

# Rebels Among Ruins: Policies, Procedures, and Laws Surrounding Confederate Monuments Post-Removal

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## ABSTRACT

The fate of Confederate monuments is a nationally prominent issue. At its core, the debate about the removal of Confederate monuments evokes questions of values, national healing, and inclusivity. The action of removing public Confederate monuments symbolizes the rejection of systemic and historical racism in the United States.

But the struggle over Confederate monuments does not end with their removal. After a Confederate monument is removed, a community must decide what becomes of it. Communities who have dabbled in the post-removal process have found creative solutions. For example, removed Confederate monuments have been donated to museums, sent to national battlefields or cemeteries, or destroyed in their entirety. When choosing a procedure, communities should adhere to the post-removal objectives.

To ensure the objectives of the post-removal process are met, communities must consider the law surrounding different procedures, and the legal mechanisms which influence the operation of such procedures. Characteristics of these mechanisms either help or hinder communities' efforts to achieve the post-removal objectives.

This Comment analyzes the law of trusts that influences one of the most popular post-removal procedures: donating Confederate monuments to museums. An analysis of the framework of charitable trusts reveals that the law sufficiently supports post-removal objectives when communities donate the monuments to museums. This Comment further recommends different ways the law could be strengthened to help effectuate the post-removal objectives.

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#### I. INTRODUCTION

If you were to walk down the infamous Monument Avenue in Richmond, Virginia—the former capital of the Confederate States of America—you would not find many monuments.<sup>1</sup> This Avenue, once encircled by monuments to the Confederacy, is now empty.<sup>2</sup> Even beyond Monument Avenue, you will not find any public Confederate monuments in the former capital of the Confederacy.<sup>3</sup> Where did they go?

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1. See Andrew Lawler, *The Origin Story of Monument Avenue, America's Most Controversial Street*, NAT'L GEOGRAPHIC (July 27, 2020), <https://perma.cc/LZ9H-54H6>. The only monument that remains on Monument Avenue is the Arthur Ashe Monument commemorating the Black tennis champion of Richmond. See Stanley Kay, *Where the Confederates Fell, Arthur Ashe Still Stands*, SPORTS ILLUSTRATED (May 25, 2021), <https://perma.cc/UJ6G-4U55>.

2. See Sarah Kuta, *Richmond Removes Its Last City-Owned Confederate Monument*, SMITHSONIAN MAG. (Dec. 15, 2022), <https://perma.cc/98NJ-FJBZ>.

3. See *id.*

A journey to trace the whereabouts of Richmond's stone Confederates begins in 1865.<sup>4</sup> On April 4, 1865, President Lincoln strolled through the former capital of the Confederacy.<sup>5</sup> Richmond was empty.<sup>6</sup> The Confederate army had evacuated their capital.<sup>7</sup>

Twenty-five years later, the Confederates infiltrated Richmond once again.<sup>8</sup> This time, however, the Confederates were not dressed in grey military uniforms; they were dressed in bronze.<sup>9</sup> In 1890, the city of Richmond erected the first of 13 Confederate monuments that populated Monument Avenue.<sup>10</sup> The infamous Confederate General Robert E. Lee, nicknamed "The Marble Man,"<sup>11</sup> loomed six stories above the former Confederate capital.<sup>12</sup> Though these statues appeared grandiose, deep-down they represented the hateful undercurrent of the Confederacy—the preservation of the institution of slavery.<sup>13</sup>

For over a century, these stone Confederates intimidated the increasingly diverse population of Richmond.<sup>14</sup> After the police killing of George Floyd on May 25, 2020, these stone Confederates were again drawn into battle.<sup>15</sup> The monuments became the focal point of protests, highlighting both their divisive history and their role in perpetuating systemic racism in the United States.<sup>16</sup> With national attention on Confederate monuments, and a growing number of Americans calling for their removal, the Confederates fled Richmond once again.<sup>17</sup>

But the monuments' journeys do not end with their removal.<sup>18</sup> Today, they are headed to Richmond's Black History Museum and Cultural Center of Virginia, where they will be recontextualized to facilitate national healing.<sup>19</sup>

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4. See *Lincoln's Visit to Richmond*, NAT'L PARK SERV.: RICHMOND NAT'L BATTLEFIELD PARK VA., <https://perma.cc/SC52-JDZX> (Dec. 21, 2022).

5. See *id.*

6. See *id.*

7. See *id.*

8. See *Confederate Monuments in Virginia*, VA. PLACES, <https://perma.cc/D2Q6-F2G3> (last visited Aug. 27, 2023).

9. See *id.*

10. See *id.*

11. See C. Vann Woodward, *The Case of Robert E. Lee*, N.Y. TIMES (Apr. 3, 1977), <https://perma.cc/HF9E-33AJ> (explaining that Robert E. Lee received the nickname "The Marble Man" because peers revered him as a statuesque, god-like figure).

12. See Lawler, *supra* note 1.

13. See Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. TIMES (Nov. 5, 2021), <https://perma.cc/BP5W-P4PC>.

14. See *id.*

15. See *id.*

16. See *id.*

17. See Kuta, *supra* note 2.

18. See *id.*

19. See *id.*

Richmond's removal of their Confederate monuments is emblematic of the broader national discourse surrounding public Confederate monuments in the United States.<sup>20</sup> Because Confederate monuments are at the center of controversy in the national consciousness, some communities have elected to remove their monuments.<sup>21</sup> As the story of Richmond reflects, removal is only the first step.<sup>22</sup> Next, communities must decide what to do with these Confederate monuments in the post-removal process.<sup>23</sup>

This Comment seeks to analyze the intersection between the policies, procedures, and laws surrounding Confederate monuments after they are removed from their original public location and provide guidance for communities grappling with their own histories. Part II of this Comment begins with a brief history of Confederate monuments.<sup>24</sup> Next, this Comment discusses different post-removal procedures suggested or undertaken by communities.<sup>25</sup> This Comment then develops five general policy objectives of the post-removal process, as articulated by experts and scholars.<sup>26</sup> Part II ends with a summary of the law surrounding a popular post-removal procedure—donating monuments to museums.<sup>27</sup>

In Part III, this Comment argues that communities should choose a procedure in which the relevant laws help to effectuate the post-removal objectives.<sup>28</sup> Following this framework, Part III first analyzes whether the law surrounding the donation of Confederate monuments to museums supports the post-removal objectives.<sup>29</sup> This Comment then recommends ways that the law can be strengthened to further meet post-removal objectives.<sup>30</sup> Ultimately, this Comment argues that communities should consider donating removed Confederate monuments to museums because trust law adequately supports the objectives of the post-removal of Confederate monuments.<sup>31</sup>

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20. See Ortiz & Diaz, *supra* note 13.

21. See S. POVERTY L. CTR., *WHOSE HERITAGE?: PUBLIC SYMBOLS OF THE CONFEDERACY* 15 (3d ed. 2022), <https://perma.cc/6PH5-AP53>.

22. See Kuta, *supra* note 2.

23. See CIV. WAR TIMES MAG., *Empty Pedestals: What Should be Done with Civic Monuments to the Confederacy and Its Leaders*, HISTORYNET (July 18, 2017), <https://perma.cc/4UYH-PP9J> (detailing various viewpoints on what should happen to Confederate monuments once they are removed).

24. See *infra* Section II.A.

25. See *infra* Sections II.B.1–7.

26. See *infra* Section II.C.

27. See *infra* Section II.D.

28. See *infra* Part III.

29. See *infra* Section III.A.

30. See *infra* Sections III.B–C.

31. See *infra* Section III.A.

## II. BACKGROUND

The discourse surrounding Confederate monuments is as complex as the monuments are controversial.<sup>32</sup> Looming over this debate is the law. During the removal process of Confederate monuments, Americans use the law as a tool to both resist and mandate removing the monuments.<sup>33</sup> The post-removal process is no different. To understand the intersection of the post-removal process of Confederate monuments, law, and policy, a foundational knowledge about the history of Confederate monuments is warranted.

### A. *Revenant: The History of Confederate Monuments*

Although the Confederate States of America lasted only four years, its remnants, displayed through the sculpted stone of Confederate monuments, have kept the Confederacy alive in the national consciousness for over 150 years.<sup>34</sup> After Abraham Lincoln's victory in the election of 1860, South Carolina became the first state to secede from the Union, opening the floodgates of secession whereby ten southern states formed the Confederate States of America.<sup>35</sup>

White Southern slaveholders formed the Confederate government, built around the preservation of slavery and white supremacy.<sup>36</sup> To the Confederate states, Lincoln's election marked a direct threat to the institution of slavery.<sup>37</sup> Therefore, to southern slaveholders, secession

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32. See *Tear Down the Confederate Monuments—But What Next? 12 Art Historians and Scholars on the Way Forward*, ARTNET NEWS (Aug. 23, 2017) [hereinafter *12 Art Historians and Scholars*], <https://perma.cc/C96T-M3AH> (noting art historian W.J.T. Mitchell's warning that the removal process is complex with no one simple solution); see also Noah Caldwell & Audie Cornish, *Where Do Confederate Monuments Go After They Come Down?*, NPR (Aug. 5, 2018, 8:08 AM), <https://perma.cc/KKW6-22KY> (explaining how violence has amplified discussions about the removal of Confederate monuments).

33. See Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1399 (2020) [hereinafter Owley & Phelps, *Life and Death*] (noting that the law has been used in formal proceedings to remove Confederate monuments but has largely been used as an impediment to proponents of removal).

34. See Deborah R. Gerhardt, *Law in the Shadows of Confederate Monuments*, 27 MICH. J. RACE & L. 1, 2 (2021).

35. See *War Declared: States Secede from the Union!*, NAT'L PARK SERV.: KENNESAW MOUNTAIN NAT'L BATTLEFIELD PARK GA., <https://perma.cc/22TV-A6TH> (Mar. 9, 2022).

36. See Keisha N. Blain, *Destroying Confederate Monuments Isn't 'Erasing' History. It's Learning From It.*, WASH. POST: POSTEVERYTHING (June 19, 2020, 7:00 AM), <https://perma.cc/E6TV-AMST>; see also Dane Kennedy, *What Should We Do with Confederate Monuments?*, AHA TODAY: PERSPECTIVES ON HIST. (Oct. 30, 2017), <https://perma.cc/NQ5S-ULKK>.

37. See James W. Loewen, *Five Myths About Why the South Seceded*, WASH. POST (Feb. 26, 2011, 12:01 AM), <https://perma.cc/WS8Q-UAVM>.

from the Union was necessary to preserve and legitimize slavery in America.<sup>38</sup> The Confederacy fought the ensuing Civil War to preserve their government, founded on racist principles and the institution of slavery.<sup>39</sup>

The Confederacy's memorialization efforts did not occur directly after it dissolved following defeat in 1865.<sup>40</sup> Instead, the Confederacy's public memorialization campaign occurred in waves: (1) during the Jim Crow era of the late-nineteenth and early-twentieth centuries and (2) during the Civil Rights era of the mid-twentieth century.<sup>41</sup>

The accelerated efforts to erect Confederate statues during these two distinct eras were not coincidental. The push for Confederate monuments in public areas, such as town squares or county courthouses,<sup>42</sup> coincided with the emergence of "[B]lack political progress" in the United States.<sup>43</sup> During Jim Crow, white supremacists attempted to deny Black Americans their rights in reaction to their increased participation in the body politic.<sup>44</sup> Confederate monuments, which memorialized a government founded on the perpetuation of white supremacy, emerged alongside the rise of the Ku Klux Klan and lynch mobs to oppose social, cultural, economic, and political advancements of Black Americans during this time.<sup>45</sup> Similarly, hundreds of Confederate monuments were erected and publicly displayed during the Civil Rights era when the United States saw a momentous change in the political activism, participation, and inclusion of Black Americans.<sup>46</sup> According to Professor Jessica Owley and Attorney Jess Phelps, displaying monuments in public "give[s] legitimacy to the ideals represented."<sup>47</sup> Therefore, public Confederate memorialization efforts

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38. *See id.* The Confederacy's racist foundation is explicit in the Confederate Vice-President Alexander Stephen's "Cornerstone Speech." *See* Confederate Vice President Alexander H. Stephens, Cornerstone Speech (Mar. 21, 1861), in AM. BATTLEFIELD TR., <https://perma.cc/K8U6-2QR9> (last visited Aug. 27, 2023) ("[Our government's] foundations are laid, its cornerstone rests, 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. *See* Blain, *supra* note 36.

40. *See* Owley & Phelps, *Life and Death*, *supra* note 33, at 1405 (explaining that, directly after the Civil War, memorialization of the Confederacy was mostly restricted to private memorials of those who died in the war, rather than large-scale public statues dedicated to the Confederate government or generals).

41. *See* Blain, *supra* note 36.

42. *See* Owley & Phelps, *Life and Death*, *supra* note 33, at 1402 (explaining the various public places where Confederate monuments were erected).

43. *See* Blain, *supra* note 36.

44. *See id.*

45. *See id.*; *see also* Kennedy, *supra* note 36.

46. *See* Blain, *supra* note 36 (noting that hundreds of Confederate monuments were erected in the 1960s and 1970s).

47. Owley & Phelps, *Life and Death*, *supra* note 33, at 1409.

during both the Jim Crow and Civil Rights eras symbolized direct opposition to Black political participation.<sup>48</sup>

In addition to intimidating and opposing Black political progress, Confederate monuments became a tool for Confederate-sympathizers to distort and revise the history of the Confederacy through the “Lost Cause” narrative.<sup>49</sup> The “Lost Cause” narrative romanticizes the Confederacy by proclaiming that the Confederacy was founded on, and the Civil War was fought over, states’ rights rather than slavery.<sup>50</sup> The “Lost Cause” narrative both defends Confederate soldiers as underdogs bravely fighting against a behemoth foe and idolizes Confederate generals as righteous, honorable, and unflawed heroes.<sup>51</sup> The “Lost Cause” myth also perpetuates lies about the institution of slavery.<sup>52</sup> The narrative falsely proclaims that slavery was a mutually agreed-upon transaction between enslaved persons and slaveowners and that enslaved persons were treated with dignity and respect.<sup>53</sup>

After the Civil War, monuments played an essential role in perpetuating the “Lost Cause” narrative.<sup>54</sup> For example, a plaque on a Confederate monument in Houston, Texas, called “Spirit of the Confederacy,” read: “To all heroes of the South who fought for the principles of states [sic.] rights.”<sup>55</sup> Nowhere does this monument mention that the “states [sic.] rights” the Confederate “heroes” fought for was the right to own slaves.<sup>56</sup> In using Confederate monuments to recast the Confederacy in a favorable light, the monuments stand under the guise of “heritage” while emanating “hate.”<sup>57</sup>

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48. *See id.* at 1415 (“When [the Confederate monuments] were erected during the Jim Crow and Civil Rights eras, they specifically served to reinforce a message that government and justice was there to serve the white communities.”).

49. *See id.* at 1403.

50. *See* Karen L. Cox, *Five Myths About the Lost Cause*, WASH. POST (Jan. 14, 2021, 2:42 PM), <https://perma.cc/NW3D-93ZJ>; *see also* Owley & Phelps, *Life and Death*, *supra* note 33, at 1404.

51. *See* Cox, *supra* note 50.

52. *See id.*

53. *See id.*

54. *See* Blain, *supra* note 36 (“In these public symbols, white supremacists upheld the myth that the Confederacy was a noble cause, rather than a failed revolt to maintain slavery.”).

55. Juan A. Lozano, *Museum Says Displaying Confederate Statue Part of Healing*, AP NEWS (Aug. 18, 2020, 6:25 PM), <https://perma.cc/NYZ5-CJAX>.

56. *See id.*

57. *See* Jillian Fitzpatrick, *Reframing the Monuments: How to Address Confederate Statues in the United States*, 34 J. CIV. RTS. & ECON. DEV. 283, 291–92 (2021) (explaining Confederate monuments’ role in the “hate versus heritage” debate).

For over a century, Confederate monuments were lightning rods of division and hate.<sup>58</sup> To many, their public presence reinforces systems of racism and inequality.<sup>59</sup> As a result, the debate surrounding the removal of Confederate monuments came to the forefront of the public's consciousness following Dylann Roof killing nine Black parishioners; the police killings of George Floyd, Breonna Taylor, Tony McDade, and Rayshard Brooks; and the nationwide Black Lives Matter protests.<sup>60</sup> These events showed how systems of racism and inequality are deeply rooted in America.<sup>61</sup> These events also revealed how Confederate monuments stand as obstacles to the progression of antiracist movements.<sup>62</sup>

Today, most Confederate monuments are located in southern states.<sup>63</sup> While contemporary violence on Black communities has ignited a push toward the removal of Confederate monuments, many remain.<sup>64</sup> As of 2022, 409 Confederate memorials<sup>65</sup> have been removed, renamed, or relocated,<sup>66</sup> but 723 monuments remain standing.<sup>67</sup> While public opinion surrounding Confederate monuments has shifted in favor of their removal,<sup>68</sup> the question remains: What should we do with these contentious monuments post-removal?

#### *B. Riddance: What Happens to the Monuments Post-Removal?*

Removing Confederate monuments is effectively a two-step process.<sup>69</sup> First, communities must grapple with whether a monument

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58. See Blain, *supra* note 36.

59. See Fitzpatrick, *supra* note 57, at 293 (citing Kasi E. Wahlers, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2177 (2016)).

60. See Blain, *supra* note 36.

61. See *id.*

62. See *How Statues Are Falling Around the World*, N.Y. TIMES (Sept. 12, 2020), <https://perma.cc/LBC2-T9ZV>.

63. See S. POVERTY L. CTR., *supra* note 21, at 9 (identifying 1,910 Confederate memorials in former Confederate states).

64. See *id.* at 15.

65. See *id.* at 14 (defining “memorial” as “almost anything” that commemorates “the dead or the experience of a profound loss,” including monuments, buildings, books, roads, and stadiums, while defining “monument” as a “commemorative structure or edifice”).

66. See *id.* at 15.

67. See *id.* at 30.

68. See Rebecca Klar, *Poll: Majority Supports Removing Confederate Statues from Public Places*, HILL (June 17, 2020, 3:21 PM), <https://perma.cc/7BLG-45WM> (examining a 2020 Quinnipiac University Poll in which 52% of voters supported the removal of Confederate monuments from public spaces).

69. See *Confederate Monuments—Frequently Asked Questions*, NAT'L TR. FOR HIST. PRES., <https://perma.cc/5V6M-AEE3> (last visited Aug. 27, 2023) (separating the initial threshold question of whether Confederate monuments should be removed from the question of what to do with the monuments post-removal).



should be removed or addressed.<sup>70</sup> While this initial question is contentious, public opinion has shifted in favor of removal after the Black Lives Matter movement forced Americans to reexamine structurally racist public iconographies.<sup>71</sup> A September 2022 research survey conducted by two nonprofit organizations, Public Religion Research Institute (“PRRI”) and E Pluribus Unum, showed that approximately 54% of Americans support some type of Confederate “monument reform.”<sup>72</sup>

After a community decides that a public Confederate monument should be addressed, the second question it must resolve is what to do with the monument post-removal.<sup>73</sup> Unlike the initial question about whether a monument should be removed, the question about the post-removal process rejects a binary solution.<sup>74</sup> Americans in favor of removal are divided over which post-removal procedure is best.<sup>75</sup> The question of post-removal policy is highly individualized, and each community must decide for itself how to best handle the post-removal of Confederate monuments, given the unique nature of its circumstances.<sup>76</sup> As a result, communities who have confronted the post-removal process have suggested and implemented many different solutions.<sup>77</sup>

Even though this process is unique to each community and occurs on a case-by-case basis,<sup>78</sup> seven general post-removal procedural trends have emerged: (1) donate the monument to a museum; (2) transfer the monument to a battlefield or cemetery; (3) collect multiple monuments in

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70. See *Creating More Inclusive Public Spaces: Structural Racism, Confederate Memorials, and Building for the Future*, PRRI (Sept. 28, 2022) [hereinafter *Creating More Inclusive Public Spaces*], <https://perma.cc/A2Q8-K76Y>.

71. See *How Statues Are Falling Around the World*, *supra* note 62 (“[A]s protests against racism and police violence have renewed attention on legacies of injustices, people have been asking: Does this statue still need to be here?”).

72. See *Creating More Inclusive Public Spaces*, *supra* note 70 (defining “monument reform” as contextualizing the Confederate monument where it stands, removing the monument and destroying it, or donating it to a museum).

73. See Erik Oritz, *These Confederate Statues Were Removed. But Where Did They Go?*, NBC NEWS (Sept. 20, 2020, 6:01 AM), <https://perma.cc/3V2W-3S53>.

74. See Emanuella Grinberg, *What Can Communities Do with Confederate Monuments? Here Are 3 Options*, CNN (June 30, 2017, 8:29 AM), <https://perma.cc/5WXD-3F5S>; see Caldwell & Cornish, *supra* note 32; see also *12 Art Historians and Scholars*, *supra* note 32.

75. See *Creating More Inclusive Public Spaces*, *supra* note 70 (noting that approximately 10% of Americans believe Confederate monuments should be destroyed, 28% believe Confederate monuments should be donated to museums, and 35% believe Confederate monuments should be left in place but contextualized).

76. See *12 Art Historians and Scholars*, *supra* note 32 (“[The removal process of Confederate monuments] will inevitably be worked out on a case-by-case basis.”).

77. See *generally id.* (highlighting multiple unique solutions on what to do with Confederate monuments post-removal); see also Grinberg, *supra* note 74.

78. See *12 Art Historians and Scholars*, *supra* note 32.

a monument graveyard; (4) destroy the monument in its entirety; (5) relocate the monument to a welcoming city or to a private owner; (6) keep the monument in its place and contextualize it; or (7) hide the monument in storage and away from public sight.<sup>79</sup> While this list is non-exhaustive, these general post-removal procedures provide communities with different options when they decide what to do after removing their public Confederate monuments.<sup>80</sup>

### 1. Donate the Monument to a Museum

A commonly suggested post-removal procedure is to donate removed Confederate monuments to museums where they can be properly handled by experts.<sup>81</sup> Many scholars and historians have advocated for communities to follow this procedure.<sup>82</sup> Even politicians in favor of removing Confederate statues suggest moving them to museums.<sup>83</sup> For example, the introduced Albert Pike Statue Removal Act would have authorized the Secretary of the Interior to donate the Albert Pike monument to a museum.<sup>84</sup> Though the Act was never passed, scholars, historians, community members, and politicians still advocate for the removal of Confederate monuments to museums, and museums remain central to the debate surrounding the post-removal of Confederate monuments.<sup>85</sup>

Advocates of removing Confederate monuments to museums explain that the monuments, in the museum exhibit context, would be reinterpreted by experts and presented to expose their complex and controversial

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79. See *infra* Sections II.B.1–7.

80. See *12 Art Historians and Scholars*, *supra* note 32.

81. See Janeen Bryant et al., *Are Museums the Right Home For Confederate Monuments?*, SMITHSONIAN MAG.: HIST. (May 7, 2018), <https://perma.cc/WF8X-JVFQ>; see, e.g., Emma North, *Unanimous Vote: Richmond Confederate Monuments Going to Black History Museum*, WRIC (Jan. 24, 2022, 10:55 PM), <https://perma.cc/WYC6-EB9M> (detailing how the community of Richmond, Virginia, elected to send their Confederate monuments to a museum); Abigail Cain, *Where Do Confederate Monuments Go After They're Removed?*, ARTSY (Aug. 17, 2017, 11:22 PM), <https://perma.cc/UA23-Y52N> (detailing how students, professors, and alumni at the University of Texas at Austin elected to relocate a statue of former Confederate President Jefferson Davis to an on-campus museum in 2015).

82. See *12 Art Historians and Scholars*, *supra* note 32.

83. See Clark Mindock, *Elizabeth Warren Calls to Remove Confederate Monuments 'And Put Them in Museums Where They Belong'*, INDEPENDENT (Mar. 20, 2019, 12:46 AM), <https://perma.cc/YQ28-7E9T>; see also 167 CONG. REC. E141-04 (daily ed. Feb. 18, 2021) (statement of Rep. Holmes) (“I believe [Confederate monuments] should be moved to more appropriate settings, like museums . . .”).

84. See 167 CONG. REC. E141-04 (daily ed. Feb. 18, 2021) (statement of Rep. Holmes).

85. See Owley & Phelps, *Life and Death*, *supra* note 33, at 1474–75 (noting that the transfer of Confederate monuments to museums is a popular solution).

histories.<sup>86</sup> Professor Keisha N. Blain argues that museums provide a more proper forum to house Confederate monuments than public spaces.<sup>87</sup> Blain explains that publicly displayed Confederate monuments erase history by portraying a racist government as noble.<sup>88</sup> By placing monuments in museums, the monuments are properly contextualized, and museum patrons can learn about the oppressive history of the Confederacy.<sup>89</sup>

However, skeptics warn of the practical limitations of donating Confederate monuments to museums.<sup>90</sup> One problem involves the availability of space to display the monuments.<sup>91</sup> Most Confederate monuments, including the Robert E. Lee statue in Richmond, are over 60 feet tall.<sup>92</sup> Some museums may not have the infrastructure to house and conserve these massive monuments.<sup>93</sup> Additionally, due to the monuments' enormous size, they are likely to overshadow other items in the museum, effectively negating the purpose of removing the imposing statues from public display.<sup>94</sup> Museum interpreters and workers further question the immense duty placed upon museums to properly contextualize and display a politically charged item in their collection.<sup>95</sup> While museums offer one avenue of dealing with Confederate monuments post-removal, communities should also note museums' practical limitations and consider other options.

## 2. Transfer the Monument to a Battlefield or Cemetery

Another possible post-removal procedure is to transfer Confederate monuments to a cemetery or battlefield.<sup>96</sup> Similar to museums, veterans'

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86. See Grinberg, *supra* note 74; 12 *Art Historians and Scholars*, *supra* note 32; see generally Claire Voon, *As Confederate Monuments Come Down, American Museums Rethink How They Tell History*, ARTSY (July 22, 2020, 12:55 PM), <https://perma.cc/D9L7-N3EB> (explaining how museums allow experts to display the statues in a manner that educates patrons on their divisive nature).

87. See Grinberg, *supra* note 74 (“[M]useums are controlled spaces where experienced staff members can provide historical context for visitors, and people can choose to see the monuments or not.”).

88. See Blain, *supra* note 36.

89. See Grinberg, *supra* note 74.

90. See Bryant et al., *supra* note 81.

91. See Caldwell & Cornish, *supra* note 32; see Grinberg, *supra* note 74.

92. See Caldwell & Cornish, *supra* note 32.

93. See *id.*

94. See Bryant et al., *supra* note 81 (“[T]heir very monumentality might spark an even fiercer form of physical intimidation when squeezed into the small space of a standard museum building.”).

95. See Colleen Walsh, *Must We Allow Symbols of Racism on Public Land?*, HARV. GAZETTE: NAT'L & WORLD AFFS. (June 19, 2020), <https://perma.cc/VJ5V-JJF6>.

96. See, e.g., *Virginia County to Move Confederate Statue to Battlefield*, NBC WASH. (Sept. 10, 2020, 8:04 AM), <https://perma.cc/PG6W-54UT> (describing how Albemarle County, Virginia, removed a monument of an unnamed Confederate soldier from the

cemeteries and Civil War battlefields offer communities an option that focuses on the monument's historical context rather than its public celebration.<sup>97</sup>

In the United States, the Department of Veterans Affairs (VA) oversees 143 national cemeteries, most of which contain references to and remains of deceased Confederate soldiers.<sup>98</sup> Additionally, the National Park Service (NPS) administers “over 100 units of the National Park System with resources related to Civil War history.”<sup>99</sup> Within these parks, the NPS manages 233 Confederate memorials.<sup>100</sup> Proponents of sending removed Confederate monuments to cemeteries or battlefields argue that these settings are a more appropriate location for the monuments because they can be recontextualized and historically presented.<sup>101</sup> According to the National Trust for Historic Preservation, Confederate monuments at these sites may serve as tools for “inclusive public engagement” by “fostering recognition and inviting reconciliation.”<sup>102</sup>

However, if mismanaged, the removal of Confederate monuments to cemeteries and battlefields could continue to bolster the monuments as symbols of hate and white supremacy.<sup>103</sup> The National Trust for Historic Preservation explains that the challenge with removing public Confederate monuments to historical Civil War sites and cemeteries concerns the monuments' underlying purpose.<sup>104</sup> At Civil War battlefields, monuments may offer historical context to Civil War events or people.<sup>105</sup> However, the primary purpose of most Confederate monuments that come from public town squares or parks is to promote the “ideology of white supremacy.”<sup>106</sup> If the glorification of the Confederacy's hateful past is not extinguished through proper, nuanced contextualization, any removal of a public

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Albermale County Courthouse grounds to the Shenandoah Valley Battlefields Foundation); Dakin Andone, *Orlando Begins Process of Moving Confederate Statue*, CNN (June 20, 2017, 11:16 AM), <https://perma.cc/59MA-5U2C> (detailing how city officials in Orlando, Florida, removed a monument of “Johnny Reb” from Lake Eola Park to a designated section in the city's Greenwood Cemetery dedicated to Confederate veterans).

97. See Lozano, *supra* note 55 (noting that the NAACP's Houston chapter argues that removing Confederate monuments to locations of historical context is more appropriate than keeping them in public spheres).

98. See LAURA B. COMAY ET AL., CONG. RSCH. SERV., R44959, CONFEDERATE SYMBOLS: RELATION TO FEDERAL LANDS AND PROGRAMS 11 (2020).

99. See *Summary* of LAURA B. COMAY ET AL., CONG. RSCH. SERV., R44959, CONFEDERATE SYMBOLS: RELATION TO FEDERAL LANDS AND PROGRAMS i (2020).

100. See COMAY ET AL., *supra* note 98, at 6.

101. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69.

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.*

Confederate monument to a battlefield or cemetery will continue to perpetuate hate and racism in a different space.<sup>107</sup>

### 3. Collect the Monuments in a Monument Graveyard

A third, unique post-removal procedure option is building a site from the ground-up specifically for removed Confederate monuments.<sup>108</sup> This option would place removed Confederate monuments at a single site where they can be recontextualized to remove their oppressive narratives of white supremacy.<sup>109</sup> In essence, a single location of removed Confederate statues would act as a monument graveyard, where patrons could learn about the symbols used to oppress marginalized groups and where experts could redefine the memorialization of the United States' dark past in an inclusive, innovative, and respectful manner.<sup>110</sup>

The suggestion of a Confederate monument graveyard closely resembles how Russians addressed communist-era monuments at Fallen Monument Park in Moscow, Russia.<sup>111</sup> After the collapse of the Soviet Union in 1991, Russian citizens tore down Soviet and tsarist iconographies and placed the crumbled monuments in an empty lot near the Moskva River.<sup>112</sup> Moscow designated this lot as Fallen Monument Park.<sup>113</sup> Similar phenomena occurred in former Soviet-controlled countries in Eastern Europe.<sup>114</sup> Artists even created new monuments alongside the deconstructed Soviet monuments to provide additional context.<sup>115</sup> For example, Russian sculptor Yevgeny Chubarov created a monument of a cage with 282 stone heads trapped inside and placed it next to a removed statue of Stalin to represent the victims of the Stalinist purges.<sup>116</sup>

Advocates of a monument graveyard argue that collecting dismantled and damaged monuments of controversial figures deprives them of their symbolic power.<sup>117</sup> Geographers Jordan Brasher and Derek H. Alderman explain that placing ruined monuments of Jefferson Davis, Robert E. Lee,

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107. *See id.*

108. *See* Bryant et al., *supra* note 81.

109. *See id.*; *see also* Kennedy, *supra* note 36.

110. *See* Bryant et al., *supra* note 81.

111. *See* Jordan Brasher & Derek H. Alderman, *A Confederate Statue Graveyard Could Help Bury the Old South*, CONVERSATION (July 26, 2019, 9:03 AM), <https://perma.cc/5ANX-YLR9>; Lucian Kim, *What to Do With Toppled Statues? Russia Has a Fallen Memorial Park*, NPR (July 21, 2020, 5:04 AM), <https://perma.cc/NY66-FXUN>; *see also* 12 *Art Historians and Scholars*, *supra* note 32.

112. *See* Kim, *supra* note 111.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

or Nathan Bedford Forrest in a Confederate monument graveyard would “undermine the power these monuments once held, acknowledging, dissecting[,] and ultimately rejecting the Confederacy’s roots in slavery.”<sup>118</sup> However, designing a Confederate monument graveyard comes with its own challenges, such as finding a location for the site, finding an entity or organization to fund and design it, and ensuring the monuments’ proper contextualization.

#### 4. Destroy the Monument

Another post-removal option rejects any manner of relocating Confederate monuments, but rather prefers to destroy them in their entirety.<sup>119</sup> This conclusive method may be most appropriate when the monument was particularly divisive.<sup>120</sup>

The destruction of Confederate monuments as a form of removal is similar to how Germans confronted Nazi iconography after the fall of the Third Reich.<sup>121</sup> In the aftermath of World War II, Germans sought to remove all Nazi iconography, symbols, and monuments from the public sphere in an effort to ensure that “such horrible actions would not be celebrated, accepted, or respected.”<sup>122</sup> Beyond mandating the destruction of Nazi symbols, Germans criminalized the public display of Nazi symbols.<sup>123</sup> Advocates of destroying Confederate monuments argue that Americans should model the removal of Confederate monuments off of Germany’s removal of Nazi symbols because symbols that exude hate and honor white supremacy, similarly, do not belong anywhere in the United States.<sup>124</sup>

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118. See Brasher & Alderman, *supra* note 111.

119. See Cain, *supra* note 81; Caldwell & Cornish, *supra* note 32; *12 Art Historians and Scholars*, *supra* note 32; see generally Lozano, *supra* note 55 (describing the procedure of destroying a Confederate monument).

120. See, e.g., Nicholas Reimann, *Charlottesville Robert E. Lee Statue to Be Melted Down by African-American Heritage Center*, FORBES (Dec. 21, 2021, 1:43 PM), <https://perma.cc/5S6J-WSD5> (describing that Charlottesville, Virginia, elected to melt down the infamous Robert E. Lee statue, which was the focal point of violence in the 2017 “Unite the Right” white supremacist rally).

121. See Caldwell & Cornish, *supra* note 32.

122. See Fitzpatrick, *supra* note 57, at 303–04.

123. See STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 86, 86a, <https://perma.cc/VTB2-CEEX> (Ger.) (“[It is a crime for any person to] disseminate[] or make[] available to the public in Germany . . . propaganda material [or] symbols [of the former National Socialist party, including] flags, insignia, uniforms and their parts, slogans and forms of greeting.”); see also Dan Glaun, *Germany’s Laws on Hate Speech, Nazi Propaganda & Holocaust Denial: An Explainer*, PBS: FRONTLINE (July 1, 2021), <https://perma.cc/MCS8-ENEA>.

124. See, e.g., *12 Art Historians and Scholars*, *supra* note 32 (“[S]ymbols that celebrate enslavement and genocide are unacceptable in civilized societies.”); Caldwell &

Some citizens who approve of removal, but are against complete destruction, warn that destroying Confederate monuments may risk the perpetuation of the “Lost Cause” narrative or simply erase history.<sup>125</sup> Historian Reiko Hillyer warns:

[W]e risk erasing the past and upholding a myth of white innocence [by destroying Confederate monuments]. I would only be in favor of destroying them if we did so publicly, with great ceremony and fanfare, as a collective statement that we confront and reject the ideas that these monuments represent.<sup>126</sup>

Without acknowledgement of the monuments’ roles in America’s tumultuous past, structural wounds from generational racism may continue to loom among empty pedestals.<sup>127</sup>

##### 5. Relocate the Monument to Another City or Private Ownership

As an alternative to destroying Confederate monuments, a community might elect to relocate the monument to a more welcoming city or citizen.<sup>128</sup> Often, private organizations that aided in erecting Confederate monuments have accepted those (and other) monuments that have been removed.<sup>129</sup> In effect, this procedure returns Confederate monuments to a more welcoming owner.<sup>130</sup>

However, critics of this removal process warn that simply relocating the monument to new, supportive owners fails to address any of the issues surrounding the structural racism embedded in these statues.<sup>131</sup> Americans oppose the public display of Confederate monuments because these monuments reinforce years of oppression and inequality.<sup>132</sup> Conveying ownership of these statues to sympathizers perpetuates Confederate

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Cornish, *supra* note 32 (“You don’t need oppressive structures in museums.”); Lozano, *supra* note 55 (“I don’t believe that a statue honoring individuals that fought to continue [slavery] and destroy this nation of ours should exist anywhere on the face of the Earth.”).

125. See *12 Art Historians and Scholars*, *supra* note 32.

126. See *id.*

127. See generally Fitzpatrick, *supra* note 57, at 304–05 (arguing that the destruction of monuments forgoes an opportunity of public reconciliation and reckoning with the history of oppression).

128. See Caldwell & Cornish, *supra* note 32.

129. See Owley & Phelps, *Life and Death*, *supra* note 33, at 1477; see, e.g., Caldwell & Cornish, *supra* note 32 (describing how Gainesville, Florida, conveyed a Confederate monument to the local chapter of the UDC).

130. See Owley & Phelps, *Life and Death*, *supra* note 33, at 1476 (“When movements [of Confederate monuments] among local governments occur, the monuments remain on public land but now in a community with less vocal opposition to it.”).

131. See *id.* at 1400.

132. See Blain, *supra* note 36.

statues' symbolism of white supremacy because the monuments continue to be publicly displayed and celebrated.<sup>133</sup> Furthermore, the challenge of removing these monuments from the public eye becomes more difficult in the future because communities have little to no control over what private owners choose to do with the monuments.<sup>134</sup> Therefore, communities should carefully examine the ramifications of conveying Confederate monuments to sympathizers when considering the post-removal process.<sup>135</sup>

#### 6. Keep and Contextualize the Monument

Rather than removing a Confederate monument, a community may elect to leave the statue where it stands and contextualize the monument.<sup>136</sup> Advocates of this “middle-ground” approach<sup>137</sup> suggest that historical context gives observers a full understanding of the monuments' history.<sup>138</sup> Adding context allows observers to view the statues “as pieces of history or artifacts instead of objects of veneration.”<sup>139</sup>

Critics of this middle-ground approach question the impact of a small plaque placed alongside an imposing monument.<sup>140</sup> Beyond the whitewashed history that Confederate monuments display, critics argue that a monument's physically imposing presence inherently intimidates communities.<sup>141</sup> The removal process should address the physical location and presence of Confederate statues, rather than leaving them in public places as a reminder of their role in intimidating marginalized communities.<sup>142</sup>

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133. See Owley & Phelps, *Life and Death*, *supra* note 33, at 1400.

134. See *id.* at 1476 (implying that the removal of Confederate monuments is harder to address when the community housing the monument are less vocally opposed to it).

135. See *id.* at 1400 (“We strongly urge communities to give careful consideration to how they dispose of monuments to avoid merely relocating the controversy beyond the community's geographical bounds and, as a result, failing to address the root issues associated with these statues.”).

136. See Fitzpatrick, *supra* note 57, at 308; see, e.g., Dakin Andone, *Georgia Law Prohibits Removing These Confederate Monuments. So Atlanta Is Adding Context*, CNN (Aug. 2, 2019, 1:35 PM), <https://perma.cc/U4N2-DYZ4> (detailing how the Atlanta History Center added markers to Atlanta's Confederate monuments to provide information surrounding the history of the monuments and experiences of Black Americans).

137. See Fitzpatrick, *supra* note 57, at 308 (referring to the “middle-ground” approach as keeping the monument in its place and adding context to it).

138. See Grinberg, *supra* note 74.

139. *Id.*

140. See *id.* (“If a statue of Lee dominates a traffic circle, what impact would a small plaque have on motorists flying by?”).

141. See Bryant et al., *supra* note 81.

142. See Grinberg, *supra* note 74.



### 7. Hide the Monument in Storage

The final post-removal option involves relocating Confederate monuments from the public sphere to a private location for storage.<sup>143</sup> Although this procedure may be an effective short-term solution by removing the monuments' public presence, many argue that this procedure should not be used permanently.<sup>144</sup> Geographers Jordan Brasher and Derek H. Alderman argue that “[m]erely hiding away the monuments does not necessarily change the structural racism that birthed them.”<sup>145</sup> While Confederate monuments await their fate in dark storage facilities, communities should carefully consider what to do with the monument to address its controversial history.<sup>146</sup>

Communities that display Confederate monuments face complex and difficult decisions regarding what to do with the monuments post-removal.<sup>147</sup> Seven unique post-removal procedures offer guidance in this highly individualized process.<sup>148</sup> In making this decision, communities should also consider the policy objectives of the post-removal process when choosing a post-removal procedure.<sup>149</sup>

#### *C. Reconciliation: Policy Objectives of the Post-Removal Process*

Once a Confederate monument is removed, certain policy objectives should influence how communities decide its fate.<sup>150</sup> In discussing the post-removal process of Confederate monuments, historians, scholars, preservationists, journalists, and politicians have highlighted five general policy objectives, which are evident in the prior-presented options: (1) contextualization of the monument; (2) oversight of the monument's management; (3) care in the management and display of the monument; (4) education of the racist history that the monument memorializes; and (5) utilization of the monument as a tool for national reckoning.<sup>151</sup> While

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143. See Ortiz, *supra* note 73; Lozano, *supra* note 55; see, e.g., Caldwell & Cornish, *supra* note 32 (explaining that four Confederate monuments in New Orleans, Louisiana, and two Confederate monuments in Memphis, Tennessee, are being held in storage while their respective communities decide their fate).

144. See Brasher & Alderman, *supra* note 111.

145. *Id.*

146. See Bryant et al., *supra* note 81.

147. See *12 Art Historians and Scholars*, *supra* note 32.

148. See *supra* Sections II.B.1–7.

149. See *infra* Section II.C.

150. See generally *Confederate Monuments—Frequently Asked Questions*, *supra* note 69 (implying that certain policies that should be adhered to in the post-removal process); see also Kennedy, *supra* note 36; *12 Art Historians and Scholars*, *supra* note 32.

151. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69; Kennedy, *supra* note 36; *12 Art Historians and Scholars*, *supra* note 32.

these five objectives are non-exhaustive, they serve to guide communities in finding a solution to a complex issue.

Public Confederate monuments portray a whitewashed version of history by celebrating a racist government and opposing Black political progress.<sup>152</sup> To combat this injustice, post-removal procedures should contextualize the removed monument by educating the public about the divisive history of Confederate monuments and correcting the myths propagated by the “Lost Cause” narrative.<sup>153</sup> Post-removal procedures should also use removed monuments as a tool for national reckoning.<sup>154</sup> Recontextualized Confederate monuments offer communities an opportunity to “acknowledge[] and reconcil[e]” the United States’ divisive history.<sup>155</sup> Consequently, properly removed Confederate monuments allow the nation to heal.<sup>156</sup>

Procedurally, communities should choose a process that allows appropriate parties accessible oversight to ensure the monument’s management accurately reflects the post-removal policies.<sup>157</sup> Additionally, managers of removed statues must carefully ensure that the display of the newly contextualized monument promotes national healing, rather than a continued celebration of the Confederacy.<sup>158</sup>

Understanding the policy objectives of the post-removal process helps communities analyze whether the legal landscape surrounding certain procedures adequately serves these objectives.<sup>159</sup> Thus, communities must consider both the policy and the law when deciding how to deal with removed monuments.

#### *D. In Museums We Trust: Confederate Monuments, Museums, and Trust Law*

As communities that grappled with the initial question of whether to remove a Confederate monument understand, the law plays an important

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152. See Blain, *supra* note 36.

153. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69; see also Cox, *supra* note 50.

154. See Lozano, *supra* note 55.

155. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69.

156. See *12 Art Historians and Scholars*, *supra* note 32.

157. See Bryant et al., *supra* note 81; Kennedy, *supra* note 36 (“[H]istorians should be at the table when public discussions about Confederate monuments arise.”).

158. See *12 Art Historians and Scholars*, *supra* note 32 (“The challenge posed by the memorials arises from two contradictory facts: a) celebrating terroristic regimes like the Confederacy and Jim Crow is abhorrent and b) tearing down the memorials may induce amnesia about how bad those regimes were.”).

159. See *infra* Part III.

role in the removal process.<sup>160</sup> The law is highly relevant in the post-removal process because the law can help effectuate the post-removal objectives.<sup>161</sup> In addition to considering the different post-removal procedures and policies of Confederate monuments, communities should consider the legal framework governing each procedure when making their decision.

Laws surrounding the post-removal process are complex.<sup>162</sup> However, distinct fields of law play a dominant role in different post-removal procedures.<sup>163</sup> Because a majority of monument-removal advocates agree that the most effective post-removal solution is to donate the monument to a museum,<sup>164</sup> this Comment analyzes the laws surrounding such a donation.<sup>165</sup> Trust law predominately governs

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160. See Owley & Phelps, *Life and Death*, *supra* note 33, at 1407 (“A complex mosaic of public and private law applies [to Confederate monument removal disputes].”). For a further discussion of the public and private laws that impact whether a public Confederate monument can be removed, see *id.* at 1435–67.

161. See Jess Phelps & Jessica Owley, *The Afterlife of Confederate Monuments*, 98 IND. L.J. 371, 427 (2023) [hereinafter Phelps & Owley, *Afterlife*] (arguing that communities should carefully consider the post-removal options of Confederate monuments so they can avoid the legal morass that occurs during removal).

162. See, e.g., *id.* at 384 (explaining how property law can complicate relocation efforts).

163. See, e.g., MARYLIN E. PHELAN, MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL 20 (4th ed. 2014) (explaining how charitable trusts influence museums); see also, e.g., COMAY ET AL., *supra* note 98, at 1 (explaining how administrative law and regulations influence federal battlefields and cemeteries).

164. See *Creating More Inclusive Public Spaces*, *supra* note 70 (noting that among Americans who favor the relocation or destruction of Confederate monuments, approximately 74% favor the removal of the monuments to museums); see also *Confederate Monuments—Frequently Asked Questions*, *supra* note 69 (explaining that the National Trust for Historic Preservation’s preferred procedure is relocating the monument to a location where it can be recontextualized and historically presented). Although destroying Confederate monuments in their entirety is another popular and valid post-removal procedure, communities that have employed this method have generally relied on the political process, which generally does not implicate specific laws that influence the procedure. See Reimann, *supra* note 121. This Comment specifically addresses and analyzes the removal of monuments to museums because donating Confederate monuments to museums implicates trust law and impacts whether the process supports the objectives of post-removal. See *id.*

165. See *supra* Section II.C.1. Relocating Confederate monuments to federal battlefields, cemeteries, or monument graveyards are also popular post-removal procedures. See *supra* Sections II.C.2–3. Like donating Confederate monuments to museums, these procedures involve relocating the monument to a more acceptable location where it can be recontextualized and properly displayed. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69. Laws governing these procedures include statutory, regulatory, and administrative law. See COMAY ET AL., *supra* note 98, at 1. However, an analysis of how these laws impact the post-removal process is beyond the scope of this Comment.

donations to museums.<sup>166</sup> An initial understanding of trust law is necessary to determine whether donating Confederate monuments to museums is an effective post-removal procedure.

The American Alliance of Museums' ("AAM") Code of Ethics highlight the unique ethical duty museums hold in serving the public.<sup>167</sup> The AAM emphasizes that under their duty to serve the public, American museums should "hold[] their collections and information as a benefit for those they were established to serve."<sup>168</sup> This duty mimics the function of trust law.<sup>169</sup> Museums are organized in a manner whereby a person or organization conveys or donates property to the trustee—typically the directors or trustees of the museum.<sup>170</sup> The trustee then holds the property in trust for the beneficiary—typically the public.<sup>171</sup> As trustee, the museum owes a fiduciary duty of care to manage the trust in a non-negligent manner and owes a fiduciary duty of loyalty to public beneficiaries to not abuse their positions as trustees.<sup>172</sup> Because the organization and operation of museums are impacted by the law of trusts, trust law theories influence the post-removal process of donating Confederate monuments to museums.<sup>173</sup>

The first influential theory is the public trust doctrine. The AAM states that "[museums] are organized as public trusts."<sup>174</sup> The public trust doctrine is the principle "that certain natural and cultural resources are preserved for public benefit."<sup>175</sup> Effectively, the AAM claims that museums use the public trust doctrine to hold their collections in trust for the enjoyment and education of the public.<sup>176</sup> However, legal scholars claim that this classification of the public trust doctrine is a misnomer.<sup>177</sup>

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166. See PHELAN, *supra* note 163, at 20.

167. See *AAM Code of Ethics for Museums*, AM. ALL. MUSEUMS, <https://perma.cc/K5K3-7764> (last visited Aug. 27, 2023) ("Museums in the United States are grounded in the tradition of public service.").

168. *Id.*

169. See PHELAN, *supra* note 163, at 20; see also *AAM Code of Ethics for Museums*, *supra* note 167 ("As nonprofit institutions, museums comply with . . . specific legal standards governing trust responsibilities.").

170. See PHELAN, *supra* note 163, at 20.

171. *See id.*

172. *See id.* at 31–36; see also *id.* at 29 (defining "fiduciary duty" as a duty by "the trustees, board members, and officers of a museum . . . to manage affairs of the museum they represent so that property entrusted to the museum will be used for public purposes").

173. See *AAM Code of Ethics for Museums*, *supra* note 167.

174. *Id.*

175. *Public Trust and Accountability Standards*, AM. ALL. MUSEUMS, <https://perma.cc/3TDZ-QQK3> (last visited Aug. 27, 2023).

176. *See id.*

177. See Brian L. Frye, *Art & the "Public Trust" in Municipal Bankruptcy*, L. PROFESSOR BLOGS NETWORK (Feb. 29, 2016), <https://perma.cc/GY9H-NJAH>; see also Sullivan & Worcester LLP, *A Trust for the Benefit of the Public is Not "The Public*

The public trust doctrine is a common law doctrine originally developed for sovereign governments to hold *natural* resources, such as submerged lands, in trust for public use.<sup>178</sup> The public trust doctrine restricts the government from alienating the natural resource without legislative approval.<sup>179</sup> Once property is identified as held in the public trust, beneficiaries of the trust can challenge the government if the government's actions violate its duties as public trustee.<sup>180</sup> Recently, courts have broadened the public trust doctrine to include more public uses of natural resources and lands.<sup>181</sup>

However, courts consistently refuse to expand the public trust doctrine to museum collections or cultural monuments.<sup>182</sup> Because Confederate monuments are not natural resources, they are not likely to be legally protected by the public trust doctrine in courts.<sup>183</sup> As the public trust doctrine stands today, it is unlikely that courts will enforce legal claims using this theory for a museum's management of Confederate monuments.<sup>184</sup>

The second theory of trust law related to donating Confederate monuments to museums is the theory of charitable trusts. A charitable trust is created when a donor, with charitable intent, transfers property to be held in trust.<sup>185</sup> Charitable intent is ordinarily defined as the intent to

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Trust"—*The Deaccessioning Debate and the Detroit Institute of Arts*, LEXOLOGY (June 4, 2014), <https://perma.cc/ZD4B-KMDX>.

178. See *Schmid v. City & Cnty. of San Francisco*, 60 Cal. App. 5th 470, 493–94 (Cal. Ct. App. 2021); see also *Ladies Mem'l Ass'n v. City of Pensacola*, No. 3:20cv5681, 2020 WL 5237742, at \*7 (N.D. Fla. Sept. 2, 2020), *rev'd*, 34 F.4th 988 (11th Cir. 2022) (emphasis added).

179. See *Ladies Mem'l Ass'n*, 2020 WL 5237742, at \*7; see also *Columbus Monument Corp. v. City of Syracuse*, 74 Misc. 3d 1094, 1106 (N.Y. Sup. Ct. 2022) (citing *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (2015)).

180. See, e.g., *Pilchesky v. Redevelopment Auth. of Scranton*, 941 A.2d 762, 763–64 (Pa. Commw. Ct. 2008) (noting that a taxpayer had proper standing to challenge an improper sale of land held in public trust).

181. See *Schmid*, 60 Cal. App. 5th at 493 (noting that the public trust doctrine evolved to protect expansive public uses of natural property held in trust, such as hunting or swimming).

182. See, e.g., *id.* at 493–94 (rejecting plaintiff's argument that the public trust doctrine applied to the government's removal of a public monument because no court has extended the public trust doctrine to public art and the monument was not a natural resource); see also *Ladies Mem'l Ass'n*, 2020 WL 5237742, at \*7 (refusing to extend the application of the public trust doctrine to the removal of a Confederate monument because the monument was not a natural resource).

183. See *Schmid*, 60 Cal. App. 5th at 493; see also *Ladies Mem'l Ass'n*, 2020 WL 5237742, at \*7.

184. See *Schmid*, 60 Cal. App. 5th at 493; see also *Ladies Mem'l Ass'n*, 2020 WL 5237742, at \*7.

185. See *Rockwell v. Trs. of Berkshire Museum*, No. 1776cv00253, 2017 WL 6940932, at \*13 (Mass. Super. Ct. Nov. 7, 2017).

benefit an indefinite number of people.<sup>186</sup> In the museum setting, a charitable trust is created in two ways<sup>187</sup>: (1) A person or organization donates property with the intent of forming a museum, as a corporation, around the administration of the charitable trust;<sup>188</sup> or (2) a person or organization donates property to a previously established museum.<sup>189</sup> In either scenario, the museum operates as the trustee by managing the collections for public enjoyment.<sup>190</sup> A donor can make restrictions on property placed in a charitable trust but cannot make restrictions on property placed in a public trust.<sup>191</sup> These restrictions are made based on the circumstances surrounding the donation explicitly or implicitly.<sup>192</sup> Even though property in a charitable trust may be intended for public enjoyment, it is not a public asset.<sup>193</sup> Therefore, the trustee must follow the donor's intentions.<sup>194</sup>

As trustee of a charitable trust, museums owe a fiduciary duty to follow the intentions of the donor and provide the public with access to museum collections.<sup>195</sup> Museum trustees hold property for the purpose of protecting the asset and educating the public.<sup>196</sup> A trustee usually has broad discretion in managing the asset, within the bounds of the donor's

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186. See *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161 (Cal. Ct. App. 1987); see also, e.g., *People ex rel. Scott v. Silverstein*, 408 N.E.2d 243, 246 (Ill. App. Ct. 1980) (explaining that the citizens of Illinois were the beneficiaries of the museum, which was organized as a charitable trust).

187. See UNIF. SUPERVISION OF TRS. FOR CHARITABLE PURPOSES ACT § 2 (AM. L. INST. & UNIF. L. COMM'N 1954).

188. See, e.g., *Dennis v. Buffalo Fine Arts Acad.*, No. 2007-2220, 2007 WL 840996, at \*4 (N.Y. Sup. Ct. Mar. 21, 2007) (explaining that a charitable trust was created after a donor donated art and sculptures to the Buffalo Fine Arts Academy).

189. See, e.g., *In re Charles M. Bair Family Tr.*, 183 P.3d 61, 65 (Mont. 2008) (describing how the Charles M. Bair Family Museum was created as a charitable trust to administer the Charles M. Bair Family Trust for educational purposes).

190. See UNIF. SUPERVISION OF TRS. FOR CHARITABLE PURPOSES ACT § 2 (AM. L. INST. & UNIF. L. COMM'N 1954).

191. See *Rockwell v. Trs. of Berkshire Museum*, No. 1776cv00253, 2017 WL 6940932, at \*13 (Mass. Super. Ct. Nov. 7, 2017); cf. *Schmid v. City & Cnty. of San Francisco*, 60 Cal. App. 5th 470, 493–94 (Cal. Ct. App. 2021) (explaining how access to a public asset in public trust cannot be restricted).

192. See *Rockwell*, 2017 WL 6940932, at \*13 (“A gift to a charity usually creates some kind of charitable trust, with terms that are either express or implied based upon the circumstances of the gift.”).

193. See *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 163 (Cal. Ct. App. 1987) (“[T]he trust assets do not constitute public assets but rather the res of a charitable trust.”).

194. See *Rockwell*, 2017 WL 6940932, at \*13.

195. See PHELAN, *supra* note 163, at 20.

196. See *id.*

intentions.<sup>197</sup> However, if the trustee breaches their fiduciary duty, injured parties may bring suit against the trustee.<sup>198</sup>

For example, in *Rockwell v. Trustees of Berkshire Museum*, plaintiffs sought to enjoin the trustees of Berkshire Museum from deaccessioning<sup>199</sup> 40 different works of art.<sup>200</sup> Plaintiffs argued that the deaccessioning of Rockwell's paintings breached the intentions of the charitable trust when Rockwell donated the artwork, which was to be kept in the museum's "permanent collection."<sup>201</sup> However, the court ruled that Rockwell never intended to create a separate, restrictive trust in which the museum could not deaccession, but rather, Rockwell intended the paintings to belong to the museum's corporate purposes—including the museum's duty to deaccession artwork.<sup>202</sup> Therefore, the court denied plaintiff's request to enjoin the museum from deaccessioning the artwork.<sup>203</sup>

Additionally, the AAM's Code of Ethics for Museums may also create fiduciary duties for museums acting as trustees.<sup>204</sup> In *Breedlove v. Museum of Science and Industry*, the court held that the plaintiff sufficiently alleged that the museum owed a fiduciary duty to display donated property, based on the standards of the AAM's Code of Ethics.<sup>205</sup> Injured parties can challenge the actions of a museum to ensure the museum properly maintains the asset for public benefit.<sup>206</sup>

Unlike public trusts, in which taxpayers generally have standing to enforce the trust, charitable trusts restrict who can challenge the trust's administration.<sup>207</sup> Unique to charitable trusts, a state's Attorney General

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197. See, e.g., *In re Charles M. Bair Family Tr.*, 183 P.3d 61, 77 (Mont. 2008) (holding that the Board did not breach their fiduciary duty by delegating their authority to manage the museum when they had discretion in delegation and exercised it reasonably).

198. See, e.g., *People ex rel. Scott v. Silverstein*, 408 N.E.2d 243, 244 (Ill. App. Ct. 1980) ("The complaint charged the directors failed to display Museum artifacts to the public in violation of the Museum's corporate charter, mismanaged Museum assets by purchasing investment real estate, consistently operated the Museum at a deficit, awarded each other excessive salaries, and secretly sold a painting from the Museum collection.").

199. See AM. ALL. OF MUSEUMS, DIRECT CARE OF COLLECTIONS: ETHICS, GUIDELINES AND RECOMMENDATIONS 4 (2019), <https://perma.cc/8QE6-3W6Y> (defining "deaccessioning" as "the process of removing an item from a museum's permanent collections," usually to sell and raise funds).

200. See *Rockwell v. Trs. of Berkshire Museum*, No. 1776cv00253, 2017 WL 6940932, at \*1 (Mass. Super. Ct. Nov. 7, 2017).

201. See *id.* at \*15.

202. See *id.*

203. See *id.* at \*19.

204. See *Breedlove v. Museum of Sci. & Indus.*, No. 16 C 5861, 2017 WL 56641, at \*2 (N.D. Ill. Jan. 5, 2017).

205. See *id.*

206. See *Rockwell*, 2017 WL 6940932, at \*1.

207. See *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161–62 (Cal. Ct. App. 1987); cf. *Pilchesky v. Redevelopment Auth. Scranton*, 941 A.2d 762, 763–64 (Pa. Commw. Ct.

has standing to enforce and protect a charitable trust in that state.<sup>208</sup> Under the Uniform Supervision of Trustees for Charitable Purposes Act, the Attorney General has enforcement and supervisory powers to “institute appropriate proceedings to secure compliance [and] proper administration of [charitable trusts].”<sup>209</sup> The Attorney General has standing to enforce charitable trusts because the beneficiaries of charitable trusts are indefinite.<sup>210</sup> Due to the Attorney General’s position, “the law presumes that the Attorney General can protect public charitable trusts ‘more satisfactorily . . . than . . . individuals.’”<sup>211</sup>

Other than the Attorney General, only certain parties have standing to enforce a charitable trust.<sup>212</sup> For a party to have standing, they must have a “special and definite interest” in the trust, such as a co-trustee.<sup>213</sup> This special interest in the charitable trust is heightened beyond the enjoyment of a taxpayer or general member of the community.<sup>214</sup> In *Hardman v. Feinstein*, the court emphasized that it is good judicial policy to restrict standing when enforcing charitable trusts in order to protect the trustee against frivolous and ongoing suits.<sup>215</sup> The Attorney General is presumed to advocate for the best interest of the public, which avoids endless litigation from disagreeable groups, especially in circumstances involving contentious assets like Confederate monuments.<sup>216</sup> Because charitable trusts play an important role in the operation of museums, the law of charitable trusts also plays a dominate role in the post-removal process of donating Confederate monuments to museums. When communities consider donating Confederate monuments to museums, they must

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2008) (noting that a taxpayer had proper standing to challenge a sale of land held in public trust).

208. See *Rockwell*, 2017 WL 6940932, at \*4; see also *Hardman*, 195 Cal. App. 3d at 161.

209. See UNIF. SUPERVISION OF TRS. FOR CHARITABLE PURPOSES ACT §§ 1, 11 (AM. L. INST. & UNIF. L. COMM’N 1954).

210. See *Hardman*, 195 Cal. App. 3d at 161 (“Because the beneficiaries of charitable trusts, unlike beneficiaries of private trusts, are ordinarily indefinite, the Attorney General . . . is the proper party to enforce them.”).

211. *Rockwell*, 2017 WL 6940932, at \*4 (quoting *Burbank v. Burbank*, 152 Mass. 254, 256 (1890)).

212. See *Hardman*, 195 Cal. App. 3d at 161–62.

213. See *id.*

214. See *id.* at 162; see also *Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488, 490 (Tex. Civ. App. 1976) (explaining that a special and definite interest to enforce a charitable trust is determined by whether a certain class of beneficiaries were intended to benefit from the trust in a different manner than the general public).

215. See *Hardman*, 195 Cal. App. 3d at 162 (citing GEORGE G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 411 (2d ed. 1977)) (“This limitation on standing arises from the need to protect the trustee from vexatious litigation, possibly based on an inadequate investigation, by a large, changing, and uncertain class of the public to be benefited.”).

216. See *Rockwell*, 2017 WL 6940932, at \*4.



consider whether the law of charitable trusts effectuate the post-removal objectives.

### III. ANALYSIS

As more communities decide to rid public areas of controversial Confederate monuments and memorials,<sup>217</sup> a new complexity surrounding Confederate memorials has joined the discourse<sup>218</sup>: What should happen to Confederate monuments once they are removed? Many experts, community members, and politicians have recommended various solutions to this dilemma.<sup>219</sup> However, most of these recommendations are devoid of one key component: the law.<sup>220</sup>

Communities should choose a procedure in which the relevant laws help to effectuate the post-removal objectives. This Part argues that the law of charitable trusts helps to effectuate the post-removal objectives when communities donate Confederate monuments to museums.<sup>221</sup> Then, this Part recommends ways in which courts can strengthen the laws of charitable trusts to further promote the objectives of post-removal and ways in which federal and state governments could ease the practical burdens museums face in accepting donated Confederate monuments.<sup>222</sup>

#### *A. Charitable Trusts Support the Post-Removal Objectives*

Generally, communities should consider donating removed Confederate monuments to museums because the law of charitable trusts offers a supportive legal framework for museums to meet the five policy objectives of the post-removal process.<sup>223</sup> While it is important to ensure that the law provides an adequate pathway for enforcing post-removal policies, its consideration is meaningless, however, if donating the monuments to museums is impracticable.<sup>224</sup> Thus, federal and state governments should implement laws and policies to ease the practical limitations museums face in accepting donated Confederate monuments.<sup>225</sup>

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217. See S. POVERTY L. CTR., *supra* note 21, at 15.

218. See Oritz, *supra* note 73.

219. See generally 12 *Art Historians and Scholars*, *supra* note 32 (proposing different solutions in how to deal with removed Confederate monuments); see also Caldwell & Cornish, *supra* note 32.

220. See generally 12 *Art Historians and Scholars*, *supra* note 32 (demonstrating that no scholar considered the legal landscape that could impact the post-removal process).

221. See *infra* Section III.A.

222. See *infra* Sections III.B–C.

223. See *supra* Section II.C.

224. See Bryant et al., *supra* note 81; see also Caldwell & Cornish, *supra* note 32.

225. See *infra* Sections III.B–C.

The law surrounding charitable trusts supports the first post-removal policy objective of contextualization. Post-removal procedures must recontextualize the whitewashed histories of Confederate monuments and explain their role in intimidating and oppressing marginalized communities in public spaces.<sup>226</sup> As trustees of a donated Confederate monument, museums hold a duty of recontextualization by the donor's implicit intention to preserve the monument and remove its oppressive undertones.<sup>227</sup> Because the creation of a charitable trust, with museums as the trustee, would allow experts to recontextualize the monuments, communities should seek to donate Confederate monuments to museums as a charitable trust.

Second, charitable trusts allow for proper oversight of museums in their maintenance of Confederate monuments. Although the general public may not have standing to enforce a charitable trust,<sup>228</sup> a state's Attorney General has supervisory powers to enforce an action against the administration of a charitable trust.<sup>229</sup> Because Confederate monuments are deeply rooted in the wounds of the nation, a state's Attorney General would likely use its supervisory powers to enforce a charitable trust involving a Confederate monument.<sup>230</sup>

Third, the legal theory of charitable trusts creates proper incentives for museums to carefully manage and display Confederate monuments. Managers of removed Confederate monuments have the unenviable task—and related duty of care<sup>231</sup>—of displaying the monument in a manner that balances the educational purposes of the contextualized monument with the inadvertent celebration of the Confederacy.<sup>232</sup> As trustees of a charitable trust, museums have a legal duty to administer the trust in a

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226. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69.

227. See *Rockwell v. Trs. of Berkshire Museum*, No. 1776cv00253, 2017 WL 6940932, at \*13 (Mass. Super. Ct. Nov. 7, 2017) (explaining how the terms of a charitable trust can be impliedly created under the circumstances for which the asset was donated to charity).

228. See *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 162 (Cal. Ct. App. 1987) (explaining that taxpayers do not generally have standing to enforce a trust).

229. See UNIF. SUPERVISION OF TRS. FOR CHARITABLE PURPOSES ACT §§ 1, 11 (AM. L. INST. & UNIF. L. COMM'N 1954); see also *Rockwell*, 2017 WL 6940932, at \*4.

230. See *How Statues Are Falling Around the World*, *supra* note 62 (explaining how public Confederate monuments continue to play an active role in racism and violence in the United States). *But see* *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 755 (Cal. 1964) (explaining the inherent conflict of having a politically appointed state's attorney general enforcing charitable trusts that contain particularly divisive or politically charged objects).

231. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69.

232. See *12 Art Historians and Scholars*, *supra* note 32 (explaining the complex balance of displaying removed Confederate monuments).

manner of ordinary prudence.<sup>233</sup> Additionally, courts have relied on the AAM's Code of Ethics as a standard of care that museum trustees must follow.<sup>234</sup> Because charitable trusts impose a legal duty on museums to practice ordinary care in the management and display of Confederate monuments, the law supports the post-removal objective of care.

Furthermore, charitable trusts support the post-removal objective of education. Because education is central to both the legal theory of charitable trusts and the functions of museums, museums, as charitable trusts, inherently promote the educational objective of the post-removal of Confederate monuments.<sup>235</sup>

Finally, when Confederate monuments are donated to museums, the creation of charitable trusts meets the post-removal objective of national reckoning. A prominent controversy embedded in the national consciousness, Confederate monuments represent more than pillars of remembrance.<sup>236</sup> They resemble beacons of hate.<sup>237</sup> But some experts argue that these monuments of division could offer an opportunity for national healing in the proper setting.<sup>238</sup> To achieve the objective of national reckoning, there must be some public aspect in the administration of the monument.<sup>239</sup> The purpose of a charitable trust is for a responsible trustee to administer the asset for public benefit.<sup>240</sup> Because the creation of a charitable trust through the donation of Confederate monuments to museums would be intended, impliedly, for the public benefit, the law supports national healing.

Beyond legal considerations, communities should also consider practical limitations of the post-removal process of Confederate

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233. See PHELAN, *supra* note 163, at 31. ("The duty of care requires that a director exercise reasonable skill in the exercise of her responsibilities. A director should exercise the same care and skill that an ordinary prudent person would exercise under similar circumstances in the director's own personal affairs.")

234. See *Breedlove v. Museum of Sci. & Indus.*, No. 16 C 5861, 2017 WL 56641, at \*2 (N.D. Ill. Jan. 5, 2017) (holding that plaintiff sufficiently alleged a breach of fiduciary duty against a museum, citing to the AAM's Code of Ethics).

235. See UNIF. TR. CODE § 405(a) (UNIF. L. COMM'N 2000) ("A charitable trust may be created for . . . the advancement of education . . . or other purposes the achievement of which is beneficial to the community.")

236. See Blain, *supra* note 36; see also Lozano, *supra* note 55.

237. See Blain, *supra* note 36.

238. See *Confederate Monuments—Frequently Asked Questions*, *supra* note 69 (arguing that contextualizing divisive Confederate monuments in controlled settings could offer communities an opportunity to acknowledge and reconcile with America's history).

239. See *id.* (arguing that Confederate monuments be used as tools for national reckoning in a public setting).

240. See UNIF. SUPERVISION OF TRS. FOR CHARITABLE PURPOSES ACT § 2 (AM. L. INST. & UNIF. L. COMM'N 1954).

monuments.<sup>241</sup> Confederate monuments are imposing structures in public outdoor areas.<sup>242</sup> Most monuments are enormous and not designed to be stored indoors.<sup>243</sup> As a result, museums face physical limitations when accepting Confederate statues.<sup>244</sup>

When considering the procedural options in the post-removal process of Confederate monuments, communities should contemplate whether the law under which they operate meets the post-removal policy objectives.<sup>245</sup> Communities should choose a procedure in which the related legal mechanisms support the objectives of the post-removal process. Generally, the law of charitable trusts surrounding the donation of Confederate monuments to museums supports the post-removal objectives.<sup>246</sup> Therefore, communities should strongly consider donating removed Confederate monuments to museums when it is feasible. Furthermore, courts and legislatures can assist communities in this complex decision by expanding rules and adopting laws to strengthen support of the post-removal process.<sup>247</sup>

#### *B. Recommendation: Increase Oversight in Trust Law*

Even though trust law sufficiently supports the post-removal objectives when donating Confederate monuments to museums, courts can strengthen the law by expanding who can enforce and oversee the trust.<sup>248</sup> Under the charitable trust doctrine, only the Attorney General or parties who have a “special and definite interest” in the trust can enforce it.<sup>249</sup> While the law presumes that the Attorney General acts in the best interest of the public, this presumption is naïve,<sup>250</sup> especially when the trust holds a politically charged object.<sup>251</sup> As a result, courts should expand who has

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241. See *supra* notes 89–94 and accompanying text.

242. See Caldwell & Cornish, *supra* note 32.

243. See *id.* (noting that most Confederate monuments tower over 60 feet tall).

244. See Bryant et al., *supra* note 81.

245. See *supra* Sections II.C–D.

246. See *supra* Section II.D.

247. See *infra* Sections III.B–C.

248. See *supra* Section III.A.

249. See *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161–62 (Cal. Ct. App. 1987).

250. See *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 755 (Cal. 1964) (“The Attorney General may not be in a position to become aware of wrongful conduct or . . . appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment.”).

251. See *id.* The debate surrounding Confederate monuments is particularly political. The PRRI survey shows that 44% of Democrats support removing Confederate monuments to museums, as compared to 30% of Independents and 8% of Republicans. See *Creating More Inclusive Public Spaces*, *supra* note 70. Because the Attorney General is a political

standing to enforce charitable trusts when the object held in trust involves a controversial monument.

One specific recommendation to strengthen the law of the post-removal process is for courts to expand the standing of charitable trusts involving Confederate monuments to include experts, such as historians, as persons with a “special and definite” interest in enforcing the trust.<sup>252</sup> In Confederate monument litigation, the “special and definite interest” standard of third-party enforcement should be liberalized to include historical experts but continue to protect the policy of limiting standing for charitable trusts because historical experts are persons of a unique class who help to aid in the proper contextualization and education of Confederate monuments and, therefore, hold a special interest in enforcing a trust which holds a Confederate monument for that purpose.<sup>253</sup>

To determine whether a party has a special and definite interest to enforce a charitable trust, courts determine if a small number of an identifiable class of people hold an interest in a benefit of the trust that is unique from the public.<sup>254</sup> Courts make this determination by identifying whether the donor intended for a particular class of people—outside of the general public—that is definite in size and number to benefit specifically from the charitable trust by looking into the trust’s chartering documents.<sup>255</sup>

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position, political pressure may also influence an Attorney General’s decision to enforce a charitable trust containing a Confederate monument. *See Holt*, 61 Cal. 2d, at 755.

252. *See Hardman*, 195 Cal. App. 3d at 161–62. Another recommendation to strengthen the law in supporting post-removal procedures is for courts to expand the public trust doctrine to allow culturally significant or controversial monuments to be protected under a public trust. *See Schmid v. City & Cnty. of San Francisco*, 60 Cal. App. 5th 470, 493 (Cal. Ct. App. 2021); *see also Ladies Mem’l Ass’n v. City of Pensacola*, No. 3:20cv5681, 2020 WL 5237742, at \*7 (N.D. Fla. Sept. 2, 2020), *rev’d*, 34 F.4th 988 (11th Cir. 2022). However, a discussion about the implications of expanding the public trust doctrine to Confederate monuments is beyond the scope of this Comment.

253. *See Hardman*, 195 Cal. App. 3d, at 162 (explaining that standing to enforce charitable trusts is limited to Attorney Generals, as a representative of the general public, to prevent vexatious litigation against the trustee); *see, e.g., Kennedy*, *supra* note 36 (arguing that oversight of the post-removal process would be strengthened if historians and other experts were included in the process).

254. *See Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488, 491 (Tex. Civ. App. 1976) (holding that Saint Matthews Cathedral parishioners had a special and definite interest in enforcing a charitable trust of funds for the cathedral because they were a limited identifiable class who were unlikely to unduly harass the trustee); *cf. Forest Guardians v. Powell*, 130 N.M. 368, 374 (N.M. App. 2001) (holding that schoolchildren of a public school lacked a special and definite interest in a charitable trust of public land to enforce its administration).

255. *Sagtikos Manor Hist. Soc’y. v. Robert David Lion Gardiner Found.*, 9 N.Y.S.3d 80, 82 (N.Y. App. Div. 2015) (“This ‘special interest’ is found by looking to the trust’s chartering documents to discern the purpose of the trust, and whether there is a class of intended beneficiaries that is entitled to a preference and is sharply defined and limited in

Using this standard, courts should hold that museum professionals and historical experts have a special interest to enforce charitable trusts containing Confederate monuments. These professionals are part of a small class that holds a unique interest in benefiting from charitable trusts of Confederate monuments.<sup>256</sup> Like the public, professionals benefit from museums maintaining and contextualizing Confederate monuments to educate the public and reconcile the divisive history of the Confederacy with its memorialization.<sup>257</sup> However, historians hold a position unique from the public because they can use their expertise to ensure the monuments are contextualized and maintained in a manner consistent with post-removal objectives.<sup>258</sup>

In the absence of enforcement by a state's Attorney General, experts involved in the recontextualization process should be allowed to maintain a suit against the trustees because the experts' standing to enforce the trust was impliedly intended by the donation.<sup>259</sup> Because historians are a small, identifiable class of beneficiaries whose interests in the enforcement of Confederate monuments held in trust is different from the general public, courts should determine that museum experts and historians hold a special and definite interest in enforcing the charitable trust.<sup>260</sup>

### C. Recommendation: Promote Incentives for Museums

The law should also encourage proper incentives for museums to accept the duty of maintaining, contextualizing, and displaying Confederate monuments. One of the best ways to support museums in this

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number."); *see, e.g.*, *Valley Forge Hist. Soc'y. v. Wash. Mem'l Chapel*, 493 Pa. 491, 499 (Pa. 1981) (holding that the Valley Forge Historical Society held a special and definite interest in enforcing a charitable trust of the historical Washington Memorial Chapel, because the historical society had a long-standing relationship with the Chapel in educating the public and the society was included in the trust instrument).

256. *See Kennedy, supra* note 36.

257. *See id.*

258. *See id.*

259. *See City of Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514, 528 (N.J. Super. Ct. Ch. Div. 1967) ("While public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decide[d]ly in the public interest.").

260. *But see Sagtikos Manor Hist. Soc'y. v. Robert David Lion Gardiner Found.*, 9 N.Y.S.3d 80, 82 (N.Y. App.Div. 2015) (explaining that courts should look towards charting documents to discern the intent of the settlor and whether a party holds a special interest). In the alternative, communities should consider naming a particular historical group or group of experts as a co-trustee or alternate beneficiary when donating Confederate monuments and establishing the trust instruments because courts will be more likely to hold that identified experts have a special interest in the trust. *See id.* Naming a certain group of historians or experts also dispels fears of harassing and vexatious litigation on the trustee. *See Hardman v. Feinstein*, 195 Cal. App. 3d 157, 162 (Cal. Ct. App. 1987).

duty is to provide funding.<sup>261</sup> Preserving public monuments of hate is an expensive affair.<sup>262</sup> A special report determined that the preservation of public Confederate monuments cost Americans over \$40 million dollars within the last decade.<sup>263</sup> Federal and state governments should intentionally redirect these public funds to museums to contextualize Confederate monuments.

For example, one purpose of the Institute of Museum and Library Sciences (“IMLS”) is to assist, encourage, and support museums in carrying out their educational role in displaying culturally significant items.<sup>264</sup> The Director of the IMLS is authorized to appropriate funds and grants to museums.<sup>265</sup> Museums can apply for funds to manage the display and contextualization of Confederate monuments.<sup>266</sup> However, the federal government and the IMLS should be intentional in funding museums that accept Confederate monuments. In August 2021, Congressman Espaillat proposed legislation that sought to “prohibit the use of Federal funds for Confederate symbols.”<sup>267</sup> The legislature should pass a law that would further identify these federal funds and redirect them to support museums that accept and contextualize Confederate monuments.

Similarly, state legislatures should intentionally identify funds used to promote public Confederate monuments and redirect them toward supporting museums in their states that engage with the monuments in the post-removal process.<sup>268</sup> In the previous decade, Virginia spent \$174,000 in state funds to preserve the infamous Robert E. Lee monument in Charlottesville.<sup>269</sup> The Virginia Department of Historic Resources continues to fund neo-Confederate organizations, like the United Daughters of the Confederacy, to maintain Confederate monuments at gravesites.<sup>270</sup> Instead of funding the preservation of hateful monuments, state legislatures should support museums engaging in the post-removal process by intentionally redirecting funds to museums.

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261. See Caldwell & Cornish, *supra* note 32.

262. See Brian Palmer & Seth Freed Wessler, *The Costs of the Confederacy*, SMITHSONIAN MAG.: HIST. (Dec. 2018), <https://perma.cc/698P-UNKZ>.

263. See *id.* (“In the last decade alone, American taxpayers have spent at least \$40 million on Confederate monuments and groups that perpetuate racist ideology.”).

264. See 20 U.S.C. § 9171.

265. See *id.* § 9176.

266. See 2 C.F.R. § 3187.5 (2014).

267. H.R. 4994, 117th Cong. (2021).

268. See Palmer & Wessler, *supra* note 262.

269. See *id.*

270. See VA. CODE ANN. § 10.1-2211 (2016).

Private community-based organizations and citizens alike should also support museums in their post-removal efforts.<sup>271</sup> In 2020, for example, the Mellon Foundation established “The Monuments Project,” which committed \$250 million to support “public projects that more completely and accurately represent the multiplicity and complexity of American stories.”<sup>272</sup> Funds are granted to museums that seek to recontextualize Confederate monuments.<sup>273</sup> Congress should encourage individual and organizational contributions to museums that recontextualize Confederate monuments. For example, Congress should pass a bill to extend tax deductions to individuals who make charitable contributions, but do not itemize their deductions.<sup>274</sup> Congress should also increase the deductions taxpayers are allowed to claim for charitable contributions.<sup>275</sup> In doing so, individuals will be incentivized to donate to museums, allowing communities to help alleviate financial burdens on museums contextualizing Confederate monuments.

Another practical limitation on museums maintaining Confederate monuments is the monuments’ size.<sup>276</sup> One way to circumvent this limitation is for museums to create open-air exhibits.<sup>277</sup> Open-air museums are a contemporary phenomenon in which museums operate collections outside because they are too big to fit inside traditional museum buildings.<sup>278</sup> However, for museums to display a contextualized exhibit of Confederate monuments outdoors, they need funding and land.<sup>279</sup> The Bureau of Land Management operates and maintains public federal land.<sup>280</sup> The Federal Land Policy and Management Act of 1976, however, allows the Bureau to sell public land that is no longer in use or needed for

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271. See *The Monuments Project*, MELLON FOUND. (May 1, 2023), <https://perma.cc/TGX6-HDHN>.

272. *Id.*

273. See *id.* (“Mellon will also support efforts to contextualize or recontextualize existing commemorative sites and to uplift knowledge-bearers who can tell stories that have not yet been told.”); *The Valentine Museum and Reclaiming the Monument Receive Historic Grant*, VALENTINE (Dec. 29, 2021), <https://perma.cc/XP2Y-D8YW> (announcing that the Valentine Museum in Richmond received a \$670,000 grant from The Monuments Project); see also *HMAAC Receives Confederate Monument from the City of Houston*, HOUS. MUSEUM AFR. AM. CULTURE, <https://perma.cc/FNE7-T6YQ> (last visited Jan. 28, 2023).

274. See H.R. 1704, 117th Cong. (2021); see S. 618, 117th Cong. (2021).

275. See H.R. 1704, 117th Cong. (2021); see S. 618, 117th Cong. (2021).

276. See Caldwell & Cornish, *supra* note 32.

277. See Christine Negroni, *Everything Is Bigger at Open-Air Museums*, N.Y. TIMES (Mar. 12, 2019), <https://perma.cc/FZ9A-RLH4>.

278. See *id.*

279. See *id.*

280. See *FAQs About Federal Land Sales*, BUREAU LAND MGMT., <https://perma.cc/LYF3-PCMM> (last visited Aug. 27, 2023).



a public purpose.<sup>281</sup> While the availability of public land for sale may be rare,<sup>282</sup> the Department of the Interior should develop a policy that gives preference to museums that want the land for open-air exhibits of removed and contextualized Confederate monuments.

#### IV. CONCLUSION

As Confederate monuments fall, questions surrounding their fate arise.<sup>283</sup> Communities face a myriad of complex and important decisions in addressing removed Confederate monuments.<sup>284</sup> When deciding which post-removal procedure to use, communities should consider three important factors: (1) the policy objectives of the post-removal process, (2) the practicalities of removal, and (3) the law.<sup>285</sup>

Communities should choose a procedure in which the relevant laws help to effectuate the post-removal objectives.<sup>286</sup> Thus, communities should consider donating removed Confederate monuments to museums because the law of charitable trusts offers a legal framework for museums to meet the policy objectives of the post-removal process.<sup>287</sup> To strengthen the existing law to support post-removal efforts, courts should liberalize the standing necessary to enforce charitable trusts of Confederate monuments in museums by including interested experts and historians.<sup>288</sup> Federal and local governments should also promote incentives to ease the practical burdens placed upon museums in contextualizing Confederate monuments.<sup>289</sup>

In the highly divisive and nationally important post-removal process of Confederate monuments, the law should remain at the center of the discourse. Without an adequate discussion of the law, any removal effort of Confederate monuments remains incomplete.

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281. *See* 43 U.S.C. § 1713.

282. *See FAQs About Federal Land Sales*, *supra* note 280.

283. *See* Ortiz, *supra* note 73.

284. *See id.*

285. *See supra* Sections II.B–D.

286. *See supra* Part III.

287. *See supra* Section III.A.

288. *See supra* Section III.B.

289. *See supra* Section III.C.