

DELISTING THE DISHONORABLE

*Leah Deskins**

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The National Register of Historic Places is the “official list of the Nation’s historic places worthy of preservation.” Listing is an honor that has been bestowed upon thousands of properties across the country. Many properties undoubtedly deserve this honor. But what if a historic property conveys a message of hate and discrimination? What if it mischaracterizes history and ignores injustice? Should it be honored by the National Register?

In recent years, the continued presence of Confederate monuments in communities throughout the country has received significant attention — spurring debate and even violence — as a result of a growing understanding that these monuments were erected to promote a fictionalized version of history and white supremacist views. The National Register lists many Confederate monuments.

By analyzing a more complete history of Confederate monuments, the federal regulations (promulgated by the National Park Service) that they must satisfy to qualify for listing, and contemporary actions taken pertaining to other public references to the Confederacy, this article argues that these monuments do not and should not qualify for listing on the National Register. Many previous discussions concerning Confederate monuments have been focused at the local and state levels. By recognizing that Confederate monuments do not deserve the honor that comes with National Register recognition, the National Park Service, and thus the federal government, could communicate to the entire country that the people and cause these monuments portray and celebrate should no longer be put on a pedestal.

INTRODUCTION

The National Historic Preservation Act of 1966 authorized the creation of the National Register of Historic Places (“National Register”), the “official list of the Nation’s historic places worthy of preservation.”¹ Overseen by the National Park Service, the National Register contains over 95,000 property listings² and honors sites including Boston’s Old

¹ *National Register of Historic Places*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/index.htm> (last visited Oct. 6, 2020).

² *What is the National Register of Historic Places?*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm> (last visited Oct. 6, 2020).

North Church,³ Thomas Edison National Historical Park,⁴ and Martin Luther King, Jr. National Historical Park⁵ — sites that memorialize freedom and progress throughout American history.

The National Park Service manages the National Register pursuant to federal regulations promulgated by the agency.⁶ The regulations govern, among other things, the processes through which properties can become listed, the qualifications they must meet for listing, and how properties may be removed (or “delisted”).⁷ In the years since the National Register’s inception, the National Park Service has listed numerous Confederate monuments while adhering to these regulations.⁸ These monuments — recognizing individuals and groups who served or supported the

³ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, OLD NORTH CHURCH, NAT’L ARCHIVES CATALOG (1978), https://catalog.archives.gov/OpaAPI/media/63793857/content/electronic-records/rg-079/NPS_MA/66000776_NHL.pdf.

⁴ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-306, EDISON NATIONAL HISTORIC SITE, NAT’L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY (1979), <https://npgallery.nps.gov/NRHP/GetAsset/c4e6cf53-41be-4546-9e82-76dcebe2f527>; NAT’L PARK SERV., THE NATIONAL PARKS: INDEX 2012-2016 75 (2016) (indicating that the property was renamed “Thomas Edison National Historical Park” in 2009).

⁵ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, MARTIN LUTHER KING, JR., NATIONAL HISTORIC SITE, NAT’L ARCHIVES CATALOG (1994), https://s3.amazonaws.com/NARAprodstorage/lz/electronic-records/rg-079/NPS_GA/80000435.pdf; Jill Vejnaska, *Martin Luther King Jr. National Historical Park: What to Do There and What’s New*, ATLANTA J. CONST. (Mar. 22, 2018), <https://www.ajc.com/news/martin-luther-king-national-historical-park-what-there-and-what-new/YgjyQvXdxZjprNzYIV5HoJ/> (stating that the property’s name became “Martin Luther King, Jr. National Historical Park” in 2018).

⁶ See *Laws, Policies & Regulations*, NAT’L PARK SERV., <https://www.nps.gov/aboutus/lawsandpolicies.htm> (last visited Oct. 6, 2020); *Regulations*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/regulations.htm> (last visited Oct. 6, 2020); see also *Action Alert — NPS Seeks Comments on Proposed Changes to National Register of Historic Places*, ORG. OF AM. HISTORIANS (Mar. 18, 2019), <https://www.oah.org/insights/archive/action-alert-nps-seeks-comments-on-proposed-changes-to-national-register-of-historic-places/> (averring that the National Historic Preservation Act directed the National Park Service to promulgate regulations pertaining to the National Register (citing 54 U.S.C. § 302103(2))).

⁷ See 36 C.F.R. §§ 60.1–60.15 (2020).

⁸ See *National Register of Historic Places: National Register Database and Research*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/database-research.htm> (last visited Oct. 6, 2020) [hereinafter *National Register Database and Research*] (In the search bar under “Search Properties Listed in the National Register of Historic Places,” search for “Confederate monument” to see a list of properties.).

Confederacy — typically take the form of statues,⁹ stone tablets,¹⁰ obelisks,¹¹ and arches.¹²

National Register listing “honors a property by recognizing its importance to its community, [s]tate, or the Nation.”¹³ Listing “often changes the way communities perceive their historic places,”¹⁴ and it can bolster efforts to preserve historic sites.¹⁵ It also often serves as an important step for receiving preservation-related government funding and tax credits.¹⁶ Further, National Register recognition provides extra protection for properties that could be affected by federal agency projects.¹⁷ If a federal agency’s project will affect a listed property, or a

⁹ See, e.g., *Confederate Monument in Danville*, NAT’L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY, <https://npgallery.nps.gov/NRHP/AssetDetail?assetID=172260e1-5775-4bd5-b69c-8039c162f6dc> (last visited Oct. 6, 2020).

¹⁰ See, e.g., *Confederate Martyrs Monument in Jeffersontown*, NAT’L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY, <https://npgallery.nps.gov/NRHP/AssetDetail?assetID=9cda0e9e-51ff-4805-b98c-b0b946aff1bc> (last visited Oct. 6, 2020).

¹¹ See, e.g., *Confederate Monument of Morganfield*, NAT’L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY, <https://npgallery.nps.gov/NRHP/AssetDetail?assetID=58171eb9-817d-4c3b-8a95-4592bfd8d078> (last visited Oct. 6, 2020).

¹² See, e.g., *Confederate Monument in Russellville*, NAT’L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY, <https://npgallery.nps.gov/NRHP/AssetDetail?assetID=71e60bc8-8989-4144-a006-fd6e97ce4b80> (last visited Oct. 6, 2020).

¹³ NAT’L PARK SERV., *THE NATIONAL REGISTER OF HISTORIC PLACES 5* (2002) (a brochure published by the National Park Service). Anyone can nominate properties for listing on the National Register, *id.* at 14, but the National Park Service provides the final approval necessary for listing, *see id.* at 15–19.

¹⁴ *Id.* at 5; *see also National Register of Historic Places*, PRES. LA., <https://preserve-louisiana.org/national-register-of-historic-places> (last visited Oct. 6, 2020) (“[P]eople typically hold [National] Register properties in high regard and think twice about insensitive alteration and demolition.”).

¹⁵ See NAT’L PARK SERV., *supra* note 13, at 5.

¹⁶ See Julia Rocchi, *10 Tips to Build Your National Register Knowledge*, NAT’L TR. FOR HIST. PRES. (Mar. 8, 2016), <https://savingplaces.org/stories/10-tips-to-build-your-national-register-knowledge#.XcTZiy-ZPBI>; *Technical Preservation Services: Eligibility Requirements*, NAT’L PARK SERV., <https://www.nps.gov/tps/tax-incentives/before-apply/eligibility-requirements.htm> (last visited Oct. 14, 2020); NATIONAL PARK SERVICE, *supra* note 13, at 7.

¹⁷ See NAT’L PARK SERV., *supra* note 13, at 7, 12. Namely, § 106 of the National Historic Preservation Act requires that federal agencies provide the Advisory Council on Historic Preservation, an independent federal agency, an opportunity to comment on any project affecting properties listed, or eligible for listing, on the National Register. See *FAQS*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/faqs.htm> (last visited Apr. 9,

property eligible for listing, the agency must provide an opportunity for the Advisory Council on Historic Preservation “to comment on the project and its effects on the property.”¹⁸

Listing, however, does not subject property owners to any restrictions unless federal funding, a federal permit, or a federal license is involved.¹⁹ Absent any federal funding, permit, or license, property owners may even destroy their property if they so choose.²⁰ In other words, while National Register recognition can provide additional benefits for listed properties, it functions “primarily [as] an honor.”²¹

Amidst growing concerns about racial inequality and race-motivated violence in the United States, apprehension has developed regarding the presence of Confederate monuments and the messages they send to their communities. The topic has generated heated debate, even violence.²² Nevertheless, trends suggest that the Confederacy not only lost the Civil War 156 years ago, but that it is likewise currently losing the battle of public opinion. Yet, even though Confederate monuments have started to come down²³ and symbols of the Confederacy have been removed,²⁴ no scholarship or public movement has called for the removal of Confederate monuments from the National Register.

This article argues that given society’s emergent comprehension of what Confederate monuments represent, and the messages they send to their communities, they should be delisted from the National Register. They do not satisfy the qualifications necessary for listing, and they do not

2021). Further, “[i]f an individual or entity owns land that is located in the environs of such property, then any activities conducted on that land will be subject to review if those activities are federally funded, federally licensed, or otherwise involve some form of federal undertaking.” *National Register of Historic Places*, NAT’L TR. FOR HIST. PRES., <https://forum.savingplaces.org/learn/fundamentals/preservation-law/federal/nrhp> (last visited Apr. 9, 2021).

¹⁸ NAT’L PARK SERV., *supra* note 13, at 7.

¹⁹ *Id.* at 6.

²⁰ *See id.*

²¹ *A Comparison to the National Register of Historic Places*, N.C. DEP’T OF NAT. & CULTURAL RES., <https://www.ncdcr.gov/about/history/division-historical-resources/state-historic-preservation-office/local-historic-2> (last visited Oct. 6, 2020).

²² *See, e.g.*, Phil McCausland et al., *Charlottesville Rally Turns Deadly: One Killed After Car Strikes Crowd*, NBC NEWS, <https://www.nbcnews.com/news/us-news/charlottesville-rally-turns-deadly-one-killed-after-car-strikes-crowd-n792116> (last updated Aug. 13, 2017, 6:13 AM).

²³ *See e.g.*, Bonnie Berkowitz & Adrian Blanco, *Confederate Monuments Are Falling, but Hundreds Still Stand. Here’s Where.*, WASH. POST, <https://www.washingtonpost.com/graphics/2020/national/confederate-monuments/> (last updated July 2, 2020).

²⁴ *See Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [hereinafter *Whose Heritage?*].

deserve the honor bestowed upon them by National Register recognition. Delisting Confederate monuments would represent an important step by the federal government in recognizing and affirming that Confederate history and discriminatory beliefs should not be put on a pedestal and honored any longer.²⁵

Part I provides a brief overview of the debate regarding the presence of Confederate monuments in public spaces. It also summarizes the legal scholarship, news articles, and government publications concerning Confederate monuments, and exposes a gap in the literature pertaining to those monuments listed on the National Register. Part II discusses the listing of Confederate monuments on the National Register: the number of monuments listed and the requirements the National Park Service has indicated that they satisfy. Part III analyzes whether the National Register should continue to honor Confederate monuments. It explains why Confederate monuments do not qualify for listing pursuant to the federal regulations that govern the National Register. It also describes ways in which communities have declared that the Confederacy should not be honored and argues that these actions indicate that the federal government should not honor Confederate monuments through the National Register. Lastly, it contends that while some people may view the monuments more positively, their views do not justify keeping the monuments listed. Part IV describes how Confederate monuments may be removed from the National Register under the current federal regulations. It asserts that the National Park Service should take responsibility for delisting the monuments and explains how the monuments can qualify for delisting. Finally, Part V discusses the implications of removing Confederate monuments from the National Register.

I. A BRIEF OVERVIEW OF THE CONFEDERATE MONUMENTS DEBATE

Recent years have seen the development of a movement calling for communities across the United States to address the presence of Confederate monuments in their public spaces, as well as an accompanying heated debate between those who advocate for change and those who argue against it.²⁶ This movement has stemmed from an increasing awareness of why Confederate monuments were constructed

²⁵ See Mitch Landrieu, *'We Can't Walk Away from This Truth'*, THE ATLANTIC (May 23, 2017), <https://www.theatlantic.com/politics/archive/2017/05/we-cant-walk-away-from-this-truth/527721/> (“To literally put the Confederacy on a pedestal in our most prominent places of honor is an inaccurate recitation of our full past, it is an affront to our present, and it is a bad prescription for our future.”).

²⁶ Cf. German Lopez, *The Battle Over Confederate Statues, Explained*, VOX, <https://www.vox.com/identities/2017/8/16/16151252/confederate-statues-white-supremacists> (last updated Aug. 23, 2017, 2:36 PM) (providing background information regarding the Confederate monuments debate).

and how their presence can affect the communities in which they stand.²⁷ The June 2015 shooting of Black worshippers at Emanuel African Methodist Episcopal Church in Charleston, South Carolina, the August 2017 gathering of white nationalists in Charlottesville, Virginia, and the Summer 2020 movement for racial justice and equity in the wake of George Floyd's death in Minneapolis, Minnesota, further intensified the debate.²⁸

Those who argue against change ("monument supporters") often maintain that Confederate monuments serve purely commemorative purposes.²⁹ They view the monuments as memorials honoring the dead and the sacrifices they made.³⁰ Monument supporters declare that these monuments represent "heritage, not hate,"³¹ a belief that mirrors some of

²⁷ Cf. Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, IND. L.J. SUPP. 15, 17 (2018) ("Indeed, many, if not most, [C]onfederate monuments have direct ties to white supremacy sentiments and movements and appeared long after the end of the Civil War. Monuments of this class then served as a symbol to [B]lacks that they were not equals and to other whites that racist attitudes and behaviors would be condoned."); Neal Augenstein, *Confederate Statue Coming Down at Va. Site of Interracial Marriage Case*, WTOP (August 26, 2020), <https://wtop.com/virginia/2020/08/confederate-statue-coming-down-at-va-site-of-interracial-marriage-case/> (stating that at a public hearing before a vote to remove a Confederate monument in Caroline County, Virginia, "several Black community members said the Confederate statue was a constant reminder of slavery and racism"); Thomas S. Szayna, *Confederate Statues Symbolize Role of Racism in America*, RAND BLOG (July 16, 2020), <https://www.rand.org/blog/2020/07/confederate-statues-symbolize-role-of-racism-in-america.html> ("Retaining . . . monuments of figures who fought to keep African Americans subjugated is divisive and impedes progress in race relations.").

²⁸ See Jess R. Phelps & Jessica Owley, *Etched in Stone*, 71 FLA. L. REV. 627, 630 (2019); Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/us/confederate-statues-george-floyd.html>.

²⁹ Phelps & Owley, *supra* note 27, at 17.

³⁰ See *id.*

³¹ *Whose Heritage?*, *supra* note 24; see Marc Fisher, *Confederate Statues: In 2020, a Renewed Battle in America's Enduring Civil War*, WASH. POST (June 11, 2020, 6:44 PM), <https://www.washingtonpost.com/history/2020/06/11/confederate-statues-attacked-protesters-george-floyd/> (averring that a monument supporter referred to the monuments as "Southern heritage"); Andrew O'Reilly, *Trump Says 'We Must Build Upon Our Heritage, Not Tear It Down' amid Confederate Statue Removals*, FOX NEWS (June 16, 2020), <https://www.foxnews.com/politics/trump-build-upon-our-heritage-not-tear-it-down> ("President Trump . . . seemed to speak out against moves being taken by many cities and states to remove statues and monuments honoring the Confederacy, calling on the country to 'build upon our heritage, not tear it down.'").

the views espoused by those behind the construction of Confederate monuments.³² Civic groups lobbying for their construction, for example, often emphasized that the monuments “helped white Southern children feel pride in their heritage and their families instead of feeling guilt” because of their families’ connections to slavery.³³ Many monument supporters further argue that removing these monuments, a policy commonly promoted by advocates for change, amounts to “erasing history.”³⁴

Advocates for change (“monument opposers”) do not support the continued veneration of Confederate history through monuments. Monument opposers argue that Confederate monuments were not erected merely to honor those who served the Confederate cause, but also to intimidate Black Americans and reinforce notions of white supremacy.³⁵ They aver that these monuments celebrate a “sanitized” version of history,³⁶ and in doing so normalize reverence for the “Lost Cause” — the idea that “the Civil War was a noble struggle to preserve states’ rights and a Southern way of life.”³⁷ The Lost Cause theory minimizes the evils of slavery and ignores its place in history as the issue that sparked the Civil War.³⁸ To monument opposers, Confederate monuments hide the real history of the Confederacy and trivialize Black Americans’ pain, history, and concerns about racism.³⁹

An objective look at the history of Confederate monuments vindicates monument opposers’ darker views. The first major wave of Confederate monument construction began in the late nineteenth century, decades after the end of the Civil War and corresponding with the end of Reconstruction, and continued through the 1920s.⁴⁰ This timeframe

³² See Phelps & Owley, *supra* note 28, at 634.

³³ *Id.* at 636 (indicating that two organizations in particular, the United Daughters of the Confederacy and the Sons of Confederate Veterans, were responsible for the construction of many Confederate monuments).

³⁴ *Whose Heritage?*, *supra* note 24; Lopez, *supra* note 26.

³⁵ See, e.g., Owley & Phelps, *supra* note 27, at 17–18; cf. *Whose Heritage?*, *supra* note 24 (“[P]ublic entities should no longer play a role in distorting history by honoring[, through Confederate monuments,] a secessionist government that waged war against the United States to preserve white supremacy and the enslavement of millions of people.”).

³⁶ Landrieu, *supra* note 25.

³⁷ Phelps & Owley, *supra* note 28, at 636.

³⁸ *Id.*; see also Beth D. Jacob, *Confederate Monuments That Remain*, AM. BAR ASS’N (Aug. 15, 2019), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2019/august-2019/confederate-monuments-that-remain/ (stating that Confederate Vice President Alexander H. Stephens declared that the “new government is founded upon . . . the great truth that the negro is not equal to the white man; that slavery — subordination to the superior race — is his natural and normal condition”).

³⁹ *Whose Heritage?*, *supra* note 24.

⁴⁰ *Id.*; Phelps & Owley, *supra* note 28, at 633.

coincides with states' enactments of Jim Crow laws that disenfranchised Blacks and re-segregated society.⁴¹ Furthermore, many Confederate monuments have connections to the Ku Klux Klan,⁴² which experienced a revival during the same time period.⁴³ A second wave of Confederate monument building occurred during the civil rights movement in the 1950s and 1960s.⁴⁴ During this period, monuments sometimes appeared in response to specific events related to the civil rights movement, such as the United States Supreme Court's decision in *Brown v. Board of Education* and Martin Luther King, Jr.'s assassination.⁴⁵

Recent trends suggest that opposition to Confederate monuments is growing. Many communities have decided to acknowledge the history of their Confederate monuments more fully. However, how exactly to do this is still up for debate. Dozens of cities have chosen to remove or relocate their Confederate monuments.⁴⁶ Others have decided to keep the monuments in place, but also to add interpretive signage about the monuments and their past.⁴⁷ Still others are actively searching for solutions.⁴⁸ Moreover, although some state laws prevent or limit the

⁴¹ *Whose Heritage?*, *supra* note 24. Monument creation “and enforcement of Jim Crow went hand-in-hand.” *Statement on Confederate Memorials: Confronting Difficult History*, NAT'L TR. FOR HIST. PRES. (June 19, 2017), <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials-2017#.X2oRXS2z0zU>.

⁴² See Phelps & Owley, *supra* note 28, at 637. For example, Stone Mountain, a popular tourist attraction near Atlanta, Georgia, featuring carved depictions of Jefferson Davis, Robert E. Lee, and Thomas “Stonewall” Jackson, began as a project of the Ku Klux Klan. Kushbu Shah, *The KKK's Mount Rushmore: The Problem with Stone Mountain*, THE GUARDIAN (Oct. 24, 2018), <https://www.theguardian.com/cities/ng-interactive/2018/oct/24/stone-mountain-is-it-time-to-remove-americas-biggest-confederate-memorial>.

⁴³ *Whose Heritage?*, *supra* note 24.

⁴⁴ *Id.*; Phelps & Owley, *supra* note 28, at 637–38.

⁴⁵ Phelps & Owley, *supra* note 28, at 637–38.

⁴⁶ See, e.g., Christopher Carbone, *Which Confederate Statues Were Removed? A Running List*, FOX NEWS (Aug. 21, 2018), <https://www.foxnews.com/us/which-confederate-statues-were-removed-a-running-list>.

⁴⁷ See, e.g., Hannah Natanson, *There's a New Way to Deal with Confederate Monuments: Signs That Explain Their Racist History*, WASH. POST (Sept. 22, 2019, 3:03 PM), <https://www.washingtonpost.com/history/2019/09/22/theres-new-way-deal-with-confederate-monuments-signs-that-explain-their-racist-history/>.

⁴⁸ In Asheville, North Carolina, for example, the city government has created a “joint task force with [another locality] for the removal or repurposing of” a local Confederate monument. *Vance Monument Task Force*, THE CITY OF ASHEVILLE, <https://www.ashevilenc.gov/departments/equity-inclusion/vance-monument-task-force/> (last visited Oct. 6, 2020).

removal of Confederate monuments,⁴⁹ the fates of these laws appear uncertain in the face of changing public opinion.⁵⁰

Debate and decisions concerning Confederate monuments have not gone unnoticed by legal scholars. Indeed, the monuments serve as the focus of a growing share of legal scholarship published by law reviews.⁵¹ This scholarship tends to focus on issues regarding the physical removal or preservation of Confederate monuments — how local governments can challenge laws preventing the removal of Confederate monuments,⁵² or how international law might guide the treatment of these monuments,⁵³ for example. It also draws connections between Confederate monuments and other areas of the law, such as the relationship between the monuments and the freedom of speech.⁵⁴ Perhaps unsurprisingly, several articles discuss the framework of historic preservation laws and regulations that apply to Confederate monuments.⁵⁵ However, published legal scholarship has yet to specifically analyze the presence of these monuments on the National Register in detail and call for their delisting.

Nor have other publications questioned the National Register's recognition of Confederate monuments. Like their law review peers, newspapers and online news outlets have frequently published articles pertaining to the physical removal or preservation of Confederate monuments.⁵⁶ Nevertheless, research indicates that no such publications

⁴⁹ See, e.g., MISS. CODE ANN. § 55-15-81 (2020) (prohibiting the “relocat[ion], remov[al], . . . alter[ation], renam[ing], or rededicat[ion]” of Confederate monuments).

⁵⁰ See, e.g., Brad Bennett, *Weekend Read: Even as Southern States Continue Honoring Confederate Holidays, Monuments Are Being Removed*, S. POVERTY L. CTR. (May 2, 2020), <https://www.splcenter.org/news/2020/05/02/weekend-read-even-southern-states-continue-honoring-confederate-holidays-monuments-are>.

⁵¹ A Westlaw search for “Confederate monument!” reveals 22 law review articles published before January 1, 2015, and 128 law review articles published after that date. WESTLAW EDGE, <https://1.next.westlaw.com/Search/Home.html> (last visited Oct. 17, 2020) (Type “Confederate monument!” into the search bar, and limit the results to secondary sources. Under the “Publication Type” tab on the sidebar, further limit the results to “Law Reviews & Journals.”).

⁵² See, e.g., Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes”*, 91 TEMP. L. REV. 1 (2018).

⁵³ See, e.g., Blake Newman, *America’s Scarlet Letter: How International Law Supports the Removal and Preservation of Confederate Monuments as World Heritage of America’s Discriminatory History*, 26 SW. J. INT’L L. 147 (2020).

⁵⁴ See, e.g., Ellen Hunt, *What is a Confederate Monument?: An Examination of Confederate Monuments in the Context of the Compelled Speech and Government Speech Doctrines*, 37 LAW & INEQ. 423 (2019).

⁵⁵ See, e.g., Phelps & Owley, *supra* note 28.

⁵⁶ See, e.g., Todd Gill, *Confederate Statue Removed from Downtown Bentonville*, FAYETTEVILLE FLYER (Sept. 3, 2020),

have questioned the monuments' place on the National Register. Similarly, neither the National Park Service nor the federal government more broadly has expressed any plans to delist the monuments. Although the Congressional Research Service has published pieces that touch on the presence of references to the Confederacy within the dominion of the federal government, including the relationship between Confederate monuments and the National Register,⁵⁷ these pieces have not suggested that Confederate monuments will or should, by government action, be removed from the National Register. In questioning their fitness for National Register recognition, this article offers a novel analysis of Confederate monuments and their management by the National Park Service and makes a necessary contribution to the area of historic preservation law.

II. CONFEDERATE MONUMENTS CURRENTLY LISTED ON THE NATIONAL REGISTER

The National Register has recognized Confederate monuments among its property listings since at least 1973,⁵⁸ but the National Park Service does not maintain a separate list of properties associated with the Confederacy on the National Register. A review of properties on the National Register whose names contain the words “Confederate Monument” or “Confederate Memorial” reveals seventy-five properties located throughout the former Confederacy.⁵⁹ This review, however, fails to account for many other monuments associated with the Confederacy. For example, the Jefferson Davis Monument in Fairview, Kentucky, commemorates the birthplace of Jefferson Davis.⁶⁰ The site has no purpose other than to memorialize the birthplace of the Confederacy's first and only president.⁶¹ The monument is listed on the National Register, but because its name does not contain the words “Confederate” or “Confederacy,” it does not appear in the results of searches involving

<https://www.fayettevilleflyer.com/2020/09/03/confederate-statue-removed-from-downtown-bentonville/>.

⁵⁷ See, e.g., LAURA B. COMAY ET AL., CONG. RSCH. SERV., R44959, CONFEDERATE SYMBOLS: RELATION TO FEDERAL LANDS AND PROGRAMS 6–8, 10–11 (updated July 28, 2020).

⁵⁸ See UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, JEFFERSON DAVIS MONUMENT, NAT'L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY (1973), <https://npgallery.nps.gov/NRHP/GetAsset/b078e0a1-8471-4a25-9abf-b6367cee9e16>.

⁵⁹ *National Register Database and Research*, *supra* note 8 (In the search bar under “Search Properties Listed in the National Register of Historic Places,” conduct two searches. First, search for “Confederate monument.” Second, search for “Confederate memorial.” Each search will yield a list of properties.).

⁶⁰ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, JEFFERSON DAVIS MONUMENT, *supra* note 58, at 3, 5.

⁶¹ See *id.*

those terms. And Jefferson Davis is not the only Confederate leader memorialized through a monument. At least three monuments listed on the National Register venerate General Robert E. Lee, for example.⁶² Numerous other monuments recognize lesser-known and relatively unknown Confederate soldiers without mentioning the terms “Confederate Monument” or “Confederate Memorial” as part of their names.⁶³ Thus, because many monuments celebrating individuals who served the Confederacy do not explicitly reference the Confederacy in their names, it is difficult to determine the exact number of Confederate monuments currently listed on the National Register.

For a property to become listed on the National Register, or be deemed eligible for listing, it must satisfy requirements laid out in the governing federal regulations. The regulations state that a property must “possess integrity of location, design, setting, materials, workmanship, feeling, and association,”⁶⁴ and it must additionally satisfy *at least one* of four Criteria for Evaluation (Criteria A–D).⁶⁵ Review of listed Confederate monuments’ nomination forms indicates that the National Park Service has listed them on the National Register pursuant to Criterion A, and in a few cases, also Criterion C.⁶⁶ To qualify for listing pursuant to Criterion A, a property must be “associated with events that have made a significant contribution to the broad patterns of our history.”⁶⁷ To qualify pursuant to Criterion C, a property must “embody the distinctive characteristics of a type, period, or method of construction, . . . represent the work of a master, . . . possess high artistic values, or . . . represent a significant and distinguishable entity whose components may lack individual distinction.”⁶⁸

⁶² *National Register Database and Research*, *supra* note 8 (In the search bar under “Search Properties Listed in the National Register of Historic Places,” search for “Robert E. Lee” to see a list of monuments and other properties that have a connection to the general.)

⁶³ *See, e.g.*, UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, COL. ROBERT A. SMITH MONUMENT, NAT’L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY (1997), <https://npgallery.nps.gov/NRHP/GetAsset/a65da930-61c0-4be3-9159-2efbd68ea714/>.

⁶⁴ 36 C.F.R. § 60.4 (2020).

⁶⁵ *Id.*

⁶⁶ Review of Confederate monuments’ nominations forms did not reveal any instances of Confederate monuments satisfying the Criteria for Evaluation through Criteria B or D.

⁶⁷ 36 C.F.R. § 60.4.

⁶⁸ *Id.* A survey of listed Confederate monuments suggests that monuments whose nomination forms state that they qualify through Criterion C also state that the monuments qualify through Criterion A. It appears that no nomination forms for Confederate monuments indicate that the monuments qualify for the National Register only because of their artistic or architectural value.

Generally, nomination forms seeking to place Confederate monuments on the National Register pursuant to Criterion A emphasize the monuments' association with the movement to memorialize the Confederacy as the reason they warrant National Register recognition, rather than the monuments' relationship with the Civil War itself.⁶⁹ The nomination form for the Rankin County Confederate Monument in Brandon, Mississippi, for instance, asserts that the monument "merits National Register eligibility as an expression of the Confederate Memorial movement[,] which was a historically significant social movement in the postbellum South."⁷⁰

Nomination forms asserting that monuments qualify for listing through Criterion C emphasize their architectural or artistic value. To name one example, the nomination form for the Robert E. Lee monument in Richmond, Virginia, declares that the monument has "outstanding artistic quality and design," that "[i]t is a masterpiece of the internationally renowned French academic sculptor Marius-Jean-Antonin Mercié," that it "reflects the values of the French academic tradition of sculpture," and that it therefore qualifies for National Register recognition pursuant to Criterion C.⁷¹

⁶⁹ See, e.g., UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, LEE, ROBERT E., MONUMENT, NAT'L ARCHIVES CATALOG 3 (1991), https://s3.amazonaws.com/NARAprdstorage/lz/electronic-records/rg-079/NPS_LA/91000254.pdf [hereinafter LEE, ROBERT E., MONUMENT] (asserting that the monument has significance because of its relationship with the Lost Cause movement, which produced "innumerable memorials"). This is probably because most Confederate monuments appeared decades after 1865 and have only an attenuated relationship with the events of the Civil War. See, e.g., UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, CONFEDERATE MONUMENT, NAT'L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY 6 (1997), <https://npgallery.nps.gov/NRHP/GetAsset/eca78fe7-249e-4cd5-a4de-e515a2ec59f7> (stating that a United Daughters of the Confederacy chapter and a Confederate veterans organization erected the monument in 1910).

⁷⁰ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, RANKIN COUNTY CONFEDERATE MONUMENT, NAT'L ARCHIVES CATALOG 5 (1997), https://s3.amazonaws.com/NARAprdstorage/lz/electronic-records/rg-079/NPS_MS/97000797.pdf.

⁷¹ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, ROBERT E. LEE MONUMENT, NAT'L ARCHIVES CATALOG 6-7 (2007), https://catalog.archives.gov/OpaAPI/media/41683201/content/electronic-records/rg-079/NPS_VA/06001213.pdf. The monument is currently at the center of a legal battle over whether it can be removed from its current location. See, e.g., Azi Paybarah, *Virginia Governor Can Remove Robert E. Lee Statue, but Not Yet, Judge Rules*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/us/lee-statue-richmond-virginia.html>. Should the monument be removed, it will not necessarily be delisted from the National Register. See VA. DEP'T OF HIST. RES., DHR GUIDANCE REGARDING CONFEDERATE MONUMENTS 5 (2020), <https://www.dhr.virginia.gov/wp->

The governing regulations further state that “properties primarily commemorative in nature . . . shall not be considered eligible for the National Register,” even if they satisfy at least one of the Criteria for Evaluation, unless they also satisfy the requirements of at least one of several “Criteria Considerations,” or “they are integral parts of [historic] districts that . . . meet the [C]riteria” for Evaluation.⁷² Because Confederate monuments tend to be “primarily commemorative in nature,”⁷³ in order to qualify for National Register recognition, they must also satisfy the requirements of at least one Criteria Consideration or function as an integral part of a historic district that meets the Criteria for Evaluation.⁷⁴ The nomination forms of Confederate monuments listed on the National Register generally specify that they qualify through Criteria Consideration F,⁷⁵ which covers commemorative properties whose

content/uploads/2020/06/Monument-Removal-Guidance-Letterhead.pdf (indicating that a monument can remain on the National Register despite physical removal from a particular location). Indeed, the Robert E. Lee monument formerly on display in New Orleans remains listed even though it has been physically removed. *See* LEE, ROBERT E., MONUMENT, *supra* note 69; *National Register Database and Research*, *supra* note 8 (In the search bar under “Search Properties Listed in the National Register of Historic Places,” search for “Lee, Robert E., Monument.” The property is displayed in the results.); Richard Gonzales & Amy Held, *New Orleans Takes Down Statue of Gen. Robert E. Lee*, NPR (May 19, 2017, 3:23 PM), <https://www.npr.org/sections/thetwo-way/2017/05/19/529130606/new-orleans-prepares-to-take-down-statue-of-gen-robert-e-lee>.

⁷² 36 C.F.R. § 60.4. *See also* NAT’L PARK SERV., HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 25 (4th ed. 1997) (“Certain kinds of properties are not usually considered eligible for listing in the National Register: religious properties, moved properties, birthplaces and graves, cemeteries, reconstructed properties, commemorative properties, and properties achieving significance within the past 50 years. These properties *can* be eligible for listing, however,” if they satisfy one of seven Criteria Considerations (A-F) *in addition to* at least one of the Criteria for Evaluation.).

⁷³ 36 C.F.R. § 60.4.; *cf.* NAT’L PARK SERV., *supra* note 72, at 39 (“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 the person’s productive life, but serve as evidence of a later generation’s assessment of the past.”); Phelps & Owley, *supra* note 28, at 638 (“Supporters of Confederate monuments often argue that they are purely commemorative . . .”).

⁷⁴ *Cf.* UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, RANKIN COUNTY CONFEDERATE MONUMENT, *supra* note 70, at 4 (indicating in the “Statement of Significance” section that the property is “a commemorative property”).

⁷⁵ *See, e.g.*, LEE, ROBERT E., MONUMENT, *supra* note 69, at 3. A survey of nomination forms of Confederate monuments listed on the National Register does not reveal any properties listed pursuant to any other Criteria Considerations.

“design, age, tradition, or symbolic value has invested [them] with [their] own exceptional significance.”⁷⁶

Unfortunately, the nomination forms for these monuments do not explicitly specify which of the Criteria Consideration F factors — “design, age, tradition, . . . symbolic value,”⁷⁷ or some combination thereof — initially rendered the monuments eligible for National Register listing.⁷⁸ In fact, many nomination forms do not provide a list of the factors. Of these, some simply invite individuals completing the forms to indicate whether the monument is a “commemorative property” among a list of the Criteria Considerations.⁷⁹ Others list only the applicable letters associated with the Criteria Considerations.⁸⁰ Nonetheless, the listing of Confederate monuments on the National Register suggests that the National Park Service has determined that they satisfy Criteria Consideration F.

The National Park Service’s approval of Confederate Monuments’ nominations indicates that it has viewed the Confederate memorialization movement as an “event[] that ha[s] made a significant contribution to the broad patterns of our history,”⁸¹ that Confederate monuments are significant physical symbols of that movement, and that Confederate monuments can “embody the distinctive characteristics of a type, period, or method of construction, . . . represent the work of a master, . . . possess high artistic values, or . . . represent a significant and distinguishable entity whose components may lack individual distinction.”⁸² In other words, the placement of Confederate monuments on the National Register shows that the National Park Service has determined that these monuments convey the messages of the movement that led to their construction, and, in some cases, that they possess aesthetic value worth honoring.⁸³

⁷⁶ 36 C.F.R. § 60.4.

⁷⁷ *Id.*

⁷⁸ *See, e.g.*, UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, CONFEDERATE MONUMENT, NAT’L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY 3–4 (1997), <https://npgallery.nps.gov/NRHP/GetAsset/23071047-94bf-4bb3-8695-83acd9447011>.

⁷⁹ *See, e.g., id.*

⁸⁰ *See, e.g.*, LEE, ROBERT E., MONUMENT, *supra* note 69, at 3.

⁸¹ 36 C.F.R. § 60.4.

⁸² *Id.*

⁸³ *Cf. Confederate Monuments*, NAT’L PARK SERV., <https://www.nps.gov/gett/learn/historyculture/confederate-monuments.htm> (last updated Sept. 24, 2020) (“The National Park Service is committed to preserving these memorials while simultaneously educating visitors holistically about the actions, motivations, and causes of the soldiers and states they commemorate.”).

III. SHOULD THE NATIONAL REGISTER LIST CONFEDERATE MONUMENTS?

A property's listing on the National Register is "primarily an honor."⁸⁴ This Part argues that, in light of society's growing consciousness of the history of Confederate monuments and the messages they convey, the National Park Service should not list them on the National Register. Section A explains that Confederate monuments do not meet the federally promulgated requirements necessary for placement on the National Register. Section B then makes a normative argument. It describes communities' decisions to stop honoring individuals and symbols associated with the Confederacy and asserts that the federal government should likewise not honor Confederate monuments through National Register listing. Not only in a legal sense, but also a normative sense, these monuments do not merit National Register recognition. Finally, Section C avers that even though some people may view Confederate monuments more positively, their views do not justify the continued recognition of these monuments by the National Register.

A. Confederate Monuments Do Not Meet the Requirements for National Register Listing

The National Register's listing requirements do not explicitly consider whether a property deserves honor. However, consideration of the history of Confederate monuments and of the messages they convey in relation to the listing requirements promulgated by the National Park Service informs whether they can qualify for National Register listing. With this type of analysis in mind, Subsection 1 explains that Confederate monuments do not meet the requirements of Criterion A or Criterion C of the National Register's Criteria for Evaluation. Similarly, Subsection 2 avers that they do not satisfy the additional requirements of Criteria Consideration F, and that they do not qualify for listing as integral parts of historic districts. Consequently, under the current legal framework, Confederate monuments fail to qualify for National Register recognition.

1. Confederate Monuments Fail to Qualify for Listing Pursuant to Criteria A and C

Review of nomination forms associated with Confederate monuments on the National Register reveals that these monuments are typically listed because of their "associat[ion] with events that have made a significant contribution to the broad patterns of our history," pursuant to Criterion A.⁸⁵

⁸⁴ A Comparison to the National Register of Historic Places, *supra* note 21.

⁸⁵ 36 C.F.R. § 60.4; *see, e.g.*, UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, CONFEDERATE MEMORIAL, NAT'L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY 3, 6 (1997),

But what does “contribution” mean under these circumstances? *Merriam-Webster* offers several definitions of the word, including “something that is given or supplied . . . as a part or share” and “something that plays a significant part in making something happen.”⁸⁶ The dictionary lists synonyms as “benefaction,” “charity” and “philanthropy.”⁸⁷ It also provides a few examples of sentences using “contribution.” For instance: “They thanked him for his *contribution* of time and money.”⁸⁸ While the dictionary does not explicitly state that the word “contribution” cannot express a negative outcome or process, the synonyms and example sentences convey a positive, progressive connotation. This signals that, in terms of evaluating a property for the National Register, a property’s “contribution to the broad patterns of our history”⁸⁹ should be one that speaks to progress in American society.⁹⁰

<https://npgallery.nps.gov/NRHP/GetAsset/5c270439-b867-4b8c-b612-97cc1e91d841>.

⁸⁶ *Contribution*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/contribution> (last visited Oct. 15, 2020).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 36 C.F.R. § 60.4.

⁹⁰ Some properties listed on the National Register, such as still-standing slave quarters, *e.g.*, UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-900, DOVER SLAVE QUARTER COMPLEX, NAT’L ARCHIVES CATALOG (2002), https://catalog.archives.gov/OpaAPI/media/41680987/content/electronic-records/rg-079/NPS_VA/02001005.pdf, do not outwardly signify progress in American society. Slave quarters, for example, stand as physical remnants of human enslavement and suffering. Yet, they may also be seen as monuments to those who endured the horrors of slavery — honoring and acknowledging their suffering, but also their aspirations for a better life, and freedom and liberty (values that America seeks to promote). The designation of the Auschwitz Birkenau, a German concentration and extermination camp, as a UNESCO World Heritage Site reflects similar reasoning. *See Auschwitz Birkenau*, UNESCO WORLD HERITAGE CTR., <https://whc.unesco.org/en/list/31/> (last visited Oct. 6, 2020) (averring that the site is a “monument to the deliberate genocide of the Jews by the German Nazi regime and to the deaths of countless others” and “a monument to the strength of the human spirit which . . . resisted the efforts of the German Nazi regime”). By serving the dual purpose of acknowledging the suffering that took place within their boundaries while promoting respect for the individuals who endured it and honoring their legacy, these properties arguably stand as a reflection of how far American society has come — progress. Indeed, preserving such properties “has become a central effort in the historic preservation field.” J. Peter Byrne, *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws* 4 n.16 (2020) (citing *Summer 2016 Forum Journal: The Full Spectrum of History: Prioritizing Diversity and Inclusion in Preservation*, PRES. LEADERSHIP F. NAT’L TR. FOR HIST. PRES. (Sept. 8, 2016), <https://forum.savingplaces.org/viewdocument/summer-2016-forum-jo>).

The National Park Service’s guidelines for evaluating properties for the National Register under Criterion A lend additional support to this theory. Importantly, the guidelines list examples of properties that would qualify for the National Register under Criterion A.⁹¹ Examples include: “[t]he building in which an important invention was developed,” and a “downtown district representing a town’s growth as the commercial focus of the surrounding agricultural area.”⁹² These examples, and others, reflect progress in society and signal that the word “contribution,” as used in Criterion A, should be interpreted to take on a connotation reflective of that progress.

This understanding of the National Park Service’s interpretation of “contribution,” combined with a growing consciousness of the history of Confederate monuments and the messages they convey, indicates that these monuments do not satisfy Criteria A. The Confederate memorialization movement that led to the creation of the monuments (and to which their National Register listing is tied) did not promote progress in American society. While the movement may have enabled some members of society to celebrate their history rather than feel ashamed by it,⁹³ it also conveyed messages that marginalized and threatened Blacks,⁹⁴ and it promoted an inaccurate version of history,⁹⁵ glorifying individuals who fought to maintain the enslavement and oppression of their fellow Americans. The removal of over 200 Confederate monuments and symbols in recent years,⁹⁶ as well as calls to remove or contextualize remaining monuments,⁹⁷ reflect the realization that these monuments do

⁹¹ See NAT’L PARK SERV., *supra* note 72, at 12.

⁹² *Id.*

⁹³ See Phelps & Owley, *supra* note 28, at 634.

⁹⁴ See *AHA Statement on Confederate Monuments*, AM. HIST. ASS’N (Oct. 1, 2017), <https://www.historians.org/publications-and-directories/perspectives-on-history/october-2017/aha-statement-on-confederate-monuments> (“Memorials to the Confederacy were intended, in part, . . . to intimidate African Americans politically and isolate them from the mainstream of public life.”); 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> (“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.’”).

⁹⁵ Phelps & Owley, *supra* note 28, at 636–37.

⁹⁶ See *SPLC Whose Heritage? Dataset Updates as of August 11, 2020*, S. POVERTY L. CTR. (Aug. 11, 2020), <https://www.splcenter.org/presscenter/splc-whose-heritage-dataset-updates-august-11-2020>.

⁹⁷ See, e.g., Allison Winter, *Confederate Statues Would Be Removed from National Parks Under New Push in Congress*, GA. RECORDER (Aug. 31, 2020), <https://georgiarecorder.com/2020/08/31/confederate-statues-would-be-removed-from-national-parks-under-new-push-in-congress/>.

not symbolize progress in society. While other properties listed on the National Register honor the lives of advocates for women's rights⁹⁸ and revolutionary scientific advances in medicine,⁹⁹ Confederate monuments represent a movement that promoted a false historical narrative and supported the reduction of Black Americans to second-class citizens.

Confederate monuments whose nomination forms aver that they not only qualify for National Register listing through Criterion A, but also Criterion C,¹⁰⁰ fare no better, despite any technical architectural or artistic value that they embody. Federal law recognizes that the United States need not hold all art in high regard and allows the federal government to avoid promoting and supporting art that endorses values antithetical to those of American society.¹⁰¹ Confederate monuments do not reflect moral values that American society seeks to encourage and celebrate. Instead, they reflect values that communities actively strive to discourage;¹⁰² values that

⁹⁸ See, e.g., UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, SUSAN B. ANTHONY HOUSE, NAT'L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY 3 (1978), <https://npgallery.nps.gov/NRHP/GetAsset/37b3fc18-5f6d-4327-915f-ebb0f031c594> (emphasizing "Susan B. Anthony's prominent role in the wom[e]n's rights movement").

⁹⁹ See, e.g., UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, ETHER DOME, NAT'L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY 3 (1978), <https://npgallery.nps.gov/NRHP/GetAsset/fe6d94f0-71a6-4766-8644-d28aff02b855> (explaining that Massachusetts General Hospital's Ether Dome was the site of the first public medical operation to use inhaled ether gas as an anesthetic).

¹⁰⁰ Because properties need only meet the requirements of one of the Criteria for Evaluation, see 36 C.F.R. § 60.4 (2020), a property's qualification through Criterion C could render it suitable for National Register recognition without regard to the other Criteria for Evaluation.

¹⁰¹ See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 569 (1998) (quoting 20 U.S.C. § 954(d)(1) (1990) (amended 2014)) (upholding as constitutional a statute requiring the Chairperson of the National Endowment for the Arts ("NEA"), a federal agency, to consider "general standards of decency and respect" for the American public's diverse values and beliefs as part of the evaluation process for determining awards of NEA funds to artists). The statute at issue in *Finley* authorizes the NEA to avoid providing funding for artistic endeavors that violate those standards of "decency and respect," see *id.*, and it signifies the federal government's determination that society's values can affect whether particular artworks receive state-sponsored promotion and support.

¹⁰² See, e.g., Debbie Truong, *A Virginia High School That Honored a Confederate General Gets a New Name: Washington-Liberty*, WASH. POST (Jan. 11, 2019, 10:00 AM), https://www.washingtonpost.com/local/education/a-virginia-school-that-honored-a-confederate-general-gets-a-new-name-washington-liberty-high/2019/01/10/4e5e1bee-1553-11e9-90a8-136fa44b80ba_story.html (explaining that supporters of Washington-Lee High School's renaming viewed the reference to Robert E. Lee, a person "who fought to preserve slavery," as inappropriate).

sanction hate, discrimination, and violence.¹⁰³ Their reflections of these values render them inappropriate for National Register designation through satisfaction of Criterion C's requirements.¹⁰⁴

2. Confederate Monuments Do Not Satisfy Criteria Consideration F and They Need Not Remain Listed as Integral Parts of Listed Historic Districts

The nomination forms for Confederate monuments do not explicitly specify how they meet the requirements of Criteria Consideration F.¹⁰⁵ However, the National Park Service guidelines for evaluating a property for the National Register provide examples of properties that would meet those requirements. For instance, the guidelines assert that a "late [nineteenth] century statue erected . . . 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."¹⁰⁶ Another example states that "a monument to an important historical figure will qualify if through the passage of time the property itself has come to symbolize the value placed upon the individual and is widely recognized as a reminder of enduring principles or contributions valued by the generation that erected the monument."¹⁰⁷

While it appears that these examples actively authorize the placement of Confederate monuments on the National Register, note that the National Park Service last updated its guidelines in 1997,¹⁰⁸ long before today's increasingly pervasive recognition of the full history of the construction of Confederate monuments.¹⁰⁹ Twenty-four years later, the "principles or contributions valued by the generation that erected the

¹⁰³ See, e.g., 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/> (describing the events of the August 2017 "Unite the Right" rally in Charlottesville).

¹⁰⁴ Cf. Byrne, *supra* note 90, at 3 ("Whatever . . . aesthetic values these monuments may possess are dwarfed by the danger they pose . . .").

¹⁰⁵ See, e.g., LEE, ROBERT E., MONUMENT, *supra* note 69, at 3 (listing only the applicable letters associated with the Criteria for Evaluation and Criteria Considerations). As properties "primarily commemorative in nature," Confederate monuments must satisfy the requirements of at least one of the Criteria for Evaluation *and* they must either satisfy the requirements of one of several Criteria Considerations or function as "integral parts of [historic] districts that . . . meet the [C]riteria" in order to qualify for National Register listing. 36 C.F.R. § 60.4 (2020).

¹⁰⁶ NAT'L PARK SERV., *supra* note 72, at 39.

¹⁰⁷ *Id.* at 40.

¹⁰⁸ *Id.* at edition notice.

¹⁰⁹ See Phelps & Owley, *supra* note 28, at 630 ("Although past debates centered on the Confederate battle flag, advocates recently renewed their efforts to remove Confederate monuments, particularly those in public spaces.").

monument[s]” are arguably not “enduring.”¹¹⁰ American society is increasingly aware that the supposed veneration of the “noble character and valor of the veterans and their cause” often masked a more sinister motive.¹¹¹ In addition, even during the periods in which Confederate monuments were constructed, the perception that Confederate veterans and their cause were worth honoring was arguably not shared by all or even most members of American society.¹¹²

The proffered examples suggest that the National Register should recognize commemorative properties, such as monuments, that reflect values that American society seeks to encourage. It is now widely acknowledged that Confederate monuments do not promote such values. Instead, they propagandize white supremacist views and normalize a fictional version of history. Surely American society does not seek to promote white supremacy or dishonesty. Thus, despite the guidelines’ apparent sanctioning of listing Confederate monuments on the National Register, changes in societal views and beliefs signal that the monuments do not now meet the requirements of Criteria Consideration F.¹¹³

Historic districts recognized by the National Register provide no safe harbor for Confederate monuments. The National Historic Preservation Act requires federal agencies to give the Advisory Council on Historic Preservation an opportunity to comment on projects that may affect properties listed, or eligible for listing, on the National Register.¹¹⁴ But the

¹¹⁰ NAT’L PARK SERV., *supra* note 72, at 39; *see, e.g.*, Artemis Moshtagian & Susanne Cullinane, *NC Governor Orders Removal of Confederate Statues at State Capitol*, CNN (updated June 20, 2020, 5:48 PM), <https://www.cnn.com/2020/06/20/us/north-carolina-confederate-statues-removed/index.html> (averring that, in ordering the removal of Confederate monuments at the state Capitol, North Carolina’s governor stated that “monuments to white supremacy don’t belong in places of allegiance”).

¹¹¹ NAT’L PARK SERV., *supra* note 72, at 40; *see Whose Heritage?*, *supra* note 23.

¹¹² *Cf.* Jay Smith, *African-Americans Have Long Defied White Supremacy and Celebrated Black Culture in Public Spaces*, MINNPOST (Aug. 11, 2020), <https://www.minnpost.com/politics-policy/2020/08/african-americans-have-long-defied-white-supremacy-and-celebrated-black-culture-in-public-spaces/> (“African[]Americans have been protesting against Confederate monuments since they were erected.”).

¹¹³ The Advisory Council on Historic Preservation, an independent federal agency, has stated that “[i]t is essential to acknowledge that societal values are fluid, and such values, particularly those associated with a memorial or monument, may be very different today from when it was created.” *ACHP Policy Statement on Controversial Commemorative Works*, ADVISORY COUNCIL ON HIST. PRES. (Mar. 22, 2018), <https://www.achp.gov/digital-library-section-106-landing/achp-policy-statement-controversial-commemorative-works>. It further declared that “[m]anagement decisions must necessarily take into account the views and needs of the contemporary community.” *Id.*

¹¹⁴ NAT’L PARK SERV., *supra* note 13, at 12; 36 C.F.R. § 800.1(a) (2020).

Act does not require agencies to preserve the properties.¹¹⁵ Therefore, an agency's project can result in the complete destruction of a historic property without running afoul of the Act. Moreover, countervailing agency needs or public policy concerns can outweigh the value of keeping a property listed on the National Register.¹¹⁶ The same logic applies to Confederate monuments within historic districts. These monuments represent racist beliefs and promote an untruthful historical narrative,¹¹⁷ harming the communities in which they stand.¹¹⁸ And their effects are not only mental or emotional; Confederate monuments invite and incite violence.¹¹⁹ They raise significant public policy concerns that outweigh the value of their continued listing on the National Register. Thus, Confederate monuments currently listed on the National Register because of their status as integral parts of listed historic districts need not remain listed as such.¹²⁰

B. American Society Has Rejected and Replaced References to the Confederacy

Since the June 2015 attack in Charleston, communities across the country, from Washington State to Florida, have removed over 200

¹¹⁵ NAT'L PARK SERV., *supra* note 13, at 12; *see also* Walsh v. U.S. Army Corps of Eng'rs, 757 F. Supp. 781, 784 (W.D. Tex. 1990) (asserting that the National Historic Preservation Act "create[s] only procedural, not substantive rights").

¹¹⁶ *Cf.* Landmarks Pres. Council of Ill. v. City of Chicago, 531 N.E.2d 9, 12 (Ill. 1988) (mentioning that "the public benefits of the redevelopment . . . significantly outweigh[ed] the architectural or aesthetic value of the" building at issue).

¹¹⁷ *See Statement on Confederate Memorials: Confronting Difficult History*, *supra* note 41.

¹¹⁸ *See, e.g.*, Heim, *supra* note 103.

¹¹⁹ *See, e.g.*, Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>.

¹²⁰ Should these monuments actually serve as integral parts of listed historic districts, their delisting could have implications for the entirety of the historic districts within which they stand. Analysis of nomination forms for Confederate monuments listed on the National Register, however, does not reveal any monuments listed as integral parts of listed historic districts. Consequently, it appears unlikely that removing Confederate monuments from the National Register would result in the dissolution or removal of currently listed historic districts. *Cf.* VA. DEP'T OF HIST. RES., *supra* note 71, at 6 ("Concerning most historic districts in Virginia, removal of a monument/memorial that is a contributing object or structure likely would not cause the entire district to be delisted.").

monuments and other symbols of the Confederacy.¹²¹ These removals reflect an increasingly widespread understanding of what and who deserves honor.

First, numerous schools formerly named after prominent Confederate figures have taken on new names. In 2018, for instance, the city of Richmond changed the name of J.E.B. Stuart Elementary School to Barack Obama Elementary School.¹²² Richmond's mayor noted that the name change "corrected a 'serious contradiction' in having students, mostly of color, attend a school named after a figure who fought to preserve slavery."¹²³ Similarly, in Arlington, Virginia, Washington-Lee High School became Washington-Liberty High School at the beginning of the 2019–2020 school year after the local school board determined that Robert E. Lee's "principal legacy" did not reflect Arlington Public Schools' values.¹²⁴ Even more recently, in July 2020, the Montgomery County Board of Education in Montgomery County, Alabama, voted to change the names of high schools named after Jefferson Davis, Robert E. Lee, and Sidney Lanier (a Confederate veteran and poet).¹²⁵ In changing the names of schools, Richmond, Arlington, Montgomery County, and many other communities¹²⁶ have decided that their schools should not honor important figures in Confederate history.

Second, communities have removed names referencing the Confederacy and individuals who served it from buildings, streets, parks, and even holidays.¹²⁷ In 2016, Vanderbilt University changed the name of

¹²¹ *SPLC Whose Heritage? Dataset Updates as of August 11, 2020*, *supra* note 96.

¹²² Christine Hauser, *Virginia School Drops Confederate General's Name in Favor of Obama's*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/us/barack-obama-elementary-school.html>.

¹²³ *Id.*

¹²⁴ Truong, *supra* note 102.

¹²⁵ Krista Johnson, *Montgomery School Board Votes to Change the Confederate Names of Three High Schools*, MONTGOMERY ADVERTISER (July 14, 2020), <https://www.montgomeryadvertiser.com/story/news/education/2020/07/14/montgomery-high-schools-jefferson-davis-robert-e-lee-sidney-lanier-confederacy-name-changes-board/5433727002/>.

¹²⁶ Communities in states such as Mississippi, Oklahoma, Texas, and Florida have also renamed schools formerly named after individuals associated with the Confederacy. *See Whose Heritage?*, *supra* note 24 (Scroll down to the map embedded in the site. Select the sidebar tool in the upper left corner and unselect "2019 Active" to view location markers indicating where schools have been renamed.).

¹²⁷ *See id.* (Use the embedded map and "2019 Removed" feature to display location markers pinpointing where, and what kinds of, references to the Confederacy have been removed.).

a dormitory from Confederate Memorial Hall to simply Memorial Hall.¹²⁸ As part of a public statement regarding the change, Vanderbilt's chancellor noted that "[t]he name [Confederate Memorial Hall] is discordant with our own work under the founding charge of Cornelius Vanderbilt, to find union and healing after the bloodshed of the Civil War."¹²⁹ Similarly, in October 2018, the city government of Atlanta, Georgia, changed the names of Confederate Avenue, East Confederate Avenue, and Confederate Court to United Avenue, United Avenue Southeast, and Trestletree Court, respectively.¹³⁰ In support of the changes, Atlanta's mayor asserted that "[t]he imagery and symbolism of [the former] names . . . represent systematic injustice, persecution and cruelty."¹³¹ And in July 2020, city officials in Petersburg, Virginia, decided to rename a park named after Robert E. Lee to Petersburg Legends Historical Park in honor of successful athletes who honed their skills at the park.¹³²

Third, mere symbols of the Confederacy, even those without explicit language linking them to Confederate history, have also been removed from display in recent years. These removals reflect the view that the Confederacy does not belong in spaces typically reserved for ideas, symbols, and people of honor. For example, shortly after the June 2015 attack in Charleston, the College of William and Mary removed a depiction of the Confederate seal and battle flag from a mace carried during official ceremonies.¹³³ In his announcement of the removal, the school's president stated that the William and Mary community should be

¹²⁸ Elizabeth Latt, *Vanderbilt to Remove 'Confederate' Inscription from Residence Hall*, VANDERBILT UNIV. (Aug. 15, 2016, 1:45 PM), <https://news.vanderbilt.edu/2016/08/15/vanderbilt-will-remove-confederate-inscription-from-residence-hall/>.

¹²⁹ *Id.*

¹³⁰ Emily Sullivan, *Atlanta to Change Names of Streets That Honored Confederacy*, NPR (Oct. 4, 2018, 6:57 AM), <https://www.npr.org/2018/10/04/648290022/atlantas-mayor-signs-bill-to-change-streets-named-after-confederacy>. Although Atlanta residents had advocated for many years to rename the avenues, the 2015 Charleston shooting and the 2017 violence in Charlottesville renewed and strengthened support for the changes. Rosalind Bentley, *Atlanta Mayor Signs Bills Changing Confederate Street Names*, ATLANTA J. CONST. (Oct. 3, 2018), <https://www.ajc.com/news/local/just-atlanta-confederate-streets-get-new-names/uStM5kDReX0Y5CmemAygrM/>.

¹³¹ Sullivan, *supra* note 130.

¹³² Wayne Covil & Scott Wise, *Lee Park Renamed to Honor Moses Malone, Other Petersburg Legends*, WTVR CBS 6 NEWS (July 21, 2020), <https://www.wtvr.com/news/local-news/lee-park-renamed-to-honor-moses-malone-other-petersburg-legends>.

¹³³ See Taylor Reveley, *Confederate Plaque and College Mace*, COLL. OF WM. & MARY (Aug. 14, 2015), <https://www.wm.edu/news/announcements/2015/confederate-plaque-and-college-mace.php>.

“welcoming to everyone who is part of our university’s life.”¹³⁴ In June 2020, lawmakers in Mississippi changed the state’s flag, abandoning a design in use since 1894 that featured the Confederate battle flag.¹³⁵ Mississippi’s governor explained that because a flag represents the state’s past, present, and future, Mississippi needed a new symbol.¹³⁶ The same month, the United States Marine Corps banned the display of the Confederate flag in public spaces on Marine Corps installations.¹³⁷ Likewise, in July 2020, the United States Department of Defense effectively banned the display of the Confederate flag on American military bases around the world.¹³⁸

Communities’ decisions to remove names and symbols referencing the Confederacy indicate that they have decided that the Confederacy, and those who served it, do not deserve honor. These communities have rejected the continued reverence of those who fought to preserve slavery and the injustice it entailed, and they have replaced references to Confederate history with references to individuals and symbols that more accurately represent their communities’ values. The reasoning behind communities’ decisions to stop honoring the Confederacy also applies well to Confederate monuments on the National Register: If communities around the country are refusing to honor the Confederacy, and removing names and symbols associated with it from places of prominence, the federal government should not venerate the Confederate cause or individuals who served the Confederacy by honoring Confederate monuments through National Register listing.

¹³⁴ *Id.*

¹³⁵ Mark Berman & Ben Guarino, *Mississippi Governor Signs Bill Changing State’s Flag, Abandoning Confederate Symbol*, WASH. POST (June 30, 2020, 6:12 PM), https://www.washingtonpost.com/national/mississippi-flag-confederacy-removed/2020/06/30/f47df152-baed-11ea-8cf5-9c1b8d7f84c6_story.html.

¹³⁶ *Id.* By law, the new flag could not include the Confederate emblem, *id.*, and in November 2020, Mississippians chose a new design featuring a magnolia flower. Rick Rojas, *Mississippi Voters Approve Flag with Magnolia Instead of Confederate Symbol*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/03/us/politics/mississippi-voters-approve-flag-with-magnolia-instead-of-confederate-symbol.html>.

¹³⁷ Diana Stancy Correll, *Marine Corps Bars Public Display of Confederate Flag on Installations*, MARINE CORPS TIMES (June 6, 2020), <https://www.marinecorpstimes.com/news/your-marine-corps/2020/06/06/marine-corps-bars-public-display-of-confederate-flag-on-installations/>; COMAY ET AL., *supra* note 58, at 16.

¹³⁸ Helene Cooper, *Pentagon Sidesteps Trump to Ban the Confederate Flag*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/politics/pentagon-trump-confederate-symbols.html>.

C. But What of Heritage, History, and Memory?

While some individuals or groups may regard Confederate monuments more positively — associating the monuments with the celebration of Southern heritage, appreciating them as historical artifacts, or viewing them as memorials to those who lost their lives during the Civil War — these views do not justify honoring the monuments through National Register listing. Indeed, historic preservation organizations — groups dedicated to the protection and preservation of the United States’ historic sites — have recognized that although Confederate monuments may help individuals commemorate their heritage, serve historical purposes, or remember lives that were lost, the monuments’ association with oppression and white supremacy overshadows these functions.¹³⁹ For people who view Confederate monuments in a positive light, delisting the monuments from the National Register could come across as an affront to their views.¹⁴⁰ Glorification of white supremacy, however, is not a prerequisite to being Southern, understanding and learning from history,

¹³⁹ See, e.g., *National Trust for Historic Preservation 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#.XxyIcy85RDU> (stating that while some Confederate monuments “were erected . . . for reasons of memorialization” and some have been recognized as historic, removal of these monuments “may be necessary to achieve the greater good of ensuring racial justice and equality”); cf. *Our Statement on Confederate Monuments*, PRES. N.C., <https://www.presnc.org/news/statement-confederate-monuments/> (last visited Oct. 7, 2020) (“As preservationists and story-tellers, we believe it is necessary for us to reinforce our stand against white supremacy and racism by supporting the removal of Confederate monuments.”); *Confederate Monuments — Frequently Asked Questions*, NAT’L TR. FOR HIST. PRES., <https://savingplaces.org/confederate-monuments-faqs#.XxybIC85RDV> (last visited Oct. 7, 2020) (explaining that “[w]hile these monuments may be understood as part of the legacy of Confederate veterans, they are viewed by others . . . as public confirmation of an ideology that supports racial oppression,” and “monuments in public spaces should reflect the shared values of the full community and should not project oppression or intimidation.”).

¹⁴⁰ As one Sons of Confederate Veterans member put it: “The Virginia history we were taught . . . didn’t teach us we were evil and we should be ashamed . . . We were taught that just as in the first War of Independence, when we stood up to King George III, our ancestors saw the federal government as a tyranny . . . and they stood up.” Paul Duggan, *Sins of the Fathers*, WASH. POST MAG. (Nov. 18, 2018) (second and third alterations in original), <https://www.washingtonpost.com/news/magazine/wp/2018/11/28/feature/the-confederacy-was-built-on-slavery-how-can-so-many-southern-whites-still-believe-otherwise/> (stating that one Sons of Confederate Veterans member explained it this way: “The Virginia history we were taught . . . didn’t teach us we were evil and we should be ashamed . . . We were taught that just as in the first War of Independence, when we stood up to King George III, our ancestors saw the federal government as a tyranny . . . and they stood up.”).

or remembering those who sacrificed their lives for something greater than themselves.

Removing Confederate monuments from the National Register would not prevent individuals from celebrating their Southern heritage. Southern heritage can be celebrated in ways other than by placing Confederate monuments on the National Register. For example, individuals could consider celebrating their Southern heritage by commemorating the passage of the Virginia Statute for Religious Freedom (penned by Thomas Jefferson) that served as a precursor to the national freedom of religion provided for in the First Amendment of the Constitution,¹⁴¹ by attending a performance of the world-renowned play “A Streetcar Named Desire,” written by southerner Tennessee Williams,¹⁴² by remembering the South’s critical contributions to the Space Race that led to humankind’s first steps on the Moon,¹⁴³ or by listening to and presenting live concerts of rock music, which was pioneered by Southern musicians.¹⁴⁴

In addition, the monuments need not be honored by National Register listing for their historical or artistic value to be appreciated. The history of

¹⁴¹ *Thomas Jefferson and the Virginia Statute for Religious Freedom*, VA. MUSEUM OF HIST. & CULTURE, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/thomas-jefferson> (last visited Oct. 7, 2020).

¹⁴² See Michael Billington, *Tennessee Williams: The Quiet Revolutionary*, THE GUARDIAN (July 27, 2009, 4:35 PM), <https://www.theguardian.com/stage/2009/jul/27/tennessee-williams>.

¹⁴³ See *Langley Research Center Overview*, NAT’L AERONAUTICS & SPACE ADMIN., <https://www.nasa.gov/langley/overview> (last visited Oct. 7, 2020) (NASA’s Langley Research Center is located in Hampton, Virginia); *NASA Langley and the Space Race*, NAT’L AERONAUTICS & SPACE ADMIN. (July 17, 2017), <https://www.nasa.gov/image-feature/nasa-langley-and-the-space-race> (“Langley Research Center . . . trained astronauts, managed Project Mercury, . . . assumed major roles in both the Gemini and Apollo programs[, and] . . . led the Lunar Orbiter initiative, which not only mapped the moon, but chose the spot for the first human landing.”); *History of Johnson Space Center*, NAT’L AERONAUTICS & SPACE ADMIN., https://www.nasa.gov/offices/history/center_history/johnson_space_center (last visited Oct. 7, 2020) (“The [Mission Control Center in Houston, Texas,] manages all activity onboard the space station and directs all space shuttle missions, including station assembly flights and Hubble Space Telescope servicing.”).

¹⁴⁴ See *Elvis Presley Biography*, GRACELAND, <https://www.graceland.com/biography> (last visited Oct. 7, 2020) (explaining that Presley was born in Tupelo, Mississippi); *Elvis Presley*, ROCK & ROLL HALL OF FAME LIBR. & ARCHIVES, https://library.rockhall.com/elvis_presley (last visited Oct. 7, 2020) (describing Presley as the “King of Rock & Roll” and declaring that he “kicked off a musical revolution by modernizing traditional genres such as blues, country and bluegrass”); *Jerry Lee Lewis*, JERRY LEE LEWIS, <https://jerryleewis.com> (last visited Oct. 7, 2020) (averring that Jerry Lee Lewis, a native of Ferriday, Louisiana, was “one of the first true rock ‘n’ roll musicians”).

these monuments would not end with their removal from the National Register.¹⁴⁵ They could still stand as reminders of the past and serve as points of reference for teachers and scholars seeking to educate others about American history. Further, removing Confederate monuments from the National Register would not also remove the craftsmanship that played an important role in their construction. Individuals could still view the monuments and recognize the high level of artisanship that some of them exhibit.¹⁴⁶

As for monuments serving as memorials to individuals who gave their lives for the Confederacy, their removal from the National Register will not prevent them from serving that purpose. The monuments memorialized these individuals before they became listed on the National Register, and they can continue to memorialize them after they have been delisted.

Those who view Confederate monuments in a more positive light may feel that the choice to delist the monuments would indicate that the National Park Service, and thus the federal government, does not value Southern heritage or certain aspects of American history, or feels that some lives are less worthy of remembrance and recognition than others. This reaction is understandable. However, Confederate monuments, whether they were intended to do so or not, and despite any beneficial purposes they serve, convey messages of hate and oppression to many Americans — messages antithetical to American values that the National Park Service (and federal government more broadly) strive to uphold. The positive elements some see in the monuments can be honored in ways that do not simultaneously honor those messages.

IV. REMOVING CONFEDERATE MONUMENTS FROM THE NATIONAL REGISTER

Should the National Park Service decide to remove Confederate monuments from the National Register, it must follow the removal procedures laid out in the National Register's governing regulations.¹⁴⁷ Section A describes who may initiate the delisting of Confederate monuments and why that responsibility should fall upon the National Park Service. Section B then avers that, to be delisted, a Confederate monument

¹⁴⁵ Cf. *National Trust for Historic Preservation Statement on Confederate Monuments*, *supra* note 139 (stating that the monuments' "history needs not end with their removal" and supporting the relocation of the monuments to museums or other locations "where they may be preserved so that their history as elements of Jim Crow and racial injustice can be recognized and interpreted").

¹⁴⁶ Cf. BYRNE, *supra* note 91, at 3 (asserting that Civil War monuments of great aesthetic value can be physically "moved from public prominence without losing their aesthetic significance").

¹⁴⁷ See 36 C.F.R. § 60.15 (2020) (describing how a property can be removed from the National Register).

must satisfy at least one of four enumerated grounds for removal and explains how Confederate monuments can satisfy this requirement.

A. Delisting Is a Task for the National Park Service

The regulations governing the National Register provide two methods to initiate a property's delisting: (1) an individual or organization may request that a property be delisted by filing a petition;¹⁴⁸ or (2) the Keeper of the National Register ("the Keeper") — an official within the National Park Service "who has been delegated the authority . . . to list properties and determine their eligibility for the National Register"¹⁴⁹ — may delist a property on her own motion.¹⁵⁰ That is, in choosing how to remove Confederate monuments from the National Register, the National Park Service could rely upon individuals and organizations to take the lead, it could begin the delisting process on its own, or it could prompt the delisting of some monuments while asking individuals and organizations to pick up where it leaves off. Consideration of the procedures involved in utilizing each avenue for removal, the resources needed to initiate and complete the removal process for each Confederate monument, and the National Park Service's "commit[ment] to lead change and work against racism"¹⁵¹ signals that the responsibility for removing Confederate monuments from the National Register should fall squarely upon the National Park Service, not individuals or organizations.

First, the procedures for removing a property from the National Register, when initiated by the National Park Service, are more straightforward and efficient than those initiated by a petition from an individual or organization. For the National Park Service to delist a property, the Keeper must first notify the authority that nominated the property for listing,¹⁵² any affected owners of the property, "and the applicable chief elected local official" of her intent to delist the property

¹⁴⁸ See *id.* § 60.15(c) (including state historic preservation offices and officers); cf. *At Least 1,750 Sites Removed from the National Register of Historic Places Since 1970*, L.A. DAILY NEWS (last updated Aug. 28, 2017, 8:26 AM), <https://www.dailynews.com/2013/02/05/at-least-1750-sites-removed-from-the-national-register-of-historic-places-since-1970/> (implying that state historic preservation offices can initiate the removal process).

¹⁴⁹ 36 C.F.R. § 60.15(c), (f).

¹⁵⁰ 36 C.F.R. § 60.15(k).

¹⁵¹ *Statement from Deputy Director David Vela Regarding Race, Equity, and the Values of the National Park Service*, NAT'L PARK SERV. (June 9, 2020), <https://www.nps.gov/orgs/1207/06-09-20-david-vela-statement.htm>.

¹⁵² See 36 C.F.R. § 60.15(k) (designating a property's nominating authority as the person or entity that nominated the property for National Register recognition); see, e.g., NAT'L PARK SERV., *supra* note 13, at 15, 17–19 (asserting that a property's nominating authority can be, for example, a state historic preservation officer, a federal agency's federal preservation officer, a tribal historic preservation officer, or an individual or local government).

and provide them with an opportunity to comment on the potential delisting.¹⁵³ Then, “[u]pon removal, the Keeper [must] notify the nominating authority of the basis for the removal,” and the nominating authority will then inform “the affected owner(s) and the chief elected local official of the removal.”¹⁵⁴ Meanwhile, for an individual or organization to successfully petition for the delisting of a property, the process is much more complicated. In addition to the Keeper, affected property owners, and the relevant chief elected local official, it involves historic preservation officers, potentially a state review board, multiple formal communications in writing between the petitioner and the historic preservation officer, and various different commentary and decision timelines.¹⁵⁵ While these hurdles may help ensure that decisions to delist some properties are fully informed, they are not needed with regard to requests to delist Confederate monuments. Thus, placing the burden upon individuals and organizations to seek removal of the monuments from the National Register would only serve to hinder the removal process when the National Park Service could complete the process more quickly and efficiently.

Second, the National Park Service, a federal agency, is better equipped to initiate and complete the procedures necessary to remove Confederate monuments from the National Register. Individuals and organizations may not have the staffing, knowledge, or monetary resources necessary to pursue the delisting of Confederate monuments in addition to their other responsibilities,¹⁵⁶ especially given the complex procedural requirements they must complete to petition for property removals.¹⁵⁷ Conversely, the National Park Service has an entire staff devoted to the management of the National Register, including the Keeper.¹⁵⁸

Third, in a June 2020 statement made in response to calls for racial justice and equity during Summer 2020, the National Park Service “commit[ted] to lead[ing] change and work[ing] against racism.”¹⁵⁹ Taking responsibility for delisting Confederate monuments would comport with these efforts and turn the agency’s words into actions.

¹⁵³ 36 C.F.R. § 60.15(k).

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* § 60.15(c)–(j).

¹⁵⁶ *See At Least 1,750 Sites Removed from the National Register of Historic Places Since 1970*, *supra* note 148 (explaining that properties sometimes remain on the National Register even after they have become eligible for removal because state historic preservation offices often do not have the resources necessary to adequately monitor National Register properties within their state).

¹⁵⁷ *See* 36 C.F.R. § 60.15(c)–(j).

¹⁵⁸ *See Contact Us*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/contactus.htm> (last visited Oct. 7, 2020).

¹⁵⁹ *Statement from Deputy Director David Vela Regarding Race, Equity, and the Values of the National Park Service*, *supra* note 151.

While the National Park Service should be responsible for leading the charge to remove Confederate monuments from the National Register, its leadership does not mean that individuals or organizations cannot play a role. Indeed, targeted efforts by individuals or organizations to delist these monuments could hasten the process of eliminating them from the National Register even if the bulk of the burden, and ultimate responsibility, falls upon the National Park Service.

B. Additional Information and Error in Professional Judgment as Paths to Delisting

Confederate monuments do not satisfy the qualifications necessary for National Register listing. However, asserting that they fail to satisfy the necessary qualifications does not by itself render them eligible for delisting. For a property to be removed from the National Register, the property must satisfy at least one of four enumerated grounds for removal:

- (1) “[t]he property has ceased to meet the criteria for listing in the National Register because the qualities which caused it to be originally listed have been lost or destroyed, or such qualities were lost subsequent to nomination and prior to listing;”
- (2) “[a]dditional information shows that the property does not meet the National Register [C]riteria for [E]valuation;”
- (3) there was an “[e]rror in professional judgment as to whether the property meets the [C]riteria for [E]valuation;” or
- (4) there was “[p]rejudicial procedural error in the nomination or listing process.”¹⁶⁰

Of the four options, the second and third grounds for removal provide the best paths for the delisting of Confederate monuments.¹⁶¹

¹⁶⁰ 36 C.F.R. § 60.15(a).

¹⁶¹ Because of the ways in which they were constructed, many Confederate monuments likely remain in good condition, making it difficult to argue for their delisting pursuant to the first ground for removal. However, Confederate monuments have recently been the targets of vandalism and destruction. *See, e.g.,* Tyler Hammel, *Lee, Jackson Statues Damaged for Second Time in a Month*, ROANOKE TIMES (Nov. 25, 2019), https://www.roanoke.com/news/virginia/jackson-lee-statues-damaged-for-second-time-in-a-month/article_261595ed-7d4a-5a45-bfb4-236f76cdceb3.html. Should they become sufficiently damaged, Confederate monuments might qualify for removal from the National Register via the first path. These are particularly important circumstances to consider when arguing for the delisting of one of the very few Confederate monuments listed before 1980, for which this is currently the only available path for removal (though the National Park

Between the second and third grounds for removal, the second likely offers the smoothest path for delisting Confederate monuments. Information concerning the true history of the monuments and the messages they convey amounts to “[a]dditional information”¹⁶² not fully accounted for in Confederate monument nomination forms. When this “[a]dditional information”¹⁶³ is considered with regard to the monuments’ ability to satisfy the Criteria for Evaluation, the monuments fail to meet those requirements.¹⁶⁴ While those participating in the delisting process would need to tailor their arguments based on the facts and circumstances surrounding individual Confederate monuments, their general approach could be fairly straightforward. For example, demonstrating that “[a]dditional information”¹⁶⁵ shows that a Confederate monument is not associated with “events that have made a significant contribution to the broad patterns of our history”¹⁶⁶ would indicate that the Confederate monument does not qualify for listing through Criterion A. If the monument did not satisfy any other Criteria for Evaluation, it would be eligible for delisting.¹⁶⁷

Advocating for a monument’s delisting pursuant to the third ground for removal would likely involve a tougher, but still potentially winnable, battle. Arguably, officials involved in the nomination and approval process should have better understood the history and symbolism of Confederate monuments and realized that they should not qualify for listing on the National Register. However, this might be a challenging position to support given that major efforts to characterize these monuments in their proper light are a relatively recent phenomenon.¹⁶⁸ Additionally, previously published National Park Service guidelines regarding the evaluation of properties for the National Register actively sanctioned the

Service could change the regulations to eliminate that issue). *See* 36 C.F.R. § 60.15(b). As for the fourth ground for removal, in many instances, “[p]rejudicial procedural error in the nomination or listing process,” *id.* § 60.15(a)(4), might not have occurred, and thus many monuments will not be eligible for delisting pursuant to that reasoning.

¹⁶² 36 C.F.R. § 60.15(a)(2).

¹⁶³ *Id.* *Cf. id.* § 60.4 (listing the Criteria for Evaluation).

¹⁶⁴ *Cf. ACHP Policy Statement on Controversial Commemorative Works*, *supra* note 113 (recognizing that society’s values can change over time, and that decisions regarding the management of historic properties must account for these changes).

¹⁶⁵ 36 C.F.R. § 60.15(a)(2).

¹⁶⁶ *Id.* § 60.4.

¹⁶⁷ A similar argument could support the delisting of the small number of monuments that are also listed pursuant to Criterion C. *Cf. supra* Part III.A.1 (explaining that the federal government need not hold all art in high regard, that Confederate monuments “endorse values antithetical to those of American society,” and that it is therefore inappropriate to list the monuments on the National Register through satisfaction of Criterion C’s requirements).

¹⁶⁸ *See Lopez, supra* note 26; Phelps & Owley, *supra* note 28, at 630.

listing of Confederate monuments.¹⁶⁹ Nonetheless, it might serve as an effective method to secure the delisting of recently listed Confederate monuments from the National Register and help prevent the listing of any Confederate monuments nominated in the future.¹⁷⁰

V. IMPLICATIONS OF REMOVING CONFEDERATE MONUMENTS FROM THE NATIONAL REGISTER

It would not be unprecedented for the National Park Service to adopt the view that Confederate monuments do not qualify for listing on the National Register. The agency has taken a similar stance in the past.¹⁷¹ In June 2015, after the Charleston shooting, it ordered the removal of merchandise depicting Confederate flags without additional context from its bookstores and gift shops.¹⁷² Citing the desire of the National Park Service to tell a “complete story,” the agency’s director declared that “stand-alone depictions of Confederate flags have no place in park stores.”¹⁷³ In making this decision, the National Park Service recognized that Confederate symbols can represent views contrary to the values of the United States.

Removing Confederate monuments from the National Register would not necessitate their removal from public view or prevent their preservation. Because a property’s listing on the National Register is “primarily an honor”¹⁷⁴ that, by itself, does not require property owners to maintain their properties in a specific way,¹⁷⁵ delisting the monuments would not require communities to take particular actions regarding their Confederate monuments. However, removal from the National Register would eliminate the requirement that a federal agency solicit comments from the Advisory Council on Historic Preservation before carrying out a

¹⁶⁹ See NAT’L PARK SERV., *supra* note 72, at 39–40 (averring that, for example, “[a] late [nineteenth] 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”).

¹⁷⁰ Review of Confederate monuments listed on the National Register reveals that at least one was added as recently as 2014. See *National Register Database and Research*, *supra* note 8 (In the search bar under “Search Properties Listed in the National Register of Historic Places,” search for “Caddo Parish Confederate Monument.” The monument’s listing date is January 29, 2014.).

¹⁷¹ See *National Park Service Press Release*, NAT’L PARK SERV. (June 25, 2015), <https://www.nps.gov/aboutus/news/release.htm?id=1713> (showing the Caddo Parish Confederate Monument’s listing date as January 29, 2014).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *A Comparison to the National Register of Historic Places*, *supra* note 21.

¹⁷⁵ See NAT’L PARK SERV., *supra* note 13, at 6.

project that could affect a monument.¹⁷⁶ And to the extent that owners of Confederate monuments currently listed on the National Register receive monetary benefits as a result of the monuments' listings (e.g., through preservation tax credits), removal from the National Register could limit or eliminate such benefits.¹⁷⁷ In addition, some state historic property registers consider or require National Register listing (or a determination that the property is eligible for listing) as part of their nomination and evaluation processes.¹⁷⁸ For example, National Register-listed properties located in the state of Georgia are automatically listed on the Georgia Register of Historic Places.¹⁷⁹ Delisting Confederate monuments could have implications for these state historic property registers in that removing a property from the National Register may also trigger its removal from the state register, or lead to litigation regarding whether it should remain.

The removal of Confederate monuments from the National Register could have implications for other listed properties that meet the requirements for listing solely because of their association with the Confederacy. Justifications for delisting Confederate monuments can also apply to these properties. Consider, for example, the White House of the Confederacy in Richmond.¹⁸⁰ The statement of significance provided on the property's nomination form only discusses the property's significance as the executive mansion for the Confederacy.¹⁸¹ Likewise, the statement

¹⁷⁶ *Cf. id.* at 12 (“Agencies proposing projects that may affect a property listed in or eligible for the National Register must allow the Advisory Council on Historic Preservation . . . an opportunity to comment prior to funding, licensing, or granting assistance on such projects.”).

¹⁷⁷ *See id.* at 6–10; *Technical Preservation Services: Eligibility Requirements*, *supra* note 16 (discussing four factors that can help property owners decide whether their rehabilitation project qualifies for the federal government's twenty percent historic preservation tax credit, including that “[t]he historic building must be listed in the National Register of Historic Places or be certified as contributing to the significance of a ‘registered historic district’”). However, it remains unclear how many owners of Confederate monuments would lose monetary benefits as a result of monuments' removals from the National Register.

¹⁷⁸ *See, e.g., Maryland Register of Historic Properties*, MD. HIST. TR. 1 (Mar. 2016), <https://mht.maryland.gov/documents/pdf/research/Maryland-Register.pdf> (“Inclusion in the Maryland Register requires that a property be listed in the National Register . . . or determined eligible . . . for listing . . .”).

¹⁷⁹ *Georgia Register of Historic Places: Recognizing and Preserving Our Historic Properties*, GA. DEP'T OF NAT. RES. 2 (revised Jan. 2013), https://www.novoco.com/sites/default/files/atoms/files/georgia_register_of_historic_places_073014.pdf.

¹⁸⁰ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, MUSEUM OF THE CONFEDERACY, NAT'L ARCHIVES CATALOG (1975), https://catalog.archives.gov/OpaAPI/media/41679141/content/electronic-records/rg-079/NPS_VA/66000924_NHL.pdf.

¹⁸¹ *Id.* at 3.

of significance on the nomination form for Confederate general Nathan Bedford Forrest's boyhood home in Chapel Hill, Tennessee, describes the life of the general (in the process, declaring him "[t]he most talented military leader that Tennessee, and perhaps the United States, ever produced") and states that the house "is the only home still existing associated with Forrest" without providing any additional justification for National Register recognition of the property.¹⁸² National Register recognition of these properties, as with Confederate monuments, serves to honor a cause that sought the perpetuation of white supremacist beliefs and individuals who assisted in that goal. Fresh consideration of whether these properties, and others like them, qualify for listing may likely indicate that they, too, should be delisted.¹⁸³

Conversely, removing Confederate monuments from the National Register would not necessarily indicate that properties affiliated with both sides of the Civil War should also be delisted. To determine whether these properties, such as battlefields and cemeteries, should remain listed, the National Park Service should analyze the facts and circumstances surrounding each property's nomination for National Register listing. As a result of such analysis, the National Park Service may well determine that at least some of these properties may continue to receive National Register recognition. If the agency finds that a property's listing on the National Register honors the Confederacy and those who served it, however, delisting might be appropriate.

Factoring honor into the analysis of what qualifies for recognition by the National Register could also affect other properties beyond those associated with the Confederacy. In particular, even outside of the context of the Civil War, many well-known American historical figures have acted in ways that much of modern American society might consider dishonorable, and many properties currently listed on the National Register derive their significance, at least in part, from their association with these figures. For example, consider that Woodrow Wilson's last

¹⁸² UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, NATHAN BEDFORD FORREST BOYHOOD HOME, NAT'L REG. OF HIST. PLACES DIGIT. ARCHIVE ON NPGALLERY 3 (1977), <https://npgallery.nps.gov/GetAsset/8ce5812c-f929-4b35-b606-b24a73e3e2cf>. After the Civil War, Forrest served as the first grand wizard of the Ku Klux Klan. *Nathan Bedford Forrest: Postwar Life and the Ku Klux Klan*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Nathan-Bedford-Forrest/Postwar-life-and-the-Ku-Klux-Klan> (last visited Oct. 7, 2020).

¹⁸³ This could also have implications for the very few properties associated with the Confederacy that are recognized as National Historic Landmarks. *Cf.* 36 C.F.R. § 65.4 (2020) (detailing the criteria a property must satisfy for designation as a National Historic Landmark). The White House of the Confederacy is one such example. UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, MUSEUM OF THE CONFEDERACY, *supra* note 180, at 1.

home in Washington, D.C., is listed on the National Register.¹⁸⁴ Wilson served as the twenty-eighth President of the United States, led the country through the First World War, and received a Nobel Prize for his efforts to establish the League of Nations, a predecessor of the modern United Nations.¹⁸⁵ But he also held racist views and embraced racist policies.¹⁸⁶ Likewise, Laura Ingalls Wilder, a celebrated children's book author, used racist language to describe Native Americans and Black Americans in her novels,¹⁸⁷ and her home has been honored by National Register listing.¹⁸⁸ Whether these and other properties associated with individuals who behaved in dishonorable ways should be delisted should be decided on a property-by-property basis, and delisting Confederate monuments could press the National Park Service to begin that process.

Lastly, delisting Confederate monuments would send a strong message to the Nation regarding how society should evaluate and interpret Confederate monuments (even those not currently listed on the National Register), as well as other symbols of the Confederacy. The National Park Service's determination that Confederate monuments should not be honored would lend clear support to those advocating for efforts to treat the monuments in a way that more accurately reflects their history and intended meaning. Whether communities decide to remove the monuments, place them in museums, or implement any other policy reforms aimed at better telling the story of Confederate monuments, their efforts will benefit from the removal of these monuments from the National Register. Similarly, removing Confederate monuments from the National Register could catalyze efforts to address the presence of

¹⁸⁴ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, WOODROW WILSON HOUSE, NAT'L ARCHIVES CATALOG (1980), https://s3.amazonaws.com/NARAprdstorage/lz/electronic-records/rg-079/NPS_DC/66000873_NHL.pdf.

¹⁸⁵ *Woodrow Wilson Biography*, BIOGRAPHY, <https://www.biography.com/us-president/woodrow-wilson> (last visited Oct. 5, 2020).

¹⁸⁶ See Dylan Matthews, *Woodrow Wilson Was Extremely Racist — Even by the Standards of His Time*, VOX (Nov. 20, 2015, 8:10 am), <https://www.vox.com/policy-and-politics/2015/11/20/9766896/woodrow-wilson-racist>; Brian Pietsch, *Princeton Will Remove Woodrow Wilson's Name from School*, N.Y. TIMES (June 27, 2020), <https://www.nytimes.com/2020/06/27/nyregion/princeton-university-woodrow-wilson.html>.

¹⁸⁷ *Laura Ingalls Wilder Removed from Book Award Over Racist Language*, BBC (June 25, 2018), <https://www.bbc.com/news/world-us-canada-44604844>.

¹⁸⁸ UNITED STATES DEPARTMENT OF THE INTERIOR, NPS FORM 10-300, LAURA INGALLS WILDER HOUSE, NAT'L ARCHIVES CATALOG (1970), https://catalog.archives.gov/OpaAPI/media/63821230/content/electronic-records/rg-079/NPS_MO/70000353.pdf.

references to the Confederacy and those who served it elsewhere within the federal government.¹⁸⁹

CONCLUSION

“There is a difference between remembrance of history and reverence of it.”¹⁹⁰ Confederate monuments symbolize a movement that sought to ignore history, promote false narratives, and marginalize members of society. Moreover, society’s progressively widespread understanding of the full history and meaning of these monuments informs evaluations of their ability to satisfy the National Register’s listing requirements. Reevaluating Confederate monuments using this better-informed understanding indicates that they do not meet these requirements. Therefore, Confederate monuments currently listed on the National Register should be delisted and no others should be added. They are not worthy of the honor bestowed upon them by National Register recognition. This position reflects the true history of the Civil War and subsequent efforts to memorialize the Confederacy. Perhaps most importantly, it encourages respect for individuals and groups who have been marginalized throughout history and promotes progress, understanding, and justice in American society.

¹⁸⁹ “A number of federal agencies administer assets or fund activities in which references to the . . . Confederacy, Confederate flags and artifacts, and commemorations of Confederate soldiers are present.” COMAY ET AL., *supra* note 57, at summary page. Various pieces of proposed legislation seek to address these references. *See id.* at 3–5.

¹⁹⁰ Landrieu, *supra* note 25.