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### **Etched in Stone: Historic Preservation Law and Confederate Monuments**

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ETCHED IN STONE: HISTORIC PRESERVATION LAW AND  
CONFEDERATE MONUMENTS

*Jess R. Phelps\* and Jessica Owley\*\**

Abstract

This Article examines the current controversy regarding Confederate monuments. While many have focused on the removal of these commemorative objects, the legal framework regarding their protection has not been fully explored. This Article provides an in-depth understanding of the application of historic preservation laws to monument removal efforts and examines the impact of these federal, state, and local laws. The examination raises significant questions about the permanency of preservation laws generally. This Article considers how historic significance is evaluated and valued, noting the lack of flexibility and absence of mechanisms for reevaluating past protection decisions. This Article uses the Confederate monument debate both to help illustrate the general limitations inherent in static historic preservation laws and to provide practical guidance for those seeking to modify or remove monuments.

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## INTRODUCTION

On June 17, 2015, Dylann Roof attended a prayer service at Emanuel African Methodist Episcopal Church in Charleston, South Carolina.<sup>1</sup> In the middle of the service, he opened fire on the gathering, killing nine people and injuring one.<sup>2</sup> All of his victims were black. When Roof confessed to the murders, he stated that he had acted with the hope of igniting a race war.<sup>3</sup> Roof’s personal website contained photos of him posing with symbols of white supremacy, including the Confederate flag.<sup>4</sup> He also wrote a manifesto outlining his views on black people, among others.<sup>5</sup> He developed his white supremacist views after reading

1. Jason Horowitz et al., *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html> [<https://perma.cc/CVV9-QMAQ>] (describing the gathering as “a prayer meeting”); Ray Sanchez & Keith O’Shea, *Mass Shooter Dylann Roof, with a Laugh, Confesses, ‘I Did It,’* CNN (Dec. 10, 2016, 7:16 AM), <https://www.cnn.com/2016/12/09/us/dylann-roof-trial-charleston-video/index.html> [<https://perma.cc/LZ7Z-8SYF>] (noting that Roof describes sitting with his victims at “a Bible study” before shooting them as they stood for prayers with their eyes closed).

2. Horowitz et al., *supra* note 1 (explaining that eight people died at the scene, two were taken to the hospital, and one of those two died on the way).

3. See Polly Mosendz, *Dylann Roof Confesses: Says He Wanted to Start ‘Race War,’* NEWSWEEK (June 19, 2015, 9:38 AM), <https://www.newsweek.com/dylann-roof-confesses-church-shooting-says-he-wanted-start-race-war-344797> [<https://perma.cc/JM42-NGSQ>]; Sanchez & O’Shea, *supra* note 1 (quoting Roof as saying “[h]is goal was ‘to agitate race relations’” and describing himself as a white supremacist).

4. Scott Neuman, *Photos of Dylann Roof, Racist Manifesto Surface on Website*, NPR (June 20, 2015, 1:22 PM), <https://www.npr.org/sections/thetwo-way/2015/06/20/416024920/photos-possible-manifesto-of-dylann-roof-surface-on-website> [<https://perma.cc/59ZE-GS4E>] (showing photos and describing some of the content on Roof’s website, “The Last Rhodesian”); Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html> [<https://perma.cc/42UR-NQTE>] (discussing content from Roof’s website).

5. See Robles, *supra* note 4.

about the 2012 shooting of Trayvon Martin and black-on-white crime.<sup>6</sup> In the months leading up to the shooting, Roof traveled throughout South Carolina visiting Confederate cemeteries, monuments, and other sites from which he drew inspiration.<sup>7</sup>

On August 11, 2017, white nationalists gathered in Charlottesville, Virginia, on the campus of the University of Virginia to protest the removal of Confederate monuments generally, and specifically the proposed removal of a Robert E. Lee statue from Charlottesville's Emancipation Park.<sup>8</sup> This event preceded a planned event on August 12th, called the "Unite the Right" rally by organizers.<sup>9</sup> That event quickly turned ugly.<sup>10</sup> Protesters were members of the far-right and included white supremacists, members of the alt-right, neo-Confederates, Klansmen, neo-Nazis, and various militias.<sup>11</sup> Some of the marchers

6. Neuman, *supra* note 4 ("The event that truly awakened me was the Trayvon Martin case . . . I read the Wikipedia article and right away I was unable to understand what the big deal was. It was obvious that Zimmerman was in the right."). George Zimmerman shot and killed Trayvon Martin, an unarmed black teenager, in 2012, believing that Martin was a threat and that he, Zimmerman, had the authority to shoot him. See Adam Weinstein & Mojo News Team, *The Trayvon Martin Killing, Explained*, MOTHER JONES (Mar. 18, 2012, 5:42 PM), <https://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained/> [<https://perma.cc/AQ68-H7E3>].

7. Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), <https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist> [<https://perma.cc/FVP3-9RSC>] ("He drove to the 400-year-old Angel Oak on Johns Island, the Museum & Library of Confederate History in Greenville, a graveyard of Confederate soldiers in his hometown, and plantations like Boone Hall in Mount Pleasant.").

8. Richard Fausset & Alan Feuer, *Far-Right Groups Surge into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017) <https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html> [<https://perma.cc/3L8N-NJ8C>]; Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html> [<https://perma.cc/3WKD-HMTC>].

9. Frontline Documentary, <https://www.pbs.org/wgbh/frontline/film/documenting-hate-charlottesville/> [<https://perma.cc/75E8-GQS5>] (explaining the planned event for August 12, 2017, and the unpermitted march).

10. See Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm\\_term=.c18fbdc17cd3](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.c18fbdc17cd3) [<https://perma.cc/5PFW-A2TT>].

11. Morgan Gstalter, *KKK Leader Found Guilty of Firing Gun During Charlottesville Rally*, THE HILL (May 8, 2018, 3:01 PM), <https://thehill.com/blogs/blog-briefing-room/news/386745-kkk-leader-found-guilty-of-firing-gun-during-charlottesville> [<https://perma.cc/SA6N-TGJZ>]; Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018, 4:44 PM), <https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500> [<https://perma.cc/9ATB-WV3N>]; Hanna Kozłowska, *Who Were the Armed Camouflaged Men in Charlottesville Who Have Nothing to Do with the Military?*, QUARTZ (Aug. 15, 2017), <https://qz.com/1053604/who-were-the-armed-camouflaged-men-in-charlottesville-who-have->

chanted racist and anti-Semitic slogans; some carried semi-automatic rifles, swastikas, Confederate battle flags, and other symbols.<sup>12</sup> Marchers clashed with counter-protesters, leaving over thirty injured.<sup>13</sup> The most violent moment happened when a man linked to white-supremacist groups rammed his car into a crowd of counter-protesters, killing one person and injuring nineteen.<sup>14</sup>

In the wake of violence in Charleston and Charlottesville, the ongoing debate over Confederate icons escalated.<sup>15</sup> Although past debates centered on the Confederate battle flag, advocates recently renewed their efforts to remove Confederate monuments, particularly those in public spaces.<sup>16</sup> With this added attention to the future of Confederate monuments comes a need to focus on legal processes for removal and

nothing-to-do-with-the-military/ [https://perma.cc/DP7S-EXYS]; Ray Sanchez, *Who Are White Nationalists and What Do They Want?*, CNN (Aug. 13, 2017, 4:35 PM), <https://www.cnn.com/2017/08/13/us/white-nationalism-explainer-trnd/index.html> [https://perma.cc/PP2S-FYP6].

12. Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/> [https://perma.cc/3E3P-XLYC]; Kozłowska, *supra* note 11; Matt Pearce, *A Guide to Some of the Far-Right Symbols Seen in Charlottesville*, L.A. TIMES (Aug. 14, 2017, 2:00 PM), <http://www.latimes.com/nation/la-na-far-right-symbols-20170814-story.html> [https://perma.cc/66GH-YDT7].

13. Holly Yan et al., *Virginia Governor on White Nationalists: They Should Leave America*, CNN, <https://www.cnn.com/2017/08/13/us/charlottesville-white-nationalist-rally-car-crash/index.html> [https://perma.cc/E8US-QVPV] (last updated Aug. 14, 2017, 6:22 AM).

14. Justin Carissimo, *I Dead, 19 Injured After Car Plows into Protesters in Charlottesville*, CBS NEWS, <https://www.cbsnews.com/news/1-dead-19-injured-after-car-plows-into-protesters-in-charlottesville/> [https://perma.cc/RLY7-EV89] (last updated Aug. 13, 2017, 1:42 AM). James Alex Fields, Jr., was charged with first degree murder and the legal proceedings against him began in the summer of 2018. Emily Shugerman, *James Alex Fields Jr: Man Accused of Driving into Charlottesville Protesters Charged*, INDEPENDENT (June 27, 2017, 5:59 PM), <https://www.independent.co.uk/news/world/americas/charlottesville-james-alex-fields-jr-latest-heather-fields-car-protest-charged-a8420086.html> [https://perma.cc/NL2E-UULA]. On March 27, 2019, he pleaded guilty in exchange for the prosecutors not seeking the death penalty. Paul Duggan & Justine Jouvenal, *Neo-Nazi Sympathizer Pleads Guilty to Federal Hate Crimes for Plowing Car into Protesters at Charlottesville Rally*, WASH. POST (Mar. 27, 2019), [https://www.washingtonpost.com/local/public-safety/neo-nazi-sympathizer-pleads-guilty-to-federal-hate-crimes-for-plowing-car-into-crowd-of-protesters-at-unite-the-right-rally-in-charlottesville/2019/03/27/2b947c32-50ab-11e9-8d28-f5149e5a2fda\\_story.html?noredirect=on&utm\\_term=.2662db17b54f](https://www.washingtonpost.com/local/public-safety/neo-nazi-sympathizer-pleads-guilty-to-federal-hate-crimes-for-plowing-car-into-crowd-of-protesters-at-unite-the-right-rally-in-charlottesville/2019/03/27/2b947c32-50ab-11e9-8d28-f5149e5a2fda_story.html?noredirect=on&utm_term=.2662db17b54f) [https://perma.cc/CZH4-VZ29] (explaining that Fields pled guilty to twenty-nine of the thirty charges with sentencing set for July 3, 2019).

15. See, e.g., *Confederate Heritage Preservation*, C-SPAN (July 28, 2018), <https://www.c-span.org/video/?448679-9/confederate-heritage-preservation> [https://perma.cc/L7G6-8EAR] (exploring this ongoing societal debate).

16. See generally *The Long and Divisive History of the Confederate Flag*, NPR (June 23, 2015, 5:02 AM), <https://www.npr.org/2015/06/23/416736897/the-long-and-divisive-history-of-the-confederate-flag> [https://perma.cc/46T2-GPCX] (explaining that the battle over the appropriate use of the Confederate battle flag has raged for several decades).

management. Laws often prevent the removal, relocation, obscuration, and contextualization of Confederate monuments, even where such efforts have widespread local support.<sup>17</sup> Specifically, removal efforts are often limited by historic preservation and conservation laws that directly protect either the monuments or the landscape in which they sit.<sup>18</sup> This Article outlines the role historic preservation laws play in efforts to modify or remove Confederate monuments. Many Confederate monuments dotting the landscape of the southern United States and beyond are symbols of white supremacy and were erected not to commemorate the dead but to subjugate the living. Today, there is often local public support for their removal, but this Article illustrates why, despite this support, such efforts are more difficult legally than many initially believed. This Article provides a roadmap for communities to address the future of such monuments.

Beyond commenting on Confederate monuments alone, however, this Article uses the example of Confederate monuments to highlight concerns with historic preservation law more generally. A hallmark of these laws is that they rarely contain flexible mechanisms for change or reinterpretation of historical meaning. Thus, once a monument is designated as historic under a federal or local preservation law or protected with a preservation easement, few mechanisms allow for reevaluation of either the decision to preserve the monument or the preservation rationale for its designation.<sup>19</sup> Using the context of Confederate monuments, this Article broadly critiques historic preservation and conservation efforts that lock in place contemporary ideas of heritage and environmental protection. Historic preservation efforts focus on designators' original intent and are potentially disconnected from the accretion of memories and how these resources are now perceived.<sup>20</sup> In short, ongoing debates over historical meaning of events and structures collide with static historic preservation protection efforts. By its nature, the historic preservation movement often views change as an unqualified negative and therefore promotes an inflexible vision of heritage. Changes to historic preservation laws to allow for

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17. See Naomi Shavin, *States Are Using Preservation Laws to Block the Removal of Confederate Monuments*, ARTSY (Apr. 24, 2018, 5:20 PM), <https://www.artsy.net/article/artsy-editorial-states-preservation-laws-block-removal-confederate-monuments> [<https://perma.cc/CGJ3-KKA7>].

18. See *infra* Part II.

19. See generally J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENVTL. L.J. 203 (2009) (discussing the evolving interpretation of the Gettysburg battlefield).

20. See, e.g., *id.* at 256 (noting debate regarding the intent and meaning of the Neutra building).

reconsideration and to address the greater public interest are necessary.<sup>21</sup> This Article uses the example of Confederate monuments both to help explore general limitations inherent in historic preservation law and to provide some practical guidance for those seeking to modify or remove monuments.

## I. CONFEDERATE MONUMENTS

The Civil War was the bloodiest conflict fought on this continent and has a deep and continuing impact on collective public memory.<sup>22</sup> The number of lives lost far exceeds American losses in any other war, both by gross number (620,000 at the lower end of the estimates) and as a percentage of the population (two percent of the country's total population).<sup>23</sup> Given this degree of loss, it would not be surprising if there had been a strong desire to commemorate those lost in this struggle—on both the Union and Confederate sides.<sup>24</sup> Yet, Confederate monuments are largely *not* statues honoring lost loved ones erected in the aftermath of the war.<sup>25</sup> Instead, white Southern civic groups established monuments in the wake of Reconstruction and later Jim Crow to reinforce cultural

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21. A future challenge of the historic preservation movement is how to deal with competing histories, the accretion of memories and reflecting and preserving uncomfortable moments from our nation's past. Over the past decades, there has been a movement to make the field more inclusive and representative of our shared national history, but this is a slow and unsteady progress. See Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship with Sally Hemings*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html> [<https://perma.cc/NGL8-3XKE>] (noting one example of these tensions within the interpretation of Monticello).

22. See, e.g., James M. Lundberg, *Thanks a Lot, Ken Burns*, SLATE (June 7, 2011, 7:03 AM), [http://www.slate.com/articles/arts/culturebox/2011/06/thanks\\_a\\_lot\\_ken\\_burns.html](http://www.slate.com/articles/arts/culturebox/2011/06/thanks_a_lot_ken_burns.html) [<https://perma.cc/HEV5-VPGP>] (profiling the impact of the Civil War on our national consciousness through the lens of the 1990 Ken Burns miniseries).

23. See J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIVIL WAR HIST. 307, 307 (2011); *Civil War Casualties*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/civil-war-casualties> [<https://perma.cc/6UNN-9TAC>]; Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html> [<https://perma.cc/EP28-DRRL>]. For a sense of the emotional impact of this conflict on our country, see DREW GILPIN FAUST, *This Republic of Suffering: Death and the American Civil War 8–10* (2008).

24. See James Robertson *History of Confederate Monuments*, C-SPAN (July 28, 2018), <https://www.c-span.org/video/?c4742746/james-robertson-history-confederate-monuments> [<https://perma.cc/89WG-T22K>].

25. *Statement on Confederate Monuments: Confronting Difficult History*, NAT'L TR. HISTORIC PRESERVATION (June 29, 2017), <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials#.Wjf4C1WnGuk> [<https://perma.cc/6VU7-GWDL>] [hereinafter *Statement*].

norms that treated black and other non-white people as second-class citizens.<sup>26</sup>

The vast majority of Civil War memorials are monuments to Confederate soldiers and the Confederate cause.<sup>27</sup> Hundreds of Confederate monuments are scattered across thirty-one states, largely in the South.<sup>28</sup> The Southern Poverty Law Center (SPLC) produced a report in 2016, in the wake of the Dylann Roof shooting, documenting both Confederate place names and Confederate symbols in public spaces nationwide.<sup>29</sup> The SPLC found 1,503 such names and places (admitting, however, that its study was far from comprehensive, suggesting a potentially substantial undercounting).<sup>30</sup> Of these listings, 718 were Confederate monuments and statues.<sup>31</sup> The bulk of these are found in Georgia, Virginia, and North Carolina, illustrating that “[c]itizens and ancestors of the former Confederate States raised more monuments to a defeat than any other civilization in history.”<sup>32</sup> Most of the monuments identified (551) were created before 1950,<sup>33</sup> many in what is considered the boom time for Confederate monuments—roughly between 1889 and 1920.<sup>34</sup>

Shortly after the Civil War, Americans on both sides began erecting monuments to remember lost loved ones.<sup>35</sup> Families and towns raised the first Confederate monuments in cemeteries.<sup>36</sup> The monuments tended to be simple obelisks dedicated to inhabitants of a particular town or

26. *Id.*

27. S. POVERTY LAW CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY 9–10 (2016) [hereinafter SPLC].

28. *See Statement, supra* note 25 (noting that some monuments are in “far-flung places” as well).

29. *See* SPLC, *supra* note 27.

30. *Id.* at 7.

31. *Id.*

32. U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900-B, CIVIL WAR COMMEMORATIVE SCULPTURE IN ARKANSAS, 1884–1934, at E-2 (1996).

33. SPLC, *supra* note 27, at 10.

34. *Id.* at 14. This corresponds “with a shameful upsurge in racist atrocities, as whites lynched at least 884 blacks between 1897 and 1906.” Byrne, *infra* note 76, at 232.

35. *See* GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH 1865 TO 1913, at 2–3, 36–46 (1987) (describing the widespread melancholy of this period and noting this as the first period on the spectrum of Confederate monument building—a period of bereavement); Andrew Kahn, *The Landscape of Civil War Commemoration*, SLATE (July 2, 2015, 6:03 PM), [http://www.slate.com/articles/news\\_and\\_politics/history/2015/07/civil\\_war\\_historical\\_markers\\_a\\_map\\_of\\_confederate\\_monuments\\_and\\_union\\_ones.html](http://www.slate.com/articles/news_and_politics/history/2015/07/civil_war_historical_markers_a_map_of_confederate_monuments_and_union_ones.html) [https://perma.cc/S86G-Z4UG].

36. U.S. DEP’T OF THE INTERIOR, *supra* note 32, at E-5.



region.<sup>37</sup> Sometimes, they honored a particular person or distinguished general or officer.<sup>38</sup> These monuments went largely unnoticed.<sup>39</sup>

A change in the monument movement, beginning around 1889, seemed to be driven by a few factors. First, there was a shift from honoring the dead to supporting the living.<sup>40</sup> The monuments became symbols of Southern pride.<sup>41</sup> The civic organizations lobbying for the monuments argued that they helped white Southern children feel pride in their heritage and their families instead of feeling guilt for having families that championed slavery.<sup>42</sup> Second, white Southern social groups erected Confederate monuments in conjunction with the passage of Jim Crow laws as symbols of white supremacy and as part of their efforts to reinforce a segregated society.<sup>43</sup> The monuments conveyed the idea that the races were not equal, even in the context of a society that no longer thought slavery to be morally right.<sup>44</sup> Third, capitalism played a role. A growing monument industry advertised broadly and appealed to community groups.<sup>45</sup> Community groups convinced many civic

37. FOSTER, *supra* note 35, at 43–44 (explaining this focus on commemoration/bereavement).

38. Thomas Brown, *Confederate Monuments*, in 4 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE 43, 43 (Charles Reagan Wilson et al. eds., 2006).

39. FOSTER, *supra* note 35, at 44 (explaining the role/visibility of monuments during the bereavement period of monument installation).

40. See U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-3.

41. See *id.*

42. See *id.*

43. See, e.g., SPLC, *supra* note 27, at 11.

44. See U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-4. Others argue the correlation between the timing of when these structures were constructed and the Jim Crow period does not imply causation, although separating out the original intent to honor the war's dead versus other less explicit messaging (and the backdrop of the conflict's roots in defending the institution of slavery) is not easily accomplished or even possible. *Competing Memories of the Civil War*, C-SPAN (July 28, 2018), <https://www.c-span.org/video/?448679-6/competing-memories-civil-war&playEvent> [<https://perma.cc/RV63-AAJ9>] (explaining the timing and historical context).

45. One larger contributor was the McNeel Marble Company of Marietta, Georgia. U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-9. McNeel had a very successful advertising campaign urging all communities to erect their own Confederate monuments. *Id.* In 1909, the United Daughters of the Confederacy erected more monuments than it had in the previous decade. *Id.* Ninety-five percent of these monuments were built by McNeel. *Id.*; see also Jonathan M. Katz, *Protester Arrested in Toppling of Confederate Statue in Durham*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/protester-arrested-in-toppling-of-confederate-statue-in-durham.html> [<https://perma.cc/C5JH-4N5R>] (describing a McNeel-manufactured Confederate monument in Durham, North Carolina, as being “erected in 1924 during a wave of installations of Confederate memorials, mass-produced and promoted in regional advertising campaigns across the South in the 1920s”). Ironically, many of these statues were identical to those used in Northern memorials as Northern manufacturers also sold to the Southern market. See Marc Fisher, *Why Those Confederate Soldier Statues Look a Lot Like Their Union Counterparts*, WASH. POST (Aug. 18, 2017), <https://www.washingtonpost.com/politics/why-those-confederate-soldier-statues-look>

organizations that a town was not complete without a Confederate monument to bolster Southern pride and heritage.<sup>46</sup>

Together, these three reasons also illustrate why the monuments themselves began to look different. Shifting from mourning to commemorating, the monuments often recognized a particular historic figure (for example, Robert E. Lee, Jefferson Davis, or Thomas “Stonewall” Jackson). As James Grossman, Executive Director of the American Historical Association, explains, “[t]hese statues were meant to create legitimate garb for white supremacy . . . Why would you put a statue of Robert E. Lee or Stonewall Jackson in 1948 in Baltimore?”<sup>47</sup> Perhaps not surprisingly, there are very few, if any, monuments of Confederate generals who worked with the U.S. government during Reconstruction.<sup>48</sup> Take, for example, General James Longstreet, one of Lee’s most trusted subordinates, who has one block on his grave, a small statue at Gettysburg, and military service plaques, but otherwise has been left without commemoration despite his role as one of the South’s leading generals.<sup>49</sup>

Much more common than even monuments honoring notable Confederate generals is the construction of statues recognizing unnamed soldiers and figures who represented the ideal of Southern loyalty and strength.<sup>50</sup> For example, ninety percent of the Confederate monuments erected in Arkansas before 1885 had a funerary aspect, demonstrating themes of loss or bereavement.<sup>51</sup> By 1912, only twenty-five percent of

-a-lot-like-their-union-counterparts/2017/08/18/cefcc1bc-8394-11e7-ab27-1a21a8e006ab\_story.html?utm\_term=.3278ce998638 [https://perma.cc/8SWU-EJR5] (explaining the role of Monumental Bronze, a Bridgeport, Connecticut, company, in fueling this demand).

46. See John J. Winberry, “*Lest We Forget*”: *The Confederate Monument and the Southern Townscape*, 23 SE. GEOGRAPHER 107, 118 (1983).

47. Miles Parks, *Confederate Statues Were Built to Further a ‘White Supremacist Future,’* NPR (Aug. 20, 2017, 8:31 AM), <https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future> [https://perma.cc/HD7M-MASQ].

48. See, e.g., Jane Dailey, *The Confederate General Who Was Erased*, HUFFINGTON POST (Aug. 21, 2017, 4:42 PM), [https://www.huffingtonpost.com/entry/the-confederate-general-who-was-erased-from-history\\_us\\_599b3747e4b06a788a2af43e](https://www.huffingtonpost.com/entry/the-confederate-general-who-was-erased-from-history_us_599b3747e4b06a788a2af43e) [https://perma.cc/68TH-XM8H] (detailing the efforts of Southerners to erase the history of General William Mahone because of his postwar activities).

49. Charles Lane, *The Forgotten Confederate General Who Deserves a Monument*, WASH. POST (Jan. 27, 2016), [https://www.washingtonpost.com/opinions/the-forgotten-confederate-general-who-would-make-a-better-subject-for-monuments/2016/01/27/f09bad42-c536-11e5-8965-0607e0e265ce\\_story.html?utm\\_term=.3b8edb6d386f](https://www.washingtonpost.com/opinions/the-forgotten-confederate-general-who-would-make-a-better-subject-for-monuments/2016/01/27/f09bad42-c536-11e5-8965-0607e0e265ce_story.html?utm_term=.3b8edb6d386f) [https://perma.cc/8CZT-7MUX] (noting this fact and arguing that Longstreet was scapegoated by Confederates for his postwar positions during Reconstruction).

50. Brown, *supra* note 38, at 46.

51. U.S. DEP’T OF THE INTERIOR, *supra* note 32, at E-6.

the monuments had a funerary aspect.<sup>52</sup> Eighty percent represented a lone soldier.<sup>53</sup> During this era, the monuments were most likely to be erected on courthouse lawns or other civic spaces (for example, over eighty-five percent of Confederate monuments in Arkansas are in public spaces).<sup>54</sup>

Monument construction was part of an ongoing battle between the veterans' associations in the North and the South to define the rationale for the war in historical memory.<sup>55</sup> Two organizations are responsible for many of these monuments: Sons of Confederate Veterans and United Daughters of the Confederacy.<sup>56</sup> By constructing monuments, these organizations sought to honor the Confederate dead, whom they view as heroic, and to spread the organizations' view of the underlying conflict at the heart of the war, usually labeled the "Lost Cause" movement.<sup>57</sup> Under the Lost Cause theory, the Civil War was a noble struggle to preserve states' rights and a Southern way of life.<sup>58</sup> This view ignores the fact that the "[S]outhern way of life" was built upon slavery, and it tries to minimize the evils of this unconscionable system.<sup>59</sup> There are four tenets to the Lost Cause ideology: (1) that the South fought honorably and bravely; (2) that the South was not defeated, but was overwhelmed by superior Northern economic prowess and population; (3) that preservation of states' rights, not slavery, was the cause of the war; and (4) that secession was constitutional (not treasonous).<sup>60</sup> The Lost Cause Movement has its roots in white anxiety and fear of a loss of standing in

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52. *Id.* at E-8.

53. *Id.*

54. *Id.*

55. *Competing Memories of the Civil War*, *supra* note 44.

56. *See, e.g.*, CAROLINE E. JANNEY, BURYING THE DEAD BUT NOT THE PAST: LADIES MEMORIAL ASSOCIATIONS AND THE LOST CAUSE 1–14 (2008) (providing overview of this patriotic movement).

57. *See* Peter Galuszka, *The Women Who Erected Confederate Monuments Are Stunningly Silent*, WASH. POST (Oct. 13, 2017), [https://www.washingtonpost.com/opinions/the-women-who-erected-confederate-statues-are-stunningly-silent/2017/10/13/2e759dde-a920-11e7-b3aa-c0e2e1d41e38\\_story.html?utm\\_term=.542c600cd2b2](https://www.washingtonpost.com/opinions/the-women-who-erected-confederate-statues-are-stunningly-silent/2017/10/13/2e759dde-a920-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.542c600cd2b2) [<https://perma.cc/959D-MST7>]; *see also* Winberry, *supra* note 46, at 115–16 (describing the "Lost Cause" movement's growth and its role in shaping the landscape of the South).

58. *See, e.g.*, James Oliver Horton, *Confronting Slavery and Revealing the "Lost Cause,"* NAT'L PARK SER., <https://www.nps.gov/resources/story.htm%3Fid%3D217> [<https://perma.cc/GH8X-NV8C>]; *see also* Gary W. Gallagher, *Introduction to THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 1*, 1–4 (Gary W. Gallagher & Alan T. Nolan eds., 2000) (providing an overview of the development of this movement).

59. *See* Horton, *supra* note 58.

60. *See, e.g.*, *The Lost Cause*, CIV. WAR JOURNEYS, [http://civil-war-journeys.org/the\\_lost\\_cause.htm](http://civil-war-journeys.org/the_lost_cause.htm) [<https://perma.cc/RH2A-2P6N>].

society.<sup>61</sup> It applauds a social order based on innate racial inequality.<sup>62</sup> Placement of many Confederate monuments worked and still works to normalize the Lost Cause view (a view almost entirely rejected or discredited by historians).<sup>63</sup>

The groups responsible for the monuments often had (and sometimes still have) close ties to the Ku Klux Klan and sometimes specifically acknowledged their desire to use monuments to shift public attitudes and rewrite history.<sup>64</sup> As one prominent woman from Arkansas announced at the unveiling of a Confederate memorial in 1897 in Fayetteville:

These monuments we build will speak their message to generations. These voiceless marbles in their majesty will stand as vindicators of the Confederate soldier. They will lift from these brave men the opprobrium of rebel, and stand them in the line of patriots. This is not alone a labor of love, it is a work of duty as well. We are correcting history.<sup>65</sup>

Additional monuments appeared in the 1950s and 60s during the civil rights era,<sup>66</sup> sometimes in response to specific events, like the Supreme Court decision in *Brown v. Board of Education*<sup>67</sup> and the assassination of

61. David A. Graham, *The Stubborn Persistence of Confederate Monuments*, ATLANTIC (Apr. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-stubborn-persistence-of-confederate-monuments/479751/> [<https://perma.cc/L9LS-SEDG>] (charting the motivations for monument construction).

62. See U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-3.

63. See Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1084–85 (1995) (noting the normalization of Confederate statues); Parks, *supra* note 47 (“To build Confederate statues . . . in public spaces, near government buildings, and especially in front of court houses, was a ‘power play’ meant to intimidate those looking to come to the ‘seat of justice or the seat of the law.’”); see also Irvin D.S. Winsboro, *The Confederate Monument Movement as a Policy Dilemma for Resource Managers of Parks, Cultural Sites, and Protected Places: Florida as a Case Study*, 33 GEORGE WRIGHT F. 217, 218–19 (2016) (discussing this contested historical narrative).

64. See, e.g., Sarah E. Gardner, *What We Talk About When We Talk About Confederate Monuments*, ORIGINS (Feb. 2018), <http://origins.osu.edu/article/what-we-talk-about-when-we-talk-about-confederate-monuments> [<https://perma.cc/9EZB-VGCN>] (discussing the purpose of Confederate monuments and connections to the Ku Klux Klan); Eric Levitz, *Confederate Monuments Were Built to Change History, Not Preserve It*, N.Y. MAG.: INTELLIGENCER (Aug. 17, 2017), <http://nymag.com/daily/intelligencer/2017/08/confederate-monuments-were-built-to-change-history.html> [<https://perma.cc/5VW4-3EF8>] (“Trump had not built a monument to preserve history; he had constructed a prop to lend credibility to a convenient fiction.”).

65. U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-13 (quoting CONFEDERATED S. MEM'L ASSOC., HISTORY OF THE CONFEDERATED MEMORIAL ASSOCIATIONS OF THE SOUTH 66–68 (1904)).

66. SPLC, *supra* note 27, at 10.

67. 347 U.S. 483 (1954). Also notable is that in the years following the *Brown* decision, there was a steady growth in naming schools after Confederate figures and renewed efforts at influencing classroom history curriculum. See, e.g., Julie Chang, *Confederate Names on Austin*

Martin Luther King Jr.<sup>68</sup> The number of monuments is once again growing.<sup>69</sup> SPLC has identified thirty-two monuments dedicated or rededicated after 2000.<sup>70</sup>

The meaning of these monuments is often complicated by the original intent of the erectors, debates over historical context, and what the monuments currently represent.<sup>71</sup> Supporters of Confederate monuments often argue that they are purely commemorative, with the only message being a need to remember the past and honor the dead.<sup>72</sup> In addressing the timing of the monuments' construction, supporters suggest a less pernicious reason, arguing it was about economics and fear of reprisals.<sup>73</sup> The slow rebound of the shattered Southern economy may indeed have played a role in delaying any type of commemorative monuments.<sup>74</sup> The South was trying to grapple with its staggering losses, suggesting that would-be supporters of monuments did not have the resources to build many before the late 1880s. Additionally, some historians believe that,

*Schools Date Back to Civil Rights Movement*, STATESMAN (Sept. 13, 2016, 12:01 AM), <https://www.statesman.com/NEWS/20160923/Confederate-names-on-Austin-schools-date-back-to-civil-rights-movement> [<https://perma.cc/33A7-83D5>] (charting this complicated history within the context of schools in Austin, Texas).

68. SPLC, *supra* note 27, at 10.

69. Sabrina Tavernise, *A Boom in Confederate Monuments, on Private Land*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/confederate-monuments.html> [<https://perma.cc/5WXH-Q7NP>] (citing a study that found twenty Confederate monuments erected in North Carolina since 2000).

70. SPLC, *supra* note 27, at 10. These monuments are located across the nation, but are not evenly dispersed. "Iowa . . . has three Confederate monuments, all dedicated after 2000." Amanda Holpuch & Mona Chalabi, *'Changing History'? No - 32 Confederate Monuments Dedicated in Past 17 Years*, GUARDIAN (Aug. 16, 2017, 4:54 PM), <https://www.theguardian.com/us-news/2017/aug/16/confederate-monuments-civil-war-history-trump> [<https://perma.cc/4H5S-3EST>] (discussing the construction of new monuments).

71. See, e.g., Wanda Rushing, *Setting the Record Straight on Confederate Statues*, CONTEXTS MAG. (Aug. 10, 2018), <https://contexts.org/blog/after-charlottesville-part-two/> [<https://perma.cc/WTX3-23EX>] (profiling the layers of meaning people associate with these structures).

72. See, e.g., Kevin M. Levin, *The Case Against Vandalizing Confederate Monuments*, ATLANTIC (Dec. 21, 2011), <https://www.theatlantic.com/national/archive/2011/12/the-case-against-vandalizing-confederate-monuments/250337/> [<https://perma.cc/8KBR-QRXB>] (arguing for retention). *But see* Kevin M. Levin, *Why I Changed My Mind About Confederate Monuments*, ATLANTIC (Aug. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/08/why-i-changed-my-mind-about-confederate-monuments/537396/> [<https://perma.cc/K63L-NYSL>] (profiling the reasons for changing position).

73. See, e.g., Winberry, *supra* note 46, at 115.

74. See *id.* (explaining that "many individuals who had been ruined after the war rebuilt their lives and fortunes" and monuments erected in the early 1900s were "as much a monument to them as to the Confederate past"); see also Harold D. Woodman, *Post-Civil War Southern Agriculture and the Law*, 53 AGRIC. HIST. 319, 319–20 (1979) (discussing the economic conditions at the end of the conflict generally).

particularly during Reconstruction, Southerners were afraid of retaliation by the still-present Union army and were worried that monuments would be provocative.<sup>75</sup> Other supporters of these monuments currently see them as expressions of heroism or shared sacrifice, but the original meaning and later acquired meaning complicate the various ways that people perceive them—both originally and currently.<sup>76</sup>

Confederate memorials, even more so than battlefields or historic homes and plantations, are problematic for preservationists. There is always a tension between preserving history and respecting present day views and attitudes. However, monuments present a special case because they do not fit easily in what we think of as our standard justifications for historic protection (protecting buildings, historic districts, and places for a variety of social and place-based motivations).<sup>77</sup>

In response to the Charleston and Charlottesville events, more communities are struggling with how to handle Confederate monuments.<sup>78</sup> For public safety reasons and in acknowledgement of the symbolism of the monuments, many communities are working toward removal.<sup>79</sup> In 2016, the SPLC noted over one hundred efforts to remove

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75. See, e.g., FOSTER, *supra* note 35, at 44.

76. See Dane Kennedy, *What Should We Do With Confederate Monuments?*, AHA TODAY: PERSP. ON HIST. (Oct. 30, 2017), <https://www.historians.org/publications-and-directories/perspectives-on-history/october-2017/what-should-we-do-with-confederate-monuments> [<https://perma.cc/KB2L-PHSK>] (arguing that these monuments protect a distorted view of history); see also Anna Dubenko, *Right and Left on Removal of Confederate Statues*, N.Y. TIMES (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/us/politics/right-and-left-on-removal-of-confederate-statues.html> [<https://perma.cc/43HR-DVW4>] (noting the political context of these resources); J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENV'T L. J. 203, 230–32 (2009) (describing the preservation of the site of the Battle of Gettysburg, including memorials to Confederate soldiers, and explaining that “white opinion leaders in the North and South portrayed the war as a tragic mistake, redeemed by heroic self-sacrifice on both sides”).

77. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479–80 (1981).

78. See *Confederate Monuments Are Coming Down Across the United States. Here's a List.*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html> [<https://perma.cc/6DS2-E32M>] [hereinafter *Confederate Monuments Coming Down*]; Jonathan Lande, “*Confederate Monuments . . . What to Do?*”: *Historians' Town-Hall Meeting on Memorialization—And Racial Injustice*, J. CIVIL WAR ERA: MUSTER (Apr. 27, 2018), <https://www.journalofthecivilwarera.org/2018/04/confederate-monuments-historians-town-hall-meeting-memorialization-racial-injustice/> [<https://perma.cc/SJL4-ZYEZ>] (discussing these connections and additional acquired meanings of the monuments generally).

79. See, e.g., *Confederate Monuments Coming Down*, *supra* note 78. At the same time, however, new monuments are going up. Emanuella Grinberg, *New Confederate Monuments Are Going Up and These Are the People Behind Them*, CNN, <https://www.cnn.com/2017/08/18/us/new-confederate-monuments/index.html> [<https://perma.cc/GP3F-WAGV>] (last updated Aug. 23, 2017, 11:27 PM); Jenny Jarvie, *As Monuments to the Confederacy Are Removed from*

Confederate monuments, symbols, or names from public spaces.<sup>80</sup> The efforts to remove Confederate monuments on public lands are often complicated by a host of historic preservation, conservation, and land-use laws.<sup>81</sup> This Article details these laws below and provides examples of how such benign-seeming laws have led to protracted disputes and complicated proceedings.

## II. HISTORIC PRESERVATION LAW

Confederate monuments often receive protection from historic preservation laws.<sup>82</sup> As detailed throughout this Section, federal, state, and local laws, along with private protection mechanisms, work to fix these monuments in place, complicating efforts to reassess Confederate monuments. As communities consider whether to remove, relocate, obscure, or contextualize Confederate monuments, several historic preservation laws can thwart or delay their efforts.<sup>83</sup> This Section outlines the historic preservation laws that sometimes apply to Confederate monuments. As this Article demonstrates below, not all laws apply in all circumstances, and understanding the landscape of Confederate monuments requires an individualized inquiry based on placement, legal recognition, funding, and a host of other factors. This Article does not intend to address every possible scenario, but it provides a working understanding of the laws that will most commonly apply if a Confederate monument is being targeted for removal or other treatment. This Article focuses on commemorative structures, generally those located in public spaces that are divorced from the actual historic battlefield context. These structures differ from other types of historic resources in that they were expressly intended to signal present day viewpoints over preservation or protection of historical moments.<sup>84</sup> While the case of Confederate monuments may seem an exceptional one, the conversation below highlights concerns with preservation laws that

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*Public Squares, New Ones Are Quietly Being Erected*, L.A. TIMES (Oct. 22, 2017), <https://www.latimes.com/nation/la-na-new-confederate-memorials-20171020-story.html> [https://perma.cc/DN4J-FATM]. See generally Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPPLEMENT 15 (2018) (discussing the controversial and complicated landscape surrounding the removal of Confederate monuments, particularly looking at the blurred line between public and private ownership of the monuments and the land).

80. SPLC, *supra* note 27, at 11.

81. See generally Owley & Phelps, *supra* note 79 (discussing these complications). We are also particularly intrigued by the issues that arise with Confederate monuments on private land. See *id.* at 21–23.

82. See, e.g., 54 U.S.C. § 300101 (Supp. V 2018).

83. See discussion *infra* Sections II.A., II.B.

84. See *Statement*, *supra* note 25.

give little room for reassessing which objects society seeks to protect through land-use regulation.

This Section begins by outlining the federal historic preservation laws that might apply to Confederate monuments. Continuing the federal inquiry, it then explores some related laws regarding environmental protection and protection for artwork. It then looks to the state and local historic preservation mechanisms. In particular, a flurry of new state laws prohibiting removal of statues and commemorative structures is a clear impediment to monument removal efforts. This Section concludes with private historic preservation endeavors in the form of preservation easements. For each case, this Article explains how the law works, how Confederate monuments fit within in the protective scheme, and the impacts on potential removal efforts.

### A. Federal Law

Federal historic preservation laws play a role in monument removal, often requiring public participation regarding either removal or modification of monuments. These historic preservation laws operate in diverse contexts and their application hinges on a number of factors, including the type of resource (a building, object, structure, site, or district), its ownership, and its location. At the federal level, two primary laws are most likely to apply: the National Historic Preservation Act (NHPA)<sup>85</sup> and the National Environmental Policy Act (NEPA).<sup>86</sup>

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85. Pub. L. No. 113-287, 128 Stat. 3187 (2014) (codified as amended in scattered sections of 54 U.S.C.).

86. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.). Other preservation laws may apply in some scenarios. For example, the Department of Transportation Act applies if federal transportation funds helped to construct the monument or the area surrounding the monument. *See* 49 U.S.C. § 303(b) (2012); Monumental Task Force Comm., Inc. v. Foxx, 259 F. Supp. 3d 494, 511 (E.D. La. 2017) (rejecting a Department of Transportation Act claim raised in connection with the removal of statues in New Orleans). Other sections of the NHPA (particularly § 110 and the requirements related to the agency's responsibilities in caring for properties under its ownership) could also come into play. *See* 54 U.S.C. § 306101(a) (Supp. V 2018) (amended NHPA § 110). Section 110 requires federal agencies to review historic properties under their jurisdiction and plan for their appropriate care. *Id.* Section 110's impact, however, is diluted by case law holding that § 110(a) effectively lacks a remedy but could still be a hook to attempt to force an agency to comply with its obligations and force action. *See* Andrea Ferster, *Enforcing Section 110(a): Can a Legal Obligation Without a Remedy Be an Effective Tool for Preservation?*, PRESERVATION LEADERSHIP F. (July 15, 2015, 1:09 PM), <https://forum.savingplaces.org/blogs/special-contributor/2015/07/15/enforcing-section-110a-can-a-legal-obligation-without-a-remedy-be-an-effective-tool-for-preservation> [<https://perma.cc/AZ9Y-EXBC>] (explaining the impact of the holding in *National Trust for Historic Preservation v. Blanck*, 93 F. Supp. 908 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999)).



## 1. The National Historic Preservation Act

The National Historic Preservation Act was passed in 1966.<sup>87</sup> The main goals of the act are to incorporate the need to protect historic resources into our national consciousness and to advocate for the retention of historic structures and resources.<sup>88</sup> The NHPA is the wide-ranging preservation legislation that established the National Register of Historic Places (National Register).<sup>89</sup> The NHPA also requires consideration of the impacts of federal activity on historic resources through a consultation process, and it established the Advisory Council on Historic Preservation (ACHP)—the federal entity responsible for advising agencies on their compliance with the NHPA and for advocating for historic resources more generally.<sup>90</sup>

The National Register is an official list of the buildings, structures, districts, sites, and objects that the federal government has deemed worthy of protection.<sup>91</sup> The National Register contains over 90,000 individual listings (covering over one million properties) and is managed by the National Park Service.<sup>92</sup> The designation process itself is state-led, with State Historic Preservation Offices (SHPOs) coordinating and submitting nominations.<sup>93</sup> To be eligible for the National Register, the resource must qualify as a building, structure, object, site, or district.<sup>94</sup> A monument would likely be classified as an object.<sup>95</sup> For a property to merit listing on the National Register, it must meet several criteria outlined by federal law.<sup>96</sup> This process requires an examination of a property's significance, age, and integrity.<sup>97</sup> National Park Service regulations instruct that it consider a property's "significance in

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87. Pub. L. No. 89-665, 80 Stat. 915 (1966), *repealed by* National Park Service and Related Programs, Pub. L. No. 113-287, 128 Stat. 3187.

88. *See* BENDING THE FUTURE: 50 IDEAS FOR THE NEXT 50 YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES 1–6 (Max Page & Marla R. Miller eds., 2016) (providing overview of motivations for this landmark legislation).

89. *See* 54 U.S.C. § 302101.

90. *See* SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 106 (2012).

91. *See* 54 U.S.C. § 302101; *National Register of Historic Places*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/real-estate/historic-preservation/historic-building-stewardship/national-register-of-historic-places> [<https://perma.cc/DF5B-U8DM>].

92. *National Register of Historic Places*, *supra* note 91.

93. *How to List a Property*, NAT'L PARK SERV., <https://www.nps.gov/subjects/national-register/how-to-list-a-property.htm> [<https://perma.cc/ZV3J-MY75>].

94. 54 U.S.C. § 302101; *see also* 36 C.F.R. § 60.3 (2018) (defining some of these terms).

95. "An object is a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." 36 C.F.R. § 60.3(j). In certain cases, it may be difficult to distinguish between structures and objects. BRONIN & BYRNE, *supra* note 90, at 59.

96. *See, e.g.*, 54 U.S.C. §§ 302102, 302103, 302107.

97. *See How to List a Property*, *supra* note 93.

American history, architecture, archeology, engineering, and culture.”<sup>98</sup> Furthermore, listed objects must “possess integrity of location, design, setting, materials, workmanship, feeling, and association.”<sup>99</sup> Additionally, the property must fall under one or more of four criteria:<sup>100</sup> (a) “associat[ion] with events that have made a significant contribution to the broad patterns of our history;” (b) association with the lives of significant individuals; (c) architectural or artistic value; or (d) “have yielded, or may be likely to yield,” archaeological information/data.<sup>101</sup> For Confederate monuments, based upon a cursory survey of monument nomination forms available online, criteria (a)<sup>102</sup> and (c)<sup>103</sup> are the most likely to apply.

Several exceptions limit the number of listed properties.<sup>104</sup> The National Park Service’s regulations “[o]rdinarily” exclude from eligibility “cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years.”<sup>105</sup> While this language suggests that Confederate monuments would be excluded from the National Register, there are in fact many listed monuments. The public digital database for the National Register contains 101 listings with the word “Confederate” in the title.<sup>106</sup>

98. *National Register Criteria for Evaluation*, NAT’L PARK SERV., [https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15\\_2.htm](https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_2.htm) [<https://perma.cc/P84S-EK3T>].

99. *Id.*

100. This differs from the standards that apply to § 106 review under the NHPA, which apply to those properties that are eligible rather than listed. *See* 54 U.S.C. § 306108.

101. 36 C.F.R. § 60.4 (2018). In addition to qualifying under the criteria, the property must also retain sufficient historic integrity. *See National Register Criteria for Evaluation*, *supra* note 98 (explaining the seven factors under which historic integrity is evaluated).

102. *See, e.g.*, U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900, CLARKSVILLE CONFEDERATE MONUMENT (1999), <http://www.arkansaspreservation.com/National-Register-Listings/PDF/JO0102S.nr.pdf> [<https://perma.cc/D6ZR-3DSD>] (listing under criteria 9(a)).

103. *See, e.g.*, U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900, CONFEDERATE MONUMENT (1997), [https://www.dhr.virginia.gov/VLR\\_to\\_transfer/PDFNoms/124-0183\\_Confederate\\_Monument\\_1997\\_Final\\_Nomination.pdf](https://www.dhr.virginia.gov/VLR_to_transfer/PDFNoms/124-0183_Confederate_Monument_1997_Final_Nomination.pdf) [<https://perma.cc/SGC3-9NXY>] (listing under criteria (c)).

104. *See, e.g.*, 36 C.F.R. § 60.4.

105. *Id.*; *see also* JOHN H. SPRINKLE, JR., CRAFTING PRESERVATION CRITERIA: THE NATIONAL REGISTER OF HISTORIC PLACES AND AMERICAN HISTORIC PRESERVATION 151–53 (2014) (discussing the debate over exclusions to the National Register to limit its scope).

106. *NPGallery Digital Asset Search*, NAT’L PARK SERV., <https://npgallery.nps.gov/nrhp> [<https://perma.cc/RDZ7-W7LB>] (insert “confederate” into “Resource Name” search field, then click “Search”). This simple search did not cover monuments named after specific people and those that did not have “confederate” in their title. For example, there are at least four monuments

One such monument is the “First Monument to the Unknown Confederate Dead”<sup>107</sup> in Union City, Tennessee, erected in 1869 in the local cemetery and listed in 1977.<sup>108</sup> In completing the form to request inclusion on the National Register, the Tennessee Historical Society checked the “OTHER (SPECIFY)” box for qualifying areas of significance and then typed in “[c]ommemorative.”<sup>109</sup> Yet, *commemorative* is actually an exception to listing.<sup>110</sup> If commemorative value was the sole significance of this site, it should not have been eligible for listing.

Most listed monuments were built between 1890 and 1950 and were listed between 1975 and 1997.<sup>111</sup> The Rankin County Confederate Monument in Brandon, Mississippi, serves as a typical example. The local chapter of the United Daughters of the Confederacy erected the statue of an unknown Confederate soldier in the town square in 1907.<sup>112</sup> An excerpt of the rather long inscription includes an homage “to those who wore the grey” and a call for “states’ rights and home rule” to “rise again.”<sup>113</sup> While petitioners supporting the listing of the Union City monument view the structure as commemorative, the narrative statement of significance for the Brandon monument suggests that the statue merits listing because it is “a locally important example of the extensive effort to memorialize the Confederacy which was a major expression of social and civic consciousness in the South . . . [and] part of the development of

to Robert E. Lee, suggesting many more listed sites despite the exception for commemorative structures.

107. *Id.* (insert “confederate” into “Resource Name” search field, then filter “State” to “Tennessee,” then click “Search”). It is possible that this is indeed the first such monument. Unlike other monuments listed in the National Register, this statue was constructed shortly after the Civil War and at the time of its listing in the National Register in 1977, no extant older monument had been located. *Id.*

108. U.S. DEP’T OF THE INTERIOR, FORM 10-300 (REV. 10-74), FIRST MONUMENT TO UNKNOWN CONFEDERATE DEAD (1977), <https://npgallery.nps.gov/NRHP/GetAsset/7742c469-5335-4244-9d4f-7f8675665c25> [<https://perma.cc/G9ZE-S279>].

109. *Id.*

110. 36 C.F.R. § 60.4 (2018).

111. Becky Little, *How the U.S. Got So Many Confederate Monuments*, HISTORY (Aug. 17, 2017), <https://www.history.com/news/how-the-u-s-got-so-many-confederate-monuments> [<https://perma.cc/U2HX-X79Z>]; *NPGallery Digital Asset Advanced Search*, NAT’L PARK SERV., <https://npgallery.nps.gov/NRHP/AdvancedSearch/> [<https://perma.cc/693N-XBBV>] (insert “confederate” into “Resource Name” search field, insert “1975” into “Beginning Year” search field, insert “1997” into “to End Year” search field, and then click “Search”).

112. U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900: RANKIN COUNTY CONFEDERATE MONUMENT § 7, at 1 (1997) <https://npgallery.nps.gov/NRHP/GetAsset/8df34646-daa8-4246-ab76-c47fa481fd4e/> [<https://perma.cc/HE5H-4TNL>]. Both public and private funds went towards the cost of the monument. *Id.* § 8, at 3.

113. *Id.* § 7, at 1.

a sense of a Southern regional identity during that period.”<sup>114</sup> As such, the persons completing the nomination form justify the listing as a property associated with significant parts of American history.<sup>115</sup> Yet, the history cited is not of the Civil War itself, but of later efforts to use Confederate memorials to create a post-conflict Southern identity.<sup>116</sup> The form also lists the monument as being a locally important example of a sculpture even though it is “a conventional or stock sculptural piece.”<sup>117</sup> While the nomination form acknowledges that the property is commemorative and therefore should be subject to the applicable criteria exception, it argues that the resource “merits National Register eligibility as an expression of the Confederate Memorial movement which was a historically significant social movement in the postbellum South,” which the Keeper of the National Register confirmed.<sup>118</sup>

Once a property is listed on the National Register, a host of other provisions come into play. Under the NHPA, the most likely provision to inhibit removing a Confederate monument is § 106, which outlines the requirement for federal agencies to consider the potential adverse effects of their “undertakings” on historic structures before proceeding with a project or approval.<sup>119</sup> The consultation process of § 106 does not impose an affirmative obligation on any federal agency to avoid an outcome but requires consideration of impacts on historic structures before proceeding with a project.<sup>120</sup> While § 106 does not prevent federal funding of projects that significantly impact or even demolish designated historic structures, it does “require the agency to identify historic resources and explore alternative measures . . . that may mitigate or avoid whatever harm the project would have on the buildings.”<sup>121</sup>

114. *Id.* § 8, at 2.

115. *Id.* § 8, at 2–3.

116. *Id.* § 8, at 2.

117. *Id.* The Narrative of Significance also suggests that the statue is particularly significant because it is “the primary example of public statuary in Rankin County,” and “is the only major outdoor sculpture in Brandon, other than funerary monuments.” *Id.* Such a situation actually suggests an even greater concern about the role and symbol such a statue might play in the community.

118. *Id.*

119. 54 U.S.C. § 306108 (Supp. V 2018); see 36 C.F.R. § 800.1 (2018). See generally *Protecting Historic Properties: A Citizen’s Guide to Section 106 Review*, ACHP, <https://www.achp.gov/sites/default/files/documents/2017-01/CitizenGuide.pdf> [<https://perma.cc/4BWT-VMMS>] (summarizing this process).

120. Jess R. Phelps, *The National Historic Preservation Act at Fifty: Surveying the Forest Service Experience*, 47 ENVTL. L. 471, 483 (2017).

121. JULIA H. MILLER, *A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION* 5 (2008).

Section 106 applies to any federal “undertaking.”<sup>122</sup> The statute defines an “undertaking” as a

project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a federal agency.<sup>123</sup>

Once the action agency has determined that a specific action qualifies as an undertaking with the potential to affect historic properties, the agency begins consultation.<sup>124</sup> The first step in the consultation process is identification.<sup>125</sup> Identification involves determining the scope of the undertaking to assess the potential impacts on qualifying historic resources.<sup>126</sup> The identification process begins by establishing the area of potential effects.<sup>127</sup> The federal action agency (with the agreement of the state historic preservation office) assesses whether potential historic properties are within that geographic area.<sup>128</sup> The historic resources of concern under § 106 are those either designated or eligible for designation on the National Register.<sup>129</sup> Determining eligibility for designation can be complicated in any case but should theoretically be

122. See 54 U.S.C. § 300320.

123. *Id.*; see also 36 C.F.R. § 800.16(y) (defining “undertaking” similarly, but excluding the fourth category listed above). The ACHP has historically taken a broad view of this jurisdictional definition, with its former executive director concluding, “[t]hrough any federal action is technically covered by the definition of ‘undertaking,’ the reality is that the more tenuous the federal nexus, the less likely an agency will take its Section 106 duties seriously.” John M. Fowler, *The Federal Preservation Program*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 35, 47 n.21 (Robert E. Stipe ed., 2003).

124. The parties that might be involved in a consultation vary, but in addition to the federal agency, the State Historic Preservation Office (SHPO) or Tribal Historic Preservation Officer, or the local government, amongst others, might be involved. See *Section 106 Applicant Toolkit*, ACHP, <https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit> [<https://perma.cc/86J4-7JEU>].

125. See 36 C.F.R. § 800.4.

126. *Id.*; see 800.16(d).

127. See *id.* §§ 800.4(a)(1), 800.16(d).

128. See *id.* § 800.4.

129. See *id.* § 800.4(c). This is a wider definition than applies under the tax incentives for historic properties or the historic rehabilitation tax credits as it also covers eligible, not just designated, resources. See Jess R. Phelps, “*A Tinge of Melancholy Lay upon the Countryside*”: *Agricultural Historic Resources within Contemporary Agricultural and Historic Preservation Law*, 33 VA. ENVTL. L.J. 56, 90–91 (2015) (profiling this distinction and the difficulty it presents in protecting historic agricultural resources through preservation easements).

particularly involved for commemorative properties such as Confederate monuments.<sup>130</sup>

If a property is listed on the National Register of Historic Places, or even if the action agency determines it to be eligible for inclusion,<sup>131</sup> the parties will move into the assessment phase of consultation. Assessment involves determining whether the undertaking will have an adverse effect on the historic resources.<sup>132</sup> Section 106 explains that adverse effects occur “when an undertaking may alter, directly or indirectly, an[y] of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling or association.”<sup>133</sup> If the agency’s goal is removal of a property or significant object associated with the property, this will almost unavoidably have an adverse effect, which will require moving to the last phase of consultation: resolving the adverse effects.

The last step in the consultation process explores how to resolve adverse effects on the affected historic structures.<sup>134</sup> This phase generally involves robust discussion about other options for the project that would either avoid or mitigate the potential impacts to the historic resource.<sup>135</sup> Mitigation can come in a number of forms including documentation of the resource that will be altered or lost.<sup>136</sup> As one commentator notes, “[a]n agreed-upon outcome under Section 106 is not usually a pure preservation solution. . . . Rarely is the ‘no-build’ option given serious consideration, and the economic realities of the project are almost always dominant.”<sup>137</sup> Instead, the solution typically involves a negotiated solution balancing the project needs, the sensitivity of the resource, and the interests of the parties involved in the consultation.<sup>138</sup>

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130. See ADVISORY COUNCIL ON HISTORIC PRES., ACHP POLICY STATEMENT ON CONTROVERSIAL COMMEMORATIVE WORKS 2 (2018), <https://www.achp.gov/sites/default/files/policies/2018-06/controversial-commemorative-works-policy%20%281%29.pdf> [https://perma.cc/D9P8-P64K] (explaining the limitations on commemorative properties within the historic significance arena).

131. This expands the number of Confederate monuments at issue as it is not only those actually on the National Register but also those that an action agency might view as eligible.

132. See 36 C.F.R. § 800.5(a).

133. *Id.* § 800.5(a)(1).

134. *Id.* § 800.6.

135. See, e.g., S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 898–99 (2012) (summarizing this requirement in the tribal context).

136. See THOMAS F. KING, *CULTURAL RESOURCES LAWS & PRACTICE* 179–80 (3d ed. 2008) (summarizing possible options for resolving adverse effects).

137. Fowler, *supra* note 123, at 49.

138. See KING, *supra* note 136, at 57, 165–67.

To be effective, consultation must involve informed discussion of the competing interests concerning the project and the historic resources and a dialogue towards an agreed-upon solution.<sup>139</sup> In early 2018, the ACHP issued a policy statement on consultations involving “controversial commemorative works,” which includes, but is not limited to, monuments related to the Confederacy.<sup>140</sup> In the ACHP’s view, “[b]road civic involvement and public engagement should be pursued. [And] [p]arties on all sides . . . should be given the opportunity to participate in discussions, provide information, express concerns, and propose alternatives for consideration.”<sup>141</sup> The alternatives suggested by the ACHP to resolve adverse impacts include: (1) retaining the work unchanged; (2) retaining the work and providing additional on-site interpretation; (3) “[m]odifying the . . . work to address community concerns while maintaining [its] overall integrity” (i.e., removing a part of the work that is objectionable); and (4) “[p]reserving the . . . work, but removing it from prominent display in a public space” to a museum or other suitable context.<sup>142</sup> The consultation over any proposed relocation or modification of a public monument has the potential to be highly controversial.

To conclude consultation, the parties enter into a Memorandum of Agreement or a Programmatic Agreement, depending upon the complexity of the project.<sup>143</sup> The document contains the parties’

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139. See generally Kathryn Sears Ore, Student Article, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RESOURCES L. REV. 205, 238–43 (2017) (discussing § 106 and attaining meaningful consultation).

140. See ADVISORY COUNCIL ON HISTORIC PRES., *supra* note 130, at 1.

141. *Id.* at 2.

142. See *id.* at 3 (providing treatment alternatives and practical examples of their application where available). These suggestions are close to those suggested by the National Trust for Historic Preservation, the national preservation advocacy organization. See *Statement*, *supra* note 25.

143. See 36 C.F.R. §§ 800.6(a)(4), 800.14(b) (2018). Memoranda of Agreement (MOAs) are for a specific project, while Programmatic Agreements (PAs) address complicated or ongoing undertakings. See ADVISORY COUNCIL ON HISTORIC PRES., TYPES OF AGREEMENT DOCUMENTS IN SECTION 106: WHAT THEY ARE AND WHEN THEY SHOULD BE USED 1 (2018), <https://www.achp.gov/sites/default/files/guidance/2018-09/TypesofAgreementDocumentsinSection106WhatTheyAreandWhenTheyShouldBeUsed.pdf> [<https://perma.cc/N9HR-DCTY>]. There are two types of PAs: project and program. *Id.* A project PA allows a project to proceed before the final decision on the undertaking is made but establishes parameters on the process and check-in points. *Id.* An example would be the acquisition of a linear right-of-way. The agency is not expected to make all of its decisions up front, so it can start and have a framework for evaluating the acquisitions downstream. A program PA addresses impacts for an entire class of agency undertakings—usually undertakings that are simple or similar to streamline consultation. See 36 C.F.R. § 800.6(a)(4); ADVISORY COUNCIL ON HISTORIC PRES., *supra*, at 2 n.2. For more information on the distinctions between the various ACHP agreement documents, see *Guidance*

agreement, including the federal action agency's decisions regarding mitigation and resolution of the project impacts.<sup>144</sup> If the parties fail to agree on how to resolve the adverse effects, they can terminate the consultation.<sup>145</sup> Terminating consultation results in the ACHP providing its comments and making formal recommendations to the action agency, which will have to show its consideration of the ACHP's input in making its final decision on the undertaking.<sup>146</sup> While the action agency must consider the ACHP's comments and recommendations, it is under no obligation to respond or adhere to them. Termination of consultation is rare, as the parties typically want to avoid potential political blowback, but in the monument context, this would be a possibility for a contested removal and a difficult political decision.<sup>147</sup>

To summarize the consultation process and apply it to the monument context, the federal agency will first determine whether the project that would affect the monument is an undertaking. Here, there are at least two (likely interrelated) types of qualifying undertakings: (1) where federal funding is used for removal or modification and (2) where the monument is located on federal land.

Once the federal agency acknowledges the project as an undertaking, the identification stage requires considering whether the undertaking has the potential to affect a Confederate monument or related historic resources.<sup>148</sup> If not, the § 106 process ends there.<sup>149</sup> If there are impacts, the action agency must assess whether the impacts will be adverse.<sup>150</sup> "Adverse impacts" to Confederate monuments in the context of § 106 would center on alterations to those characteristics of the property that made it eligible for inclusion on the National Register.<sup>151</sup> Designation of

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*Agreement Documents: Do You Need a Section 106 Agreement?*, ACHP, [https://www.achp.gov/do\\_you\\_need\\_a\\_section\\_106\\_agreement](https://www.achp.gov/do_you_need_a_section_106_agreement) [<https://perma.cc/658G-VKZF>].

144. See 36 C.F.R. §§ 800.6(b)–(c).

145. *Id.* § 800.7.

146. See, e.g., ADVISORY COUNCIL ON HISTORIC PRES., COMMENTS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING THE RELEASE FROM SUSPENSION OF THE PERMIT TO DRILL BY SOLONEX LLC IN LEWIS AND CLARK NATIONAL FOREST, MONTANA 1–8 (2015), <https://www.doi.gov/sites/doi.gov/files/uploads/ACHP%20Rec.%20Letter%20re%20-%20B2M%20Lease.pdf> [<https://perma.cc/B58Y-SMV2>].

147. See Michael C. Blumm & Andrew Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 *ECOLOGICAL L.Q.* 609, 628 (2015) (exploring why so few consultations end with council comments).

148. See discussion *supra* notes 119–21.

149. See 36 C.F.R. § 800.4(d)(1).

150. See *id.* § 800.4(d)(2).

151. *Cf. id.* § 800.5(a)(1)–(2) (stating the definition of adverse effect and listing examples of this).



Confederate monuments is generally based on the cultural role the monument played in the community or the artistic value of a statue.<sup>152</sup>

If the proposed undertaking could adversely impact the historic resource, the agency will need to consult with the SHPO or ACHP.<sup>153</sup> Removal or modification of a monument would be an adverse impact.<sup>154</sup> Consultation involves close discussion with impacted parties on how to identify, evaluate, and resolve any proposed project involving designated or eligible historic resources—including a commemorative structure.<sup>155</sup>

Overall, § 106 and the consultation process could impact monument removal in two ways. First, as in *Monumental Task Committee, Inc. v. Foxx*,<sup>156</sup> a plaintiff could use § 106 as a vehicle to challenge removal if the removal project has a federal hook and parties fail to appropriately engage in the consultation process.<sup>157</sup> In *Monumental Task Force*, preservation organizations brought an action challenging New Orleans's decision to remove Confederate-era monuments under § 106.<sup>158</sup> The court, however, rejected this argument as the plaintiffs were unable to establish a “nexus between a federally-funded project or undertaking and the removal of the four monuments at issue.”<sup>159</sup> While § 106 does not impose a substantive bar against removal or modification, it does require agencies to engage and comply with this procedural mandate.<sup>160</sup> Second, the existence of § 106 alone could discourage removal through its requirements for a costly, controversial, and time-consuming process. Thus, § 106 has the power to complicate removal efforts, but this statute will not be outcome determinative or serve as a substantive bar against that eventual outcome.<sup>161</sup>

152. ADVISORY COUNCIL ON HISTORIC PRES., *supra* note 130.

153. See 36 C.F.R. § 800.6(a)–(b).

154. *Id.* § 800.5(a)(2)(ii)–(iii).

155. See *id.* §§ 800.5(d)(2), 800.6(a), 800.16(f).

156. 157 F. Supp. 3d 573 (E.D. La. 2016).

157. *Id.* at 580–82, 591 (rejecting the NHPA claim). This might not always be possible given the nature of the applicable monument. See, e.g., *Shreveport Chapter #237 of United Daughters of the Confederacy v. Caddo Parish Comm'n*, No. 17-1346, 2018 WL 5666512, at \*7–8 (W.D. La. Jan. 26, 2018) (rejecting United Daughters of the Confederacy's challenge to removal of a monument under either a private right of action under the National Historic Preservation Act or the Administrative Procedure Act as there was no undertaking).

158. *Monumental Task Force*, 157 F. Supp. 3d at 590.

159. *Id.* at 591.

160. See, e.g., *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 772 (9th Cir. 2006).

161. There is a circuit split between courts as to whether the NHPA provides a private right of action or if the only cause of action is under the Administrative Procedure Act. See Amanda M. Marincic, Note, *The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nations*, 103 IOWA L. REV. 1777, 1793 (2018) (noting this split).

## 2. National Environmental Policy Act

The National Environmental Policy Act (NEPA) could also apply to an effort to remove or alter a Confederate monument. NEPA requires federal agencies planning a major federal action to consider and evaluate the project's impacts on the environment.<sup>162</sup> While many are likely familiar with NEPA in the environmental law context, NEPA also requires agencies to consider impacts to cultural resources, including properties listed on the National Register of Historic Places.<sup>163</sup> NEPA requires federal agencies to assess these impacts if the project qualifies as "a 'major Federal action significantly affecting the quality of the human environment.'"<sup>164</sup> If this standard, which is generally viewed as requiring more than the NHPA's undertaking standard, is met, the agency must prepare an environmental impact statement.<sup>165</sup> If the agency is unclear as to whether the proposed action will significantly impact the environment, the agency can first complete an environmental assessment to determine whether a full environmental impact statement is required.<sup>166</sup> If, based upon the environmental assessment, the agency determines that the action will not have a significant impact, the agency will issue a Finding of No Significant Impact or proceed to prepare the full impact statement.<sup>167</sup> Like § 106 of the NHPA, however, NEPA does not compel any particular outcome. It requires the agency to study the impacts of its proposed actions but does not dictate any particular action

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162. See 42 U.S.C. § 4331 (2012) (recognizing the policy of the federal government to "use all practicable means and measures" to ensure the policies of § 4321 are achieved); Daniel R. Mandelker, *Thoughts on NEPA at 40*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10640, 10641 (2009).

163. *NEPA and Section 106 of the National Historic Preservation Act*, NAT'L PRESERVATION INST., <https://www.npi.org/NEPA/sect106> [<https://perma.cc/B3ER-9F6Z>] [hereinafter *NEPA and Section 106*]; see 40 C.F.R. § 1508.27(b)(8) (2018) (noting that NEPA requires consideration of the adverse impact on "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places"); see also KING, *supra* note 136, at 55–57 (discussing the scope of the NEPA analysis and the consideration of impacts on the human environment).

164. *NEPA and Section 106*, *supra* note 163.

165. See Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1509–10 (2012); see also Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 246 (2000) (claiming that the procedures of NEPA, such as filing environmental impact statements, lack substance).

166. COUNCIL ON ENVTL. QUALITY EXECUTIVE OFFICE OF THE PRESIDENT & ADVISORY COUNCIL ON HISTORIC PRES., *NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106*, at 9 (2013), [https://www.achp.gov/sites/default/files/2017-02/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013\\_0.pdf](https://www.achp.gov/sites/default/files/2017-02/NEPA_NHPA_Section_106_Handbook_Mar2013_0.pdf) [<https://perma.cc/MP2P-J5LB>] [hereinafter COUNCIL & ACHP].

167. *Id.* at 5, 9, 11.

or change of plan in response to the study. This requirement can serve as another potential path for advocates seeking to slow down a removal effort or to force additional scrutiny and possible mitigation or avoidance alternatives.<sup>168</sup>

NEPA is likely to apply to Confederate monuments where the monument is located on federal land or the removal is being carried out with federal funds. The scope of the projects that will be covered under NEPA and the NHPA are very similar, but the NHPA provides more significant protection as it requires consultation regarding avoiding or reducing the harm, which provides more opportunity for a negotiated solution.<sup>169</sup> NEPA could, however, apply to a resource not protected under the NHPA; a cultural resource as defined under NEPA would not be eligible for the National Register, which provides another possible hook to challenge an effort to remove or relocate a Confederate monument.<sup>170</sup>

### 3. Visual Artists Rights Act

The federal Visual Artists Rights Act (VARA)<sup>171</sup> might prove an impediment for more recent monuments. VARA recognizes that an artist has moral rights in the works of art she creates.<sup>172</sup> It acknowledges that artists inject a persona into a work of art that exists despite a “physical relinquishment” of the work to another.<sup>173</sup>

VARA grants the creators of visual art (including statues) the right to prevent any “distortion, mutilation, or other modification of the work [that] would be prejudicial to [the creator’s] honor or reputation.”<sup>174</sup> The right is unassignable, nontransferable, and uninheritable, and may be waived only by written consent of the artist.<sup>175</sup> VARA protection lasts for

168. See, e.g., *Recent Past Pres. Network v. Latschar*, 701 F. Supp. 2d 49, 52–53 (D.D.C. 2010) (challenging demolition of historic property for failing to comply with NEPA). Although advocates won that round, the historic cyclorama (1963) was demolished in the spring of 2013. See *Cyclorama Center*, WORLD MONUMENTS FUND, <https://www.wmf.org/project/cyclorama-center> [https://perma.cc/57HK-G4D4].

169. Fowler, *supra* note 123, at 52.

170. The NHPA and NEPA review are often performed in parallel tracks given the degree of duplication. See COUNCIL & ACHP, *supra* note 166, at 4–11.

171. Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified as amended at 17 U.S.C. § 106A (2012)).

172. Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1935–36 (2000).

173. *Id.* at 1939.

174. 17 U.S.C. § 106A(a)(2) (2012).

175. *Id.* § 106A(e)(1). It is, however, common for a purchaser of a statue or artwork to request a VARA waiver. See Elizabeth Plaster, Note, *When Stuff Becomes Art: The Protection of Contemporary Art Through the Elimination of VARA’s Public-Presentation Exception*, 66 *DUKE L.J.* 1113, 1144 (2017) (discussing VARA waivers).

the lifetime of the artist.<sup>176</sup> The art must be a limited edition or have fewer than 200 copies, consecutively numbered, with identification of the artist either by signature or another mark.<sup>177</sup> The temporal limitation represents an impediment for VARA as many artists of Confederate statues died long ago. However, statues from the civil rights era and those currently being erected may find protection from VARA or related state laws.

In protecting the rights of artists, VARA has an exception for work for hire and mass-produced art.<sup>178</sup> Thus, a key issue for an artist of a Confederate monument who is seeking VARA protection is whether the monument was a work for hire, which would bring it outside the protection of the act. In *Carter v. Helmsley-Spear Inc.*,<sup>179</sup> the defendants argued that three sculptors had no right to prevent sculptures in a lobby from being destroyed because the sculptures were works for hire.<sup>180</sup> The trial court found that the plaintiffs were entitled to VARA relief.<sup>181</sup> The Second Circuit agreed with the defendants, who had expressly contracted for the right to assign the artists additional projects that the plaintiffs did indeed complete.<sup>182</sup> Further, the fact that the plaintiffs were paid a weekly salary, and had benefits such as life, health, and liability insurance, tipped the scales heavily in favor of the defendants.<sup>183</sup> It does not appear that many Confederate monuments would meet this definition of work for hire as they are usually purchased or commissioned one at a time. However, with only a few groups organizing the acquisition and erection of such monuments, it makes sense to investigate whether any artists work with these groups frequently enough to have their sculptures considered to be works for hire.

Another possible issue related to Confederate monuments is whether they would be of “recognized stature,” as is needed to qualify for VARA protection.<sup>184</sup> Although VARA itself does not define what “work of a recognized stature” is, courts will often employ a two-part test to answer this question.<sup>185</sup> First, the work must be viewed as meritorious.<sup>186</sup> Second,

176. 17 U.S.C. § 106A(d)(1) (2012).

177. *Id.* § 101 (defining “work of visual art”).

178. *Id.*

179. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

180. *See id.* at 316.

181. *Id.* at 322–23.

182. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 86–88 (2d Cir. 1995).

183. *Id.*

184. 17 U.S.C. § 106A(a)(3)(B) (2012); *see also* Robinson, *supra* note 172, at 1950 (discussing this standard application).

185. *See, e.g.*, Robinson, *supra* note 172, at 1950 (noting that this standard has “been widely quoted”).

186. *Id.*

the stature of the work must be recognized by experts or other members of the artistic community.<sup>187</sup>

The NHPA, NEPA, and VARA are three federal preservation laws that can play a role in relocation and removal efforts. That is not to say that these are the only federal laws that might deter or delay removal, but these historic preservation laws function at a different level than others. They are generally calling for review and consideration of the resource in conjunction with federal, state, and local actors. The potential role of these laws is unclear, however, because they need a federal trigger to be brought to bear.

## B. State Laws

State laws may also come into play in monument removal and modification efforts. Several state preservation laws could influence either the substance (decision to remove) or procedures (how to remove) involved. These requirements can come from general preservation laws or monument-specific state laws.

### 1. State Environmental Policy Acts

Many states have environmental policy acts that provide similar procedural protections as NEPA.<sup>188</sup> Most state environmental policy acts closely mirror NEPA and are only procedural.<sup>189</sup> They usually use the same threshold as NEPA and apply to major actions significantly affecting the environment, but they may be more lenient in determining what qualifies.<sup>190</sup> A handful of states, however, expand the environmental review process beyond NEPA. States may do so by expanding the types of activities that trigger review or by requiring consideration of more elements during the review process.

California does both, and even though there are not currently any Confederate monuments in California, an analysis of its structure provides a good sample of how state environmental protection acts operate. First, the California Environmental Quality Act (CEQA)<sup>191</sup> requires environmental review for “‘projects’ . . . proposed to be carried-

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187. *Id.*; see *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004) (holding that the plaintiff was not entitled to relief under VARA because she failed to offer expert evidence to support her argument that her swan sculpture was of a “recognized stature”).

188. BRONIN & BYRNE, *supra* note 90, at 197–98.

189. See *id.* at 197 (citing Indiana’s NEPA provision, IND. CODE §§ 13-12-4-1 to -10).

190. See, e.g., MASS. GEN. LAWS ch. 30, §§ 61–62I (2017); see also Kenneth S. Weiner, *NEPA and State NEPAs: Learning from the Past, Foresight for the Future*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10675, 10677 (2009) (noting that most state environmental policy acts are very similar to NEPA).

191. CAL. PUB. RES. CODE §§ 21000–21178 (West 2018).

out or approved by California public agencies.”<sup>192</sup> Projects are discretionary actions with “potential impacts on the physical environment.”<sup>193</sup> Impacts on the physical environment include impacts on cultural resources, as the statute defines “environment” to include “the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.”<sup>194</sup> Unlike NEPA, CEQA does not require the project to be “major,” nor does it require the potential effects to be “significant,” making the threshold for triggering review much lower.<sup>195</sup> CEQA is an example of a state environmental policy act that requires consideration of more impacts than NEPA requires; it requires analyses of impacts on agricultural land and climate change.<sup>196</sup>

CEQA requires specific consideration of a historic resource where that resource is historically significant and the project could “cause a substantial adverse change in the significance of [the] . . . resource.”<sup>197</sup> California’s approach contemplates a broader array of resources and is even more likely than the federal laws to protect statues as it covers objects and does not require official listing of the resource on either the state or national registers (although such listings would automatically qualify a resource as historic).<sup>198</sup>

Beyond expanding the scope of what activities and impacts are considered, some state environmental policy acts impose substantive requirements. For example, CEQA requires agencies to “mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”<sup>199</sup> This requirement

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192. RONALD E. BASS ET AL., *CEQA DESKBOOK* 3 (3d ed. 2012).

193. *See id.* at 3, 4; *see also* CAL. PUB. RES. CODE § 21065 (defining “project”). For a thorough discussion assessing whether something qualifies as a project, *see* BASS ET AL., *supra* note 192, at 32–36.

194. CAL. PUB. RES. CODE § 21060.5.

195. CEQA has many exemptions that lessen the burden of these broad requirements. BASS ET AL., *supra* note 192, at 36–52 (describing the various exemptions available). Additionally, while the statute does not require projects to have significant environmental impacts, the environmental review process focuses on “significant effects on the environment,” CAL. PUB. RES. CODE § 21002.1(a), and requires mitigation and avoidance only for “significant effects on the environment.” *Id.* § 21002.1(b).

196. *See, e.g.*, CAL. CODE REGS. tit. 14, § 15064.4 (2019); Governor’s Office of Planning & Research, *CEQA and Climate Change*, CA.GOV, <http://opr.ca.gov/ceqa/climate-change.html> [<https://perma.cc/H4TA-X9UG>] (describing the various places where the CEQA Guidelines require consideration, discussion, or mitigation of climate change impacts).

197. CAL. CODE REGS. tit. 14, § 15064.5(b).

198. BASS ET AL., *supra* note 192, at 152–53.

199. CAL. PUB. RES. CODE § 21002.1(b).

specifically applies to historic resources.<sup>200</sup> California courts have applied the duty to mitigate impacts to historic resources rather strictly. In *League of Protection of Oakland's Architectural & Historic Resources v. City of Oakland*,<sup>201</sup> the California appellate court prohibited demolition of a house and explained that placing historic markers, writing reports, and documenting the home did not constitute adequate mitigation.<sup>202</sup>

While California law provides an easy example of a state law that has diverged and expanded from NEPA, it plays little role in the Confederate monument debate as there are currently no known public Confederate memorials in California.<sup>203</sup> The states with environmental policy acts and large numbers of Confederate monuments are Georgia, Virginia, and North Carolina.<sup>204</sup> As applied to historic resources, Georgia's Environmental Policy Act<sup>205</sup> closely resembles § 106 of the NHPA.<sup>206</sup> It applies to state agency actions including funding.<sup>207</sup> An environmental review process is required for projects that "may significantly impact the quality of the environment," eschewing the "major" qualification of NEPA but requiring impacts to be significant.<sup>208</sup> It specifically applies to the adverse impacts on "historical sites or buildings, or cultural resources."<sup>209</sup>

Virginia's Environmental Policy Act requires environmental review for "major state project[s]."<sup>210</sup> It also specifically acknowledges the need to protect historic resources and adds a substantive requirement to protect those resources in some circumstances.<sup>211</sup> The statute requires consultation with the state's Department of Historic Resources and undertaking "reasonable efforts to avoid or minimize impacts to historic resources" for projects by local governments that cost between \$500,000 and \$2 million.<sup>212</sup>

200. CAL. CODE REGS. tit. 14, § 15064.5.

201. 60 Cal. Rptr. 2d 821 (Ct. App. 1997).

202. *Id.* at 829.

203. SPLC, *supra* note 27, at 21 (recording zero monuments but six places named after Confederate figures).

204. *See id.* at 22–24, 28–30, 35–37.

205. 2004 Ga. Laws 463 (codified as amended GA. CODE ANN. §§ 12-16-1 to -23 (2018)).

206. *Georgia Environmental Policy Act*, GA. DEP'T NAT. RESOURCES, <https://georgiashpo.org/review-GEPA> [<https://perma.cc/X68J-97E7>].

207. *See id.*

208. *Id.*

209. GA. CODE ANN. § 12-16-3(1).

210. VA. CODE ANN. § 10.1-1188(A) (2018).

211. *Id.*

212. *Id.* ("[I]f the project involves a new location or a new disturbance that extends outside the area or depth of a prior disturbance, or otherwise has the potential to affect such resources adversely.").

While North Carolina's environmental review also applies to historic resources,<sup>213</sup> 2015 amendments to the statute increased the triggering threshold, and the statute now applies only to state actions with at least \$10 million in state funds or disturbing more than ten acres of state land.<sup>214</sup>

As this section indicates, state environmental policy acts vary widely. In some cases, these laws could pose a significant additional barrier to modification or removal efforts, particularly to those monuments owned by states and those monuments located on state-owned land; these laws could provide a clear hook for those opposed to removal when triggered.

## 2. State Protections for Visual Artists

As discussed above, the federal Visual Artists Rights Act (VARA) may provide an avenue for the creators of Confederate monuments to fight against their modification or removal.<sup>215</sup> However, because of its temporal limit (the lifetime of the artist), VARA will only apply to the most recent of monuments. Artists may, however, be able to find more relief from state-level art protection laws, like California's Art Preservation Act<sup>216</sup> and the Massachusetts Artist Protection Act (MAPA).<sup>217</sup> In the southern states where this would be most likely to apply, Louisiana is the only state that has enacted a state version of VARA, which could provide another layer of protection or process if the artist is still living.<sup>218</sup>

Not only do these statutes expand the number of years artwork can be protected from destruction, sometimes they also contain prohibitions on removal and relocation. In *Phillips v. Pembroke Real Estate*,<sup>219</sup> the court ordered an injunction that prevented the defendant from altering, destroying, moving, or removing several sculptures that were located in Eastport Park in Massachusetts.<sup>220</sup> Phillips had created twenty-seven sculptures for a local park.<sup>221</sup> He had the authority to direct the placement of the artwork, materials used, and creation of walls and pathways that were incorporated into the pieces.<sup>222</sup> A few years later, Pembroke Park

213. N.C. GEN. STAT. § 113A-113(b)(4)(h) (2018).

214. *State Environmental Policy Act (SEPA)*, N.C. ENVT'L QUALITY, <https://deq.nc.gov/permits-regulations/sepa> [<https://perma.cc/SL2A-RDJ3>].

215. See discussion *supra* Section II.B.2.

216. 1994 Cal. Stat. 6007 (codified as amended at CAL. CIV. CODE § 987 (West 2018)).

217. 1996 Mass. Acts ch. 450 (codified as amended at MASS. GEN. LAWS ch. 231, § 85S (2017)).

218. LA. STAT. ANN. §§ 51:2151–2156 (2018).

219. 288 F. Supp. 2d 89 (D. Mass. 2003).

220. *Id.* at 105.

221. *Id.* at 94.

222. *Id.*



Real Estate, the owner of the park, decided to make changes that included the removal and relocation of Phillips's work.<sup>223</sup> Phillips brought suit under VARA and MAPA to prevent the destruction of his work.<sup>224</sup> Phillips argued that his work was site-specific, and that to change the location of the work would destroy its purpose.<sup>225</sup> Phillips could not obtain relief under VARA because the act's purpose is not "to preserve a work of visual art where it is, but rather to preserve the work as it is."<sup>226</sup> However, Phillips prevailed under MAPA for those works where relocation of the pieces would impact the integrity and artistic value of the work.<sup>227</sup>

While Louisiana is the only former Confederate state that currently has such a law, it is useful to keep artists' rights in mind when considering the removal of statues with clear artistic merit.

### 3. Monument-Specific State Laws

Beyond the application of more traditional historic preservation and environmental laws, a number of states have enacted legislation to expressly limit the removal of Confederate monuments—particularly those located on land owned by local governments.<sup>228</sup> The majority of these monument protection acts are relatively recent and have mostly been enacted in southern states.<sup>229</sup> Currently, seven states have this type

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223. *Id.*

224. *Id.* at 92.

225. *See id.* at 95.

226. *Id.* at 99 (emphasis omitted) (quoting Bd. of Managers of Soho Int'l Arts Condo., No. 01 Civ.1226 DAB, 2003 WL 21403333, at \*10 (S.D.N.Y. June 17, 2003)).

227. *Id.* at 102, 105.

228. *See* Aneil Kovvali, *Confederate Statue Removal*, 70 STAN. L. REV. ONLINE 82, 82 (2017). We discuss these laws in the context of historic and cultural preservation laws as that is the tone and language used in the statutes, but it may be more appropriate to think of these as laws specifically seeking to articulate a position on the ideological struggle that is creating a narrative around Confederate monuments.

229. *See* Kasi E. Wahlers, Recent Development, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2181–82 (2016); Alfred Brophy, *North Carolina Heritage Protection Act*, FAC. LOUNGE (July 16, 2015, 12:14 AM), <http://www.thefacultyounge.org/2015/07/north-carolina-heritage-protection-act.html> [<https://perma.cc/HHE9-BHWY>].

of legislation. While Virginia's<sup>230</sup> and Georgia's<sup>231</sup> laws date back to the early twentieth century, the laws of the other five states were enacted after 2000.<sup>232</sup> Three states have enacted monument protection acts since 2015 (Alabama, North Carolina, and Tennessee [modifying a slightly earlier act]).<sup>233</sup> The primary thrust of state monument protection laws is to restrict the ability of local governments to modify or remove monuments without first obtaining state approval.<sup>234</sup> Typically, the laws protect monuments located on public property.<sup>235</sup> These laws also go beyond protecting structures of historic significance to include those not eligible for listing in the National Register in an effort to protect more Confederate monuments.<sup>236</sup> It could be argued that these state laws are not even really historic preservation laws, but preemptive laws designed to remove decision-making authority from local governments regarding how to grapple with these commemorative structures.

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230. Virginia's law is a bit more complex and less focused on the protection of memoriais than on the authority of counties and local governments regarding war memorials. See Amanda Lineberry, Essay, *Payne v. City of Charlottesville and the Dillon's Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45, 45–48 (2018) (discussing the application of Virginia Code § 15.2-1812). Virginia is a Dillon's Rule state and as such, local governments cannot independently take action without express authority to do so from the state. See, e.g., John G. Grumm & Russell D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 120 (1974). The state did not clearly give authority to erect monuments to cities and towns until 1997. Lineberry, *supra*, at 46–56. Thus, all monuments erected before 1997 (the vast majority of them) that were erected by cities and towns (counties obtained this authority in 1904 and the state itself always had it), were either done under a specific state law authorizing that monument or were done without legal authority to do so. *Id.* The debates over Charlottesville's monuments, erected in the city in 1924, are wrapped up in this convoluted relationship between the state and local government. *Id.* at 47–48.

231. See GA. CODE ANN. § 50-3-1(b) (2018).

232. See ALA. CODE § 41-9-231(6) (2017); MISS CODE ANN. § 55-15-81 (2018); N.C. GEN. STAT. § 100-2 (2018); S.C. CODE ANN. § 10-1-165 (2018); TENN. CODE ANN. § 4-1-412 (2018); VA. CODE ANN. § 15.2-1812 (2018).

233. Alabama Memorial Preservation Act of 2017, 2017 Ala. Laws 354 (codified as amended at ALA. CODE §§ 41-9-230 to -237); Cultural History Artifact Management and Patriotism Act of 2015, N.C. Sess. Laws 170 (codified as amended at N.C. GEN. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36, 160A-400.13); 2018 Tenn. Pub. Acts 1033 (codified as amended at TENN. CODE ANN. §§ 4-1-401 to -419).

234. David A. Graham, *Local Officials Want to Remove Confederate Monuments—but States Won't Let Them*, ATLANTIC (Aug. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351/> [<https://perma.cc/54WG-XBLN>] (discussing this trend).

235. See, e.g., Kovvali, *supra* note 228, at 82–83 (discussing multiple statutes and the preemptive effect of them).

236. See, e.g., 2015 N.C. Sess. Laws 170 (requiring none of the official designations for protected properties and allowing protections of any objects of remembrance regardless of whether they meet any particular preservation standards or guidelines).

### a. North Carolina

North Carolina's Cultural History Artifact Management and Patriotism Act of 2015<sup>237</sup> serves as a good example of a state government seeking to preempt local authority. The act requires approval from the North Carolina Historical Commission before any Confederate monument can be "removed, relocated, or altered in any way."<sup>238</sup> It prohibits the removal of any "object of remembrance located on public property . . . whether temporarily or permanently" unless done in accordance with the act.<sup>239</sup> While seeming to delegate the decision to remove or relocate a monument to the Historical Commission, the statute ties the hands of the commission by allowing relocation only "to a site of similar prominence, honor, visibility, availability, and access that [is] within the boundaries of the jurisdiction" where the statue is located.<sup>240</sup> The law specifies that a Confederate monument "may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location."<sup>241</sup> It also restricts relocations to situations where "appropriate measures" are undertaken to preserve the object or relocation is "necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects."<sup>242</sup>

While facially content-neutral, there is no question that the statute seeks to prevent the removal of Confederate monuments, having been passed during the debate over removal of a Confederate statue in Chapel

237. 2015 N.C. Sess. Laws 170 (codified as amended at N.C. GEN. STAT. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36, 160A-400.13).

238. N.C. GEN. STAT. § 100-2.1(a).

239. *Id.* § 100-2.1(b).

240. *Id.*

241. *Id.*

242. *Id.* The statute contains three exceptions: highway markers, objects that a building inspector has determined pose "a threat to public safety because of an unsafe or dangerous condition," and objects of remembrance on public land but owned by private parties and subject to a legal agreement between the private and public parties. *Id.* § 100-2.1(c). It is not clear how frequently the third category comes into play. Adam Lovelady gives the example of a Confederate monument placed on courthouse grounds by the Daughters of the Confederacy, explaining:

If [a] private organization still owns the monument and a private agreement governs removal and relocation, then that monument is not subject to the statutory limits on removal. In that case removal would be governed by the agreement between the organization and the local government on whose property the statue is located.

Adam Lovelady, *Statues and Statutes: Limits on Removing Monuments from Public Property*, COATES' CANONS: N.C. LOC. GOV'T L. (Aug. 22, 2017), <https://canons.sog.unc.edu/statues-statutes-limits-removing-monuments-public-property/> [<https://perma.cc/KDE8-6Z9Q>].

Hill, North Carolina.<sup>243</sup> The inclusion of “patriotism” in the name of the act also signals that it is not focused on protecting examples of art and architecture. When this law hampered local government’s efforts to remove monuments, protestors tore down a statue of Robert E. Lee that had been in place outside the county courthouse since 1924.<sup>244</sup> When Takiya Thompson confessed to helping to pull down the statue, she stated: “I chose to do that because I am tired of living in fear. I am tired of white supremacy keeping its foot on my neck and the neck of people who look like me[.]”<sup>245</sup>

Governor Roy Cooper has called on the legislature to repeal the state law protecting such monuments.<sup>246</sup> As the legislature has not moved in that direction,<sup>247</sup> Cooper instead has begun proceedings as outlined in the act, petitioning the state Historical Commission.<sup>248</sup> Cooper would like to relocate some Confederate monuments to a historic battlefield, where they could be placed in context and perform an educational role.<sup>249</sup> It is not clear under the law whether that would be deemed acceptable as a site of similar prominence or if it would be possible to meet the requirement of remaining in the same jurisdiction. In August 2018, the North Carolina Historical Commission voted to retain three monuments in Raleigh as it lacked the authority to recommend removal or relocation under state law.<sup>250</sup>

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243. See Jonathan M. Katz, *Protester Arrested in Toppling of Confederate Statue in Durham*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/protester-arrested-in-toppling-of-confederate-statue-in-durham.html> [<https://perma.cc/R2ES-QEE3>].

244. *Id.*

245. *Id.*

246. E.g., Lynn Bonner, *NC Governor Has a New Site in Mind for 3 Confederate Monuments on Capitol Grounds*, NEWS & OBSERVER (Sept. 8, 2017, 5:58 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article172115977.html> [<https://perma.cc/5LUD-56S3>] (explaining that Cooper had “sent a formal request to move three Confederate monuments from the State Capitol grounds to a historic site in Johnston County”).

247. See Graham, *supra* note 234 (suggesting that it is highly unlikely that the Republican legislature that has already shown hostility to the Democratic governor would repeal the law, stating, “the legislature—which shortly after Cooper won a tight and contested election stripped him of a range of powers—responded, in effect, *fat chance*”).

248. Bonner, *supra* note 246 (“Machelle Sanders, secretary of the Department of Administration . . . sent the petition to the state historical Commission.”).

249. See Lynn Bonner, *These 11 People Will Debate Moving NC Confederate Monuments. One Says Request is ‘Political,’* NEWS & OBSERVER (Sept. 20, 2017, 12:30 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article174341606.html> [<https://perma.cc/5PSA-JMKM>].

250. Merrit Kennedy, *3 North Carolina Confederate Monuments Will Stay in Place, Commission Decides*, NPR (Aug. 22, 2018, 11:35 PM), <https://www.npr.org/2018/08/22/640923318/3-north-carolina-confederate-monuments-will-stay-in-place-commission-decides> [<https://perma.cc/LS8G-NZ9T>].

## b. Alabama

Alabama's recently overturned Memorial Preservation Act of 2017<sup>251</sup> prevented local governments from “relocat[ing], remov[ing], alter[ing], renam[ing], or otherwise disturb[ing]” any public monument over forty years old.<sup>252</sup> The law contained no exceptions or mechanisms for approval, as seen in North Carolina, unless the monument was more than twenty but less than forty years old.<sup>253</sup> Thus, for monuments erected between 1977 and 1997, local governments could seek approval for “the relocation, removal, alteration, or renaming” of monuments from the Committee on Alabama Monument Protection.<sup>254</sup> There appears to be only one Confederate monument in Alabama erected between 1977 and 1997,<sup>255</sup> the Confederate memorial in Centre, Alabama—a stone slab at the Cherokee County Courthouse.<sup>256</sup> The law did not apply to any monuments dating after May 25, 1997. At least six Confederate-related monuments have been put in place since 1997 in Alabama.<sup>257</sup> The statute offered no guidance on the standards the newly created Committee on Alabama Monument Protection should apply. The eleven-person committee was formed in August 2017 and was slated to be approved by the Alabama legislature in January 2018.<sup>258</sup> Additionally, the statute did

251. 2017 Ala. Laws 354 (codified as amended at ALA. CODE §§ 41-9-230 to -237 (2018)).

252. ALA. CODE § 41-9-232; *see also* Kovvali, *supra* note 228, at 87 (“[T]he Alabama statute most strongly protects monuments that have been in place for forty years or more.”).

253. *See* ALA. CODE §§ 41-9-232(b), 41-9-235.

254. *Id.* § 41-9-235.

255. SPLC, *supra* note 27, at 19–20 (listing 107 “publicly supported spaces dedicated to the confederacy” in Alabama with years of establishment where available).

256. *Confederate Veterans Memorial – Centre, AL*, WAYMARKING.COM (Oct. 31, 2009, 1:47 PM), [http://www.waymarking.com/waymarks/WM7JCC\\_Confederate\\_Veterans\\_Memorial\\_Centre\\_AL](http://www.waymarking.com/waymarks/WM7JCC_Confederate_Veterans_Memorial_Centre_AL) [<https://perma.cc/Y6UP-CE5R>] (describing monuments and historical markers and noting the memorial was installed on April 24, 1988, by a local chapter of the Sons of Confederate Veterans).

257. *See* SPLC, *supra* note 27, at 19–20 (listing a Town of Midway monument erected in 2010, a statue of Admiral Raphael Semmes in Mobile from 2000, a 2010 monument to the 10<sup>th</sup> Rifled Sea Coast Columbiad in Mobile, a 2006 Confederate monument at the courthouse in Moulton, a monument to General Joseph Wheeler that same year in Rogersville, and a 2002 monument in Prattville to the Prattville Dragoons); *see also* Connor Sheets, *New Confederate Memorial Unveiled in Alabama*, AL.COM (Aug. 27, 2017), [https://www.al.com/news/index.ssf/2017/08/more\\_than\\_200\\_people\\_attend\\_un.html](https://www.al.com/news/index.ssf/2017/08/more_than_200_people_attend_un.html) [<https://perma.cc/N8FM-C6Q2>] (describing the unveiling of a new “modest stone marker” commemorating unknown Confederate soldiers of Crenshaw County).

258. *See* Sherri Jackson, *Alabama Monument Protection Committee Named by State Officials*, CBS 42, <https://www.cbs42.com/news/alabama-monument-protection-committee-named-by-state-officials/867995886> [<https://perma.cc/L493-MPPK>] (last updated Aug. 17, 2017, 9:47 PM) (“The committee members still have to be approved by the Alabama Legislature which is not in session again until January [2018].”).

not provide funding or support for either monument upkeep or public safety costs related to potential protests and other actions.<sup>259</sup>

The City of Birmingham put this law to the test in its efforts to remove a Confederate monument in Linn Park.<sup>260</sup> In the wake of the state law banning removal or relocation, Mayor William Bell placed a black wooden wall around the base of the statue in August 2017.<sup>261</sup> The City argued that this was not a violation of the Alabama Monument Protection Act because it did not actually alter the monument, which the city describes as being “offensive to many Birmingham residents.”<sup>262</sup> The state apparently disagreed, because the Attorney General sued the City, seeking large fines (potentially more than \$6 million depending on how one calculates each violation).<sup>263</sup> The Alabama Attorney General interprets “altered” or “otherwise disturbed” to include “affixing tarps and placing plywood” around a memorial.<sup>264</sup> The City also argued the complete ban on removal, relocation, or alteration of these monuments violates the equal protection clause of the Fourteenth Amendment.<sup>265</sup>

On January 14, 2019, Judge Michael Graffeo overturned the law based on its limitation on the city’s freedom of speech and lack of due process of law. On the First Amendment issue, the court described the message of the statue as an “homage to the Confederacy” and showed that the Memorial Preservation Act gave “absolute control and final authority

259. See Kyle Gassiott, *State of Alabama Fights Local Community over Confederate Statue*, MARKETPLACE (Mar. 14, 2018, 6:58 AM), <https://www.marketplace.org/2018/03/14/life/lawsuit-over-protest-confederate-statue-alabama-heads-court> [<https://perma.cc/WZE3-W3ZU>] (noting that state democratic representative Juandalynn Givan argued that “the law places an undue burden on communities because it forces them to keep a monument but doesn’t set aside any money for upkeep”).

260. See, e.g., Stephen Quinn, *Arguments Heard in Legal Battle over Birmingham’s Confederate Monument*, ABC 3340 (Apr. 13, 2018), <https://abc3340.com/news/local/arguments-heard-in-legal-battle-over-birminghams-confederate-monument> [<https://perma.cc/8N3N-SCFL>].

261. Erin Edgemon, *Birmingham Covers Confederate Monument as City Considers Removal*, AL.COM (Aug. 15, 2017), [https://www.al.com/news/birmingham/index.ssf/2017/08/defy\\_state\\_law\\_and\\_remove\\_conf.html](https://www.al.com/news/birmingham/index.ssf/2017/08/defy_state_law_and_remove_conf.html) [<https://perma.cc/KE5A-QRDJ>] (documenting the construction of the wall with photos and text). Jonathan Austin, President of the Birmingham City Council, had advocated simply removing the monument and paying what he believed would be a \$25,000 fine for doing so. Hanno van der Bijl, *Judge to Hear Case over Downtown Confederate Monument*, BIRMINGHAM BUS. J. (Jan. 17, 2018, 8:04 AM), <https://www.bizjournals.com/birmingham/news/2018/01/17/judge-to-hear-case-over-downtown-confederate.html> [<https://perma.cc/NZ7S-CHXK>]. After the mayor decided to conceal the monument, a GoFundMe account was started to pay the fine of \$25,000 for the removal of the monument. *Id.*

262. Quinn, *supra* note 260.

263. *Id.*

264. Erin Edgemon, *AG Files Lawsuit Against Birmingham over Confederate Monument*, AL.COM (Aug. 16, 2017), [https://www.al.com/news/birmingham/index.ssf/2017/08/ag\\_files\\_lawsuit\\_against\\_birmi.html](https://www.al.com/news/birmingham/index.ssf/2017/08/ag_files_lawsuit_against_birmi.html) [<https://perma.cc/45ZB-Z8WN>].

265. Quinn, *supra* note 260.

over the content of the message.”<sup>266</sup> The court held that this violates the First Amendment, which guarantees the city “a right to speak for itself, to say what it wishes, and to select the views that it wants to express.”<sup>267</sup> Additionally, the law provided no process for the city to have “notice and an adequate hearing” as guaranteed by the Fourteenth Amendment. The court viewed the act as providing “no process at all – no notice and no hearing,” explaining that the state even interpreted that law as giving it all the power to “decide what the CITY can and cannot do with its own property, Linn Park and the statuary inside it.”<sup>268</sup> The state has announced its intention to appeal the ruling.<sup>269</sup>

Gubernatorial candidate Stacy George also disagreed with Bell’s actions and filed an ethics violation against the mayor, asserting he had covered the monument for “political reasons” in the run-up to the mayoral election—showing the political/contentious nature of many of these debates.<sup>270</sup>

### c. Tennessee

The Tennessee Heritage Protection Act,<sup>271</sup> originally enacted in 2013 and first amended in 2016, prohibits local governments from “remov[ing], renam[ing], relocat[ing], alter[ing], rededicat[ing], or otherwise disturb[ing]” war memorials or military monuments on public property.<sup>272</sup> There is an exception, however, enabling local governments

266. *State of Alabama v. City of Birmingham*, CV 17-903426-MCG, Order on Cross Motions for Summary Judgment, Jan. 14, 2019 at 4, [https://www.scribd.com/document/397503678/Confederate-Monument-Ruling#from\\_embed](https://www.scribd.com/document/397503678/Confederate-Monument-Ruling#from_embed) [<https://perma.cc/V2PT-QS94>].

267. *Id.* at 4 (citations omitted). “Just as the STATE could not force any particular citizen to post a pro-Confederacy sign in his or her front lawn, so too can the STATE not commandeer the CITY’s property for the State’s preferred message.” *Id.* at 5–6.

268. *Id.* at 7.

269. Ian Steward, *Judge Throws Out Alabama Law that Protects Confederate Monuments*, NPR, Jan. 15, 2019, <https://www.npr.org/2019/01/15/685672038/judge-throws-out-alabama-law-that-protects-confederate-monuments> [<https://perma.cc/P9SH-RFLS>] (stating that the Alabama Attorney General’s office “said it still believes the law is constitutional and that it will appeal the ruling”).

270. See Mike Cason, *Stacy George Files Ethics Complaint Against Mayor Bell over Monument Cover*, AL.COM (Aug. 16, 2017), [https://www.al.com/news/index.ssf/2017/08/stacy\\_george\\_files\\_ethics\\_comp.html](https://www.al.com/news/index.ssf/2017/08/stacy_george_files_ethics_comp.html) [<https://perma.cc/SE2P-YBRZ>]. Bell was ultimately unsuccessful in his re-election bid. Erin Edgemon, *Randall Woodfin Is Birmingham’s Next Mayor*, AL.COM (Oct. 3, 2017, 4:00 PM), [https://www.al.com/news/birmingham/index.ssf/2017/10/birmingham\\_mayoral\\_runoff\\_live.html](https://www.al.com/news/birmingham/index.ssf/2017/10/birmingham_mayoral_runoff_live.html) [<https://perma.cc/LLW5-XJ7U>].

271. 2018 Tenn. Pub. Acts 1033 (codified as amended at TENN. CODE ANN. § 4-1-412 (2018)).

272. TENN. CODE ANN. § 4-1-412(b)(1). There is an exemption for public lands controlled by the state department of transportation. *Id.* § 4-1-412(e)(2).

to petition the Tennessee Historical Commission for a waiver.<sup>273</sup> While the statute offers the Historical Commission no clear guidelines in deciding whether to grant a waiver, it explains that it can be done by a two-thirds vote of commissioners present and voting, and “may include reasonable conditions and instructions to ensure that a memorial is preserved and remains publicly accessible to the greatest extent possible.”<sup>274</sup>

The City of Memphis sought a waiver from the Tennessee Historical Commission for removal of a statue of Nathan Bedford Forrest from Health Sciences Park.<sup>275</sup> When the Commission denied a waiver, the City of Memphis undertook a creative solution to remove statues of Nathan Bedford Forrest, Jefferson Davis, and James Harvey Mathes.<sup>276</sup> It conveyed the public land where the statues sat to a private entity, Memphis Greenspace, Inc.<sup>277</sup> As the prohibition on monument removal only applies to public land, the new private landowners were free to remove the statues. Within hours of the sale, the new owners removed the statues and put them in storage.<sup>278</sup>

The local branch of the Sons of Confederate Veterans sued the city.<sup>279</sup> Litigation in Davidson County Chancery Court confirmed that the city had the right to sell the parks and that the nonprofit had the right to remove the statues.<sup>280</sup> While the judge lifted the injunction that was preventing Memphis Greenspace from relocating the statues (which remain in storage “at an undisclosed location”),<sup>281</sup> the judge then stayed

273. *See id.* § 4-1-412(c)(1).

274. *Id.* § 4-1-412(c)(8)(B).

275. Ryan Poe, *Chancellor: Memphis Confederate Statues Takedown was Legal*, TENNESSEAN (May 16, 2018, 5:37 PM), <https://www.tennessean.com/story/news/government/city/2018/05/16/chancellor-memphis-confederate-statues-takedown-legal/617518002/> [<https://perma.cc/4M7G-VGUF>].

276. Daniel Connolly & Vivian Wang, *Confederate Statues in Memphis Are Removed After City Council Vote*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/statue-memphis-removed.html> [<https://perma.cc/8SFT-29NX>]; *see* Toby Sells, *Confederate Statues Ready to Go (Just Not to Shelby County)*, MEMPHIS FLYER (May 25, 2018, 1:06 PM), <https://www.memphisflyer.com/NewsBlog/archives/2018/05/25/confederate-statues-ready-to-go-just-not-to-shelby-county> [<https://perma.cc/L7JU-BYVX>].

277. *See* Connolly & Wang, *supra* note 276.

278. Poe, *supra* note 275 (“On Dec. 20, [2017,] the City Council approved the sale of Health Sciences Park and Fourth Bluff Park to Memphis Greenspace . . . for \$1,000 each. Within hours, the nonprofit removed the statues—including Forrest’s statue from its pedestal atop his grave—and stored them locally.”).

279. *See* Memorandum & Final Order Denying Injunction; & Order for Rule 62.01 Stay at 1, *Sons of Confederate Veterans Nathan Bedford Forrest Camp 215 v. City of Memphis*, No. CH-13-0785 (Tenn. Ch. 2017).

280. *Id.* at 14.

281. *Id.* at 3, 4.



the order, pending appeal by the Sons of Confederate Veterans.<sup>282</sup> The appeal was heard by a three-judge panel on February 26, 2019.<sup>283</sup>

Meanwhile, the Tennessee Comptroller's Office reviewed the sale of the parks on the request of the Lieutenant Governor and House speaker.<sup>284</sup> The Comptroller concluded that the city had not violated open meetings laws and had "acted with the authority granted by *the Memphis Code of Ordinances* to sell the parks to a non-profit at less than market value."<sup>285</sup> However, the City had not required Memphis Greenspace to submit an application to the City Real Estate Department before the conveyance of the land, as it should have based on the local ordinance.<sup>286</sup> The purpose of that process was to ensure that the new landowner had adequate finances.<sup>287</sup> As the City was able to demonstrate that it had other assurances of the financial capability of Memphis Greenspace and did not always require such applications before conveying land, the Comptroller's Office simply recommended that the City "enter into a formal memorandum of understanding . . . for the storage and protection of the historic figures and artifacts."<sup>288</sup>

The state legislature did not like the City's maneuverings and punished Memphis by "vot[ing] to remove \$250,000 earmarked for the Memphis bicentennial."<sup>289</sup> Lest there be any doubts that this budgetary decision was a response to the removal action, state representative Andy Holt compared the city's actions to those of ISIS and voiced regret that the negative impact was "not in the tune of millions of dollars."<sup>290</sup>

After this punitive action against the City of Memphis, the state legislature amended the Tennessee Heritage Protection Act, imposing

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282. *Id.* at 3–4; *see also* Poe, *supra* note 275 (reporting on this injunction).

283. Natalie Allison, *Sons of Confederate Veterans, Memphis Argue Over Confederate Statues in Court of Appeals*, MEMPHIS COM. APPEAL, Feb. 26, 2019, <https://www.commercialappeal.com/story/news/courts/2019/02/26/memphis-sons-confederate-veterans-nathan-bedford-forrest-statue-removal/2990743002/> [<https://perma.cc/G7NC-KV6T>] (describing oral arguments and main issues).

284. *See* JUSTIN P. WILSON, COMPTROLLER'S OFFICE REVIEWS SALE OF TWO MEMPHIS PARKS 1 (2018), <https://comptroller.tn.gov/content/dam/cot/administration/documents/press-releases/2018/20180214MemphisParksSale.pdf> [<https://perma.cc/SMT7-VALU>].

285. *Id.*

286. *Id.*

287. *See id.* ("The purpose of this application is to gauge an entity's financial strength and overall stability.").

288. *Id.*

289. Alex Horton, *Tennessee Lawmakers Punish Memphis for Removing Statue of Confederate and KKK Leader*, WASH. POST (Apr. 18, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/04/18/tennessee-lawmakers-punish-memphis-for-removing-statue-of-confederate-and-kkk-leader/?utm\\_term=.7271fec9eeba](https://www.washingtonpost.com/news/post-nation/wp/2018/04/18/tennessee-lawmakers-punish-memphis-for-removing-statue-of-confederate-and-kkk-leader/?utm_term=.7271fec9eeba) [<https://perma.cc/7DYZ-CU96>].

290. *Id.*

financial penalties on cities that remove historic monuments<sup>291</sup> and expressly prohibiting the strategy used by Memphis (“the sale or transfer of a memorial or public property containing a statue without first obtaining a waiver from the state Historical Commission”).<sup>292</sup> Further, the amended law contains a citizen suit provision, “allow[ing] ‘any entity, group or individual’ with a ‘real interest in a memorial’ to seek an injunction” in county court if it believes a local government is violating the law.<sup>293</sup>

While the terms of these laws are neutral on the content or message of the memorial, the clear target is protection of Confederate monuments.<sup>294</sup> To the extent that state-level monument protection acts apply, these laws are substantial barriers to local governments grappling with the question of whether to remove or relocate a monument.<sup>295</sup>

291. Jordan Buie, *Senate Passes Bill that Would Punish Cities for Removing Historical Monuments*, TENNESSEAN (Apr. 25, 2018, 7:24 PM), <https://www.tennessean.com/story/news/politics/2018/04/25/tennessee-confederate-monuments-memphis-statues/549760002/> [<https://perma.cc/3A8V-2JR6>].

292. Joel Ebert, *Legislation in Response to Memphis’ Confederate Statue Removal Signed by Gov. Haslam*, TENNESSEAN (May 22, 2018, 9:18 AM), <https://www.tennessean.com/story/news/politics/2018/05/22/governor-signs-measure-bolstering-heritage-protection-act-into-law/565755002/> [<https://perma.cc/3ZW9-34X2>].

293. *Id.* The most likely group to bring such an action is the Sons of Confederate Veterans, which is not only responsible for many Confederate monuments in Tennessee but has been active in challenging removal efforts. See Maya Smith, *Sons of Confederate Veterans to Appeal Memphis Statue Ruling*, MEMPHIS FLYER (May 24, 2018, 12:17 PM), <https://www.memphisflyer.com/NewsBlog/archives/2018/05/24/sons-of-confederate-veterans-to-appeal-memphis-statue-ruling> [<https://perma.cc/GX8T-85S3>] (“The Sons of Confederate Veterans . . . appeal[ed] a ruling by the Davidson County Chancery Court that said Memphis acted legally in removing Confederate monuments.”); see also Memphis Brigade, Sons of Confederate Veterans, FACEBOOK (July 31, 2018), <https://www.facebook.com/SCVmemphis/> [<https://perma.cc/27XC-CRVU>] (containing calls to donate money to “help[] pay for attorney and court fees to continue the fight for the Forrest statue and gravesite”).

294. See Graham, *supra* note 234 (describing such laws as being “designed to prevent the removal of Civil War memorials”); see also Dakin Andone, *NAACP Slams Alabama Governor’s Campaign Ad About Law Protecting Confederate Monuments*, CNN, <https://www.cnn.com/2018/04/21/us/alabama-confederate-monuments-kay-ivey-campaign/index.html> [<https://perma.cc/N88N-3XCA>] (last updated Apr. 21, 2018, 3:15 PM) (“At the time the [Alabama] bill was passed, state Sen. Hank Sanders, a Democrat from Selma, said it was ‘clearly’ meant to protect Confederate memorials and monuments and honor the memory of white supremacists.”). But see Gassiott, *supra* note 259 (quoting one of the bill’s sponsors who asserts that the act was not specifically seeking to protect Confederate monuments as saying “[n]owhere in the legislation is the word ‘Confederacy,’” but instead, “this [legislation] covers all history here in Alabama”).

295. See Wahlers, *supra* note 229, at 2192–95 (providing three examples of attempts to apply North Carolina’s law to signage within a museum, a city’s seal, and statuary in the state capital). See generally Benjamin Wallace-Wells, *The Fight over Virginia’s Confederate Monuments*, NEW YORKER (Dec. 4, 2017), <https://www.newyorker.com/magazine/2017/12/04/the-fight-over->

### C. Local Preservation Laws

Local preservation laws are generally the backbone of the regulatory preservation framework. Two types of local laws may govern the removal of Civil War monuments:<sup>296</sup> (1) local preservation laws and (2) demolition delay ordinances.

#### 1. Local Preservation Laws

Local historic districts (LHDs) are the historic preservation tool that most people are likely familiar with.<sup>297</sup> This tool focuses on preventing the demolition or destruction of groups of properties where the significance is collective, rather than based on the importance of individual resources.<sup>298</sup> Authorized under state enabling laws, LHDs are established through locally created and administered preservation ordinances.<sup>299</sup> The local ordinances typically create a commission or reviewing entity tasked with issuing certificates of appropriateness for proposed modifications to resources within a designated district.<sup>300</sup> There are more than 2,300 LHDs nationwide, including at least one district in virtually every state.<sup>301</sup>

Although similar, landmark laws are less common than LHDs and differ in that individual properties, rather than whole neighborhoods or

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virginias-confederate-monuments [<https://perma.cc/Q6JC-6VT4>] (profiling the litigation over the Charlottesville monuments under Virginia law).

296. See, e.g., Mark D. Brookstein, Note, *When History Is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI-KENT L. REV. 1847, 1848 (2001) ("[P]reservation law has focused primarily on two areas: first, whether historic designation amounts to a taking in violation of the Fifth Amendment; and second, whether a permit may be granted for the demolition of a building already designated a historic landmark." (footnote omitted)).

297. See, e.g., Tad Heuer, Note, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768, 774–77 (2007) (describing the development of LHDs as a preservation tool).

298. MILLER, *supra* note 121, at 7–8; see also Grace Blumberg, Comment, *Legal Methods of Historic Preservation*, 19 BUFF. L. REV. 611, 616 (1970) ("Preservation of a few isolated old houses [in new regulatory districts] appears a pathetic and dreary effort; a visit to one of the 'antiquities' is likely to evoke discomfiting thoughts of foolish elderly aunts and musty corners.").

299. See, e.g., Paul W. Edmondson, Comment, *Historic Preservation Regulation and Procedural Due Process*, 9 ECOLOGY L.Q. 743, 746–47 (1981) (discussing state enabling legislation as a prerequisite to local historic district regulations).

300. See, e.g., MILLER, *supra* note 121, at 2–3.

301. CONSTANCE E. BEAUMONT, NAT'L TR. FOR HISTORIC PRES., A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES 1 (2002), <http://mrsc.org/getmedia/0E24E2FB-023D-45E0-A611-96B94FF43F35/toolkit.aspx> [<https://perma.cc/F7QK-6BCP>].

areas, are listed as landmarks.<sup>302</sup> Landmark laws focus on the most important resources of a community and then single these out for individualized review by an administering commission.<sup>303</sup> Both LHDs and landmark laws use similar design-review principles and alteration-approval processes, making them functionally equivalent in their practical application to monuments.<sup>304</sup>

As of July 2018, only a few applications have been made to either LHDs or landmark commissions for the removal of a Confederate monument. One such request was made in 2015 in Rockville, Maryland, and is instructive.<sup>305</sup> In 2015, Montgomery County applied to the Rockville Historic District Commission to remove a statue located in front of the county courthouse.<sup>306</sup> The statue is of a solitary Confederate soldier with the following verse on the base: “That we through life may not forget to love the thin grey line,” a reference to the uniforms worn by the Confederate army.<sup>307</sup> The statue itself dates to 1913, but it had been moved to the courthouse grounds in 1971.<sup>308</sup> The request for a certificate of appropriateness fell under the district commission’s jurisdiction

302. See, e.g., John Nivala, *The Future for Our Past: Preserving Landmark Preservation*, 5 N.Y.U. ENVTL. L.J. 83, 83–84 (1996) (noting that landmark laws protect individual properties through discussion of the significant decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

303. See, e.g., *About LPC*, NYC: LANDMARKS PRESERVATION COMMISSION, <https://www1.nyc.gov/site/lpc/about/about-lpc.page> [https://perma.cc/38GA-IGBD].

304. An example of this blurring is that some communities use single resource historic districts (i.e., creating a historic district for a single property, which is essentially, although with a different operative structure, the equivalent of landmarking a property). See, e.g., *Historic Districts*, CITY ROCKVILLE, <http://www.rockvillemd.gov/2177/Historic-Districts> [https://perma.cc/L7FR-M7PP].

305. See Andrew Metcalf, *Rockville Historic District Commission Grants County’s Request to Move Confederate Statue*, BETHESDA MAG. (Sept. 18, 2015, 11:22 AM), <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Rockville-Historic-District-Commission-Grants-Countys-Request-to-Move-Confederate-Statue/> [https://perma.cc/4UJ3-YJDK]. This statue has been a long-term issue with opposition dating back to at least 1993. See *Confederate Soldier Statue*, MONTGOMERY HIST., <http://montgomeryhistory.org/confederate-soldier-statue/> [https://perma.cc/2MD4-ZQF3] (providing summary of media coverage and the issue).

306. Seth Denbo, *All History Is Local: Debating the Fate of a Confederate Soldier Statue in Maryland*, PERSP. HIST.: AHA TODAY (July 27, 2015), <http://blog.historians.org/2015/07/debating-the-fate-of-a-confederate-soldier-statue/> [https://perma.cc/WA58-RMQM].

307. Bill Turque, *Montgomery County Officials Want to Move Confederate Statue to Rockville Park*, WASH. POST (Sept. 23, 2015), [https://www.washingtonpost.com/local/md-politics/montgomery-county-decides-on-new-site-for-confederate-monument/2015/09/23/ea7fad18-6227-11e5-9757-e49273fd5f65\\_story.html?utm\\_term=.3f3b13b3423d](https://www.washingtonpost.com/local/md-politics/montgomery-county-decides-on-new-site-for-confederate-monument/2015/09/23/ea7fad18-6227-11e5-9757-e49273fd5f65_story.html?utm_term=.3f3b13b3423d) [https://perma.cc/PZ6V-RHZX].

308. SHEILA BASHIRI, CITY OF ROCKVILLE, HISTORIC DISTRICT COMMISSION STAFF REPORT: CERTIFICATE OF APPROVAL HDC2016-00756, 29 COURTHOUSE SQUARE 8, 17 (2015). The Maryland Historical Trust also held a preservation easement on the courthouse, but the city concluded that the statue was not a protected feature under the terms of its easement. *Id.* at 16.

because the courthouse was, in 1984, designated as a single resource local historic district by the City of Rockville's historic district commission.<sup>309</sup> The historic district commission concluded the statue was not a contributing element to the courthouse's historic significance (as it had been moved onto the site and was a commemorative property) and the decision to relocate (instead of demolish) the statue mitigated the impacts.<sup>310</sup> The statue's 1971 relocation gave the commission a basis for concluding that the 2015 removal did not have an impact on the historic resource (as the monument was not originally associated with the courthouse).<sup>311</sup> Such a circumstance will not often occur.

The debate over Confederate memorial modification or removal may be exacerbated by the fact that most local preservation laws lack any form of public policy, or public interest exception or safety valve, that would allow demolitions or alterations when required by practical necessity.<sup>312</sup> Some commentators advocate for broader adoption and application of practical necessity provisions to better balance competing interests, which would directly relate to the types of issues preservationists face in the debate over these monuments.<sup>313</sup> Absent such provisions, historic district commissions may grapple with how to address competing interests within the confines of their jurisdictional task—leaving commission members in a somewhat difficult position.

## 2. Demolition Delay Ordinances

Last, demolitions delay ordinances, although far less common, could also have an impact on a community's decision to remove a Confederate monument.<sup>314</sup> Demolition delay ordinances typically require the owner of a listed property to pause before carrying out a substantial demolition

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309. See Miriam Bunow, *County Executive Plans to Move Confederate Statue*, PEERLESS ROCKVILLE (July 21, 2015), <http://www.peerlessrockville.org/2015/07/21/county-executive-plans-to-move-confederate-statue/> [https://perma.cc/MB37-TJVB].

310. BASHIRI, *supra* note 308, at 17–19.

311. *Id.*

312. See, e.g., J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENVTL L. REV. 343, 389–90 (2015).

313. See, e.g., J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 672, 687 (2012) (profiling the benefit of this type of provision and its application under Washington's landmarks law).

314. See, e.g., Elizabeth M. Tisher, *Historic Housing for All: Historic Preservation as the Inclusionary Zoning*, 41 VT. L. REV. 603, 621–22 (2017) (exploring application of demolition delay ordinances).

that would include moving the object or property.<sup>315</sup> The idea behind this delay is to allow preservation advocates to mobilize, purchase, or come up with other options for protecting the resource before it is lost.<sup>316</sup> To the extent that the ordinance defines removal as substantial demolition, a demolition delay ordinance could cause a considerable delay and allow monument advocates time to mobilize and develop an alternative plan.

Overall, preservation laws will likely play a role in many efforts to remove these commemorative structures. As is the general rule with preservation law, the strongest protections or legal requirements will be triggered by and apply through local preservation laws, although they may be practically limited by a community's will to enforce these requirements.<sup>317</sup> State and federal laws, which are important and potentially provide an opportunity for dialogue and alternative assessments, are generally only procedural barriers, not substantive ones. The exception to this, of course, is the relatively recent trend in some states to preempt some degree of local control through statewide monument-specific laws that impose affirmative protection at the state level.<sup>318</sup>

#### D. *Private Preservation Laws*

In addition to governmental efforts to regulate and protect Confederate monuments, private laws and agreements, specifically conservation easements, can also restrict or limit Confederate monument removal. For the purposes of this Article, conservation easements are defined as "private" laws, but this line is often blurred as governmental entities, rather than private land trusts, sometimes hold these restrictions. This Article addresses these as private as they are secured through legal agreements rather than through regulatory means.

##### 1. Preservation Easements

Conservation easements are one mechanism for protecting Confederate monuments.<sup>319</sup> Conservation easements protect several

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315. See, e.g., KATHLEEN O'DONNELL, MASSACHUSETTS ENVIRONMENTAL LAW § 6.5.1 (4th ed. 2016) (profiling demolition delay bylaws in Massachusetts).

316. See Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 URB. LAW. 405, 411 (1998).

317. BRONIN & BYRNE, *supra* note 90, at 323–27 (exploring the impact of demolition delay bylaws).

318. See *supra* Section II.B.3.

319. See, e.g., SPECIAL COMM'N TO REVIEW BALT.'S PUB. CONFEDERATE MONUMENTS, REPORT TO MAYOR RAWLINGS-BLAKE 28 (2016), <https://www.baltimorecity.gov/sites/default/files/Confederate%20Monuments%20report.pdf> [<https://perma.cc/G89N-7XEP>] [hereinafter

types of resources, including the built and natural environment.<sup>320</sup> These interests are labeled “preservation easements” when the primary goal of the restriction is protection of the built environment.<sup>321</sup> When the goal is to protect the landscape or scenic views, these interests are referred to as “conservation easements” (a term also used when discussing this form of property interest in a collective sense).<sup>322</sup> That is, preservation easements are a subset of the larger general category of conservation easements.

Landowners enter into conservation easements, a private mechanism for protecting targeted resources, by conveying the ability to modify, develop, or demolish a resource.<sup>323</sup> When entering into a conservation easement, the landowner gives another party (typically a non-governmental organization or governmental body that serves as the conservation easement-holder) the ability to enforce this restriction.<sup>324</sup>

The classic “bundle of sticks” metaphor for property can be helpful: Think of the landowner as losing one of the sticks in her bundle, but instead of simply handing the stick to another person who can use it as she likes, the holder of the stick is its guardian, who agrees to monitor and enforce its terms for the duration of the property interest—which is typically perpetual.<sup>325</sup> Landowners rarely hand over these sticks for free. Instead, they seek payments, permits, or other benefits in return for restricting their properties. A landowner’s primary motivation for donating a conservation easement is often the potential to qualify for

SPECIAL COMM’N] (profiling the City of Baltimore’s Confederate monuments protected by preservation easements held by the Maryland Historic Trust).

320. See, e.g., *Land Acquisition: Easements*, OPEN SPACE INST., <https://www.openspaceinstitute.org/what/land-acquisition/easements> [<https://perma.cc/UR6V-K8N2>] (profiling the various resources conservation easements can protect).

321. See, e.g., *Preservation Easements*, PRESERVATION LEADERSHIP F., <https://forum.savingplaces.org/learn/fundamentals/preservation-law/easements> [<https://perma.cc/T8AT-FB3R>].

322. BRONIN & BYRNE, *supra* note 90, at 534–35 (exploring terminology used to describe this form of property interest); see also ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 14–19 (2d ed. 2005) (profiling the variety of conservation easement types).

323. Jess R. Phelps, *Preserving Perpetuity: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World*, 43 ENVTL. L. 941, 945–47 (2013).

324. Jessica Owley, *The Future of the Past: Historic Preservation Easements*, 35 ZONING L. & PRAC. REP., Nov. 2012, at 1, 3; Jess R. Phelps, *Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future*, 91 NEB. L. REV. 121, 128 (2012). The conservation easement holder has not only the ability to enforce the restriction, but the obligation and responsibility to do as required under the Internal Revenue Code and potentially under state charitable giving laws. See Phelps, *supra*, at 133–36.

325. See Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).

federal and state tax benefits, primarily the charitable deduction associated with any reduction in the property's value.<sup>326</sup>

Although some promote preservation easements as a way to protect historic resources through private action, the government still plays a significant role through its promotion, facilitation, and funding of conservation easements. This Section explores how conservation easements potentially work to protect Confederate monuments, focusing on the two primary pathways: (1) tax-incentivized conservation easements and (2) non-tax-incentivized conservation easements. This Article examines these categories separately because the public interest involved differs—suggesting distinct and material barriers to monument removal or alteration. The involvement of conservation easements in the Confederate monument debate suggests two things. First, the line between public and private in the context of Confederate memorials is even muddier than we thought, with a complicated array of property interests and public investments. Second, the layer of a conservation easements could present a further obstacle (and additional stakeholder) in the efforts to modify or remove monuments.

#### a. Tax-Incentivized Conservation Easements

Federal involvement in conservation easements can come in different forms. Sometimes the federal government creates programs financing acquisition of conservation easements.<sup>327</sup> At times, it even serves as conservation easement holder.<sup>328</sup> The most significant role, however, (and the one most salient for preservation easements) is as provider of tax incentives for donations of preservation interests.<sup>329</sup> This governmental

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326. See NAT'L TR. FOR HISTORIC PRES., BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP 34 (2008) (providing an overview of these incentives).

327. See, e.g., Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 44 *ECOLOGY L.Q.* 627, 650–52 (2017) (profiling federal Farm Bill programs designed to acquire these interests).

328. See, e.g., Jess R. Phelps, *Preserving National Historic Landmarks?*, 24 *N.Y.U. ENVTL. L.J.* 137, 180–83 (2016) (profiling the National Park Service's role as a holder of conservation easements protecting the historic Green Springs area of Virginia).

329. BRONIN & BYRNE, *supra* note 90, at 571–85 (providing an overview of the tax incentives); see also SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004*, at 13 (2005) (profiling the interconnectedness of public and private interests within conservation easements and dispelling the notion that conservation easements are less “governmental” than other forms of land acquisition, including fee acquisition by federal land management agencies).



role illuminates the public interest even in seemingly private endeavors and can complicate efforts to modify or remove monuments.<sup>330</sup>

While the tax incentive is unlikely to apply directly to protection of Civil War monuments (as explained below), it may apply to the properties on which monuments are located. Tax-incentivized conservation easements could protect Confederate monuments in two scenarios: (1) direct application or protection by preservation easements and (2) indirect application or protection through conservation easements.<sup>331</sup>

The charitable deduction has driven many preservation easement donations.<sup>332</sup> No different in principle from a cash gift to a nonprofit through a pledge drive, a donated conservation easement falls under the general category of charitable donations.<sup>333</sup> However, as a non-cash donation, one of the primary challenges is how to value the conveyed interest.<sup>334</sup> The Internal Revenue Code and the Treasury Regulations instruct that these donations be appraised on a before-and-after basis.<sup>335</sup> For a simplified example, take a hypothetical property worth \$1,000,000. An appraisal determines that this restriction reduced the property's market value to \$900,000. This suggests a non-cash charitable donation of \$100,000.

Depending on the magnitude of the restriction and the market value or development potential of the property, conservation easement donations can result in substantial charitable deductions and, as a result, have contributed to the protection of thousands of historic properties

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330. See, e.g., Ian Duncan, *Baltimore Lacked Authority to Take Down Confederate Statues, and State Says It Could — but Won't — Order Them Restored*, BALT. SUN (Oct. 26, 2017, 2:45 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-confederate-monuments-letter-20171026-story.html> [<https://perma.cc/M9LP-WKSN>] (exploring the complicated legal issues involving the City of Baltimore's authority to remove four Confederate monuments/statues in late 2017).

331. In addition to the federal tax incentives explored in this section, state tax credits/deductions can also apply. See Philip M. Hocker, *Transferable State Tax Credits as a Land Conservation Incentive*, in WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE, 124, 124–27 (James N. Levitt ed., 2005).

332. Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 117–19 (2014).

333. *Id.* at 117.

334. See generally Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225 (2016) (exploring the challenges and issues valuation presents for easement donations).

335. See LAND TR. ALL. & NAT'L TR. FOR HISTORIC PRES., APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 30–33 (3d ed. 1999) (describing legal and practical issues when applying the before-and-after standard).

nationally.<sup>336</sup> In 2014 alone, the most recent year for which reporting is available, the combined value of conservation easements, nationally, totaled \$3.2 billion dollars.<sup>337</sup>

To qualify for the tax deduction, the donation must: (1) consist of “a qualified real property interest;” (2) be made “to a qualified organization;” and (3) be made “exclusively for conservation purposes.”<sup>338</sup> The first two requirements are similar for both preservation and conservation easements.

The first requirement, that the donation be of a qualified real property interest, mandates a perpetual restriction on the use of the property.<sup>339</sup> The second requirement, that the donation be made to a qualified organization, means that the preservation easements must be held by either state or local governments or approved nongovernmental organizations.<sup>340</sup> These nongovernmental organizations, typically called land trusts, are generally established under § 501(c)(3) of the Tax Code and have organizational purposes aligned with the purposes of the donation.<sup>341</sup>

However, the third requirement, that the donation be made exclusively for conservation purposes, differs depending on the type of conservation easement involved. For a conservation easement to qualify for the charitable deduction, the landowner must demonstrate that it meets one of the statutorily defined “conservation purpose[s].”<sup>342</sup> The statute defines “conservation purpose[s]” as falling into one or more of the following four categories:

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems,

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336. See generally Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47 (2011) (exploring the various motivating factors that fuel tax incentivized easement donations).

337. ADAM LOONEY, BROOKINGS INST., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 3 (2017), [https://www.brookings.edu/wp-content/uploads/2017/05/looney\\_conservationeasements.pdf](https://www.brookings.edu/wp-content/uploads/2017/05/looney_conservationeasements.pdf) [<https://perma.cc/8B9T-BJ6X>] (charting this staggering number in the context of recent efforts by some promoters to syndicate conservation easements as an investment vehicle that the IRS recently called out as a listed activity for future enforcement action).

338. Treas. Reg. § 1.170A-14(a) (2018); see also *id.* § 1.170A-14(b)–(c) (defining “[q]ualified real property interest” and “[q]ualified organization” respectively).

339. *Id.* § 1.170A-14(b)(2).

340. *Id.* § 1.170A-14(c)(1).

341. *Id.*; see also C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 34–35 (2008) (discussing a public support requirement and the potential application of this requirement).

342. Treas. Reg. § 1.170A-14(d).

- (iii) the preservation of open space (including farmland and forest land) . . . or
- (iv) the preservation of an historically important land area or a certified historic structure.<sup>343</sup>

It is possible that a monument will be on land protected by a conservation easement under one of the first three categories. In such cases, the protection of the monument is more of a collateral or indirect effort rather than the heart of the restriction. In the context of Confederate monuments, section (iv), “the preservation of an historically important land area or a certified historic structure,” is likely to apply. To meet the conservation purposes requirement, the resource must be a “certified historic structure” or a “historically important land area.”<sup>344</sup> Under the Internal Revenue Code, a certified historic structure is “any building, structure, or land area which is listed in the National Register [of Historic Places], or . . . is located in a registered historic district . . . and is certified . . . as being of historic significance to the district.”<sup>345</sup> Thus, properties listed on the National Register automatically qualify.<sup>346</sup>

To be eligible for the National Register, the resource must qualify as a building, structure, object, site, or district.<sup>347</sup> While these categories encompass most fixed (non-movable) resources, the tax code restricts its coverage to buildings, structures, or land areas.<sup>348</sup> A monument would likely be classified as an object.<sup>349</sup> Additionally, as explained above, to be eligible for listing on the National Register, the property must meet one or more of four criteria:<sup>350</sup> (a) “associat[ion] with events that have made a significant contribution to the broad patterns of our history;” (b) association with the lives of significant individuals; (c) architectural or

343. I.R.C. § 170(h)(4)(A)(i)–(iv) (2012); see Treas. Reg. § 1.170A-14(d)(i)–(iv).

344. I.R.C. § 170(h)(4)(A)(iv); see also § 170(h)(4)(B) (listing special rules that apply to “buildings in registered historic districts”). The “historically important land area” prong under § 170(h)(4)(A)(iv) is infrequently invoked as it is often easier to protect land areas under open space or scenic purposes. The regulatory definition of historically important land area, however, actually does provide as its example a “Civil War battlefield with related monuments.” Treas. Reg. § 1.170A-14(d)(5)(ii)(A).

345. I.R.C. § 170(h)(4)(C)(i)–(ii); accord Treas. Reg. § 1.170A-14(d)(5)(iii)(A)–(B).

346. See Martha Jordan, *Repairing Façade Easements: Is this the Gift that Launched a Thousand Deductions?*, 22 AKRON TAX J. 101, 104 (2007) (discussing this process within the façade easement context).

347. 54 U.S.C. § 302102 (Supp. V 2018); see 36 C.F.R. § 60.3 (2018) (defining terms).

348. I.R.C. § 170(h)(4)(A)(iv), (C)(ii).

349. “An object is a material thing . . . that may be . . . movable yet related to a specific setting or environment.” 36 C.F.R. § 60.3(j). In certain cases, it may be difficult to distinguish between structures and objects. See BRONIN & BYRNE, *supra* note 90, at 59.

350. This differs from the standards that apply to § 106 review under the NHPA, which apply to those properties that are eligible rather than listed. See 54 U.S.C. § 306108.

artistic value; and (d) “have yielded, or may be likely to yield,” archaeological information or data.<sup>351</sup>

Beyond the four eligibility criteria, several exceptions limit the number of listed properties.<sup>352</sup> National Park Service regulations “[o]rordinarily” exclude from eligibility “cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature and properties that have achieved significance within the past 50 years.”<sup>353</sup>

The bar against commemorative properties would bar many, if not most, monuments, and the fifty-year mark for eligibility would also apply to more recent monument efforts.<sup>354</sup> There are, however, limited exceptions to these general exceptions.<sup>355</sup>

For monuments, “[a] property primarily commemorative in intent [can be eligible] if design, age, tradition, or symbolic value has invested it with its own exceptional significance,” which accounts for the listing of several Confederate monuments despite limitations that would otherwise seem to directly apply.<sup>356</sup> For example, the Caddo Parish Confederate Monument (1902–06) in Shreveport, Louisiana, was listed under Criteria A “as one of four major Louisiana Monuments representing what is known by historians as ‘the Cult of the Lost Cause.’ . . . [The] monuments are Louisiana’s most important representations of the Memorial Period, or second phase (1883 to 1907), of the Civil War Commemorative Sculpture Movement.”<sup>357</sup> This monument, located on the grounds of the Caddo Parish Courthouse, is

351. 36 C.F.R. § 60.4. In addition to qualifying under the criteria, the property must also retain sufficient historic integrity. See JAMES P. DELGADO & KEVIN J. FOSTER, U.S. DEP’T OF THE INTERIOR, NATIONAL REGISTER BULL. NO. 34, GUIDELINES FOR EVALUATING AND DOCUMENTING HISTORIC AIDS TO NAVIGATION 8 (1992) (explaining the seven factors under which historic integrity is evaluated).

352. See U.S. DEP’T OF THE INTERIOR, NATIONAL REGISTER BULL. NO. 15, HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 52 (1997).

353. 36 C.F.R. § 60.4; see also SPRINKLE, *supra* note 105, at 149–53 (discussing the debate over exclusions to the National Register to limit its scope).

354. NORMAN TYLER ET AL., HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 148–49 (2d ed. 2009).

355. See 36 C.F.R. § 60.4.

356. *Id.* § 60.4(f). A similar exception applies to properties achieving significance in the last fifty years, but this has been deemed a high bar. *Id.* § 60.4(g).

357. U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900, CADDO PARISH CONFEDERATE MONUMENT, <https://www.nps.gov/nr/feature/places/pdfs/13001124.pdf> [<https://perma.cc/ULB6-4WK4>]. Note, the very qualities that may make this monument most objectionable are those that led to its listing in the National Register—demonstrating how complicated monument protection or removal efforts can oftentimes be.

thirty feet tall and depicts Confederate generals Robert E. Lee, Stonewall Jackson, and P.G.T. Beauregard, among others.<sup>358</sup> Installed in 1905 by the Daughters of the Confederacy, according to the state historian, it is a “‘cenotaph,’ i.e. a sepulchral monument erected in memory of deceased persons whose bodies are buried elsewhere.”<sup>359</sup> The Keeper of the National Register listed and approved this monument’s designation in early 2014.<sup>360</sup>

If the property is not on the National Register but is in a historic district, two requirements must be satisfied to meet the IRS’s conservation purposes requirement. First, the district must qualify as a registered historic district, and second, the property must contribute to the district or relate to the district’s general historic characteristics and significance.<sup>361</sup>

Two types of historic districts meet the requirements: (1) National Register Historic Districts, and (2) locally created historic districts.<sup>362</sup> National Register districts qualify automatically, but locally created historic districts must be created pursuant to a local preservation law and certified by the National Park Service’s Certified Local Government Program.<sup>363</sup>

Simply being in the district is not enough, though. The landowner seeking the tax deduction must also demonstrate that the property contributes to the district or shares the general characteristics for which the district was created.<sup>364</sup> To demonstrate this, the property owner will need to apply for a certification of significance from the National Park Service to establish the significance of the individual property.<sup>365</sup> Thus, a property can qualify if it is individually listed on the National Register or if it contributes to a registered historic district.

To summarize, to qualify for the charitable deduction, the property has to be a certified historic structure that requires National Register status, which, despite apparent barriers, some monuments have obtained.

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358. *Id.* at 4.

359. *Id.*

360. *Id.* at 2.

361. *Id.*

362. NAT’L PARK SERV., EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS 5–6 (2010), <https://www.nps.gov/tps/tax-incentives/taxdocs/easements-historic-properties.pdf> [<https://perma.cc/NW7E-KR2M>].

363. *Id.*

364. *See* I.R.C. § 170(h)(4)(C)(ii); ELIZABETH WATSON & STEFAN NAGEL, ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 5 (2007).

365. WATSON & NAGEL, *supra* note 364, at 5; *see also* *Historic Preservation Certification Application*, NAT’L PARK SERV., <https://www.nps.gov/tps/tax-incentives/application.htm> [<https://perma.cc/H3B9-KE8G>] (providing information and instructions on applying for this certification).

As a result, it is at least theoretically possible that a preservation easement donation protecting a monument could qualify for a charitable deduction.<sup>366</sup>

Even if a property meets the general Internal Revenue Code requirements, it is unlikely for a donation of a conservation easement solely protecting a Confederate monument to be claimed, absent unusual circumstances, because of: (1) the nature of ownership, (2) the valuation of any donations, and (3) other regulatory factors. The large majority of Confederate monuments, particularly those from the distant past, are located on public land.<sup>367</sup> By virtue of their location, these resources are often owned or controlled by governmental or nonprofit actors.<sup>368</sup> By both definition and operating structure, governmental and nonprofit actors lack taxable income.<sup>369</sup> As the tax deduction for conservation easements relies on taxable income for its correlated benefit, these entities are not going to be able to claim a deduction, which in all reality, will limit its use as a preservation tool.<sup>370</sup>

For monuments located on private land, as noted above, the economic value embedded in these transactions is the primary driver.<sup>371</sup> In protecting a monument, it is not clear how much property value is lost. There may be very little, if any, reduction in property value associated

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366. For new efforts to list Confederate monuments on the National Register, this process can take a substantial amount of time. *See, e.g.*, N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., NATIONAL REGISTER OF HISTORIC PLACES: RECOGNIZING AND DOCUMENTING NEW YORK STATE'S RICH AND DIVERSE HERITAGE 1–3 (2009), <http://www.landmarksociety.org/wp-content/uploads/2012/04/National-Register-Introduction-Packet.pdf> [<https://perma.cc/9KPW-ZXKN>] (explaining the process for designation and the approvals that have to be obtained; the process can often take several years and can involve, but does not require, hiring a consultant).

367. *See, e.g.*, Kathryn Casteel & Anna Maria Barry-Jester, *There Are Still More than 700 Confederate Monuments in the U.S.*, FIVETHIRTYEIGHT (Aug. 16, 2017, 1:38 PM), <https://fivethirtyeight.com/features/there-are-still-more-than-700-confederate-monuments-in-the-u-s/> [<https://perma.cc/3V63-68CR>] (“There are currently more than 700 monuments to the Confederacy in public places, located predominantly in the South.”).

368. Guelda Voien, *The Number—and Locations—of Confederate Monuments in the U.S. Prove How Much Work We Have Left to Do*, ARCHITECTURAL DIG. (Aug. 17, 2017), <https://www.architecturaldigest.com/story/confederate-monuments> [<https://perma.cc/5FHW-QJ27>] (noting examples of avenues and plaques on government and private properties, respectively).

369. *See Exemption Requirements - 501(c)(3) Organizations*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501c3-organizations> [<https://perma.cc/2ALR-48UR>] (describing exemption requirements under § 501(3)(c) of the Internal Revenue Code).

370. There may be non tax-incentivized preservation easements as discussed in the next section, but if not tax-incentivized they will not be limited by the IRS rules.

371. *See, e.g.*, Jess R. Phelps, *Reevaluating the Role of Acquisition-Based Strategies in the Greater Historic Preservation Movement*, 34 VA. ENVTL L.J. 399, 440–44 (2016) (exploring the role of economic value in shaping project design in historic preservation projects).

with conveying the right to modify a monument. The presence of a monument would not likely affect property values, so the before value will roughly equal the after value for any conservation easements. The transaction costs associated with drafting a conservation easement, finding a conservation easement-holder, and covering any required stewardship payments (to offset the perpetual costs of monitoring and enforcing the terms of the restriction) will likely outweigh any potential benefit provided by the actual tax incentive—making donation of a conservation easement solely protecting a Confederate monument to be an unlikely occurrence.

Other practical factors further limit the use of this tool, including public access requirements. To qualify for the tax deduction, “some visual public access to the donated property is required.”<sup>372</sup> If a monument is on private land without visual or physical public access, it would not be eligible for the tax deduction. A landowner could, however, open her property to the public as long as “the general public is given the opportunity on a regular basis” to view the protected features of the property.<sup>373</sup> Depending upon the type and location of the monument, this could potentially be an issue in qualifying a donation, and there are likely other similar practical challenges to claiming a deduction for this resource type.<sup>374</sup>

The federal tax incentives, to the extent that they have been used to protect monuments, have largely protected these resources indirectly (through conservation easements protecting the land upon which they are located). Non-tax-incentivized preservation easements are more likely to protect these resources. As a result, there has likely been little tax expenditure to protect Confederate monuments through private efforts, and the majority of efforts to protect these resources have been funded through state or local grants (requiring conservation easements as a condition of funding) or for land preservation-related motivations. Both of these types of protections are discussed below.

The above Section examined the potential for a tax deduction for a Confederate monument encumbered by a conservation easement where the purpose of the conservation easement is historic preservation-focused. The Internal Revenue Code also allows deductions for conservation easements with three other types of conservation purposes: (1) outdoor recreation and education; (2) natural habitat for fish, wildlife,

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372. Treas. Reg. § 1.170A-14(d)(5)(iv)(A) (2018).

373. *Id.* The regulations do not explain exactly how much access is required for it to be on a “regular basis.” *Id.*

374. For another example, for properties located in registered historic districts, the Pension Protection Act of 2006 added additional documentation and protection requirements for qualifying resources. *See* I.R.C. § 170(h)(4)(B) (2012).

or plants; and (3) open space.<sup>375</sup> Protection of monuments under the outdoor recreation and education category is unlikely because the Treasury Regulations emphasize that the protection should be of “land areas” and the examples are hiking areas and waterways open to boating or fishing.<sup>376</sup> Likewise, the natural habitat category will not apply directly to the protection of a monument or structure as the focus is on environmental systems.<sup>377</sup> While a Confederate monument could exist on land with public recreation areas or relatively natural habitats, the purpose of any conservation easement on such land would not be protection of the monument itself.

The final category of open-space protection is the one most likely to interact with Confederate monuments.<sup>378</sup> A donation can qualify under the open-space prong where the protection is: (1) “for the scenic enjoyment of the general public;” or (2) “pursuant to a ‘clearly delineated [governmental] conservation policy.’”<sup>379</sup> The Treasury Regulations further specify that the donation must provide a “significant public benefit.”<sup>380</sup> Preservation of land for scenic purposes qualifies for a tax deduction if the development of land “would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama that can be enjoyed . . . by[] the public.”<sup>381</sup> For the clearly delineated governmental policy prong, land fitting within a specific and defined governmental policy objective, such as the protection of farmland or a wild and scenic river, will also be potentially eligible.<sup>382</sup>

By the nature of the Civil War, most critical points of conflict were within the rural countryside.<sup>383</sup> A conservation easement designed to protect a battlefield as open space or for scenic motivations could also protect a monument located on the protected land.<sup>384</sup> Again, the protection of the monument would not be the driver for the donation, as its non-related scenic and open-space value would be the basis for this

375. *Id.* § 170(h)(4)(A)(i)–(iii).

376. Treas. Reg. § 1.170A-14(d)(2)(i).

377. *Id.* § 1.170A-14(d)(3).

378. *See* I.R.C. § 170(h)(4)(A)(iii).

379. LINDSTROM, *supra* note 341, at 43–44.

380. Treas. Reg. § 1.170A-14(d)(4)(i)(A).

381. *Id.* § 1.170A-14(d)(4)(ii)(A).

382. *See* I.R.C. § 170(h)(4)(A)(iii)(II); Treas. Reg. § 1.170A-14(d)(4)(iii)(A).

383. *See, e.g., Gettysburg Battlefield*, AM. BATTLEFIELD TR., <https://www.civilwar.org/visit/battlefields/gettysburg-battlefield> [<https://perma.cc/Y34J-DP6H>] (profiling the over 1,000 acres of protected farmland surrounding this critically important battlefield in rural Pennsylvania).

384. *See, e.g., Civil War Battlefield Conservation: Focus on Antietam*, CONSERVATION FUND, <https://www.conservationfund.org/projects/civil-war-battlefield-conservation-focus-on-antietam> [<https://perma.cc/RM3R-23UG>] (detailing conservation easement project protecting the historic Grove Farm—part of the Antietam battlefield in Western Maryland).



protection, but the value of the tax incentive could indirectly incentivize the monument's protection and leave a historic preservation organization or state or nonprofit organization committed to safeguarding this resource.<sup>385</sup>

It is hard to gauge how often this happens, but particularly given the battlefield focus of some land trusts and the targeted efforts of programs such as the federal American Battlefield Protection Program and land trusts such as the Civil War Trust,<sup>386</sup> it is probable that a number of conservation easements protect Confederate and other monuments. Conservation easements, protecting a monument indirectly (or at least as a secondary objective), present a very real challenge to conservation easement-holders who have to balance and assess whether additional interpretation, modification, or removal of the monument is barred under the terms of the restriction.

#### b. Non-Tax-Incentivized Conservation Easements

As discussed above, conservation easements are a relatively recent legal development and are a creature of state law. For a conservation easement to exist as a legally enforceable property interest, it has to comply with the terms of the state's enabling legislation. For a variety of reasons, a landowner may wish to donate a conservation easement even if a federal tax deduction is not claimed. The Uniform Conservation Easement Act, the Uniform Laws Commission model legislation that is the basis for about half of states' enabling legislation, sets forth twelve purposes or values that a conservation easement can protect—including historic purpose or value (which is not defined).<sup>387</sup> Even those states not basing their legislation on the uniform act do not deviate much from the act's broad coverage.<sup>388</sup> Some states, however, have separate legislation specifically enabling historic preservation easements.<sup>389</sup> The general trend of these state statutes is to provide a broad definition or authorization for a landowner and a nonprofit to agree whether the historic value of the site merits perpetual protection.<sup>390</sup> In the monument

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385. See, e.g., Linda Wheeler, *Civil War Trust: 'Don't Erase History,'* WASH. POST (Sept. 4, 2015), [https://www.washingtonpost.com/news/house-divided/wp/2015/09/04/civil-war-trust-dont-erase-history/?utm\\_term=.aa489d58af81](https://www.washingtonpost.com/news/house-divided/wp/2015/09/04/civil-war-trust-dont-erase-history/?utm_term=.aa489d58af81) [<https://perma.cc/3MGE-JV8R>] (profiling large conservation easement holder's position on Civil War monuments).

386. See *American Battlefield Protection Program*, NAT'L PARK SERV., <https://www.nps.gov/ABPP/> [<https://perma.cc/MS6H-P73A>]; *Saved Land*, AM. BATTLEFIELD TR., <https://www.battlefields.org/preserve/saved-land> [<https://perma.cc/4NTR-NNXQ>].

387. BRONIN & BYRNE, *supra* note 90, at 537–39.

388. *Id.*

389. See ROBERT H. LEVIN, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES 10 (2014) (summarizing conservation values generally).

390. See, e.g., CONN. GEN. STAT. §§ 47-42a to -42d (2018).

context, this allows conservation easements protecting monuments to exist as a valid and enforceable interest in real property in most states.

Local, state, and federal governments have protected Confederate monuments through their conservation easement programs. One pathway for this is as a condition of grant funding.<sup>391</sup> Historic preservation agencies often support the upkeep, maintenance, and repair of historic properties, including commemorative structures.<sup>392</sup> They often do so through grant programs. For example, a local neighborhood may have a neglected monument. The neighborhood group could apply to the historic preservation agency for a grant to cover all or part of the monument's restoration.<sup>393</sup> Not surprisingly given the degree of public investment in restoring the resource, the historic preservation agency funding this work will often want some assurances that its investment will be protected. Thus, the agency will make the grant contingent on encumbering the monument with a preservation easement (for at least a meaningful, if not perpetual, term).<sup>394</sup>

An example of this comes from Baltimore, where the debate over the future of a number of Confederate monuments has been extremely controversial.<sup>395</sup> In 2015, then-Mayor Stephanie Rawlings-Blake tasked a commission with reviewing the fate of four monuments owned by the city and located on city property: (1) the Roger B. Taney monument (1887); (2) the Confederate Soldiers and Sailors monument (1902); (3) the Confederate Women's monument (1915–17); and (4) the Lee and Jackson monument (1948).<sup>396</sup> The Maryland Historical Trust (MHT), a

391. See, e.g., U.S. DEP'T OF THE INTERIOR, HISTORIC PRESERVATION FUND GRANT MANUAL 6–41 (2007), [https://www.nps.gov/preservation-grants/manual/HPF\\_Manual.pdf](https://www.nps.gov/preservation-grants/manual/HPF_Manual.pdf) [<https://perma.cc/P9J5-VBUB>] (providing an example of a grant).

392. See, e.g., *Massachusetts Preservation Projects Fund*, SECRETARY COMMONWEALTH MASS., <https://www.sec.state.ma.us/mhc/mhcmpf/mppfidx.htm> [<https://perma.cc/PD8D-DJB6>].

393. See, e.g., *Duluth Civil War Monument to be Restored*, DULUTH NEWS TRIB. (June 20, 2016, 10:00 PM), <http://www.duluthnewstribune.com/news/4078090-duluth-civil-war-monument-be-restored> [<https://perma.cc/HXL2-D8SV>] (noting that the city of Duluth gave a \$70,000 grant to a nonprofit group).

394. See, e.g., MD. DEP'T OF PLANNING, CONVEYANCE OF A PRESERVATION EASEMENT TO THE MARYLAND HISTORICAL TRUST 2, [https://mht.maryland.gov/documents/PDF/easement/easement\\_procedures\\_conveyance\\_grants\\_2019.pdf](https://mht.maryland.gov/documents/PDF/easement/easement_procedures_conveyance_grants_2019.pdf) [<https://perma.cc/7NYV-W5VQ>]. Conservation easements can also be obtained as a condition of permitting or mitigation for governmental approval. See *Preservation Easements*, CAMBRIDGE HIST. COMMISSION, <https://www.cambridge.ma.gov/historic/districtsHistoricProperties/preservationeasements> [<https://perma.cc/G6AL-XBG5>].

395. See Brentin Mock, *What to Do About Baltimore's Confederate Monuments*, CITYLAB (Sept. 15, 2016), <https://www.citylab.com/equity/2016/09/baltimores-confederate-monuments/500195/> [<https://perma.cc/828C-EPDT>].

396. See *Confederate Monuments*, CITY BALT., <https://chap.baltimorecity.gov/confederate-monuments> [<https://perma.cc/3PRJ-SQU3>]; see also *Timeline of Baltimore City Confederate Monuments*, SPECIAL COMMISSION REV. BALT.'S PUB. CONFEDERATE MONUMENT

state agency, held conservation easements on three of the four monuments.<sup>397</sup> These conservation easements were conveyed in a single deed in 1984 through the state's cyclical outdoor bronze sculpture maintenance program and were a condition of the city receiving funding to maintain the statues.<sup>398</sup> The conservation easement terms require MHT approval for any changes or modifications to the monuments.<sup>399</sup> The range of monuments considered is particularly interesting given the array of funding mechanisms associated with their construction on public land, ranging from purely publicly supported to those placed through individual and non-profit donations.<sup>400</sup> In addition to debating the future of the monuments, the commission appointed by Rawlings-Blake explored the legal requirements for removal, noting the very real limits on the city's authority resulting from the MHT preservation easements.<sup>401</sup>

In the summer of 2017, newly elected Mayor Catherine Pugh ordered the removal of the monuments, which occurred on the night of August 16, through the morning of August 17.<sup>402</sup> Without obtaining MHT approval, Pugh declared removal necessary under a public nuisance theory, asserting that she needed to "protect her city" and to prevent future protest and vandalism to the monuments.<sup>403</sup> MHT has since stated that this removal occurred without legal authority but that in this instance it will not seek to enforce the terms of its conservation easements or insist on restoration.<sup>404</sup>

The process and ability of a preservation easement-holder to approve a request to remove a monument will hinge upon the terms of the agreement and potentially upon the state's conservation easement enabling legislation.<sup>405</sup> Most conservation easements provide some

<http://baltimoreplanning.wixsite.com/monumentcommission/monuments-timeline> [<https://perma.cc/XSS6-YP29>] (providing a timeline of when the four monuments were built).

397. SPECIAL COMM'N, *supra* note 319.

398. *Id.*

399. *Id.*

400. *See id.* at 21–28.

401. *Id.* at 28.

402. *See* Merrit Kennedy, *Baltimore Took Down Confederate Monuments. Now It Has to Decide What to Do with Them*, NPR (Aug. 28, 2017, 3:47 PM), <http://www.npr.org/sections/thetwo-way/2017/08/28/546131805/baltimore-took-down-confederate-monuments-now-it-has-to-decide-what-to-do-with-them> [<https://perma.cc/AVR4-L4M5>].

403. *See* Michelle Harris & Meredith Herzing, *Confederate Monuments in Baltimore "Quickly and Quietly" Removed*, BALT. MAG. (Aug. 16, 2017, 5:25 PM) <http://www.baltimoremagazine.com/2017/8/16/confederate-monuments-in-baltimore-quickly-and-quietly-removed> [<https://perma.cc/9NTW-SDP3>].

404. *See* Duncan, *supra* note 330.

405. *See generally* Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, 23 PROB. & PROP. 52 (2009) (providing an overview of some of the issues involved in amendment/termination of perpetual easements).

flexibility for the property owner and conservation easement-holder to mutually agree to a change, but the degree of change and the purposes that the conservation easement was intended to protect ultimately will place limits on this authority.<sup>406</sup> Where the agreements are silent on modification or removal, the parties will need to follow the applicable state law process for amending or terminating the preservation easement, which may require obtaining court approval to terminate or modify the property interest.<sup>407</sup> In some cases, the parties will need to go through a public process; for governmental holders, obtaining legislative approval may be necessary before any modification or disposal of governmental assets.

Relatedly, if the state fails to enforce the terms of the preservation easement, it may face a challenge from interested third parties seeking to enforce the preservation easement. A third party's ability to enforce a preservation easement will depend upon whether the party can establish standing.<sup>408</sup> The ability of a third party to enforce the terms of a preservation easement will hinge on state law. In some states, such as Illinois, it may be possible for a third party to bring an action to enforce the terms of a restriction.<sup>409</sup> Most states, however, have statutorily limited third-party standing—barring this form of action—or remain silent on this issue.<sup>410</sup> Overall, any effort to remove a protected monument will not be straightforward or simple and, if challenged, will require substantial legal and political effort to complete. Baltimore perhaps has been fortunate thus far that neither the MHT nor any other interested party has challenged these actions and, further, that the state did not attempt to enforce the terms of its preservation easement.

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406. See Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145, 156–57 (2011) (discussing discretionary approvals provisions and their limits).

407. See, e.g., Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 WYO. L. REV. 1, 94 (2009).

408. See Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 759–60 (2005) (discussing third party standing and the ability of third parties to seek judicial enforcement of conservation easements generally).

409. LEVIN, *supra* note 389, at 38.

410. *Who Has Standing?: Conservation Easements in Pennsylvania Courts*, CONSERVATIONTOOLS.ORG, <https://conservationtools.org/guides/121-who-has-standing> [<https://perma.cc/2N7H-JR94>] (explaining the limitations on third-party standing under the state's Conservation and Preservation Easements Act (the state's enabling legislation)); see also Jessica Owley, *A New Conservation Easement Case from Maine's Highest Court Is a Lesson in Statutory Interpretation*, LPB NETWORK: LAND USE PROF BLOG (Jan. 27, 2017), [http://lawprofessors.typepad.com/land\\_use/2017/01/a-new-conservation-easement-case-from-maines-highest-court-is-a-lesson-in-statutory-interpretation.html](http://lawprofessors.typepad.com/land_use/2017/01/a-new-conservation-easement-case-from-maines-highest-court-is-a-lesson-in-statutory-interpretation.html) [<https://perma.cc/3MWX-4Y67>] (discussing the Maine Supreme Court's decision in *Estate of Robbins v. Chebeague & Cumberland Land Trust*, 151 A.3d 1185 (Me. 2017), which rejected third-party standing).

## CONCLUSION

The events in Charleston and Charlottesville reignited the debate over Confederate monuments and their place in our landscape and collective memory. It is likely that the outcome of this debate will hinge on a number of factors, including content, location, and the community in which a monument is located. The easier cases for removal will likely be Confederate monuments located in public spaces not associated with a historic event, as these most clearly connote ideas of oppression. This Article seeks to be a step in untangling the complicated process of removal and providing insight into which laws a community may need to address before beginning that process. Additionally, lessons learned in the Confederate monument context can help in understanding and improving historic preservation law generally—moving away from its static and frozen approach to the cultural landscape. Historic preservation laws, in some material instances, limit the flexibility for possible future options. Four steps or recommendations could allow for more meaningful consideration of how to handle these options. This Article aims its four principal recommendations at the different actors involved across the many layers of these debates.

First, the National Park Service and the Keeper of the National Register should take more seriously the prohibition on listing commemorative structures. If Confederate monuments are simply memorials to the dead, there is no reason to list them. If they are indeed something beyond being purely commemorative, their listing should be avoided as against public policy as presenting a viewpoint. Such an approach will help with new petitions to list properties. For those already listed, the federal government should commence a revisitation process where it can reassess listed properties to determine whether they really meet the evaluation criteria (or to revise the nomination forms to capture a more complete historic narrative or context than was initially presented). Historic preservationists need to think more about looking at the past with a critical eye. De-designation of historic resources (or determining that a property no longer has historic significance) is rare unless the property has been physically altered, locking in past preservation determinations for posterity. Relatedly, National Register nominations, once created, are only rarely updated. This also freezes the initial rationale for why a property was listed on the National Register, which may be under- and over-inclusive as to its continued significance. Developing meaningful ways to reevaluate and reinterpret historic significance should be an area of future policy attention.

Second, state legislatures should overturn the monument laws that are clearly based on protection of Confederate monuments and overly

constrain local governments.<sup>411</sup> These laws preempt local governments' abilities to make decisions on resources located on their own lands, where much of the dialogue over their future should actually occur. Local communities, being closest to the resources, are the most appropriate level for dialogue on a monument-to-monument basis, and state efforts to preempt local decision-making expressly frustrate this dialogue.

Third, local governments should make sure that their local historic preservation laws allow changes based on public safety or public interest considerations and remove the pressure on designation or approval processes.<sup>412</sup> Without an express safety valve of this nature, advocates for and against monument removal must hash out the debate over the narrow landscape of historic significance without any consideration for what these monuments mean to current residents who interact with these structures. With a public interest exemption, a community could make the determination that non-preservation-based criteria should prevail. For example, Washington, D.C.'s preservation ordinance allows for the demolition or alteration of historic structures if "necessary in the public interest," as decided by the Mayor's agent.<sup>413</sup> This sort of provision could provide flexibility to allow for recontextualizing or removing a monument, depending on a community's decision on addressing its past.

Fourth, those seeking removal should participate in the environmental review processes as those processes provide the type of dialogue that local preservation laws often lack. Consulting under the NHPA or commenting under NEPA provides the opportunity to weigh in and offer alternatives to removal or modification and develop a consensus for their future treatment. This may mean that that relocation of a monument will be easier to obtain than demolition. This may involve finding a middle ground and lobbying for removing the structures to museums or other sites where they can be contextualized and moved out of certain types of public spaces, such as courthouse grounds, where they are often most objectionable.<sup>414</sup>

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411. See, e.g., W. Fitzhugh Brundage, *I've Studied the History of Confederate Memorials. Here's What to Do About Them*, VOX (Aug. 18, 2017, 9:40 AM), <https://www.vox.com/the-big-idea/2017/8/18/16165160/confederate-monuments-history-charlottesville-white-supremacy> [<https://perma.cc/5XQL-TAYK>] (explaining the role of these monument protection laws and arguing for repeal to allow for local decision making regarding retention/removal).

412. See, e.g., Byrne, *supra* note 313, at 673 (discussing this type of provision).

413. D.C. CODE ANN. § 6-1102(10) (2018).

414. Holland Cotter, *We Need to Move, Not Destroy, Confederate Monuments*, N.Y. TIMES (Aug. 20, 2017), <https://www.nytimes.com/2017/08/20/arts/design/we-need-to-move-not-destroy-confederate-monuments.html> [<https://perma.cc/B44N-MTRV>] (arguing for moving these monuments to museums). *But see* Noah Caldwell & Audie Cornish, *Where Do Confederate Monuments Go After They Come Down?*, NPR (Aug. 5, 2018, 8:08 AM), <https://www.npr.org/2018/08/05/633952187/where-do-confederate-monuments-go-after-they-come-down> [<https://>

Overall, one of the primary hallmarks of the preservation laws interacting with Confederate monuments is that they rarely contain flexible mechanisms for change. Thus, once a monument is designated as historic or is protected with a preservation easement, few mechanisms allow for a fresh look or a critical reevaluation. American heritage preservation laws generally view change as bad, whether the change is to a structure's physical appearance or the change regards how to fully evaluate significance based on evolving societal views. This legal structure therefore promotes a vision of heritage that is a relatively frozen approach to cultural protection. To allow for greater societal input and to represent a broader view of history, legislators should actively consider changes to current historic preservation laws. Historic significance is not etched in stone, and perhaps this latest round of monument disputes is an important reminder that our heritage preservation determinations should not be either.