁴⁰ However, some of the most significant actions taken in regard to the nation’s natural resources

³⁵ *Id.* at 753. “At the same time, a new perspective, one that . . . embraced the values of stewardship and preservation, emerged.” *Id.*

³⁶ Though the actions of the legislature and executive are explicitly delineated here, the judiciary has, of course, been present in interpreting and (usually) sanctioning those actions as well. For specific examples, see *infra* Part II(B)(ii)(2).

³⁷ U.S. Antiquities Act, 16 U.S.C. §§ 431-32 (2000).

³⁸ Taylor Grazing Act of 1934, 43 U.S.C. § 315 (2004). The Act required the Department of the Interior to “classify certain . . . public lands as grazing lands, and to prohibit . . . activity on the rest.” Foley, *supra* note 10, at 752. This was the first time the federal government mandated “wide-scale land use planning of the public lands, and by so doing recognized ‘the exhaustion of the values which had made the public domain a dynamic force in building the country.’” *Id.* (quoting GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 34, 134 (1980)).

³⁹ Historic Sites Act of 1976, 16 U.S.C. §§ 461-67 (2004). The Act declared that “it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.” 16 U.S.C. §§ 461. The Act is unique among those listed here in making provisions to help preserve privately owned historic sites. 16 U.S.C. § 462(e); Rand, *supra* note 2, at 290. The HSA reflects a continuity of the historic preservation policy begun with the U.S. Antiquities Act. See Biasi, *supra* note 30, at 205.

⁴⁰ Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2005). FLPMA ended the officially sanctioned “disposition” phase of public land management, favoring effective management and preservation of the public domain. Foley, *supra* note 10, at 752. The FLPMA reflects legislative commitment to the environmental conservation strand, much as the HSA does for the historic preservation strand. See 16 U.S.C. §§ 461-67. FLPMA provides for the President or the Secretary of the Interior to make land withdrawals subject to a number of procedural limitations not found in the Antiquities Act, such as requiring Congressional approval for withdrawals over 5,000 acres intended to last more than twenty years and a public notice-and-comment period. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1040 (2000).

have been taken by the Executive Branch through the rigorous use of the Antiquities Act.⁴¹

1. Origins of the Antiquities Act

The impetus behind the Antiquities Act appears to have been the "desire of archaeologists to protect aboriginal objects and artifacts."⁴²

⁴¹ Particularly in the West, "conservation-oriented protected areas have been fashioned largely by executive action." John D. Lesly, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 290 (2001). "Although the Antiquities Act often escapes notice in conversations about important environmental legislation, it has, in fact, been one of the most powerful conservation tools of this century." Rasband, *supra* note 22, at 500. The Antiquities Act was also "unique in affording the President clear authority to set aside [public] lands for preservation purposes." Squillace, *supra* note 33, at 488.

In addition to the Antiquities Act, the President has also historically exercised an implied power to withdraw public lands from development based on legislative acquiescence. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (sanctioning this practice and affirming President Taft's declaration prohibiting oil and gas development on over three million acres of public lands). FLPMA, however, "repealed" this implied authority. Zellmer, *supra* note 40. Despite FLPMA's imposition of significant procedural mandates for future land withdrawals, including congressional approval for withdrawals of specific sizes and durations and a public notice and comment period, it leaves Antiquities Act powers intact. *Id.*

The 1891 General Revision Act (GRA) (codified as amended at 16 U.S.C. § 471) (repealed 1976) was widely used to set aside public lands containing timber. Zellmer, *supra* note 40, at 1038. While the GRA affords broad presidential discretion similar to the Antiquities Act, further treatment is foregone here because of the latter's comparatively wider applicability beyond timber lands. *Id.* In addition, Congress proved far more successful in circumscribing Presidential power under the GRA than under the Antiquities Act, revoking the power to create new reserves in six western states. *Id.* The GRA was also subject to the ultimate limitation of repeal in 1976. *Id.*

Finally, though the FLPMA can be thought of as a manifestation of Congress' active control in making public land reservations, it leaves Antiquities Act powers intact. *Id.* at 1040. By utilizing Antiquities Act powers instead of FLPMA, the President also avoids the Environmental Impact Assessment requirements of the National Environmental Policy Act. Justin J. Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 83-84 (1999).

⁴² Squillace, *supra* note 33, at 477. "[P]rivate collecting of artifacts on public lands by both professionals and amateurs threatened to rob the public of its cultural heritage." *Id.* Cf. Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, *supra* note 1, at 578 (contending that society looks to the preservation of European-based elements of society based on respect for the past while looking to the preservation of Native American cultures out of scientific curiosity and the desire for economic profit).

Legislative history suggests that the Antiquities Act was originally meant to protect "specific items of antiquity, such as ruins, pottery, and picture graphs"⁴³ and small areas of land on or in which they were found.⁴⁴ As enacted, the heart of the statute consists of a mere two sentences,⁴⁵ and yet there were concerns at the outset that it would be used on a scale far beyond what its brevity might initially suggest.⁴⁶ In fact, Congress had rejected earlier versions of the bill because of open-ended provisions regarding scientific, non-archaeological interests.⁴⁷ Nevertheless, the Antiquities Act, as adopted, incorporated those interests⁴⁸ and paved the way for the Executive Branch to exercise substantial and controversial discretion in the years to come.

2. The Antiquities Act in Action

Concerns over an expansive use of the Antiquities Act were born out almost immediately. The first national monument established under the Antiquities Act, the 1152-acre reservation encompassing Dev-

⁴³ Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument – A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 414 (1998). Cf. Squillace, *supra* note 33, at 485. "Hewett's bill established a middle ground between the 'postage stamp' archaeological sites favored by western legislators, and the large scale reservations that could be designated solely for their scenic beauty, as was favored by the Department of Interior." *Id.* Notwithstanding legislative history and congressional intent, the plain language of the act supports Presidential authority to protect large swaths of land. *See id.* at 486.

⁴⁴ Squillace, *supra* note 33, at 477.

⁴⁵ *Id.* at 476; *see also supra* text accompanying note 6.

⁴⁶ *See* Squillace, *supra* note 33, at 478. "By the time Congress enacted this law in 1906, it already knew what chief executives had done with the modestly expressed authority in the 1891 General Revision Act, so it took some care to confine reserves to the 'smallest area compatible with the proper care and management of the objects to be protected.'" Leshy, *supra* note 41, at 295. However this still left unqualified the phrase "objects of scientific or historic interest" which, though speculated to be a mere afterthought has proven vital in supporting an expansive interpretation of the Antiquities Act. *See* Harrison, *supra* note 43, at 415; *see also* Squillace, *supra* note 33, at 480.

⁴⁷ Harrison, *supra* note 43, at 415.

⁴⁸ "[T]he Department of the Interior consistently pushed for more expansive authority than was needed to address this specific problem [archaeological site exploitation], and the Department's persistence helps to explain why the language included in the final legislation was not as limiting as some in Congress may have preferred." Squillace, *supra* note 33, at 478 (internal citations omitted).

ils Tower, did not involve any aboriginal objects at all.⁴⁹ After that, President Theodore Roosevelt went on to what can be called a monument designation rampage, using the Antiquities Act to give full reign to his conservationist bent.⁵⁰ Roosevelt created eighteen national monuments in less than three years,⁵¹ including the reservation of over 800,000 acres for the Grand Canyon National Monument.⁵²

Thereafter, the Antiquities Act was invoked by every administration through President Carter, resulting in over 100 national monuments comprising about 70 million acres.⁵³ Though the Antiquities Act also supports the reduction of existing sites,⁵⁴ Presidents rarely exercised such authority.⁵⁵

a. Congressional Efforts to Curb Presidential Use of the Antiquities Act

The Antiquities Act has sparked a great deal of controversy since its inception,⁵⁶ an expected and perhaps unavoidable side effect of an act delegating broad discretion to a single government official. Congress has overseen a number of proposals to limit or abolish the authority granted to the Executive office under the Antiquities Act, but, with a handful of relatively minor exceptions, it has failed to limit that authority.⁵⁷ Most significantly, "congressional pique" over Roosevelt's creation of the Jackson Hole National Monument eventually led to an

⁴⁹ Quigley, *supra* note 41, at 79-80. "Such large reservations for 'scientific' objects undoubtedly surprised the congressional members who must have envisioned that 'the smallest area compatible' would be relatively small . . ." *Id.* at 80.

⁵⁰ *Id.*

⁵¹ Squillace, *supra* note 33, at 490.

⁵² U.S. Antiquities Act, 16 U.S.C. §§ 431-33 (2002); Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906).

⁵³ Mark Udall, *Scaling New Heights or Retreating from Progress: How Will the Environment Fare Under the Administration of President George W. Bush?*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 1, 12 (2000); see also Squillace, *supra* note 33, at 493 (describing the "surprising vigor" with which the six presidents immediately following Roosevelt took up the cause of proclaiming new monuments).

⁵⁴ Udall, *supra* note 53, at 14.

⁵⁵ See, e.g., Squillace, *supra* note 33, at 493-95.

⁵⁶ Udall, *supra* note 53, at 13.

⁵⁷ *Id.*; see also *supra* text accompanying note 43. While FLPMA delegates considerably less discretion to the Executive, it leaves Antiquities Act powers wholly untouched and, according to Leshy, "more of a congressional endorsement than a congressional repudiation of executive withdrawal authority." Leshy, *supra* note 41, at 298.

amendment barring future use of the Antiquities Act in Wyoming.⁵⁸ Though the collective will of the legislature has not led to subsequent significant limitations on this far-reaching executive power,⁵⁹ individual members of Congress have gone to great lengths to stymie actual protection efforts by blocking funds for management of designated monuments.⁶⁰ However, congressional action has completely dismantled very few national monuments.⁶¹

b. Court Challenges

The courts have consistently upheld the President's authority under the Antiquities Act.⁶² In fact, there has never been a successful legal challenge to any presidential use of the Antiquities Act.⁶³ Where the U.S. Supreme Court has interpreted the Antiquities Act, it has done so summarily.⁶⁴

In *Cameron v. United States*, the Court examined the propriety of the General Land Office's actions voiding Cameron's mining claims

⁵⁸ Leshy, *supra* note 41, at 297; U.S. Antiquities Act, 16 U.S.C. §§ 431(a), 451(a) (2000).

⁵⁹ Two years after the Carter Administration took action under FLPMA withdrawing approximately 115 million acres of Alaskan land from development, Congress did prohibit the President from making withdrawals above a certain size in Alaska without congressional approval in the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. § 3213(a) (2005). The actual effect of ANILCA on the Antiquities Act power is ambiguous. *See generally* Squillace, *supra* note 33, at 505-06.

⁶⁰ Squillace, *supra* note 33, at 500.

⁶¹ Leshy, *supra* note 41, at 297. "The handful of exceptions have involved very small areas of little national significance that were either turned over to state or local governments . . . or put back into ordinary national forest status . . ." *Id.*

⁶² *See, e.g.,* Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1179-80 (D. Utah 2004); *see also* *Cameron v. United States*, 252 U.S. 450 (1920) (the designation of the Grand Canyon as a national monument was a valid use of the President's authority under the Antiquities Act); *Cappaert v. United States*, 426 U.S. 128 (1976) (proclamation by the President using his withdrawal authority to take the Devil's Hole tract of land and accompanying water from the public domain and combining it with the Death Valley National Monument, was a valid use of presidential authority under the Antiquities Act); *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980) (when proclaiming national monuments under the Antiquities Act, the President is not subject to the requirements of the National Environmental Policy Act).

⁶³ *Rasband, supra* note 22, at 501. *Cf. United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (declaring certain Antiquities Act penalty provisions unconstitutional).

⁶⁴ *See, e.g., Cappaert*, 426 U.S. at 128; *Cameron*, 252 U.S. at 450.

on the South Rim of the Grand Canyon.⁶⁵ Cameron brought suit challenging the Office's action, as the mining claims had enabled him to charge lucrative tourist fees.⁶⁶ Though the Court focused primarily on the appropriateness of the Office's action, it also responded to Cameron's argument that President Roosevelt's designation of the Grand Canyon National Monument was illegal because the canyon lacked any historical interest.⁶⁷ The Court's response, in its entirety, was:

The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.⁶⁸

In *Cappaert v. United States*, the boundaries of "scientific interest" were again broadly construed.⁶⁹ Devil's Hole in Death Valley National Monument was home to a unique, endangered species of the pupfish.⁷⁰ The Government sued to prevent a rancher from pumping groundwater from an area near the Devil's Hole formation.⁷¹ In its opinion, the Court rejected Cappaert's claim that the designation of Death Valley as a national monument exceeded presidential authority.⁷² Noting the plain language of the Act, the Court declared "the pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest,'" and thus designation was authorized under the Act.⁷³

The scarce lower court authority on the Antiquities Act has remained consistent with the Supreme Court's broad interpretation, adding a few new and significant wrinkles. In *Wyoming v. Franke*,⁷⁴ the

⁶⁵ *Cameron*, 252 U.S. at 454.

⁶⁶ *Id.* at 454-55.

⁶⁷ *Id.* at 455. Apparently, Cameron did not challenge the size of the designation as the Court did not address the issue. Harrison, *supra* note 43, at 417.

⁶⁸ *Cameron*, 252 U.S. at 455-56.

⁶⁹ *Cappaert*, 426 U.S. at 142.

⁷⁰ *Id.* at 133.

⁷¹ *Id.* at 134-35.

⁷² *Id.* at 141-42.

⁷³ *Id.* (citing *Cameron*, 252 U.S. at 451-56).

⁷⁴ 58 F. Supp. 890 (D. Wyo. 1945).

Federal District Court of Wyoming approved President Franklin Roosevelt's designation of Jackson Hole National Monument, articulating an "arbitrary and capricious" standard of review for determining the propriety of the Executive's invocation of the Antiquities Act.⁷⁵ The District Court also held that the same standard of review applied to challenges based on the size of the designation.⁷⁶ Of even greater significance, the court explicitly stated in *Franke* that where Congress had delegated the ability to the President to make a judgment call, as with the Antiquities Act, the President's motive in exercising that judgment is not subject to judicial review.⁷⁷ In *Alaska v. Carter*,⁷⁸ the Federal District Court of Alaska upheld President Carter's withdrawal of vast amounts of acreage under the FLPMA.⁷⁹ The court noted that the restrictions of the National Environmental Policy Act (NEPA)⁸⁰ apply only to agency action and not executive action.⁸¹ The court held that even when an agency, such as the Department of the Interior recommends monument designation, subsequent designation by the President pursuant to the Antiquities Act is not subject to NEPA, so long as the President made the initial recommendation request.⁸² Finally, in *Anaconda Copper Co. v. Andrus*,⁸³ the Federal District Court of Alaska again rejected a challenge to President Carter's withdrawals of public land for preservation, primarily on the basis of *Cameron* and *Cappaert*.⁸⁴

3. "The Utah Event"

The history of the Antiquities Act sets the stage for perhaps its most contentious use to date and certainly the most disputed in recent memory—President Clinton's creation of Utah's Grand Staircase-

⁷⁵ *Franke*, 58 F. Supp. at 894; Rasband, *supra* note 22, at 502.

⁷⁶ *Franke*, 58 F. Supp. at 896.

⁷⁷ *Id.*; see also *U.S. v. George S. Bush & Co.*, 310 U.S. 371 (1940). The Court said it could not review the President's exercise of his discretion to impose a tariff on canned clams from Japan under the Tariff Act because Congress delegated the authority to him to make the tariff. *Id.* at 376, 380.

⁷⁸ 462 F. Supp. 1155 (D. Alaska 1978).

⁷⁹ See *supra* text accompanying note 63.

⁸⁰ 42 U.S.C. §§ 4321-61 (2005).

⁸¹ *Carter*, 462 F. Supp. at 1159-60.

⁸² *Id.* at 1160.

⁸³ 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980).

⁸⁴ *Andrus*, 14 Env't Rep. Cas. (BNA) at 1855.

Escalante National Monument (GSE).⁸⁵ On September 18, 1996, President Clinton stood near the same spot on the Grand Canyon's South Rim as Teddy Roosevelt when the latter announced the creation of the Grand Canyon National Monument.⁸⁶ "With the stroke of his pen,"⁸⁷ President Clinton dealt a decisive blow in "one of the decade's most virulent conservation fights."⁸⁸ Presidential Proclamation No. 6920⁸⁹ established GSE and effectively blocked future development⁹⁰ in what is now the nation's largest national monument consisting of nearly 1.7 million acres.⁹¹

The President's move took the nation by surprise,⁹² and Utah citizens and officials were furious.⁹³ Three lawsuits were filed,⁹⁴ and the state's congressional representatives introduced a number of bills to either repeal the designation or curb the President's power to take fu-

⁸⁵ Proclamation, *supra* note 16, at 50, 223. "The Utah Event" was the code term used by Clinton Administration staff to refer to and keep relatively secret the impending announcement. See Rasband, *supra* note 22, at 510.

⁸⁶ *Clinton Acts to Protect Utah Canyons; Move Blocks Development of Coal Mines*, ST. LOUIS POST-DISPATCH, Sept. 19, 1996, at 1A.

⁸⁷ Lars-Erik Nelson, Editorial, *Line-Item Veto Will Give Bill the Power to Punish*, N.Y. DAILY NEWS, Sept. 23, 1996, at 23.

⁸⁸ Richard Benedetto & Linda Kanamine, *President Protects Utah Lands: Clinton Sides With Environmentalists, Creates Monument*, USA TODAY, Sept. 19, 1996, at 3A.

⁸⁹ See generally Proclamation, *supra* note 16.

⁹⁰ Tom Rhodes, *President in Grand Play for Green Vote*, TIMES, Sept. 19, 1996, § Overseas News.

⁹¹ Benedetto, *supra* note 88, at 3A. The GSE "dwarfs the next biggest [national monument], Alaska's 600,000-acre Cape Krusenstern National Monument." *Id.*

⁹² *Learning From the Monument: An Introduction*, 21 J. LAND RESOURCES & ENVTL. L. 509, 509 (2001).

⁹³ Utah's Congressional delegation,

[W]hich had only learned of the President's intentions in a Washington Post story eleven days before the proclamation, described the President's action as a shameful and arrogant act of political opportunism . . . Residents of Kane and Garfield counties, the southern Utah counties within which the Monument is located . . . hung President Clinton and Interior Secretary Bruce Babbitt in effigy and subjected them to vituperative criticism.

Rasband, *supra* note 22, at 484-85.

⁹⁴ See *Mountain States Legal Found. v. Clinton*, No. 97CV 0836G (D. Utah filed Nov. 5, 1997) at 3-4 (citation omitted); *Utah School & Institutional Trust Lands Admin. v. Clinton*, Civ. No. 97CV 492B (D. Utah filed June 25, 1997); *Utah Assoc. of Counties v. Clinton*, Civ. No. 97CV 0479B (D. Utah filed June 23, 1997). See also Rasband, *supra* note 22, at 514-18.

ture action in Utah under the Antiquities Act.⁹⁵ Two highly critical government reports emerged.⁹⁶

a. Explaining the Backlash

A number of arguments have been advanced to explain the upheaval resulting from President Clinton's designation, and they can generally be divided along substantive and procedural lines.⁹⁷ Substantively, critics attacked the designation for its predicted effects on the state and local economies, particularly relating to school trust lands and the resulting quality of life issues.⁹⁸ Procedurally, the timing of the designation was attacked as politically motivated, and the noticeable lack of local input into the President's decision was used to highlight the designation's "undemocratic" character.⁹⁹

i. *Lost Revenues*

Utah's coal industry bore the brunt of the GSE designation's economic consequences.

With the designation . . . President Clinton effectively prevented the development of an estimated: (1) sixty-two billion tons of coal, worth approximately \$221 to \$312 billion; (2) 2.6 to 10.5 trillion cubic feet of coal-bed methane, worth approximately \$2 to \$17.5 billion; and (3) 270 million barrels of oil, worth approximately \$20 million to \$1.08 billion.¹⁰⁰

⁹⁵ See Rasband, *supra* note 22, at 530-32.

⁹⁶ See Staff of Senate House Comm. on Resources, 105th Cong., *Monumental Abuse: The Clinton Administration's Campaign of Misinformation in the Establishment of the Grand Staircase-Escalante National Monument*, http://resources.committee.house.gov/archives/105cong/parks/utah_monument_report.htm (Oct. 7, 1998) (last visited May 12, 2005); *Behind Closed Doors*, H.R. No. 105-D, 105th Cong., 1st Sess. (Comm. Print 1997), <http://thomas.loc.gov/cgi-bin/query/R?r105:FLD001:E02259-E02264> (last visited May 12, 2005).

⁹⁷ See, e.g., Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 *ECOLOGY L.Q.* 707, 720-25 (2002).

⁹⁸ For instance, the effect on ranchers and the burdens associated with increased tourism. See Eric C. Rusnak, *Note: The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 *OHIO ST. L.J.* 669, 709-15 (2003).

⁹⁹ Lin, *supra* note 97, at 720-23.

¹⁰⁰ Quigley, *supra* note 41, at 100. Cf. Glenn Kessler, *A Monumental Act*, *NEWSDAY*, Sept. 19, 1996, at A7 (noting that some estimates of coal value in the

The majority of the state's mining prospects were located in the Monument's Kaiparowits Plateau.¹⁰¹ Two companies held mineral leases with plans to develop the coal at the time of the monument's designation.¹⁰² Naturally, the loss of potential jobs promised by the coal development projects worried residents and state politicians alike.¹⁰³ One commentator predicted that increased tourism resulting from the monuments would more or less offset the economic losses in the coal and other natural resource industries.¹⁰⁴ However, this potential tourism benefit was countered by arguments that increased tourism would place additional strains on emergency and law-enforcement resources.¹⁰⁵

ii. School Trust Fund Money

Utah residents were further angered that approximately 176,600 acres of Utah's school trust lands were included within the newly des-

region were as high as \$1 trillion, though that number was dismissed by the administration as "tremendously speculative"). See also Rusnak, *supra* note 98, at 704-07.

¹⁰¹ See Rasband, *supra* note 22, at 504.

¹⁰² See *id.* at 506, 523. "Monument designation effectively hindered Andalex from mining on this land, and the Department of the Interior eventually swapped these leases for coal leases in other parts of Utah." Ranchod, *supra* note 11, at 557. Nonetheless, the estimated one thousand new jobs and \$16.7 million annual payroll promised by Andalex's original plans never came to pass. Rusnak, *supra* note 98, at 705-06.

As of 1998, Conoco's plans for development were losing momentum as well. See *Grand Staircase-Escalante National Monument Draft Environmental Impact Statement*, http://www.ut.blm.gov/monument/Monument_Management/Initial%20Planning/deis/chapter_3/3_L.html (last visited Feb. 4, 2005). While Utah yields its share of dry wells, the occasional success can be valuable to the state government. See Paul Foy, *Wildcatter Strikes Oil in Utah, Has 2 Wells*, VENTURA COUNTY STAR, May 5, 2005, § Business and Stocks, at 1. "Oil companies pay 12.5 percent of the value of oil taken from federal lands – and half of that comes back to Utah, which shares some of it with local governments." *Id.*

¹⁰³ Lin, *supra* note 97, at 723; Benedetto, *supra* note 88, at 3A. "Kanab, Utah, residents, many of whom were counting on mining jobs, staged a town shutdown in protest." *Id.*; see also Biasi, *supra* note 30, at 235 (providing another estimate of the economic consequences of the designation).

¹⁰⁴ Lin, *supra* note 97, at 723.

¹⁰⁵ See Ann E. Halden, *The Grand Staircase-Escalante National Monument and the Antiquities Act*, 8 FORDHAM ENVTL. L. REV. 713, 729 (1997); see also Rusnak, *supra* note 98, at 711-15.

ignated national monument.¹⁰⁶ Although development of trust lands within the monument was permissible under the designation, it would have been "economically impractical."¹⁰⁷ Local communities¹⁰⁸ depended on trust fund revenue,¹⁰⁹ and "many Utahns . . . did not trust the Clinton administration to fulfill its promise of respecting the mandate of Utah's trust lands within the Monument's boundaries."¹¹⁰

iii. Clinton's Grab for the Green Vote

Much of the lingering rancor over President Clinton's designation stemmed from what were perceived by many as his extremely political motivations for creating GSE.¹¹¹ Utah officials, local citizens, and commentators have asserted that while President Clinton may have acted within the law, his actions betrayed the citizens' trust out of vin-

¹⁰⁶ "Upon statehood, Congress, under the Utah Enabling Act, granted the State of Utah four sections (sections 2, 16, 32, and 36) in each township for the support of public schools." Quigley, *supra* note 41, at 90-91.

¹⁰⁷ *Id.* at 92.

¹⁰⁸ Even after the Secretary of the Interior and Utah Governor negotiated a land exchange deal, State Representative Tom Hatch complained that his constituents were "really getting the shaft. We'd always hoped we could leverage those trust lands for the benefit of our local economies. What the governor has done is taken that opportunity away forever." Jason M. Keith, *The 1998 Utah Schools and Lands Exchange Act: Project BOLD II*, 19 J. LAND RESOURCES & ENVTL. L. 325, 343 (1999).

¹⁰⁹ One billion dollars of funds had already been earmarked for schools from expected mineral revenues earned from the land. Nelson, *supra* note 87, at 23.

¹¹⁰ See Keith, *supra* note 108, at 343-44; Rusnak, *supra* note 98, at 714 (stating that many Utahns doubt that designating the area with monument status will protect the land as Clinton claimed). President Clinton later did fulfill this promise by giving the state valuable Federal land. Holly Chamberlain, *A Plan of Action: A New Alternative to Traditional School Trust Land Exchanges in the West?*, 23 J. Land Res. & Envtl. L. 241, 257-59 (2003).

¹¹¹ See, e.g., Rhodes, *supra* note 90; Donald Lambro, *Heritage Memo Calls Clinton's Late Executive Orders 'Improper, Illegal'*, WASH. TIMES, Feb. 19, 2001, at A1; Lisa Riley Roche, *Utahns Unsure About Hillary*, DESERET MORNING NEWS, July 27, 2004; Editorial, *Living with the Monument*, DESERET MORNING NEWS, Apr. 21, 2004.

As years roll by, people will forget, or perhaps misunderstand, the widespread opposition in Utah to this monument. It had very little to do with the need to preserve much of the land within the monument, which is spectacular and awe-inspiring. It had everything to do with the way Clinton treated Utahns in the process - as little more than an insignificant species that happened to live near the monument he was creating.

Id.

dictive, partisan, and/or selfish reasons.¹¹² Following the designation, the administration confirmed to some extent what many Utahns already suspected: that the monument symbolized, at best, recognition of Utah's dispensability in Clinton's upcoming reelection effort and, at worst, punishment for the state's lack of support.¹¹³ The White House portrayed the decision as "the final confrontation between the industrial Old West and the environmentally conscious New West, in essence the fight between Republicans and Democrats."¹¹⁴ Internal administration communications reveal that the designation was aimed, in part, at securing the environmentalist vote,¹¹⁵ and the press consistently highlighted that connection in the aftermath of the event.¹¹⁶

¹¹² "[I]n the case of the Grand Staircase, the very virtues that are properly extolled by preservationists in advocating how man should interact with wild lands seem to have been largely violated in their acquisition." Rasband, *supra* note 22, at 534; see also Quigley, *supra* note 41, at 88-90. That is, though the move was designed to protect unique environmental features for the benefit of the nation, the manner in which Clinton achieved this goal cut that portion of the nation that would arguably be most affected by the designation out of the process. "The Clinton campaign believe[d] the president [could] win Arizona . . . [B]y contrast, Clinton owe[d] little politically to the deeply conservative state of Utah." Kessler, *supra* note 100, at A7. Senator Bob Bennett declared that Clinton "demonstrated an outrageous, arrogant approach to public policy." Nelson, *supra* note 87, at 23. The proclamation was termed by many disgruntled Utahans as "the mother of all land grabs." Rusnak, *supra* note 98, at 671.

¹¹³ See Nelson, *supra* note 87, at 23. "There is a message intended." *Id.* (quoting an anonymous White House official). Clinton had virtually no hope of winning Utah in the 1996 election; its two Republican senators were notoriously at odds with Clinton's administration, and its governor was a member of the same rival party. *Id.* Clinton could "afford to ignore Utah and three electoral votes he wouldn't have gotten from the conservative state anyway." *Utah Strikes Back*, WASH. TIMES, June 30, 1997, at A16. Indeed, 54% of Utah's voters supported Bob Dole and a mere 33% voted for the incumbent president. See 1996 Presidential Election Results - Utah, available at <http://uselectionatlas.org/USPRESIDENT/state.php?year=1996&fips=49&f=1>.

¹¹⁴ Rhodes, *supra* note 90, § Overseas News.

¹¹⁵ Quigley, *supra* note 41, at 89.

¹¹⁶ See, e.g., Benedetto, *supra* note 88, at 3A; Rhodes, *supra* note 90, § Overseas News. "Clinton . . . sought to burnish his environment credentials . . ." Kessler, *supra* note 100, at A7 (noting the attendance of environmental activist actor Robert Redford at Clinton's proclamation designating GSE, which took place near the same spot where Roosevelt dedicated an Arizona monument in 1908). "Clinton [was] eager to link himself with Roosevelt, a fierce environmentalist." *Id.*

iv. *Nobody Told Us*

No single issue related to the establishment of GSE spurred as much discontent as President Clinton's failure to solicit and consider local input regarding the designation.¹¹⁷ Local critics frequently lamented that local communities would shoulder the bulk of the consequences for decisions made in faraway Washington.¹¹⁸ Residents had thus expected some form of notice and the opportunity to offer feedback. Remarkably, even Utah's congressional representatives were intentionally kept in the dark.¹¹⁹ Compounding the sense of betrayal and ambush was that preliminary action regarding wilderness protection for the designated GSE lands had been underway for some time, with local officials and representatives actively participating in the process.¹²⁰ While it is technically true that Clinton's actions did not constitute a "land grab" since the lands were already federally owned,¹²¹ the people who for years lived and worked the land in the manner to which they were accustomed saw their voice in its future effectively silenced.¹²²

¹¹⁷ See, e.g., Lin, *supra* note 97, at 720; Ranchod, *supra* note 11, at 556. "To amplify President Clinton's disconnect with those in the State of Utah, Clinton conducted the Grand Staircase-Escalante proclamation by television while he was in Arizona." Biasi, *supra* note 30, at 228.

¹¹⁸ Lin, *supra* note 97, at 720-21. See also Frederick Turner, *Oh, Wilderness*, OUTSIDE MAGAZINE, Apr. 1997, http://outside.away.com/magazine/0497/9704fe_wild.html (last visited May 12, 2005). Long-time local residents regard "federal presence on the lands as unwarranted and intrusive." *Id.* Disparate effects are unsurprising, given that public land makes up a disproportionately higher percentage of western states. Jeffrey B. Teichert, *The Enlbra Doctrine and Preserving the Unique Rural Cultures of the West*, 13 UTAH BAR J. 10, 12 (2000).

¹¹⁹ See 143 CONG. REC. H8398 (daily ed. Oct. 6, 1997). President Clinton purportedly assured Utah's Governor on the eve of the proclamation that the designation would not occur. Biasi, *supra* note 30, at 228.

¹²⁰ "Clinton interfered with protection of Utah lands that were already under consideration by a variety of agencies to become protected lands." Rusnak, *supra* note 98, at 693. See also Quigley, *supra* note 41, at 67-77 (chronicling the multiple surveys and proposed bills relating to Utah wilderness designation). The fact that the Clinton designation went well beyond any size estimate submitted for wilderness protection by Utah officials undoubtedly led to the claim in the most recent lawsuit that the administration violated the Antiquities Act by failing to limit the size of the monument to the smallest area necessary to preserve the protected objects. *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1177 (D. Utah 2004).

¹²¹ Lin, *supra* note 97, at 722.

¹²² *Id.*; see also Turner, *supra* note 118; Edward J. Heisel, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 ECOLOGY L.Q. 229,

b. Results of the Backlash

The three lawsuits seeking to overturn Clinton's designation were eventually consolidated¹²³ and disposed of by summary judgment in favor of the President.¹²⁴ Several legislative proposals were introduced in response to President Clinton's designation with the intent of curtailing or prohibiting future use of the Antiquities Act, but the legislative drive went nowhere.¹²⁵ Utah's economic and mineral lease concerns were addressed by federal land-swap deals, wherein the federal government exchanged other federal lands—and cash for the school trust lands and other interests within the designated monument area.¹²⁶

The procedural issues saw markedly contrasting dispositions. Clinton's effort to appease environmentalists paid off in the form of reelection and positive responses from a number of commentators.¹²⁷ The bitterness resulting from Clinton's lack of consultation with local citizens, however, persisted long after his term of office ended.¹²⁸ The enduring debate and criticism that has surrounded the Antiquities Act since its inception is not surprising given its "antidemocratic" nature.¹²⁹ What is surprising, however, is that such turmoil and conflict

306 (1998) (describing the same sense of transgressed local entitlement when federal land is swapped out for private land).

¹²³ *Utah Ass'n of Counties*, 316 F. Supp. 2d at 1172.

¹²⁴ *Id.*

¹²⁵ *See Utah Ass'n of Counties v. Clinton*, 1999 U.S. Dist. LEXIS 15852, *56 (D. Utah 1999) (noting defendant's argument and citation to 144 CONG. REC. H9790 (1998)).

¹²⁶ *Id.* at *27-28. The land swap deals took care of the mineral leases too- they received federal lands rich in mineral resources in return for the school trust lands. Chamberlain, *supra* note 110, at 257-58.

¹²⁷ *See, e.g.,* Rasband, *supra* note 22, at 486. "[W]ilderness advocates were almost as hyperbolic in their praise of President Clinton as the counties were in their criticism." *Id.* "[I]f history is any guide, Clinton will be considered to have an [sic] commendable environmental record . . ." Biasi, *supra* note 30, at 227. *But see* Heideman, *supra* note 10, at 67 (maintaining that the Bureau of Land Management is not currently "managing the Grand Staircase Monument in compliance with governing law," which mandates preservation).

¹²⁸ *See, e.g.,* Donna Kemp Spangler, *SUWA Letter Aims to Win Support for Monument*, DESERET NEWS, Oct. 7, 2003, at B01; Ron St. Germain, *Utah Offers New Activities, Views of Life*, LANSING STATE JOURNAL, Aug. 5, 2001, at 9C. *Cf.* Paul Larmer, *Controversial Monument Here to Stay*, DENVER POST, Apr. 20, 2003, at E-06. "Old West resentments die harder than the Old West itself." *Id.*

¹²⁹ Lin, *supra* note 97, at 725-26; Klein, *supra* note 14, at 1403-04 (describing the Antiquities Act as "the statute that politicians love to hate").

has never been lessened by any significant remedial action.¹³⁰ This lingering effect of the Utah Event will be revisited after an examination of a similar controversy that recently took place across the Atlantic Ocean.

III. PRESERVATION LAW IN IRELAND

A. General Policies and Attitudes

Ireland's pride in its national heritage is in many ways similar to that of other nations, particularly the United States.¹³¹ However, Ireland faces at least one problem that the United States has not been forced to confront with the same urgency.¹³² The Emerald Isle is rich both in history and artifacts¹³³ but limited by land available to house its relics and simultaneously support the implements of modern day life.¹³⁴ This dilemma becomes more readily apparent in Ireland's preservation policy over the course of history,¹³⁵ as living space becomes

¹³⁰ See Klein, *supra* note 14, at 1336-37, 1403-04.

¹³¹ Ireland, CULTURELINK NETWORK, <http://www.unesco.org/culturelink/culpol/ie.html> (last modified Sept. 9, 2001) (last visited May 12, 2005). "One of the main cultural characteristics of the Irish population is a preoccupation with cultural identity and national character at the intellectual and artistic level." *Id.*

¹³² Rand states that "[b]ecause preservation is a relatively recent concern in the United States, and because the United States is a relatively young country, these problems [of balancing preservation and progress] have not developed in America to the same extent that they have in Europe." Rand, *supra* note 2, at 295.

¹³³ "Ireland abounds in national monuments. Throughout most of the country . . . one runs into them . . ." HEFFERNAN, *supra* note 19, at 69.

¹³⁴ With a total land area of approximately 68,900 square kilometers, Ireland's roughly 3.9 million citizens occupy an area slightly larger than West Virginia. Ireland, CIA WORLD FACTBOOK 2004, <http://www.odci.gov/cia/publications/factbook/print/ei.html> (last visited May 12, 2005). There are approximately 17.7 square meters of land per Irishman. *Id.* By comparison, there are approximately 31.27 square meters of land per American. United States, CIA WORLD FACTBOOK 2004, <http://www.odci.gov/cia/publications/factbook/print/us.html> (last visited May 12, 2005).

The rate of redevelopment and excavation in urban centers in Ireland during the late 1980s was particularly exceptional. GINA JOHNSON, THE HERITAGE COUNCIL, REVIEW OF URBAN ARCHAEOLOGY RESEARCH § 3.3.6 (2000), <http://www.heritagecouncil.ie/publications/archresearch/10.html>.

¹³⁵ Particularly in the early twentieth century, the pace of urban social and commercial development quickened dramatically. JOHNSON, *supra* note 134, at § 3.3.1.

increasingly scarce and the capacity to juxtapose museums and malls becomes increasingly limited.¹³⁶

B. Law, Legislation, and Ministerial Action

1. The National Monument Act in History

Though various European regulations may affect Irish heritage sites,¹³⁷ Ireland's primary piece of preservation legislation is the National Monuments Act.¹³⁸ The National Monuments Act of 1930 defined the term "monument" as:

any artificial . . . structure . . . affixed or not affixed to the ground and any . . . natural product . . . which has been artificially carved, sculptured or worked upon or which . . . appears to have been purposely put or arranged in position and any prehistoric or ancient tomb, grave or burial deposit [but not in-

¹³⁶ Similar problems have been faced by Florence, Italy, and its becoming a "museum city." See Rand, *supra* note 2, at 303-05.

¹³⁷ For instance, violation of certain EC directives relating to environmental impact assessment studies can jeopardize funding for projects. See, e.g., Alison Healy, *Council Confident of Making Motorway Deadline*, IRISH TIMES, Jan. 7, 2004, at 5; Dunne v. Minister for the Environment, [2004] I.E.H.C. 304 (7th September, 2004) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2004/304.html> (last visited September 10, 2005); Review of EIA of South Eastern Motorway, Dublin, European Commission, Directorate-General Regional Policy, July 2003, http://www.derossa.com/fileDownloads/kampsax_Report.doc (last visited May 12, 2005) [hereinafter Kampsax Report].

¹³⁸ National Monuments Act, 1930 (Act No. 2/1930) (Ir.). Though the purposes of the Irish Act are generally the same as the original motive behind the U.S. Antiquities Act (archaeological preservation), the Irish Act is different in that it had a number of statutory predecessors. The Irish Church Act of 1869 authorized the Church Temporalities Commissioners to protect, via a Board of Works, any church or ecclesiastical ruin deemed to be of historical or antiquarian interest and in need of conservation, but no longer used for public worship. Rena Lohan, *The Archives of the Office of Public Works and Their Value for Local History*, J. IRISH SOC'Y ARCHIVES (1998), http://www.nationalarchives.ie/topics/OPW/LH_archives.html (last visited May 12, 2005). Later, the Ancient Monuments Protection Act of 1882 empowered the Board to accept the ownership or guardianship of specific non-ecclesiastical Irish monuments. *Id.* Lastly, the Ancient Monuments Protection Act of 1892 "extended the provisions of the 1882 Act to any ancient or medieval structure of historic or architectural interest, as it was realized that not every worthwhile monument of this kind had been vested by the Church Act." *Id.*

cluding] any building . . . habitually used for ecclesiastical purposes.¹³⁹

"National monument," in turn, referred to:

a monument or the remains of a monument the preservation of which is a matter of national importance by reason of the historical, architectural, traditional, artistic, or archaeological interest attaching thereto . . . and . . . in addition to the monument itself, the site of the monument and the means of access thereto and also such portion of land adjoining such site as may be required to fence, cover in, or otherwise preserve from injury the monument or to preserve the amenities thereof.¹⁴⁰

As these definitions suggest, the general provisions of the Irish legislation were, and remain, noticeably more lengthy and complex than its American equivalent. Specific provisions of the National Monuments Act without counterparts in the Antiquities Act include those governing: (1) state acquisition of private property,¹⁴¹ (2) removal of national monuments to museums,¹⁴² (3) the establishment of a National Monuments Advisory Council,¹⁴³ and (4) burial sites in national monuments.¹⁴⁴ More importantly, however, are those unique provisions governing disposition of state-owned national monuments, which actually allow for demolition, removal, or other alterations with the consent of designated officials.¹⁴⁵

The National Monuments (Amendment) Act of 1954 affected a number of minor changes to the original act.¹⁴⁶ For example, the 1954 amendment directed the Commissioners of Public Works to publish periodic lists of monuments, taking into account the reports of the Ad-

¹³⁹ National Monuments Act, 1930 (Act. No. 2/1930) (Ir.).

¹⁴⁰ National Monuments Act, 1930 (Act. No. 2/1930) (Ir.). The Act also specifically incorporated all artifacts covered by the 1882 Ancient Monuments Protection Act. National Monuments Act, 1930 (Act. No. 2/1930) (Ir.). *See supra* text accompanying note 138.

¹⁴¹ National Monuments Act, 1930 (Act No. 5/1930) (Ir.).

¹⁴² National Monuments Act, 1930 (Act No. 13/1930) (Ir.).

¹⁴³ National Monuments Act, 1930 (Act No. 21/1930) (Ir.).

¹⁴⁴ National Monuments Act, 1930 (Act No. 17/1930) (Ir.).

¹⁴⁵ National Monuments Act, 1930 (Act No. 14/1930) (Ir.). Most national cultural preservation laws lack specific destruction-upon-consent provisions such as these. Wangkeo, *supra* note 4, at 197.

¹⁴⁶ National Monuments (Amendment) Act, 1954 (Act No. 37/1954) (Ir.).

visory Council and listing "such other monuments as the Commissioners think fit."¹⁴⁷ The National Monuments Act was amended again in 1987, adding provisions restricting the use of "archaeological detection devices,"¹⁴⁸ protecting historic shipwreck sites,¹⁴⁹ and increasing penalties for violations of the Act.¹⁵⁰ The 1987 amendments also (1) replaced the Advisory Council with the Historic Monuments Council, comprised by members from a number of Irish universities and scientific academies,¹⁵¹ (2) incorporated the lists of monuments created by the 1954 amendments into a more expansive Register of Historic Monuments,¹⁵² and (3) expanded the definition of "monument."¹⁵³

Perhaps because the National Monuments Act has not been used to preserve immense swaths of land,¹⁵⁴ monument designations have generally been less prone to attack than in the United States.¹⁵⁵ Since property protected by the National Monuments Act includes only the adjoining land "required to . . . otherwise preserve" monuments,¹⁵⁶ the language and history¹⁵⁷ of the Act simply do not lend themselves to the protection of large-scale landscapes. Consequently, the National Monuments Act has not engendered many suits regarding appropriate monument size.¹⁵⁸ Case law construing the National Monuments Act

¹⁴⁷ National Monuments (Amendment) Act, 2004 (Act No. 8/2004) (Ir.).

¹⁴⁸ National Monuments (Amendment) Act, 1987 (Act No. 2/1987) (Ir.).

¹⁴⁹ National Monuments (Amendment) Act, 1987 (Act No. 17/1987) (Ir.) (§ 3).

¹⁵⁰ National Monuments (Amendment) Act, 1987 (Act No. 17/1987) (Ir.) (§§ 17, 23).

¹⁵¹ See National Monuments (Amendment) Act, 1987 (Act No. 17/1987) (Ir.) (§ 4).

¹⁵² National Monuments (Amendment) Act, 1987 (Act No. 17/1987) (Ir.) (§ 5).

¹⁵³ National Monuments (Amendment) Act, 1987 (Act No. 17/1987) (Ir.) (§ 11). The term "monument" remained similar to the 1930 Act, but also included any "ritual, industrial or habitation site, and any place comprising the remains or traces of [the foregoing] situated on land or in the territorial waters of the State." National Monuments (Amendment) Act, 1987 (Act No. 17/1987) (Ir.) (§ 11).

¹⁵⁴ See GIS Heritage Data for Ireland, Sites and Monuments Record, <http://www.heritagedata.ie/en/NationalMonuments/Download/> (last visited May 12, 2005) (downloadable in Microsoft Access or compatible format).

¹⁵⁵ There have been at least four lawsuits directly challenging designations under the U.S. Antiquities Act (not including GSE). See generally *supra* Part II(B)(2)(b). Prior to the Carrickmines controversy in 2003, only one reported opinion and one unreported opinion touched on the propriety of bestowing national monument status on an Irish site. See *infra* note 158.

¹⁵⁶ National Monuments Act, 1930 (Act No. 5/1930) (Ir.) (§ 2).

¹⁵⁷ Lohan, *supra* note 138; See *supra* Part III(B)(1)-(2).

¹⁵⁸ The term "national monument" has been given a wide connotation in a suit contesting the size of land acquired by the state for preservation. *Blascaod Mor Teoranta v. Commissioners of Public Works*, [1998] I.E.H.C. 38 (27th February, 1998)

deal mostly with ancillary issues;¹⁵⁹ however, a number of developments remain crucial to this Article's discussion.

2. Apparent Culmination of the National Monuments Act following the Wood Quay Controversy

In 1961, excavation work at Dublin Castle revealed a treasure trove of medieval Viking artifacts, including pottery, jewelry, tools, houses, and a plank-paved street.¹⁶⁰ The excavation site was gradually expanded into neighboring areas, and from 1974 to 1981, the focus of the project centered on an area fronting the river Liffey, known as Wood Quay.¹⁶¹ It was at this site that archaeologists "unearthed a major part of the original Viking settlement of Dublin[,] . . . one of the major European archaeological discoveries of the century."¹⁶² The site was important, not only for its "remarkable state of preservation," but because it demonstrated for the first time that Dublin served as a vital link for foreign trade and artistic influence between Ireland and the rest of the medieval world.¹⁶³ However, the local government threatened the continued preservation of the Wood Quay site with its plan to construct a civic office building.¹⁶⁴ After a number of setbacks,¹⁶⁵ official sanction for the development of the offices on a four-block site

(H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/1998/38.html> (last visited September 13, 2005) (citing the Irish Supreme Court's unreported decision in *Tormey v. Commissioners of Public Works*, Dec. 21, 1972).

¹⁵⁹ For example, "in the O'Callaghan Case [1985] I.L.R.M. 364 it was held that the preservation orders made under the National Monuments Act, 1954, did not constitute an unjust attack on the right of ownership." *Lawlor v. Minister for Agriculture*, [1987] 5 I.E.H.C. 4 (2d October, 1987) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/1987/4.html> (last visited September 13, 2005); see also *Webb v. Ireland*, [1987] I.E.S.C. 2 (16th December, 1987) (S.C.) (Ir.) available at <http://www.bailii.org/ie/cases/IESC/1987/2.html> (last visited September 13, 2005) (determining proper application of NMA penalty provisions).

¹⁶⁰ HEFFERNAN, *supra* note 19, at 5-6.

¹⁶¹ *Id.* at 1, 17.

¹⁶² *Id.* at 1.

¹⁶³ *Id.* at 2. The quality of preservation and the extent of the remains at Wood Quay established the site as one of the most important in Europe. JOHNSON, *supra* note 134, at § 3.3.4; see also HEFFERNAN, *supra* note 19, at 43-46 (generally describing the items unearthed).

¹⁶⁴ HEFFERNAN, *supra* note 19, at 32-33.

¹⁶⁵ Most of the setbacks were due to historical circumstances and inconsistent interest in the project; however, concerns over the potential clash between the site's archaeological significance and its proposed use as civic offices was raised at least as early as 1968. *Id.* at 34.

over Wood Quay came when permission to begin planning was granted in late 1970.¹⁶⁶ In 1974, the controversy surrounding the development plans grew as "serious archaeology" began at the Wood Quay site.¹⁶⁷ A pitched battle ensued between those advocating a complete and careful preservation of the ancient city and the developers and local authorities wanting to minimize costs and move forward.¹⁶⁸ To demonstrate their support for the continued excavation, an unprecedented 20,000 people¹⁶⁹ spent nearly three weeks marching in protest and occupying the proposed construction site to hold off construction crews.¹⁷⁰ Some opponents proposed using the site as a tourist center as an alternative to the civic offices.¹⁷¹ Drawn out legal battles resulted in the Irish judiciary's first declaration of a national monument.¹⁷²

Despite these objections, the relevant local and national officials invoked their ability to consent to destruction of the newly recognized national monument pursuant to Section 14 of the National Monuments Act.¹⁷³ The offices were built "unimpeded . . . by archaeological restraints" in 1981, ending the exploration of Viking Dublin at Wood Quay.¹⁷⁴ Though many artifacts were catalogued from Wood Quay that would not otherwise have been,¹⁷⁵ "the bitter and divisive battle over the development of the site had far-reaching consequences that are still evident to this day."¹⁷⁶ The preservation movement suffered a setback at Wood Quay, but it nonetheless had a lasting impact; the

¹⁶⁶ *Id.* at 35.

¹⁶⁷ *Id.* at 40.

¹⁶⁸ See JOHNSON, *supra* note 134, at § 3.3.4; see generally HEFFERNAN, *supra* note 19, at 3-4. "A protest of that magnitude over a cultural cause was . . . unprecedented in Ireland." *Id.*

¹⁶⁹ See generally HEFFERNAN, *supra* note 19, at 3-4; see also JOHNSON, *supra* note 134, at § 3.3.4.

¹⁷⁰ HEFFERNAN, *supra* note 19, at 107-16. The protest lasted from the second of the month until the twenty-first. *Id.*

¹⁷¹ See HEFFERNAN, *supra* note 19, at 75. One report predicted a Wood Quay tourist center would generate £3.2 million per year. *Id.*

¹⁷² *Id.* at 68-79; see also GEORGE LAMBRICK AND KLARA SPANDL, THE HERITAGE COUNCIL, URBAN ARCHAEOLOGICAL PRACTICE IN IRELAND § 2.3.5 (2000), <http://www.heritagecouncil.ie/publications/urbanarch/ch2.html> (last visited May 12, 2005).

¹⁷³ This was the first time in history that the power to consent to destruction was actually exercised. See HEFFERNAN, *supra* note 19, at 80-82.

¹⁷⁴ *Id.* at 128. "Brave gestures and compromise were the order of the day, and the development went on." *Keepers of the Past*, IRISH TIMES, Oct. 21, 2000, at 67.

¹⁷⁵ HEFFERNAN, *supra* note 19, at 4.

¹⁷⁶ JOHNSON, *supra* note 134, at § 3.3.6.

National Monuments Act was again amended in 1994 to strengthen the protection of national monument sites and to ensure incidents like Wood Quay would not happen again.¹⁷⁷

3. Redux: the Current Showdown at Carrickmines Castle

a. The Facts and Political Aspects

In 1992, Ireland received its first appraisal report on the proposed South Eastern Route (SER), part of a comprehensive national highway program.¹⁷⁸ The SER was intended to serve as an efficient artery between other primary routes around Dublin and alleviate traffic gridlock.¹⁷⁹ The plans called for an interchange at an outlying area of Dub-

¹⁷⁷ See 440 DÁIL DEB. col. 1339-40 (Mar. 24, 1994) (statement of M. Higgins, Minister for Arts, Culture and the Gaeltacht). Despite being "effected in a remarkably tortuous and oblique fashion," the effects of the amendment were clear. *Mulcreavy v. Minister for the Env't, Heritage & Local Gov't*, [2004] I.E.S.C. 5 (27th January, 2004) (S.C.) (Ir.) available at <http://www.bailii.org/ie/cases/IESC/2004/5.html> (last visited September 10, 2005). The hierarchy of controls established by the NMA over interference with national monuments was changed from requiring the consent of two distinct and independent statutory bodies to three. *Id.* The amendments qualified the "wide residual discretion formerly vested in the Commissioners and the local authority" in three ways. *Id.* First, the amendments provided that the Commissioners and local authority could only give their consent to destruction of a monument when it was in the interests of archaeology to do so. *Id.* This in particular was intended to avoid a repetition of "the Wood Quay debacle." Frank McDonald, *Ruling Could Upset Plans of Developers*, IRISH TIMES, Feb. 25, 2003, at 7. Second, the amendments required the approval of the Arts Minister, an official with a "different statutory remit," in all cases prior to monument destruction. *Mulcreavy*, [2004] I.E.S.C. 5. Third, any destruction orders approved by the Arts Minister on grounds other than public health or safety required the tacit approval of both houses of the Oireachtas (Irish national legislature). *Id.*

Despite the attempt to increase protection, the effect of the act after 1994 may be limited to large-scale, prominent monuments. See Muiris O'Sullivan, *The Survival of Archaeological Monuments: Trends and Attitudes*, 31(2) IRISH GEOGRAPHY 88, 98 (1998) (stating fear of prosecution does not strongly deter NMA violations among farmers likely to come across archaeological features on their property).

¹⁷⁸ See Kampsax Report, *supra* note 137, at 14. The South Eastern Route is the final part of the M50 C-ring motorway around Dublin. *Dunne v. Minister for the Env't*, [2004] I.E.H.C. 304 (7th September, 2004) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2004/304.html> (last visited September 10, 2005). As has been recognized in earlier proceedings, it forms a strategic element of the national road network, providing a high-speed link between the N11 and the other national primary routes around Dublin. *Id.*

¹⁷⁹ Petrina Vousden, *Euro 144M Road is Held Up By an Old Ditch*, THE SUN, Feb. 25, 2003.

lin known as Carrickmines. In accordance with existing policy,¹⁸⁰ environmental impact assessments and archaeological surveys were conducted at the site from April 2000 through August 2002.¹⁸¹ "Soon after the archaeologists began their work, it quickly emerged that the Carrickmines site was large, and significant."¹⁸² Like Wood Quay,¹⁸³ each round of excavation revealed further evidence of a complex Viking settlement, eventually dubbed Carrickmines Castle.¹⁸⁴ Also like the Wood Quay protests, interest groups coalesced to protect the site once it became apparent that the National Roads Authority intended to proceed with the highway as originally planned, constructing the interchange over a large portion of the Carrickmines site.¹⁸⁵

¹⁸⁰ In 2000, the National Road Authority issued its code of practice recommending that new road routes should avoid archaeological sites or, if avoidance is impossible, to excavate and record the sites before construction. *Ruling Could Upset Plans of Developers*, IRISH TIMES, Feb. 25, 2003, at 7; see also Kampsax Report, *supra* note 137, at 25-27.

¹⁸¹ Kampsax Report, *supra* note 137, at 25; Tim O'Brien, *Carrickmines Dig Ends Without Agreement*, IRISH TIMES, Aug. 30, 2002, at 5.

¹⁸² Liam Reid, *Carrickmines Saga Haunted by Echoes of Wood Quay*, IRISH TIMES, Aug. 12, 2004, at 6.

¹⁸³ *Id.*

¹⁸⁴ The work uncovered up to 20,000 pieces of medieval pottery, as well as coins, musket and cannon balls, weapons, human skeletons and medieval textiles. *Id.* The overall complex excavated included 1.5 acres of buildings, workshops, houses, kilns and wells. *Id.* The archaeologists also unearthed a medieval ditch, or fosse, which formed part of the castle's fortifications. *Id.*

Photos of the dig are available. The Carrickmines Croquet and Lawn Tennis Club, <http://www.carrickmines.com/pictures/castle/castle.html> (last visited May 12, 2005); see also Howard Clarke, *Carrickmines Needs to be Preserved and Our National Heritage Protected*, IRISH TIMES, Aug. 7, 2002, at 6 (providing additional information on the history of the Carrickmines site); see also Chapters of Dublin History, Carrickmines Castle, the Vale of Shanganagh, Dalkey, Killiney and Ballybrack Hills, <http://www.chapters.eiretek.org/books/Neighbourhood/chapter5.html> (last visited May 12, 2005).

¹⁸⁵ Reid, *Carrickmines Saga Haunted by Echoes of Wood Quay*, *supra* note 182, at 6. The coalition seeking to protect the site from the highway interchange became known as the Carrickminders. *Id.* They made several requests to reroute the road around the castle remains. *Id.*; see also Press Release of Proinsias De Rossa, Labour Party Member of the European Parliament (MEP) Press Release, *EP Urges Carrickmines/M50 Compromise*, Feb. 16, 2004, <http://www.derossa.com/asp/showdoc.asp?ID=634&AREA=3> (last visited May 12, 2005). When it became apparent that there would be no compromise route, the Carrickminders staged a picket to prevent machinery from moving onto the site. Reid, *Carrickmines Saga Haunted by Echoes of Wood Quay*, *supra* note 182, at 6. The Local County Council and the National Roads Authority (NRA) responded by obtaining court injunctions against the picketers. *Id.*

b. The Lawsuits

In early 2003, serious challenges were mounting against the government's ongoing efforts to pave over Carrickmines.¹⁸⁶ Preservationists filed a lawsuit seeking to enjoin the road project and alleged that the archeological excavation work at the site had become illegal removal and destruction of the site.¹⁸⁷ The plaintiffs argued that the removal and destruction of portions of the Carrickmines site required a license under Section 14 of the National Monuments Act.¹⁸⁸ The plaintiffs claimed that the license procured by the local government for excavation work pursuant to Section 26 of the Act was invalid and did not fulfill Section 14's independent requirement.¹⁸⁹ The case was eventually heard by the Irish Supreme Court, which rendered a decision in favor of the preservationists.¹⁹⁰ In the opinion, Justice Hardiman stated:

[F]irstly . . . what is authorised under a s.14 consent (including removal or altering a national monument) . . . is different from what is authorised under a s.26 licence, and secondly, . . . the Minister [for the Environment] in considering whether to consent under s. 14 as amended is limited to quite a narrow set of criteria which do not appear to constrain him in any other capacity.¹⁹¹

The opinion also noted that several prior acts of government reorganization¹⁹² had the strange result of vesting the discretion to consent to

¹⁸⁶ See, e.g., Alison Healy, *Dáil Question Over Removal of Medieval Ditch*, IRISH TIMES, Feb. 18, 2003, at 4.

¹⁸⁷ See *Dunne v. Dun Laoghaire-Rathdown County Council*, [2003] I.E.S.C. 15 (24th February, 2003) (S.C.) (Ir.) available at <http://bailii.org/ie/cases/IESC/2003/15.html> (last visited September 10, 2005) (the defendant local government owned the Carrickmines site).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ The Plaintiffs had lost at the High Court, which found that the Local Council "had paid sufficient attention to archaeology" in their work at the site. McDonald, *supra* note 177, at 7.

¹⁹¹ See *Dunne*, [2003] I.E.S.C. 15.

¹⁹² The Heritage (Transfer of Functions of Commissioners of Public Works) Order, 1996 (SI 61 of 1996) and the Heritage (Transfer of Departmental Administration and Ministerial Functions) Order, 2002 (SI 356 of 2002) transferred the functions of the Commissioners of Public Works and the Minister for Arts, Culture, and

monument destruction under the National Monuments Act in the same Minister for the Environment who was responsible for the road building programs.¹⁹³ Nevertheless, the court felt bound to “presume that the Minister would correctly direct himself, if asked for consent under s. 14, that he was then discharging a freestanding statutory function to which many of the considerations which properly influenced him in other capacities were irrelevant or improper to consider.”¹⁹⁴ Without explicitly holding that a separate Section 14 consent order was required, the Irish Supreme Court affirmed a temporary injunction against further construction at Carrickmines.¹⁹⁵

With an injunction in place, the government was left with several choices: (1) return to court to argue that Carrickmines did not meet the definition of a national monument, (2) raise the road by a meter, or (3) replace the proposed roundabout with a signaled junction to preserve the site.¹⁹⁶ On July 3, 2003, the Minister for the Environment chose another solution, simply giving his consent to the construction pursuant to his National Monuments Act authority.¹⁹⁷ The local council had long ago issued its own consent; therefore, the issue went to the Oireachtas (Irish Parliament) to determine whether the construction was in the public interest.¹⁹⁸ The opposition continued to claim that the project was not, arguing that the Minister “has in effect approved his own consent.”¹⁹⁹ The legislature chose not to act, allowing the meas-

the Gaeltacht, relating to NMA consents, to the Minister for the Environment, Heritage, and Local Government. *See id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ McDonald, *supra* note 177, at 7.

¹⁹⁷ Sorcha Crowley, *Carrickmines M50 Road Project to Restart*, IRISH TIMES, July 4, 2003, at 11; *see also Council Seeks to Overturn Ruling*, IRISH TIMES, Dec. 6, 2003, at 4.

¹⁹⁸ 587 DÁIL DEB. Col. 947-951 (June 17, 2004).

¹⁹⁹ Crowley, *supra* note 197, at 11. In response, the government claimed a “significant groundswell of people,” particularly the local communities and businesses of the affected area, were in favor of the roadway as planned. *Id.* Another report claimed that opinion was divided locally on the issue. Shane Coleman, *EU Ruling Could Halt Carrickmines M50 Extension*, SUNDAY TRIBUNE, July 6, 2003. Cf. Irish Public Television Poll, <http://www.rte.ie/comments/carrickmines.html> (last visited May 12, 2005) (mixed comments regarding whether Carrickmines development was overshadowing national heritage); The Irish Independent’s Online Poll, <http://www.unison.ie/polls/index.php3?ident=Irish%20Independent&mypollid=735&vo=1> (last visited May 12, 2005) (asking readers for reactions to the Supreme Court’s injunction prohibiting construction: 55.9% agreed, 41% disagreed, and 3% were undecided).

ure to sunset and thereby automatically validating the Minister's consent order.²⁰⁰ Thereafter, on application by the government, the High Court terminated the injunction prohibiting construction at the site.²⁰¹

Preservationists again filed suit, alleging, *inter alia*, that the Minister for the Environment's consent to his own proposal was unconstitutional in *Mulcreavy v. Minister for the Env't, Heritage & Local Gov't*.²⁰² The Irish Supreme Court agreed, holding that the 1996 order purporting to transfer powers among various government officials²⁰³ impermissibly amended the National Monuments Act.²⁰⁴ The order attempted to substitute a scheme under which the consent or approval of only two bodies was necessary for a scheme under which the consent of three independent statutory bodies had to be obtained.²⁰⁵

The National Roads Authority responded to *Mulcreavy* with a call for new legislation to aid in the completion of road projects slowed by national monument discoveries.²⁰⁶ The Minister for the Environment then introduced proposed amendments to the National Monuments Act.²⁰⁷ Predictably, the proposed amendment set off a new round of public²⁰⁸ and governmental²⁰⁹ debate regarding the bill's content,

²⁰⁰ *Council Seeks to Overturn Ruling*, *supra* note 197, at 4.

²⁰¹ *Court to Rule On M50 Works*, IRISH TIMES, Jan. 6, 2004, at 4.

²⁰² *Mulcreavy v. Minister for the Env't, Heritage & Local Gov't*, [2004] I.E.S.C. 5 (27th January, 2004) (S.C.) (Ir.) available at <http://www.bailii.org/ie/cases/IESC/2004/5.html> (last visited September 10, 2005).

²⁰³ See *supra* text accompanying note 177.

²⁰⁴ *Mulcreavy*, [2004] I.E.S.C. 5.

²⁰⁵ Mary Carolan, *Carrickmines Work Order Struck Down as Unconstitutional*, IRISH TIMES, Jan. 30, 2004, at 4.

²⁰⁶ See Joe Humphreys, *Museum, NRA at Odds on Policy*, IRISH TIMES, May 15, 2004, at 6.

²⁰⁷ O'Brien, *Will Law Be a Licence to Bypass Our Heritage?*, IRISH TIMES, June 19, 2004, at 51.

²⁰⁸ Dr. Mark Clinton, chairman of the Monuments Committee of An Taisce, an independent Irish environmental charity, called the reasoning behind the bill, "Orwellian" and said that "[i]n granting himself the power to decide on the necessity and level of preservation as well as the power to bulldoze, [the Minister] has made the archaeological community 'dependent on what side of the bed he gets out of in the morning.'" *Id.* A number of archaeologists and academics protested the amendments. See, e.g., Kitty Holland, *Proposed Monuments Bill is 'Reprehensible' and 'Primitive'*, IRISH TIMES, June 22, 2004, at 3. The objections centered on the amendment's removal of procedural and substantive safeguards against monument destruction and the belief that the effect would be far greater than Carrickmines. Editorial, *An Act Designed to Facilitate Roads and Real Estate*, *supra* note 18, at 14 (written by a founding member of the Carrickminers and Save Tara Skryne Valley Group). Even representatives of the National Museum voiced solidarity with the protestors. See

which essentially exempted SER road projects from the consent requirements applicable elsewhere in the National Monuments Act.²¹⁰ To the dismay of the protestors, the proposed amendment passed and went into force on July 18, 2004.²¹¹ Though another suit was filed,²¹² resulting in the Irish judiciary's recognition of "a constitutional duty on the part of the State to protect . . . heritage" for "the first time in Irish legal history,"²¹³ construction was able to proceed over the castle site²¹⁴ and at least one of the higher-profile protest groups shifted its focus to another planned roadway site.²¹⁵

IV. COMPARISON

Though the GSE designation and Carrickmines controversy at first glance appear completely distinguishable, it is precisely the differ-

Mark Clinton, *Castle Retention, Motorway are Still Possible*, IRISH TIMES, Jan. 19, 2004, at 14.

For his part, the Minister defended the legislation as a necessary attempt to bring "balance" to the debate and affirmed his commitment to the protection of archaeological heritage. O'Brien, *Carrickmines Dig Ends Without Agreement*, *supra* note 181, at 5; 587 DÁIL DEB. col. 933-1006 (June 17, 2004) (statement of Mr. Cullen). Public support was reportedly behind the Minister, as residents were increasingly impatient regarding the quality of life issues of traffic jams and economic consequences of delay. *Id.*

²⁰⁹ 587 DÁIL DEB. col. 933-1006 (June 17, 2004); 587 DÁIL DEB. col. 1211-1240 (June 22, 2004); 177 SEANAD DEB. col. 630-667 (July 1, 2004); 177 SEANAD DEB. col. 802-813 (July 6, 2004); 177 SEANAD DEB. col. 993-1004 (July 7, 2004).

²¹⁰ National Monuments (Amendment) Bill, 2004 (Act No. 22/2004) (Ir.) available at <http://www.oireachtas.ie/viewdoc.asp?DocID=2933> (last visited Sept., 22, 2004). The effect of the amendments, "insofar as any works necessary in connection with the completion of the South Eastern Route impact on Carrickmines Castle, such works are totally free from regulation under the National Monuments Acts [except] that any such works must be carried out on the directions of the Minister." *Dunne v. Minister for the Env't*, [2004] I.E.H.C. 304 (7th September, 2004) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2004/304.html> (last visited September 10, 2005).

²¹¹ *Id.*; see also, Marie O'Halloran, *24 Bills Passed Since Easter Recess*, IRISH TIMES, July 9, 2004, at 8.

²¹² See *Dunne*, [2004] I.E.H.C. 304.

²¹³ Salafia, *supra* note 20.

²¹⁴ *Judgment Reserved Over Carrickmines Costs*, RTÉ NEWS (Ir.), Oct. 19, 2004, <http://www.rte.ie/news/2004/1019/carrickmines.html> (last visited May 12, 2005); Salafia, *supra* note 20.

²¹⁵ Salafia, *supra* note 20; Frank McNally, *Challenge to Tara Motorway Planned*, IRISH TIMES, Nov. 6, 2004, at 5. See generally Yahoo! Groups Carrickminers' Message Board, <http://groups.yahoo.com/group/carrickmines/> (last visited May 12, 2005).

ences in each case that make comparison useful. On further examination, some of the starker differences, though responsible for the markedly different outcomes in each instance, suggest not that one country's system or approach is necessarily preferable to the other, but rather that both nations' approaches are ripe for the same improvements.

A. Similarities

First, in both American and Irish preservation battles, arguments tend to align along one of two similar lines of interest. Those in favor of monument designation or other preservation activities consist of archaeologists, historians, environmentalists, and, in some cases, people whose businesses thrive on tourism.²¹⁶ The forces of economic development and modernization, on the other hand, generally oppose designation.²¹⁷ Local populations, generally most affected by the decision to preserve or develop, tend to vary in their support, depending on the circumstances of each case.²¹⁸

Second, both the American and Irish legal systems through the Antiquities Act and National Monuments Act, respectively, vest a tremendous amount of preservation discretion in their executive branches. Admittedly, the two acts are distinct on their face; the Antiquities Act is void of provisions authorizing destruction or deface-

²¹⁶ See *infra* note 231; HEFFERNAN, *supra* note 19, at 75; Holland, *supra* note 208, at 3.

²¹⁷ See *infra* note 231; Rasband, *supra* note 22, at 523-25. That is, pro-development entities are opposed to any preservation efforts other than those made "by record." Preservation by record refers to removal of objects from their site by excavation, whereas preservation *in situ* means leaving items as they are found. Louise Hogan, 'Destructive Plans' For an Historic Site, BELFAST NEWS LETTER, Jan. 13, 2005, at 20. Much of the Carrickmines controversy was about precisely what would happen to the ruins: total destruction by bulldozers, preservation *in situ* (leaving the site as it was found) or preservation by record. See, e.g., Liam Reid, *Claims on Standard of Castle Excavation 'Incorrect'*, IRISH TIMES, Aug. 28, 2004, at 4; see also Wangkeo, *supra* note 4, at 270 (listing the preferred options in descending order as *in situ* preservation, excavation, and documentation).

²¹⁸ While the bulk of local opinion weighed in favor of development in Utah and, arguably, at Carrickmines, the massive demonstrations of Wood Quay indicated a much more divided populace. In addition, the distinction between local and national residents may lose some of its significance in Ireland, where practically the entire country would be considered "local" from an American perspective. See generally *supra* text accompanying note 134.

ment of a national monument,²¹⁹ while the National Monuments Act explicitly sanctions decisions *not* to preserve, even if that particular choice was not historically exercised.²²⁰ However, as amply demonstrated by GSE, in certain cases where extractive industries or others categorized as “developers” hold valid rights to federal land, the President’s failure to exercise his preservation authority is essentially the same as the Irish Minister’s consent to destruction.²²¹ With passage of the 2004 amendments, the National Monuments Act looks more like the Antiquities Act, in that both the President and the Minister enjoy virtually unlimited discretion to prevent or allow the destruction of certain national monuments.²²²

Third, action by a U.S. President or Irish Minister that attracts any appreciable degree of publicity is practically guaranteed to result in litigation,²²³ often filed on the heels of long-simmering debates.²²⁴

²¹⁹ Quite to the contrary, the Act authorizes penalties for the unauthorized appropriation, excavation, injury, or destruction of any historic or prehistoric ruins or monument. 15 U.S.C. § 433 (2005). *See, e.g.*, *United States v. Smyer*, 596 F.2d 939, 942 (10th Cir. 1979).

²²⁰ Wangkeo, *supra* note 4, at 196; HEFFERNAN, *supra* note 19, at 73.

²²¹ That is, the similarity lies in the resulting disposition of the land or object. The President’s designation in reaction to a perceived threat is what first creates a national monument, thereby prohibiting most types of commercial and industrial development. *See generally* Rasband, *supra* note 22, at 413. In Ireland, whether an object or area is a national monument is already determined by the statutory definition and policy set by the Oireachtas. *Dunne v. Minister for the Env’t*, [2004] I.E.H.C. 304 (7th September, 2004) (H. Ct.) (Ir.) *available at* <http://www.bailii.org/ie/cases/IEHC/2004/304.html> (last visited September 10, 2005). The Minister for the Environment (and others depending on the circumstances) subsequently decides, pursuant to guidelines also dictated by the Oireachtas, whether to remove the prohibitions on development that such monument classification automatically entails. National Monuments Act, 1930 (Act No. 5/1930) (Ir.) (§ 14).

²²² Though the bounds of the Minister for the Environment’s discretion have yet to be fully tested in court, the legislation from which his power derives is clearly, plainly, and broadly worded so as to require that “works affecting any national monument in connection with the completion of the South Eastern Route . . . shall be carried out on the directions of the Minister.” National Monuments (Amendment) Act, 2004 (Act No. 22/2004) (Ir.) (§ 8(1)).

²²³ This is amply demonstrated by the history of lawsuits challenging the Antiquities Act, GSE, Wood Quay, and Carrickmines.

²²⁴ Some of the same petitioners in *Utah Ass’n of Counties v. Clinton* filed a previous suit seeking to enjoin the BLM from conducting its second land assessment in 1996. *Utah Ass’n of Counties v. Clinton*, 1999 U.S. Dist. LEXIS 15852, *56 (D. Utah 1999); *see also* *State v. Babbitt*, 1998 U.S. Dist. LEXIS 22812, *1 (D. Utah 1996). Similarly, the Irish Government received some form of notice that various

Though the legal claims advanced vary depending on the given controversy, statutes, and available precedent, citizens of both nations have proven willing to second-guess their executives' conservation decisions in court.²²⁵ The most common charge is that the government acted without fully consulting the proper interests.²²⁶

Finally, both President Clinton and the Irish Ministry can claim legitimacy for their decisions based on various levels of government approval. In addition to the Oireachtas' sanction, the actions at Carrickmines complied with European Commission regulations.²²⁷ Thus, an American president can claim validation for the Antiquities Act designations based on failed challenges at the local²²⁸ and national levels.²²⁹ Similarly, the Irish bureaucracy can claim validation based on failed challenges at the local and international levels, even if support by the national government has been historically inconsistent.²³⁰

Though these similarities taken individually may not be particularly significant, in aggregate they demonstrate a recurring and problematic backdrop for many preservation policy decisions. In each country, legislation enables a single individual to enter a controversy

roadway sites were potential repositories of archaeological treasure long before the construction and resulting lawsuits began. Kampsax Report, *supra* note 137, at 14.

²²⁵ See *supra* Part II (B)(2)(b); see also *supra* Part III(B)(3)(b).

²²⁶ See, e.g., *supra* Part II(B)(3)(a)(iv); see also *supra* text accompanying note 208. Extreme cases charge that the failure to consult was motivated by conflicts of interest. Some theorized that Clinton's GSE designation was specifically meant to disadvantage those companies with mining claims in the monument to the benefit of a competitor that donated to Clinton's campaign. Rusnak, *supra* note 98, at 707-09. There have also been allegations that the location of the Carrickmines was chosen to facilitate development of adjacent Jackson Way properties. See O'Brien, *Will Law Be a Licence to Bypass Our Heritage?*, *supra* note 207, at 51; Miley v. Flood, [2001] I.E.H.C. 9 (24th January, 2001) (H. Ct.) available at <http://www.bailii.org/ie/cases/IEHC/2001/9.html> (last visited Sept. 13, 2005); The Tribunal of Inquiry into Certain Planning Matters & Payments, <http://www.planningtribunal.ie/> (last visited Sept. 15, 2005).

²²⁷ The conclusions reached in the European Commission's review acknowledged that the required environmental studies at the site were "flawed," but nonetheless "there is little that can be done except for the greatest possible degree of preservation within the existing road limits." Kampsax Report, *supra* note 137, at 42-43. The most recent challenges to the Carrickmines construction based on non-compliance with EU law were also rejected by Justice Laffoy in *Dunne*. *Dunne v. Minister for the Env't*, [2004] I.E.H.C. 304 (7th September, 2004) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2004/304.html> (last visited September 10, 2005).

²²⁸ See *supra* text accompanying note 108.

²²⁹ See *supra* Part II(B)(2)(b); see *supra* text accompanying note 98.

²³⁰ See *supra* text accompanying note 185.

between two highly motivated factions, choose a side, and render a decision.²³¹ Though implementation of that decision may be delayed and made more expensive by litigation, it is generally the final word. While each act *permits* consultation with local citizens, only the National Monuments Act *requires* consultation with local government, and even then in limited circumstances.²³² The ability to settle a complex quarrel with comparative speed and finality is a powerful, and often necessary, tool properly vested in the executive departments.²³³ However, those same virtues can also be the legislations' greatest vices, as will be further explored after a discussion of the differences in the GSE and Carrickmines controversies.

B. Differences

The immediate difference between the most recent American and Irish forays into the preservation thicket is their outcomes. Like many monuments before,²³⁴ the GSE was created and has persisted despite the protests of local residents and pro-development interests.²³⁵ In Ireland, portions of Carrickmines Castle were removed to make way for the motorway, and the Wood Quay offices were built atop ancient ruins, despite the outcries from the archaeological and preservationists

²³¹ For instance, President Clinton was seen as siding with environmentalists and against developers and local interests. See, e.g., Benedetto, *supra* note 88, at 3A. "Efforts to negotiate a middle ground [had] failed . . ." *Id.* In the case of Carrickmines, the Irish Government sided with development plans and against a group "including conservationists, medieval historians and eco-warriors." *The Castle Battleground*, IRISH TIMES, Oct. 26, 2002, at 53. There too, it became apparent "that there would be no compromise route . . ." Reid, *Carrickmines Saga Haunted by Echoes of Wood Quay*, *supra* note 182, at 6.

²³² For instance, when the monument at issue is owned by the local government. National Monuments Act, 1930 (Act No. 5/1930) (Ir.) (§ 14(2)). However, as illustrated by the Carrickmines saga, the problem suggested by a lack of public input remains where the local government is already predisposed towards the Minister's view.

²³³ "Like breaking eggs to make an omelet . . . an element of controversy may illustrate the value of executive leadership." Leshy, *supra* note 41, at 300. Leshy concludes that "[w]here the debate has been joined, the various alternatives aired, and legislative action thwarted, we have been fortunate that Presidents have had the legal, as well as the moral, authority to step in and cut the Gordian knot." *Id.* Cf. Lin, *supra* note 97, at 737-38 (arguing the President is better situated to make withdrawal decisions from a national perspective, as opposed to individual congressional members likely to exercise their "near-veto power" to favor local interests).

²³⁴ See Leshy, *supra* note 41, at 300.

²³⁵ See Bureau of Land Management's Official Grand Staircase-Escalante Website, <http://www.ut.blm.gov/monument/> (last visited Feb. 4, 2005).

communities.²³⁶ Put simply, the conservationists won in the United States and lost abroad.

The second major difference goes a long way towards explaining the historically different records of each nation. The underlying governmental policies contain important differences, which shape any challenger's ability to bring effective claims. America's mindset has long been disposed towards preservation.²³⁷ Ireland, on the other hand, has a longer history of more feverishly engaging in the battle for space between heritage sites and the implements of modern living.²³⁸ It was only in 2004 that the High Court explicitly recognized the Irish State's constitutional duty to protect its heritage.²³⁹

These divergent policies are reflected in the legislative history of the Antiquities Act and National Monuments Act. The former has persisted without significant change since its inception in 1906. The staying power of the Antiquities Act has been noted by the courts²⁴⁰ and commentators²⁴¹ and has been relied upon by successive administrations.²⁴² The only notable amendment to the Antiquities Act merely restricted the President's ability to unilaterally designate monuments in Wyoming.²⁴³ Courtroom challenges have consistently failed in the United States.²⁴⁴

²³⁶ Tim O'Brien, *Medieval Fosse Removed From Carrickmines Site*, IRISH TIMES, Sept. 30, 2004, at 3. "The site is wrecked . . . [w]e are down to a few stones to fight over . . ." Salafia, *supra* note 20.

²³⁷ In fact, the Historic Sites Act of 1935 explicitly proclaims the federal government's policy of preservation and imposes a duty on the Secretary of the Interior to implement that policy. *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1373 (Fed. Cir. 2001).

Western states now are considered comprised of vast, pristine frontiers largely protected from threats of industry and settlement. This image appeals to the American public, who considers the western states to be a "playground, a colony the rest of us visit when we want to relax or indulge our fantasies . . ." Biasi, *supra* note 30, at 243.

²³⁸ See JOHNSON, *supra* note 134, at §§ 3.3.5 to 3.3.6.

²³⁹ Salafia, *supra* note 20.

²⁴⁰ *Utah Ass'n of Counties v. Clinton*, 1999 U.S. Dist. LEXIS 15852, *35-67 (C.D. Utah Aug. 12, 1999); *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas (BNA) 1853, 1853-54 (D. Alaska 1980).

²⁴¹ Lin, *supra* note 97, at 731; David Negri, *Grand Staircase-Escalante National Monument: Presidential Discretion Plus Congressional Acquiescence Equals a New National Monument*, 10 UTAH BAR J. 20 (1997).

²⁴² Rusnak, *supra* note 98, at 730 n. 126 (recounting internal Clinton administration emails planning the GSE designation so as to conform to historical practice).

²⁴³ This amendment came on the heels of a decision by the Wyoming Federal District Court validating President Franklin D. Roosevelt's designation of the Jack-

The Irish legislation is another story altogether. The National Monuments Act underwent significant revision in 1994, largely in response to Wood Quay.²⁴⁵ Despite what many viewed as steady progress in Ireland's heritage preservation policy,²⁴⁶ the Oireachtas again revisited and altered the Act in 2004.²⁴⁷ Those amendments bestow complete discretion over the disposition of monuments lying in the path of the South Eastern Route in a single Minister.²⁴⁸ The Irish legislature's demonstrated willingness to side with developers is unparalleled in the American Congress.

The third significant difference between GSE and Carrickmines is their aftermaths. To be sure, both resulted in bitterness from the aggrieved interest groups and judicial review of the relevant executive's decisions. In the United States, legal fall-out lasted well into 2004, and some continue to decry Clinton's actions today,²⁴⁹ although, active campaigns to overturn the designation have largely disappeared.²⁵⁰ No organized groups are seeking to prevent the next presidential designation; in fact, any such movement is largely confined to scholarly publications.²⁵¹ Matters are noticeably different in Ireland, where the Car-

son Hole National Monument. *State v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945). The court noted tension between Congress and the Executive branch, but declined to break the deadlock, stating instead that remedial legislation was the proper response. *Id.* Congress attempted just that, but was thwarted by presidential veto and public sentiment favoring preservation of the area. Quigley, *supra* note 41, at 82. Thus Congress was relegated to accept the Jackson Hole designation, but in ratifying it a proviso was added prohibiting the creation or extension of further national monuments in Wyoming other than by Congressional action. *Id.*

²⁴⁴ See *supra* Part II(B)(2)(b).

²⁴⁵ See *supra* text accompanying note 177.

²⁴⁶ LAMBRICK, *supra* note 172, at § 2.2.1.

²⁴⁷ National Monuments (Amendment) Act, 2004 (Act No. 22/2004) (Ir.); see also, O'Halloran, *24 Bills Passed Since Easter Recess*, *supra* note 211, at 8; Liam Reid, *Work at Carrickmines to Resume this Morning*, *IRISH TIMES*, Sept. 8, 2004, at 6. The act was "billed as the 'final solution' to the impasse at Carrickmines Castle . . ." Editorial, *An Act Designed to Facilitate Roads and Real Estate*, *supra* note 18, at 14.

²⁴⁸ See National Monuments (Amendment) Bill, 2004 (Act No. 22/2004) (Ir.).

²⁴⁹ Turner, *supra* note 118; Larmer, *supra* note 128, at E-06.

²⁵⁰ As early as 1997, Senator Orrin Hatch's Washington office "said that in the wake of President Clinton's reelection, Hatch had accepted the monument as a fait accompli." Turner, *supra* note 118. This accords with Leshy's "pattern" response. Leshy, *supra* note 41, at 300.

²⁵¹ See, e.g., Rusnak, *supra* note 98, at 715. "One point is clear: the Antiquities Act must be severely amended, or better still, completely abolished." *Id.*; see also Jack M. Beermann, *Presidential Powers in Transitions*, 83 B.U. L. REV. 947, 1005

rickminers are actively working to prevent the national motorway project from destroying other historic landmarks.²⁵²

C. Analysis

1. GSE and Carrickmines

The American and Irish legal systems have, for the most part, validated executive action taken pursuant to their respective national legislation, both historically and in recent clashes. Adherence to national law, however, is only one way to evaluate a government's conservation record. In 2003, Wangkeo examined four governments' decisions regarding the destruction of cultural property during peacetime and posited an existing international norm for evaluation.²⁵³ Wangkeo posited that though "no per se norm has developed against destroying relics during peacetime . . . international actors do expect that host states will protect their own cultural property in most circumstances."²⁵⁴ A main criterion for judging deviation from this preference is whether destruction occurs in the interests of economic development.²⁵⁵ Wangkeo's existing norm and her proposed alternative suggest that both the GSE designation and ultimate construction of the Carrickmines interchange were proper actions.

Generally, Wangkeo first argues that there should be a presumption against destroying cultural heritage as it is "a non-renewable and finite resource."²⁵⁶ Second, national decisions regarding the fate of

(2003) (suggesting a prohibition on designation for a certain period of time before the end of a President's term); *see generally* Lin, *supra* note 97.

²⁵² *See, e.g.,* The Save Tara/Skryne Valley Campaign, <http://www.taraskryne.org> (last visited May 12, 2005); *Save Tara Group Sees Hope in Carrickmines Judgment*, MEATH CHRONICLE, Sept. 18, 2004, <http://groups.yahoo.com/group/carrickmines/message/1024> (last visited May 12, 2005). Irish actor Stuart Townsend has become an official spokesperson for the group and has invited other Irish celebrities to join the cause as well. Stuart Townsend Fansite, <http://www.stuarttownsend.org/tara.html> (last visited May 12, 2005).

²⁵³ Wangkeo, *supra* note 4, at 264-74.

²⁵⁴ *Id.* at 264.

²⁵⁵ *Id.* at 264-65. Wangkeo's second criterion for evaluating destruction of cultural property is whether the destruction is motivated by iconoclasm. *Id.* Though the actions of the government in the Carrickmines' decision may have seemed anti-archaeology, the decision to carry on with the M50 highway system was not solely to destroy part of Irish history, rather it was to "confer a tangible benefit" on those driving around the country. *Id.*

²⁵⁶ *Id.* at 266. As outlined in the introduction, *supra* Part I, most national representatives would probably be quick to agree. Even in the Irish incidents, where the

cultural property should only be subject to international scrutiny if the property is of "worldwide significance."²⁵⁷ Accordingly, Ireland was subject to noticeable European oversight.²⁵⁸ The international relationship was collaborative,²⁵⁹ at least in the sense that no real hostility was shown to the European Union's presence.²⁶⁰ Third, "any norm that develops should be focused on the welfare of living people."²⁶¹ Cultural property has no intrinsic value outside of human interpretation and should therefore give way in favor of human welfare in certain circumstances.²⁶² While an argument remains that the welfare of environmentalists and Clinton's reelection effort were put ahead of the welfare of Utahns, the GSE designation was not made strictly for love of the monument.²⁶³ GSE was also justified on the grounds that average Americans could derive pleasure from the recreational and aesthetic opportunities the land affords.²⁶⁴ Ireland's decision is similarly

ultimate result was destruction, the attitude was that such destruction was something of a necessary evil. *See supra* text accompanying note 208 and 210.

²⁵⁷ Wangkeo, *supra* note 4, at 267. Wangkeo recognizes that a question remains regarding who properly decides what cultural property is of universal value, and advocates "a collaborative effort between host states and international actors." *Id.* She emphasizes the role of expertise available from professionals and local communities. *Id.*

²⁵⁸ *See supra* text accompanying note 136. The Viking origin of Carrickmines suggested its value extended to other parts of the world. *See supra* text accompanying note 163.

²⁵⁹ Wangkeo posits that the decision of which properties are of universal value should be a "collaborative effort between host states and international actors." Wangkeo, *supra* note 4, at 267.

²⁶⁰ *See, e.g., EU Delegation to Visit Carrickmines Site*, RTE NEWS, March 21, 2003, <http://www.rte.ie/news/2003/0321/carrickmines.html> (last visited May 12, 2005); *see also* Healy, *Council Confident of Making Motorway Deadline*, *supra* note 137, at 5.

²⁶¹ Wangkeo, *supra* note 4, at 267.

²⁶² *Id.*

²⁶³ In fact President Clinton took great pains to ensure the designation could be justified on grounds other than environmentalism. *See* Quigley, *supra* note 41, at 89 (describing internal administration e-mails discussing how to make the GSE designation conform to Antiquities Act precedent). Though he would have risked running afoul of the Antiquities Act had he done otherwise, the international norm would probably still have been satisfied. *See* Wangkeo, *supra* note 4, at 267. Wangkeo notes that "[t]his [anthropocentric] proposition would be less acceptable in a realm like the environment because people are not the only ones dependent on the ecosystem." *Id.*

²⁶⁴ At the GSE designation, Clinton recounted memories of his visits to the Grand Canyon and his desire for such "sites to be with all Americans for all time to come." Kessler, *supra* note 100, at A7. "[T]here are many measures of human wel-

justified by the benefits contemplated for modern Dubliners – most reports indicated that the Carrickmines interchange would go a long way towards alleviating critical traffic conditions.²⁶⁵

Ireland's road project is further affirmed by the needs of economic development. Wangkeo asserts that "it should always be lawful to destroy cultural heritage out of economic necessity," but that where, as in the Carrickmines case, such development is for improving quality of life as opposed to basic survival needs, other factors should be considered by potential international interveners.²⁶⁶ These factors include a broad interpretation of improved quality of life, the participation of affected communities, the equitable distribution of benefits, the destructive nature of alternatives, and mitigation of harm.²⁶⁷

In the Carrickmines case, the first two factors can be analyzed using similar considerations. On one hand, a broad interpretation of improved quality of life includes recognition that "people may derive value from simply knowing that [an] object exists."²⁶⁸ On the other hand, it also includes economic values²⁶⁹ inherent in transportation concerns²⁷⁰ as well as the health effects of traffic pollution. The com-

fare" Wangkeo, *supra* note 4, at 268; see also *supra* text accompanying note 237.

²⁶⁵ "Residents have been enduring the fumes, dust, danger and appalling quality of life for several years." O'Brien, *Will Law Be a Licence to Bypass Our Heritage?*, *supra* note 207, at 51. The road will ultimately cater to 80,000 vehicles whereas prior to construction it accommodated just 25,000. Vousden, *supra* note 179. The local Dun Laoghaire/Rathdown County Council agreed that there was an "urgent need" to finish the motorway to fend off traffic gridlock. *Id.* In addition, the National Roads Authority claimed that construction delays on various portions of the roadway were costing anywhere from €100,000 to €200,000 per week. Alison Healy, *Cullen is Accused On Road Plan Dispute*, IRISH TIMES, Feb. 28, 2003, at 6.

²⁶⁶ *Id.* at 268.

²⁶⁷ *Id.* at 268-71. Wangkeo also includes international financial and technical support as a factor. *Id.* However, none was offered or sought for preservation purposes in the Carrickmines situation.

²⁶⁸ *Id.* at 268.

²⁶⁹ *Id.*

²⁷⁰ The multiplicity of economic values related to transportation planning include efficient commuting and shipment of goods and jobs in the road construction industry, and the prosperity of local communities linked by new roads. See, e.g., Canada, PARL. DEB., H.C., Sept. 26, 1997, 1235 (John Maloney, Parliamentarian), available at http://www.parl.gc.ca/36/1/parlbus/chambus/house/debates/005_1997-09-26/han005_1235-e.htm (last visited May 12, 2005) (urging passage of a petition to upgrade the national highway system and citing "job creation, economic development and . . . the saving of lives and the avoidance of injuries" as benefits to be obtained thereby). "Our national highways link the majority of Canadians for the

munities most notably affected by the disposition of the Carrickmines controversy included constituencies such as the local county council,²⁷¹ archaeological and historical interest groups,²⁷² and the Irish public at large.²⁷³ General public opinion was more or less divided on the issue.²⁷⁴ The local government and national officials favored the onward march of the highway, and the interest groups strongly supported a slower pace²⁷⁵ (if not complete cessation) of construction at Carrickmines.²⁷⁶ The Irish government's choice essentially boiled down to two equally vocal and important affected communities, each advocating a different priority under the "quality of life" rubric. The Oireachtas had to choose a side, and its decision to acquiesce in plans that its own Minister already had under way can hardly be considered a mistake or violation under Wangkeo's analysis.

Similarly, the South Eastern Route entailed an equitable distribution of benefits.²⁷⁷ By its very nature, a national highway scheme lends itself to widely enjoyed benefits as it seeks to link far-flung communities using common resources.²⁷⁸ The SER's benefits may be limited to

benefit of all Canadians." House of Commons of Canada, Standing Comm. on Finance, *Evidence*, Oct. 30, 2003 (Pat Fiocco, Mayor of Regina), <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=67308> (last visited May 12, 2005).

²⁷¹ The council purportedly acts on behalf of the local population. "The application from . . . Dún Laoghaire -Rathdown County Council, was expressly made on public interest grounds." 587 DAIL DEB. col. 937 (June 17, 2004) (quoting Minister Cullen). See also Stepside Action Report, http://www.dlrco.ie/planning/stepside_plan_report.htm (acknowledging the Council's status as "a participant with a wider community responsibility" for developing sustainable development guidelines).

²⁷² "[Carrickmines] is of interest not only to archaeologists but historians, historical geographers and students of the Angevin Empire, which stretched from Ireland to Sicily." Alison Healy, *Carrickmines Dispute Back in Court*, IRISH TIMES, Feb. 10, 2003, at 5 (quoting Dr. Mark Clinton).

²⁷³ See *supra* text accompanying notes 199 and 272.

²⁷⁴ See *supra* text accompanying note 199.

²⁷⁵ "Mr. Dunne . . . insisted that the action had never been taken to block the motorway but as a protest against the government's 'anti-heritage legislation.'" *Working at Carrickmines to Resume this Morning*, IRISH TIMES, Sept. 8, 2004 at 6 (quoting the newly defeated plaintiff in *Dunne v. Minister for the Env't*, [2004] I.E.H.C. 304 (7th September, 2004) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2004/304.html> (last visited September 10, 2005)).

²⁷⁶ Paul Cullen, *Green Party Calls on NRA to "Bend the Road" to Avoid Remains of Castle*, IRISH TIMES, June 18, 2003, at 5.

²⁷⁷ "[D]iminishing cultural heritage should only be acceptable if the benefits are widely enjoyed . . ." Wangkeo, *supra* note 4, at 269.

²⁷⁸ "The purpose of the national highway system . . . is 'to provide an interconnected system of principal arterial routes which will serve major population centers .

those wealthy enough to afford automotive transport, but no serious argument was made that the project was meant to benefit the rich at the expense of the poor.²⁷⁹

Ireland probably failed to fulfill its duty to consider less damaging alternatives²⁸⁰ for the Castle, thus weakening one factor in support of the Carrickmines result. The Irish bureaucracy repeatedly expressed its deference to the demands of archaeology and the investigation of alternative routes and methods.²⁸¹ However, the fact that potential archaeological problems with the motorway route were raised almost twenty years ago²⁸² saps those claims of credibility.

Despite the probability that construction proponents were less than genuine in proclaiming openness to compromise, Ireland probably fulfilled its duty to mitigate harm. Wangkeo acknowledges that despite the superiority of *in situ* preservation, "it will often be impossible to preserve the property where it is."²⁸³ In choosing excavation, the next best option,²⁸⁴ the Irish Roads Authority made significant archaeologi-

. . . and other major travel destinations; meet national defense requirements; and serve interstate and interregional travel.'" Krall v. DOT, 682 A.2d 63, 66-67 (Pa. Commw. Ct. 1996) (quoting 23 U.S.C. § 103(b)(1); citing 23 U.S.C. § 143(a) (suggesting the importance of automotive travel in contemporary society)).

²⁷⁹ However, cost over-runs relating to the South Eastern Route were cited in at least one Dail debate charging Ireland's Finance Minister with using "failed approaches to the formation of estimates and budgets." 593 DAIL DEB. col. 754 (Nov. 25, 2004).

²⁸⁰ See Wangkeo, *supra* note 4, at 270.

²⁸¹ The Minister for the Environment maintained that the 2004 amendments to the NMA, "achieved a fine balance between the need for development of national infrastructure and the 'maximum protection' of Ireland's heritage." *O'Malley Criticises Cullen Over Carrickmines*, RTÉ NEWS (June 15, 2004), <http://www.rte.ie/news/2004/0615/carrickmines.html> (last visited May 12, 2005). See also Tim O'Brien, *Cullen Defends EUR 100m Archaeology Spending*, IRISH TIMES, Dec. 4, 2004, at 5; O'Brien, *Carrickmines Dig Ends Without Agreement*, *supra* note 181, at 5 (describing initial proposals from the National Roads Authority to preserve key aspects of the castle); Adrienne Sweeney, *Roads Authority Denies Claims it is 'Wrecking' the Countryside*, IRISH INDEPENDENT, Sept. 10, 2004.

²⁸² "From the earliest discussion of the possible route of the motorway there was an awareness of Carrickmines Castle . . ." Kampsax Report, *supra* note 137, at 14. A report describing the Castle was issued to the Dublin Planning office in 1983. *Id.* "According to conservationists . . . the Carrickmines Castle conflict could have been avoided when the line of the motorway was drawn in the early 1990s." O'Brien, *Will Law Be a Licence to Bypass Our Heritage?*, *supra* note 207, at 51.

²⁸³ Wangkeo, *supra* note 4, at 270.

²⁸⁴ *Id.*

cal expenditures and did, in fact, preserve portions of the Carrickmines ruins for posterity.²⁸⁵

Carrickmines was a messy affair marked by zealous advocacy groups, a general public divide, and a flawed pre-construction assessment. However, efforts to satisfy the growing demand on Ireland's transportation infrastructure are difficult to impugn. The road construction ultimately satisfies the economic interest criteria of Wangkeo's international norm for the destruction of cultural property during peacetime.²⁸⁶

2. The Antiquities Act and the National Monuments Act

The Antiquities Act is a comparative success in terms of remaining unchanged in the face of persistent criticism. Historically, challengers of Ireland's National Monument Act have met with greater success than those challenging the Antiquities Act.²⁸⁷ The latest amendment to the Irish Act brings it closer in line with the American Act by consolidating complete discretion for certain monument decisions in a single individual.²⁸⁸ If left unchanged, the Irish Act's new provisions will

²⁸⁵ See Tim O'Brien, *Roads Authority Rejects Claims of Overstated Costs*, IRISH TIMES, Sept. 9, 2004, at 6. *But see* Sean Duffy, *Failure of Legal Challenge to Roundabout at Carrickmines Castle*, IRISH TIMES, Jan. 13, 2004, at 15 (suggesting the portion of the site saved was not satisfactory to the opposition groups).

²⁸⁶ Looking beyond Carrickmines to Ireland's road-building plan as a whole, it would seem entirely possible that the government's repeated choice of roads over archaeology in similarly charged confrontations could place it outside the norm. See, e.g., Mark Lynas, *The Concrete Isle*, GUARDIAN, Dec. 4, 2004, at 16.

²⁸⁷ See, e.g., HEFFERNAN, *supra* note 19, at 79-80; *Dunne v. Dun Laoghaire-Rathdown County Council*, [2003] I.E.S.C. 15 (24th Feb., 2003) (S.C.) (Ir.) available at <http://bailii.org/ie/cases/IESC/2003/15.html> (last visited Sept. 10, 2005); *Mulcreavy v. Minister for the Env't, Heritage & Local Gov't*, [2004] I.E.S.C. 5 (27th Jan., 2004) (S.C.) (Ir.) available at <http://www.bailii.org/ie/cases/IESC/2004/5.html> (last visited September 10, 2005).

²⁸⁸ See *supra* text accompanying note 208. "It will allow the Minister . . . at his discretion, to order the demolition, sale, or export of any national monument" 587 DAIL DEB. col. 933 (June 17, 2004), <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20040617.xml&Node=H5> (quoting Eamon Gilmore, Deputy). The text of the amendment limits the Minister's absolute discretion to road projects on the South Eastern Route. National Monuments (Amendment) Act, 2004 (Act No. 24/2004) (Ir.) (§ 8), available at <http://www.oireachtas.ie/documents/bills28/bills/2004/2404/b2404d.pdf> (last visited September 10, 2005). However, some fear that the Minister's power will be extended beyond the expressed parameters. Marie O'Halloran, *Labour Describes Monuments Bill as 'Official Vandalism'*, IRISH TIMES, June 18, 2004, at 8.

probably enable it to withstand future challenges to its exercise just as the Antiquities Act has since the early 20th Century.

However, a law's success should not be determined solely by lack of amendment, repeal, or successful challenge. It is equally, perhaps more, important that the effects of a law be agreeable to and accepted by the citizenry.²⁸⁹ In this sense, both the Irish and American laws are failures, at least as far as their ability to quell or avoid dissent surrounding their implementation. Even if history has looked favorably upon practically all United States presidential monument designations,²⁹⁰ there is no reason that a president should have to wait for vindication. Significant numbers of Americans should not necessarily have to expend so much energy and emotion contesting or supporting their president on conservation issues. Even though history may have rendered a less favorable judgment on Ireland's preservation record, there is no reason the Irish cannot enjoy a more peaceful method of resolution in the future. Wangkeo's norm demonstrates that circumstances may require Ireland to lean towards destruction more often than America and that those decisions can indeed be judged as proper under international law.²⁹¹ However, if past objections to government action are any indication, both nations can alter the way they reach and implement final decisions so that their own populations are more likely to judge them as proper.

The one constant in both nations' recent preservation battles, indeed in most of such battles in America and Ireland throughout history, is bitterness resulting from a perceived lack of input.²⁹²

²⁸⁹ "We ultimately accept or reject a law because of its success in securing or confirming our beliefs, values, and policies." Ragsdale, *supra* note 33, at 52.

²⁹⁰ "[H]istory . . . demonstrates that many national monuments that were controversial at the time of their creation, have become widely popular." Udall, *supra* note 53, at 15. "If history is cyclical, then the fury besetting President Clinton's designations will dissipate in time and the present challenges to the Antiquities Act and Clinton's monuments will fritter out, leaving the Act in tact." Biasi, *supra* note 30, at 242; see also Leshy, *supra* note 41, at 300 (describing the "pattern" response to executive action resulting in popular acceptance and congressional ratification).

²⁹¹ See *supra* Part IV(C)(1).

²⁹² See *supra* text accompanying note 234. "Opponents of President Clinton's uses of executive authority to conserve federal lands have focused not nearly so much on what he has done as on how he has done it." Leshy, *supra* note 41, at 305. On the Irish side as well, opponents of government action at Wood Quay in the 1970s and at Carrickmines this past year echoed complaints that the authorities simply did not give their objections any credence. See, e.g., HEFFERNAN, *supra* note 19, at 31, 65 (describing the "less than cogent reasons" given for refusing to select an alternative site for the Wood Quay civic offices and the "tincture of despair" in the

The first time I or any other Utah official heard about the new national monument was . . . when the Washington Post published an article announcing that President Clinton was about to use the Antiquities Act of 1906 to create a 2 million acre national monument in southern Utah. Naturally, we were all somewhat concerned. In fact, I think most of us found it a little hard to believe. Surely the President would have had the decency to at least let the citizens of Utah know if he were considering a move that would affect them so greatly.²⁹³

Surely this is to be expected in reaction to a law designed to allow a single, in most cases distant, entity in Washington or Dublin to interject itself into a passionate local debate and designate a winner and a loser.²⁹⁴ No matter what happens, certain individuals will always feel aggrieved. However, it is possible to balance the benefits derived from the national government's ability to quickly and decisively settle complex local questions with procedural mechanisms designed to assuage the bulk of any negative reaction from the losing side. Furthermore, it is possible to achieve a better balance than either the United States or Ireland has struck in the past. Not only is it possible, it is preferable despite the admitted possibility of ephemeral immediate benefits.²⁹⁵ Put simply, the ends do not necessarily justify the means, and "if there

protestors appeals and resolutions throughout the ordeal); O'Brien, *Will Law Be a Licence to Bypass Our Heritage?*, *supra* note 207, at 51 ("[w]e have zero trust in Minister Cullen . . ."); Healy, *Cullen is Accused On Road Plan Dispute*, *supra* note 265, at 6 (reporting charges of a "democratic deficit" highlighted by the Carrickmines Castle controversy"). A professor at the National University of Ireland objected to the 2004 National Monuments Bill, saying the government "needs to start listening to the people and stop listening to the" Minister's former political party. Holland, *supra* note 208, at 3.

²⁹³ 143 CONG. REC. H8398 (daily ed. Oct. 6, 1997) (statement of Rep. Hansen) (regarding President Clinton's 1996 designation of Utah's Grand Staircase-Escalante National Monument, thereby effectively removing a significant swath of Utah land from future development).

²⁹⁴ "The virtual absence of local or congressional input and approval of a president's monument designation often generates discord among interested parties." Rusnak, *supra* note 98, at 672; *see also Gift of Gab Endeard Gipper*, BOSTON HERALD, June 13, 2004, at O23 (quoting the famous Ronald Reagan quip: "The nine most terrifying words in the English language are 'I'm from the government and I'm here to help'").

²⁹⁵ "[E]ven if including the community in the designation process had no demonstrable benefits, it would be the right thing." Rasband, *supra* note 22, at 547.

is one thing legal history teaches, it is that legality is not an adequate proxy for virtue."²⁹⁶

In order to engage in either virtuous acquisition or destruction of cultural property, future action under the Irish or American Acts should incorporate a number of changes in practice. Several commentators have noted the danger in substantive or procedural alteration of the U.S. Antiquities Act.²⁹⁷ In fact, many of the changes advocated by adversaries would eliminate much of the difference between the Antiquities Act and other legislation designed to preserve U.S. Antiquities heritage,²⁹⁸ thereby rendering the former irrelevant. Insofar as the

²⁹⁶ *Id.* at 533. Rasband continues, "ultimately, if the value of wilderness is its ability to teach, or at very least provide the setting for, 'redeeming' behavior, it simply will not do to acquire that wilderness by anything other than application of the same principles." *Id.* at 534. Rasband's argument for increased public participation in land withdrawal decisions is based on a wilderness ethic more closely identified with environmental concerns than cultural heritage concerns; however, the notion that process should be characterized by the same virtues sought of the goal should not be limited to environmental preservation. *Id.* We seek to preserve cultural property also for its ability to teach and connect us to the redeeming behavior of our society, "cultural property . . . enhances identity, understanding, and appreciation for the culture that produced" it. Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, *supra* note 1, at 569. As noted before, the Antiquities Act by design or by interpretation unarguably embraces both cultural and natural wonders. President Theodore Roosevelt's great-grandson once referred to the Antiquities Act as a "monument to our national conscience." Biasi, *supra* note 30, at 238. If that is true, then Rasband's contention that "voluntary adherence to an ethical code elevates the self-respect of the sportsman, but . . . voluntary disregard of the code degenerates and depraves him," applies with equal force to those hunting archaeological or cultural treasure. Rasband, *supra* note 22, at 536. Thus, to the extent a proposed national monument represents a society that values democratic participation in public decisions, those same values should be the hallmark of the process used to protect it.

²⁹⁷ See, e.g., Rasband, *supra* note 22, at 548-57 (noting that repeal of Antiquities Act authority would likely resulting in the decline of protective public land withdrawals); Udall, *supra* note 53, at 16 (maintaining that "the president's full authorities to use the [Antiquities] Act to protect special areas that may be at imminent risk of harm should remain unencumbered"); Klein, *supra* note 14, at 1391-95 (identifying "core values" of the Antiquities Act explaining its longevity); Leshy, *supra* note 41, at 303-04 (arguing that Congress has "many tools to ensure that executive abuses will not stand"). Albert Lin concludes that the "Antiquities Act authority is thus not an instance of authoritarianism. Rather, it is better characterized as an instance of 'democratically coercing ourselves to behave responsibly.'" See Lin, *supra* note 97, at 725-46.

²⁹⁸ See Rasband, *supra* note 22, at 491-92, 549 (noting that the amendments to the Antiquities Act proposed in the wake of GSE would cause the land withdrawal

2004 amendments to the Irish Act seek to recreate the benefit of swift and decisive authority to resolve controversies seen in the U.S. Antiquities Act, reintroducing the procedural safeguards of old or adding new ones would tend to disserve that goal.²⁹⁹ Thus, the changes advocated herein are not suggested as formal statutory amendments; rather, it is the voluntary public relations practices internal to a given presidential or ministerial administration prior to and during the otherwise proper exercise of U.S. Antiquities Act or National Monuments Act authority that should be altered.³⁰⁰

process under the act to resemble more closely that under FLPMA, and contending that FLPMA is not an adequate substitute for Antiquities Act proclamations).

²⁹⁹ The contentious portion of the 2004 Amendments vests complete discretion in the Minister for the Environment to carry out the SER scheme, regardless of what would otherwise be archaeological impediments. National Monuments (Amendment) Act, 2004 (Act No. 8/2004) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2004/2404/b2404d.pdf> (last visited September 10, 2005); see also *supra* text accompanying note 208. This is to be distinguished from the other sections of the act, which require the consent of a number of different officials (depending on the ownership status of a given monument) and remain in force for other areas of Ireland. National Monuments (Amendment) Act, 1987 (Act No. 17/1987) (Ir.) (§ 15), available at <http://www.irishstatutebook.ie/ZZA17Y1987S15.html> (last visited September 10, 2005). However, significant revisions of the older portions of the act would probably be a mistake as well. Further amendments designed to consolidate power in a single entity akin to the U.S. Act may appeal to a desire for simplicity in statutory form, but that is their only appeal. Legal challenges to the Irish Act have been successful only in challenging the failure to obtain joint consent. See HEFFERNAN, *supra* note 19, at 80; *Mulcreavy v. Minister for the Env't*, [2004] I.E.S.C. 5 (27th January, 2004) (S.C.) (Ir.) available at <http://www.bailii.org/ie/cases/IESC/2004/5.html> (last visited Sept. 10, 2005). No lawsuit to date has succeeded in proving any abuse of discretion by an entity issuing that consent. See *Blascaod Mor Teoranta v. Commissioners of Public Works*, [1998] I.E.H.C. 38 (27th Feb., 1998) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/1998/38.html> (last visited September 13, 2005); *Dunne v. Dun Laoghaire-Rathdown County Council*, [2003] I.E.S.C. 15 (24th February, 2003) (S.C.) (Ir.) available at <http://bailii.org/ie/cases/IESC/2003/15.html> (last visited September 10, 2005); *Dunne v. Minister for the Env't*, [2004] I.E.H.C. 304 (7th September, 2004) (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2004/304.html> (last visited September 10, 2005). Thus, the American and Irish Acts are substantially the same in that once conservation discretion is exercised it is absolute. The only difference is that the former grants this unfettered power to a single individual free of consultation requirements; whereas, the latter requires consultation with another official prior to consenting to destruction. National Monuments (Amendment) Act, 2004 (Act No. 5/2004) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2004/2404/b2404d.pdf> (last visited September 10, 2005).

³⁰⁰ “[E]ven if the law does not require process, nothing prevents a President or his subordinates from providing it, and the political success of future decisions may well require it.” Squillace, *supra* note 33, at 579. Furthermore, “noncompulsory

Specifically, both the Irish and American government should address the persistent claim that detractors have no voice in conservation matters by adopting an informal notice and comment period prior to monument protection or designation.³⁰¹ The *informal* qualifier should be read literally, without any absolute mandate for length or form of comment time. Though the executive's underlying authority to make the ultimate decision regarding preservation or development should remain unchanged,³⁰² citizens would be much more apt to accept the decision regardless of whether their individual interests lie with archaeology, the environment, or the local economy if they were given a more recognizable and consistent forum in which to voice their opinions.³⁰³

In addition to increased acceptance and legitimacy of a given exercise of power, this mode of operation would provide a number of other benefits for Americans and Irish alike. For instance, the responsible official would enjoy an enhanced reputation as a public servant accountable to a variety of interests.³⁰⁴ A multitude of satisfied constitu-

adherence to a virtuous process would enhance the nobility of the preservationist project more than obligated adherence to codified virtue." Rasband, *supra* note 22, at 557.

³⁰¹ But see Klein, *supra* note 14, at 1397 (suggesting that the public accountability of the President is an effective substitute for public participation).

³⁰² Public participation should be blocked, or at least heavily scrutinized, where it could potentially "undermine the common good by interfering with the Government's capacity to make decisions . . . designed to promote the . . . [common] interest." Squillace, *supra* note 33, at 577.

³⁰³ In fact, President Clinton's adoption of a non-binding but extended dialogue with local interests regarding subsequent monument designations largely succeeded in preventing a repeat of the GSE controversy. Leshy, *supra* note 41, at 308-09; see also Lin, *supra* note 97, at 720. "President Clinton followed a more politically savvy approach in his subsequent monument designations." *Id.* The George W. Bush Administration has also attempted to utilize an approach designed to address the alleged procedural faults in Clinton's designations, including soliciting input from state and local officials regarding prospective monument use and management. *Id.*; see also, Robert Gehrke, *Land Exchange Refloated in House*, SALT LAKE TRIBUNE, May 10, 2005, at C1 (describing the negotiations between the Utah and Federal governments regarding designation of a San Rafael Swell National Monument). But see William Perry Pendley, *Natural Resources Policy Under the Bush Administration: Not What It Says, But What It Has Done in Court*, 14 DUKE ENVTL. L. & POL'Y F. 313, 315 (2004) (arguing that the Bush Administration's post-election actions regarding monument designation did not comport with its pre-election promises to undo Clinton's designations or to utilize a more "constitutional" manner in making further natural resources decisions).

³⁰⁴ Klein argues that the Antiquities Act as written creates incentives for presidents to act in a politically accountable manner. Klein, *supra* note 14, at 1397. While

ents can serve as an added source of information that may well present issues that are either invisible or ignored by an official's immediate, more insulated, circle of advisors.³⁰⁵ Furthermore, a good deal of the negative publicity historically attendant to large designations would be avoided; claims of improper motivation and surprise federal usurpation of power³⁰⁶ are sapped of vigor when motive and power are voluntarily and visibly checked. Lastly, a more cooperative federal approach to monument designation or destruction is more likely to gain allies in the debates that inevitably follow regarding what to do next.³⁰⁷ Local residents and special interest groups are often well-suited by virtue of specialized knowledge to advise federal officials on the management of heritage sites post-designation or post-destruction.³⁰⁸

Costs of voluntary notice and comment are minimal,³⁰⁹ especially when compared to the potential benefits delineated above. One disadvantage, from the administration's standpoint at least, is that it is forced to expose its plan, defend accusations, and answer questions in front of local, national, and perhaps worldwide inquisitors at an earlier junction.³¹⁰ However, the time and energy necessary to send federal emissaries to promote, justify, or explain a designation pale in comparison to the time and energy necessary to rebut the charges of collu-

this may be true generally, substantial evidence including official admission by administration officials, proves that the Clinton Administration, if not others, have acted largely out of concern for self-preservation if not spite. Even in a less controversial instance, fostering public participation can only increase the legitimacy of a leader's claims that a variety of interests have been taken into account.

³⁰⁵ See Squillace, *supra* note 33, at 573; Rasband, *supra* note 22, at 538.

³⁰⁶ See, e.g., Rusnak, *supra* note 98, at 713-14.

³⁰⁷ See, e.g., Heideman, *supra* note 10.

³⁰⁸ "Cooperative community level involvement can provide the 'institutional memory' of people, projects and local knowledge that is lost when agency employees make frequent location transfers." Peter M. Lavigne, *The Movement for American Ecosystem Restoration and Interactive Environmental Decisionmaking: Quagmire, Diversion, or Our Last, Best Hope?*, 17 TUL. ENVTL. L.J. 1, 37 (2003).

³⁰⁹ Squillace, *supra* note 33, at 574-75. "[M]inimal process requirements such as prior notice . . . along with a brief opportunity for public comment, would not likely impose a substantial impediment to the operation of the law, and might allow the President to avoid unintended conflicts and secure stronger political support for the proposal." *Id.*

³¹⁰ The possibility also exists that such a process can have the effect of targeting a resource in a manner that attracts the very damage a protective decision would be designed to prevent. See *id.*

sion or abuse that may otherwise appear.³¹¹ In the rare instance that justification of a decision requires atypical effort, it should serve as an indicator that the proposed action may well be, politically, an abuse of discretion that should be abandoned. The much-lauded ability of officials to act in the face of an emergency³¹² would remain in force, since achieving public consensus or demonstrating some minimum level of attention to local concerns would not be legally required.³¹³

V. CONCLUSION

The Irish and American people are no different in the sense of pride they take in their cultural heritage. Each culture has, throughout its history, attempted to give a legislative imprimatur to its urge to preserve that heritage, but with decidedly different results. While executive action under the U.S. Antiquities Act has been generally ratified by Congress, history, and public opinion, it remains subject to examination for its persistent tendency to cause significant rifts in the public resulting from its implementation. The Irish Act, on the other hand, has been subject to far more pervasive legislative tinkering, yet it has still produced the same raging controversies when invoked. Having traced the development and use of some of the primary cultural preservation laws in each nation, this Article suggests that it is not enough to say that vocal minorities oppose conservation domestically but champion it abroad. While cultural differences and dissimilar demographic circumstances may lead more often towards American preservation and Irish destruction, the laws underlying those results do a poor job of legitimizing themselves in particular instances.

Whether proponents of conservation adhere to environmental ethics, archaeological/historical values, or both, the fundamental problem in every conservation controversy involves striking a balance between development and the status quo.³¹⁴ Regardless of the number of people

³¹¹ "In truth, the argument that the designation may have been derailed by public notice is only a claim that the Administration could not have achieved its objective as easily." Rasband, *supra* note 22, at 539.

³¹² See Leshy, *supra* note 41, at 300; Klein, *supra* note 14, at 1394-95.

³¹³ Indeed, the very point of this recommended change in practice is that legal proscription should not be the only limit in choosing between preservation and destruction. See Rasband, *supra* note 22, at 557-62.

³¹⁴ Cf. Rand, *supra* note 2, at 272. "Ultimately, the task in public lands decision making is to find a balance between the competing benefits of wilderness and civilization." *Id.* The fundamental conflict in preservation law is identified as preservation versus progress. *Id.* "A classic confrontation between norms of preservation

on each side in a given situation, a victory for one side necessarily entails loss for the other. American and Irish decisions over the years have largely conformed to the relevant law, but the bitter and often high-profile protests that accompany those decisions indicate that the laws do not adequately address the recurring perception that they permit technically proper action at the expense of a truly democratic process.

Judging results retrospectively, the furor matters little; however, process matters from a prospective point of view. Members of the current generation are sure to be subject to that same process at some point themselves. "Historic preservation is not just about history. It is about the quality of life for all people."³¹⁵ In order for conservation practices to achieve the maximum quality of life for both proponents and detractors, those vested with decision-making discretion must take into account the more subtle needs of cultural identity, understanding, and appreciation in addition to immediately apparent economic needs. The most virtuous way to recognize these often-conflicting needs is to allow as much diverse public input and commentary as possible prior to implementing any decision of lasting effect. Neither the U.S. Antiquities Act nor the Irish National Monuments Act requires amendment to effectuate these aims; however, the current practices of both governments as demonstrated by their actual implementation of their respective legislation merit adjustment in the future.

and development developed as the excavation [at Carrickmines] unfolded." *Saving Carrickmines*, IRISH TIMES, Aug. 17, 2002, at 13.

³¹⁵ Melissa A. MacGill, *Old Stuff is Good Stuff: Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L.J. AM. U. 697, 736 (1994).