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LAWS REGARDING CONTROVERSIAL CULTURAL HERITAGE IN SOUTH AFRICA AND THE UNITED STATES: PUBLIC MONUMENTS AND STREET NAMES

1. INTRODUCTION

Like stalagmites, the characteristics of a culture – sensibilities, world-view, spirituality, language, myths and stories, literature, mores – accrete slowly. This incremental development of culture tethers generations past, present, and future with powerful bonds of “memory, continuity, and identity” that have far-reaching, positive effects on society¹. Yet unique tangible manifestations of cultural heritage, such as art, architecture, writings, monuments, relics, and handicrafts, may vanish in an instant².

To display legitimacy and authority, nascent social movements and political regimes tend to erase the cultural capital of the old, often in cities which themselves have been or remain designated national or ‘cultural’ capitals. Monuments are destroyed, relocated or repurposed; landscapes are changed; buildings are dismantled; streets are renamed; literature is banned or “cleansed”; movable relics embodying past identities are eradicated or reinterpreted to support a new cultural narrative.

Targeting cultural heritage to buttress new political and social aims is an ancient, and unfortunately, omnipresent practice among authoritarian regimes. Pharaohs’ excised the names of predecessors (and carved their own) on Egyptian obelisk cartouches; King Edward I of England captured and transported the Stone of Scone – Scotland’s coronation stone – to Westminster Abbey in 1296;

¹ T. Mayes, *Why Do Old Places Matter? How Historic Places Affect our Identity – and our Wellbeing*, National Trust for Historic Preservation, Washington DC 2014, pp. 1–2.

² Consider how much more we would know about the ancient Mediterranean World if the great universal libraries at Alexandria were not entirely ravaged and destroyed. See M. El-Abbadi, *Life and Fate of the Ancient Library of Alexandria*, Paris 1992.

Chairman Mao's "Great Leap Forward" led to the wholesale destruction of Chinese feudal culture in the mid-20th century; the Nazis methodically bombed and bulldozed over 90% of Warsaw's historic Old Town³; and the Islamic State (ISIS) recently demolished the tomb of the biblical prophet, Jonah, in Iraq⁴.

Calculated removal of cultural heritage, however, is also a widespread threat in representative polities like South Africa and the United States. This is particularly true when historic monuments and street names highlight controversial chapters of an unreconciled past, like slavery and racial inequality. Monuments and street names that some significant minorities and newly empowered groups associate with slavery and racial inequality are significant threads that delineate and reinforce a distinct and unwelcome cultural narrative of identity and importance across many urban tapestries in South African and the United States. But the laws for protecting or removing monuments and street names that have become controversial in these two countries has received little attention. This article will, therefore, examine and compare the legal frameworks for protecting or removing controversial historic monuments and renaming controversial streets in South Africa and the United States.

2. CULTURAL HERITAGE AT RISK IN SOUTH AFRICA AND THE UNITED STATES

Despite their geographic separation, South Africa and the United States share many political and cultural similarities. Both countries have representative governments; South Africa is one of the youngest parliamentary republics, while the United States is the oldest functioning democracy. These countries also share a long history with slavery and racial inequality that legally ended only in the latter half of the twentieth century⁵. But most important for this study, recent dis-

³ The deliberate, careful targeting of Polish heritage in Warsaw by the Nazis in World War II is one of the grimmest examples of systematic cultural annihilation by an authoritarian regime. See A. Tung, *Preserving the World's Great Cities: The Destruction and Renewal of the Historic Metropolis*, New York 2001, pp. 81–82.

⁴ See J. Moyer, *After Leveling Iraq's Tomb of Jonah, the Islamic State Could Destroy Anything in the Bible*', Washington Post, 25 July 2014; S. J. Evans, *Shocking Moment ISIS Militants Take Sledgehammers to Mosul Tomb of Prophet Jonah as More than 50 Blindfolded Bodies are Found Massacred South of Baghdad*, Daily Mail, UK, 9 July 2014.

⁵ We say "legally ended" here because we are cognizant that mere legal change did not, and has not, terminated the pain, discrimination, and attitudes promoted by Apartheid laws in South African and Jim Crow laws in the United States. Apartheid in South Africa officially ended with the promulgation and enforcement of a new South African Constitution on 4 February 1997. See Constitution of the Republic of South Africa, 1996. And in the United States, the Civil Rights Act of 1964 outlawed discrimination on the basis of race, color, religion, sex, or national origin,

putes over race relations in South Africa and the United States has led to vandalism, removal, or contemplated removal of historic monuments and street names honoring individuals who some view as symbolizing and thus reinforcing racial inequality.

In South Africa, frustration over the lack of educational and economic opportunities for black South Africans nearly twenty years after apartheid's demise has prompted the defacement (and in some cases removal) of statues honoring colonial-era figures. This recrudescence of anti-apartheid and anti-colonial sentiment was sparked by University of Cape Town (UCT) students protesting against a large, bronze statue memorializing British imperialist and mining magnate, Cecil Rhodes, situated in the middle of the UCT's picturesque campus. In early 2015 one student splashed the statue with excrement. This was followed by supportive mass protests, vandalism of the statue, and sit-ins demanding that UCT remove the statue. Following the 30-member UCT Council vote and subsequent approval from the provincial heritage authority, the Rhodes statue was relocated "for safekeeping"⁶. The rage over the Rhodes' statue in Cape Town elicited a 'vandalism domino effect' on other monuments to apartheid and colonial figures in other South African cities. A statue in Pretoria to Paul Kruger, a 19th century Afrikaner leader opposed to the British, was doused with green paint as was a 112 year-old statue of Queen Victoria that stood outside the library in Port Elizabeth. In Durban, a statue of King George VI located on the grounds of KwaZulu-Natal University was spray-painted⁷. And many streets named after apartheid and colonial leaders have been renamed (or are in the process of being officially renamed) in honor of historic South African leaders and heroes of the struggle to end apartheid⁸.

Likewise, some groups in the United States are advocating for cultural heritage that is arguably connected to racism to be removed. Against a backdrop of ongoing racial inequality in education, employment, and housing along with several recent fatal shootings of unarmed black men by white police officers, Dylann Roof's horrific, racially-motivated killing of nine African-American parishioners at a church in Charleston, South Carolina and his connections to white supremacist groups triggered intense social and political backlash to historic icons hon-

required equal access to public facilities and employment, and enforced desegregation of schools and the right to vote See United States Code § 1981 sqq.

⁶ University of Cape Town (UCT), Communication and Marketing Department *Application for permanent removal of CJ Rhodes Statue*, September 16, 2015; BBC, *Rhodes Statue Removed in Cape Town as Crowd Celebrates*, 9 April 2015.

⁷ D. Smith, *Vandalism of Apartheid-Era Statues Sparks Fevered Debate in South Africa*, The Guardian, April 10, 2015.

⁸ *Apartheid Street Names Replaced*, at www.Joburg.org.za (visited July 22, 2015); T. Farber, *Name Changes: Cape Town*, Mail & Guardian, June 29, 2007.

oring the Confederate States of America⁹ – a collection of eleven Southern states who championed slavery and ignited the American Civil War (1861–1865)¹⁰.

In Tennessee, for example, a 9,500 pound brass statue to Confederate general Nathan Bedford Forrest (a notorious slave dealer and grand wizard of the Ku Klux Klan) is slated to be removed from a public park in Memphis. Forrest's body along with that of his wife, which lay encased since 1905 in the monument's eight-ton marble base, will be disinterred and relocated¹¹. In South Carolina, the state legislature recently voted to permanently remove the Confederate battle flag from the grounds of the state capitol¹². In Louisiana, a vigorous debate has erupted as to whether streets honoring Confederate leaders should be renamed for Civil Rights advocates and whether a 60-foot tall granite monument of Robert E. Lee (the leading general of the Confederacy) should be removed from a prominent intersection of New Orleans, where his statue has stood watch for over a century¹³. And in the state of Georgia, activists are demanding that streets named for Confederate heroes be renamed and that memorials honoring rank-and-file Confederate soldiers killed during the Civil War be removed from public lands¹⁴.

3. LEGAL FRAMEWORK FOR PROTECTING OR REMOVING HISTORIC MONUMENTS

3.1. SOUTH AFRICA

South Africa's National Heritage Resources Act of 1999 (NHRA) describes the legal framework for preserving and managing the country's cultural heritage¹⁵. Significantly, the Preamble to the Act states that cultural heritage has the

⁹ F. Robles, *Dylann Roof Photos and Manifesto are Posted on Website*, New York Times, June 20, 2015. Photos of Dylann Roof show him with several white supremacist symbols, including the apartheid-era flags.

¹⁰ The Confederate States of America were comprised of the following states: South Carolina, North Carolina, Virginia, Tennessee, Arkansas, Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

¹¹ E. Yellin, *A Confederate General's Final Stand Divides Memphis*, New York Times, July 19, 2015.

¹² E. Izadi, A. Phillip, *South Carolina House Votes to Remove Confederate Flag from Statehouse Grounds*, The Washington Post, July 9, 2015.

¹³ M. Rhodan, *New Orleans Mayor Asks City Council to Remove Confederate Statues*, Time, July 9, 2015; R. McClendon, *Jefferson Davis Parkway Should be Names for Norman Francis, Mitch Landrieu Says*, Times-Picayune, July 9, 2015.

¹⁴ B. York, *Most Oppose Removal of Confederate Names*, Landmarks, Washington Examiner, July 2, 2015; P. Ramati, *Former Macon Mayor Wants Confederate Statues Removed from Public Property*, The Telegraph: Middle Georgia's News Source, June 25, 2015.

¹⁵ National Heritage Resources Act, No. 25 of 1999 [hereinafter NHRA].

ability define cultural identity, affirm diverse cultures, shape the national character, redress past inequities, and “facilitates healing and material and symbolic restitution”¹⁶. The NHRA provides that “those heritage resources of South Africa which are of cultural significance or other special value” form part of the “national estate” and fall within the jurisdiction of various heritage resource authorities¹⁷. The Act defines “national estate” broadly to include nationally significant buildings, objects, landscapes, sites, and structures, including historic monuments and memorials older than 60 years that are erected on public lands or monuments and memorials on private lands that were funded by the public purse¹⁸.

The South African Heritage Resources Agency (SAHRA) is the national body established under the NHRA to manage nationally significant historic resources¹⁹. The Act also provides for the establishment of provincial heritage resource authorities (PHRAs) to manage heritage resources of significance on the provincial and local levels through coordination with local authorities and through enacting by-laws conforming to the NHRA²⁰. With the assistance of the PHRAs, SAHRA is identifying and creating a Heritage Register comprised of three classes of significant resources that determine the appropriate heritage resource steward: 1) Grade I heritage resources are those deemed to have national significance and are managed by SAHRA; 2) Grade II heritage resources are those with provincial, regional, or local significance and are managed by the applicable PHRA; 3) Grade III heritage resources are “other heritage resources worthy of conservation” and are managed by the appropriate PHRA or by delegated local authorities, usually municipalities²¹.

If a public monument or memorial is listed under any of the three grades, the NHRA offers this monument or memorial significant legal protections. No governmental body may take any “action”²² that adversely affects any listed historic monument unless “there is no feasible and prudent alternative to the taking of that action” and “all measures that can reasonably be taken to minimize the adverse effect will be taken”²³. On its face, the NHRA’s “no feasible and prudent alter-

¹⁶ NHRA, Preamble.

¹⁷ NHRA Section 3(1).

¹⁸ NHRA Sections 2(xxxviii, xivl), 3(2-3), 34, 37.

¹⁹ NHRA Sections 11-22.

²⁰ NHRA Sections 24-26; Each of South Africa’s nine provinces has created a Provincial Management Authority, but variations in resources, competence, and desire to engage in the responsibilities and challenges of cultural heritage management has meant that some provinces have enacted more significant heritage legislation than others.

²¹ NHRA Sections 7-8, 39.

²² Governmental “actions” include making recommendations, issuing licenses, granting permissions, approving programs, or making decisions that would affect a heritage resource. See NAHRA, Section 9(5).

²³ NHRA Section 9(3). The NHRA’s “no feasible and prudent alternative” legal standard was likely influenced in the drafting stage by consultation with United States heritage authorities, as it closely tracks the legal standard articulated in Section 4(f) of the U.S. Department of

native” legal standard is an incredibly powerful tool for preserving controversial monuments, as any government actions that might adversely affect a historic monument, like removal or relocation, cannot be taken unless all the alternatives have been considered and there is simply no better alternative. And even if a historic monument must be removed or relocated, the government authority must take affirmative steps to minimize the adverse effect that a removal or relocation would have. However, the decentralization of heritage resource identification and governance into this relatively fluid tripartite management system has led to some “confusion about which authority is ultimately responsible for decisions about the possible removal, relocation, or re-interpretation of existing monuments and the addition of new commemorative objects”²⁴. Despite this uncertainty, the NHRA’s highly protective legal standard for existing monuments underscores one of its key principles for heritage resource management: that “heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity”²⁵. Removing controversial monuments, therefore, should be the exception not the rule.

Anyone may apply to the relevant heritage authority for a permit to remove or relocate a historic public monument or memorial²⁶. In the province of Western Cape, for example, an application for removal must include documentation regarding the cultural significance of the monument; results of wide-ranging public consultation processes including the PHRA, local planning authorities, conservation organizations registered with the PHRA, and other interested stakeholders; and statements about where the monument will be relocated and who will maintain it²⁷. The PHRA or local authority must also independently consult the owner(s), planning authority, and relevant conservation and non-governmental organizations²⁸. Decisions on whether to remove the monument should be grounded in the “no feasible and prudent alternative” legal standard, the “cultural significance” of the monument, the financial costs of removal and maintenance, and have due regard for heritage conservation principles stated in the NHRA. Appeals from a decision can be made within 30 days to an independent tribunal composed of three experts appointed by the Minister of Arts and Culture²⁹.

In sum, South African Law offers its historic public monuments and memorials – even those viewed by some as symbolizing racism or reinforcing racial

Transportation Act of 1966, which provides the strongest heritage protections under United States law. See 49 United States Code § 303(c).

²⁴ S. Marschall, *Landscape of Memory: Commemorative Monuments, Memorials and Public Statuary in Post-Apartheid South Africa*, Leiden 2009, pp. 140–141.

²⁵ NHRA Section 5(1)(c).

²⁶ NHRA Section 27(18).

²⁷ *Heritage Western Cape Draft Guidelines for Public Monuments and Memorials*, Section 5.3-4, August 26, 2015.

²⁸ *Ibidem*, at 5.4.

²⁹ NHRA Section 49.

inequality – powerful procedural and substantive legal protections. This strongly suggests that most public monuments and memorials honoring the colonial and apartheid eras will remain *in situ*. Even in extreme cases where a monument or memorial is removed, a “suitable plaque should be placed to mark the position and relevant information pertaining to the monument or memorial” as a lasting reminder of the role the monument once played in civic life³⁰. Anyone who defaces monuments or memorials may also be fined and/or imprisoned according to the severity of the offense³¹.

3.2. UNITED STATES

The United States’ National Historic Preservation Act of 1966 (NHPA) provides the primary legal framework for preserving and managing the country’s cultural heritage, including historic monuments³². The purpose of the NHPA is to preserve the “historical and cultural foundations” as a “living part of our community life and development in order to give a sense of orientation to the American people”³³. The NHPA established the National Register for Historic Places (National Register) – the inventory of nationally significant historic properties, objects, districts, structures, and sites worthy of preservation – which is administered by the United States National Park Service³⁴. Historic resources, including monuments and memorials, must be listed, or eligible for listing, on the National Register to receive legal protections under the NHPA³⁵. For a monument or memorial to be listed or eligible for listing on the National Register, it must meet the following four criteria: 1) it must be one of five types of resources – a district, site, building, structure or object (intangible heritage resources are not currently recognized or protected by U.S. law); 2) it must be relevant to a prehistoric or historic context; 3) it must be significant; and 4) it must have integrity, that is, the monument or memorial must be able to communicate its significance³⁶.

³⁰ *Heritage Western Cape Draft Guidelines for Public Monuments and Memorials*, Section 5.5, 26 August 2015.

³¹ NHRA Section 51.

³² 16 U.S.C § 470 sqq; Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. §303(c)) offers powerful protections for historic resources threatened by federal transportation programs or projects. However, since monuments and commemorative memorials are typically unaffected by federal transportation projects this law will not be discussed here.

³³ 16 U.S.C. § 470(b)(2).

³⁴ 16 U.S.C. § 470(a).

³⁵ 36 Code of Federal Regulations [hereinafter C.F.R.] § 800.16(l)(2); S. Bronin, R. Rowberry, *Historic Preservation Law in a Nutshell*, St Paul 2014, pp. 86–87.

³⁶ 16 U.S.C. § 470a(a)(1)(A); Each of these four criteria – type, context, significance, integrity – has been further defined and elaborated through regulation. For “type” see 36 C.F.R. § 60.3; for “context” see 16 U.S.C. § 470a(a)(1)(A); for “significance” see 36 C.F.R. § 60.4; for “integrity” see

If a monument or memorial is listed or eligible for listing on the National Register, it receives procedural legal protections under Section 106 of the NHPA. Section 106 of the NHPA establishes a review process for actions carried out, funded, or approved by an agency of the federal government that may impact historic monuments listed or eligible for listing on the National Register³⁷. Regulations implementing the Section 106 process consider the relocation or removal of monuments listed on the National Register as an “adverse effect” that requires the federal agency sponsoring the action to consult with affected parties to try and mitigate the negative effects of removing the monument from its original context³⁸. If a negotiated solution cannot be reached, the Advisory Council for Historic Preservation, an independent federal agency responsible that promotes the preservation, enhancement, and productive use of United States historic resources, issues comments to the head of the sponsoring federal agency, who in turn makes a final decision on whether or not to remove the historic monument³⁹.

Thus, while the NHPA Section 106 process allows historic monuments to be removed or relocated, it does mandate that certain procedures to be followed before the monument may be relocated; you must look closely before you leap. As a further disincentive, “structures [including monuments] that have been moved from their original locations” are typically ineligible for listing in the National Register and thus for financial assistance under the NHPA⁴⁰ and for related national tax benefits⁴¹. United States national law, therefore, discourages – but does not prohibit – the removal or relocation of nationally important historic monuments from public lands.

Using the NHPA as a model, states have also enacted legislation protecting historic resources on public lands, including monuments that have state or local significance⁴². For example, Georgia has created the Georgia Register of Historic Places, an inventory that uses the same criteria and documentation procedures as the National Register⁴³. Georgia also requires a similar review process to NHPA Section 106 – finding of adverse impact, consultation with affected parties, mitigation – for state and local government actions that may impact historic mon-

³⁶ C.F.R. § 60.4; see also National Register Bulletin No. 15, *How to Apply the National Register Criteria for Evaluation*.

³⁷ 16 U.S.C. § 470(f).

³⁸ 36 C.F.R. § 800.5(a)(2)(iii); 36 C.F.R. § 800.5-6.

³⁹ 36 C.F.R. § 800.6-7.

⁴⁰ 36 C.F.R. § 60.4; Exceptions can be made for properties “primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance” See 36 C.F.R. § 60.4(f).

⁴¹ 36 C.F.R. § 67.4(h).

⁴² See S. Bronin, R. Rowberry, *Historic Preservation Law...*, pp. 57–68.

⁴³ Georgia Code Annotated [hereinafter Geo. Code. Ann.] § 12-3-50-1.

uments⁴⁴. And like its national counterpart, a state or local historic monument that is relocated generally loses valuable financial aid and tax incentives that can help to maintain it. Thus, like the national government, states and their political subdivisions generally discourage but do not prohibit removal of historic monuments of state or local significance from public lands. One example of the ability of most states, counties, and cities to remove monuments can be found in New Orleans, Louisiana, where Mayor Mitch Landrieu has asked the City Council to invoke city ordinances to declare four historic monuments dedicated to Confederate leaders as ‘public nuisances’ and remove them⁴⁵.

In addition, it should be noted that South Carolina, Georgia, and Tennessee – three former Confederate states – have enacted laws designed to make the removal, relocation, or alteration of historic monuments honoring the Confederacy that reside on public lands throughout their states, including those in political subdivisions like counties and municipalities, incredibly difficult⁴⁶. The 2013 Tennessee Heritage Act forbids Tennessee counties and cities from removing historic Confederate monuments unless they obtain a waiver from the Tennessee Historical Commission. Such a waiver would presumably allow for removal or relocation of a historic monument, but has never been tested⁴⁷. The Heritage Acts of Georgia and South Carolina are even more protective of historic monuments to the Confederacy. Georgia simply bars the removal or relocation of historic monuments on public lands throughout the state⁴⁸, while South Carolina prohibits removal or relocation unless two-thirds of both branches of the General Assembly (the state legislative body) vote to amend the Heritage Act, a virtual impossibility⁴⁹. While none of these three Heritage Acts have been challenged in court, the Attorney General of South Carolina has issued opinions broadly construing South Carolina’s Heritage Act to forbid the relocation of a Confederate monument to a different location within the same park, suggesting that Confederate mon-

⁴⁴ Geo. Code Ann. § 12-16-1 sqq.

⁴⁵ R. Rainey, *Are Confederate Statues Nuisances? New Orleans City Council to Decide*, NOLA.com, December 1, 2015; The ordinances that deal specifically with removing monuments from public property can be found at New Orleans, Louisiana – Code of Ordinances, Chapter 146, Article VII, section 611.

⁴⁶ For Georgia, see Geo. Code Ann. § 50-3-1; for South Carolina see S.C. Code Ann. § 10-1-165; for Tennessee see Tenn. Code Ann. § 4-1-412. For a comprehensive list of monuments and markers to the Confederacy in Georgia (with photographs), see United Daughters of the Confederacy Georgia Division, *Confederate Monuments and Markers in Georgia*, 2002; in 2016 the state of Mississippi will be considering a ballot initiative that could add similar Confederate monument removal prohibitions to its state constitution. See A. Ganucheau, *Ballot Petition Aims to Protect Confederate Heritage*, The Clarion-Ledger, November 5, 2014.

⁴⁷ Tenn. Code Ann. § 4-1-412(d).

⁴⁸ Geo. Code Ann. § 50-3-1.

⁴⁹ S.C. Code Ann. § 10-1-165.

uments in South Carolina will likely remain in their historic locations⁵⁰. Financial penalties and injunctions are also available against any person or entity that defiles these monuments⁵¹.

3.3. COMPARATIVE ANALYSIS

A close comparison of the laws for protecting or removing controversial historic monuments in the South Africa and the United States reveals important similarities but even greater differences. With respect to the most important similarities, both countries share a powerful common ethos that heritage is critical to shaping, informing, and changing national and community identity to be more inclusive of diverse cultures. Furthermore, South Africa and the United States have cultural heritage management systems that are decentralized, offering provincial/state and local government autonomy in deciding how to manage the identification, protection, and possible removal of controversial monuments in their respective spheres of authority. This regional and local autonomy is tempered somewhat by the fact that the legal standards for designating a monument as historic (thus triggering legal protections) on the provincial/state and local levels are those framed by the national/federal government⁵². Furthermore, as one might expect in representative governments, both countries have crafted a consultation process for removing historic monuments involving a high degree of public participation. Whether or not the realities of this participation truly represent the public at large in either country is a topic for another article.

Yet compared to the similarities, the differences between the laws of South Africa and the United States are far greater. The two most important differences lie in the strength and scope of the legal standards protecting historic monuments in both countries from adverse governmental actions. South African historic monuments enjoy powerful substantive protections from removal under the “no feasible and prudent alternative” standard – meaning that authorities must refrain from removing a monument unless there is no other viable alternative. United States historic monuments, on the other hand, are offered only procedural protections of the NHPA; that is the overwhelming majority of U.S. historic monuments can be removed for *any* reason provided that the public consultation process outlined in Section 106 is followed. Even when states’ legal standards deviate from the federal norm – like Tennessee, South Carolina, and Georgia – the tendency

⁵⁰ See *Opinion Letter from Attorney General of South Carolina Alan Wilson to Senators Grooms and Verdin*, June 10, 2014.

⁵¹ See, e.g., Geo. Code Ann. § 50-3-1(b)(4).

⁵² For South Africa see NHRA Sections 2(xxxviii, xivl), 3(2-3), 7, 30, 34, 37; for the United States see 16 U.S.C. § 470a(a)(1)(A); S. Bronin, R. Rowberry, *Historic Preservation Law...*, pp. 57–63.

is to create stronger procedural protections for monuments rather than impose substantive mandates. Comparing the strength of legal standards alone, therefore, controversial monuments in South Africa appear more likely to remain in place than controversial U.S. monuments.

However, there is also an important difference in the scope of protections offered to historic monuments in both countries that must be considered in conjunction with the protective power of their respective legal standards. In South Africa, only those monuments listed as part of the inventory of the “national estate” receive the robust protections of the NHRA; unlisted monuments are not covered⁵³. But this process for identifying and declaring what monuments comprise the “national estate” has been hampered by the inability or unwillingness of provincial/local governments to work with SAHRA on establishing the national inventory as well as confusion over which authority – national, provincial, or local – is responsible for deciding whether a monument meets the NHRA’s “national estate” criteria and deserves listing⁵⁴. In contrast, the United States’ NHPA affords its procedural protections to monuments listed on *or eligible* for listing on the National Register⁵⁵. This means that federal agencies must evaluate the significance all historic monuments that might be impacted by their actions during the Section 106 process and offer unlisted historic monuments that meet the National Register criteria the same procedural protections afforded to listed monuments⁵⁶. The same is generally true of state and local agencies, as state historic resource review processes usually mimic the federal ones.

In sum, while South Africa boasts a more powerful legal standard for protecting controversial monuments than that of the United States, the range of monuments to which South Africa’s “no feasible and prudent alternative” applies is narrower than the range of controversial monuments protected by the NHPA and its various state incarnations in the United States. Arguably, then, one might conclude that South Africa offers stronger legal protections to its controversial monuments than the United States, but it protects fewer of them.

⁵³ NHRA Section 39.

⁵⁴ Many of the objectives that require the cooperation and participation of PHRAs and local governments have not been achieved, or are only partially achieved. See SAHRA Annual Report (2014), pp. 19–24; S. Marschall, *Landscape of Memory...*, pp. 140–141.

⁵⁵ 36 C.F.R. § 800.16(l)(2).

⁵⁶ S. Bronin, R. Rowberry, *Historic Preservation Law...*, pp. 86–87. There are currently over 90,000 historic properties listed on the National Register. See *National Register of Historic Places Program: Research*, at <http://www.nps.gov/nr/research/>.

4. LEGAL FRAMEWORK FOR RENAMING CONTROVERSIAL STREETS

4.1. SOUTH AFRICA

National roads in South Africa are devoid of names honoring individuals or events. The South African National Roads Agency Limited (SANRAL), an independent statutory company whose sole shareholder is the South African government, is responsible for naming, constructing, and maintaining a series of national roads (toll and free) throughout the country's nine provinces⁵⁷. Rather than naming national roads SANRAL labels them, combining the letter 'N' for 'national' and a number (e.g., N1) to designate national roads in South Africa.

In contrast to national roads, many provincial and municipal roads in South Africa serve as memorials to people or events. The South African Constitution confers upon provincial governments and municipalities the power to govern street names in their respective jurisdictions⁵⁸. And the laws and policies enacted by South African local governments to guide the renaming of controversial streets are relatively consistent in their broad scope. For example, one of the leading objectives of the Cape Town Naming Policy is "to address or replace names which are held to be controversial or offensive"⁵⁹. Similarly, in E'Tekwini Municipality (formerly the City of Durban) names that are "offensive" should be replaced with those that "strengthen community identity"⁶⁰. And in Johannesburg, the primary criteria for renaming streets are if the street name is "considered offensive", "historically irrelevant", or where "the name change is desirable to promote the goodwill of people now living in the new South Africa"⁶¹. With the demise of the apartheid government, several street names honoring apartheid leaders in Johan-

⁵⁷ The South African National Roads Agency Limited and National Roads Act, Act No. 7, 1998; a map of national roads under SANRAL's jurisdiction can be found at: <http://www.nra.co.za/content/9596SanralRoads.jpg>.

⁵⁸ For provincial authority over streets see Constitution of South Africa, Chapter 6, Section 104(1)(b)(2) and Schedule 5 Part A; for municipal authority over streets see Constitution of South Africa, Chapter 7, Section 156 and Schedule 5 Part B; See also *The Democratic Alliance v. Ethekwini Municipality*, Supreme Court of Appeal of South Africa, Case No. 887/2010 (November 30, 2011) (holding that the Ethekwini Municipal Council had the authority to rename streets and buildings within its jurisdiction).

⁵⁹ City of Cape Town, *Amended Naming Policy of the City of Cape Town* [hereinafter Cape Town Amended Naming Policy] April 2012, Section 2.5.

⁶⁰ E'Tekwini Municipality, *Public Notice – Street Renaming*, January 9, 2012; see also J. Duminy, *Street Renaming, Symbolic Capital, and Resistance in Durban, South Africa*, Environment and Planning D: Society and Space 2014, No. 32, pp. 310–328.

⁶¹ City of Johannesburg, *Policy on the Naming and Renaming of Streets and Other Public Places* [hereinafter Jo-Burg Policy on the Naming and Renaming of Streets], 2nd Revision, August 2007, Section 8(i-iii).

nesburg – like Hendrik Verwoerd Drive (named for the Prime Minister of South Africa (1958–1966) who is “considered to be the architect of grand apartheid”) – met the criteria of being “offensive” and have been renamed for anti-apartheid heroes, like Bram Fischer, an Afrikaner lawyer who fought for equal rights for all South Africans during apartheid⁶².

The process for renaming a controversial street in Johannesburg is typical of street renaming in South Africa localities generally. Any person or group may submit a proposal to the relevant local authority. In Johannesburg, this is the Executive Director in the Development Planning and Urban Management unit⁶³. The proposal must include:

- 1) the proposed name and reasons for the name change;
- 2) a locality map showing the feature proposed for renaming; and
- 3) proof of legal residency of business address in Johannesburg⁶⁴.

The Executive Director then reviews the application in terms of the criteria mentioned above and sends the application to the City’s Naming/Renaming Committee who also review the application under the set criteria⁶⁵. The Committee then makes a recommendation on the application, which is sent with a report to the City Council for a decision on whether to proceed with the renaming⁶⁶. If the City Council rejects the renaming application, it must state clear reasons for doing so⁶⁷. But if the City Council decides to move forward with the renaming, the relevant Ward Councillor(s) are informed and a public consultation process begins in which comments and alternatives to the proposed name are requested and considered for about one month’s time⁶⁸. At the end of this public consultation process, the Ward Councillor(s) submits a report to the Executive Director detailing the proposal, their recommendation, and the financial implications of their recommendation⁶⁹. The Executive Director then assesses the report with its

⁶² *Apartheid Street Names Replaced*, at www.Joburg.org.za, Official Website of the City of Johannesburg, July 22, 2015. For other name changes see.

⁶³ Jo-Burg Policy on the Naming and Renaming of Streets, Section 9(i); see also Cape Town Amended Naming Policy, Section 7 and 7.1.

⁶⁴ Jo-Burg Policy on the Naming and Renaming of Streets, Section 9(ii); in Cape Town the person or group applying for a street to be renamed must supply proof “reflecting substantial support for the nomination in the community most affected” and financial implications of the change. See Cape Town Amended Naming Policy, Section 7.2-7.3.

⁶⁵ Jo-Burg Policy on Naming and Renaming of Streets, Section 9(iii); Cape Town has also made provision for its Naming Committee to have the assistance of an expert panel if necessary. See Cape Town Amended Naming Policy, Section 9.

⁶⁶ Jo-Burg Policy on Naming and Renaming of Streets, Section 9(iv); see also Cape Town Amended Naming Policy, Section 8.

⁶⁷ Jo-Burg Policy on Naming and Renaming of Streets, Section 9(iv).

⁶⁸ *Ibidem* at Section 9(v-ix).

⁶⁹ Jo-Burg Policy on Naming and Renaming of Streets, Section 9(x); see also Cape Town Amended Naming Policy, Section 8.

recommendation and submits it to the City Council for consideration and final approval or rejection⁷⁰. If the name change is approved, notices are erected on the street, the relevant local agencies are notified, and the City budget should make a provision for capital funds and operating funds needed for implementation⁷¹.

4.2. UNITED STATES

Honorific street names in the United States are governed solely by state and local law, as the federal government uses only numbers to designate interstate roads. Old transcontinental named routes, like the Lincoln Highway or the Jefferson Davis National Highway, were originally named by the states through which the routes passed and were split among several numbers when interstate highways “adopted the U.S. numbering plan in November 1926”⁷². This U.S. numbered highway system (e.g. U.S. 15, U.S. 80) “was simply a marking device for identifying the nation’s best interstate roads” while “the roads remained under state control”⁷³. After the passage of the Federal Aid Highway Act of 1956 which authorized construction and massive expansion of highways between the states, the newly created U.S. Department of Transportation Federal Highway Administration subsumed several of the U.S. numbered highways into the federal Interstate Highway System and decided to label interstates with a numbering system prefaced by the capital letter ‘I’ for ‘interstate’ (e.g. I-90, I-20)⁷⁴.

States, counties, and cities in the United States generally retain wide discretion on the naming or renaming of streets. State Constitutions usually grant counties and municipalities extensive powers to govern their own affairs under what is known as Home Rule provisions, which includes authority to name or rename streets within their jurisdictions⁷⁵. A recent controversy over streets named for Confederate heroes in the city of Alexandria, Virginia exemplifies the broad authority that most local governments in the United States – whether county or city – wield over honorific street names and the process used to rename controversial streets. In 1963, the City Council of Alexandria passed an ordinance requiring that all north-south streets in the city be named for Confederate military

⁷⁰ Jo-Burg Policy on Naming and Renaming of Streets, Section 9(xi-xii).

⁷¹ *Ibidem* at Section 9(xii-xiv).

⁷² R. F. Weingroff, *Jefferson Davis Memorial Highway*, U.S. Department of Transportation Federal Highway Administration, at <https://www.fhwa.dot.gov/infrastructure/jdavis.cfm> (visited December 7, 2015); see also R. F. Weingroff, *From Names to Numbers: The Origins of the U.S. Numbered Highway System*, American Association of State Highway and Transportation Officials Quarterly Magazine 1997, Vol. 76.

⁷³ R. F. Weingroff, *Jefferson Davis Memorial...*

⁷⁴ The Federal Highway Act of 1956 can be found at 23 U.S.C. § 1 sqq.

⁷⁵ See, e.g., Georgia Constitution, Article IX, Section 2 – Home Rule for Counties and Municipalities.

leaders. In 2014, some citizens expressed concern that these street names were fomenting and reinforcing racial discord, so they petitioned the City Council, through the planning department, to change the 1963 law⁷⁶.

Following public consultation, the Alexandria City Council voted to abolish the 1963 law for all new street names and reaffirmed that existing street names could be changed “by adoption of an ordinance of the city council”⁷⁷. Thus, if a group in Alexandria wants to rename its portion of the 468 miles of roadways in the eleven former Confederate states that bear the name of Jefferson Davis – the former President of the Confederate States of America – it would need to submit an application to the city planning department who would refer the matter to the city council for public consideration and a vote, usually within 30-60 days of receiving the application⁷⁸. Street renaming applications typically require:

- 1) a cost estimate for the proposed change;
- 2) a guarantee that the applicant will bear these costs; and
- 3) the names, addresses, and signatures of a majority or supermajority of the residents and businesses located on the street to which the renaming applies⁷⁹.

The legal criteria used by county commissioners and city councils to assess street renaming applications vary widely from no stated criteria to a cryptic statement in the Wilmington, North Carolina City Code that “in some cases, the street with a name of historical significance should retain the disputed name”⁸⁰.

However, the states of Tennessee and South Carolina – two former Confederate states – are exceptions to the general rule that local governments in the United States govern street naming and renaming. In Tennessee, no public street in the state named in honor of Confederate military personnel “may be renamed or rededicated” unless the local government seeks a waiver from the Tennessee Historic Commission⁸¹. South Carolina’s street renaming law is even more restrictive, as no public street named for “a historic figure or historic event may be renamed or rededicated” unless two-thirds of each branch of the state General Assembly vote to amend the state law⁸². The state legislatures of Tennessee and

⁷⁶ D. Hansen, *Alexandria Council Repeals Confederate Street-Naming Law*, Old Town Alexandria Patch, January 28, 2014.

⁷⁷ Alexandria, Virginia – Code of Ordinances, Chapter 2, Article C, Section 5-2-66.

⁷⁸ *Ibidem*; D. Darlin, J. B. Merrill, *Honors for Confederates, for Thousands of Miles*, New York Times, June 26, 2015.

⁷⁹ The City of Wilmington and New Hanover County in the state of North Carolina require signatures from 51% of residents and businesses on the street that is to be renamed. See New Hanover County & the City of Wilmington, North Carolina, *Addressing Standards & Procedures Manual for New Hanover County & the City of Wilmington*, North Carolina, August 6, 2002, Section 2.7-8; The city of Atlanta, Georgia requires signatures from 75% of the residents and businesses. See Atlanta, Georgia – Code of Ordinances, Section 138.8.

⁸⁰ *Addressing Standards & Procedures...*, Section 2.8.

⁸¹ Tenn. Code Ann. § 4-1-412(a)(2); § 4-1-412(d).

⁸² S.C. Code Ann. § 10-1-165.

South Carolina, therefore, have chosen to protect streets honoring the Confederacy by removing local authority over historic street renaming and making the renaming process extremely cumbersome.

4.3. COMPARATIVE ANALYSIS OF LAWS FOR CONTROVERSIAL STREET RENAMING

The laws for controversial street renaming in South Africa and the United States, contain striking similarities. Street naming and renaming in South Africa and the United States are under the exclusive purview of provinces/states and their local governments; the national/federal government has no authority. Furthermore, with the exception of the states of Tennessee and South Carolina, the application procedures for renaming streets in both countries are relatively simple: submission of an application and report to the local or provincial/state authority stating the reasons for the name change, the proposed new name, the financial costs involved if the name were changed, and the results of significant public consultation. Provincial/state and local governments in both countries also wield wide discretion about whether to rename a controversial street or not. South African provinces and local governments favor renaming when a street name is considered “offensive”, though one wonders where the outer boundaries of such a standard lie as different people can take offense at different names for different reasons. In the United States, criteria for renaming controversial streets are often not delineated. But if they are, they usually reinforce the discretion of the local authority, unless that local authority is in Tennessee or South Carolina where the state decides whether or not to rename a street honoring the Confederacy.

However, there is a salient difference between laws in South Africa and the United States with respect to renaming controversial streets that has powerful practical consequences. In the United States, the person or entity proposing the street renaming must bear the financial costs of the change; whereas in South Africa, the costs for renaming a street are drawn from the coffers of the relevant provincial or local authority. This financial requirement in the U.S. may pose a significant barrier to those wanting to change an offensive street name, particularly in the former Confederate states where thousands of miles of roadway venerate Confederate heroes but the black population often composes a sizable portion of the poor⁸³. While the laws of provincial and local governments in South Africa are more egalitarian with respect to the financial costs of street renaming, their budgets are likely more limited; and chronic paucity of government funds fused with more pressing civic priorities (e.g., potable water, sanitation) may prove the

⁸³ See D. Darlin, J. B. Merrill, *Honors for Confederates...*; for poverty rates see S. Macartney, A. Bishaw, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011*, U.S. Census Bureau, American Community Survey Briefs, February 2013.

most effective deterrent to budgeting for renaming controversial streets⁸⁴. In general, however, South Africa's commitment of public funds to renaming "offensive" streets suggests that, on the whole, it is probably easier to rename a street honoring an apartheid leader than it is to change a street name dedicated to the Confederacy.

5. CONCLUSION

Monuments and honorific street names, like the people and purposes they represent, tell tangible, multi-layered, nuanced stories about history, memory, identity, status, and community⁸⁵. The focus of this article has been to tell the related story of the legal frameworks that two representative governments, South Africa and the United States, have erected to preserve or discard these stories from the public sphere. This legal activity preceded the current rash of public activities and discussion to do with the permanence and placement of public symbols; contextualizing the law and recognizing its purpose and variety should be an important reference point and element of public debate.

Although the legal frameworks of South Africa and the United States diverge in the strength of legal standards used to protect controversial monuments and streets; the range of monuments and streets covered by the law; and the financial implications of removing monuments or renaming streets, they share several important similarities – a decentralized government structure for heritage preservation; a requirement for robust public participation in heritage decisions; and most importantly, a codified ethos recognizing that heritage, even controversial heritage, has the unique capacity to promote healing, inclusivity, and understanding within our communities while guiding us into an unknown future. The clearest product of this ethos is that while neither country prohibits the removal of controversial monuments or renaming controversial streets, their laws tend to discourage these actions. It will be interesting to see if current transatlantic debates about the role(s) of controversial cultural heritage in civic life translate into modification of the legal landscape in South Africa, the United States, and other countries⁸⁶.

⁸⁴ See N. Schoeman, *Fiscal Performance and Sustainability of Local Government in South Africa – An Empirical Analysis*, Working Paper 201, January 2011; 3SMedia, *Challenges in South Africa's Smaller Municipalities*, Infrastructure News and Service Delivery, March 11, 2013, at www.infrastructuren.ws.

⁸⁵ R. Schein, *Acknowledging and Addressing Sites of Segregation*, Forum Journal 20051, Vol. 34, No. 19, p. 38.

⁸⁶ See, e.g., R. Fausset, *South Carolina Faces the High Cost of Curating History's Dustbin*, New York Times, December 26, 2015; *The Guardian* view on Cecil Rhodes's legacy: *the empire*

LAW REGARDING CONTROVERSIAL CULTURAL HERITAGE IN SOUTH AFRICA AND THE UNITED STATES: PUBLIC MONUMENTS AND STREET NAMES

Summary

Targeting cultural heritage to buttress new political and social aims is an ancient, and unfortunately, omnipresent practice among authoritarian regimes. Pharaohs' excised the names of predecessors (and carved their own) on Egyptian obelisk cartouches; King Edward I of England captured and transported the Stone of Scone – Scotland's coronation stone – to Westminster Abbey in 1296; Chairman Mao's 'Great Leap Forward' led to the wholesale destruction of Chinese feudal culture in the mid-20th century; the Nazis methodically bombed and bulldozed over 90% of Warsaw's historic Old Town; and the Islamic State (ISIS) recently demolished the tomb of the biblical prophet, Jonah, in Iraq. Calculated removal of cultural heritage, however, is also a modern widespread concern in representative governments like South Africa and the United States. This is particularly true when historic monuments and street names highlight controversial chapters of the past, like slavery and racial inequality. Monuments and street names that some associate with slavery and racial inequality are significant threads that delineate and reinforce a distinct cultural narrative of identity and importance across many urban tapestries in South Africa and the United States. But the laws for protecting or removing controversial monuments and street names in these two countries has received little attention. This article will, therefore, examine and compare the legal frameworks for protecting or removing controversial historic monuments and renaming controversial streets in South Africa and the United States.

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REGULACJE PRAWNE DOTYCZĄCE KONTROWERSYJNEGO DZIEDZICTWA KULTUROWEGO W RPA I USA: POMNIKI HISTORYCZNE I NAZWY Ulic

Streszczenie

Działania wymierzone w dziedzictwo kulturowe z zamiarem wsparcia nowych politycznych i społecznych celów w świecie antycznym i niestety obecnie było i jest powszechną praktyką reżimów autorytarnych. Faraonowie usuwali imiona swych poprzedników (i dławiali własne) na egipskich obeliskach; król Edward I zabrał i przetransportował kamień ze Scone – szkocki kamień koronacyjny – do Opactwa Westminsterskiego w 1296; maoistowski Wielki Skok Naprzód doprowadził do zniszczenia całej chińskiej struktury feudalnej w połowie XX wieku. Naziści systematycznie bombardowali i zrównali z ziemią ponad 90% warszawskiego Starego Miasta; ISIS ostatnio zniszczyło grobowiec biblijnego proroka Jonasza w Iraku. Niszczenie dziedzictwa kulturalnego z premedytacją dotyczy także legitymowanych rządów, jak na przykład w RPA czy USA. Ma to znaczenie głównie w odniesieniu do zabytków i nazw ulic kojarzących się z kontrowersyjną przeszłością, jak niewolnictwo i nierówność rasowa. Zabytki i nazwy ulic, które łączą się z niewolnictwem i nierównością rasową, to poważne kwestie wytyczające i wzmacniające odrębną narrację kulturową, mające znaczenie na wielu płaszczyznach miejskich w RPA i USA. Ale prawu chroniącemu bądź niwelującemu kontrowersyjne zabytki i nazwy ulic w obu krajach poświęcono dotychczas mało uwagi. Niniejszy artykuł bada i konfrontuje ze sobą ramy prawne ochrony lub niwelacji kontrowersyjnych zabytków i zmianiania kontrowersyjnych nazw ulic w RPA i USA.

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