

2019

Coastal Cultural Heritage Protection in the United States, France and the United Kingdom

Ryan Rowberry

Georgia State University College of Law, rrowberry@gsu.edu

Ismat Hanano

U.S. Court of Appeals for the 11th Circuit, ismat_hanano@ca11.uscourts.gov

Sutton M. Freedman

Antonini & Cohen, freedman@antoniniandcohen.com

Michelle Wilco

Alston & Bird LLP, michelle.wilco@alston.com

Cameron Kline

Miles, Hansford & Tallant LLC, ckline@mhtlegal.com

Follow this and additional works at: <https://readingroom.law.gsu.edu/jculp>



Part of the [Comparative and Foreign Law Commons](#), [Environmental Law Commons](#), [Land Use Law Commons](#), and the [Urban Studies Commons](#)

Recommended Citation

Rowberry, Ryan; Hanano, Ismat; Freedman, Sutton M.; Wilco, Michelle; and Kline, Cameron (2019) "Coastal Cultural Heritage Protection in the United States, France and the United Kingdom," *Journal of Comparative Urban Law and Policy*. Vol. 3 : Iss. 1 , Article 2, 2-62.

Available at: <https://readingroom.law.gsu.edu/jculp/vol3/iss1/2>

This Article is brought to you for free and open access by Reading Room. It has been accepted for inclusion in *Journal of Comparative Urban Law and Policy* by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

COASTAL CULTURAL HERITAGE PROTECTION IN THE UNITED STATES, FRANCE AND THE UNITED KINGDOM

Ryan Rowberry, Ismat Hanano, Sutton Freedman, Michelle Wilco,
Cameron Kline¹

ABSTRACT

Exacerbated by climate change, sea levels are rising rapidly. This poses a significant, immediate threat to coastal or riverine urban areas and the tangible cultural heritage (e.g. artifacts, buildings, monuments, archaeological sites) that makes them unique. Protecting coastal cultural resources from climate change is quickly becoming a global priority, and comparing cultural heritage laws designed to protect historic resources in coastal areas from several countries may illuminate potential paths forward. Following a brief discussion of the economic and public health benefits arising from the protection of cultural heritage, this article describes, examines, and compares the legal frameworks through which the United States, France, and the United Kingdom address cultural heritage protection in coastal areas. Several case studies from each country are also presented to demonstrate different preservation initiatives.

KEY WORDS: cultural heritage, preservation, law, France, United Kingdom, United States, historic resources

INTRODUCTION

As the Pacific Ocean continues to rise, the hundreds of ancient, giant stone anthropomorphic statues (*Moai*) ringing 15-mile wide Easter Island may soon need to be fitted for snorkels.² Although the image is comical, the global ramifications

¹ Ryan Rowberry, Associate Professor of Law, Georgia State University College of Law and Co-Director, Center for the Comparative Study of Metropolitan Growth, rowberry@gsu.edu; Ismat Hanano, Staff Attorney, U.S. Court of Appeals for the 11th Circuit, Ismat_hanano@ca11.uscourts.gov; Sutton Freedman, Associate Attorney, Antonini & Cohen, freedman@antoniniandcohen.com; Michelle Wilco, Associate, Alston & Bird LLP, michelle.wilco@alston.com; R. Cameron Kline, Associate, Miles, Hansford & Tallant LLC, ckline@mhtlegal.com.

² Nicholas Casey & Josh Haner, *Easter Island is Eroding*, N. Y. TIMES, (Mar. 15, 2018), <https://www.nytimes.com/interactive/2018/03/14/climate/easter-island-erosion.html?action=click&module=Top%20Stories&pgtype=Homepage>.

of climate change on priceless cultural heritage are catastrophic. Rising sea levels and extreme weather events like cyclones and hurricanes are swamping low-lying areas from Fiji³ to Florida.⁴ Rivers, such as the Seine in France, are bursting their banks and flooding historic cities, like Paris, with increased frequency and intensity.⁵ Myriad old villages in Tibet and the Caucasus mountains are likewise staring down bigger, faster avalanches.⁶ Coastal and riverine cities around the world, in particular, face immediate and terrible challenges from the effects of climate change.

Over half of the world's population currently lives in urban areas, and this number is increasing exponentially.⁷ By the year 2050, more than two-thirds of the world's population (66–70%) will live in cities.⁸ To place the importance of cities to a nation's economic health in context, roughly 80% of the U.S. population currently lives in cities, and these urban areas generate 85% of the national GDP.⁹ Most major global cities are located near bodies of water, and in 2007 an estimated 634 million people worldwide lived in areas less than thirty feet above sea level,¹⁰ with nearly half of the U.S. population (44.8% or ~180 million people) residing in coastal regions.¹¹

³ *Fiji PM: Climate Change Threatens our Survival*, BBC NEWS, (April 3, 2018), <https://www.bbc.com/news/world-asia-43625608>.

⁴ Laura Parker, *Sea Level Rise will Flood Hundreds of Cities in the Near Future*, NATIONAL GEOGRAPHIC (July 12, 2017), <https://news.nationalgeographic.com/2017/07/sea-level-rise-flood-global-warming-science/>

⁵ *Paris Readies for Floods as Seine Surges Higher*, BBC NEWS (Jan. 27, 2018), <http://www.bbc.com/news/world-europe-42841615>.

⁶ Kendra Pierre-Louis, *Bigger, Faster Avalanches, Triggered by Climate Change*, N. Y. TIMES (Jan. 23, 2018), <https://mobile.nytimes.com/2018/01/23/climate/glacier-collapse-avalanche.html?action=click&module=Discovery&pgtype=Homepage>.

⁷ ADVISORY COMMITTEE FOR ENVTL. RES. & EDUC., SUSTAINABLE URBAN SYSTEMS: ARTICULATING A LONG-TERM CONVERGENCE RESEARCH AGENDA 8 (Jan. 2018), <https://www.nsf.gov/ere/ereweb/ac-ere/sustainable-urban-systems.pdf>.

⁸ *Id.* at 4, 8; HISTORIC URBAN LANDSCAPES GUIDEBOOK 4 (2016), <http://historicurbanlandscape.com/themes/196/userfiles/download/2016/6/7/wirey5prpznidqx.pdf>. For information about how the UN defines “city,” see *What is a City? What is Urbanization?*, POPULATION RES. BUREAU (Oct. 13, 2009), <https://www.prb.org/urbanization/>.

⁹ ADVISORY COMMITTEE FOR ENVTL. RES. & EDUC., *supra* note 7, at 8.

¹⁰ Nell Greenfieldboyce, *Study: 634 Million People at Risk from Rising Seas*, NPR (Mar. 28, 2007), <https://www.npr.org/templates/story/story.php?storyId=9162438>.

¹¹ *Population Rising in Coastal Counties—Data Key to Hurricane Response*, U.S. CENSUS BUREAU, (Sept. 2017) <https://www.census.gov/library/stories/2017/08/hurricane-season.html>.

Exacerbated by climate change, sea levels are rising rapidly.¹² This poses a significant, immediate threat to coastal or riverine areas and the tangible cultural heritage (e.g. paintings, monuments, archaeological sites)¹³ that makes them unique.¹⁴ The inundation of historic New Orleans after Hurricane Katrina in 2005, for instance, left the city uninhabitable for months.¹⁵ At that time, Hurricane Katrina was the third most expensive natural disaster in modern world history, and the governor of the Bank of England, Mark Carney, presciently warned that climate change would have a “catastrophic impact” on the world’s financial systems unless banks and insurers realistically assessed and disclosed their vulnerabilities.¹⁶ Of course, Hurricane Katrina is merely one example of the rising incidence of natural disasters affecting historic coastal communities around the world. It is impossible to forget the mass casualties and widespread devastation of historic coastal communities in southeast Asian nations caused by the 2004 tsunami in the Indian

¹² R.S. Nerem et al, *Climate-change-driven accelerated sea-level rise detected in the altimeter era*, PNAS (Feb. 12, 2018), <http://www.pnas.org/content/early/2018/02/06/1717312115>; Brandon Miller, *Satellite observations show sea levels rising, and climate change is accelerating it*, CNN (Mar. 13, 2018) <https://www.cnn.com/2018/02/12/world/sea-level-rise-accelerating/index.html>. See also Michael Kimmelman, *The Dutch Have Solutions to Rising Seas. The World is Watching.*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/interactive/2017/06/15/world/europe/climate-change-rotterdam.html>.

¹³ The United Nations Educational, Scientific and Cultural Organization (UNESCO) separates cultural heritage into two main categories: tangible (e.g. paintings, monuments, and archaeological sites) and intangible (e.g. rituals and performing arts). *Tangible Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/> (last visited Mar. 30, 2018) (“Cultural heritage is the legacy of physical artefacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations.”). From an even wider perspective, cultural heritage may be viewed as a concept that encompasses the history and tradition of places, societies, and civilizations, all relating to a group’s culture, or “set of practices and behaviors defined by customs, habits, language, and geography.” CULTURE AND HEALTH, THE LANCET COMMISSION 1607, 1609 (Nov. 1, 2014), [http://dx.doi.org/10.1016/S0140-6736\(14\)61603-2](http://dx.doi.org/10.1016/S0140-6736(14)61603-2).

¹⁴ See, e.g., Ryan Rowberry, *Avoiding Atlantis: Protecting Urban Cultural Heritage from Disaster*, in HOW CITIES WILL SAVE THE WORLD 49, 50 (Ray Brescia & John Marshall eds., 2016) (“...[L]ike many residents of modern coastal cities, Alexandrians believed their city to be immune from the natural catastrophes that ultimately consumed it.”).

¹⁵ John Travis Marshall & Ryan Max Rowberry, *Urban Wreckage and Resiliency: Articulating a Practical Framework for Preserving, Reconstructing, and Building Cities*, 50 IDAHO L. REV. 50, 50 (2014).

¹⁶ *Id.*; Richard Partington, *Mark Carney warns of climate change threat to financial system*, THE GUARDIAN (Apr. 6, 2018), https://www.theguardian.com/business/2018/apr/06/mark-carney-warns-climate-change-threat-financial-system?CMP=share_btn_link.

Ocean, or the palpable fear engendered by the 2011 tsunami that crippled and exposed nuclear reactors in ancient Fukushima, Japan.

In the face of widespread loss of life and culture, legal protections for cultural heritage are critical to preserving the vitality and character of coastal urban areas. It is human nature to seek to preserve objects and sites that people deem significant, and throughout history people have sought to collect, catalogue, and honor important heritage.¹⁷ However, striving to protect historic resources through law is a relatively recent phenomenon.¹⁸ For example, the United States has recognized historic preservation as a critical national priority only since 1966, when the U.S. Congress enacted the National Historic Preservation Act (NHPA) to “give a sense of orientation to the American people” and protect a “vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits.”¹⁹ Many U.S. states followed suit, enacting legislative counterparts to the NHPA starting in the 1970s and 1980s.²⁰ Furthermore, while several national and multinational organizations, including UNESCO, have compiled reports about pre-and-post natural disaster cultural heritage preservation,²¹ nascent legal regimes protecting historic resources in many younger countries often lack the flexibility and adequate protection necessary to guard cultural resources from sea level rise induced by climate change.²² Thirteen Caribbean nations, for instance, recently petitioned the Organization of American States—the world’s oldest international regional organization—for assistance in developing effective legislation to define, catalogue, and protect their abundant cultural heritage.²³

¹⁷ SARAH C. BRONIN & RYAN ROWBERRY, *HISTORIC PRESERVATION LAW IN A NUTSHELL* 2–3 (2nd ed. 2018). See also Rowberry, *supra* note 14, at 50 (“The first step in becoming a forgotten city is when a city forgets its past.”); T.M. Luhrmann, *How Places Let Us Feel the Past*, N.Y. TIMES (May 25, 2015), <https://www.nytimes.com/2015/05/25/opinion/how-places-let-us-feel-the-past.html?action=click&pgtype=Homepage&module=opinion-c-col-right-region> (“...[I]t can be so hard to shed possessions, because each knickknack, every book, carries the trace of a particular where and when and with whom, and we can feel that when we toss the object, part of who we are goes with it.”).

¹⁸ BRONIN & ROWBERRY, *supra* note 17, at 2.

¹⁹ 16 U.S.C. § 470(b); BRONIN & ROWBERRY, *supra* note 17, at 16–17.

²⁰ BRONIN & ROWBERRY, *supra* note 17, at 5.

²¹ Ryan Rowberry, *Anchoring Memory in the Face of Disaster: Technology and Istanbul’s Cultural Heritage Preservation Regime*, 8 Bahçeşehir U. L. Rev. 195 (2014). Available at SSRN: <https://ssrn.com/abstract=2479957>.

²² BRONIN & ROWBERRY, *supra* note 17, at 2.

²³ These nations include: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, The Bahamas, and Trinidad and Tobago. For the cultural heritage legislation guidelines developed by

As protecting coastal cultural resources from climate change becomes a global priority, comparing cultural heritage laws designed to protect historic resources in coastal areas from several countries may illuminate potential paths forward. Following a brief discussion of the economic and public health benefits arising from the protection of cultural heritage, this article will describe, examine, and compare the legal processes through which the United States, France, and the United Kingdom address cultural heritage protection in coastal areas. We selected these three countries because they are developed, highly populated nations with robust legal systems and abundant coastlines. Thus, each has either already begun to tackle the preservation problem or must address it soon. By comparing these three nations, we aim to unearth and identify sustainable legal tactics and tools that may be useful to other nations.

I. WHY PRESERVE CULTURAL HERITAGE?

A. *Economic Benefits*

Research into the economic benefits of cultural heritage prevention has shown that protecting historic resources directly benefits economic growth and neighborhood stability.²⁴ The United States Department of the Interior—which oversees management and conservation of federal lands and natural resources—has implemented a Federal Historic Preservation Tax Incentives (HTC) program to encourage restoration, rehabilitation, and re-use of historic buildings.²⁵ This program provides: (1) a 20% income tax credit available for rehabilitating historic, income-producing buildings, (2) a 10% tax credit for rehabilitating non-historic, non-residential buildings placed in service before 1936, and (3) tax benefits for historic preservation easements.²⁶ Since 1978, the HTC program has created more than two million jobs, produced more than \$106.6 billion in income, generated \$41.7 billion in taxes, and has preserved nearly 40,000 historic properties.²⁷ In 2012, the federal historic preservation tax credit accounted for approximately 58,000 new jobs, generated \$3.4 billion in gross domestic product (GDP), and

the Organization of American States, *see* ORGANIZATION OF AMERICAN STATES, *A Regional Standard for Protective Heritage Legislation: Expanding the Socio-Economic Potential of Cultural Heritage in the Caribbean* (June 2017).

²⁴ *See e.g.*, Brian Mikelbank, “Residential Historic Preservation and Neighborhood Stability,” 11 *Journal of Urban Regeneration and Renewal* 371 (2018).

²⁵ *Tax Incentives for Preserving Historic Properties*, NAT’L PARK SERV., <https://www.nps.gov/tps/tax-incentives.htm>.

²⁶ *Id.*; BRONIN & ROWBERRY, *supra* note 17, at 441.

²⁷ NAT’L PARK SERV., ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT FOR FY 2016 1, 5–7 (2017), <https://www.nps.gov/tps/tax-incentives/taxdocs/economic-impact-2016.pdf>; BRONIN & ROWBERRY, *supra* note 17, at 441.

produced more than \$2.5 billion in income.²⁸ Many of the 744 certified rehabilitated buildings that leveraged this credit in 2012 were “abandoned or underutilized, and all were in need of substantial rehabilitation to return them to, or for their continued, economic viability.”²⁹ These figures continue to increase. In 2016 alone, the National Park Service certified 1,039 completed historic rehabilitation projects, representing \$5.85 billion in estimated rehabilitation costs that qualified for the 20% federal tax credit.³⁰ In 2016, this HTC program also created more than 100,000 new jobs and generated more than \$4 million in income.³¹ In addition to federal government incentives, many states have developed historic preservation tax incentives that in many ways mirror the federal HTC program.³²

Additionally, the U.S. Congress has designated places with natural, cultural, and historic resources as National Heritage Areas (NHAs). NHAs assist in creating sustainable economic development by generating jobs and revenue for local government, while supporting local community revitalization and heritage tourism.³³ Currently, there are 49 NHAs across the United States, several of which are in coastal regions.³⁴ For example, the Mississippi Gulf Coast NHA preserves the region’s historic Native American, Spanish, and French artifacts and buildings.³⁵ Preservation-related construction within NHAs also creates more local

²⁸ NAT’L PARK SERV., ANNUAL REPORT ON THE ECONOMIC IMPACT OF THE FEDERAL HISTORIC TAX CREDIT FOR FY 2012 1, 3–5 (2013), <http://www.nps.gov/tps/tax-incentives/taxdocs/economic-impact-2013.pdf>.

²⁹ *Id.* at 1; Marshall & Rowberry, *supra* note 15, at 72.

³⁰ NAT’L PARK SERV., *supra* note 27, at 1.

³¹ *Id.* at 6.

³² These states include Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Vermont, Virginia, and West Virginia, and Illinois, which has an incentive program that is not statewide. NAT’L TRUST FOR HIST. PRESERVATION, STATE TAX CREDITS FOR HISTORIC PRESERVATION 1, 4–9 (2013), <http://ncshpo.org/State-Tax-Credits-Report%202013.pdf>.

³³ *National Heritage Areas: Heritage Areas 101*, NAT’L PARK SERV., <https://www.nps.gov/articles/what-is-a-national-heritage-area.htm>.

³⁴ *National Heritage Areas: Discover NHAs*, NAT’L PARK SERV., <https://www.nps.gov/subjects/heritageareas/discover-nhas.htm>.

³⁵ *See* MISSISSIPPI GULF COAST NAT’L HERITAGE AREA, <http://msgulfcoastheritage.ms.gov/>.

jobs than work that is not related to preservation,³⁶ and research shows that property values tend to increase in neighborhoods that are designated as historic areas.³⁷

The United States is not the only country working to evaluate the positive economic impact of cultural heritage preservation. Australia's Department of Environment, Water, Heritage and the Arts measured the value of cultural heritage according to a site's historical value, social value, and educational/scientific value to the Australian people.³⁸ Additionally, France has integrated heritage into an "overall urban vision" incorporated into the country's town planning initiatives.³⁹ Within this vision, the country enacted a law similar to the United States' NHA program, designating homogenous areas with "a character of historic or aesthetic value" for conservation, restoration, and enhancement efforts.⁴⁰ This "heritage safeguarding" initiative has shown that cultural preservation can be a "powerful contributor" to both a country's social stability and its sustainable economic development.⁴¹

B. Health Benefits

Along with the economic benefits of preserving culture, research is beginning to show that, like healthy buildings, historic resources have a demonstrable positive effect on public health.⁴² Intergovernmental entities, including UNESCO and the World Health Organization (WHO), are beginning to realize there is a connection between culture and health⁴³ and have recently established a commission to research the best approach for identifying and

³⁶ BRONIN & ROWBERRY, *supra* note 17, at 15.

³⁷ *Id.*

³⁸ David Throsby et al, *Measuring the Economic and Cultural Value of Historic Heritage Places*, ENVTL. ECON. RES. HUB RES. REPORT (Nov. 2010).

³⁹ Antonella Versacia, *The Evolution of Urban Heritage Concept in France, Between Conservation and Rehabilitation Programs*, ELSEVIER 3, 3–4 (2016).

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 3–4.

⁴² Researchers at Harvard School for Public Health (www.forhealth.org) have found that by doubling ventilation rates in buildings—costing employers an extra \$10-\$40 per person per year—the health benefits for each employee represented between "\$6,000--\$7,000 dollars per person per year, not including the co-benefits to health from diminished absenteeism and the avoidance of other so-called sick-building symptoms such as headaches and fatigue." Oset Babür, *Cognitive Benefits of Healthy Buildings*, HARVARD MAGAZINE 1, 16 (May–June 2017).

⁴³ WHO and UNESCO experts explore the linkages between culture, health and well-being, UNESCO (Mar. 19, 2017), <https://ich.unesco.org/en/news/who-and-unesco-experts-explore-the-linkages-between-culture-health-and-well-being-00224>.

measuring cultural factors that affect health and well-being.⁴⁴ Anthropologists researching the connection between heritage and health have discovered that people's memories are attached to places.⁴⁵ Researchers in the United Kingdom expanded on this concept and found that people experience wellbeing, contentment, and belonging more from places than from objects.⁴⁶

Using in-depth fMRI (Functional Magnetic Resonance Imaging), researchers examined how the brain reacts when presented with places of personal significance. They discovered that an area of our brain associated with positive emotion displayed a significantly larger response to such meaningful places than to common/everyday places—which indicates that meaningful places can generate feelings of wellbeing and joy.⁴⁷

Furthermore, in the United States, the National Park Service has found that NHA designations and historic preservation “foster[s] pride of place,” improves local quality of life, and strengthens sense of place and community via engagement in conservation activities.⁴⁸ Moreover, the University of Florida as well as the City of San Antonio (Texas) Office of Historic Preservation recently concluded that preserving cultural and historic landmarks enhances residents' and tourists' lives by improving their sense of place and belonging.⁴⁹

Preserving the past may also have a direct effect on the future of medicine. Antibiotic-resistant microbes are requiring scientists to constantly look for innovative treatments for ailments that have become immune to the current suite of antibiotics. In 2017, a team of medievalists, microbiologists, medicinal chemists,

⁴⁴ *Cultural contexts of health*, WORLD HEALTH ORG. (2017), <http://www.euro.who.int/en/data-and-evidence/cultural-contexts-of-health>.

⁴⁵ Luhrmann, *supra* note 17.

⁴⁶ See Caroline Davies, *Wellbeing enhanced more by places than objects, study finds* (Oct. 12, 2017), <https://www.theguardian.com/education/2017/oct/12/wellbeing-enhanced-more-by-places-than-objects-study-finds>.

⁴⁷ Press Release, Univ. of Surrey, *Nostalgia of special places plays an important part to well-being*, (Oct. 23, 2017), <https://www.surrey.ac.uk/mediacentre/press/2018/nostalgia-special-places-plays-important-part-well-being>.

⁴⁸ National Heritage Areas, *supra* note 33.

⁴⁹ *Historic Preservation Enhances Quality of Life of Floridians, UF Study Finds*, UNIV. OF FLA. LEVIN COLLEGE OF LAW (Dec. 20, 2006), <https://www.law.ufl.edu/law-news/historic-preservation-enhances-quality-of-life-of-floridians-uf-study-finds>; *Historic Preservation Essential to the Economy and Quality of Life in San Antonio*, PLACEECONOMICS (Feb. 18, 2015), <http://www.placeeconomics.com/resources/historic-preservation-essential-to-the-economy-and-quality-of-life-in-san-antonio/>.

parasitologists, pharmacists, and data scientists posited that studying medical history and the methods employed by early medieval doctors to treat disease could help researchers find new treatments for long-standing ailments.⁵⁰ Using an Old English medicinal compendium known as *Bald's Leechbook* along with a 15th-century Middle English translation of this text, these researchers redeveloped a 1,000-year-old antibiotic salve.⁵¹ This salve successfully killed strains of methicillin-resistant *Staphylococcus aureus* (MRSA), which were resistant to modern antibiotics.⁵²

Mental health research also indicates that knowledge of the past boosts self-esteem, identity, and intercultural tolerance.⁵³ Psychological studies from Emory University show that children with a thorough understanding of their family's history manage the physical and mental effects of stress more effectively.⁵⁴ Similarly, research from the U.S. National Trust for Historic Preservation reveals that a strong emotional connection to personally-significant places can help children and adults relax, self-reflect, and re-evaluate stresses and concerns.⁵⁵ Studies on cultural health published in the United Kingdom's leading medical journal, *The Lancet*, found that social stress negatively impacts cultural innovation, partially because stress reduces both people's tolerance to those they see as "outsiders" and the number of caring relationships people maintain.⁵⁶ These studies also revealed that feeling mentally and emotionally connected to a place gives people a sense of identity, which can help give people perspective and view their problems within a broader social context.⁵⁷ Furthermore, case studies throughout Europe concluded that heritage preservation projects involving the public enhance

⁵⁰ Erin Connelly, *Medieval medical books could hold the recipe for new antibiotics*, THE CONVERSATION (Apr. 17, 2017), <https://theconversation.com/medieval-medical-books-could-hold-the-recipe-for-new-antibiotics-74490>.

⁵¹ *Id.*

⁵² *Id.* Staph and MRSA infections cause multiple severe and chronic infections.

⁵³ Marshall & Rowberry, *supra* note 15, at 73.

⁵⁴ See, e.g., Tage Rai, *Mental Resilience and Narratives: Physiological Stress Responses to Media Coverage of 9/11*, ALFRED P. SLOAN CTR. FOR MYTH AND RITUAL IN AM. LIFE AT EMORY UNIV. 2, (2006), <http://www.marial.emory.edu/research/index.html>; Amber Lazarus, *Relationships Among Indicators of Child and Family Resilience and Adjustment Following the September 11, 2001 Tragedy*, ALFRED P. SLOAN CTR. FOR MYTH AND RITUAL IN AM. LIFE AT EMORY UNIV. 12 (2004), <http://www.marial.emory.edu/research/index.html>. See also Marshall & Rowberry, *supra* note 15, at 73.

⁵⁵ NATIONAL TRUST, PLACES THAT MAKE US RESEARCH REPORT 1, 26 (2011).

⁵⁶ LANCET, *supra* note, at 1627.

⁵⁷ *Id.* at 26–28.

social cohesion, inclusion, confidence, civil pride and tolerance, empower communities, and increase opportunities for learning and skill development, particularly when these projects are used to foster intercultural dialogue in communities.⁵⁸ British researchers have also found that having a sense of place connected to a personal historic environment has a positive impact on social capital (the connection between groups and individuals),⁵⁹ and that people living in cities and towns with a larger proportion of historic buildings are more likely to have a stronger sense of place than those living in areas with fewer preserved historic structures.⁶⁰

II. COASTAL CULTURAL HERITAGE PROTECTIONS IN THE UNITED STATES

Coastal cultural heritage in the United States is protected by various federal and state laws. In theory, the type of law governing the management of historic resources depends upon the jurisdiction of the land on which (or under which) they are situated. That is, coastal historic resources on federal lands would be subject to federal laws, while those on state lands would fall under the purview of state laws. In reality, however, most coastal cultural heritage in the United States is protected by both federal *and* state laws, because any state project that is (1) under the management or control of the federal government; (2) requires a federal permit; or (3) receives funding from the federal government must *also* comply with federal laws. Taken together, these federal and state laws establish a complex regulatory regime governed by the Secretary of the Department of the Interior through the National Park Service at the federal level, and by the State Historic Preservation Officer at the state and local levels.⁶¹

In this section, we briefly examine the federal and state laws protecting coastal cultural heritage. Following this discussion, we outline three case studies that offer a taste of coastal cultural heritage protection in action in the United States.

A. Federal and State Laws Protecting Coastal Cultural Heritage in the United States

⁵⁸ Cornelia Dümcke & Mikhail Gnedovsky, *The Social and Economic Value of Cultural Heritage: literature review*, EUROPEAN EXPERT NETWORK ON CULTURE 139–40 (July 2013), <http://www.interarts.net/descargas/interarts2557.pdf>.

⁵⁹ David Bradley et al., *Sense of Place and Social Capital and the Historic Built Environment: Report of Research for English Heritage* 8 (2009), http://hc.english-heritage.org.uk/content/pub/sense_of_place_web.pdf; Marshall & Rowberry, *supra* note 15, at 73.

⁶⁰ Marshall & Rowberry, *supra* note 15, at 73.

⁶¹ Historic resources on tribal lands are overseen by a Tribal Historic Preservation Officer who often works in concert with the SHPO.

1. National Historic Preservation Act

Federal laws outlining planning-related protections for coastal cultural heritage in the United States are manifold. 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 that in coastal cities and areas.⁶² The purpose of the NHPA is to “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”⁶³ 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 Service.⁶⁴ Historic resources, including archaeological sites, monuments, and memorials, must be listed or eligible for listing on the National Register to receive legal protections under the NHPA.⁶⁵ 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 significance.⁶⁶

If a building, site, monument or object 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 resources listed or eligible for listing on the National Register.⁶⁷ Regulations implementing the Section 106 process consider damage, destruction, relocation or removal of historic resources listed on the National Register as

⁶² National Historic Preservation Act, Pub. L. No. 113-287, 128 Stat. 3187.

⁶³ 54 U.S.C. § 300101(1) (2018).

⁶⁴ 54 U.S.C. §§ 302101-302108 (2018).

⁶⁵ 36 C.F.R. § 800.16(1)(2) (2018); Sara Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell* (West Academic, 2014) pp. 86-87.

⁶⁶ 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 (2018); for “context” see 16 U.S.C. § 470a(a)(1)(A) (2018); for “significance” see 36 C.F.R. § 60.4; for “integrity” see 36 C.F.R. § 60.4; See also National Register Bulletin No. 15, *How to Apply the National Register Criteria for Evaluation*.

⁶⁷ 54 U.S.C. § 306108 (2018).

“adverse effects” that require the federal agency sponsoring the action to consult with affected parties to try and mitigate the negative effects of the actions on the historic resource *before* the federal action commences.⁶⁸ Thus, through early intervention in the planning process, the NHPA seeks to ensure that cultural heritage in the United States is preserved.

If a negotiated solution cannot be reached between the federal agency and any affected parties, the Advisory Council for Historic Preservation—an independent federal agency that promotes the preservation, enhancement, and productive use of United States historic resources—issues comments to the head of the sponsoring federal agency. The head of the federal agency then makes a final decision on what actions to take concerning the historic resource(s) in question.⁶⁹ Thus, while the NHPA Section 106 process allows historic resources to be damaged, destroyed, removed or relocated, it requires that certain procedures be followed *before* any such actions are taken. In other words, federal agencies must look closely before they leap. As a further disincentive, historic resources “that have been moved from their original locations” may be ineligible for listing in the National Register and thus for financial assistance under the NHPA⁷⁰ and for related national tax benefits.⁷¹ United States national law, therefore, discourages—but does not prohibit—the damage, destruction, removal or relocation of nationally important historic resources from federal land.

Using the NHPA as a model, every state has also enacted planning-related legislation protecting historic resources on public lands that have state or local significance.⁷² For example, Georgia has created the Georgia Register of Historic Places, an inventory that uses the same criteria and documentation procedures as the National Register.⁷³ Georgia also requires a similar review process to NHPA Section 106—finding of adverse impact, consultation with affected parties, mitigation *before* any project commences—for state and local government actions that may impact coastal historic resources.⁷⁴ And like its national counterpart, a

⁶⁸ 36 C.F.R. § 800.5-6.

⁶⁹ 36 C.F.R. § 800.6-7 (2018).

⁷⁰ 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).

⁷¹ 36 C.F.R. § 67.4(h).

⁷² See Sara Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell* (West Academic 2014), pp. 57-68.

⁷³ O.C.G.A. § 12-3-50-1 (2019).

⁷⁴ O.C.G.A. § 12-16-1 (2019).

state or local historic resource 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 the damage, removal, or relocation of historic monuments of state or local significance from public lands.

2. *Section 4(f)*

Section 4(f) of the Department of Transportation Act of 1966 provides the most powerful protection for coastal historic resources threatened by federal action, but its application is narrow.⁷⁵ It applies only to federal transportation programs or projects. Despite this narrow focus, Section 4(f) is immensely important to preserving coastal cultural heritage due to the ribbons of federal highways that line the coasts and often run through coastal cities in the United States. Section 4(f) requires that such programs or projects may adversely affect a significant historic site only if two criteria are met. First, there must be no prudent and feasible alternative to using the site. Second, the program or project must include all possible planning to minimize harm to the protected site.⁷⁶ Section 4(f) does not apply to a historic resource unless the resource is deemed to be a “historic site.” This term includes any public or private “prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register.”⁷⁷

Although federal agencies will often engage in Section 4(f) and NHPA Section 106 reviews simultaneously, the scope of these two reviews differs substantially. Section 4(f) requires a single federal agency—the Department of Transportation—to review alternatives and minimize harm if it is going to proceed with a transportation program or project that will use a property on or eligible for

⁷⁵ 49 U.S.C. § 303 (2018).

⁷⁶ 49 U.S.C. § 303(c) (2018):

[T]he Secretary [of the Department of Transportation] may approve a transportation program or project. . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

- (1) there is no prudent and feasible alternative to using that land; and
- (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

⁷⁷ 23 C.F.R. § 774.17 (2018).

the National Register.⁷⁸ NHPA Section 106, on the other hand, requires *all* federal agencies to “take into account the effect” of their federal undertakings on properties on or eligible for the National Register.⁷⁹ While Section 4(f) applies only to the Department of Transportation, NHPA Section 106 applies to all federal agencies. Furthermore, Section 4(f) actually dictates certain substantive results, while NHPA Section 106 review only requires agencies to “take into account” the effect of their actions before proceeding.

The success of Section 4(f) at the federal level as a tool to ensure protection of historic resources has inspired states to pass similar laws. Many Section 4(f)-inspired state statutes apply to all state agency actions, and even to some county and locality actions, rather than being limited to only state transportation agency actions. Only a few states, however, have adopted both aspects of Section 4(f)’s central enforcement mechanism: the review of the feasibility and prudence of the alternatives and the requirement to minimize harm. Kansas, for example, prevents the state from proceeding with any project that will damage or destroy properties on the National Register or state register of historic places unless the governor or other relevant official has determined that “there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to such historic property resulting from such use.”⁸⁰ South Dakota has adopted identical language, except that the South Dakota statute adds that “encroach[ing] upon” historic properties is a prohibited activity unless the review of alternatives and planning to minimize harm occurs.⁸¹ New Mexico, California, Florida, Texas, and South Carolina have also adopted similar state laws.⁸²

⁷⁸ 49 U.S.C. § 303 (2018).

⁷⁹ 54 U.S.C. § 306108 (2018).

⁸⁰ KAN. STAT. ANN. § 75–2724(a)(1) (2019). (Before the 2013 legislative session, this language also protected the “environs” surrounding the landmarked property.)

⁸¹ S.D. CODIFIED LAWS § 1–19A–11.1(1) (2019).

⁸² New Mexico prevents state agencies from spending money on any program or project “that requires the use of any portion of or any land from a significant prehistoric or historic site unless there is no feasible and prudent alternative to such use, and unless the program or project includes all planning to preserve and protect and to minimize harm.” N.M. STAT. ANN. § 18–8–7 (2019). In California, no state agency can alter historic fabric or “transfer, relocate, or demolish historic resources” in a way that has adverse effects on a listed historic resource without adopting “prudent and feasible measures that will eliminate or mitigate the adverse effects.” CAL. PUB. RES. CODE §§ 5024.5(a)–(b) (2019). Florida has a very similar provision, adding that the agency may also “undertake an appropriate archaeological salvage excavation or other recovery action to document the property as it existed prior to demolition or alteration.” FLA. STAT. ANN. § 267.061 (2019). In Texas, parks, recreation areas, scientific areas, wildlife refuges, and historic sites are protected from public bodies’ use and taking unless the appropriate official determines that: “(1) there is no feasible and prudent alternative to the use or taking of such land; and (2) the program or project includes all

3. *Archaeological Recovery Act*

The Archaeological Recovery Act of 1974 (ARA) acts as a corollary to the NHPA and to Section 4(f).⁸³ The ARA is designed to preserve historical and archaeological data that might otherwise be lost or destroyed *during* federal construction projects or federally licensed activities or programs. These provisions are especially important to preserving archaeological data from coastal federal projects designed to respond to climate change in coastal areas.

Under the ARA, federal agencies are required to inform the Secretary of the Department of the Interior if they discover or are notified in writing that their activities “in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data.”⁸⁴ Once informed, the Secretary may survey the affected site or permit another entity to survey the affected site, and if any relics or specimens are found, the Secretary must consult with the appropriate federal and state agencies, or educational or cultural institutions to preserve the objects.⁸⁵ The ARA’s real significance, therefore, lies in the fact that it protects historic and archaeological resources during the entirety of a federal construction project, not only during the planning phase.

4. *Archaeological Resources Protection Act*

The Archaeological Resources Protection Act (“ARPA”) was passed in 1979 to strengthen protections for archaeological resources through the imposition of strict penalties. ARPA defines archaeological resources very broadly to include “any material remains of past human life or activities of archaeological interest” that are “at least 100 years of age.”⁸⁶ ARPA protects these archaeological resources by establishing a permitting scheme for any excavations of archaeological resources, with stringent penalties for violators. ARPA prohibits the removal and damage of archaeological resources from federal land without a permit as well as

reasonable planning to minimize harm to the land, as a park, recreation area, scientific area, wildlife refuge, or historic site, resulting from the use or taking.” TEX. PARKS & WILDLIFE CODE ANN. § 26.001 (2019). And in South Carolina, agencies proposing easements, rights-of-way, or other encroachments on state parks or historic areas must demonstrate that: “[t]here is an important public necessity for the encroachment;” alternative routes are neither prudent nor feasible; and the applicable agency must “make reasonable mitigation of the impacts of the proposed encroachment.” S.C. CODE ANN. § 10–1–135 (2019).

⁸³ 54 U.S.C. §§ 312501–312508 (2018).

⁸⁴ 54 U.S.C. §312502(a) (2018).

⁸⁵ 54 U.S.C. §§ 312503-312504 (2018).

⁸⁶ 16 U.S.C. §470bb(1) (2018).

the sale or purchase of any archaeological resource.⁸⁷ Any person may apply for a permit under ARPA,⁸⁸ which allows a party to excavate or remove an archaeological resource from federal land.⁸⁹ However, in order to obtain a permit, the applicant must disclose how long the work will take, the qualifications of the applicant, and “the names of the university, museum, or other scientific or educational institution” where any archaeological resources collected will be stored.⁹⁰ Thus, ARPA permits not only allow for permission to excavate archaeological resources, they also track where these archaeological resources will reside in case the federal government needs access to the item.

If any person removes or excavates an archaeological resource from federal land without a permit, they may be subject to a \$10,000 fine and up to a year in prison for their first offense.⁹¹ However, if the “commercial or archaeological value” and/or the restoration of damage to an archaeological site exceeds \$500 then a violator may be subject to a fine of \$20,000 and up to two years in prison.⁹² For two or more violations of ARPA a person may be subject to a fine of \$100,000 and up to five years in prison.⁹³

Most states have state laws that in many ways mirror ARPA and protect archaeological resources on state lands, including the coast. The state of Georgia, for example, has its Antiquities Act, under which all “ruins, artifacts, treasure, and treasure-trove, and other similar sites and objects found on all lands owned or controlled by the state” are protected from illegal excavation.⁹⁴ Only the Department of Natural Resources for the state of Georgia is allowed to issue permits allowing for excavation of archaeological remains on state lands.⁹⁵ And anyone illegally excavating an archaeological site or damaging archaeological resources may be charged with a misdemeanor.⁹⁶

5. *The Abandoned Shipwrecks Act*

⁸⁷ 16 U.S.C. § 470ee(a)-(c) (2018).

⁸⁸ 16 U.S.C. § 470cc(a) (2018).

⁸⁹ *Id.*

⁹⁰ 43 C.F.R. § 7.6 (2018).

⁹¹ 16 U.S.C. § 470ee(d) (2018).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ O.C.G.A. § 12-3-52(b) (2019).

⁹⁵ *Id.* § 12-3-52(d).

⁹⁶ *Id.* § 12-3-54; *See also* O.C.G.A. § 12-3-621.

The Abandoned Shipwrecks Act (ASA) was passed by Congress in 1987. The ASA is a narrow statute that only provides protections for a specific set of coastal archaeological resources. As the name suggests, the ASA provides clear guidance on the ownership rights of abandoned shipwrecks. However, the ASA does not include any penalty provisions for violations of these rights. The ASA sets out a multi-step process to determine if a shipwreck falls under the ASA protections. First, it must be determined whether it is a shipwreck. The ASA defines shipwreck as a “vessel or wreck, its cargo, and other contents.”⁹⁷ However, isolated artifacts not associated with a wrecked vessel (i.e. a random anchor) are not considered to be a shipwreck under the ASA.⁹⁸ Next, the shipwreck has to be found to be “abandoned.” While this term is not defined in the ASA, the Supreme Court have given abandoned its usual meaning: that no one claims an ownership interest.⁹⁹ Lastly, the abandoned shipwreck must be embedded. The ASA’s definition of “embedded” requires that excavation tools be necessary to reach the shipwreck.¹⁰⁰ However, shipwrecks that are eligible to be listed on the National Register are not required to be embedded.¹⁰¹

If a shipwreck meets the requirements set out by the ASA, the United States may assert title to the shipwreck. After the United States has asserted title, the State in which the shipwreck is located can assert a claim to the shipwreck and ask that title be transferred. With the transfer of title to the state comes certain obligations. Namely, the state must provide legal protections for the wreck and ensure public access to it.¹⁰²

Similar to the ASA, many coastal states have laws that protect their underwater cultural heritage. For instance, the state of Georgia has a Submerged Cultural Resources Act (SCRA) that provides for the protection and preservation of submerged artifacts in the state’s territorial waters. Specifically, the SCRA protects “all prehistoric and historic sites, ruins, artifacts, treasure, treasure-trove, and shipwrecks or vessels and their cargo or tackle which have remained on the bottom for more than 50 years.”¹⁰³ Any submerged item which falls under this definition belongs to the state of Georgia. The state, then, has the exclusive right to

⁹⁷ 43 U.S.C. § 2102(d) (2018).

⁹⁸ Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116-01 (Dec. 4, 1990).

⁹⁹ *Ne. Research, LLC v. One Shipwrecked Vessel*, No. 11-1644-CV, 2013 WL 4753732 (2d Cir. Sept. 5, 2013).

¹⁰⁰ 43 U.S.C. § 2102(a) (2018).

¹⁰¹ 43 U.S.C. § 2105(a)(3) (2018).

¹⁰² 43 U.S.C. § 2103(a)(2) (2018).

¹⁰³ O.C.G.A. § 12-3-80 (2019).

regulate the recovery of these resources.¹⁰⁴ The State Department of Natural Resources may grant a permit to anyone who wishes to recover a submerged cultural resource. However, applicants must submit a detailed application which includes all plans for preservation and storage, and applicants must be supervised by a professional archaeologist if they are not one themselves.¹⁰⁵

Most coastal states in the United States have also enacted laws protecting historic resources submerged within state waters, including shipwrecks. For instance, Georgia has passed the Submerged Cultural Resources Act, which allows the state to protect “all prehistoric and historic sites, ruins, artifacts, treasure, treasure-trove, and shipwrecks or vessels and their cargo or tackle” within its territorial water that have remained on the bottom of the ocean for over 50 years.¹⁰⁶ Any party who wants to perform survey or recovery operations of submerged cultural resources in Georgia must first apply for and receive a permit from the Department of Natural Resources. Typical permit applications include a “detailed plan outlining the location, objectives, scope, methods, [and] plan for preservation and storage of any submerged cultural resources to be recovered.”¹⁰⁷ Illegal and unpermitted salvage or recovery operations, or damage to underwater cultural resources are punishable as misdemeanor crimes.¹⁰⁸

6. Coastal Zone Management Act

The Coastal Zone Management Act (“CZMA”) was passed by Congress in 1972 to protect the coastal waters of the United States and preserve them for future generations. Although the CZMA does not place affirmative requirements on coastal states to protect their historic resources, states may use the CZMA to provide protections for coastal cultural heritage and receive federal funding to do so. The CZMA is designed to:

encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, *cultural*, *historic*, and esthetic values as

¹⁰⁴ *Id.*

¹⁰⁵ O.C.G.A. § 12-3-82 (2019).

¹⁰⁶ O.C.G.A. § 12-3-80 (2019).

¹⁰⁷ *Id.* § 12-3-82(a).

¹⁰⁸ *Id.* § 12-3-83.

well as the needs for compatible economic development.¹⁰⁹
(emphasis added).

The process for implementing a coastal management program, however, is left entirely to the states. Currently, all 35 coastal and Great Lakes states within the United States, excepting Alaska, have some form of coastal management program.¹¹⁰ The scope and intensity of these programs, however, vary widely.

The state of Georgia, for example, has “approximately 100 miles of oceanfront shoreline and 3,650 miles of tidal creek and riverine shoreline.”¹¹¹ Under the CZMA, Georgia created the Georgia Coastal Management Program through the implementation of the Georgia Coastal Management Act in 1997.¹¹² Although the Georgia Coastal Management Act does not list the preservation of historic resources as a primary goal of the legislation, the Coastal Incentive Grants (CIG) administered under this legislation have been very effective at conserving maritime cultural heritage.¹¹³ Between 2005—2011 Georgia awarded nearly seven million dollars in CIG program funds to local governments, state agencies, or research institutions “for projects that promote the understanding, protection or enhancement of coastal natural and historic resources.”¹¹⁴ The coastal town of Darien, Georgia, for instance, utilized CIG program funding to create a working waterfront park, including a multi-use trail, interpretative signage explaining the ecological value of coastal resources, boardwalks, and the preservation of the working waterfront that has traditionally been associated with shrimping for over one-hundred years.¹¹⁵ Thus, while the CZMA is largely concerned with environmental science issues, there is ample space within its orbit for the preservation of coastal cultural heritage. Nevertheless, it remains an underutilized tool that states could use to preserve their coastal historic resources.

¹⁰⁹ 16 U.S.C. § 1452(2) (2018).

¹¹⁰ For a listing of each of these states and the government departments within each state that are responsible for managing coastal areas see: <https://coast.noaa.gov/czm/mystate/>.

¹¹¹ *Evaluation Findings for the Georgia Coastal Management Program December 2005-May 2011*, Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, United States Department of Commerce, February 2012, p. 8.

¹¹² O.C.G.A. § 12-5-320 (2019).

¹¹³ O.C.G.A. § 12-5-321 (2019).

¹¹⁴ *Evaluation Findings for the Georgia Coastal Management Program December 2005-May 2011*, Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, United States Department of Commerce, February 2012, p. 13.

¹¹⁵ *Id.*

B. Case Studies

1. Shoreline Cultural Heritage Vulnerability Study

The only large-scale study of the vulnerability of cultural heritage on U.S. coasts (to our knowledge) was conducted in 2015 by Leslie Reeder-Myers, then of the Smithsonian Museum in Washington, D.C.¹¹⁶ This study investigated the vulnerabilities of known archaeological sites located on long sections of shorelines in California, Texas, and Virginia.¹¹⁷ The coasts of California, Texas, and Virginia all have unique and important characteristics, as each coastline offers windows into different periods of North American history. Virginia's coast, for instance, provides insight into longstanding Native American settlements and practices as well as the early days of European colonization of the Americas from the seventeenth-century onward. California coasts offer a wealth of historic information on Spanish contact with Native American tribes as well as the rapid expansion of the United States in the nineteenth century. Similarly, Texas shores contain historic information on ancient Native American settlement and economic patterns, Spanish explorers' contact with indigenous peoples, and burgeoning United States' interests in the region during the nineteenth century. While each coastline is unique, Reeder-Myers comprehensive look at the vulnerability of archaeological sites on sections of these coastlines yielded valuable information on the precarious status of cultural heritage along several U.S. coasts.

Using publically available Geographical Information Systems (GIS) datasets from national and state agencies, like the United States Geological Survey Coastal Vulnerability Index (2000), Reeder-Myers found that her study area of 480 kilometers of California coastline contained 2,357 known archaeological sites.¹¹⁸ Her study of the 980 kilometer stretch of coastline from Texas' Galveston Bay to Matagorda Bay contained only 259 known archaeological sites, with almost one-third of these sites already underwater.¹¹⁹ And examination of the 1500 kilometer coastline of Virginia's five coastal counties between the York and Potomac Rivers

¹¹⁶ Leslie Reeder-Myers has since become an Assistant Professor and Director of the Anthropology Laboratory and Museum at Temple University in Philadelphia, Pennsylvania. See <https://liberalarts.temple.edu/academics/faculty/reeder-myers-leslie>

¹¹⁷ Leslie Reeder-Myers, "Cultural Heritage at Risk in the Twenty-First Century: A Vulnerability Assessment of Coastal Archaeological Sites in the United States," *Journal of Coastal Archaeology*, vol. 10, pp. 436-445 (2015).

¹¹⁸For California, the study area included 418 kilometers of shoreline along the coasts of Santa Barbara County and the Northern Channel Islands. *Id.* at 437, 440.

¹¹⁹ *Id.* at 437, 443.

yielded a total of 1,007 known archaeological sites.¹²⁰ Using this data, Reeder-Myers calculated a cultural resource vulnerability (CRV) score for each archaeological site according to its position on the landscape (distance to shoreline and elevation), the degree of vulnerability of the nearest shoreline, and modern land uses at the site.

After CRV calculations were made for each archaeological site, Reeder-Myers compared the coasts of the three states. The California shoreline was found to have the lowest CRV number out of all three subject shorelines.¹²¹ This was in part due to the fact that over half of the subject shoreline was found within the Channel Islands National Park or on land owned by the Nature Conservancy, which was largely protected from future land use developments that might adversely impact coastal cultural heritage. The Texas shoreline, on the other hand, was found to be the most vulnerable because the low, sloping elevation and lack of land use restrictions in the subject area left these shorelines particularly exposed to the ravages of rising sea levels.¹²² Finally, the Virginia shoreline was found to be moderately vulnerable. Interestingly, non-submerged archaeological sites were found to be more vulnerable than submerged sites in Virginia because their location in developed or agricultural areas where land use patterns have a habit of changing rapidly.¹²³ Furthermore, Virginia's coasts had the highest absolute number of highly vulnerable sites compared with California and Texas.¹²⁴

Although Reeder-Myers assessed the vulnerability of archaeological sites along three large sections of shoreline in the United States, her study did not propose any protective strategies. Nevertheless, her innovative methodology shows that, using readily available data and software, archaeologists and policy makers at local, state, and national levels can quickly “identify areas that are under particularly high threat from climate change and modern development, and can prioritize those areas for research” and protection.¹²⁵

2. Canaveral National Seashore, Florida

A much more localized case study of cultural heritage preservation along U.S. coasts can be found at Canaveral National Seashore, on the eastern coast of

¹²⁰ *Id.* at 437.

¹²¹ *Id.* at 439-443.

¹²² *Id.* at 443.

¹²³ *Id.* at 443.

¹²⁴ *Id.* at 443. Reeder-Myers calculated that Virginia had 144 archaeological sites that were highly vulnerable sites, whereas California had 95 and Texas 82.

¹²⁵ *Id.* at 444.

Florida facing the Atlantic Ocean. The history of Canaveral National Seashore spans thousands of years: the Timucua Indians were the original inhabitants, and later the Spanish renamed the site Eldora. Today, Canaveral National Seashore is best known for its proximity to the Kennedy Space Center, and parts of the seashore are closed to visitor during launches at the space center.

While modern Canaveral National Seashore is associated with ethereal outer space, its more tangible prehistoric terrestrial remains are eroding due to climate change. Canaveral National Seashore is home to four prehistoric shell mounds, including Turtle Mound, the tallest extant shell mound within the national park system at 11m (37 feet) high.¹²⁶ Shell mounds, composed mostly of oyster and clam shells, contain large amounts of archaeological, paleoecological, and environmental data that provide valuable insight into prehistoric societies in North America. However, these four shell mounds, none of which have received extensive archaeological investigation, are threatened with severe “erosion from sea level rise and increased storm activities.”¹²⁷ The National Park Service (NPS) predicted that given the rising seas and more intense storms that, without any intervention, the four prehistoric shell mounds of Canaveral National Seashore would quickly wash away.

NPS, therefore, developed a three-phase project to address the threats facing these prehistoric shell mounds. First, the NPS Southeast Archeological Center has documented the four shell mound sites using GIS and LIDAR technologies to understand “the present state of erosion on the mounds, and possible related terrain features.”¹²⁸ Second, NPS conducted archaeological testing and scientific data recovery at portions of each of the four shell mound sites in order to gather information and documentation. Such documentation is crucial to determining whether the four shell mounds qualify as National Historic Landmarks, which would afford them extra legal protections and funding.¹²⁹ Third, NPS stabilized the four prehistoric shell mounds using “soft armoring and living shoreline

¹²⁶ Margo Schwadron, *Shell Mound Sites Threatened by Sea Level Rise and Erosion, Canaveral National Seashore, Florida*, Coastal Adaptation Strategies: Case Studies National Park Service Report (Sept. 2015), p. 7. The names of the other three shell mounds are Ross Hammock, Castle Windy, and Seminole Rest. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 8.

¹²⁹ National Historic Landmarks are “properties of exceptional value to the nation as a whole rather than a particular State or locality.” 36 C.F.R. § 65.2(a). For the legal criteria applicable to National Historic Landmarks see, Sarah Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell*, pp. 48-49.

techniques.”¹³⁰ Specifically, NPS planted cordgrass and mangroves in the intertidal zone as well as “deploying bags of oyster shells seaward of the cordgrass, and placing oyster restoration mats seaward of the bags.”¹³¹ These interventions should stabilize Canaveral National Seashore’s four prehistoric shell mounds in the short term, while NPS decides on how to best preserve these important historic resources.

3. *Cape Hatteras National Seashore, North Carolina*

Farther up the Atlantic coastline at Cape Hatteras National Seashore in North Carolina stands the Cape Hatteras lighthouse, originally built on a barrier island in 1803.¹³² Cape Hatteras lighthouse has been a popular tourist destination since the nineteenth century. However, shoreline retreat estimated at 3.7 m (12 feet) per year since the 1930s, along with increasing incidences of hurricanes and associated storm surges, threatened the base of the lighthouse.¹³³ From the 1930s through the 1990s the NPS attempted to protect the lighthouse from erosion using various techniques—beach nourishment, reinforced concrete groins, sand bags, piled rubble, artificial seascapes—but none of these provided the long-term protection that would preserve the lighthouse.¹³⁴

Finally, in 1999 the NPS decided that relocation of the lighthouse was the best way to preserve it for future generations. Using public-private partnerships that developed over a decade along with various funding campaigns, the Cape Hatteras lighthouse was moved 0.9 km (0.55 miles) from its previous location and 0.5 km (0.3) inland from the shoreline at a cost of nearly 12 million dollars.¹³⁵ To keep the memory of the original lighthouse location alive, a ring of granite stones, “each engraved with the name of a lighthouse keeper,” was placed at the original site.¹³⁶ As sea level continues to rise, these engraved memorial stones have been over-washed and buried several times, prompting NPS to move the stones to a new amphitheater on Cape Hatteras National Seashore.¹³⁷ While relocation of every threatened coastal historic resource is infeasible, the Cape Hatteras lighthouse is a wonderful example of the government and private sectors working together to

¹³⁰ Schwadron, *supra* note 338, at 8.

¹³¹ *Id.*

¹³² John Kowlok, *Relocating the Lighthouse, Cape Hatteras National Seashore, North Carolina*, Coastal Adaptation Strategies: Case Studies National Park Service Report (Sept. 2015), p. 20.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 21.

¹³⁶ *Id.*

¹³⁷ *Id.*

preserve a truly remarkable monument that is precious to a local coastal community.

III. COASTAL CULTURAL HERITAGE PROTECTIONS IN FRANCE

In France, coastal cultural heritage is protected through layers of laws implemented at various governmental and geographic levels. We begin by discussing the role of the European Union in guiding French law on cultural heritage preservation. Next, we outline the legal frameworks at the national, regional, and municipal levels for the protection of coastal archaeology and for the preservation of historic buildings in France. Finally, this section concludes with case studies of legal strategies employed by Marseille, Le Havre, and Bordeaux to preserve significant historic places and sites.

A. EU Law and Coastal Cultural Heritage Preservation

As a member state of the European Union (EU), France is guided by EU law on coastal cultural heritage preservation.¹³⁸ The controlling legislation on cultural heritage preservation for the European Union is Council Directive 2011/92/EU.¹³⁹ The Directive codifies the principle of “preventive action” that permeates the EU’s environmental legislation.¹⁴⁰ Preventive action, often called the precautionary principle, is used by the EU to ensure that governments and organizations understand the risks that come with environmental management—including private or commercial development.¹⁴¹ Following this principle of preventive action, the Directive implements mandatory environmental impact assessments (EIAs) for certain listed types of development projects.¹⁴² EIAs require the developer of the project at issue to prepare a report that “describes and assesses . . . the direct and indirect significant effects of a project on . . . material assets, cultural heritage, and the landscape” among other factors.¹⁴³

¹³⁸ European Union, France, https://europa.eu/european-union/about-eu/countries/member-countries/france_en#france_in_the_eu (last visited Apr. 22, 2019).

¹³⁹ Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, 2011 O.J. L 26, as amended by Council Directive 2014/52/EU, 2014 O.J. L 124 [hereinafter Directive].

¹⁴⁰ Directive, *supra* note 2, ¶ 2 at 2.

¹⁴¹ *Communication from the Commission on the Precautionary Principle*, COM (2000) 0001 final (Feb. 2, 2000), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52000DC0001:EN:HTML>.

¹⁴² *Id.* art. 4 at 13. Member states can exempt certain projects as outlined within the Directive. *Id.* art. 2 at 11.

¹⁴³ *Id.* art. 3(1)(d) at 12.

Projects that require an EIA are listed in Annex I of the Directive, and many of these projects directly affect coastal heritage resources.¹⁴⁴ These Annex I projects include: “Inland waterways and ports for inland waterway traffic” and “trading ports, piers for loading and unloading connected to land and outside ports.”¹⁴⁵ By requiring an EIA for these types of projects, the Directive protects and catalogues archaeological and cultural heritage found in coastal zones throughout the EU.¹⁴⁶ The Directive also requires that public authorities having jurisdiction over projects needing an EIA are “given an opportunity to express their opinion on the information supplied by the developer.”¹⁴⁷ Once public authorities have evaluated the assessments, they use the opinions in the reports to determine whether the project should proceed or be denied.¹⁴⁸

EU member states also have the discretion to require EIAs for projects listed in Annex II of the Directive that may be located near the coast, such as animal or vegetable manufacturing, packing, and canning plants.¹⁴⁹ Member states can make this determination on a “case by case examination; or thresholds or criteria set by the Member State.”¹⁵⁰ Included in Annex II are projects that involve “reclamation of land from the sea”; “in-land waterway construction not included in Annex I”; and “coastal work to combat erosion and maritime works capable of altering the coast.”¹⁵¹ However, the scope of the EIAs required for Annex II projects is less extensive than those used in Annex I.¹⁵² EIAs for Annex II focus solely on the environmental effects of a project with no specific mention of cultural heritage that might be adversely affected by the project.¹⁵³

B. French Coastal Cultural Heritage Preservation

1. Archaeological Sites

¹⁴⁴ *Id.* art. 4 at 13; *Id.* an. I at 24.

¹⁴⁵ Directive, *supra* note 138, an. I(8)(a)–(b) at 24.

¹⁴⁶ *Id.* an. I(8)(a)–(b) at 24; *Id.* art. 3(1)(d) at 12.

¹⁴⁷ *Id.* art. 6(1) at 15.

¹⁴⁸ *Id.* art. 8a at 18.

¹⁴⁹ *Id.* art. 4(2) at 13.

¹⁵⁰ *Id.* art. 4(2) at 13.

¹⁵¹ Directive, *supra* note 138, an. II(10) at 28.

¹⁵² *Id.* an. II(A) at 30.

¹⁵³ Directive, *supra* note 138, an. II(A) at 30.

France's current archaeological framework derives from the Valetta Treaty, signed on January 16, 1992.¹⁵⁴ Mirroring the political structure of the country, France's cultural heritage legal framework is a highly centralized system with layers of oversight and authority.¹⁵⁵ French cultural heritage authorities are divided into three main geographical levels.¹⁵⁶ The first (and largest) level is comprised of twenty-one territorial commissions which have jurisdiction over a combination of regions.¹⁵⁷ Below the territorial commissions are the regional authorities that cover a specific region and its cultural heritage. For example, Marseille's archaeological and cultural heritage falls under the Provence-Alps-Cote d'Azur Regional Service.¹⁵⁸ Lastly, every commune (county) within each region has a heritage department responsible for the protection and preservation of cultural heritage within its jurisdiction.¹⁵⁹ This layered structure of authority implies there is no single autonomous local body solely responsible for archaeology. In reality, however, the regional and territorial governments are largely led by the national

¹⁵⁴ INRAP, *Legislation, procedures and funding*, INRAP (Dec. 7, 2016), <http://www.inrap.fr/en/legislation-procedures-and-funding-12007> ("The Malta Convention forms the basis of the current French system of preventive archaeology.")

¹⁵⁵ Compare John E. Flower, et al., *France*, Encyclopedia Britannica (Jan. 8, 2009), <https://www.britannica.com/place/France> with PROVENCE-ALPS-COTE D'AZUR REGIONAL SERVICE OF ARCHAEOLOGY, <http://www.culturecommunication.gouv.fr/Regions/Drac-Paca/La-direction-regionale/La-Drac-et-ses-services/Service-regional-de-l-archeologie> (last visited Nov. 7, 2017). Political power in France is comprised of a national government, eighteen regions, and below them 101 departments, and finally 36,681 communes. See Flower, *supra*.

¹⁵⁶ See PROVENCE-ALPS-COTE D'AZUR REGIONAL SERVICE OF ARCHAEOLOGY, <http://www.culturecommunication.gouv.fr/Regions/Drac-Paca/La-direction-regionale/La-Drac-et-ses-services/Service-regional-de-l-archeologie> (last visited Nov. 7, 2017); DEPARTMENTAL UNIT OF ARCHITECTURE AND HERITAGE OF BOUCHES-DU-RHONE, <http://www.culturecommunication.gouv.fr/Regions/Drac-Paca/La-direction-regionale/La-Drac-et-ses-services/Unites-departementales-de-l-architecture-et-du-patrimoine-UDAP/Udap-des-Bouches-du-Rhone> (last visited Nov. 7, 2017).

¹⁵⁷ PROVENCE-ALPS-COTE D'AZUR REGIONAL SERVICE OF ARCHAEOLOGY, *supra* note 78. The territorial commissions are: Auvergne – Rhone-Alpes, Bourgogne-Franche-Comte, Brittany, Center-Loire Valley, Corsica, Grand Est, Guadeloupe, Guyana, Hauts-de-France, Ile-de-France, Martinique, Mayotte, Normandy, New Aquitaine, New Caledonia, Drac Occitanie, Pays de la Loire, Drac Paca, Drac Indian Ocean, DCSTEP Saint Pierre, Miquelon. *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ DEPARTMENTAL UNIT OF ARCHITECTURE AND HERITAGE OF BOUCHES-DU-RHONE, <http://www.culturecommunication.gouv.fr/Regions/Drac-Paca/La-direction-regionale/La-Drac-et-ses-services/Unites-departementales-de-l-architecture-et-du-patrimoine-UDAP/Udap-des-Bouches-du-Rhone> (last visited Nov. 7, 2017).

government.¹⁶⁰ The city of Marseille serves as an excellent example. Heritage sites throughout Marseille are managed by a variety of local organizations working under the supervision of national institutions¹⁶¹ like the College of France or the National Institute for Preventive Archaeological Research (INRAP)—the national organization tasked with heritage and archaeological protection.¹⁶²

The French *Code du Patrimoine* (Heritage Code) applies to all cultural property in France.¹⁶³ Cultural property in the Heritage Code is defined as property belonging to the museums of France, public archives, historic monuments, and “[o]ther properties of major interest for the national heritage from the point of view of history, art or archaeology.”¹⁶⁴ Book V of the Heritage Code details the policies that govern the field of archeology and the national government’s role within the larger preservation framework.¹⁶⁵ Preventive archaeology is the chosen method of protection of archaeological resources for the national government¹⁶⁶ and is defined as the “detection, conservation, or safeguarding by scientific study of the archaeological heritage elements.”¹⁶⁷ The scope of preventive archaeology extends

¹⁶⁰ *Id.* The Bouche-du-Rhone is the most local level of the archaeological preservation framework for the Provence-Alps-Cote d’Azur region. *Id.*

¹⁶¹ PROVENCE-ALPS-COTE D’AZUR REGIONAL SERVICE OF ARCHAEOLOGY, *Scientific Review of the PACA Region* (2016), available at: <http://www.culture.gouv.fr/Regions/Drac-Paca/Ressources/Archeologie/Bilans-scientifiques-regionaux>.

¹⁶² *Id.*

¹⁶³ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 111-1–L111-12 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006159928&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁶⁴ *Id.*

¹⁶⁵ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 510-1 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006144113&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁶⁶ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 521-1 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006159950&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁶⁷ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 521-1 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006159950&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

to “the ground and underwater,”¹⁶⁸ meaning that France’s coastal archaeological heritage is protected using this preventive framework.¹⁶⁹

The role of the national government in administering preventive archaeology is outlined in six articles within Book V of the Heritage Code.¹⁷⁰ The national government’s primary role is facilitating and organizing archaeological research and excavation.¹⁷¹ Specifically, the national government is authorized to: “prescribe measures aimed at the detection, conservation or safeguarding by the scientific study of the archaeological heritage; designate the scientific manager of any operation; provide scientific and technical control and evaluate these operations; and is to be the addressee of all the scientific data relating to the operations.”¹⁷² The national government’s power to “prescribe measures”¹⁷³ is applied through its ability to give “diagnostic prescriptions.”¹⁷⁴ Simply put, the national government diagnoses what is needed for a specific archaeological site and ensures those plans are carried out. In addition to controlling archaeological operations, the national government is tasked with creating a national archaeological map to display all current archaeological data available.¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-1–522-6 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁷¹ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-1 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-2 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁷⁵ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-5–522-6 (Fr.) (requiring the National government to respond to project requests within two months from receiving the project or waive any power over the site for five years thereafter). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

Finally, the national government's actions are given a strict timetable when archaeological heritage is discovered.¹⁷⁶ Developments that have the potential to impact archeologically significant areas must be submitted to the national government for review.¹⁷⁷ If the national government does not respond within two months after a development is submitted, then the national government has waived its ability to evaluate that development for a period of five-years.¹⁷⁸

Book V creates a “national public administrative body” that is tasked with implementing the “diagnoses of preventative archaeology” throughout France.¹⁷⁹ This national body, the National Institute for Preventative Archaeology (INRAP), is led by a board of directors in consultation with a scientific council.¹⁸⁰ INRAP enjoys a privileged status among the organizations that work to preserve archaeological discoveries.¹⁸¹ INRAP is the largest cultural heritage organization in France and was created by statute on February 1, 2002.¹⁸² Supervision of INRAP falls to both the Ministry of Culture and the Ministry of Research.¹⁸³

¹⁷⁶ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-3–522-4 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 523-1 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=3C8886848351E25B871AFD09FFCD3B8B.tplgfr30s_1?idSectionTA=LEGISCTA000006159952&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁸⁰ Code du patrimoine [C. patri.] [Heritage Code] art. L. 523-2 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=3C8886848351E25B871AFD09FFCD3B8B.tplgfr30s_1?idSectionTA=LEGISCTA000006159952&cidTexte=LEGITEXT000006074236&dateTexte=20171026. INRAP is the only national body authorized by France to carry out the scientific and research goals in the Heritage Code. <http://www.inrap.fr/en/legislation-procedures-and-funding-12007>.

¹⁸¹ PROVENCE-ALPS-COTE D’AZUR REGIONAL SERVICE OF ARCHAEOLOGY, *supra* note 24.

¹⁸² INRAP, *Legislation, procedures and funding* (Dec. 7, 2016), available at: <http://www.inrap.fr/en/legislation-procedures-and-funding-12007> (“INRAP’s statutes are defined by the decree of January 16, 2002, amended by the decree of August 11, 2016, codified in the regulatory section of the aforementioned Code, Book V, Title II and Title IV, Chapter V, Section III.”). These statutes are found in the Heritage Code. *Id.*

¹⁸³ *Id.*

INRAP has two modes of operation: evaluation and excavation.¹⁸⁴ Evaluations are carried out as a “public monopoly” in conjunction with local authorities.¹⁸⁵ Development projects that affect the subsoil must be submitted to the national government which then refers them to INRAP.¹⁸⁶ INRAP then analyzes the effects of the development on the proposed sites to determine whether or not an excavation should take place to protect archeological heritage.¹⁸⁷ Excavation projects for archaeological sites are awarded through “free competition” where the bidding authorities must first meet the minimum requirements for a certain project.¹⁸⁸ In 2016, amendments to the Heritage Code increased the national government’s power over local public archeological services.¹⁸⁹ In addition, the national government continues to exercise its power over private organizations by making the licensing process for excavation more stringent.¹⁹⁰

INRAP’s strict regulation of private and local authorities has led to a backlash against its monopoly over archaeological sites.¹⁹¹ After a number of complaints were filed with the *Autorite de la Concurrence* [Competition Authority], the national government proposed a number of changes to the evaluation and excavation processes utilized by INRAP.¹⁹² First, the government will create a secure platform to disseminate preliminary information to all

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* As discussed above, to be part of the evaluation process, the local authorities must have an accredited archaeological service.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See id.* (Strengthening the financial, scientific, technical, administrative, and social reviews of private operators).

¹⁹¹ AP-The Monitor.FR, *Preventive Archaeology, INRAP should share better*, LE MONITEUR (Jan. 1, 2017), <http://www.lemoniteur.fr/article/archeologie-preventive-l-inrap-devra-mieux-partager-34545896>. Because INRAP works in both archaeological evaluation and excavation, they have been able to subvert the competition system that was originally established in 2002. *Id.* Critics say that INRAP uses its near-exclusive control of the evaluation system, through the power of accrediting local authorities, to tailor excavation projects and make them suitable only for INRAP. *Id.* Critics specifically point to INRAP’s privileged access to information and its ability to price excavation projects below market because it receives public funding from the national government. *Id.*

¹⁹² *Id.*

operators.¹⁹³ Second, INRAP will set up an accounting system that separates its non-profit wing from the for-profit excavation projects it undertakes.¹⁹⁴ The accounting system will be audited annually by an independent expert to ensure there is no further collusion between the two sides of INRAP.¹⁹⁵

Book V also carves out a narrow role for local authorities that wish to utilize their own archaeological services for projects.¹⁹⁶ However, local authorities are still under the authority of the State as it relates to the actual excavation operations themselves.¹⁹⁷ Book V also sets out the process for starting and maintaining an archaeological excavation.¹⁹⁸ A notable feature of these processes is that the national government can require any archaeological service, other than INRAP, to provide it with a report about the archaeological operation it is working on and use it to guide policy decisions.¹⁹⁹

¹⁹³ See AP-The Monitor.FR, *Preventive Archaeology, INRAP should share better*, LE MONITEUR (Jan. 1, 2017), <http://www.lemoniteur.fr/article/archeologie-preventive-l-inrap-devra-mieux-partager-34545896>. Operators are those that carry out the archaeological excavation, they can be public or private. INRAP, *supra* note 76. INRAP is considered an operator. *Id.*

¹⁹⁴ See AP-The Monitor.FR, *supra* note 59.

¹⁹⁵ See *id.* Seeing that INRAP and the national government had made significant changes to INRAP's practices, the Competitive Authority has closed all complaints filed against INRAP. *Id.*

¹⁹⁶ Code du patrimoine [C. patri.] [Heritage Code] art. L. 523-4 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=3C8886848351E25B871AFD09FFCD3B8B.tplgfr30s_1?idSectionTA=LEGISCTA000006159952&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁹⁷ Code du patrimoine [C. patri.] [Heritage Code] art. L. 523-4 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=3C8886848351E25B871AFD09FFCD3B8B.tplgfr30s_1?idSectionTA=LEGISCTA000006159952&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁹⁸ Code du patrimoine [C. patri.] [Heritage Code] art. L. 523-8–523-11 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=3C8886848351E25B871AFD09FFCD3B8B.tplgfr30s_1?idSectionTA=LEGISCTA000006159952&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

¹⁹⁹ Code du patrimoine [C. patri.] [Heritage Code] art. L. 523-11 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=3C8886848351E25B871AFD09FFCD3B8B.tplgfr30s_1?idSectionTA=LEGISCTA000006159952&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

Local authorities,²⁰⁰ such as the Bouche-du-Rhone Heritage Department that governs Marseille, organize and finance their own archaeological services.²⁰¹ Although local authorities create their own archaeological departments, the departments are still subject to the “scientific and technical control” of the national government.²⁰² In order for local authorities to conduct archaeological operations, therefore, services and operations must be authorized by the national government.²⁰³ The locality must apply to the next highest government level for this authorization, e.g., the commune of Marseille must apply to the Bouche-du-Rhone Department which then applies to the Provence-Alps-Cote d’Azur region.²⁰⁴ From the regional government, the request is forwarded to the thirty-two member National Council for Archaeological Research (NCAR), working within the Ministry of Culture and Ministry of Research.²⁰⁵ The NCAR studies and maintains archeological projects at the national level, and it contributes to the “establishment of a concerted interdepartmental policy in the field of archeology.”²⁰⁶

The NCAR evaluates the capacity of the local authority to handle the proposed archaeological project.²⁰⁷ Local authorities must also submit an

²⁰⁰ Local authority is not specifically defined in the Heritage Code, but can be presumed to mean the regional and commune levels of government.

²⁰¹ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-7–522-8 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do?sessionId=6675B3C1E4A704234B6CF91F5F86D761.tplgfr30s_1?idSectionTA=LEGISCTA000006177310&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

²⁰² *Id.* The national government exercises its control over local archaeological services through an accreditation process that must be completed every five years. CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 523-8-1 (Fr). Available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006074236&idArticle=LEGIARTI000032857391&dateTexte=&categorieLien=id>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ The National Council for Archaeological Research is comprised of thirty-two members from a range of institutions such as members of INRAP, the Ministry of Research, university professors, foreign archeologists, and members from the various Territorial Commissions. The Council is chaired by the Minister of Culture or a Vice-President that he appoints. See MINISTRY OF CULTURE, *National Council for Archeological Research* (Apr. 13, 2018) <http://www.culture.gouv.fr/Thematiques/Archeologie/Conseil-national-de-la-recherche-archeologique>.

²⁰⁶ *Id.*

²⁰⁷ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-7–522-8 (Fr). Available at: <https://www.legifrance.gouv.fr/affichCode.do?sessionId=6675B3C1E4A704234B6CF91F5F86D7>

agreement that will set the “modalities of [national government] participation in the scientific exploration of preventive archaeology operations.”²⁰⁸ After review by the NCAR, the requested archaeological project may be approved or “refused, suspended, or withdrawn by reasoned decision.”²⁰⁹

Another preservation tool available to municipalities within the Heritage Code is the “Area of enhancement of architecture and heritage” easement (Heritage Easement).²¹⁰ The Heritage Easement is a new form of easement dedicated to promoting cultural heritage spaces.²¹¹ The Heritage Easement is created by a city’s legislative branch, allowing greater municipal control over the use of heritage spaces and any construction that might occur around urban heritage sites.²¹² A Heritage Easement must be based on an “architectural, heritage, and environmental diagnosis” that takes into account sustainable planning goals and future urban developments that might occur in the area.²¹³ And the primary use for any Heritage Easement must be a furtherance, in some way, of public utility.²¹⁴

2. *Historic Coastal Buildings*

As noted above France’s legal framework for protecting coastal archaeological resources is highly centralized, with authority for such projects flowing from the national government. Similarly, the legal framework for designating and preserving historic buildings lying within French coasts is centralized and organized around a national commission, *La Commission Nationale du Patrimoine et de L’architecture* (Commission).²¹⁵ The Commission, which

61.tplgr30s_1?idSectionTA=LEGISCTA000006177310&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 642–1 (Fr). Available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022493350&cidTexte=LEGITEXT000006074236&dateTexte=20100907&oldAction=rechCodeArticle>.

²¹¹ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 642–1 (Fr). Available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022493350&cidTexte=LEGITEXT000006074236&dateTexte=20100907&oldAction=rechCodeArticle>.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Some form of national Commission for French tangible cultural heritage has existed since 1837. First thought of by the statesman Françoise Guizot, the goal of the Commission is the protection and restoration of French heritage and historic buildings. The current Commission was authorized on July 7, 2016, with the passage of the law on freedom of creation, architecture, and

operates under the authority of the Ministry of Culture, is organized into seven sections, each dealing with a certain type of historical object: (1) remarkable heritage sites and surroundings; (2) immovable heritage; (3) architectural projects and building work; (4) movable heritage; (5) musical instruments; (6) ornate caves; and (7) parks and gardens.²¹⁶ Each of the seven sections within the Commission consists of 26 members drawn from state representatives, elected officials, representatives of historical associations, and qualified experts, all of whom are appointed for a five year term.²¹⁷

The Commission's purpose is to restore and protect historic buildings, monuments, and sites degraded by time, weather, or man-made causes.²¹⁸ To achieve this, the Commission has been granted broad authority related to all projects of national importance to France.²¹⁹ Perhaps most importantly, the Commission has the authority to classify monuments and buildings as historic and maintain buildings already classified as historic.²²⁰ The process for classifying monuments as historic is outlined in Book VI of the Heritage Code.²²¹ There are two main types of monuments that are immediately classified as historic: immovable objects that have been the subject of past decrees and orders and

heritage. This most recent reauthorization consolidated three older national preservation organizations into the Commission: the National Commission for Historic Monuments; the National Council for Safeguarded Areas; and the National Parks and Gardens Council. See MINISTRY OF CULTURE, *Historic Monuments and Remarkable Heritage Sites* (Sept. 1, 2018) <http://www.culture.gouv.fr/Thematiques/Monuments-historiques-Sites-patrimoniaux-remarquables/Acteurs-et-partenariats/Commissions/Commission-nationale-du-patrimoine-et-de-l-architecture>; The Historical Monuments Service, <http://www.compagnie-acmh.fr/historique/commission-superieure/> (Sept. 1, 2018); Wendy Hills, Mary Brush, Tina Roach, *Preservation in France: Reflections from Three Hunt Fellows*, FORUM JOURNAL, Fall 2013, at 23, 24.

²¹⁶ MINISTRY OF CULTURE, *Historic Monuments and Remarkable Heritage Sites* (Sept. 1, 2018) <http://www.culture.gouv.fr/Thematiques/Monuments-historiques-Sites-patrimoniaux-remarquables/Acteurs-et-partenariats/Commissions/Commission-nationale-du-patrimoine-et-de-l-architecture>.

²¹⁷ *Id.*

²¹⁸ Hills, *supra* note 137, at 24–25.

²¹⁹ *Id.*

²²⁰ Hills, *supra* note 137, at 24–25.

²²¹ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-1–621-6 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

properties appearing on a prior list of historic sites initially promulgated on April 18, 1914.²²²

Potentially historic sites may be classified through one of two processes.²²³ First, the Commission itself, through one of its subsections, may recommend a site or building be designated as a historic resource.²²⁴ This subsection recommendation is then referred to the Commission as a whole for approval depending on the strength of the recommendation from the subsection.²²⁵ Once the recommendation is received by the Commission, the Commission deliberates and votes on the recommendation for classification.²²⁶ If a potential site is located within the jurisdiction of one of the territorial commissions, then the Commission will take into account the opinion of the territorial commission before deciding on whether to classify the site as a historic monument.²²⁷ However, if a potential site is privately owned, the Commission can classify the site as historic regardless of the consent of the owner.²²⁸ The private owner is allowed to seek indemnification for the involuntary classification and will still be allowed to access the site provided that access does not result in damage to the site.²²⁹

²²² CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-3 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

²²³ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-1–621-6 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

²²⁴ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-4 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-5 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

²²⁸ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-6 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

²²⁹ *Id.*

The second, and more typical process of classifying a building or site as historic begins at the local level.²³⁰ Each year, the Commission receives numerous applications requesting that specific historic buildings or sites be preserved.²³¹ The owner or lessee of a historic property, or “any person having an interest in the historic property” can submit a preservation application to the Commission.²³² The Commission has interpreted “any person having an interest in the historic property” broadly to include heritage associations and local authorities seeking to protect a historic building in their municipality.²³³ The preservation application is first sent to the *Service D’Architecture et Patrimoine* (SDAP), the local preservation planning office for a city, who will initially evaluate the application, often in conjunction with its regional counterparts.²³⁴ After the local authorities evaluate an application, they issue an advisory opinion either supporting or opposing the application to the Regional Prefect for Buildings. The Regional Prefect may then either refuse the application or recommend the application to the Minister of Culture.²³⁵ The ultimate decision whether to accept or deny the application is made by the Minister of Culture, acting through the Commission.²³⁶ If the application is accepted, the Commission will begin preservation on the site by working with local authorities, such as the Chief Architect for a region and SDAP.²³⁷ Together, the Commission and local authorities create a preservation plan for the historic building and implement it throughout the life of the project.

Once a building has been classified as historic, a panoply of protective measures immediately insulates the historic building from degradation. First, the building may not be removed or destroyed, and the Commission will enforce a 500-meter protective radius around the building.²³⁸ Furthermore, any new construction,

²³⁰ MINISTRY OF CULTURE, *Protect an object, a building, a space* (Sept. 1, 2018) <http://www.culture.gouv.fr/Thematiques/Monuments-historiques-Sites-patrimoniaux-remarquables/Proteger-un-objet-un-immeuble-un-espace>

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*; Hills, *supra* note 137, at 24–25.

²³⁸ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-9 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

restorative work or building modifications made within this 500-meter radius must be approved by the Commission prior to commencement.²³⁹ Easements are also prohibited unless explicitly approved by the Commission.²⁴⁰ And the Commission may send notices to owners of historic properties to begin restoration work on historic buildings that are seriously degraded.²⁴¹ To ensure compliance, the Commission works with local authorities located in the same city as the historic building or monument.²⁴² Thus, French preservation of historic buildings operates in similar manner to the protection of French archaeological heritage—through a highly centralized national organization with local involvement largely circumscribed by the authority of the national government.

C. Case Studies in France

1. Marseille

Marseille, a 2,500-year-old coastal city in southern France, offers a unique example of the Heritage Code in practice because of the city's storied history and location on the Mediterranean.²⁴³ Further, Marseille is frequently the site of significant archaeological operations that are the focus of national attention in France.²⁴⁴ The high concentration of archaeological sites in Marseille has led to tension between attempts to preserve archaeological heritage and urban development projects.²⁴⁵

In 2017 the discovery of an ancient Greek rock quarry in Marseille's 7th arrondissement during urban redevelopment triggered a vigorous debate over how

²³⁹ *Id.*

²⁴⁰ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-16 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ John N. Tuppen, Robin Caron Buss, Blake Ehrlich, *Marseille*, ENCYCLOPEDIA BRITANNICA (Nov. 2, 2017), <https://www.britannica.com/place/Marseille>.

²⁴⁴ PROVENCE-ALPS-COTE D'AZUR REGIONAL SERVICE OF ARCHAEOLOGY, *supra* note 78 (listing 12 archeological operations within Marseille during 2016 alone).

²⁴⁵ Tasos Kokkinids, *Ancient Greek Quarry in Marseille 'Partly Classified' as Historic Monument*, NEWS NETWORK ARCHAEOLOGY (Aug. 2, 2017), <https://archaeologynewsnetwork.blogspot.com/2017/08/ancient-greek-quarry-in-marseille.html#w6yXgDKPIbcewWi5.97> (“There should be a balance between the necessary preservation of cultural heritage and development that it is not vital...”).

best to protect coastal archaeological heritage.²⁴⁶ The ancient quarry, located on Boulevard de la Corderie, was discovered by construction crews working for the Vinci Group, the world's largest construction company, during the early stages of construction on a residential apartment building.²⁴⁷ Originally, Vinci was going to continue construction on the site before the national government intervened.²⁴⁸ When the ancient site was discovered, the public quickly mobilized and demanded that the construction stop.²⁴⁹ The public backlash against continued work on the site prompted a review and a report by the Provence-Alps-Cote d'Azur Regional Authority.²⁵⁰ After receiving the opinion of the regional authority, Françoise Nyssen, the Minister of Culture, ordered that part of the ancient quarry be classified as a historic monument and protected with a heritage easement to allow unfettered, permanent public access.²⁵¹ The study and excavation of this ancient Greek rock quarry was carried out by INRAP.²⁵²

The events surrounding the rock quarry mirror the process outlined in the sections of the Book V that govern national and local authority over preventive archaeology.²⁵³ The public organized and appealed to the regional authority for

²⁴⁶ AFP Agency, *Threatened with demolition, a Greek quarry will be partly classified*, LE FIGARO IMMOBILIER (Aug. 1, 2017), http://immobilier.lefigaro.fr/article/menacee-de-demolition-une-carriere-grecque-sera-en-partie-classee_24a23ae8-7698-11e7-a6ae-f9e93f9c55d4/; Laetitia Gentili & Olga Bibiloni, *The protection of the ancient quarry confirmed*, LA PROVENCE.COM (July 29, 2017), <http://www.laprovence.com/article/societe/4558719/marseille-corderie-la-protection-de-la-carriere-antique-confirnee.html>; Alexandra Del Peral & Beatrix Baconnier Martin, *In Marseille, a Greek quarry partially classified after the mobilization of the inhabitants*, COURRIER PICARD (Aug. 1, 2017), <http://www.courrier-picard.fr/47157/article/2017-08-01/marseille-une-carriere-grecque-en-partie-classee-apres-la-mobilisation-des#>.

²⁴⁷ INRAP, *The Stones That Built Massalia* (Aug. 16, 2017), <http://www.inrap.fr/la-pierre-qui-batit-massalia-12979>; VINCI, Annual Report (2016) available at: <https://www.vinci.com/publi/vinci/2016-Fact-sheet.pdf>.

²⁴⁸ Kokkinids, *supra* note 167.

²⁴⁹ Gentili & Bibiloni, *supra* note 168 (“Resident’s, CIQ, associations..., already mobilized against the building project for reasons of population density in the neighborhood, had seized [the discovery] to request safeguarding of this historic site.”).

²⁵⁰ AFP Agency, *supra* note 168.

²⁵¹ *Id.* 650 by 6,500m² will be protected with the rest reverting back to its original construction purpose. *Id.*

²⁵² *Id.*

²⁵³ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-7–522-8 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=6675B3C1E4A704234B6CF91F5F86D761.tplgfr30s_1?idSectionTA=LEGISCTA000006177310&cidTexte=LEGITEXT000006074236&dateTexte=20171026; CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-1–522-6 (Fr.). Available at:

intervention in the site; the regional authority conducted a review with a report and sent it to the national government; the national government issued a decision with the advice of the regional authority.²⁵⁴

2. *Le Havre*

Le Havre offers another example of coastal cultural heritage preservation at work in France. This ancient city is located on the northern coast of France along the English Channel.²⁵⁵ Le Havre has been an important port for France since at least the 14th century, when the French fleet was massed there in June 1346 to prevent the naval assault of England's King Edward III in his claim for the French throne during the Hundred Years War.²⁵⁶ Furthermore, Le Havre was a haven for Protestant Huguenots during the 16th century wars of religion in France.²⁵⁷ Such extensive history makes Le Havre a hotbed for archaeological research, as the city and its port have been the location of several important events in French and European history.²⁵⁸

During World War II, Le Havre suffered severe damage because of extensive bombing in the Battle of Normandy.²⁵⁹ Auguste Perret, the renowned French architect, rebuilt the city along with his team from 1945 to 1964.²⁶⁰ The city was rebuilt in a modernist style that drew significant attention and acclaim.²⁶¹ Perret's success in rebuilding the city was celebrated throughout France, and in 2005 the city was placed on the UNESCO World Heritage List.²⁶² The core zone

https://www.legifrance.gouv.fr/affichCode.do?jsessionid=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

²⁵⁴ AFP Agency, *supra* note 168.

²⁵⁵ ICOMOS, *Evaluation of Le Havre*, No. 1181, Jan. 22, 2004.

²⁵⁶ GRAHAM CUSHWAY, *EDWARD III AND THE WAR AT SEA 1327–1377* 124 (Matthew Bennet eds. 2011).

²⁵⁷ Daniel Ringle, "The Effects of Huguenot Settlements Upon the French Colonial Empire," Unpublished Masters Thesis at the Utah State University, (1971), pp. 32-33.

²⁵⁸ ICOMOS, *supra* note 177.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ UNESCO, *Le Havre* (Apr. 12, 2018), <http://unesco.lehavre.fr/en/discover/world-heritage>.

²⁶² *Id.*

of the World Heritage site is 133 hectares of urban space that includes administrative, commercial, and cultural buildings.²⁶³

To protect its built heritage, Le Havre created a special type of heritage easement called the “*Zone de protection du patrimoine architectural, urbain et paysager*,” which covered the entire city, including the port.²⁶⁴ This *Zone de Protection* regulated building type and density, general land use, and mandated that building permits comply with the requirements of the easement and provide verification of having done so.²⁶⁵ Although the *Zone de Protection* has been recently replaced by the Heritage Easement in the French Heritage Code which protects the same values, Le Havre’s innovative use of heritage easements has ensured the protection and preservation of its coastal heritage sites and may fruitfully be applied in other historic coastal towns in France.

3. Bordeaux

Bordeaux’s “Port of the Moon” (*Le Port de la Lune*) is another coastal urban heritage site whose preservation strategy is important to analyze. Bordeaux is an ancient port city located on the Garonne River, approximately 100km from the Atlantic Ocean.²⁶⁶ The city was founded by Gallic tribes, and it became a commercial center after the Roman conquest in 56 B.C.²⁶⁷ Bordeaux’s commercial rise was spurred by its natural geography, being situated at the bend of the Garonne River which formed a protected natural harbor.²⁶⁸ Over time, this crescent-shaped port came to be called *Le Port de la Lune* or the “Port of the Moon.”²⁶⁹ Bordeaux’s location allowed it to effectively foster commercial relationships with Britain and the Low Lands.²⁷⁰ The city is also home to a number of monasteries and

²⁶³ ICOMOS, *Evaluation of Le Havre*, No. 1181, Jan. 22, 2004.

²⁶⁴ *Id.* The *Zone de protection du patrimoine architectural, urbain et paysager* was later replaced by the Heritage Easement. CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 642–1 (Fr). Available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022493350&cidTexte=LEGITEXT000006074236&dateTexte=20100907&oldAction=rechCodeArticle>.

²⁶⁵ *Id.*

²⁶⁶ ICOMOS, *Evaluation of Bordeaux*, No. 1256, 146–47, Jan. 21, 2007.

²⁶⁷ *Id.* at 147.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

churches.²⁷¹ Bordeaux has the largest number of protected buildings in France after Paris.²⁷²

Bordeaux has maintained its status as a center of commerce throughout its history, even during the World Wars in the 20th century.²⁷³ The Port of the Moon has retained its original integrity, and the port was at the center of France’s World Heritage nomination for the city.²⁷⁴ Importantly, the International Council on Monuments and Sites (“ICOMOS”)—a “non-governmental organization dedicated to the conservation of the world’s monuments and sites”²⁷⁵—concluded that Bordeaux more effectively preserved the unity of the port when compared with other port cities such as Marseille.²⁷⁶ Bordeaux is able to achieve such stability with thorough planning of all the factors that might affect the integrity of the city.²⁷⁷ The city developed RAMSES, a “comprehensive defence system” that is able to anticipate rain storms and flooding moving in from the Atlantic.²⁷⁸ Additionally, through participation in a number of scientific studies on climate change and urbanization, the city hopes to mitigate risks from potential flooding and plans to ameliorate the rapid urbanization of the city.²⁷⁹

Bordeaux also employs sophisticated planning mechanisms to adequately protect its historic city and port from harmful activities, such as vehicular traffic, that might deteriorate the integrity of the heritage sites.²⁸⁰ The city uses four main plans to protect its heritage: (1) the land use plan, (2) the local town plan, (3) the global project for urban renewal, and (4) the plan for urban transportation development.²⁸¹ In addition to Bordeaux’s own plans, the Ministry of Culture has created a plan for Bordeaux through the Departmental Section on Architecture and

²⁷¹ *Id.*

²⁷² *Id.* at 151.

²⁷³ ICOMOS, *Evaluation of Bordeaux*, No. 1256, 148, Jan. 21, 2007.

²⁷⁴ *Id.*

²⁷⁵ ICOMOS, <https://www.icomos.org/en/> (last visited Apr. 2, 2018).

²⁷⁶ *Id.* (“There is no other port city in France (including Rouen, Nantes, Marseille) which has respected its urban and architectural unity over two and a half centuries like Bordeaux.”).

²⁷⁷ *Id.* at 148–49.

²⁷⁸ ICOMOS, *Evaluation of Bordeaux*, No. 1256, 150, Jan. 21, 2007.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 151.

²⁸¹ *Id.*

Heritage.²⁸² These two plans led the city and the Ministry of Culture to form a partnership that manages the city's historic sites.²⁸³

The World Heritage management plan of the city has four goals: “preserving the historic and heritage character, allowing the controlled evolution of the historic centre, unifying various planning rules and contributing to the international significance of metropolitan Bordeaux.”²⁸⁴ Bordeaux utilizes several organizations, along with the national government, to achieve its preservation goals.²⁸⁵ These organizations include Recollections of Bordeaux, Cap Archéo, and Grand Saint Michael Promotion.²⁸⁶ These organizations are locally organized and help protect and promote the city's heritage through local community involvement.²⁸⁷ Bordeaux's use of comprehensive plans and partnerships with various organizations is a model that may be useful for other coastal areas to emulate.

IV. COASTAL CULTURAL HERITAGE PROTECTIONS IN THE UNITED KINGDOM

A. *Historic England and National Cultural Heritage Legislation*

In the United Kingdom, coastal cultural heritage is protected by a raft of statutes that are implemented at various governmental and geographic levels. The Historic Buildings and Monuments Commission for England (commonly called Historic England) is the governmental body charged with the preservation of archaeological sites and buildings related to cultural heritage in the United Kingdom.²⁸⁸ Historic England is an executive public body of the British Government and operates within the Department for Digital, Culture, Media, and Sport.²⁸⁹ Historic England's mission statement is: “We champion and protect

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ ICOMOS, *Evaluation of Bordeaux*, No. 1256, 152, Jan. 21, 2007.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Historic England* (November 1, 2017), <https://historicengland.org.uk/>. The body received its original mandate under the National Heritage Act of 1983, and was known as English Heritage for its first fifteen years of existence. On April 1, 2015, the department was rebranded as Historic England. Historic England is comprised of a chairman and up to fourteen other board members, all appointed by the Prime Minister. Board members must be “persons who have knowledge, experience, or interests relevant to the purposes for which the Fund may be applied,” and must be “connected by residence or otherwise with England, Wales, Scotland, or Northern Ireland.”

²⁸⁹ *Department for Digital, Culture, Media & Sport* (November 7, 2017), <https://www.gov.uk/government/organisations/department-for-culture-media-sport>

historic places, helping people understand, value and care for them.”²⁹⁰ Historic England operates within a framework of national legislation that delineates its rights and responsibilities.

1. Ancient Monuments and Archaeological Areas Act

The Ancient Monuments and Archaeological Areas Act (1979) is one of the most important pieces of national legislation for preserving cultural heritage in the United Kingdom. The Act “make[s] provision for the investigation, preservation and recording of matters of archaeological or historical interest and (in connection therewith) for the regulation of operations or activities affecting such matters.”²⁹¹ Importantly for coastal preservation, the jurisdiction of the Act extends to “any monument situated in, on or under the seabed within the seaward limits of the United Kingdom territorial waters adjacent to England.”²⁹²

The process of “scheduling” (listing) monuments lies at the heart of the Act.²⁹³ The Act reserves to the Secretary of State for the Department of Digital, Culture, Media & Sport (Secretary) the power to decide what areas qualify for scheduling. In order to assist British citizens in determining what may be eligible for scheduling, Historic England offers 18 thematically arranged guides for download on its website.²⁹⁴ Each guide includes detailed descriptions of the factors relevant to scheduling a site within a given category, literature on the current understanding of the history and development of scheduled sites, and how many sites of a given category are currently scheduled. While the criteria for scheduling vary from category to category, the Secretary has laid down “Principles of Selection” that are generally used when deciding whether a site deserves legal

²⁹⁰ *Historic England* (November 1, 2017), <https://historicengland.org.uk/>

²⁹¹ *Ancient Monuments and Archaeological Areas Act*, 1979, c. 46 (Eng.)

²⁹² *Id.*

²⁹³ Scheduling has been at the fore of historic preservation in the United Kingdom since 1913, but its roots can be traced back to the 1882 Ancient Monuments Protection Act.²⁹³ While the earliest version of scheduling preservation focused almost exclusively on prehistoric monuments, its’ modern counterpart includes over 200 categories of monuments - ranging from “prehistoric standing stones and burial mounds, through to the many types of medieval sites— castles, monasteries, abandoned farmsteads and villages—to the more recent results of human activity, such as collieries.” See *Scheduled Monuments* (November 9, 2017)

<https://historicengland.org.uk/listing/what-is-designation/scheduled-monuments/>

²⁹⁴ The scheduling guides currently provided by Historic England cover the following categories of sites: Law and Government; Transport Sites; Commemorative and Funerary; Sites of Health and Welfare; Gardens; Places of Learning; Culture, Entertainment and Sport; Utilities; Commercial Sites; Religion and Ritual pre-AD 410; Sites of Early Human Activity; Agriculture; Pre-1500 Military Sites; Religion and Ritual post-AD 410; Maritime and Naval; Industrial Sites; Military Sites post-1500; and Settlement Sites to 1500.

protection. These include: period, rarity, documentation/finds, group value, survival/condition, fragility/vulnerability, diversity, and potential. The Secretary is prohibited from taking any other factors into account when scheduling a monument or site.²⁹⁵

Once the Secretary has indicated that a site or monument is to be scheduled, he must inform the owner and any local authority where the monument is situated.²⁹⁶ Once a monument or site is scheduled, the Act provides that anyone who “executes or causes or permits to be executed” any work in the area “shall be guilty of an offence.”²⁹⁷ To avoid these penalties, the Act requires written consent in the form of a conditional or unconditional permit from the Secretary before any work may be performed.²⁹⁸ Conditional permits often have a requirement that either the Secretary or someone authorized by him have an “opportunity to examine the monument and its site” and to “carry out any excavations” which they determine to be “desirable for the purpose of archaeological investigation.”²⁹⁹

2. *Treasure Act*

A second vital piece of national legislation relating to Historic England’s work is the Treasure Act (1996).³⁰⁰ The Act has particular relevance to metallic archaeological artifacts unearthed by metal detectorists, development, or coastal erosion in coastal areas. The Treasure Act defines treasure as:

any object at least 300 years old when found which - (i) is not a coin but has metallic content of which at least 10 percent by weight is precious metal; (ii) when found, is one of at least two coins in the same find which are at least 300 years old at that time and have that percentage of precious metal; or (iii) when found, is one of at least ten coins in the same find which are at least 300 years old at the time.

The Treasure Act also describes the procedures a private citizen must follow if they find something of cultural significance. Upon discovery of a suspected artifact, a citizen is required to report that fact to their local county coroner within fourteen days. The fourteen day ‘clock’ starts either from the date the individual

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Ancient Monuments and Archaeological Areas Act, 1979, c. 46 (Eng.)*

³⁰⁰ *Treasure Act, 1996, c.24 (Eng.)*

found the artifact, or if the finder did not realize immediately that the item was significant, from the time they realized it may possess significance. If the coroner determines that the item constitutes treasure, the finder must offer the item for sale at a price determined by the Treasure Valuation Committee (TVC),³⁰¹ an advisory non-departmental public body comprised of independent antiques or coin experts as well as a representative from the metal-detecting community.³⁰²

A finder may only retain the found item if a museum either 1) expresses no interest in the piece or 2) is unable to purchase the item for another reason. Otherwise, a museum will pay full market value for the item with the proceeds being split 50/50 between the finder and the owner of the land where the item was found.³⁰³ Finders who do not report to their local coroners or who fail to turn over the item after it is labeled ‘treasure,’ face criminal prosecution under the Act – which may result in imprisonment of up to three months, a fine, or both.³⁰⁴

3. *Protection of Wrecks Act*

The Protection of Wrecks Act 1973 (Wrecks Act) is another important piece of legislation relating to cultural heritage items in coastal areas. The Wrecks Act lists known historic wrecks, their locations, significance, and prescribes criminal penalties for interfering with a designated wreck site without a license.³⁰⁵ Historic England has interpreted the reach of the Wrecks Act as follows: “Designated sites are identified as being likely to contain the remains of a vessel, or its contents, which are of historical, artistic or archaeological importance.”³⁰⁶ Sites that are far off-shore are generally marked with a yellow buoy, labeled “protected wreck.”³⁰⁷

³⁰¹ *The Portable Antiquities Scheme* (November 9, 2017), <https://finds.org.uk/>.

³⁰² *Treasure Valuation Committee* (January 10, 2018), <https://www.gov.uk/government/organisations/treasure-valuation-committee> This role is currently held by Trevor Austin, the General Secretary of the National Council for Metal Detecting. The TVC holds its meetings at the Museum of London Archaeology, even though the two organizations are not officially affiliated with one another.

³⁰³ *The British Museum*, (January 10, 2018), <http://www.britishmuseum.org/about-us/news-and-press/press-releases/2011/archaeological-finds-report.aspx>

³⁰⁴ Section 3 of Part 8 provides: Any person who fails to comply with sub-section (1) – the section requiring notification of the local coroner - is guilty of an offence and liable on summary conviction to - (a) imprisonment for a term not exceeding three months; (b) a fine of an amount not exceeding level 5 on the standard scale; or (c) both.³⁰⁴

³⁰⁵ *Protection of Wrecks Act*, 1973, c. 33 (Eng.)

³⁰⁶ <https://historicengland.org.uk/advice/planning/consents/protected-wreck-sites/>

³⁰⁷ *Protected Wreck Sites* (November 9, 2017), <https://historicengland.org.uk/advice/planning/consents/protected-wreck-sites/>

Sites closer to shore often have notices posted on land. Under the Act the Secretary has the power to declare an area around a wreck prohibited on the basis of its potential danger to “life or property.” Diving and other recreational activities are strictly prohibited in these areas.³⁰⁸ The Wrecks Act is vital to coastal preservation in the United Kingdom given the “combination of historically high volumes of shipping traffic and a long history of sea-faring and frequent rough seas” around the British Isles. To date, Historic England has archived approximately 40,000 wreck sites, documented losses, and seabed archaeological features. The process of archiving these sites may be only beginning given the fact that “the density of shipwrecks in United Kingdom Territorial Waters is likely to be amongst the highest in the world.”³⁰⁹

If a wreck is of a military ship or aircraft however, it will instead be governed by the Protection of Military Remains Act of 1986 (“PMRA”).³¹⁰ PMRA’s preamble states that its purpose is “to secure the protection from unauthorised interference of the remains of military aircraft and vessels that have crashed, sunk or been stranded and of associated human remains; and for connected purposes.”³¹¹ The PMRA is both retroactive and forward-looking, applying to all crashes and wrecks that occurred prior to its passing as well as to any future crashes or wrecks within the United Kingdom.³¹² The Act is administered by the Ministry of Defence and divides protected areas into two categories: controlled sites and protected places. Currently twelve wrecks are listed as controlled sites, meaning that diving in the area is strictly prohibited. Seventy-nine wrecks are currently designated as protected places, meaning that divers are permitted in the area but face criminal consequences for disturbing the wreckage.³¹³

4. Dealing in Cultural Objects (Offences) Act

³⁰⁸ *Protection of Wrecks Act*, 1973, c. 33 (Eng.)

³⁰⁹ *Protected Wrecks* (November 10, 2017), <https://historicengland.org.uk/advice/hpg/has/protectedwrecks/>

³¹⁰ *The Protection of Military Remains Act*, 1986, c. 35 (Eng.)

³¹¹ *Id.*

³¹² It is not necessary that the Secretary of State confirm the presence of human remains on the vessel, he need only verify that the area contains a vessel which “appears to him to have sunk or been stranded while in military service” in the case of a ship. In the case of an aircraft, the Act empowers the Secretary to “designate as a controlled site any area. . . which appears to him to contain a place containing the remains of, or of a substantial part of, an aircraft” to which the Act applies.

³¹³ *Navy News* (November 10, 2017), <https://navynews.co.uk/>

A final piece of national legislation relevant to Historic England's preservation of England's coastal cultural heritage is the Dealing in Cultural Objects (Offences) Act 2003. The Act's preamble states that it provides "for an offence of acquiring, disposing of, importing or exporting tainted cultural objects, or agreeing or arranging to do so; and for connected purposes."³¹⁴ An object is defined as 'tainted' if it was "removed from a building or structure of historical, architectural, or archaeological interest where the object has as at any time formed part of the building or structure" or if it was "removed from a monument of such interest," and "the removal or excavation constitutes an offence."³¹⁵ A person is guilty of an offence under the act if he "dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted."³¹⁶ It is immaterial whether the potential offender knows that the object is a cultural object, he need only believe that the object is tainted to be liable. The Act defines 'deals in' as acquiring, disposing of, importing or exporting the object or agreeing with another person to do any of these things. A person convicted under the Act faces one of two criminal penalties: (a) on conviction from an indictment, to imprisonment not exceeding seven years or a fine (or both); (b) on summary conviction, to imprisonment not exceeding six months or a fine not exceeding the statutory maximum (or both).³¹⁷

B. National Planning Policy Framework and Local Development

In conjunction with the statutes discussed above, the National Planning Policy Framework ("NPPF") serves as the touchstone for all types of development in the United Kingdom, including that which may threaten coastal cultural heritage. The central theme in the NPPF is the "presumption in favour of sustainable development," a policy it sets out in twelve core land-use planning principles.³¹⁸

³¹⁴ *Dealing in Cultural Objects (Offences) Act*, 2003, c. 27 (Eng.)

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Dealing in Cultural Objects (Offences) Act*, 2003, c. 27 (Eng.)

³¹⁸ *Planning System* (November 10, 2017)

<https://historicengland.org.uk/advice/planning/planning-system/> The 12 core principles are that planning should: 1) Be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency; 2) not simply be about scrutiny, but instead be a creative exercise in finding ways to enhance and improve the places in which people live their lives; 3) proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider

The NPPF covers planning issues related to: the economy, town centres, the rural economy, sustainable transport, communications infrastructure, housing, design, healthy communities, green belt, climate change, the natural environment, the historic environment, minerals, plan-making, and decision-taking.³¹⁹ Before any potential project that may threaten a protected archaeological area or feature may begin, it must be evaluated by the Planning Inspectorate, an executive agency under the Ministry of Housing, Communities & Local Government that handles “planning appeals, national infrastructure planning applications, examinations of local plans and other planning-related and specialist casework in England and Wales.”³²⁰ The cost of the inspection is born by the developer.³²¹

The NPPF places special emphasis on Local Plans as a means of achieving its overall goals.³²² The NPPF provides detailed guidelines on how local

opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities; 4) always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings; 5) take account of the different roles and character of different areas, promoting the vitality of our main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it; 6) support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change, and encourage the reuse of existing resources, including conversion of existing buildings, and encourage the use of renewable resources (for example, by the development of renewable energy); 7) contribute to conserving and enhancing the natural environment and reducing pollution. Allocations of land for development should prefer land of lesser environmental value, where consistent with other policies in this Framework; 8) encourage the effective use of land by reusing land that has been previously developed (brownfield land), provided that it is not of high environmental value; 9) promote mixed use developments, and encourage multiple benefits from the use of land in urban and rural areas, recognising that some open land can perform many functions (such as for wildlife, recreation, flood risk mitigation, carbon storage, or food production); 10) conserve heritage assets in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of this and future generations; 11) actively manage patterns of growth to make the fullest possible use of public transport, walking and cycling, and focus significant development in locations which are or can be made sustainable; and 12) take account of and support local strategies to improve health, social and cultural wellbeing for all, and deliver sufficient community and cultural facilities and services to meet local needs.

³¹⁹ *Planning Help* (November 10, 2017) <https://planninghelp.cpre.org.uk/planning-explained/national-planning/national-planning-policy-framework>

³²⁰ Planning Inspectorate, *What we do* (April 17, 2018) <https://www.gov.uk/government/organisations/planning-inspectorate>

³²¹ Milne, Gustav (personal communication, October 17, 2017).

³²² The opening remarks of the NPPF make clear that the Framework’s three core goals of achieving better economic, social, and environmental outcomes with all planning in the U.K.

commissions should work to “set out a vision and a framework for the future development of the area, addressing needs and opportunities in relation to housing, the economy, community facilities and infrastructure—as well as a basis for safeguarding the environment, adapting to climate change and securing good design.”³²³ Local plans are expected to be kept up to date and are used as the starting point when Historic England considers a local planning commission’s application for potential projects. In creating a Local Plan, planning authorities are encouraged to consider potential future needs in the area and to do so with an eye toward long-term sustainable development. The NPPF requires that local commissions carry out a Sustainability Appraisal—a set of guidelines promulgated in the Planning and Compulsory Purchase Act of 2004.³²⁴ After completing the Appraisal, local planning authorities are required to publicize the complete Local Plan before submitting it to the Planning Inspectorate. This ‘publication stage’ allows for local individuals and organizations to come forward and have their concerns heard before the plan is considered by the national government.³²⁵ Further, local commissions are encouraged, though not required, to publish a Local Development Scheme on the commission’s website.

The next part of the process requires the local commission to forward the Local Plan, along with the required supporting documents, to the Planning Inspectorate for examination. The Planning Inspectorate ensures that the necessary legal requirements have been met and works proactively with the local planning authority to ensure that development proceeds while respecting the overall goals contemplated by the NPPF. The Inspector is not expected to suggest modifications to the overall plan unless he is asked to do so by the local planning committee. Once the Local Plan is approved, development may go forward. If the Inspector denies the current plan, the old Local Plan will remain in effect until authorities are able to prepare a new document for submission.

would not be possible without the work done by local planning commissions. “The National Planning Policy Framework sets out the Government’s planning policies for England and how these are expected to be applied. It sets out the Government’s requirements for the planning system only to the extent that it is relevant, proportionate and necessary to do so. It provides a framework within which local people and their accountable councils can produce their own distinctive local and neighbourhood plans, which reflect the needs and priorities of their communities.” National Planning Policy Framework, Department for Communities and Local Government, March 2012.

³²³ *National Planning Policy Framework (NPPF) and Heritage Assets* (November 9, 2017) <https://historicengland.org.uk/advice/hpg/decisionmaking/NPPF/>

³²⁴ *Planning and Compulsory Purchase Act*, 2004, c. 5 (Eng.)

³²⁵ *Guidance, Local Plans* (November 12, 2017) <https://www.gov.uk/guidance/local-plans--2#local-plans-key-issues>

C. Case Studies in the United Kingdom

To better understand how Historic England and the NPPF preserve British heritage in coastal urban areas, we now consider several case studies.

1. Cornish Ports and Harbours Project

The Cornish Ports and Harbours Project was prepared by the Cornwall Archaeological Unit for Historic England. The project “aimed to establish effective methodologies for assessing the fabric, significance and character of English ports and harbours by using a study of those in Cornwall and the Isles of Scilly as a pilot.”³²⁶ The report, prepared over four years, culminated in a Historic Environment Action Plan, management recommendations both for the area and for similarly situated areas across the U.K., and a list of sites and features within ports that are candidates for scheduling.

The project itself was carried out in four stages. In the first stage, the research group carried out a wide-ranging assessment of the ports, investigating previous work done in the areas as well as potential forces for change—both natural and man-made. The researchers classified the areas according to Historic England’s Conservation Principles—choosing to focus on the sites deemed most at risk and most likely to benefit from changes in development principles. Finally, fifteen sites were chosen for individual study.³²⁷

The second stage of the project involved more detailed study of the fifteen sites selected in the first stage. The group was able to create three ‘time-slices’ of each site using the following materials: photographs taken by the Royal Air Force in the 1940s, OS mapping software which was used to create an accurate image of the topography of the areas in the first decade of the 20th century, and tithe maps from the 1840s.³²⁸

The third stage involved summarizing the methodology used so that it could be replicated by researchers in other localities. The researchers also compiled their work into a Historic Environment Action Plan and created a PowerPoint for use by

³²⁶ Johns, Charles and Fleming, Fiona: *Cornish Ports and Harbours Report*, 2017.

³²⁷ Historic England’s Conservation Principles are: 1) The historic environment is a shared resource; 2) Everyone should be able to participate in sustaining the historic environment; 3) Understanding the significance of places is vital; 4) Significant places should be managed to sustain their values; 5) Decisions about change must be reasonable, transparent and consistent; 6) Documenting and learning from decisions is essential. (Historic England: *Conservation Principles, Policies and Guidance*).

³²⁸ Johns, Charles and Fleming, Fiona: *Cornish Ports and Harbours Report*, 2017.

local planning authorities as they continue to develop and re-develop urban coastal areas.

The fourth and final stage of the project involved setting out “reasonable and realistic routes towards increased protection.”³²⁹ Importantly, the project report points out that “the main generic issue affecting [coastal areas] is climate change, increased storminess, and extreme weather events resulting in loss of sand and possible exposure and degradation of archaeological features and deposits.”³³⁰ To alleviate some of these concerns, the project report recommended that “beaches be monitored at least once a year to assess the effects of coastal erosion,”³³¹ and that local planning authorities consider those effects when creating development plans. The group also compiled a list of other areas they viewed as good candidates for consideration by Historic England’s Designation Department. Finally, the group created a series of key management recommendations that have been drawn up as a separate, publicly available document for use at the local level.³³²

2. *Rapid Coastal Zone Assessment for South-West England*

In an effort to aid the conservation of heritage assets in coastal areas, Historic England has commissioned a series of projects known as rapid coastal zone assessments (RCZA).³³³ The predecessor of the RCZA projects was known as the Hullbridge Survey and took place only in Essex. The surveyors that worked on the Hullbridge Survey “literally walked . . . around most of the coast of Essex – recording sites and undertaking small-scale excavation.”³³⁴ While the primary purpose of these early surveys was to find and record artifacts, “advances in technology, but perhaps more importantly in terms of the perception of what the historic environment comprises, and what should be done about threatened sites, have meant that more recent surveys and subsequent studies have been very different.”³³⁵ Modern RCZAs apply Historic England’s “basic principles of technical feasibility, long-term sustainability, and cost effectiveness” to develop

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² https://archaeologydataservice.ac.uk/archives/view/cornish_ports_harbours_2017.

³³³ *Coastal Change* (January 16, 2018) <https://historicengland.org.uk/advice/planning/marine-planning/rczas-reports/>

³³⁴ Murphy, Peter. *England's Coastal Heritage*. Swindon, English Heritage, 2014.

³³⁵ *Id.*

“schemes to protect the historic environment, or to mitigate unavoidable damage.”³³⁶

One such RCZA, aimed at the coast of Dorset in South-West England, was a collaborative effort between the Cornwall Council and Bournemouth University in February 2015. This RCZA was divided into two distinct phases and addressed eleven different geographic “zones” within the study area, with each zone being demarcated using landmarks.³³⁷ Phase 1 consisted of a desk-based assessment, in which researchers assessed available data and studies “on the character of the historic environment within the project area, and potential threats to heritage assets.”³³⁸ For example, the western part of the Dorset and East Devon Coast—known as the Jurassic Coast—is a UNESCO World Heritage Site, meaning that any potential threats to that area needed to be carefully considered.³³⁹

Phase 2 “prioritizes areas where heritage assets may be most at risk.”³⁴⁰ The aim of this second phase is to provide a “broad assessment of the likely archaeological potential and vulnerability” of particular historic resources and to enhance “public understanding and enjoyment of the coastal heritage.”³⁴¹ Researchers consulted historical archives on the area’s natural environment, including “studies of paleogeography and coastal change, historic map regression studies and specific studies of the coastal historic environment in the study area.”³⁴² This information was paired with more contemporary sources of information, including “contact with local individuals, societies and organizations concerning . . . archaeological remains,” as well as “aerial photographic transcriptions” and “local authority maritime archaeological databases.”³⁴³

Researchers then undertook an extensive, traditional, boots-on-the-ground survey of the landscape within each zone. The information gleaned at this stage was compared with historical archives to better understand the processes shaping the

³³⁶ *Coastal Change* (January 16, 2018) <https://historicengland.org.uk/advice/planning/marine-planning/rczas-reports/>

³³⁷ Charles Johns, Graeme Kirkham, Tom Cousins and Dave Parham: Rapid Coastal Zone Assessment Survey Phase One Desk-based Assessment for South-West England (South Coast Dorset) 6673, 2015.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

natural environment of the zone. Researchers then formulated recommendations specific to each of the zones demarcated within the study, aiming to take into account projections about the future of the natural processes at work in the area as well as the opinions of authorities and stakeholders in the region. For example, the project report notes that “parts of a number of Scheduled Monuments within the South Devon coast study area are at risk of coastal erosion and it is therefore likely that targeted phases of excavation and recording may be required on these sites.”³⁴⁴

3. *Rapid Coastal Zone Assessment for North-West England*

Historic England commissioned a RCZA the north-west coast of England in September of 2009 with the goal of “form[ing] a valuable resource for improved management of the coastal historic environment and for furthering research, education and public enjoyment of the coastal heritage of the North-West.”³⁴⁵ This RCZA first surveyed the geology, topography, and sea level changes in the North West Coastal Zone.³⁴⁶ Historic England’s researchers then divided the study area into four distinct zones: (1) from Royal Seaforth Dock to the River Wyre, (2) from the River Wyre to Roa Island, (3) from Roa Island to St. Bee’s Head, and (4) from St. Bee’s Head to the River Sark.³⁴⁷

The same research methodology was followed with respect to each of these four zones. First, researchers reviewed the current topography, geology, soils and land-use within each area. Next, researchers traced the development of the natural environment in each of the four areas through the following historical periods: Early Prehistory, Later Prehistory, Roman and Romano-British, Early Medieval, Medieval, Post-Medieval, and finally Industrial/Modern. By comparing the record of the natural environment with knowledge of human activity in the area during each of these historical periods, researchers gained a greater understanding of the impact of human activity on the ecosystems of the region, which allowed them to identify “36 important sites that are at risk dating from the prehistoric period through to the Second World War.”³⁴⁸ One of these is Piel Castle, an early 12th century fortification in the study area, was found to have partially “collapsed due to coastal erosion.”³⁴⁹ Finally, the research team laid out its’ proposal for the next

³⁴⁴ *Id.*

³⁴⁵ Johnson, Ben: North-West Rapid Coastal Zone Assessment (NWRCZA), 2009.

³⁴⁶ Ian Shennan and Natasha Barlow, professors at the University of Durham, provided Historic England with an overview of their research on sea level change in North-West England, information which was reproduced in full as part of the final report on the area.

³⁴⁷ Johnson, Ben: North-West Rapid Coastal Zone Assessment (NWRCZA), 2009.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

phase of research: the development of a rapid, traditional survey “to record the sites at risk and to inform future mitigation strategies for them.”³⁵⁰

V. ANALYSIS OF THE THREE LEGAL FRAMEWORKS

A close comparison of the legal frameworks for preserving and protecting coastal historic resources reveals important similarities as well as salient differences.

A. Similarities

The United States, France, and the United Kingdom all share a powerful common ethos that cultural heritage is an indispensable tool for furthering positive social aims and for reinforcing cultural ties within each nation. The purpose statement in the National Historic Preservation Act in the United States, for example, declares that the United States should, “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”³⁵¹ The Ancient Monuments and Archaeological Areas Act in the U.K. indicates that it was created, “to make provisions for the investigation, preservation and recording of matters of archaeological or historical interest.”³⁵² And Title 1 of Book V of the French Heritage Code provides for, “the safeguarding and study [of archaeological heritage] that allows to trace the development of the history of humanity.”

To ensure that cultural heritage within their respective coastal regions is preserved, each country has enacted various heritage protection laws that aim to protect historic resources. The Heritage Code in France, a country that follows the Civil Law tradition, serves as the foundation for legal protections to the country’s cultural heritage.³⁵³ The United States and United Kingdom, both countries that follow the Common Law tradition, have promulgated a multitude of statutes which are the sources of legal protections for their cultural heritage.³⁵⁴ While there is no exact uniformity among what each country’s laws protect, broad structural similarities among the various laws do exist. For instance, the U.S., U.K., and

³⁵⁰ *Id.*

³⁵¹ 54 U.S.C. § 300101(1).

³⁵² *Ancient Monuments and Archaeological Areas Act*, 1979, c. 46 (Eng.)

³⁵³ For general background on the formation of the Civil Law tradition, see James Brundage, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* (2008).

³⁵⁴ For general background on the formation of the Common Law tradition, see John Langbein et al., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009); John Hudson, *THE FORMATION OF THE ENGLISH COMMON LAW* (1996); Paul Brand, *THE MAKING OF THE COMMON LAW* (1992); S.F.C. Milsom, *HISTORICAL FOUNDATIONS OF THE COMMON LAW*, 2ND ED. (1981).

France each have a process of registering or scheduling historically significant resources. In the United States, the National Historic Preservation Act created the National Register for Historic Places which created an inventory of historic sites and resources in the U.S.³⁵⁵ In the United Kingdom, the Ancient Monuments and Archaeological Areas Act created a process for the Secretary of State for the Department for Digital, Culture, Media & Sport to “schedule” sites that are worthy of legal protection.³⁵⁶ Finally, in France, the concept of preventative archeology enshrined within its Heritage Code, mandates that the national government is responsible for creating a national archaeological map for all current archeological sites.³⁵⁷

Governmental actors for protecting coastal cultural heritage in France, the UK, and the US are also largely similar. Setting aside France’s extra layer of EU legislation, each of these countries has three levels of government (national, state/regional, and local/municipal) that work together to preserve coastal cultural heritage. For example, in France the *Code de Patrimoine* applies to all cultural property in France, territorial commissions operate at the regional/state level, and a variety of local organizations (such as the College of France in the case of Marseille) work at the local/municipal level.³⁵⁸ In the United Kingdom national legislation like the Ancient Monuments and Archaeological Areas Act impacts coastal cultural preservation nationwide,³⁵⁹ coroners of the crown play a role regionally in determining what amounts to “treasure” under the Treasure Act 1996,³⁶⁰ and a variety of municipal and local actors are involved in creating local plans under the National Planning Policy Framework.³⁶¹ In the United States, the National Historic Preservation Act of 1966, along with other pieces of legislation, operate at the national level, while State or Tribal Historic Preservation Officers

³⁵⁵ 54 U.S.C. § 302101.

³⁵⁶ *Ancient Monuments and Archaeological Areas Act*, 1979, c. 46 (Eng.).

³⁵⁷ Code du Patrimoine [Heritage Code] art. L. 522-5–522-6 (Fr).

³⁵⁸ Code du Patrimoine [Heritage Code] art. L. 111-1–L111-12 (Fr.). Available at: https://www.legifrance.gouv.fr/affichCode.do?sessionId=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006159928&cidTexte=LEGITEXT000006074236&dateTexte=20171026.

³⁵⁹ *Ancient Monuments and Archaeological Areas Act*, 1979, c. 46 (Eng.)

³⁶⁰ *Treasure Act*, 1996, c.24 (Eng.)

³⁶¹ *Planning System* (November 10, 2017) <https://historicengland.org.uk/advice/planning/planning-system/>

(SHPOs/THPOs) function as the intermediaries between local, tribal, or municipal heritage organizations and the federal government.³⁶²

But the most striking and important similarity between these countries is the integration and primacy of planning-related laws in preserving coastal cultural heritage. In the United States, the bulk of coastal cultural heritage preservation takes place during the project planning phase. Section 106 of the National Historic Preservation Act (NHPA) and Section 4(f) of the Department of Transportation Act all require that *prior to* any federal shovel striking the soil that historic resources within the project area have been discovered, accounted for, and, if feasible, protected from harm.³⁶³ And almost all states have enacted state laws that mirror these two federal laws.³⁶⁴ Requiring federal and state agencies to take into account the effects of their projects on coastal historic resources *before* they begin moving dirt around has the salutary effect of integrating historic resource management into the project from its origins. This tends to minimize harm and damage to historic resources because mitigation measures have been outlined in advance of construction, instead of relying on *ad hoc* procedures to deal with historic resources that are discovered during the course of the project.

This same principle of historic preservation planning is also evident in France. European Union Council Directive 2011/92/EU requires France to create environmental impact assessment (EIA) reports of particular types of development projects that have “direct and indirect significant effects on. . . material assets, cultural heritage, and the landscape” among other factors.³⁶⁵ Only *after* these EIA reports have been completed, evaluated, and authorized by the appropriate governmental authorities may public or private development projects proceed.³⁶⁶ In

³⁶² 54 U.S.C. § 302303(b)(2).

³⁶³ For section 106 of the National Historic Preservation Act see 54 U.S.C. § 306108; 36 C.F.R. § 800.5-6; For section 4(f) of the Department of Transportation Act see 49 U.S.C. § 303; 23 C.F.R. § 774.17.

³⁶⁴ For example, Georgia also requires a similar review process to NHPA Section 106—finding of adverse impact, consultation with affected parties, mitigation *before* any project commences—for state and local government actions that may impact state coastal historic resources. See O.C.G.A. § 12-16-1 (2019). Likewise New Mexico, California, Florida, and South Carolina are among the many states that have enacted laws similar to Section 4(f) of the Department of Transportation Act. See N.M. STAT. ANN. § 18-8-7 (2019); CAL. PUB. RES. CODE §§ 5024.5(a)–(b) (2019); FLA. STAT. ANN. § 267.061 (2019); TEX. PARKS & WILDLIFE CODE ANN. § 26.001 (2019); S.C. CODE ANN. § 10-1-135 (2019).

³⁶⁵ Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, 2011 O.J. L 26, as amended by Council Directive 2014/52/EU, 2014 O.J. L 124, art. 3(1)(d) at 12.

³⁶⁶ *Id.* art. 6(1) at 15.

addition to this EU Directive, French law requires that any development projects that affect the subsoil must first submit a project report to the national government which refers it to the French National Institute for Preventative Archaeological Research (INRAP).³⁶⁷ INRAP then analyzes the effects of the proposed development on potential archaeological sites in the project area to determine whether or not an excavation should take place to protect archeological heritage.³⁶⁸ And anyone wishing to perform construction within 500 meters of a historic building (near the coast or otherwise) must first have their development plans approved by *La Commission Nationale du Patrimoine et de L'architecture* prior to commencement.³⁶⁹

Planning law is also a central feature in the United Kingdom's framework for protecting historic coastal resources. During the planning phase of any project (whether publically or privately funded) the developer must submit a plan to the Planning Inspectorate of how this development may threaten or harm any protected archaeological or historic resources.³⁷⁰ Using the Local Plan developed by local commissions, the Planning Inspectorate then assesses whether or not this proposed development meets the protective and sustainable criteria for historic resources detailed in the Local Plan. Thus, well *before* construction commences on any development in the U.K., historic resources and their preservation are taken into account. Furthermore, the United Kingdom's innovative Rapid Coastal Zone Assessments (RCZAs) are working in conjunction with local planning commissions to quickly identify coastal historic resources that are at risk, develop planning guidelines to safeguard them, and integrate these guidelines into the relevant Local Plans.³⁷¹

³⁶⁷ INRAP, *Legislation, procedures and funding* (Dec. 7, 2016), available at: <http://www.inrap.fr/en/legislation-procedures-and-funding-12007> (“INRAP’s statutes are defined by the decree of January 16, 2002, amended by the decree of August 11, 2016, codified in the regulatory section of the aforementioned Code, Book V, Title II and Title IV, Chapter V, Section III.”).

³⁶⁸ *Id.*

³⁶⁹ CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 621-9 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do?sessionId=ACB1939184362A2E892EAA2EC28D57F8.tplgfr32s_1?idArticle=LEGIARTI000006845801&idSectionTA=LEGISCTA000006177318&cidTexte=LEGITEXT000006074236&dateTexte=20190305.

³⁷⁰ Planning Inspectorate, *What we do* (April 17, 2018) <https://www.gov.uk/government/organisations/planning-inspectorate>

³⁷¹ See *Coastal Change* (January 16, 2018) <https://historicengland.org.uk/advice/planning/marine-planning/rczas-reports/>

In sum, all three countries in this study—the United States, France, and the United Kingdom—share important similarities in how they approach protecting coastal historic resources through law. Each country shares a common preservation ethos that is enshrined in law. Each country has established government agencies focused on protecting historic resources at the national, regional/state, and local levels. Each country maintains a register of historic resources that qualify for legal protections. And most importantly, each country integrates legal protections for coastal historic resources directly into their planning-related laws to ensure these invaluable historic resources are, at a minimum, thoughtfully considered and recorded before development occurs.

B. Differences

Despite the many similarities between the legal frameworks that protect coastal cultural heritage in each of these three countries, however, there many important differences. Some of these include broad structural differences inherent in each countries governmental architecture: preservation in France is largely centralized in national government agencies, like INRAP; the United Kingdom is somewhat less centralized than France, relying on a symbiotic relationship with its counties and municipalities in creating Local Plans; and the United States is much more decentralized than either France or the United Kingdom, as the states assume a much larger role in directing preservation initiatives than does the federal government.

But here we focus on two important differences that dramatically impact how these legal frameworks function. First, there are salient differences in the strength of legal protections offered to coastal historic resources. Historic resources that have been listed or scheduled on the respective national inventories of France and the United Kingdom qualify for powerful legal protections that prevent these listed or scheduled sites from being removed, destroyed, altered, or damaged.³⁷² In the United States, however, the strength of the legal protections afforded to listed historic sites depends on the type of development that may adversely affect it. Transportation-related programs that may impact sites or buildings listed on the National Register site must comply with “no prudent and feasible alternative” standard, requiring the Department of Transportation to refrain from destroying or

³⁷² See CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-1-6 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do?sessionId=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026; *Scheduled Monuments* (November 9, 2017) <https://historicengland.org.uk/listing/what-is-designation/scheduled-monuments>; *Treasure Act, 1996* (Eng.).

damaging the listed historic resources unless there is no viable alternative.³⁷³ All other federal projects affecting listed historic sites must merely comply with the much weaker procedural protections of Section 106 of the NHPA—meaning that once the public consultation process of Section 106 is properly followed, the listed historic resource may be removed for *any* reason.³⁷⁴ Comparing the strength of legal standards alone, therefore, once a coastal historic resource is listed or scheduled, it is afforded far greater protections in France and the United Kingdom than in the United States.

Secondly, the scope of legal protections offered to coastal cultural heritage in these three countries must also be considered. In France and the United Kingdom, only listed or scheduled historic resources receive the highest form of legal protections under law. Historic resources discovered during the course of development, construction, or metal-detecting on public or private land are afforded only limited protections depending on the importance of the newly discovered site.³⁷⁵ In contrast, the United States' NHPA affords its procedural protections to historic resources listed on *or eligible* for listing on the National Register.³⁷⁶ This means that U.S. federal agencies must evaluate the significance of all historic resources on federal lands that might be impacted by their actions during the Section 106 process and offer significant unlisted historic resources the same procedural protections (e.g. public consultation) afforded to listed sites. The same is generally true of state and local agencies, as state historic review processes typically mimic the federal Section 106 process.³⁷⁷ Absent some federal or state permit, historic resources discovered on private lands in the United States, such as archaeological artifacts or buried treasure, are not protected by law.³⁷⁸ Thus, while France and the United Kingdom boast more powerful legal standards for protecting coastal cultural heritage than does the United States, it may be that the range of

³⁷³ See 49 U.S.C. § 303(c) (2018).

³⁷⁴ See 54 U.S.C. § 306108; 36 C.F.R. § 800.5-7.

³⁷⁵ See CODE DU PATRIMOINE [C. PATRI.] [HERITAGE CODE] art. L. 522-1-6 (Fr). Available at: https://www.legifrance.gouv.fr/affichCode.do?sessionId=FCE080A73A12E03BD3CB0495341D0B19.tplgfr30s_1?idSectionTA=LEGISCTA000006177309&cidTexte=LEGITEXT000006074236&dateTexte=20171026; *Scheduled Monuments* (November 9, 2017) <https://historicengland.org.uk/listing/what-is-designation/scheduled-monuments/>; *Treasure Act, 1996* (Eng.).

³⁷⁶ See 49 U.S.C. § 303(c) (2018).

³⁷⁷ See Sara Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell* (West Academic 2014), pp. 57-68.

³⁷⁸ Human remains discovered on private lands in the United States are always subject to some type of legal oversight. At a minimum, the coroner would be notified to determine whether or not the human remains were recent and possibly connected any unsolved homicides.

historic resources protected by law in the United States is greater than those of France or the United Kingdom.

CONCLUSION

Coastal cultural heritage provides an invaluable tangible window in who we were, are, and orientation on who we may yet become as a global society. But with climate change causing rapidly rising sea levels, each tide of the twenty-first century “washes away midden, domestic waste heaps,” burials, artifacts, and structural materials that comprise our “cultural and economic biography.”³⁷⁹ A reminder of this fragility can be found in a recent large-scale study of UNESCO World Heritage sites in the Mediterranean which concluded that of the 49 World Heritage sites located within up to 10 meters of elevation from the sea, 37 (75%) of them are at severe risk from a 100-year storm surge event and 42 (86%) of them are at risk of dramatic coastal erosion due to sea level rise.³⁸⁰ Among these endangered World Heritage sites are Pompeii, Carthage, Ephesus, Dubrovnik, and parts of Istanbul.³⁸¹

The time to act to save priceless remnants of our ancestors, our story is now. Dilatory response to climate change is the death-knell to coastal cultural heritage. Indeed, the Sendai Framework for Disaster Risk Reduction endorsed by the United Nations General Assembly in 2015 advocates that cultural heritage protections must be integrated into national disaster preparedness frameworks in order to be effective.³⁸² One critical tool to ensuring that coastal cultural heritage in our nations will be protected for future generations is an understanding of the laws that preserve it.

This article demonstrates that the legal frameworks for preserving coastal cultural heritage in the United States, France, and the United Kingdom share illuminating similarities and marked differences. Each these countries shares a common ethos that historic resources should be protected and has decided to protect its historic resources through law by creating national inventories of historic resources, by establishing some level of governmental oversight of cultural heritage, and by integrating legal protections for coastal historic resources directly

³⁷⁹ Jim Dwyer and Josh Haner, *Saving Scotland's Heritage From the Rising Seas*, NEW YORK TIMES Sep. 25, 2018.

³⁸⁰ Lena Reimann et al, “Mediterranean UNESCO World Heritage at Risk from Coastal Flooding and Erosion Due to Sea-Level Rise, 9 *Nature Communications* 1 (2018). Available at: <https://www.nature.com/articles/s41467-018-06645-9/>

³⁸¹ *Id.*

³⁸² See United Nations, *The Sendai Framework for Disaster Risk Reduction 2015-2030* (2015) at 10, 15, 19. Available at: https://www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf

into their planning-related laws to ensure that historic resources are not thoughtlessly destroyed as their countries continue to develop. But precisely how the law protects historic resources in each country is different. France and the United Kingdom have promulgated a stronger legal standard for protecting cultural heritage that is listed or scheduled in its national inventories than has the United States. Listed or scheduled historic resources in France or the United Kingdom are afforded more powerful legal protections from removal, destruction, or alteration than are afforded the majority of historic resources listed in the National Register of the United States, which only receive relatively weak procedural protections. However, because the scope of these procedural protections in the United States also encompasses historic resources not listed on the national inventory, United States law may protect, albeit feebly, a wider range of historic resources than do the laws of France or the United Kingdom.

More comparative studies of national cultural heritage law frameworks need to be done. Comparing and contrasting cultural heritage laws between countries can be a fruitful exercise in discovering innovative legal tools or ideas that might be useful in other locations, identifying similarities and differences that may lead to international cultural heritage cooperation initiatives, and, at a minimum, creating a deeper appreciation between nations of how divergent national cultures affect and shape laws and processes designed to preserve their past. Such international understanding is critical at this time, because overcoming or mitigating the effects of climate change, which are not circumscribed by geopolitical boundaries, will require sustained coordinated cooperation, immense patience, and profound mutual understanding.