

## North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape\*

### INTRODUCTION

The North Carolina landscape is densely populated with Confederate monuments; these commemorations can be found in more than half of the state's one hundred counties.<sup>1</sup> The state has more monuments honoring the Civil War than any other historical event, with five Civil War monuments for every World War I monument.<sup>2</sup> Most of these structures were erected between 1890 and 1930,<sup>3</sup> and many are located on public property, such as in and around courthouses,<sup>4</sup> town squares,<sup>5</sup> graveyards,<sup>6</sup> and university campuses.<sup>7</sup>

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1. See Charlie Shelton, Frank Stasio & Andrew Tie, *More Than Half of North Carolina's Counties Have Confederate Monuments*, WUNC (June 26, 2015), <http://wunc.org/post/more-half-north-carolinas-counties-have-confederate-monuments-0#stream/0> [<http://perma.cc/RP88-J297>].

2. *Id.*

3. *Id.*

4. See, e.g., *Commemorative Landscapes of North Carolina: Alexander County Confederate Monument, Taylorsville*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/614/> [<http://perma.cc/4R4S-PZ2H>] (describing the Alexander County Confederate Monument located next to the county courthouse); *Commemorative Landscapes of North Carolina: Caldwell County Confederate Monument, Lenoir*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/220/> [<http://perma.cc/JC3C-R4Y5>] (describing the Caldwell County Confederate Monument located at the courthouse plaza).

5. See, e.g., *Commemorative Landscapes of North Carolina: Forest City Confederate Memorial, Forest City*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/607/> [<http://perma.cc/8YRZ-L3RT>] (describing the Forest City Confederate Memorial located in what was formerly a public square); *Commemorative Landscapes of North Carolina: Henry Lawson Wyatt Memorial Fountain, Tarboro*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/495/> [<https://perma.cc/J7SW-KUEV>] (describing the Henry Lawson Wyatt Memorial Fountain, which is dedicated to the first documented North Carolinian to lose his life in battle fighting for the Confederate Army and located within the historic Tarboro Town Commons).

6. See, e.g., *Commemorative Landscapes of North Carolina: Confederate Monument, Cedar Grove Cemetery, New Bern*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/228/> [<http://perma.cc/79FF-H5X7>] (describing the Confederate monument located in the Cedar Grove Cemetery in New Bern); *Commemorative Landscapes of North Carolina: House of Memory, Oakwood Cemetery, Raleigh*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/97/> [<http://perma.cc/JD46-TFCW>] (describing the Oakwood Cemetery House of Memory, which was dedicated to North Carolina veterans from every war, but sponsored by the United Daughters of the Confederacy).

Confederate monuments are present in the daily lives of many North Carolinians, evoking a range of sentiments from those who encounter them. In the popular new series, *The People v. O.J. Simpson: American Crime Story*, fictional depictions of lawyers Johnnie Cochran and F. Lee Bailey are shown standing outside the Forsyth County courthouse after the court denied their subpoena to have North Carolina witnesses and documents produced at O.J. Simpson's California trial.<sup>8</sup> A Confederate monument is depicted in the background as the attorneys discuss their displeasure with the court's ruling.<sup>9</sup> F. Lee Bailey's character, a white attorney, tells Mr. Cochran, an African American attorney, that he would prefer to appear before the North Carolina court for the appellate hearing, stating:

Take a good look where you're standing. We're in the South. Haven't you noticed the smell of mint julep and condescension in the air? Right behind you is a statue of a Confederate soldier holding a rifle. With all due respect, I don't know if you play as well in Dixie.<sup>10</sup>

This scene illustrates the sentiment shared by many: that Civil War era symbols are physical reminders that African Americans remain systematically disadvantaged in many ways, especially in the South.<sup>11</sup> The placement of these monuments in and around courthouses is often interpreted as a signal that unfair treatment awaits inside.

Controversy over Confederate monuments in public spaces is not new to North Carolina or to its southern neighbors. Public discourse has centered on the morality of maintaining Confederate monuments,

7. See, e.g., *Commemorative Landscapes of North Carolina: Confederate Monument, Louisburg*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/16/> [<http://perma.cc/9ZYU-BPW5>] (describing the publicly-owned Confederate monument on the campus of Louisburg College); *Commemorative Landscapes of North Carolina: Memorial to Civil War Soldiers of the University, UNC (Chapel Hill)*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/41/> [<http://perma.cc/G9P2-49KH>] (describing a monument of a Confederate soldier, nicknamed "Silent Sam," on the University of North Carolina campus).

8. *The People v. O.J. Simpson: American Crime Story: Manna from Heaven* (FX television broadcast Feb. 2, 2016).

9. *Id.*

10. *Id.*

11. See, e.g., Alfred L. Busby [sic], *Alfred Brophy: Legislating Confederate Monuments*, WINSTON-SALEM J. (July 23, 2015, 8:30 PM), [http://www.journalnow.com/opinion/columnists/alfred-l-brophy-legislating-confederate-monuments/article\\_1db4acd4-309f-11e5-870c-73bbd75fa258.html](http://www.journalnow.com/opinion/columnists/alfred-l-brophy-legislating-confederate-monuments/article_1db4acd4-309f-11e5-870c-73bbd75fa258.html) [<https://perma.cc/3GH4-G6P2>] ("Recently I was talking with a law client in a county courthouse. I asked her how she felt about her case and she said, 'Well, there is a Confederate monument out front.' I was taken aback, quite frankly. The message of that monument to her was that she might not get justice.").

as well as names of buildings, streets, parks, and other public places in honor of Confederate leaders; these conversations have only increased in the aftermath of the tragic, racially-motivated church shooting in Charleston and the subsequent removal of the Confederate flag from the South Carolina State House grounds.<sup>12</sup> Supporters of monument removal and renaming argue that there is an important distinction between acknowledging the past and honoring the legacy of white supremacy.<sup>13</sup> Similarly, other commentators focus on the historical narratives of non-whites that are often omitted from places of honor and challenge the unequal representation within monument and naming decisions.<sup>14</sup> Conversely, some opponents of

12. See Campbell Robertson, Monica Davey & Julie Bosman, *Calls to Drop Confederate Emblems Spread Nationwide*, N.Y. TIMES (June 23, 2015), [http://www.nytimes.com/2015/06/24/us/south-carolina-nikki-haley-confederate-flag.html?\\_r=0](http://www.nytimes.com/2015/06/24/us/south-carolina-nikki-haley-confederate-flag.html?_r=0) [<http://perma.cc/3XRV-YLCR>].

13. One editorial opinion states the following:

Naming a building for Saunders was therefore a clear attempt to inscribe the legacy of white supremacy into the very fabric of the university's cultural landscape. And the fact that the building's name endured for over 90 years speaks to how legacies of anti-black racism are a largely unquestioned and taken-for-granted aspect of our everyday surroundings, both on and off university campuses.

Altha Cravey et al., *Op-Ed: #KickOutTheKKK: Challenging White Supremacy at UNC*, ASS'N AM. GEOGRAPHERS (June 25, 2015), <http://news.aag.org/2015/06/op-ed-kickoutthekkk-challenging-white-supremacy-at-unc/> [<http://perma.cc/P8EC-7AY4>]. There have also been reported incidents of vandalism of Confederate monuments. See, e.g., Arielle Clay, *Vandals Tag Confederate Monument in Durham Cemetery*, WRAL (July 1, 2015), <http://www.wral.com/vandals-tag-confederate-monument-in-durham-cemetery/14748941/> [<https://perma.cc/2T78-28DT>].

14. See Joey DeVito, *UNC Professors Discuss Renaming Buildings*, CHAPELBORO (Jan. 25, 2016, 9:58 PM), <http://chapelboro.com/featured/unc-professors-discuss-renaming-buildings> [<https://perma.cc/2L3Q-68WT>] (quoting UNC Law Professor Ted Shaw, who stated that while he is not necessarily “opposed to those who want to tear down Silent Sam,” he is “much more interested in an honest rendition of history, so that it isn’t, as we say in the black community, ‘only his story.’”). Others would similarly appreciate recognition of various historical perspectives:

Our statehouse displays no statues to celebrate the interracial Fusion movement of the 1890s, which could have led the way into a different kind of South. We have no monuments on our courthouse lawns to the interracial civil rights movement that helped to pass the Voting Rights Act of 1965, which made black Southerners full citizens for the first time. There are no monuments at the Capitol to Abraham Galloway, Charlotte Hawkins Brown, Ella Baker or Julius Chambers.

Timothy B. Tyson, *Commemorating North Carolina's Anti-Confederate Heritage, Too*, NEWS & OBSERVER (Aug. 16, 2015, 12:45 PM), <http://www.newsobserver.com/opinion/op-ed/article31123988.html> [<http://perma.cc/JT8D-28R4>]. For a discussion of the undemocratic nature of naming public places, see generally Ann Bartow, *Trademarks of Privilege: Naming Rights and The Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 934–45 (2007) (discussing the naming of public spaces in honor of the late Senator Strom Thurmond and the resulting “Thurmondization” of South Carolina).

removal view monuments and naming decisions as parts of the historical record that provide important teaching moments,<sup>15</sup> while other opponents insist that the monuments honor their ancestors and must be protected.<sup>16</sup>

Recent events at the University of North Carolina at Chapel Hill illustrate the contentious debate surrounding Confederate monuments. Campus discussions surrounding monument removal and building renaming, a subset of the larger monument debate, illustrate the conversation taking place across the state. In May 2015, displeasure surrounding Saunders Hall, a campus building named in honor of a trustee who was an active leader in the Ku Klux Klan, prompted the university to rename the building.<sup>17</sup> Ongoing protests to remove “Silent Sam,” a statue of a Confederate soldier dedicated to University of North Carolina alumni who perished during the Civil War,<sup>18</sup> have garnered some public support, but have not prompted any meaningful steps toward removal.<sup>19</sup> Due to a statute that the

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15. See Alfred L. Brophy, Opinion, *Why We Shouldn't Pull Down All Those Confederate Memorials*, NEWSWEEK (July 10, 2015, 12:21 PM), <http://www.newsweek.com/why-we-shouldnt-pull-down-all-those-confederate-memorials-352222> [http://perma.cc/AUX6-S67G]. Professor Brophy has justified maintaining monuments in the following way:

[T]hey're part of our landscape. Yes, they're reminders of the days of slavery and secession. But they teach important lessons: [t]hey point to a Southern political system that, from the 1870s to the 1930s (the period of most frequent commemoration), continued to support the ideals of the Confederacy. They're graphic reminders of Jim Crow, and the ways white supremacy was codified in statutes, social practices and stone. And they reveal the psychology (however misguided) of an era and people: the fact that white Southerners and their elected leaders believed in the righteousness of their society. Ultimately, removal of the monuments will, quite literally, erase an unsavory—but important—part of our nation's history.

*Id.*

16. See Clay, *supra* note 13.

17. See Jane Stancill, *UNC-Chapel Hill Trustees to Rename Saunders Hall 'Carolina Hall'*, NEWS & OBSERVER (May 28, 2015, 10:15 AM), <http://www.newsobserver.com/news/local/education/article22503351.html> [http://perma.cc/X397-NALE]. The UNC University Archives and Records Management staff has taken an active role in making primary information available regarding the initial Board of Trustees' decision to name the building after William Saunders. See Lawrence Giffin, *University Archives in Action: Renaming Saunders Hall*, UNC U. LIBR. (May 15, 2015), <http://blogs.lib.unc.edu/uarms/index.php/2015/05/university-archives-in-action-renaming-saunders-hall/#sthash.Qh6IEAg2.dpuf> [https://perma.cc/45SP-3MGU] (noting that Saunders' involvement in the KKK was explicitly noted in the minutes from the Board of Trustees meeting in 1920).

18. *Commemorative Landscapes of North Carolina: Memorial to Civil War Soldiers of the University, UNC (Chapel Hill)*, *supra* note 7.

19. See Michael Muhammad Knight, *The University of North Carolina's Silent Sam Statue Represents a Legacy of White Supremacy*, VICE (Jan. 29, 2015), <http://www.vice.com/read/facing-the-legacy-of-racism-on-uncs-campus-456> [http://perma.cc/L5V8-UEKF].

North Carolina General Assembly recently enacted, however, it appears that Silent Sam and similar publicly-owned monuments are here to stay.

North Carolina enacted the Heritage Protection Act (“HPA”) in July 2015,<sup>20</sup> less than two weeks after the removal of the Confederate flag from the South Carolina State House.<sup>21</sup> This law severely restricts the removal, relocation, or alteration of any monument or “display of a permanent character” located on public property.<sup>22</sup> While it does not specifically focus on Confederate monuments, the HPA was enacted amidst cries for removal of Confederate monuments and rampant Confederate monument vandalism.<sup>23</sup> Therefore, many observers have inferred that the purpose of this legislation is the protection of these monuments, an inference that has had significant implications for the heated public debate surrounding the statute.<sup>24</sup>

20. See Cultural History Artifact Management and Patriotism Act of 2015, ch. 170, 2015 N.C. Sess. Laws 435, 435–36 (codified as amended at N.C. GEN. STAT. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36, 160A-400.13 (2015)) (showing the Act was approved July 23, 2015). The official title of the Act is the “Cultural History Artifact Management and Patriotism Act of 2015.” *Id.* However, statutes of this kind are commonly called “Heritage Protection Acts.” See, e.g., Tennessee Heritage Protection Act of 2016, ch. 601, 2016 Tenn. Pub. Acts \_\_ (codified at TENN. CODE ANN. § 4-1-412 (2015)); Alfred L. Brophy, *North Carolina Heritage Protection Act*, FACULTY LOUNGE (July 16, 2015), <http://www.thefacultylounge.org/2015/07/north-carolina-heritage-protection-act.html> [http://perma.cc/F6TN-EA43].

21. See Stephanie McCrummen & Elahe Izadi, *Confederate Flag Comes Down on South Carolina’s Statehouse Grounds*, WASH. POST (July 10, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/watch-live-as-the-confederate-flag-comes-down-in-south-carolina/> [https://perma.cc/5M2U-6DWS] (noting the Confederate flag was removed from the State House on July 10, 2015). Although the HPA was signed into law immediately following the removal of the Confederate flag from the South Carolina State House grounds, it was proposed months before the removal of the flag and the tragic Charleston shootings. See *Bill Look-Up: Senate Bill 22/S.L. 2015-170*, N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=s22> [http://perma.cc/EU9M-PP2G] (noting the original version of the bill was first introduced in the state Senate on February 3, 2015).

22. See N.C. GEN. STAT. § 100-2.1 (2015). The statute protects “objects of remembrance” from removal and defines such objects as “a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina’s history.” § 100-2.1(b).

23. See, e.g., Clay, *supra* note 13; *Another Triangle Confederate Monument Vandalized*, ABC 11 (July 21, 2015), <http://abc11.com/news/another-triangle-confederate-monument-vandalized/868751/> [http://perma.cc/2NQ7-5VFM]. Interestingly, the HPA was enacted within a month of legislation that created the “Criminal Offense of Graffiti Vandalism.” See Act of June 11, 2015, ch. 72, sec. 1, § 14-127.1, 2015 N.C. Sess. Laws 158, 158–59 (codified as amended at N.C. GEN. STAT. § 14-127.1 (2015)) (prohibiting, among other acts, vandalism to “statue[s] or monument[s] situated in any public place”).

24. See Brophy, *supra* note 20 (noting “obviously this is about Confederate monuments—no one’s taking down Vietnam or WWII monuments.”); Colin Campbell, *NC House Could Ban Removal of Confederate and Other Monuments*, NEWS &

As the public debate over Confederate monuments continues, many questions about this new law remain unanswered.

This Recent Development argues that the North Carolina HPA creates a lack of accountability on behalf of the state legislature, usurps powers of local governments, and engenders confusion as to its proper scope. Consequently, the North Carolina General Assembly should modify the HPA by removing the illusory delegation to the Historical Commission; clarifying that the Act clearly applies to only state-owned property rather than both state and municipally-owned property; and removing the catch-all provision that applies the Act to all “display[s] of a permanent character.”<sup>25</sup> Furthermore, the legislature should include a provision allowing for the erection of plaques that contextualize these monuments within local history so that the messages the monuments are intended to convey are clear.

Analysis proceeds in three parts. Part I briefly sketches the propagation of Heritage Protection Acts across the South, outlines the North Carolina HPA, and highlights ways the North Carolina statute differs from those of other states. Part II examines the challenging provisions of this statute and analyzes the legislative history of the law to offer insight as to how the delegation of authority to the State Historical Commission operates, whether the HPA applies to municipally-owned monuments, and what constitutes a “display of permanent character.”<sup>26</sup> Finally, Part III argues that this statute should be modified and amended to provide for plaques that contextualize these monuments within their local history in order to balance the inherent tension between those who perceive the monuments and the HPA as perpetuating racial concepts with those who perceive the monuments as preserving southern history.

## I. WHAT ARE HERITAGE PROTECTION ACTS?

### A. *The Propagation of Heritage Protection Acts Across the South*

Over the past two decades, a large scheme of state laws, colloquially called “Heritage Protection Acts,” or “HPAs,” has emerged across the South.<sup>27</sup> These laws, enacted in response to calls from the political right to stop the “re-writing of history,” seek to

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OBSERVER (July 15, 2015, 5:58 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article27345613.html> [<http://perma.cc/7WX9-VS6Z>] (interpreting the statute as directly targeting Confederate monuments).

25. § 100-2.1(a).

26. *Id.*

27. See Brophy, *supra* note 20.

protect Confederate monuments and naming conventions from being removed or altered.<sup>28</sup> Currently, South Carolina, Georgia, Mississippi, and Tennessee have similar laws on the books, and Alabama and Arkansas are considering proposed legislation on the topic.<sup>29</sup> Although the Acts vary considerably, each contains a provision for monument protection.<sup>30</sup> Following the examples of the aforementioned states, in July 2015, North Carolina enacted an HPA that includes a signature provision restricting removal and relocation of monuments.<sup>31</sup> While similar in some respects to other HPAs, North Carolina's Act differs from others across the South in several significant ways, including the apparent delegation of authority to the state Historical Commission; the lack of clarity regarding its applicability to municipally-owned monuments; and the broad definition of monuments to which the HPA applies. After review of the ways that North Carolina's HPA departs from those of its southern neighbors, it is apparent that the statute raises legal questions.

28. See Campbell, *supra* note 24; John Moritz, *Governor McCrory Signs Bill Protecting North Carolina Confederate Monuments*, ABC 11 (July 24, 2015), <http://abc11.com/politics/mccrory-signs-bill-protecting-confederate-monuments/876469/> [<http://perma.cc/2V8U-M8R4>] (describing Governor McCrory's reaction to the bill). An extreme example of this phenomenon is seen in Mississippi's proposed "Heritage Initiative" to amend its state constitution. See *State Heritage*, MISS. SEC'Y OF STATE CONST. INITIATIVES, <https://www.sos.ms.gov/Elections/Initiatives/InitiativeInfo.aspx?IIId=46> [<http://perma.cc/XA5J-WMGN>]. Mississippi's "Heritage Initiative" sought to reverse any renaming of structures originally named to honor the Confederacy, amend the Mississippi Constitution to designate a Confederate Heritage Month, and amend the state curriculum to include information about the state's Confederate history. *Id.* The initiative also sought to preserve the state flag and require that a state flag of equal size be displayed wherever the United States flag is on display. *Id.*

29. See GA. CODE ANN. § 50-3-1(b) (2015) (preventing removal or alteration of military monuments); MISS. CODE ANN. § 15-15-81 (2015) (preventing removal of military monuments and renaming of public property named after military events or figures); S.C. CODE ANN. § 10-1-165 (2015) (enumerating certain kinds of memorials that may not be removed or altered, stating that state property named after historic figures may not be renamed, and preventing amendments to the statute without two-thirds vote of the North Carolina General Assembly); Tennessee Heritage Protection Act of 2016, ch. 601, 2016 Tenn. Pub. Acts \_\_ (codified at TENN. CODE ANN. § 4-1-412 (2016)) (preventing removal of military monuments and renaming of public property but allowing counties and towns a mechanism to seek waiver of this prohibition); S.B. 13, 2016 Leg., Reg. Sess. (Ala. 2016) (prohibiting any alteration to monuments or naming conventions honoring an enumerated list of historical events without first obtaining a waiver); H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (preventing removal of military monuments or renaming of public property).

30. See, e.g., GA. CODE ANN. § 50-3-1(b) (2015); MISS. CODE ANN. § 55-15-81 (2015); S.C. CODE ANN. § 10-1-165(a) (2015); Tennessee Heritage Protection Act of 2016, ch. 601, sec. 2, 2016 Tenn. Pub. Acts \_\_ (codified at TENN. CODE ANN. § 4-1-412 (2015)).

31. See Moritz, *supra* note 28.

*B. North Carolina's HPA*

Laws providing for the erection and upkeep of Confederate monuments are not new to North Carolina.<sup>32</sup> Members of the state legislature proposed legislation similar to the current HPA in 2001 and 2005, but both bills died in committee.<sup>33</sup> Prior to the HPA's enactment, no barriers to monument alteration existed in North Carolina; local governments and college campuses could remove or relocate controversial symbols with no legal obstacles.<sup>34</sup>

The current legislation was proposed in February 2015 and passed after contentious debate.<sup>35</sup> Marvin Lucas, a state representative from Cumberland County and an opponent of the bill, commented that “[w]e ought to be looking to be one North Carolina, and if what one does offends a large segment of the population, a distinct group of the population, one ought to look at that with a jaundiced eye.”<sup>36</sup> On the other side of the debate, Larry Pittman, a member of the North Carolina House of Representatives from Cabarrus County, compared efforts to remove Confederate monuments to the dystopia of George Orwell’s *1984*<sup>37</sup>:

32. See N.C. GEN. STAT. § 100-9 (2013) (allowing counties to spend public funds to erect iron fences around monuments honoring “the confederate dead”); *id.* § 100-10 (allowing for the use of public funds to construct monuments to the “war between the states”). Both provisions remained in effect in 2015. *Id.* §§ 100-9, 10 (2015).

33. S.B. 176, 2005 Gen. Assemb., Reg. Sess. (N.C. 2005) (prohibiting monument removal unless two-thirds of both houses vote in favor or two-thirds of the state Historical Commission votes in favor of removal); H.B. 1258, 2001 Gen. Assemb., 2001–2002 Reg. Sess. (N.C. 2001) (prohibiting monument removal unless two-thirds of both houses vote in favor of removal). See *Bill Look-Up: Senate Bill 176 (= H502)*, N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2005&BillID=S176&submitButton=Go> [<https://perma.cc/7WZ2-JXGK>] (noting that the last action on S.B. 176 was a committee referral on February 21, 2005); *Bill Look-Up: House Bill 1258*, N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2001&BillID=hb1258> [<https://perma.cc/28N5-AWGJ>] (noting H.B. 1258 was postponed indefinitely on October 3, 2002). These prior proposals differed from the legislation currently in force by allowing a two-thirds legislative vote for removal, which is not included in the current statute. See N.C. GEN. STAT. § 100-2.1(a)–(b) (2015) (requiring approval of the North Carolina Historical Commission).

34. See, e.g., Danielle Battaglia, *Reidsville Confederate Monument Rests in Uneasy Peace*, WINSTON-SALEM J. (July 13, 2014, 9:30 PM), [http://www.journalnow.com/news/local/reidsville-confederate-monument-rests-in-uneasy-peace/article\\_dbe8e667-1cc1-57f6-8c2b-9b963ed01120.html](http://www.journalnow.com/news/local/reidsville-confederate-monument-rests-in-uneasy-peace/article_dbe8e667-1cc1-57f6-8c2b-9b963ed01120.html) [<http://perma.cc/3XYE-TNKY>]; Stancill, *supra* note 17.

35. See *supra* note 21; see also *infra* text accompanying notes 36–38.

36. Laura Leslie, *Lawmakers Seek to Protect Confederate Monuments*, WRAL (July 15, 2015), <http://www.wral.com/lawmakers-seek-protection-for-monuments/14775207/> [<http://perma.cc/JB4X-HZGQ>].

37. *Id.*

History needs to be retained. You don't know what you are without your history . . . . We need to face it and, like it or not like it, it is what it is, and we shouldn't be trying to change it. And I don't think the government has the right to change what history is.<sup>38</sup>

Debate was no less polarized in the public sphere. The NAACP held a press conference urging Governor Pat McCrory to veto the bill,<sup>39</sup> while supporters of the bill rallied outside the State Capitol in an attempt to portray the monuments as markers of state history.<sup>40</sup>

Signed into law by Governor McCrory in July 2015, the HPA begins with a general provision that limits the instances when a monument may be removed.<sup>41</sup> The provision states that the North Carolina Historical Commission (“the Commission”) must approve any modification or removal of a monument.<sup>42</sup> In addition to the powers granted to the Commission within the HPA, this appointed body also has the power to approve any monument, memorial, or work of art before it becomes state property.<sup>43</sup> Following the delegation of authority to the Commission, the “Limitations on Removal” subsection states that “[a]n object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection.”<sup>44</sup> The statute then lists two circumstances in which

38. *Id.*

39. See Moritz, *supra* note 28.

40. See *Group Holds Confederate Monument Rally in Raleigh*, ABC 11 (July 16, 2015), <http://abc11.com/politics/group-holds-confederate-monument-rally-in-raleigh/856802/> [<http://perma.cc/W3SM-MB4P>].

41. N.C. GEN. STAT. § 100-2.1(a) (2015) (stating that “[e]xcept as otherwise provided in subsection (b) of this section, a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.”).

42. The Historical Commission was created to “give advice and assistance to the Secretary of Natural and Cultural Resources.” *Id.* § 143B-62. The Commission, which existed prior to the HPA’s enactment, is comprised of eleven individuals appointed by the Governor, five of whom must have professional training related to historic preservation. *Id.* § 143B-63.

43. *Id.* § 100-2.

44. *Id.* The statute continues on to state:

An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was

relocation is appropriate: “(1) [w]hen appropriate measures are required by the State or a political subdivision of the State to *preserve* the object [and] (2) [w]hen necessary for *construction, renovation, or reconfiguration* of buildings, open spaces, parking, or transportation projects.”<sup>45</sup> In sum, the HPA effectively prohibits any object of remembrance from being permanently removed, and it only permits relocation in those two narrow circumstances.

### C. *How North Carolina’s HPA Differs from Those in Other States*

While North Carolina was the fifth state to enact a HPA, its legislation departs from that of its southern neighbors in several significant ways. First, the statute appears to, but does not in fact, employ the North Carolina Historical Commission as the final arbiter of decisions to alter monuments. The statute’s provisions do not include an outright prohibition of any changes whatsoever, unlike other HPAs that include an outright prohibition of removal and do not employ a separate decision-making body.<sup>46</sup> Second, while the statute applies to state-owned monuments located on public property, it does not specify whether the law applies to municipally-owned monuments as many other HPAs do.<sup>47</sup> Finally, the statute includes a broad catch-all provision that applies to all “display[s] of a permanent character” that commemorate “an event, a person, or military service that is part of North Carolina’s history,” instead of enumerating specific types of monuments to be protected.<sup>48</sup> Ultimately, this statute

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relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location.

*Id.*

45. *Id.* (emphasis added).

46. Compare N.C. GEN. STAT. § 100-2.1(a) (2015) (requiring approval of the state Historical Commission before any monument may be “removed, relocated, or altered in any way”), with S.C. CODE ANN. § 10-1-165(A) (2015) (including a blanket prohibition and no mechanism for removing, relocating, or altering monuments).

47. Compare N.C. GEN. STAT. § 100-2.1(a)–(b) (2015) (applying broadly to “work[s] . . . owned by the State” and “public property”), with TENN. CODE ANN. § 4-1-412(d) (2015) (applying to all property owned by the state, a county, a municipality, or a metropolitan government), and H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (applying to all property owned or leased by the state, a county, or a municipality). Although the Arkansas bill failed in the state Senate, it provides a useful comparison to the drafting of the North Carolina law. See H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

48. Compare N.C. GEN. STAT. § 100-2.1(b) (2015), with S.C. CODE ANN. § 10-1-165(A) (2015) (applying to monuments, memorials, and nameplates honoring an exhaustive list of historical events), and GA. CODE ANN. § 50-3-1(b)(2) (2015) (applying to monuments and memorials honoring military service of the United States of America or Confederate States of America).

is unnecessarily difficult to understand and leaves local governments with many unanswered questions and without a thorough grasp of the law. If the current tension between the negative and positive perceptions of monuments and their role in the North Carolina landscape is to be resolved, this law must be clear.

## II. QUESTIONS LEFT UNANSWERED BY NORTH CAROLINA'S HPA

As enacted, the North Carolina HPA leaves questions unanswered. On its face, the HPA does not clarify (1) what role the North Carolina Historical Commission plays, if any, in deciding to permanently remove or relocate monuments; (2) whether this statute applies to county- or city-owned monuments; or (3) what constitutes a “display of permanent character.”<sup>49</sup> This Part analyzes legislative history to offer answers to these questions. Additionally, this Part reiterates that the statute does little to address the public debate on whether or not monuments should remain in place to preserve history or be taken down to avoid propagating racism.

### A. *What Role Does the State Historical Commission Play in Monument Removal?*

After the passage of North Carolina's HPA, many interpreted the legislation as giving the legislature the ultimate authority in decisions to alter monuments.<sup>50</sup> However, a cursory reading of the statute reveals that monuments “may not be removed, relocated, or altered in any way without the approval of the *North Carolina Historical Commission*” rather than the approval of the legislature.<sup>51</sup> Nonetheless, a closer investigation of the HPA reveals that the Commission in fact holds practically no real power when it comes to monument removal or alteration.

This illusory delegation of power seems to mask the true intention of the legislature—that no monuments be altered or removed at any time, by anyone—while making this prohibition appear out of the hands of the legislature; in effect, this “delegation” to the Commission allows the North Carolina General Assembly to

49. N.C. GEN. STAT. § 100-2.1(b) (2015).

50. See, e.g., John Moritz, *Controversial North Carolina Monuments Bill Becomes Law*, ASHEVILLE CITIZEN-TIMES (July 23, 2015, 6:54 PM), [http://www.citizen-times.com/story/news/2015/07/23/sides-confederate-debate-pressure-mccrory-act/30568221/?from=global&sessionKey=&autologin=\[http://perma.cc/J8XP-E7SN\]](http://www.citizen-times.com/story/news/2015/07/23/sides-confederate-debate-pressure-mccrory-act/30568221/?from=global&sessionKey=&autologin=[http://perma.cc/J8XP-E7SN]) (“The North Carolina legislature will have the ultimate say over public ‘objects of remembrance,’ including Confederate memorials, under a new law signed by the governor.”).

51. See N.C. GEN. STAT. § 100-2.1(a) (2015) (emphasis added).

escape accountability for its actions. When confronted by a group challenging a monument as offensive,<sup>52</sup> the legislature can hide behind this delegation of authority and blame all decisions against removal or alteration on the Commission, when in reality the Commission has no discretionary authority whatsoever.

The HPA's delegation of decision-making authority to the Commission is a hollow façade. First, subsection (b) of the statute severely circumscribes the prior section's delegation of power to the Commission by flatly forbidding the permanent removal of objects covered by the statute.<sup>53</sup> This prohibition seems logically disconnected when read in conjunction with the prior subsection's grant of power to the Commission, which states that monuments cannot be removed without the Commission's approval.<sup>54</sup> Next, the law allows the Commission to approve both the temporary and permanent relocation of monuments, but only when relocation is necessary to

52. None of the states with HPAs include a provision in the statute clarifying who, if anyone, has standing to challenge decisions regarding monument removal or alterations. The only jurisdiction to consider this issue at the appellate level was Tennessee in 2015. *See Hayes v. City of Memphis*, No. W2014-01962-COA-R3-CV, 2015 WL 5000729, at \*1 (Tenn. Ct. App. Aug. 21, 2015). In the *Hayes* case, the Tennessee Court of Appeals considered challenges from individuals and organizations such as the Sons of Confederate Veterans, who sought to invalidate a Memphis City Council ordinance renaming three public parks in apparent violation of the state's HPA. *Id.* at \*1–2. In dismissing the case as to fourteen of the fifteen plaintiffs, the Tennessee Court of Appeals held that the one remaining plaintiff had a particularized injury to support standing to challenge the renaming. *Id.* at \*14. The sole plaintiff with standing was the group “Sons of Confederate Veterans Nathan Bedford Forrest Camp #215.” *Id.* at \*11. The group was “formed with the express purpose of educating the public about the life and history of General Forrest,” and the group, which sought an injunction preventing the renaming of Nathan Bedford Forrest Park, was held to have special interest in the Forrest Park name. *Id.* Similarly, to establish standing in North Carolina, a plaintiff has to show: (1) an injury in fact, or an invasion of a legally protected interest, that is (a) concrete and particularized, and (b) actual or imminent, rather than conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant's challenged action; and (3) that it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *See Sullivan v. State*, 170 N.C. App. 433, 434, 612 S.E.2d 397, 399 (2005) (quoting *Estate of Apple v. Commercial Courier Exp.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005)). If a suit challenging the recent renaming of Aycock Auditorium at the University of North Carolina at Greensboro goes forward, North Carolina courts could have a chance to apply the standing doctrine under the new HPA. *See* John Newsom, *UNCG Drops Aycock Name from Auditorium*, NEWS & RECORD (Feb. 18, 2016, 8:35 PM), [http://www.greensboro.com/news/schools/uncg-drops-aycock-name-from-auditorium/article\\_3a345ecf-1c73-55ea-b842-08cb461b8f0d.html](http://www.greensboro.com/news/schools/uncg-drops-aycock-name-from-auditorium/article_3a345ecf-1c73-55ea-b842-08cb461b8f0d.html) [<https://perma.cc/CKJ4-BPDF>] (discussing opposition to the renaming of the auditorium).

53. N.C. GEN. STAT. § 100-2.1(b) (2015) (stating that objects of remembrance on public property “may not be permanently removed”).

54. *Id.* § 100-2.1(a) (stating that monuments “may not be removed . . . without the approval of the North Carolina Historical Commission”).

preserve the object or when necessary for construction.<sup>55</sup> A temporary relocation must be placed back in its original location within ninety days, while a permanent relocation must be to a “site of similar prominence, honor, visibility, availability, and access that are [sic] within the boundaries of the jurisdiction from which it was relocated.”<sup>56</sup> The first portion of the statute appears to shift power away from the legislature and into the hands of the Commission by stating that monuments “may not be removed [or] relocated . . . in any way without the approval of the North Carolina Historical Commission[.]”<sup>57</sup> but the subsequent provision makes clear that the Commission does not have any power to remove monuments and may only relocate monuments in two narrow circumstances.<sup>58</sup>

A brief look at the legislative history of the HPA illustrates that the legislature never intended for the Commission to hold meaningful discretionary authority. A proposed amendment by former state representative Rick Glazier of Cumberland County sought to create a mechanism for local governments to remove monuments; it permitted them to petition the Commission for a waiver of the prohibition of removal contained in subsection (b) of the statute,<sup>59</sup> much like a similar provision included in the Tennessee HPA.<sup>60</sup> This proposed amendment failed,<sup>61</sup> signaling the intent of the legislature to prohibit monument removal entirely and severely restrict instances of relocation. When considering the way the statute operates as opposed

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55. *Id.* § 100-2.1(b).

56. *Id.*

57. *Id.* § 100-2.1(a).

58. *Id.* § 100-2.1(b) (stating that monument relocation is only appropriate: “(1) when relocation is necessary to preserve the object or (2) when necessary for construction”).

59. Amendment No. A1:S22-ASV-90-V-1, S. 22, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015), <http://www.ncleg.net/Applications/BillLookup/LoadBillDocument.aspx?SessionCode=2015&DocNum=5714&SeqNum=0> [<https://perma.cc/D3S8-MB74>].

60. TENN. CODE ANN. § 4-1-412(c) (2015). The Tennessee Code states:

*Any entity exercising control of public property on which an item, structure or area described in subsection (a) is located may petition the Tennessee historical commission for a waiver to this section. A petition for waiver shall be in writing and shall state the reason, or reasons, upon which the waiver is sought. At any regularly scheduled meeting of the commission, the commission may grant a petition for waiver by a majority vote of those present and voting. The commission may include reasonable conditions and instructions to ensure that any items, structures, or areas are preserved to the greatest extent possible.*

*Id.* (emphasis added).

61. *North Carolina House of Representatives: Roll Call, SB 22*, N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2015&sChamber=H&RCS=845> [<http://perma.cc/Q92Q-AWWF>].

to how it appears on its face, the North Carolina HPA is functionally a complete prohibition of monument removal.<sup>62</sup>

This inquiry into legislative intent shows that the delegation of monument modification power to the Commission within the HPA is meaningless. The empty assignment of power essentially shifts blame away from legislators and onto the Commission while controversial monuments remain in place. As public debate continues over monuments such as Silent Sam,<sup>63</sup> the legislature can publicly cast the Commission as final arbiter of decisions and avoid being held accountable for unpopular decisions, despite the Commission's clear inability to act. This avoidance is especially problematic given the massive number of monuments covered by the bill and the controversy surrounding them.

*B. Does the HPA Apply to Municipally-Owned Monuments?*

On its face, North Carolina's HPA applies to state-owned objects of remembrance located on public property.<sup>64</sup> But the statute, unlike the HPAs of other states, is silent as to whether "public property" includes city or county property.<sup>65</sup> The statute's legislative history suggests that the law applies to all public property within the state, effectively prohibiting local governments from controlling their own monuments. The intent of legislators to make the HPA applicable to all public property is clear when examining rejected proposals to narrow the scope of the HPA.

For example, a proposed amendment to subsection (b) of the HPA, suggested by Senator Elmer Floyd from Cumberland County, sought to clarify that "[t]his section does not apply to an object of remembrance located on city or county property."<sup>66</sup> The amendment failed,<sup>67</sup> manifesting legislative intent for the HPA to apply to all

62. The North Carolina HPA is in fact quite similar to the South Carolina HPA. Compare N.C. GEN. STAT. § 100-2.1(a)–(b) (2015), with S.C. CODE ANN. § 10-1-165(A) (2015) (stating that no "monuments or memorials... may be relocated, removed, disturbed, or altered").

63. See *supra* notes 18–19 and accompanying text.

64. N.C. GEN. STAT. § 100-2.1(a)–(b) (2015).

65. Compare N.C. GEN. STAT. § 100-2.1(a)–(b) (2015) (applying broadly to "state property"), with TENN. CODE ANN. § 4-1-412 (2015) (applying to all property owned by the state, a county, a municipality or a metropolitan government), and H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (applying to all property owned or leased by the state, a county, or a municipality).

66. Amendment No. A2:S22-ASV-85-V-1, S. 22, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015), <http://www.ncleg.net/Applications/BillLookup/LoadBillDocument.aspx?SessionCode=2015&DocNum=5713&SeqNum=0> [https://perma.cc/3K2W-V5VS].

67. *North Carolina House of Representatives: Roll Call, SB 22, supra* note 61.

public property within the state that meets the vague criteria for “objects of remembrance.”<sup>68</sup> In a press release issued after he signed the bill into law, Governor McCrory expressed concern over the Act’s reach into local decision-making:

The protection of our heritage is a matter of statewide significance to ensure that our rich history will always be preserved and remembered for generations to come. I remain committed to ensuring that our past, present and future state monuments tell the complete story of North Carolina. While I *disagree with the process created in the bill and the overreach into local decision making*, the overall goals of the bill merit my signature.<sup>69</sup>

The failure of Senator Floyd’s amendment and the gubernatorial press release following the passage of the HPA show that the legislature intended the statute to apply to municipal property.

Furthermore, a report from the North Carolina Senate Standing Committee on Commerce summarized the law at a time before the HPA’s passage, noting that it allowed local governments the ability to designate historic landmarks within their jurisdiction.<sup>70</sup> The committee report states that “[l]ocal governments may, by ordinance, designate historic landmarks within their jurisdiction. To be so designated, the local preservation commission must determine that the landmark is of special significance in terms of its historical, prehistorical, architectural, or cultural importance.”<sup>71</sup> The statutory scheme mentioned in this report was amended contemporaneously with the HPA’s enactment to clarify that the HPA supersedes any power a local government may have over an object within their jurisdiction that meets the definition of an “object of remembrance.”<sup>72</sup> This means that any object that a local government currently has or acquires in the future that also falls within the incredibly broad

68. See discussion *infra* Section II.C.

69. *Governor McCrory Signs Legislation and Urges Legislature to Pass Budget, Jobs Plan and Bond Proposal*, N.C. OFF. OF THE GOVERNOR (July 23, 2015), <https://governor.nc.gov/press-release/governor-mccrory-signs-legislation-and-urges-legislature-pass-budget-jobs-plan-and> [<http://perma.cc/L6JU-PEVT>] (emphasis added).

70. S. STANDING COMM. ON COMMERCE, SUMMARY OF S.B. 22: HISTORICAL ARTIFACT MGT. AND PATRIOTISM ACT, S. 22-CTS-7, 2015–16 Gen. Assemb., at 2 (N.C. 2015), [http://www.ncleg.net/Applications/Dashboard/Chamber/Services/BillSummary.aspx?sSessionCode=2015&sBarcode=S22-SMTU-15\(CSTU-7\)-v7](http://www.ncleg.net/Applications/Dashboard/Chamber/Services/BillSummary.aspx?sSessionCode=2015&sBarcode=S22-SMTU-15(CSTU-7)-v7) [<http://perma.cc/ZWC2-HQJQ>].

71. *Id.*

72. N.C. GEN. STAT. § 160A-400.13(a) (2015) (“G.S. 100-2.1 supersedes this Part with regard to the removal or relocation of a historic landmark designated under this Part that meets the definition of an ‘object of remembrance’ as defined in G.S. 100-2.1.”).

definition of “display of a permanent character”<sup>73</sup> as defined by the HPA cannot be removed and may only be relocated in the two circumstances previously discussed.<sup>74</sup> The HPA effectively freezes the North Carolina landscape in time, prohibiting any municipality from permanently removing any monuments that they currently have or may acquire in the future, regardless of local consensus about their appropriateness. When coupled with the expansive reach of the statute, discussed in the next section, the vast implications of the statute become apparent.

C. *What Constitutes a “Display of Permanent Character”?*

While it seems obvious that the North Carolina HPA applies to massive stone statues such as the seventy-five-foot-tall Confederate Monument on the State Capitol grounds,<sup>75</sup> the expansive definition of “objects of remembrance” in the statute raises questions as to how far this category extends. As defined in the HPA, “the term ‘object of remembrance’ means a monument, memorial, plaque, statue, marker, or *display of a permanent character* that commemorates an event, a person, or military service that is part of North Carolina’s history.”<sup>76</sup> The catch-all provision “display of a permanent character” is the first of its kind among HPAs in the South.<sup>77</sup> This makes the statute even more difficult to apply, especially because it is already unclear what kind of potentially contentious monuments are subject to the HPA.<sup>78</sup>

The expansive nature of this provision raises questions about the kinds of objects that would be affected by the HPA’s application. Considering contentious objects within North Carolina that would not traditionally be considered monuments but may be engulfed by the amorphous “display of a permanent character” definition illustrates the difficulty of applying this provision. This Section considers three

73. *Id.* § 100-2.1(b); see discussion *infra* Section II.C.

74. See discussion *supra* Section II.A.

75. *Commemorative Landscapes of North Carolina: Confederate Monuments, State Capitol, Raleigh*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/106/> [<http://perma.cc/9B2N-UWNZ>] (describing a monument of the common Confederate soldier which stands adjacent to the state capitol building).

76. N.C. GEN. STAT. § 100-2.1(b) (2015) (emphasis added).

77. Compare *id.* (applying to any “monument, memorial, plaque, statue, marker, or *display of a permanent character*” (emphasis added)), with GA. CODE ANN. § 50-3-1(b)(2) (2015) (applying to “monument[s] or memorial[s]”), and MISS. CODE ANN. § 15-15-81 (2015) (applying to “statues, monuments, memorials, or nameplates”), and S.C. CODE ANN. § 10-1-165 (2015) (applying to “monuments or memorials”), and TENN. CODE ANN. § 4-1-412 (2015) (applying to “statue[s], monument[s], memorial[s], nameplate[s] or plaque[s]”).

78. See *supra* text accompanying notes 75–76.

examples: the “Confederate Memorial” signage on Orange County’s Historical Museum,<sup>79</sup> the Market House on Fayetteville’s city seal,<sup>80</sup> and the bust of William Alexander Graham within the State Capitol.<sup>81</sup> These examples demonstrate how the definitional language within the HPA is so vague that it is unworkable.

### 1. The Confederate Memorial Signage on the Orange County Historical Museum

An early attempt at applying the HPA occurred just months after its passage when Hillsborough’s Historic District Commission voted to remove the words “Confederate Memorial” from the Orange County Historical Museum.<sup>82</sup> Originally a “whites-only” public library, the building was constructed in 1934 with the financial help of the United Daughters of the Confederacy and bore the words “Confederate Memorial Public Library.”<sup>83</sup> The building was converted into a museum in the 1980s, and the words “Public Library” were removed.<sup>84</sup> However, the words “Confederate Memorial” remained.<sup>85</sup> After the passage of the HPA in 2015, the remaining copper letters were un-bolted from the face of the building.<sup>86</sup> Although this action was not challenged within the judicial system,<sup>87</sup> an attorney for the Town of Hillsborough stated that the HPA did not apply in this instance because the nature of the “screwed-on” letters indicated that they were never meant to be

79. See *Hillsborough to Remove ‘Confederate Memorial’ From Museum*, ABC 11 (Sept. 7, 2015), <http://abc11.com/news/hillsborough-to-remove-confederate-memorial-words/972893/> [<http://perma.cc/J7X6-DZ5N>].

80. See Andrew Barksdale, *Fayetteville’s Market House Should Be Removed From City Logo, Lawyer Says*, FAYETTEVILLE OBSERVER (Aug. 3, 2015, 2:07 PM), [http://www.fayobserver.com/news/local/fayetteville-s-market-house-should-be-removed-from-city-logo/article\\_98c15352-9e85-5f2c-9aed-1dddf1a4174.html](http://www.fayobserver.com/news/local/fayetteville-s-market-house-should-be-removed-from-city-logo/article_98c15352-9e85-5f2c-9aed-1dddf1a4174.html) [<http://perma.cc/384V-C3YB>].

81. *Commemorative Landscapes of North Carolina: Bust of William Alexander Graham, State Capitol, Raleigh*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/commland/monument/153/> [<http://perma.cc/N86Z-BB5N>] (describing the small bust of William Alexander Graham, a supporter of the Confederacy and large slaveholder, which sits in the North Carolina Capitol rotunda).

82. See *Hillsborough to Remove ‘Confederate Memorial’ From Museum*, *supra* note 79.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Due to the high standing burden, which prevents many plaintiffs from seeking judicial clarification, it is unlikely that the confusion surrounding the HPA will be resolved without legislative re-drafting. See *supra* note 52.

permanent.<sup>88</sup> He contrasted the Hillsborough “Confederate Monument” signage to inscriptions on buildings, which he considered permanent and therefore subject to the HPA.<sup>89</sup>

The invocation of the HPA in this removal demonstrates how application of the “displays of a permanent character” provision can produce idiosyncratic results. If the distinction drawn by the Town of Hillsborough’s attorney is correct, it produces an awkward standard through which the statute protects some names of buildings but not others. To understand how problematic the standard is, one need only compare Saunders Hall with Aycock Residence Hall, both buildings at the University of North Carolina at Chapel Hill whose namesakes were deeply connected to white supremacy causes.<sup>90</sup> While some may argue that a building name, whether permanently engraved or on a removable sign, counts as a “display of a permanent character,” and is therefore prohibited from removal or alteration, the Hillsborough example suggests that removable signs are not subject to the North Carolina law. Following the logic of the Hillsborough attorney, Saunders Hall cannot be renamed after the passage of the HPA because “Saunders Hall” is engraved on the side of the building.<sup>91</sup> Applying the HPA to Aycock Residence Hall, whose name is not engraved into the side of the building but appears on an easily removable sign, produces a different result due to the less permanent nature of the sign. This strange dichotomy illustrates a problem caused by the HPA’s expansive definitional language that will likely persist as this statute is applied to future building names. Rather than keep this broad and unworkable terminology, the legislature should adopt an explicit prohibition<sup>92</sup> against renaming, consistent with its

88. See *Hillsborough to Remove ‘Confederate Memorial’ From Museum*, *supra* note 79.

89. See *id.*

90. See Charles Brantley Aycock, N.C. Governor, Speech to the North Carolina Society (Dec. 18, 1903), in *THE LIFE AND SPEECHES OF CHARLES BRANTLEY AYCOCK* 161, 161–63 (R.D.W. Connor & Clarence Hamilton Poe, eds., 1912) (discussing the “negro problem” and promoting disenfranchisement and segregation); *Saunders, Hero of Reconstruction*, *NEWS & OBSERVER*, July 11, 1909, § 1, at 1 (“Under the Leadership of Such Men as Saunders, the Ku Klux Saved North Carolina Many of the Worst Horrors of Reconstruction”). For a discussion of the morality of building renaming and how removal threatens memory of the past, see Alfred L. Brophy, *The Law and Morality of Building Renaming*, 52 S. TEX. L. REV. 37, 52–67 (2010).

91. Interestingly, Saunders Hall was renamed “Carolina Hall” two months prior to the HPA’s enactment. See Stancill, *supra* note 17.

92. This provision could look like South Carolina’s law, which states that no monuments honoring any of the enumerated historical events “may be relocated, removed, disturbed, or altered.” S.C. CODE ANN. § 10-1-165(A) (2015).

likely intent, similar to the provisions in the Mississippi or Tennessee HPAs.<sup>93</sup>

## 2. Fayetteville City Seal

The city seal of Fayetteville, North Carolina illustrates another instance of the “objects of a permanent character” provision producing incongruous results. The city seal is an image of a two-story Market House and is depicted on large plaques attached to government buildings as well as city emails and stationery.<sup>94</sup> Although the historical accuracy of its former uses is contested, many believe that the Market House was once used as a slave-trading post and therefore find its image on the town seal inappropriate.<sup>95</sup> Fayetteville Councilman Chalmers McDougald said, “If 45 percent of your population thinks it offensive, that’s enough to remove it . . . . We are not saying tear [the physical Market House structure] down. Just don’t put it on the official logo of the city of Fayetteville.”<sup>96</sup>

Attempting to apply the catch-all “objects of a permanent character” provision to the seal produces inconsistent results. While logos on emails and stationery are not likely to be considered “objects of a permanent character,” the brass seal affixed to the side of local government buildings very well may be. The city seal appears securely attached to buildings in the town, much larger and central to the architecture of structures than the small bolted-on letters of the Hillsborough library. The distinction between the Fayetteville seal and the Hillsborough “Confederate Memorial” lettering demonstrates another line-drawing problem within the statute: at what point is a plaque or signage “permanent”? According to the Hillsborough town attorney’s interpretation, the decision turns on how difficult the object in question is to remove. It would also make sense, however, to draw this distinction based on historical research into the original purpose of the object. Lingering questions surrounding the city seal illustrate yet another complication produced by the vague statutory language. That language would likely require a city to keep imagery deemed offensive by almost half of its citizens in place in situations involving items such as the brass seal on

93. See MISS. CODE ANN. § 15-15-81 (2015) (preventing removal of monuments and renaming of dedicated public property); TENN. CODE ANN. § 4-1-412 (2015) (same).

94. See generally *City Council Members*, CITY OF FAYETTEVILLE, N.C., <http://fayettevillenc.gov/government/city-council/city-council-members> [http://perma.cc/SDY2-5WGU] (depicting the seal on the city council’s website).

95. See Barksdale, *supra* note 80.

96. *Id.*

government buildings, but not in other situations with items such as stationery or emails.

### 3. Busts in Public Spaces

Finally, smaller busts commonly found in public spaces also illustrate the flimsy nature of the catch-all “objects of a permanent character” provision. For example, a bust of William Alexander Graham, a former slaveholding Governor of North Carolina and supporter of the Confederacy, is currently located within the State Capitol building.<sup>97</sup> If attempts are made to remove this bust, it is unclear whether the relatively small figure would be considered an object “of a permanent character” subject to the HPA’s prohibition of removal. On the one hand, a bust is easily transportable and not “permanent” to the extent of outdoor monuments.<sup>98</sup> On the other hand, a bust shares many of the same qualities as the outdoor statues clearly protected by the HPA.<sup>99</sup> Because the physical objects covered by the HPA are deeply controversial, the need for a clearer standard is evident. Confusingly, the “object of a permanent character” provision within the HPA covers objects that would be left untouched by HPAs of other states. The outer bounds of the statute’s reach become unworkably vague when applied to building names, temporary and permanent logos, and smaller objects such as busts.

These three examples illustrate the difficulties that will inevitably arise as local governments attempt to apply the HPA to objects within their communities that the public wishes to remove or relocate. Even relocations of uncontroversial items to a different place for aesthetic reasons are likely to fall under the sweeping scope of “objects of a permanent character,” and therefore, such items will be required to remain in place in perpetuity. These problems, along with concerns about the Commission’s lack of power and the statute’s broad reach, call for drafting revisions on the part of the North Carolina General Assembly in order to address the ramifications the statute may have on keeping monuments in place that many view as offensive.

97. DICTIONARY OF NORTH CAROLINA BIOGRAPHY 337–39 (William S. Powell ed., 1986); *Commemorative Landscapes of North Carolina: Bust of William Alexander Graham, State Capitol, Raleigh*, *supra* note 81.

98. *See, e.g., Commemorative Landscapes of North Carolina: Alexander County Confederate Monument, Taylorsville*, *supra* note 4 (describing the Alexander County Confederate Monument, which is located next to the county courthouse and weighs almost 1,500 pounds).

99. Both structures are made of the same material and often in the same architectural design, but a bust is often lighter and more easily transportable than a monument.

## III. RECOMMENDATIONS

Stopping short of evaluating the morality of the motivations behind the HPA, this Recent Development argues that the legislation decreases the North Carolina General Assembly's accountability, overreaches into the realm of local government and creates uncertainty through the vague definition of "objects of permanent character." Consequently, drafting revisions, as well as an additional provision allowing for the installation of plaques contextualizing these monuments, are necessary to clarify the statute and to address the public debate surrounding whether or not potentially offensive monuments should remain standing and unaltered.

*A. The General Assembly Should Modify Provisions of the HPA*

The legislature can avoid much of the inevitable confusion that will arise under the HPA by modifying the statute. The three issues of minimal accountability, overreaching into local decision-making, and vagueness could all be ameliorated by such modification.

First, unless the legislature intends for the Commission to have power regarding monument removal, it should remove the delegation in the statute. Under North Carolina's HPA, the Commission has no actual authority to act. Because the North Carolina HPA currently operates in a similar manner to the South Carolina HPA, as an outright prohibition of removal, clarifying the language to mirror that of South Carolina's HPA would reduce confusion in the future.<sup>100</sup> This change would make legislators more directly accountable for their actions; it would also provide clarity to local governments that seek to understand how the law applies.

Second, the overreach into local government power allowed by the statute, while troubling, appears to be the intent of the legislature. Nonetheless, a provision on the face of the statute that clarifies that it applies to all public property owned by the *state*, excluding that owned by local governments, would provide a more workable future standard that does not usurp local decision-making power. This modification would quell the apprehensions of Governor McCrory and legislators who expressed concern over the HPA's reach into local decision-making authority. It would also appease many commentators who have likewise noted that monument removal or

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100. See S.C. CODE ANN. § 10-1-165(A) (2015) (including a blanket prohibition against monument removal).

alteration “is a decision that should largely be made at the local level.”<sup>101</sup>

Finally, because many of the difficulties inherent in applying the vague “objects of a permanent character” provision included in the statute surround naming conventions, this definitional language should be stricken and replaced with a prohibition against name changing, consistent with legislative intent. A provision similar to those included in the South Carolina, Mississippi, or Tennessee provisions would provide a more workable standard.<sup>102</sup> Such a prohibition would alleviate inconsistent results produced by application of the statute, as evidenced by the previous comparison between Saunders Hall and Aycock Residence Hall.<sup>103</sup> Furthermore, the vague “objects of a permanent character” provision creates a fuzzy and largely arbitrary dichotomy, as illustrated by the Hillsborough “Confederate Monument” signage and the Fayetteville city seal.<sup>104</sup> Further explanation by the legislature as to what makes an object “permanent” is needed. Alternatively, the catch-all provision unique to the North Carolina HPA could be removed entirely, providing for a workable standard that leaves more objects eligible for removal.

While these changes are unlikely to completely quell the public discord surrounding the HPA, they will create standards that can more easily be understood by citizens and members of local governments. Those in opposition to monuments and naming conventions will be better able to grasp how the law functions, and local governments will have a clearer understanding of their inability to remove or rename objects that are met with public opposition.

#### *B. A Provision for “Truth Plaques” Should Be Added*

Even if these monuments ultimately remain in place, to the chagrin of protestors, slight modifications to the statute to allow for plaques contextualizing the monuments would be a meaningful step toward compromise. In espousing her support for the HPA, North Carolina Representative Marilyn Avila stated that “[w]hen you talk

101. See Brophy, *supra* note 15; see also Governor McCrory Signs Legislation and Urges Legislature to Pass Budget, Jobs Plan and Bond Proposal, *supra* note 69.

102. See MISS. CODE ANN. § 15-15-81 (2015) (preventing renaming of public property named after military events or figures); S.C. CODE ANN. § 10-1-165 (2015) (stating that state property named after historic figures may not be renamed); TENN. CODE ANN. § 4-1-412 (2015) (preventing renaming of public property).

103. See *supra* text accompanying notes 90–91.

104. See *supra* Sections II.C.1. and II.C.2.

about memorials and remembrances, the point of time at which they were erected is extremely relevant . . . . A lot of these things were done shortly after the War between the States.”<sup>105</sup> This statement reflects a common misconception among supporters of the HPA. In fact, most of the Confederate monuments located in North Carolina were erected between 1890 and 1930, decades after the Civil War had ended.<sup>106</sup> The fact that most of the monuments seen today were not erected in the years immediately following the Civil War changes their meaning for many people, who see them not as paying contemporaneous homage to war veterans, but instead as signaling to the public that white supremacy remains pervasive in the minds of many North Carolinians. Historian Timothy Tyson interprets this delay in erecting monuments as central to understanding their true meaning, stating that “[m]ore importantly, [the State] built the monuments after the white supremacy campaigns had seized power by force and taken the vote from black North Carolinians. The monuments reflected that moment of white supremacist ascendancy as much as they did the Confederate legacy.”<sup>107</sup>

An understanding of the circumstances surrounding monument erection may enable citizens to contextualize monuments within the backdrop of local history. For example, Silent Sam was erected on the University of North Carolina at Chapel Hill campus in 1913—almost five decades after the end of the Civil War—with funding from the United Daughters of the Confederacy.<sup>108</sup> Although the monument is considered by many to honor the alumni that fought in the Civil War, its dedication ceremony included Julian Carr, the namesake of the town of Carrboro, publicly recounting whipping an African American woman for insulting a “Southern lady.”<sup>109</sup> Stories like this cause many to interpret the monument as honoring invidious racial politics of the early twentieth century.<sup>110</sup> A “truth plaque” placed next to the monument would allow onlookers to make their own appraisal of the monument’s meaning.

A provision within the HPA explicitly granting local governments the power to approve plaques containing relevant

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105. See Campbell, *supra* note 24.

106. See Shelton, Stasio & Tie, *supra* note 1.

107. See Tyson, *supra* note 14.

108. *Commemorative Landscapes of North Carolina: Memorial to Civil War Soldiers of the University, UNC (Chapel Hill)*, *supra* note 7.

109. *Id.*

110. See, e.g., Knight, *supra* note 19.

information<sup>111</sup> would not only allow some degree of local control over the objects but would also shed light onto the problematic contexts that influenced the monuments' erections. As written, the HPA suggests that local governments do not have the authority to put plaques up, creating the need for an explicit provision providing such authority. Section (b) of the HPA states:

Nothing in this Part shall be construed to prevent the ordinary maintenance or repair of any exterior architectural feature in a historic district or of a landmark *which does not involve a change in design, material or appearance thereof*, nor to prevent the construction, reconstruction, alteration, restoration, moving or demolition of any such feature . . . .<sup>112</sup>

This provision implies that local governments are without power to alter the appearance of monuments within their jurisdiction under the HPA. Placing a plaque explaining historical context *on* a monument, even on its base, would likely be forbidden because it would change the appearance of the monument. Placing a plaque *beside* a monument is less likely to be considered an alteration, but that is uncertain under the current law. On one hand, a plaque placed next to a monument may not change the appearance of the monument because the objects would not be touching each other and therefore, would not constitute an alteration. Conversely, a plaque may change the broader aesthetic appearance of the monument when considering the view of the monument and its surrounding area and consequently be considered an alteration. For clarity's sake, the North Carolina General Assembly should amend the HPA to allow for these plaques and provide a uniform procedure through which local governments may, with input from the local community, approve the content of the plaques.

Community groups have already shared their thoughts on provisions such as these. An official statement from the NAACP supported a similar proposal.<sup>113</sup> In his official statement, Rev. Dr.

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111. The information included could consist of when the monuments were erected, what was said at their erection, and who funded the construction of the monument. For example, people may appreciate that the Alexander County courthouse monument was erected almost a century after the Civil War, in 1959, but it honored a Confederate soldier who was purportedly opposed to both slavery and secession and freed all of his own slaves seventeen years prior to the war. See *Commemorative Landscapes of North Carolina: Alexander County Confederate Monument, Taylorsville*, *supra* note 4.

112. N.C. GEN. STAT. § 160A-400.13(b) (2015) (emphasis added).

113. Heather Travar, *Symbols of Pro Slavery*, N.C. NAACP (July 24, 2015), [http://www.naacpn.org/symbols\\_of\\_pro\\_slavery](http://www.naacpn.org/symbols_of_pro_slavery) [<http://perma.cc/9TMM-5JMN>] (posting Reverend Dr. William J. Barber II's statement on the passage of the HPA).

William J. Barber II called on the legislature to “write a Truth Bill, demanding that if these monuments are going to stay up, we now have to write some Truth plaques that are placed on these monuments that tell exactly when, and why, and in what context they were erected.”<sup>114</sup> The push for contextualization of these monuments has also been met with the support of many faculty members of the University of North Carolina at Chapel Hill, who released a statement supporting the efforts of Silent Sam’s opponents to place a plaque explaining Silent Sam’s controversial origin.<sup>115</sup> Given the expansive scope of the HPA and the multitude of monuments that it cements into the North Carolina landscape for the foreseeable future, a provision providing for plaques that contextualize these monuments is necessary.

#### CONCLUSION

The presence of Confederate memorials within the North Carolina landscape invokes strong emotional responses from many citizens. While it is outside of the judiciary’s purview to determine whether these symbols are moral, it is its duty to ensure that laws enacted by the legislature are accessible and fairly applied. Because the vague and confusing provisions within the HPA produce irregular results, it is essential that the North Carolina legislature draft more straightforward legislation. This is necessary so that local governments can understand what, if any, control they maintain over these symbols, and citizens affected by the presence of these structures clearly understand where to address their grievances. The North Carolina HPA renders legislators unaccountable, usurps power from local governments, and is unworkably vague. By adding both legislative clarity and accountability to the statute, as well as historical context in the form of truth plaques, North Carolina citizens can more fully understand the state’s heritage and the intricacies of the debate that surrounds it.

KASI E. WAHLERS\*\*

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114. *Id.*

115. Jean Dennison, *Letter: Professors Support Real Silent Sam*, DAILY TAR HEEL (Mar. 2, 2015, 11:48 PM), <http://www.dailytarheel.com/article/2015/03/letter-professors-support-real-silent-sam> [<http://perma.cc/3TQ7-E6MD>].

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