STONE MONUMENTS AND FLEXIBLE LAWS: REMOVING CONFEDERATE MONUMENTS THROUGH HISTORIC PRESERVATION LAWS

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Jess Phelps and Jessica Owley present an informative and useful account of how historic preservation laws might complicate or prevent efforts to remove Confederate monuments.[1] Many lawyers and activists will be grateful for this guidance. However, Phelps and Owley overstate the burdens historic preservation laws impose on such removal and ignore the benefits of the administrative processes they provide. They claim that our preservation laws embody a "relatively frozen approach to cultural protection" and that heritage preservation should not be "etched in stone."[2] While preservation restrictions should reflect greater cultural dynamism than may be common now, they already facilitate changing perceptions of significant heritage to an impressive extent. Failing to recognize this inadvertently plays into an ignorant and hostile narrative about preservation law as elitist and undemocratic.[3]

Phelps and Owley discuss a variety of federal, state, and local laws.[4] Of these, the laws that most directly prevent removal of Confederate monuments are state statutes directly prohibiting local governments and state instrumentalities, such as state universities, from removing war memorials from public property.[5] Despite the specious claims of some sponsors, such preemption legislation cannot be considered to be bona fide preservation law. These state statutes lack most of the features of the leading and exemplary preservation laws, which have been enacted at the federal and local levels. State statutes entirely lack any requirements for

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1. Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627 (2019).

2. *Id.* at 688.

3. For a particularly distressing example of a poorly reasoned diatribe apparently based on complete ignorance of historic preservation law, see generally Lior Jacob Stahilevitz, *Historic Preservation and its Even Less Authentic Alternative*, *in* EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 108 (Lee Anne Fennell & Benjamin J. Keys eds., Cambridge Univ. Press 2017).

4. Phelps & Owley, *supra* note 1, at 641, 654, 668.

5. *See, e.g.*, *id.* at 664–65 (discussing The Tennessee Heritage Protection Act which "prohibits local governments from 'remov[ing] . . .' war memorials or military monuments on public property"); *see also* Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes,"* 91 TEMPLE L. REV. 1, 20–40 (2018) [hereinafter *Monuments of Folly*] (citing various state statutes). *See generally* Ricahrd Schragger & C. Alex Retzloff, *Confederate Monuments and Punitive Preemption: The Latest Assault on Local Democracy* (Va. Pub. L. & Legal Theory, Research Paper No. 2019-54, 2019), https://ssrn.com/abstract=3462746 [https://perma.cc/CNM7-UG6G] (discussing state statutes and the surrounding litigation).

historical documentation and consultation among experts and affected citizens, or reputable findings of historic or cultural significance. Rather, these statutes are political efforts of state legislators to confirm a particular view of the past held by their base supporters.[6] While Phelps and Owley are right to include these state monument laws among those that advocate for removal must overcome, it is misleading to list them among preservation laws. From a serious historic preservation perspective, all of these state monument statutes should be replaced by laws treating Confederate monuments like any other cultural resource.

Before engaging with the legal issues, a brief discussion of why removal of Confederate monuments usually will not offend the norms of historic preservation may be helpful. The purposes of historic preservation include the conservation of the physical remains of the past that express the significance of past people, events, movements, and places in order to give contemporary people a sense of orientation to, and meaning from, their cultures and places.[7] Plainly, not every building or structure from the past can or should be saved from the normal processes of decay or replacement. Monuments generally are problematic subjects for preservation. Under the widely influential standards for listing in the National Register of Historic Places, "properties primarily commemorative in nature" normally are not eligible for listing.[8] The reasons for this can be inferred from the other types of resources normally not eligible, such as graves and reconstructed buildings.[9] Such resources are created consciously to shape cultural memory and often reflect biases that promote a fictitious or propagandistic narrative about the subject.[10]

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6. As Professor Bray has shown, such legislation reflects the political divide between rural conservative forces at the state level and more progressive outlooks at the municipal level. Zachary Bray, *We Are All Growing Old Together: Making Sense of America's Monument-Protection Laws*, 61 WM. & MARY L. REV. 1259, 1259 (2020) [hereinafter *Growing Old Together*] ("Part of the problem is a lack of agreement about what does or should count as a monument. . . and a persistent rural-urban divide that helps fuel many contemporary American monument conflicts.").

7. *See* SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 17–32 (2012).

8. Criteria for Evaluation, 36 C.F.R. § 60.4 (2019). Section 106 of the National Historic Preservation Act (NHPA) applies to all properties *eligible* for listing on the National Register, whether actually listed or not. 54 U.S.C. § 306108 (2014); *see also* 36 C.F.R. § 800.1 (2019) (discussing purposes of section 106). Thus, the standards for listing are more important than the process for listing. This contrasts with local preservation laws, where properties are not protected unless they are actually designated or listed.

9. *See* U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 2 (1995), https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf [https://perma.cc/24JS-HZPR] [hereinafter NATIONAL REGISTER CRITERIA].

10. "But what makes public monuments so interesting is that they constitute highly self-conscious attempts to create a culture that determines what is politically correct—i.e., the honoring of certain persons or causes." SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 151 (2018).

In the language of the National Park Service Bulletin explaining the criteria:

> Commemorative properties are designed or constructed after the occurrence of an important historic event or after the life of an important person. They are not directly associated with the event or with the person's productive life, but serve as evidence of a later generation's assessment of the past.[11]

Put more bluntly, monuments do not reliably tell us about the subject being commemorated but only about the mindset of those promoting the commemoration.

The normal exclusion of a monument from the National Register can be overcome "if design, age, tradition, or symbolic value has invested it with its own exceptional significance."[12] A clear example of a Civil War monument of exceptional aesthetic significance is Augustus Saint-Gaudens' 1897 relief sculpture of Colonel Robert Shaw leading the Massachusetts 54th Regiment, the first unit composed of African American troops and white officers, which has been termed "America's greatest public monument."[13] Very few Civil War memorials achieve a high level of aesthetic value, and those that do can usually be moved from public prominence without losing their aesthetic significance.[14]

Far more complicated is the assessment of the historic significance of Confederate monuments as expressing the viewpoints of the southern whites who erected them. Notoriously, Confederate monuments were erected in prominent public locations throughout the South primarily during the period of intensifying Jim Crow subordination of African Americans to convey a heroic "Lost Cause" interpretation of the Civil War and bolster white supremacy.[15] There is no doubt that, for some at the time, the Confederate monuments played a part in the commemoration movement to simply honor the sacrifice of former soldiers living and dead. Thus, the National Park Bulletin provides an

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11. *See* NATIONAL REGISTER CRITERIA, *supra* note 9, at 15.

12. *Id.* at 2.

13. *The Shaw Memorial*, U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., https://www.nps.gov/saga/learn/historyculture/the-shaw-memorial.htm [https://perma.cc/8BXJ-SKTM] (last updated June 12, 2020).

14. The regulations providing the standards for listing on the National Register "ordinarily" remove from eligibility "structures that have been moved," but then except from the exclusion those that are significant primarily for "architectural value," within which should be included the aesthetic value of a monument. 36 C.F.R. § 60.4 (2019).

15. *See, e.g.*, DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 265 (2001); GARY W. GALLAGHER & ALAN T. NOLAN, THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 7 (2000); W. Fitzhugh Brundage, *I've Studied the History of Confederate Memorials. Here's What to do with Them*, VOX (Aug. 18, 2017), https://www.vox.com/the-big-idea/2017/8/18/16165160/confederate-monuments-history-charlottesville-white-supremacy [https://perma.cc/A9JG-4L9E].

example of a monument eligible for listing: "A late 19th century statue erected on a courthouse square to commemorate Civil War veterans would qualify if it reflects that era's shared perception of the noble character and valor of the veterans and their cause."[16] But historic scholarship has firmly rooted the rapid spread of Confederate monuments between 1895 and 1930 as part of a renewed push to institutionalize black subordination.[17] And in recent years, zeal for preserving these monuments has been embraced primarily by neo-Confederate organizations, many of which espouse toxic forms of white nationalism. The public demand to remove these monuments today often represents popular efforts by local communities to reject resurgent, and sometimes violent, claims of white supremacy. Whatever heritage or aesthetic values these monuments may possess are dwarfed by the danger they pose to African Americans, Jews, and community peace. No community should be legally obligated to maintain public monuments supporting contemporary claims of white supremacy.[18] The preservation challenge here is to engage with Confederate monuments in a manner that respects the complex realities of southern heritage, where, as Faulkner famously wrote: "The past is never dead. It's not even past."[19]

Defenders of Confederate monuments sometimes argue that removal is a denial of history.[20] But this is a gross simplification. The Jim Crow era, the period for which the monuments have historic significance, is an important and painful era of history, and these heroic monuments to Confederate leaders are problematic resources for conveying that

16. NATIONAL REGISTER CRITERIA, *supra* note 9, at 39.

17. Recognizing the centrality of white supremacy to Confederate memorials does not deny that other motives were mixed in many instances. One theme often present in the post-Reconstruction period was "reconciliation"—a joint celebration of white heroism in the Civil War, which ignored slavery as a cause of the war and also the plight of African Americans in the South. *See* MICHAEL KAMMEN, MYSTIC CORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE 106–15 (First Vintage Books 1993) (1991).

18. "Historic preservation reflects the present as well as the past. Decisions about preservation and presentation of a historic site of central cultural and political significance will always reflect the perspectives of contemporary society, especially those with power." *See* J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENV'T. L.J. 203, 268 (2009). The National Trust for Historic Preservation expressly supports the removal of Confederate monuments "from our public spaces when they continue to serve the purposes for which many were built—to glorify, promote, and reinforce white supremacy, overtly or implicitly." *Statement on Confederate Monuments*, NAT'L TR. FOR HIST. PRES. (June 18, 2020), https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials?utm_medium=email&utm_source=update#.XwNYTShKjIU [https://perma.cc/U4DE-EJL9].

19. WILLIAM FAULKNER, REQUIEM FOR A NUN 85 (Chatto & Windus 1953).

20. *See, e.g.*, Jennifer Schuessler, *Historians Question Trump's Comments on Confederate Memorials*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/arts/design/trump-robert-e-lee-george-washington-thomas-jefferson.html [https://perma.cc/9WDK-ZUB2] (discussing President Trump's defense of Confederate monuments).

significance, because they cast a cloak of Romantic glory over the terrible cruelty and injustice of the racial subordination occurring during that time. What continues to be socially necessary, and broadly supported by public opinion, are efforts to tell the truth about the brutal subordination of African Americans during that era, which included thoroughgoing economic exploitation, political disenfranchisement, and social humiliation, all enforced through both official and vigilante violence. Commemorative endeavors like the Legacy Museum in Montgomery, Alabama, presenting the legacy of slavery, lynching, and segregation, correct the false heritage tales of the "Lost Cause," and speak to the continuing need to acknowledge and understand painful aspects of our national history.[21] The heritage value of most Confederate monuments can be adequately preserved in museums where their historical usage and the context of their time can be explained, or in battlefield parks, where they can serve their commemorative function.[22]

Let us turn now to consider the claims of Phelps and Owley that historic preservation laws are an impediment to removal of Confederate monuments. The authors provide a detailed account of the applicability of Section 106 of the National Historic Preservation Act (NHPA) on the removal of Confederate monuments.[23] They correctly note that the consultative process of Section 106 would need to be followed if a federal agency would remove a monument eligible for inclusion on the National Register of Historic Places, provide funds for such removal, or permit removal from federal land.[24] However, Phelps and Owley cannot identify any case in which Section 106 prevented removal of a monument or even

21. Preserving and presenting sites that tell the histories of the struggles and accomplishments of formerly marginalized people have become a central effort in the historic preservation field. *See, e.g.*, *The Full Spectrum of History: Prioritizing Diversity and Inclusion in Preservation*, 30 F.J. 1 (2016), https://forum.savingplaces.org/viewdocument/summer-2016-forum-jo [https://perma.cc/E935-KZCT].

22. Communities may successfully contextualize and preserve Confederate monuments in a way that places the Lost Cause ideology in a useful contemporary perspective. Arguably, Richmond, Virginia, has achieved that by placing in a prominent public location near its Confederate monuments, Kehinde Wiley's bronze statue of a contemporary African American man in a heroic pose on horseback. *See* Gregory S. Schneider, *In the Capital of the Confederacy, a New Monument and a Chance to Change the Narrative*, WASH. POST (Dec. 10, 2019, 7:15 PM), https://www.washingtonpost.com/local/virginia-politics/in-the-capital-of-the-confederacy-a-new-monument-and-a-chance-to-change-the-narrative/2019/12/10/92c77468-1b6c-11ea-b4c1-fd0d91b60d9e_story.html [https://perma.cc/69A7-UWYZ]. My comments in support of communities that want to remove Confederate monuments do not impugn inclusive decisions to create context rather than remove statues.

23. *See* Phelps & Owley, *supra* note 1, at 645–50.

24. *See id.* at 649.

was successfully invoked to delay the removal of such a monument.[25] They admit that Section 106, by its terms, would never substantively bar removal of any historic property, but express concern that it would subject a federal agency to its procedures and thereby "discourage removal through its requirements for a costly, controversial, and time-consuming process."[26]

A federal administrative process to consider a proposal to remove a monument based on historic research, community consultation, and the weighing of alternatives and mitigation measures, likely would have substantial social value. The issue of Confederate monument removal is contentious because different people have radically different views of what the monuments signify.[27] As discussed above, for proponents of removal, most such monuments primarily express a yearning to maintain white supremacy, but for defenders, they may primarily commemorate the blood sacrifice of their ancestors for a cause that an even smaller group believe to have been a noble attempt to maintain state sovereignty. The gulf between these narratives cries out for a civil and informed dialogue. Section 106 provides a public pathway for ascertaining facts about the erection of a particular monument, the clarification and critique of perspectives, and the search for acceptable mitigation.[28] A historic preservation law with this potential, which at the end of the day will not constrain a federal agency's choice of action, deserves commendation rather than criticism. How else can we collectively consider the significance and curate the physical remains of a contentious and racist history?

Sadly, some defenders of the monuments embrace frequently and explicitly the white supremacy ideology, inextricable from nostalgia for the Confederacy. Indeed, it has been the public celebration of Confederate monuments by persons chanting racist sentiments that have made retention of many such monuments intolerable.[29] While local governments must respect the First Amendment rights of such deluded persons, a subject beyond the scope of this brief response, no local government must retain monuments expressing a destructive racist

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25. The National Environmental Policy Act could have an even more tangential application to Confederate monuments because it applies only to "major federal actions significantly affecting the quality of the human environment." *Id.* at 651. This presents an even higher threshold for a full review than does the NHPA threshold of a federal undertaking. *See id.*

26. *See id.* at 650.

27. *See* LEVINSON, *supra* note 10 (demonstrating the conflicting opinions surrounding various monuments).

28. *See* Phelps & Owley, *supra* note 1, at 645.

29. *See* Jess Bidgood et al., *Confederate Monuments Are Coming Down Across the United States. Here's a List.*, N.Y. TIMES (Aug. 16, 2017), https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html [https://perma.cc/UQ3L-DK8M].

ideology. Removal of public monuments from public spaces does not violate the First Amendment, because it would constitute government speech and not prohibit the speech of any private person.[30]

One place where the NHPA might discourage removal of Confederate monuments would be battlefield parks administered by the National Park Service ("NPS"). Many Civil War battlefields are listed as historic districts on the National Register and, since the historic monuments are on federal land, Section 106 surely would apply if removal were proposed. The NPS would likely resist removal of historic Confederate memorials from its battlefield parks to protect the heritage value of the public honoring of the soldiers engaged. In such a case, the determining factor would be the NPS's sense of its mission as an agency, although the decision would emerge from the Section 106 process. As noted above, Section 106 does not provide substantive protection to historic resources, only a process requiring study and consultation.[31] Nonetheless, retention of most Confederate monuments on battlefield park sites seems appropriate. Civil War battlefields are very different from urban parks or courthouse squares. Civil War battlefields do not directly address contemporary civic life, but they provide interpretative context about both the Civil War and monuments for both armies. At Gettysburg, for example, exhibits in the Visitor Center explain both the centrality of slavery to the Civil War and the motives of those who erected monuments.[32] This is a location where the cultural and commemorative significance of Confederate monuments can be considered with the most benefit and least harm.

In theory, local preservation laws pose a more complete barrier to removal of Confederate monuments. As Phelps and Owley explain, many local preservation ordinances bar or delay demolition and restrict the alteration, including relocation, of a designated landmark or structure contributing to a designated historic district.[33] Thus, a historic preservation board or local legislature operating under such an ordinance could designate a statue of a Confederate soldier as a historic landmark in order to prevent its otherwise lawful removal. Such a monument would also receive legal protection against demolition if it is within a historic district, such as a courthouse square or residential neighborhood, and if it

30. Public decisions about public monuments, as matters of government speech, do not implicate First Amendment rights. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to fund a program to encourage certain activities it believes to be in the public interest. . . .").

31. *See* Phelps & Owley, *supra* note 1, at 650.

32. *See* Byrne, *supra* note 18, at 238–39.

33. *See* Phelps & Owley, *supra* note 1, at 668–71.

was erected there within the district's period of significance.[34]

However, incidents of local preservation laws protecting Confederate monuments seem rare or non-existent. In the one example Phelps and Owley cite, the Rockville, Maryland preservation commission *permitted removal* of a more than 100-year old statue of a Confederate soldier located within a historic district.[35] The Rockville, Maryland, preservation commission ruled that the statue did not contribute to the significance of the historic courthouse grounds because it had been moved to the courthouse grounds only in 1971.[36] The case seems to illustrate that preservation commissions can find grounds within their local law upon which to sanction removal of offensive monuments. Phelps and Owley minimize the ease with which removal complied with local historic preservation laws by stressing that recent placement would be rare.[37]

But there are a host of other reasons why local historic preservation laws have not, and normally will not, bar removal of Confederate monuments.[38] First, statues are not often individually designated for historic protection. Unless a property is designated individually or as part of a historic district, local preservation laws do not protect it.[39] This is in contrast to Section 106 of the NHPA, which applies to any property *eligible* for listing on the National Register, whether actually listed or not.[40] Local commissions and legislative councils, who usually share designation roles in local laws, have discretion not to designate any property otherwise eligible. Local commissions would share the concerns expressed in the National Register standards for designating "properties primarily commemorative in nature," but also may well respond to the desire of their constituents not to protect monuments with a racist provenance. Second, local governments already own or have jurisdiction

34. Historic districts typically have established periods of significance specifying the time period when the properties that give significance to the district were built. *Growing Old Together*, *supra* note 6, at 1301. Any individual property within the district built after the period of significance is not protected.

35. *See* Phelps & Owley, *supra* note 1, at 669–70.

36. *Id.*

37. *Id.* at 670.

38. This discussion focusses on traditional local historic district ordinances, which strictly regulate demolition or alteration of historic resources. Recent innovations in preservation law, such as conservation districts or form-based coding, such as the path breaking approach in Hartford, Connecticut, promote neighborhood identity without restricting demolition. *See* Sara C. Bronin, *Rezoning the Post-Industrial Hartford*, 31 PROB. & PROP. 44, 45 (2017). *See generally* NAT'L TRUST FOR HIST. PRES., NEIGHBORHOOD CONSERVATION DISTRICTS: PLANNING AND ADMINISTRATIVE PRACTICES (2018) (discussing neighborhood conservation districts in Detroit, Michigan, and various strategies to implement conservation efforts).

39. BRONIN & BYRNE, *supra* note 7, at 91.

40. Federal agencies complying with Section 106 must survey the area likely to be affected by its undertaking to discover properties that may be eligible for listing on the National Register. 36 C.F.R. § 800.4(b) (2019).

over the most sensitive Confederate monuments, which are located conspicuously in public parks or the grounds of public buildings.[41] Local governments may feel that they need not designate properties they already control because public properties are not threatened by commercial real estate development pressures.

Third, many communities never get to the point of considering whether their local laws permit removal of a Confederate memorial because other factors prevent reaching the legal question. Of course, state statutes prohibiting removal of Confederate monuments prevent local governments from exercising their local preservation laws.[42] Virginia recently repealed its 1890 prohibitory law with another that authorizes local governments to "remove, relocate, contextualize or cover" Confederate memorials.[43] Cities such as Norfolk, Richmond, and Charlottesville have previously either decided to remove, or have seriously studied removing, Confederate memorials, so now we may have a chance to test whether their local preservation laws deter what seems to be a strong desire to act.

Some local communities never test their local preservation ordinance because they cannot reach a firm political decision. This may reflect a political stalemate between those repulsed by the monuments and those wishing to retain them. This could result from practical concerns such as overlapping authority over the memorial or site, costs concerns, and an inability to persuade any acceptable party to take custody of the monument. In the Rockville, Maryland case discussed by Phelps and Owley, the city refused to take possession of the "Johnny Reb" statue from Montgomery County because it lacked a suitable site for the eighteen-foot tall and 11,000-pound statue and did not want to bear ongoing costs of upkeep and security.[44] Eventually, Montgomery County offered the statue on Craigslist and it was acquired by a private-ferry operator who appears to be a neo-Confederate enthusiast, an

41. *See generally Monuments of Folly*, *supra* note 5 (suggesting local governments in many jurisdictions have far more freedom to move, modify, or get rid of Confederate monuments in public spaces than many have supposed).

42. *See* Phelps & Owley, *supra* note 1, at 659.

43. H.B. 1537, 2020 Sess. (Va. 2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1537. The Virginia statute expressly exempts public war memorials from any law that would otherwise prohibit a local government from removing or contextualizing them. *Id.* The Virginia statute also requires that local governments provide a public hearing before deciding whether to remove war memorials, thereby aiming for a process akin to section 106 of the NHPA. *Id.*

44. Sonya Burke, *Rockville Leaders Vote, 4-1, Against Confederate Soldier Statue Move*, MONTGOMERY CMTY. MEDIA (Fed. 8, 2016), https://www.mymcmedia.org/rockville-leaders-vote-4-1-against-confederate-soldier-statue-move/ [https://perma.cc/KLS3-ZDYL]. A video of the Council's deliberations can be viewed at City of Rockville, *Mayor and Council Meeting – Feb. 8, 2016*, GRANICUS, http://rockvillemd.granicus.com/MediaPlayer.php?view_id=2&clip_id=3470 [https://perma.cc/BX33-DF4F].

embarrassing outcome for the county.[45] Few reputable entities seek to possess Confederate monuments. In short, all sorts of practical concerns can prevent a locality from agreeing on an acceptable plan of removal regardless of its leeway under its local preservation law.

Finally, once a local government decides to remove a memorial it has ample authority to do so, regardless of its preservation law. Local preservation laws can be superseded by subsequent local legislation. Many local governments keep political control over the designation process, but even if that decision is largely delegated to a historical preservation commission, exceptions can be made by legislation. Even for designated memorials, new legislation can override protections. Legislation will be required in any event to address the many details of removal: it must be disposed of, contracts entered into to physically remove, transport, and reinstall it, and funds appropriated. Such practical legislation can also provide that the local preservation law shall be no impediment to the project. Preservationists understandably dislike ad hoc legislative exceptions to existing protections, but Confederate monuments already are in a class by themselves.

Phelps and Owley mention the Washington, D.C. provision by which the "Mayor's Agent" can authorize the demolition or removal of landmark or contributing property to a historic district when necessary to construct a project of "special merit."[46] Removing a designated monument offensive to many citizens as an expression of white supremacy might be found to meet the standard for a "special merit," which is defined as a "plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services."[47] However, there has never been a case where "special merit" has been found solely through elimination. Such a removal would qualify most easily if a statue of, say, former Confederate General Albert Pike, was replaced by a statue of an honored former District of Columbia resident such as Frederick

45. *See* David S. Rotenstein, *No Country for Johnny Reb or Bobby Lee*, THE ACTIVIST HIST. REV. (Aug. 21, 2017), https://activisthistory.com/2017/08/21/no-country-for-johnny-reb-or-bobby-lee/#_ednref14 [https://perma.cc/7DBU-CS8F].

46. D.C. CODE § 6-1104(h) (2015).

47. *Id.* § 6-1102(11) (2014).

Douglass.[48] While this replacement could be accomplished by statute,[49] proceeding through the "special merit" process would generate an evidentiary hearing and findings of fact, which would be educational and address the competing narratives of local heritage. While few local historic preservation ordinances contain special merit provisions, all should.

Phelps and Owley also provide a careful analysis of the role of conservation and preservation easements in preventing or complicating the removal of Confederate monuments—as one would expect from two of the leading scholars of conservation easement law. They circumscribe the issue when they suggest that "making donation of a conservation easement solely protecting a Confederate monument [would] be an unlikely occurrence."[50] They also recognize that easement holders and property owners usually retain flexibility to amend protective easements, even if doing so requires careful lawyering, and third parties generally lack standing to object.[51]

Phelps and Owley do explore two situations where modifying a historic preservation easement would be more complicated. First, they consider Confederate monuments on privately-owned battlefields protected by a conservation easement. They note that it would "present a very real challenge to conservation easement-holders who have to

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48. The statue of Pike is the only outdoor statue of a Confederate general in Washington, D.C. *Why is Confederate General Albert Pike Memorialized at Judiciary Square?*, WASH. POST (Oct. 22, 2016), https://www.washingtonpost.com/local/why-is-confederate-general-albert-pike-memorialized-at-judiciary-square/2016/10/22/9d69f26c-96ed-11e6-bc79-af1cd3d2984b_story.html [https://perma.cc/E3UG-GALL]; *see also* Ben Pershing, *Frederick Douglass Statue Unveiled in the Capitol*, WASH. POST (June 20, 2013), https://www.washingtonpost.com/local/dc-politics/frederick-douglass-statue-unveiled-in-the-capitol/2013/06/19/a64916cc-d906-11e2-a9f2-42ee3912ae0e_story.html [https://perma.cc/4C86-EATQ].

49. H.R. 4135, 116th Cong. (2019) (directing the Secretary of the Interior to Remove the statue of Albert Pike).

50. Phelps & Owley, *supra* note 1, at 680.

51. *Id.* at 684–85. Section 2 of the Uniform Conservation Easement Act provides that preservation easements "modified, terminated, or otherwise altered or affected in the same manner as other easements." NAT'L CONF. OF COMM'N ON UNIF. STATE LAWS, UNIF. CONSERVATION EASEMENT ACT § 2 (2007). Admittedly, property owners would not easily agree to modify an easement if it endangered an earlier tax deduction for a charitable contribution of land.

Termination of a preservation easement is always an entirely private matter; state attorney generals may have standing to object either by statute or, when donated, under the principles of the charitable trust. A few states, such as Maine, have enacted laws limiting modification of conservation easements. Maine provides that a "conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party." ME. STAT. tit. 33, § 477-A(2)(B) (2007). But states, mostly in New England, that limit modifications of easements are very unlikely to oppose removal of Confederate monuments agreed to by the easement holder.

balance and assess whether additional interpretation, modification, or removal of the monument is barred under the terms of the easement."[52] Careful and creative interpretation of such an easement, however, does not seem like an undue hardship for a non-profit battlefield land trust, the usual easement holder. More broadly, a land trust's decision does not affect today's civic life to any degree comparable to a municipality because there is no government affirmation behind the monument.[53] Finally, as argued above, rural battlefields telling the story of important battles and containing memorial to both armies seem the best, or least bad, location for Confederate monuments.[54]

Second, Phelps and Owley describe the more complex situation where Baltimore's mayor removed several Confederate monuments subject to easements held by the Maryland Historic Trust ("MHT"), a state agency.[55] MHT took the easements in 1984 as a result of its funding maintenance of the statues, which stood on public land.[56] The mayor acted without MHT's consent, which violates the terms of the easement.[57] This case is far more sensitive than any battlefield case because the statues stood on public land in a city roiled by racial unrest. Phelps and Owley properly indicate the legal troubles that could emerge from this mix but risk appearing naïve in concluding that Baltimore has been "fortunate" that neither MHT nor the state attorney general has legally challenged the removal.[58] No Maryland official wants to exercise their legal authority to force Baltimore to remount monuments rejected by the overwhelming sentiment of Baltimore citizens.[59] The continuing problem with these monuments is that no one wants to take possession of them: They remain "hidden from the public inside a small pen made of Jersey

52. Phelps & Owley, *supra* note 1, at 682.

53. Private owners have First Amendment rights to determine their messages that also differentiate them from government sponsors of monuments.

54. The position of the American Battlefield Trust in support of retaining monuments is that "[w]e must not permit battlefield memorials to be removed in the mistaken belief that we can cleanse history by deleting selected American soldiers from our collective memory." Letter from Thomas H. Lauer, Vice Chairman of the Bd. of the Civ. War Tr., to the Ed. of the Am. Battlefield Tr. (Aug. 20, 2017), https://www.battlefields.org/letter-protect-our-battlefield-monuments [https://perma.cc/F3MP-W78F].

55. Phelps & Owley, *supra* note 1, at 683–84.

56. *Id.* at 684.

57. *Id.*

58. Phelps & Owley, *supra* note 1, at 684–85.

59. A recent historical study of Maryland's Roger Taney monuments concludes that they expressed the racist consensus of post-war Maryland, excusing Taney's denigration of African Americans in the *Dred Scott* case. Corey M. Brooks, *Sculpting Memories of the Slavery Conflict: Commemorating Roger Taney in Washington, D.C., Annapolis, and Baltimore, 1864-1887*, 112 MD. HIST. MAG. 6, 30 (2017).

barriers."[60]

CONCLUSION

Historic preservation laws do not seriously impede the removal or contextualization of Confederate memorials. The tangled and toxic heritage they signify does. The law may create the context within which parties contend about the meaning and continuing value of these monuments. Historic preservation laws have many gaskets through which the vile humors of our past can be dissipated. Phelps and Owley gave a useful account of the machinery of preservation but do not fully credit the extent to which in application it permits people today to shape the heritage needed to foster the contemporary culture we aspire to. Historic preservation law is not so much "etched in stone," as a living requirement that we collectively and carefully address what remnants of the past to retain and what to discard.

60. Colin Campbell, *Baltimore's Confederate Statues Were Removed in the Dead of Night. 2 Years Later, They Languish on a City lot*, BALT. SUN (Sept. 26, 2019, 1:33 PM), https://www.baltimoresun.com/politics/bs-md-pol-confederate-monuments-20190926-3ionc4ekhrdllpp72uld7npzdm-story.html [https://perma.cc/7CJH-PDJR] (reporting that MHT is continuing to require Baltimore to report on status of the monuments).