

University of Virginia School of Law

Public Law and Legal Theory Research Paper Series 2019-54

October 2019



Confederate Monuments and Punitive Preemption: The Latest Assault on Local Democracy

By

Richard Schragger

University of Virginia School of Law

C. Alex Retzloff

J.D. Candidate, Class of 2021

University of Virginia School of Law

Abstract #462746

A complete index of University of Virginia School of Law research papers is available
at: Law and Economics: <http://www.ssrn.com/link/U-Virginia-LEC.html>
Public Law and Legal Theory: <http://www.ssrn.com/link/U-Virginia-PUB.html>



Confederate Monuments and Punitive Preemption: The Latest Assault on Local Democracy

Richard C. Schragger, Perre Bowen Professor of Law, University of Virginia School of Law

C. Alex Retzloff, J.D. Candidate, Class of 2021, University of Virginia School of Law

October 2019



Introduction

In recent years, local county and municipal residents have begun to pay closer attention to the monuments that dot public properties throughout their communities, and reflect on the legacies and values these monuments represent.¹ Following the horrific acts of racially motivated violence perpetrated by white supremacists in places like Charleston, South Carolina, and Charlottesville, Virginia, these reflections took on a new sense of urgency, and residents began to seriously question the place that monuments—especially those memorializing civilian and military leaders of the Confederate States of America and other individuals associated with white supremacy—enjoyed in their communities.² For many, the result of this reflection was the determination that these monuments must come down.³ But as many residents and localities were investigating how to remove these monuments, legislatures in several states were exploring how best to protect the same monuments from this rising tide of local resentment.

Employing the same tactics used to restrain local government initiatives concerning undocumented immigrants, firearms restrictions, environmental protections, and others, state legislatures have relied on preemptive statutes to block, or “preempt” local governments from removing, relocating, or altering Confederate monuments on public property. Would-be violators often face harsh consequences. While some legislatures have relied on existing statutes to preempt local action, many more have enacted,⁴ or proposed, new statutes striking at the ability of localities to manage

¹ See, e.g., City of Charlottesville Blue Ribbon Comm’n on Race, Memorials, and Pub. Spaces, Report to City Council (Dec. 19, 2016), <https://perma.cc/R82U-JPPP> [hereinafter Blue Ribbon Comm’n].

² See Jason Horowitz et al., *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), <https://perma.cc/M8PG-Q5N2>; Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://perma.cc/3DBW-V2BJ>.

³ See, e.g., Karen L. Cox, Opinion, *Why Confederate Monuments Must Fall*, N.Y. TIMES (Aug. 15, 2017), <https://perma.cc/P8VX-J93M>.

⁴ VA. CODE ANN. § 15.2-1812 (2018) (Virginia); MISS. CODE ANN. § 55-15-81 (2019) (Mississippi); S.C. CODE ANN. § 10-1-165 (2018) (South Carolina); KY. REV. STAT. ANN. § 171.780 (LexisNexis 2019) (Kentucky); TENN. CODE ANN. § 4-1-412 (2019) (Tennessee); N.C. GEN. STAT. § 100-2.1

public monuments.⁵ Broadly termed “statue statutes,”⁶ these old and new punitive preemption statutes have become an increasingly popular way of reining in progressive-leaning localities. The unfortunate result of this burgeoning legislative movement to adopt statue statutes and other punitive preemption measures has been the erosion of local democracy, the stifling of local political innovation, and the undermining of local faith in the democratic process. States have a great deal of authority to regulate the content of the local public square. However, some statue statutes may run afoul of state and federal constitutional and statutory protections for individuals and municipal governments, and may be vulnerable to legal challenges on First and Fourteenth Amendment grounds. These challenges face some doctrinal hurdles, and ultimately, a spirited and engaged political defense of local democracy may be more effective.

(2018) (North Carolina); ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019) (Alabama); GA. CODE ANN. § 50-3-1 (2019) (Georgia).

⁵ See, e.g., H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (Arkansas); H.B. 1349, Gen. Assemb., Reg. Sess. (Fla. 2018); H.B. 97, Gen. Assemb., Reg. Sess. (Fla. 2019); S.B. 288, Gen. Assemb., Reg. Sess. (Fla. 2019) (Florida); H.B. 54, Gen. Assemb., Reg. Sess. (Ky. 2018) (Kentucky); H.B. 71, Leg., Reg. Sess. (La. 2017); S.B. 198, Leg., Reg. Sess. (La. 2017) (Louisiana); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (Texas); S.B. 418, 84th Leg., 1st Reg. Sess. (W. Va. 2018) (West Virginia); S.B. 2320, Leg., Reg. Sess. (Miss. 2017) (Mississippi).

⁶ Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 63 (2018).

Confederate Monuments: History and Current State of Affairs

Although the Civil War ended over 150 years ago, its legacy lives on in the public monuments and memorials to the Confederacy, its leaders, and its veterans that are fixtures in public spaces throughout the United States, and are nearly ubiquitous in Southern counties and municipalities. In the wake of recent violent incidents perpetrated by white supremacists, over 110 Confederate monuments and symbols have come down, but there are still over 1,700 Confederate monuments, place names, and other symbols displayed in public spaces.⁷ That includes 780 monuments honoring some aspect of the Confederacy, 103 public schools and 3 colleges named after Confederates, and 80 localities and 10 U.S. military bases named in honor of Confederate leaders.⁸ Although some of these Confederate memorials were dedicated shortly after the Civil War ended in 1865, the majority were dedicated during one of two periods: the first ran from the early 1900s through the 1920s, and the second ran from the 1950s through the 1960s.⁹ It is telling that these two spikes in Confederate memorialization coincide with the rise of Jim Crow laws and re-segregation efforts following the end of Reconstruction in the early 20th century, and with the massive-resistance campaign waged by opponents of the civil rights and desegregation movements of the 1950s and 1960s. These were not random acts of memorialization during a period of historical and patriotic fervor, but were instead part of a concerted effort to reinforce a white supremacist worldview in mainstream society.¹⁰

Despite the fact that those who erected these monuments to the Confederacy often made clear their racist intentions for doing so,¹¹ there is still spirited public debate

⁷ *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://perma.cc/GFE4-LGN7> [hereinafter *Whose Heritage?*].

⁸ *Id.*

⁹ *Id.*

¹⁰ See AM. HISTORICAL ASS'N, STATEMENT ON CONFEDERATE MONUMENTS (2017), <https://perma.cc/8Q6E-HKBH> (arguing that Confederate monuments erected in the early and mid-20th century were “part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South . . . [and] were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African Americans politically and isolate them from the mainstream of public life”).

¹¹ See, e.g., Julian S. Carr, Unveiling of Confederate Monument at University. June 2, 1913 (June 2, 1913) (transcript available in the Julian Shakespeare Carr Papers, Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill). In his speech dedicating the “Silent

over the legacies and values these monuments represent today.¹² Though some see the monuments as hateful, others subscribe to the Lost Cause narrative promulgated by groups like the Sons of Confederate Veterans and the United Daughters of the Confederacy, and assert that the monuments simply recognize the sacrifice of their forefathers in a bloody war that had more to do with states' rights, honor, and duty, less to do with slavery, and nothing to do with promoting white supremacy.¹³ And indeed, many still adhere to this revisionist history of the Civil War and Confederate monuments, “cling[ing] to the myth of the Lost Cause”¹⁴ and advocating for additional statue statutes to protect their revered memorials and encourage the construction of additional monuments.¹⁵ This ideological and cultural divide between those who see Confederate monuments as symbols of hate and those who see them as memorials to heroic individuals fighting for a noble cause devoid of racial animus is only part of a broader culture war between urban, often progressive cities, and rural, often conservative communities. But acknowledging this cultural and ideological divide helps to contextualize the rise in local efforts to remove these monuments and the concurrent growth in legislative measures to preempt these removal efforts through statue statutes.¹⁶

The Rise of Statue Statutes

The movement to protect Confederate monuments through the use of preemptive and punitive statue statutes has grown concurrently with the opposing movement to remove these monuments, especially in the wake of white supremacist violence. As of this writing, eight states have enacted some form of statue statute,¹⁷ two states have

Sam” statute—a memorial to the Confederate veterans of the University of North Carolina—Carr repeatedly made reference to “the Sacred Cause” for which the men fought, and celebrated “the Anglo Saxon race . . . the purest strain of [which] is to be found in the 13 Southern States.” Carr also boasted of the time he “horse-whipped a negro wench . . . in the immediate presence of [a federal] garrison.”; *see also* Blue Ribbon Comm’n, *supra* note 1.

¹² Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes”*, 91 TEMP. L. REV. 1, 13-16 (2018).

¹³ *See* Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPP. 15, 17-18 (2018).

¹⁴ *Whose Heritage?*, *supra* note 7.

¹⁵ Sabrina Tavernise, *A Boom in Confederate Monuments, on Private Land*, N.Y. TIMES (Aug. 30 2017), <https://perma.cc/5FSR-TPTJ>.

¹⁶ Bray, *supra* note 12, at 5-6.

¹⁷ *See* VA. CODE ANN. § 15.2-1812 (2018); MISS. CODE ANN. § 55-15-81 (2019); S.C. CODE ANN. § 10-1-165 (2018); KY. REV. STAT. ANN. § 171.780 (LexisNexis 2019); TENN. CODE ANN. § 4-1-412

proposed expansions to their existing statue statutes,¹⁸ and five states currently without statue statutes have proposed adopting some form of protection for their public monuments.¹⁹ Virginia was the first state to enact a statue statute in 1904.²⁰ The 1904 act was significantly limited in scope and only applied to counties that erected Confederate monuments and memorials.²¹ But as the act was subsequently amended and recodified over the next century, the legislature significantly expanded its scope and the protections it afforded not only to Confederate monuments, but to war monuments and memorials generally.²² In its current form, Virginia’s statue statute empowers all localities to erect monuments for any war or conflict, and provides broad protections for all such monuments.²³

Following Virginia’s example in spirit, if not entirely in form, seven other states have enacted statue statutes to protect Confederate monuments. These statutes generally prohibit private parties and public entities from removing, relocating, disturbing, or altering any monument—often including monuments to the “War Between the States” or the Confederate States of America²⁴—with only minor exceptions to allow for removal in the event of repair or restoration, or for relocation to accommodate public works projects.²⁵ Other states, however, go much further in preempting local monument management through statue statutes, and have either expanded the scope

(2019); N.C. GEN. STAT. § 100-2.1 (2018); ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019); GA. CODE ANN. § 50-3-1 (2019).

¹⁸ See S.B. 2320, Leg., Reg. Sess. (Miss. 2017); H.B. 54, Gen. Assemb., Reg. Sess. (Ky. 2018).

¹⁹ See H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); H.B. 1349, Gen. Assemb., Reg. Sess. (Fla. 2018); H.B. 97, Gen. Assemb., Reg. Sess. (Fla. 2019); S.B. 288, Gen. Assemb., Reg. Sess. (Fla. 2019); H.B. 71, Leg., Reg. Sess. (La. 2017); S.B. 198, Leg., Reg. Sess. (La. 2017); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019); S.B. 418, 84th Leg., 1st Reg. Sess. (W. Va. 2018).

²⁰ See 1904 Va. Acts ch. 29.

²¹ See Amanda Lineberry, Payne v. City of Charlottesville and the Dillon’s Rule Rationale for Removal, 104 VA. L. REV. ONLINE 45, 49 (2018).

²² See Bray, *supra* note 12, at 24-25.

²³ See Lineberry, *supra* note 21, at 51. *But cf.* Va. Attorney General, Opinion Letter No. 17-032 (Aug. 25, 2017), 2017 WL 3901711, at *3. Virginia’s attorney general has endorsed the view of the Commonwealth’s statue statute taken in *Heritage Preservation Association v. City of Danville* (No. CL5000500-00 (Va. Cir. Ct., Dec. 7, 2015)) that the recent broad expansions of protection under the statute all apply retroactively, meaning that the protections the statute currently affords to monuments may not apply to nearly as many monuments as currently stand.

²⁴ Four current statutes, two proposed statutes, and one amendment to a current statute specifically protect monuments dedicated to the “War Between the States” (a dog-whistle for Lost Cause sympathizers), and two current statutes specifically protect monuments dedicated to the “Confederate States of America.”

²⁵ See, e.g., MISS. CODE ANN. § 55-15-81 (2019).

of protected monuments under the statutes²⁶ or the breadth of the protections they confer on those monuments.²⁷ Significantly, these new measures only go in one direction—increasing the degree to which legislatures preempt or punish local initiative—and have been neither limited through amendment nor repealed.²⁸ While some states have, admittedly, included limited opportunities for local entities to appeal for individual exceptions or waivers, the efficacy of these appeal provisions is dubious and generally does not appear to provide localities a reliably viable workaround.²⁹ As if the preemptive limits these statute statutes impose on localities were not onerous enough, several of the statutes also currently or may soon include punitive provisions designed to severely punish localities—and sometimes even individual local officials—that violate monument protections, thereby ensuring stricter compliance.

The use of state preemptive statutes to regulate localities and nullify local measures deemed inconsistent with state policy is a time-honored tradition in American governance.³⁰ But in the last several years, legislatures have gone further in drafting statutes that are not only preemptive, but punitive in nature, imposing significant

²⁶ See, e.g., N.C. GEN. STAT. § 100-2.1 (2018) (protecting all “objects of remembrance” including monuments, memorials, plaques, statues, markers, and “displays of a permanent character” that commemorate an event, person, or military service “that is part of North Carolina’s history”); GA. CODE ANN. § 50-3-1 (2019) (extending additional protections to privately owned monuments on private property and providing private owners a civil right of action against violators).

²⁷ See, e.g., ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019) (adding renaming to the list actions localities are prohibited from doing as concern protected monuments).

²⁸ See, e.g., H.B. 2377, Gen. Assemb., Reg. Sess. (Va. 2019) (seeking to amend Virginia’s statue statute to permit localities to manage monuments and memorials as they see fit; died in committee); S.B. 51, Gen. Assemb., Reg. Sess. (Ga. 2019) (seeking to repeal Georgia’s statue statute; died in committee); H.B. 10, Gen. Assemb., Reg. Sess. (N.C. 2019) (seeking to repeal North Carolina’s statue statute; died in committee).

²⁹ See ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019) (requiring localities to submit a petition for review by a monument protection committee); S.C. CODE ANN. § 10-1-165 (2018) (requiring a two-thirds vote of the general assembly after a third reading to approve a waiver); TENN. CODE ANN. § 4-1-412 (2019) (requiring clear and convincing evidence and a two-thirds vote of a largely gubernatorially-appointed commission); KY. REV. STAT. ANN. § 171.780 (LexisNexis 2019) (requiring a state commission to approve a waiver or rescind the protected status assigned to a particular monument); N.C. GEN. STAT. § 100-2.1 (2018) (allowing localities to make changes, but only with the approval of a state commission). *But see* Merritt Kennedy, *3 North Carolina Confederate Monuments Will Stay in Place, Commission Decides*, Nat’l Pub. Radio (Aug. 22, 2018), <https://www.npr.org/2018/08/22/640923318/3-north-carolina-confederate-monuments-will-stay-in-place-commission-decides> (reporting that the North Carolina Historical Commission believes it can only approve an exemption in order to better preserve a monument, and not for any other reason, effectively barring any permanent removal).

³⁰ See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2002 (2018).

penalties on both local government entities and officials who dare to violate the statutes.³¹

Statue statutes are just the latest example of states adopting this new, pernicious form of preemption. Dissatisfied with simply blocking localities from using their discretion in managing Confederate monuments, at least two statue statutes also include punitive provisions. The Alabama statue statute imposes a punitive fine of \$25,000 for each violation on any locality that is found to have disturbed a protected monument in violation of the statute.³² In Tennessee, the legislature went a step further than its Alabama counterpart and, rather than impose a set punitive fine for violations, violations of the Tennessee statue statute result in the loss of state grants for economic and community development for a period of five years.³³ Not to be outdone, both Kentucky and Texas have proposed similar legislation empowering the state legislature to impose oppressive fines on localities for violations of the state statue statutes.³⁴ Legislatures have not, however, restrained themselves to imposing these punitive fines and funding cuts on local governments. In 2017, Mississippi considered a bill that would not only have imposed fines of up to \$10,000 and prison sentences of up to one year on violators, but provided that in instances where the violation was the result of a local commission or board decision, each member of the commission or board would be held individually liable to prosecution.³⁵ Although the Mississippi bill died in committee, it represents a dangerous escalation in the attempted use of punitive preemption statutes to protect Confederate monuments, punish local officials, and stifle local democracy, and may serve as an unfortunate precedent for similar measures in other states.³⁶

Confederate Monuments and Statue Statutes Litigation

³¹ *Id.* at 2002-07.

³² ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019).

³³ TENN. CODE ANN. § 4-1-412 (2019).

³⁴ *See* H.B. 54, Gen. Assemb., Reg. Sess. (Ky. 2018) (imposing a \$25,000 fine per violation); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (imposing a \$1,000 to \$1,500 fine for the first violation, a \$25,000 to \$25,500 fine for each additional violation, and counting each subsequent day a monument is left altered as an additional violation).

³⁵ S.B. 2320, Leg., Reg. Sess. (Miss. 2017).

³⁶ *See, e.g.*, S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (waiving official immunity and opening up local officials to personal liability for violations of the statue statute).

While Confederate monuments have stood in local communities for generations, the national controversy surrounding them and the statutes protecting them are relatively recent phenomena. As such, there has been comparatively little litigation concerning statue statutes. What little litigation there has been over statue statutes has generally relied on state-specific technical challenges, not substantive challenges to the statutes;³⁷ however, a handful of lawsuits in Virginia and Alabama have raised substantive challenges to statue statutes and the protections they afford Confederate monuments.

In Virginia, three recent lawsuits have raised substantive challenges to the Commonwealth's statue statute. In the first, *Payne v. City of Charlottesville*, a group of local citizens and pro-Confederate activists filed suit against the city of Charlottesville, challenging the Charlottesville city council's decision to remove imposing statues of Confederate Generals Robert E. Lee and Thomas J. "Stonewall" Jackson from two local city parks as a violation of Virginia's statue statute.³⁸ The city answered by arguing that Virginia's statue statute does not apply to the two monuments in question because they are not war memorials and because of the restriction on the retroactive application of the statute.³⁹ Importantly, the city also argued that if the court determined that Virginia's statue statute did apply to these monuments, then it would run afoul of state and federal constitutional guarantees of equal protection by condoning the preservation of public symbols that constitute racially discriminatory government speech.⁴⁰ The trial judge has rejected all these arguments, reading Virginia's statue statute broadly to protect the Lee and Jackson monuments as war memorials.⁴¹ It has also rejected the city's equal protection argument. What will occur on appeal is as yet unclear.

³⁷ See, e.g., *Sons of Confederate Veterans Nathan Bedford Forrest Camp 215 v. City of Memphis*, No. 18-29-III (Tenn. Ch. May 16, 2018), *appeal filed*, No. M2018-01096-COA-R3-CV (Tenn. Ct. App. June 13, 2018) (concluding that the city did not violate the statue statute when it sold a park with a Confederate monument to a private party who took it down because the statute only protected monuments on public property); *Heritage Pres. Ass'n v. City of Danville*, No. CL15000500-00 (Va. Cir. Ct., Dec. 7, 2015) (finding that Virginia's statue statute does not apply retroactively).

³⁸ Complaint at 9-12, *Payne v. City of Charlottesville*, No. CL 17-145 (Va. Cir. Ct. Mar. 20, 2017).

³⁹ Defendant's Brief in Opposition to Plaintiff's Motions for Partial Summary Judgment and to Strike Equal Protection Affirmative Defense at 4-10, *Payne v. City of Charlottesville*, No. CL 17-145 (Va. Cir. Ct. Jan. 11, 2019).

⁴⁰ *Id.* at 25-39; Lineberry, *supra* note 21, at 51-56.

⁴¹ Letter Ruling on Motion for Partial Summary Judgment Regarding the Statues Being Monuments or Memorials at 5-9, *Payne v. City of Charlottesville*, No. CL 17-145 (Va. Cir. Ct. Apr. 25, 2019).

Two other lawsuits concern a Norfolk, Virginia statue of a Confederate soldier and battle standard ostensibly erected to memorialize Confederate war dead. In the first Norfolk case, *Perry-Bey v. City of Norfolk*, the plaintiffs—two Norfolk residents—challenged the Confederate monument’s presence on city property on Equal Protection, Due Process, and Establishment Clause grounds.⁴² In dismissing the case, the Virginia trial court found that the plaintiffs failed to state a claim upon which relief could be granted. According to the court, they had demonstrated neither actual harm, nor any deprivation of life, liberty, or property.⁴³

Following the dismissal of the first Norfolk case, in *City of Norfolk v. Virginia*, the City of Norfolk itself brought a complaint against the Commonwealth, challenging Virginia’s statue statute based on First and Fourteenth Amendment theories.⁴⁴ According to the city’s First Amendment theory, cities *qua* cities enjoy a right to free speech, and compelling Norfolk to maintain a Confederate monument on its property constitutes coerced speech.⁴⁵ With respect to the Fourteenth Amendment, the city claimed that Virginia’s statue statute violates the city’s due process protections by denying it the right to exclusive possession of its property.⁴⁶

Alabama’s statue statute is similarly being litigated in state court. In the Alabama case, *State v. City of Birmingham*, the state has sued Birmingham for allegedly violating the state’s statue statute when it erected a twelve-foot high plywood screen around a local Confederate monument to block it from public view.⁴⁷ Like Norfolk, Birmingham argues that the statue statute violates the city’s right to free speech under the First Amendment and constitutes a denial of due process under the Fourteenth Amendment. Invoking the conclusion reached in *Pleasant Grove City v. Summum* that “[p]ermanent monuments displayed on public property typically represent government speech,”⁴⁸ the Alabama court agreed with the city that the monument represents government speech and that, in abridging the city’s right to decide how it

⁴² Order Sustaining Demurrers at 2-8, *Perry-Bey v. City of Norfolk*, No. CL 19-3928 (Va. Cir. Ct. July 22, 2019).

⁴³ *Id.* at 2-5.

⁴⁴ Complaint at 2, *City of Norfolk v. Virginia*, No. 2:19-cv-00436 (E.D. Va. filed Aug. 29, 2019).

⁴⁵ *Id.* at 6-8.

⁴⁶ *Id.* at 10-12.

⁴⁷ Order on Cross Motions for Summary Judgment at 2, *State v. City of Birmingham*, CV 17-903426-MGG (Ala. Cir. Ct. Jan. 2019).

⁴⁸ 555 U.S. 460, 470 (2009).

wants to articulate that speech—in this case, placing a plywood screen around the monument to shield it from public view—the state’s statute violated the city’s right to free speech.⁴⁹ The court similarly found that the state’s statute violated the city’s Fourteenth Amendment due process protections. The court reasoned that by both taking \$25,000 worth of city property as a fine for allegedly violating the statute, and restricting the city’s right to manage its own land as it saw fit, the statute effectuated a deprivation of city property. That the statute permitted this deprivation without giving the city or its residents any opportunity to be heard at all, “much less at a meaningful time and in a meaningful manner,” meant the deprivation was violative of the Fourteenth Amendment’s Due Process Clause guarantee.⁵⁰ Given that the Alabama statute did not contain a severability clause, the court invalidated the entire statute.⁵¹

A win for the city and proponents of local democracy, the court’s decision suggests that judges may be receptive to arguments against statute statutes and punitive preemption on First and Fourteenth Amendment grounds. Just how receptive they may be is about to be tested—the Alabama Supreme Court granted a stay of the lower court’s ruling as it considers an appeal from the state challenging the lower court’s determination that municipalities enjoy federally-protected rights which they can assert against the state.⁵²

Potential Challenges to Statute Statutes

The Virginia and Alabama cases illustrate two possible substantive challenges to statute statutes and punitive preemption of local management of Confederate monuments. Yet, it must be remembered that state power over localities is extensive, and it is made all the more so since cities *qua* cities generally do not enjoy constitutional or civil rights.⁵³ But state power is not without limits and states cannot

⁴⁹ Order on Cross Motions for Summary Judgement, *supra* note 47, at 4-6.

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 8-10.

⁵² Plaintiff State of Alabama’s Motion to Stay at 3-4, *State v. City of Birmingham*, CV 17-903426-MGG (Ala. Cir. Ct. Jan. 2019); Brandon Moseley, *Alabama Supreme Court Temporarily Blocks Jefferson County Court’s Confederate Monuments Ruling*, ALA. POLITICAL REPORTER (Feb. 18, 2019), <https://www.alreporter.com/2019/02/18/alabama-supreme-court-temporarily-blocks-jefferson-county-courts-confederate-monuments-ruling/>.

⁵³ Schragger, *supra* note 6, at 61.

“manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations.”⁵⁴ And indeed, even the notion that localities lack constitutional and civil rights is more a matter of judicial habit than black letter law.⁵⁵

First Amendment

The first, and most straightforward argument against statue statutes and punitive preemption—the argument advanced by Norfolk,⁵⁶ Birmingham,⁵⁷ and the NAACP⁵⁸—is that statutes which force others to engage in expressive activity violate the free speech protections enjoyed by private individuals and public entities under the First Amendment.⁵⁹ In the context of Confederate monuments, the erection and maintenance of a monument is an expressive activity and, by extension, a form of speech. The Supreme Court has already made clear that “[p]ermanent monuments displayed on public property typically represent government speech,” because monuments are, “by definition, [] structure[s] . . . designed as a means of expression.”⁶⁰ Thus, if the state compels a locality to maintain and protect a Confederate monument in a public space, the state flouts the locality’s freedom of speech by forcing the locality to engage in a certain kind of expression.⁶¹ Significantly, in *Summum*, the Court rejected the notion that monuments only qualify as government speech when they are publicly financed and erected on public property; rather, the Court maintained that even privately financed monuments can become government speech when they are donated to a locality and displayed on public property.⁶² This more liberal interpretation of government speech could provide cities the means to challenge statue statutes and punitive preemption in an even greater variety of circumstances.

⁵⁴ *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979).

⁵⁵ Schragger, *supra* note 6, at 61.

⁵⁶ Complaint, *supra* note 44, at 6-8.

⁵⁷ Order on Cross Motions for Summary Judgment, *supra* note 47, at 4-6.

⁵⁸ Complaint at 20-23, 21, *Hanover Cty. Unit of the NAACP v. Hanover Cty.*, No. 3:19-cv-00599 (E.D. Va. Aug. 16, 2019).

⁵⁹ Bray, *supra* note 12, at 17.

⁶⁰ *Summum*, 555 U.S. at 470.

⁶¹ See Aneil Kovvali, *Confederate Statute Removal*, 70 STAN. L. REV. ONLINE 82, 83 (2017) (“The free speech objection is simply stated. When a city government erects or maintains a monument, it is speaking. A statute forcing a city to retain a Confederate monument thus compels the city to engage in speech it finds offensive.”).

⁶² *Summum*, 555 U.S. at 464-65, 481.

Whether or not cities enjoy First Amendment rights is an open question.⁶³ The Supreme Court has never explicitly ruled on whether cities are entitled to First Amendment protections, and when given the opportunity to deny cities these protections, it has thus far elected to remain silent.⁶⁴ Although the traditional view of limited constitutional rights for cities predominates,⁶⁵ commentators have argued that the Court has left the door open for lower courts to vest cities with First Amendment rights of their own.⁶⁶

A slightly different First Amendment argument is grounded in individual rights. Some assert that the removal of monuments by localities is an especially important, albeit controversial, form of political protest, analogous to flag burning.⁶⁷ Statue statutes, in stifling this political protest, infringe, not on the freedom of speech protections localities contingently enjoy, but on the freedom of political expression local residents absolutely enjoy.⁶⁸ When these statutes inhibit the expression of local residents' political sentiment by preventing the removal of monuments that a majority of residents find hateful, they inappropriately "put the state's coercive weight on the expressive scales."⁶⁹

Localities may also be able to attack statue statutes and punitive preemption by borrowing the doctrine of "non-endorsement" from Establishment Clause jurisprudence.⁷⁰ Following this approach, a locality could argue that by forcing it to

⁶³ See, e.g., Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 423-29 (2019).

⁶⁴ See *City of Boston v. Anderson*, 439 U.S. 1389 (1978) (refusing to rule on whether cities enjoy First Amendment rights, but suggesting that allowing states to block city political spending may inadvertently stifle the ability of cities to advocate for their residents); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167 (1976) (withholding from ruling on whether cities are vested with a First Amendment right to hear views of citizens and employees).

⁶⁵ See Blank, *supra* note 63, at 419-29; Moseley, *supra* note 52.

⁶⁶ See David J. Barron, *The Promise of Tribe's City: Self-Government, the Constitution, and a New Urban Age*, 42 TULSA L. REV. 811, 819-23 (2007) (describing the city of Boston's argument that it should be entitled to the same speech protections as private corporations); Schragger, *supra* note 6, at 68; Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 870 (1979).

⁶⁷ Ira C. Lupu & Robert W. Tuttle, *The Debate Over Confederate Monuments*, TAKE CARE (Aug. 25, 2017), <https://perma.cc/F2Y3-T35E>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). It should be noted that the Court recently signaled it intends to move away from its traditional religious non-endorsement precedent, and is now hesitant to find violations of the Establishment Clause in

maintain Confederate statues in its public spaces, statue statutes implicitly compel the locality to broadcast a discriminatory message—support for the Lost Cause and white supremacy—which it is constitutionally prohibited from doing.⁷¹ Just as a locality may not endorse Christianity by erecting a large cross in a public park, it also may not endorse white supremacy by erecting a sign that explicitly announces that whites are superior to blacks, or broadcast through its other representations a similar message of exclusion and second-class citizenship.⁷² State statutes cannot require that localities—or anyone for that matter—violate state or federal constitutions; statutes requiring such action must be invalidated if they force others to engage in unconstitutional action under the First Amendment.⁷³

Fourteenth Amendment

State statue statutes and other forms of punitive preemption may also be vulnerable to constitutional challenges on Equal Protection and Due Process Clause grounds under the Fourteenth Amendment. As with the First Amendment challenge, the Equal Protection Clause argument relies on the understanding that a locality's decision to erect or maintain a monument in a public space is an expressive activity and a form of government speech.⁷⁴

While hateful speech by private citizens and corporations may enjoy a degree of protection under the First Amendment, commentators have argued that government speech should be constrained by the Equal Protection Clause because of the behavioral and expressive harms the speech can have on marginalized or subordinate groups.⁷⁵ The implication is that when communities are required by statue statutes

religious cases, let alone in secular cases. See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (finding that a Christian cross memorial to WWI dead owned and maintained by the city did not violate the Establishment Clause, because what religious meaning it may have once had been eroded by the passage of time); Richard C. Schragger, *Of Crosses and Confederate Monuments: Considering the Constitutional Limits of Majoritarian Control on the Public Square* (Aug. 5, 2019) (unpublished manuscript) (on file with author).

⁷¹ See Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 649-51, 658-65 (2013); see also Micah Schwartzman & Nelson Tebbe, *Charlottesville's Monuments are Unconstitutional*, SLATE (Aug. 25, 2017), <https://perma.cc/9QQQ-LYE6>.

⁷² Tebbe, *supra* note 71, at 658-65. But see *Am. Legion*, 139 S. Ct. 2067 (2019).

⁷³ Schwartzman & Tebbe, *supra* note 71.

⁷⁴ Bray, *supra* note 12, at 18.

⁷⁵ See Helen Norton, *The Equal Protection Implication of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 174-183 (2012); Schragger, *supra* note 70, at 7-20; Tebbe, *supra* note 71, at 658-65.

and other forms of punitive preemption to display Confederate monuments—widely accepted symbols of white supremacy designed to intimidate and subordinate racial minorities—they are engaging in racially discriminatory government speech in violation of the federal Equal Protection Clause and state constitutional analogues.⁷⁶ Just as is the case with the free speech approach, state statutes cannot compel actors to engage in activity that violates the state or federal constitutions. If such statutes do, in fact, require actors to engage in constitutional violations, those actors have an obligation to defy the statutes and, in the case of Confederate monuments, remove them from public spaces.

In *Perry-Bey v. City of Norfolk*,⁷⁷ the trial court rejected the Norfolk residents’ equal protection challenge on the grounds that the residents’ lacked standing to contest non-coercive symbolic government speech. This was an unsurprising conclusion, even if commentators question the judicial distinction between government speech and government acts, both of which can be racially discriminatory.⁷⁸

In another federal court case in Virginia, *NAACP v. Hanover County*, representatives of the Hanover County, Virginia NAACP sued Hanover County and the county school board for using Confederate names and imagery in its Lee-Davis High School (home to the “Confederates”) and Stonewall Jackson Middle School (home to the “Rebels”).⁷⁹ The NAACP maintained that the use of the Confederate memory in public education violates First Amendment free speech rights by coercing local African-American students to engage in speech they disavow.⁸⁰ Further, drawing on the equal protection arguments instrumental to the NAACP’s successful challenge to segregated schools in *Brown v. Board of Education*,⁸¹ the NAACP argued that the use of Confederate names and imagery in public schools directly results in unequal learning

⁷⁶ Schwartzman & Tebbe, *supra* note 71.

⁷⁷ Order Sustaining Demurrers, *supra* note 42.

⁷⁸ *Id.* at 3-4. Two Circuits have considered constitutional challenges to the Confederate battle flag and have held that the plaintiffs lacked sufficient tangible injury to establish standing. *See Moore v. Bryant*, 853 F.3d 245, 249-53 (5th Cir. 2017); *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997) (per curiam); *NAACP v. Hunt*, 891 F.2d 1555, 1555 (11th Cir. 1990). *Cf.* James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 Yale L.J. 505 (1991); Amanda Lineberry, Note, *Standing to Challenge the Lost Cause*, 105 VA. L. REV. ____, __ (forthcoming Oct. 2019).

⁷⁹ Complaint, *supra* note 58, at 1-2, 21.

⁸⁰ *Id.* at 20-23.

⁸¹ 347 U.S. 483 (1954).

environments for children based on their race, stigmatizing African-American students and retarding their intellectual potential.⁸² This equal protection challenge may have more success because students have no choice but to attend the schools in question, and courts have traditionally shown special solicitude to inequality in the educational context.

As for the Due Process Clause challenge, there is considerably less judicial or scholarly commentary assessing the efficacy of this approach. Like the Free Speech Clause challenge, the Due Process Clause challenge assumes that localities, as government corporations or as representatives of local residents, enjoy federal constitutional and civil rights and are entitled to their protections, including protections against the deprivation of property without due process. Thus, if a state statute includes punitive preemption language either imposing some sort of fine on a locality when it allegedly violates a provision of the statute, or dictates how the locality may use the public property on which a protected monument sits without some process or procedure for the locality to seek relief, then the statute violates the Due Process Clause. Although this challenge has not been widely applied,⁸³ localities contesting state statute statutes may also consider this potential claim.

Common Law and Statutory Immunity

Apart from federal constitutional challenges to the use of statue statutes and punitive preemption to block local control over Confederate monuments, localities may also consider making state law challenges to these statutes, arguing that they impermissibly infringe upon common law or statutory immunity protections of local legislators. Many states have state constitutional or statutory analogues to the federal Speech or Debate Clause that grant immunity to state legislators from suit for their votes, public statements, or other legislative action taken while performing their official duties.⁸⁴ Although local legislators are not explicitly extended the same immunities under these analogues, state courts have been inclined to extend these protections to local legislators through broad interpretations of the state analogues, or as a matter of common law, citing the legislative immunities that gave rise to the federal Speech or

⁸² Complaint, *supra* note 58, at 25-28.

⁸³ See, e.g., Order on Cross Motions for Summary Judgement, *supra* note 47, at 7.

⁸⁴ Briffault, *supra* note 30, at 2014.

Debate Clause.⁸⁵ It follows then, that when states impose harsh civil and criminal penalties on local legislators when, in their official capacity, they vote to remove or otherwise alter a Confederate monument in violation of a statue statute,⁸⁶ the states infringe on the immunity afforded local legislators and have a chilling effect on their decisions.

Conclusion

Local communities have a strong moral claim to be able to decide for themselves whether to engage in expressive activity that offends the majority of their residents. By imposing Confederate monuments on local governments, states erode local democracy, stifle local political innovation, chill public discourse, and undermine local faith in the democratic process. With other states currently considering bills to enact corrosive statue statutes,⁸⁷ governments need to encourage political resistance to this growing trend. Thus far, localities have enjoyed the most success in proactively resisting the enactment of new statue statutes, rather than contesting existing statutes. Once enacted, statue statutes have proven more resilient to local challenges. Legislative attempts to repeal statue statutes in part or in whole have thus far been entirely unsuccessful.⁸⁸ Constitutional litigation has similarly also been of limited effectiveness. Local governments should, however, continue to resist statue statutes and punitive preemption in the state legislatures and the courts, challenging the statutes under the First Amendment's Free Speech Clause, the Fourteenth Amendment's Equal Protection and Due Process Clauses, and on common law and state statutory immunity grounds.

⁸⁵ *Id.* at 2014-15; *see also* Moore v. Call (*In re* Recall of Call), 749 P.2d 647, 677 (Wash. 1988) (recognizing that the state speech or debate analogue must apply to local legislators because of “the necessity for free and vigorous debate in all legislative bodies”); Sanchez v. Coxon, 854 P.2d 126, 130 (Ariz. 1993) (noting that there was no persuasive reason that “city or town council members should be more inhibited in debate than state or federal legislators”).

⁸⁶ *See, e.g.*, S.B. 2320, Leg., Reg. Sess. (Miss. 2017) (imposing fines and prison terms on violators and subjecting local legislators to individual liability for violation while acting in their official capacity); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (punishing violations with significant fines and expressly waiving all state and local immunity).

⁸⁷ *See, e.g.*, S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019).

⁸⁸ *See, e.g.*, H.B. 2377, Gen. Assemb., Reg. Sess. (Va. 2019) (seeking to amend Virginia's statue statute to permit localities to manage monuments and memorials as they see fit; died in committee); S.B. 51, Gen. Assemb., Reg. Sess. (Ga. 2019) (seeking to repeal Georgia's statue statute; died in committee); H.B. 10, Gen. Assemb., Reg. Sess. (N.C. 2019) (seeking to repeal North Carolina's statue statute; died in committee).

ETCHED IN STONE: HISTORIC PRESERVATION LAW AND CONFEDERATE MONUMENTS

Jess R. Phelps and Jessica Owley***

Abstract

This Article examines the current controversy regarding Confederate monuments. While many have focused on the removal of these commemorative objects, the legal framework regarding their protection has not been fully explored. This Article provides an in-depth understanding of the application of historic preservation laws to monument removal efforts and examines the impact of these federal, state, and local laws. The examination raises significant questions about the permanency of preservation laws generally. This Article considers how historic significance is evaluated and valued, noting the lack of flexibility and absence of mechanisms for reevaluating past protection decisions. This Article uses the Confederate monument debate both to help illustrate the general limitations inherent in static historic preservation laws and to provide practical guidance for those seeking to modify or remove monuments.

INTRODUCTION	628
I. CONFEDERATE MONUMENTS.....	632
II. HISTORIC PRESERVATION LAW	640
A. <i>Federal Law</i>	641
1. The National Historic Preservation Act	642
2. National Environmental Policy Act	651
3. Visual Artists Rights Act	652
B. <i>State Laws</i>	654
1. State Environmental Policy Acts	654
2. State Protections for Visual Artists	657
3. Monument-Specific State Laws	658
a. North Carolina	660
b. Alabama	662
c. Tennessee	664
C. <i>Local Preservation Laws</i>	668
1. Local Preservation Laws	668

* Attorney, Dinse P.C., Burlington, Vermont.

** Professor, University of Miami, School of Law. Jordan Hawkins provided useful research assistance. We are particularly thankful to Guyora Binder, Molly Brady, Peter Byrne, Amanda Hughett, Jonathan Manes, Athena Mutua, Rick Su, and Matt Steilen for their careful reads and insightful comments. We also thank the participants in the 2018 Vermont Law School Environmental Law Colloquium for providing valuable comments and input.

2. Demolition Delay Ordinances670

D. *Private Preservation Laws*671

1. Preservation Easements.....671

 a. Tax-Incentivized Conservation Easements673

 b. Non-Tax-Incentivized Conservation Easements682

CONCLUSION.....686

INTRODUCTION

On June 17, 2015, Dylann Roof attended a prayer service at Emanuel African Methodist Episcopal Church in Charleston, South Carolina.¹ In the middle of the service, he opened fire on the gathering, killing nine people and injuring one.² All of his victims were black. When Roof confessed to the murders, he stated that he had acted with the hope of igniting a race war.³ Roof’s personal website contained photos of him posing with symbols of white supremacy, including the Confederate flag.⁴ He also wrote a manifesto outlining his views on black people, among others.⁵ He developed his white supremacist views after reading

1. Jason Horowitz et al., *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html> [<https://perma.cc/CVV9-QMAQ>] (describing the gathering as “a prayer meeting”); Ray Sanchez & Keith O’Shea, *Mass Shooter Dylann Roof, with a Laugh, Confesses, ‘I Did It,’* CNN (Dec. 10, 2016, 7:16 AM), <https://www.cnn.com/2016/12/09/us/dylann-roof-trial-charleston-video/index.html> [<https://perma.cc/LZ7Z-8SYF>] (noting that Roof describes sitting with his victims at “a Bible study” before shooting them as they stood for prayers with their eyes closed).

2. Horowitz et al., *supra* note 1 (explaining that eight people died at the scene, two were taken to the hospital, and one of those two died on the way).

3. See Polly Mosendz, *Dylann Roof Confesses: Says He Wanted to Start ‘Race War,’* NEWSWEEK (June 19, 2015, 9:38 AM), <https://www.newsweek.com/dylann-roof-confesses-church-shooting-says-he-wanted-start-race-war-344797> [<https://perma.cc/JM42-NGSQ>]; Sanchez & O’Shea, *supra* note 1 (quoting Roof as saying “[h]is goal was ‘to agitate race relations’” and describing himself as a white supremacist).

4. Scott Neuman, *Photos of Dylann Roof, Racist Manifesto Surface on Website*, NPR (June 20, 2015, 1:22 PM), <https://www.npr.org/sections/thetwo-way/2015/06/20/416024920/photos-possible-manifesto-of-dylann-roof-surface-on-website> [<https://perma.cc/59ZE-GS4E>] (showing photos and describing some of the content on Roof’s website, “The Last Rhodesian”); Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html> [<https://perma.cc/42UR-NQTE>] (discussing content from Roof’s website).

5. See Robles, *supra* note 4.

about the 2012 shooting of Trayvon Martin and black-on-white crime.⁶ In the months leading up to the shooting, Roof traveled throughout South Carolina visiting Confederate cemeteries, monuments, and other sites from which he drew inspiration.⁷

On August 11, 2017, white nationalists gathered in Charlottesville, Virginia, on the campus of the University of Virginia to protest the removal of Confederate monuments generally, and specifically the proposed removal of a Robert E. Lee statue from Charlottesville's Emancipation Park.⁸ This event preceded a planned event on August 12th, called the "Unite the Right" rally by organizers.⁹ That event quickly turned ugly.¹⁰ Protesters were members of the far-right and included white supremacists, members of the alt-right, neo-Confederates, Klansmen, neo-Nazis, and various militias.¹¹ Some of the marchers

6. Neuman, *supra* note 4 ("The event that truly awakened me was the Trayvon Martin case . . . I read the Wikipedia article and right away I was unable to understand what the big deal was. It was obvious that Zimmerman was in the right."). George Zimmerman shot and killed Trayvon Martin, an unarmed black teenager, in 2012, believing that Martin was a threat and that he, Zimmerman, had the authority to shoot him. See Adam Weinstein & Mojo News Team, *The Trayvon Martin Killing, Explained*, MOTHER JONES (Mar. 18, 2012, 5:42 PM), <https://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained/> [<https://perma.cc/AQ68-H7E3>].

7. Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), <https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist> [<https://perma.cc/FVP3-9RSC>] ("He drove to the 400-year-old Angel Oak on Johns Island, the Museum & Library of Confederate History in Greenville, a graveyard of Confederate soldiers in his hometown, and plantations like Boone Hall in Mount Pleasant.").

8. Richard Fausset & Alan Feuer, *Far-Right Groups Surge into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017) <https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html> [<https://perma.cc/3L8N-NJ8C>]; Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html> [<https://perma.cc/3WKD-HMTC>].

9. Frontline Documentary, <https://www.pbs.org/wgbh/frontline/film/documenting-hate-charlottesville/> [<https://perma.cc/75E8-GQS5>] (explaining the planned event for August 12, 2017, and the unpermitted march).

10. See Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.c18fbdc17cd3 [<https://perma.cc/5PFW-A2TT>].

11. Morgan Gstalter, *KKK Leader Found Guilty of Firing Gun During Charlottesville Rally*, THE HILL (May 8, 2018, 3:01 PM), <https://thehill.com/blogs/blog-briefing-room/news/386745-kkk-leader-found-guilty-of-firing-gun-during-charlottesville> [<https://perma.cc/SA6N-TGJZ>]; Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018, 4:44 PM), <https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500> [<https://perma.cc/9ATB-WV3N>]; Hanna Kozłowska, *Who Were the Armed Camouflaged Men in Charlottesville Who Have Nothing to Do with the Military?*, QUARTZ (Aug. 15, 2017), <https://qz.com/1053604/who-were-the-armed-camouflaged-men-in-charlottesville-who-have->

chanted racist and anti-Semitic slogans; some carried semi-automatic rifles, swastikas, Confederate battle flags, and other symbols.¹² Marchers clashed with counter-protesters, leaving over thirty injured.¹³ The most violent moment happened when a man linked to white-supremacist groups rammed his car into a crowd of counter-protesters, killing one person and injuring nineteen.¹⁴

In the wake of violence in Charleston and Charlottesville, the ongoing debate over Confederate icons escalated.¹⁵ Although past debates centered on the Confederate battle flag, advocates recently renewed their efforts to remove Confederate monuments, particularly those in public spaces.¹⁶ With this added attention to the future of Confederate monuments comes a need to focus on legal processes for removal and

nothing-to-do-with-the-military/ [https://perma.cc/DP7S-EXYS]; Ray Sanchez, *Who Are White Nationalists and What Do They Want?*, CNN (Aug. 13, 2017, 4:35 PM), <https://www.cnn.com/2017/08/13/us/white-nationalism-explainer-trnd/index.html> [https://perma.cc/PP2S-FYP6].

12. Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/> [https://perma.cc/3E3P-XLYC]; Kozłowska, *supra* note 11; Matt Pearce, *A Guide to Some of the Far-Right Symbols Seen in Charlottesville*, L.A. TIMES (Aug. 14, 2017, 2:00 PM), <http://www.latimes.com/nation/la-na-far-right-symbols-20170814-story.html> [https://perma.cc/66GH-YDT7].

13. Holly Yan et al., *Virginia Governor on White Nationalists: They Should Leave America*, CNN, <https://www.cnn.com/2017/08/13/us/charlottesville-white-nationalist-rally-car-crash/index.html> [https://perma.cc/E8US-QVPV] (last updated Aug. 14, 2017, 6:22 AM).

14. Justin Carissimo, *1 Dead, 19 Injured After Car Plows into Protesters in Charlottesville*, CBS NEWS, <https://www.cbsnews.com/news/1-dead-19-injured-after-car-plows-into-protesters-in-charlottesville/> [https://perma.cc/RLY7-EV89] (last updated Aug. 13, 2017, 1:42 AM). James Alex Fields, Jr., was charged with first degree murder and the legal proceedings against him began in the summer of 2018. Emily Shugerman, *James Alex Fields Jr: Man Accused of Driving into Charlottesville Protesters Charged*, INDEPENDENT (June 27, 2017, 5:59 PM), <https://www.independent.co.uk/news/world/americas/charlottesville-james-alex-fields-jr-latest-heather-fields-car-protest-charged-a8420086.html> [https://perma.cc/NL2E-UULA]. On March 27, 2019, he pleaded guilty in exchange for the prosecutors not seeking the death penalty. Paul Duggan & Justine Jouvenal, *Neo-Nazi Sympathizer Pleads Guilty to Federal Hate Crimes for Plowing Car into Protesters at Charlottesville Rally*, WASH. POST (Mar. 27, 2019), https://www.washingtonpost.com/local/public-safety/neo-nazi-sympathizer-pleads-guilty-to-federal-hate-crimes-for-plowing-car-into-crowd-of-protesters-at-unite-the-right-rally-in-charlottesville/2019/03/27/2b947c32-50ab-11e9-8d28-f5149e5a2fda_story.html?noredirect=on&utm_term=.2662db17b54f [https://perma.cc/CZH4-VZ29] (explaining that Fields pled guilty to twenty-nine of the thirty charges with sentencing set for July 3, 2019).

15. See, e.g., *Confederate Heritage Preservation*, C-SPAN (July 28, 2018), <https://www.c-span.org/video/?448679-9/confederate-heritage-preservation> [https://perma.cc/L7G6-8EAR] (exploring this ongoing societal debate).

16. See generally *The Long and Divisive History of the Confederate Flag*, NPR (June 23, 2015, 5:02 AM), <https://www.npr.org/2015/06/23/416736897/the-long-and-divisive-history-of-the-confederate-flag> [https://perma.cc/46T2-GPCX] (explaining that the battle over the appropriate use of the Confederate battle flag has raged for several decades).

management. Laws often prevent the removal, relocation, obscuration, and contextualization of Confederate monuments, even where such efforts have widespread local support.¹⁷ Specifically, removal efforts are often limited by historic preservation and conservation laws that directly protect either the monuments or the landscape in which they sit.¹⁸ This Article outlines the role historic preservation laws play in efforts to modify or remove Confederate monuments. Many Confederate monuments dotting the landscape of the southern United States and beyond are symbols of white supremacy and were erected not to commemorate the dead but to subjugate the living. Today, there is often local public support for their removal, but this Article illustrates why, despite this support, such efforts are more difficult legally than many initially believed. This Article provides a roadmap for communities to address the future of such monuments.

Beyond commenting on Confederate monuments alone, however, this Article uses the example of Confederate monuments to highlight concerns with historic preservation law more generally. A hallmark of these laws is that they rarely contain flexible mechanisms for change or reinterpretation of historical meaning. Thus, once a monument is designated as historic under a federal or local preservation law or protected with a preservation easement, few mechanisms allow for reevaluation of either the decision to preserve the monument or the preservation rationale for its designation.¹⁹ Using the context of Confederate monuments, this Article broadly critiques historic preservation and conservation efforts that lock in place contemporary ideas of heritage and environmental protection. Historic preservation efforts focus on designators' original intent and are potentially disconnected from the accretion of memories and how these resources are now perceived.²⁰ In short, ongoing debates over historical meaning of events and structures collide with static historic preservation protection efforts. By its nature, the historic preservation movement often views change as an unqualified negative and therefore promotes an inflexible vision of heritage. Changes to historic preservation laws to allow for

17. See Naomi Shavin, *States Are Using Preservation Laws to Block the Removal of Confederate Monuments*, ARTSY (Apr. 24, 2018, 5:20 PM), <https://www.artsy.net/article/artsy-editorial-states-preservation-laws-block-removal-confederate-monuments> [<https://perma.cc/CGJ3-KKA7>].

18. See *infra* Part II.

19. See generally J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENVTL. L.J. 203 (2009) (discussing the evolving interpretation of the Gettysburg battlefield).

20. See, e.g., *id.* at 256 (noting debate regarding the intent and meaning of the Neutra building).

reconsideration and to address the greater public interest are necessary.²¹ This Article uses the example of Confederate monuments both to help explore general limitations inherent in historic preservation law and to provide some practical guidance for those seeking to modify or remove monuments.

I. CONFEDERATE MONUMENTS

The Civil War was the bloodiest conflict fought on this continent and has a deep and continuing impact on collective public memory.²² The number of lives lost far exceeds American losses in any other war, both by gross number (620,000 at the lower end of the estimates) and as a percentage of the population (two percent of the country's total population).²³ Given this degree of loss, it would not be surprising if there had been a strong desire to commemorate those lost in this struggle—on both the Union and Confederate sides.²⁴ Yet, Confederate monuments are largely *not* statues honoring lost loved ones erected in the aftermath of the war.²⁵ Instead, white Southern civic groups established monuments in the wake of Reconstruction and later Jim Crow to reinforce cultural

21. A future challenge of the historic preservation movement is how to deal with competing histories, the accretion of memories and reflecting and preserving uncomfortable moments from our nation's past. Over the past decades, there has been a movement to make the field more inclusive and representative of our shared national history, but this is a slow and unsteady progress. See Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship with Sally Hemings*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html> [<https://perma.cc/NGL8-3XKE>] (noting one example of these tensions within the interpretation of Monticello).

22. See, e.g., James M. Lundberg, *Thanks a Lot, Ken Burns*, SLATE (June 7, 2011, 7:03 AM), http://www.slate.com/articles/arts/culturebox/2011/06/thanks_a_lot_ken_burns.html [<https://perma.cc/HEV5-VPGP>] (profiling the impact of the Civil War on our national consciousness through the lens of the 1990 Ken Burns miniseries).

23. See J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIVIL WAR HIST. 307, 307 (2011); *Civil War Casualties*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/civil-war-casualties> [<https://perma.cc/6UNN-9TAC>]; Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html> [<https://perma.cc/EP28-DRRL>]. For a sense of the emotional impact of this conflict on our country, see DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 8–10 (2008).

24. See James Robertson *History of Confederate Monuments*, C-SPAN (July 28, 2018), <https://www.c-span.org/video/?c4742746/james-robertson-history-confederate-monuments> [<https://perma.cc/89WG-T22K>].

25. *Statement on Confederate Monuments: Confronting Difficult History*, NAT'L TR. HISTORIC PRESERVATION (June 29, 2017), <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials#.Wjf4C1WnGUK> [<https://perma.cc/6VU7-GWDL>] [hereinafter *Statement*].

norms that treated black and other non-white people as second-class citizens.²⁶

The vast majority of Civil War memorials are monuments to Confederate soldiers and the Confederate cause.²⁷ Hundreds of Confederate monuments are scattered across thirty-one states, largely in the South.²⁸ The Southern Poverty Law Center (SPLC) produced a report in 2016, in the wake of the Dylann Roof shooting, documenting both Confederate place names and Confederate symbols in public spaces nationwide.²⁹ The SPLC found 1,503 such names and places (admitting, however, that its study was far from comprehensive, suggesting a potentially substantial undercounting).³⁰ Of these listings, 718 were Confederate monuments and statues.³¹ The bulk of these are found in Georgia, Virginia, and North Carolina, illustrating that “[c]itizens and ancestors of the former Confederate States raised more monuments to a defeat than any other civilization in history.”³² Most of the monuments identified (551) were created before 1950,³³ many in what is considered the boom time for Confederate monuments—roughly between 1889 and 1920.³⁴

Shortly after the Civil War, Americans on both sides began erecting monuments to remember lost loved ones.³⁵ Families and towns raised the first Confederate monuments in cemeteries.³⁶ The monuments tended to be simple obelisks dedicated to inhabitants of a particular town or

26. *Id.*

27. S. POVERTY LAW CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY 9–10 (2016) [hereinafter SPLC].

28. *See Statement, supra* note 25 (noting that some monuments are in “far-flung places” as well).

29. *See* SPLC, *supra* note 27.

30. *Id.* at 7.

31. *Id.*

32. U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900-B, CIVIL WAR COMMEMORATIVE SCULPTURE IN ARKANSAS, 1884–1934, at E-2 (1996).

33. SPLC, *supra* note 27, at 10.

34. *Id.* at 14. This corresponds “with a shameful upsurge in racist atrocities, as whites lynched at least 884 blacks between 1897 and 1906.” Byrne, *infra* note 76, at 232.

35. *See* GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH 1865 TO 1913, at 2–3, 36–46 (1987) (describing the widespread melancholy of this period and noting this as the first period on the spectrum of Confederate monument building—a period of bereavement); Andrew Kahn, *The Landscape of Civil War Commemoration*, SLATE (July 2, 2015, 6:03 PM), http://www.slate.com/articles/news_and_politics/history/2015/07/civil_war_historical_markers_a_map_of_confederate_monuments_and_union_ones.html [<https://perma.cc/S86G-Z4UG>].

36. U.S. DEP’T OF THE INTERIOR, *supra* note 32, at E-5.

region.³⁷ Sometimes, they honored a particular person or distinguished general or officer.³⁸ These monuments went largely unnoticed.³⁹

A change in the monument movement, beginning around 1889, seemed to be driven by a few factors. First, there was a shift from honoring the dead to supporting the living.⁴⁰ The monuments became symbols of Southern pride.⁴¹ The civic organizations lobbying for the monuments argued that they helped white Southern children feel pride in their heritage and their families instead of feeling guilt for having families that championed slavery.⁴² Second, white Southern social groups erected Confederate monuments in conjunction with the passage of Jim Crow laws as symbols of white supremacy and as part of their efforts to reinforce a segregated society.⁴³ The monuments conveyed the idea that the races were not equal, even in the context of a society that no longer thought slavery to be morally right.⁴⁴ Third, capitalism played a role. A growing monument industry advertised broadly and appealed to community groups.⁴⁵ Community groups convinced many civic

37. FOSTER, *supra* note 35, at 43–44 (explaining this focus on commemoration/bereavement).

38. Thomas Brown, *Confederate Monuments*, in 4 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE 43, 43 (Charles Reagan Wilson et al. eds., 2006).

39. FOSTER, *supra* note 35, at 44 (explaining the role/visibility of monuments during the bereavement period of monument installation).

40. See U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-3.

41. See *id.*

42. See *id.*

43. See, e.g., SPLC, *supra* note 27, at 11.

44. See U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-4. Others argue the correlation between the timing of when these structures were constructed and the Jim Crow period does not imply causation, although separating out the original intent to honor the war's dead versus other less explicit messaging (and the backdrop of the conflict's roots in defending the institution of slavery) is not easily accomplished or even possible. *Competing Memories of the Civil War*, C-SPAN (July 28, 2018), <https://www.c-span.org/video/?448679-6/competing-memories-civil-war&playEvent> [<https://perma.cc/RV63-AAJ9>] (explaining the timing and historical context).

45. One larger contributor was the McNeel Marble Company of Marietta, Georgia. U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-9. McNeel had a very successful advertising campaign urging all communities to erect their own Confederate monuments. *Id.* In 1909, the United Daughters of the Confederacy erected more monuments than it had in the previous decade. *Id.* Ninety-five percent of these monuments were built by McNeel. *Id.*; see also Jonathan M. Katz, *Protester Arrested in Toppling of Confederate Statue in Durham*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/protester-arrested-in-toppling-of-confederate-statue-in-durham.html> [<https://perma.cc/C5JH-4N5R>] (describing a McNeel-manufactured Confederate monument in Durham, North Carolina, as being “erected in 1924 during a wave of installations of Confederate memorials, mass-produced and promoted in regional advertising campaigns across the South in the 1920s”). Ironically, many of these statues were identical to those used in Northern memorials as Northern manufacturers also sold to the Southern market. See Marc Fisher, *Why Those Confederate Soldier Statues Look a Lot Like Their Union Counterparts*, WASH. POST (Aug. 18, 2017), <https://www.washingtonpost.com/politics/why-those-confederate-soldier-statues-look>

organizations that a town was not complete without a Confederate monument to bolster Southern pride and heritage.⁴⁶

Together, these three reasons also illustrate why the monuments themselves began to look different. Shifting from mourning to commemorating, the monuments often recognized a particular historic figure (for example, Robert E. Lee, Jefferson Davis, or Thomas “Stonewall” Jackson). As James Grossman, Executive Director of the American Historical Association, explains, “[t]hese statues were meant to create legitimate garb for white supremacy . . . Why would you put a statue of Robert E. Lee or Stonewall Jackson in 1948 in Baltimore?”⁴⁷ Perhaps not surprisingly, there are very few, if any, monuments of Confederate generals who worked with the U.S. government during Reconstruction.⁴⁸ Take, for example, General James Longstreet, one of Lee’s most trusted subordinates, who has one block on his grave, a small statue at Gettysburg, and military service plaques, but otherwise has been left without commemoration despite his role as one of the South’s leading generals.⁴⁹

Much more common than even monuments honoring notable Confederate generals is the construction of statues recognizing unnamed soldiers and figures who represented the ideal of Southern loyalty and strength.⁵⁰ For example, ninety percent of the Confederate monuments erected in Arkansas before 1885 had a funerary aspect, demonstrating themes of loss or bereavement.⁵¹ By 1912, only twenty-five percent of

-a-lot-like-their-union-counterparts/2017/08/18/cefcc1bc-8394-11e7-ab27-1a21a8e006ab_story.html?utm_term=.3278ee998638 [https://perma.cc/8SWU-EJR5] (explaining the role of Monumental Bronze, a Bridgeport, Connecticut, company, in fueling this demand).

46. See John J. Winberry, “*Lest We Forget*”: *The Confederate Monument and the Southern Townscape*, 23 SE. GEOGRAPHER 107, 118 (1983).

47. Miles Parks, *Confederate Statues Were Built to Further a ‘White Supremacist Future,’* NPR (Aug. 20, 2017, 8:31 AM), <https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future> [https://perma.cc/HD7M-MASQ].

48. See, e.g., Jane Dailey, *The Confederate General Who Was Erased*, HUFFINGTON POST (Aug. 21, 2017, 4:42 PM), https://www.huffingtonpost.com/entry/the-confederate-general-who-was-erased-from-history_us_599b3747e4b06a788a2af43e [https://perma.cc/68TH-XM8H] (detailing the efforts of Southerners to erase the history of General William Mahone because of his postwar activities).

49. Charles Lane, *The Forgotten Confederate General Who Deserves a Monument*, WASH. POST (Jan. 27, 2016), https://www.washingtonpost.com/opinions/the-forgotten-confederate-general-who-would-make-a-better-subject-for-monuments/2016/01/27/f09bad42-c536-11e5-8965-0607e0e265ce_story.html?utm_term=.3b8edb6d386f [https://perma.cc/8CZT-7MUX] (noting this fact and arguing that Longstreet was scapegoated by Confederates for his postwar positions during Reconstruction).

50. Brown, *supra* note 38, at 46.

51. U.S. DEP’T OF THE INTERIOR, *supra* note 32, at E-6.

the monuments had a funerary aspect.⁵² Eighty percent represented a lone soldier.⁵³ During this era, the monuments were most likely to be erected on courthouse lawns or other civic spaces (for example, over eighty-five percent of Confederate monuments in Arkansas are in public spaces).⁵⁴

Monument construction was part of an ongoing battle between the veterans' associations in the North and the South to define the rationale for the war in historical memory.⁵⁵ Two organizations are responsible for many of these monuments: Sons of Confederate Veterans and United Daughters of the Confederacy.⁵⁶ By constructing monuments, these organizations sought to honor the Confederate dead, whom they view as heroic, and to spread the organizations' view of the underlying conflict at the heart of the war, usually labeled the "Lost Cause" movement.⁵⁷ Under the Lost Cause theory, the Civil War was a noble struggle to preserve states' rights and a Southern way of life.⁵⁸ This view ignores the fact that the "[S]outhern way of life" was built upon slavery, and it tries to minimize the evils of this unconscionable system.⁵⁹ There are four tenets to the Lost Cause ideology: (1) that the South fought honorably and bravely; (2) that the South was not defeated, but was overwhelmed by superior Northern economic prowess and population; (3) that preservation of states' rights, not slavery, was the cause of the war; and (4) that secession was constitutional (not treasonous).⁶⁰ The Lost Cause Movement has its roots in white anxiety and fear of a loss of standing in

52. *Id.* at E-8.

53. *Id.*

54. *Id.*

55. *Competing Memories of the Civil War*, *supra* note 44.

56. *See, e.g.,* CAROLINE E. JANNEY, BURYING THE DEAD BUT NOT THE PAST: LADIES MEMORIAL ASSOCIATIONS AND THE LOST CAUSE 1–14 (2008) (providing overview of this patriotic movement).

57. *See* Peter Galuszka, *The Women Who Erected Confederate Monuments Are Stunningly Silent*, WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/opinions/the-women-who-erected-confederate-statues-are-stunningly-silent/2017/10/13/2e759dde-a920-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.542c600cd2b2 [<https://perma.cc/959D-MST7>]; *see also* Winberry, *supra* note 46, at 115–16 (describing the "Lost Cause" movement's growth and its role in shaping the landscape of the South).

58. *See, e.g.,* James Oliver Horton, *Confronting Slavery and Revealing the "Lost Cause,"* NAT'L PARK SER., <https://www.nps.gov/resources/story.htm%3Fid%3D217> [<https://perma.cc/GH8X-NV8C>]; *see also* Gary W. Gallagher, *Introduction to THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 1*, 1–4 (Gary W. Gallagher & Alan T. Nolan eds., 2000) (providing an overview of the development of this movement).

59. *See* Horton, *supra* note 58.

60. *See, e.g.,* *The Lost Cause, CIV. WAR JOURNEYS*, http://civil-war-journeys.org/the_lost_cause.htm [<https://perma.cc/RH2A-2P6N>].

society.⁶¹ It applauds a social order based on innate racial inequality.⁶² Placement of many Confederate monuments worked and still works to normalize the Lost Cause view (a view almost entirely rejected or discredited by historians).⁶³

The groups responsible for the monuments often had (and sometimes still have) close ties to the Ku Klux Klan and sometimes specifically acknowledged their desire to use monuments to shift public attitudes and rewrite history.⁶⁴ As one prominent woman from Arkansas announced at the unveiling of a Confederate memorial in 1897 in Fayetteville:

These monuments we build will speak their message to generations. These voiceless marbles in their majesty will stand as vindicators of the Confederate soldier. They will lift from these brave men the opprobrium of rebel, and stand them in the line of patriots. This is not alone a labor of love, it is a work of duty as well. We are correcting history.⁶⁵

Additional monuments appeared in the 1950s and 60s during the civil rights era,⁶⁶ sometimes in response to specific events, like the Supreme Court decision in *Brown v. Board of Education*⁶⁷ and the assassination of

61. David A. Graham, *The Stubborn Persistence of Confederate Monuments*, ATLANTIC (Apr. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-stubborn-persistence-of-confederate-monuments/479751/> [<https://perma.cc/L9LS-SEDG>] (charting the motivations for monument construction).

62. See U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-3.

63. See Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1084–85 (1995) (noting the normalization of Confederate statues); Parks, *supra* note 47 (“To build Confederate statues . . . in public spaces, near government buildings, and especially in front of court houses, was a ‘power play’ meant to intimidate those looking to come to the ‘seat of justice or the seat of the law.’”); see also Irvin D.S. Winsboro, *The Confederate Monument Movement as a Policy Dilemma for Resource Managers of Parks, Cultural Sites, and Protected Places: Florida as a Case Study*, 33 GEORGE WRIGHT F. 217, 218–19 (2016) (discussing this contested historical narrative).

64. See, e.g., Sarah E. Gardner, *What We Talk About When We Talk About Confederate Monuments*, ORIGINS (Feb. 2018), <http://origins.osu.edu/article/what-we-talk-about-when-we-talk-about-confederate-monuments> [<https://perma.cc/9EZB-VGCN>] (discussing the purpose of Confederate monuments and connections to the Ku Klux Klan); Eric Levitz, *Confederate Monuments Were Built to Change History, Not Preserve It*, N.Y. MAG.: INTELLIGENCER (Aug. 17, 2017), <http://nymag.com/daily/intelligencer/2017/08/confederate-monuments-were-built-to-change-history.html> [<https://perma.cc/5VW4-3EF8>] (“Trump had not built a monument to preserve history; he had constructed a prop to lend credibility to a convenient fiction.”).

65. U.S. DEP'T OF THE INTERIOR, *supra* note 32, at E-13 (quoting CONFEDERATED S. MEM'L ASSOC., HISTORY OF THE CONFEDERATED MEMORIAL ASSOCIATIONS OF THE SOUTH 66–68 (1904)).

66. SPLC, *supra* note 27, at 10.

67. 347 U.S. 483 (1954). Also notable is that in the years following the *Brown* decision, there was a steady growth in naming schools after Confederate figures and renewed efforts at influencing classroom history curriculum. See, e.g., Julie Chang, *Confederate Names on Austin*

Martin Luther King Jr.⁶⁸ The number of monuments is once again growing.⁶⁹ SPLC has identified thirty-two monuments dedicated or rededicated after 2000.⁷⁰

The meaning of these monuments is often complicated by the original intent of the erectors, debates over historical context, and what the monuments currently represent.⁷¹ Supporters of Confederate monuments often argue that they are purely commemorative, with the only message being a need to remember the past and honor the dead.⁷² In addressing the timing of the monuments' construction, supporters suggest a less pernicious reason, arguing it was about economics and fear of reprisals.⁷³ The slow rebound of the shattered Southern economy may indeed have played a role in delaying any type of commemorative monuments.⁷⁴ The South was trying to grapple with its staggering losses, suggesting that would-be supporters of monuments did not have the resources to build many before the late 1880s. Additionally, some historians believe that,

Schools Date Back to Civil Rights Movement, STATESMAN (Sept. 13, 2016, 12:01 AM), <https://www.statesman.com/NEWS/20160923/Confederate-names-on-Austin-schools-date-back-to-civil-rights-movement> [<https://perma.cc/33A7-83D5>] (charting this complicated history within the context of schools in Austin, Texas).

68. SPLC, *supra* note 27, at 10.

69. Sabrina Tavernise, *A Boom in Confederate Monuments, on Private Land*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/confederate-monuments.html> [<https://perma.cc/5WXH-Q7NP>] (citing a study that found twenty Confederate monuments erected in North Carolina since 2000).

70. SPLC, *supra* note 27, at 10. These monuments are located across the nation, but are not evenly dispersed. “Iowa . . . has three Confederate monuments, all dedicated after 2000.” Amanda Holpuch & Mona Chalabi, *‘Changing History’? No - 32 Confederate Monuments Dedicated in Past 17 Years*, GUARDIAN (Aug. 16, 2017, 4:54 PM), <https://www.theguardian.com/us-news/2017/aug/16/confederate-monuments-civil-war-history-trump> [<https://perma.cc/4H5S-3EST>] (discussing the construction of new monuments).

71. See, e.g., Wanda Rushing, *Setting the Record Straight on Confederate Statues*, CONTEXTS MAG. (Aug. 10, 2018), <https://contexts.org/blog/after-charlottesville-part-two/> [<https://perma.cc/WTX3-23EX>] (profiling the layers of meaning people associate with these structures).

72. See, e.g., Kevin M. Levin, *The Case Against Vandalizing Confederate Monuments*, ATLANTIC (Dec. 21, 2011), <https://www.theatlantic.com/national/archive/2011/12/the-case-against-vandalizing-confederate-monuments/250337/> [<https://perma.cc/8KBR-QRXB>] (arguing for retention). *But see* Kevin M. Levin, *Why I Changed My Mind About Confederate Monuments*, ATLANTIC (Aug. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/08/why-i-changed-my-mind-about-confederate-monuments/537396/> [<https://perma.cc/K63L-NYSL>] (profiling the reasons for changing position).

73. See, e.g., Winberry, *supra* note 46, at 115.

74. See *id.* (explaining that “many individuals who had been ruined after the war rebuilt their lives and fortunes” and monuments erected in the early 1900s were “as much a monument to them as to the Confederate past”); see also Harold D. Woodman, *Post-Civil War Southern Agriculture and the Law*, 53 AGRIC. HIST. 319, 319–20 (1979) (discussing the economic conditions at the end of the conflict generally).

particularly during Reconstruction, Southerners were afraid of retaliation by the still-present Union army and were worried that monuments would be provocative.⁷⁵ Other supporters of these monuments currently see them as expressions of heroism or shared sacrifice, but the original meaning and later acquired meaning complicate the various ways that people perceive them—both originally and currently.⁷⁶

Confederate memorials, even more so than battlefields or historic homes and plantations, are problematic for preservationists. There is always a tension between preserving history and respecting present day views and attitudes. However, monuments present a special case because they do not fit easily in what we think of as our standard justifications for historic protection (protecting buildings, historic districts, and places for a variety of social and place-based motivations).⁷⁷

In response to the Charleston and Charlottesville events, more communities are struggling with how to handle Confederate monuments.⁷⁸ For public safety reasons and in acknowledgement of the symbolism of the monuments, many communities are working toward removal.⁷⁹ In 2016, the SPLC noted over one hundred efforts to remove

75. See, e.g., FOSTER, *supra* note 35, at 44.

76. See Dane Kennedy, *What Should We Do With Confederate Monuments?*, AHA TODAY: PERSP. ON HIST. (Oct. 30, 2017), <https://www.historians.org/publications-and-directories/perspectives-on-history/october-2017/what-should-we-do-with-confederate-monuments> [https://perma.cc/KB2L-PHSK] (arguing that these monuments protect a distorted view of history); see also Anna Dubenko, *Right and Left on Removal of Confederate Statues*, N.Y. TIMES (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/us/politics/right-and-left-on-removal-of-confederate-statues.html> [https://perma.cc/43HR-DVW4] (noting the political context of these resources); J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENV'T'L L. J. 203, 230–32 (2009) (describing the preservation of the site of the Battle of Gettysburg, including memorials to Confederate soldiers, and explaining that “white opinion leaders in the North and South portrayed the war as a tragic mistake, redeemed by heroic self-sacrifice on both sides”).

77. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479–80 (1981).

78. See *Confederate Monuments Are Coming Down Across the United States. Here's a List.*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html> [https://perma.cc/6DS2-E32M] [hereinafter *Confederate Monuments Coming Down*]; Jonathan Lande, “*Confederate Monuments . . . What to Do?*”: *Historians' Town-Hall Meeting on Memorialization—And Racial Injustice*, J. CIVIL WAR ERA: MUSTER (Apr. 27, 2018), <https://www.journalofthecivilwarera.org/2018/04/confederate-monuments-historians-town-hall-meeting-memorialization-racial-injustice/> [https://perma.cc/SJL4-ZYEZ] (discussing these connections and additional acquired meanings of the monuments generally).

79. See, e.g., *Confederate Monuments Coming Down*, *supra* note 78. At the same time, however, new monuments are going up. Emanuella Grinberg, *New Confederate Monuments Are Going Up and These Are the People Behind Them*, CNN, <https://www.cnn.com/2017/08/18/us/new-confederate-monuments/index.html> [https://perma.cc/GP3F-WAGV] (last updated Aug. 23, 2017, 11:27 PM); Jenny Jarvie, *As Monuments to the Confederacy Are Removed from*

Confederate monuments, symbols, or names from public spaces.⁸⁰ The efforts to remove Confederate monuments on public lands are often complicated by a host of historic preservation, conservation, and land-use laws.⁸¹ This Article details these laws below and provides examples of how such benign-seeming laws have led to protracted disputes and complicated proceedings.

II. HISTORIC PRESERVATION LAW

Confederate monuments often receive protection from historic preservation laws.⁸² As detailed throughout this Section, federal, state, and local laws, along with private protection mechanisms, work to fix these monuments in place, complicating efforts to reassess Confederate monuments. As communities consider whether to remove, relocate, obscure, or contextualize Confederate monuments, several historic preservation laws can thwart or delay their efforts.⁸³ This Section outlines the historic preservation laws that sometimes apply to Confederate monuments. As this Article demonstrates below, not all laws apply in all circumstances, and understanding the landscape of Confederate monuments requires an individualized inquiry based on placement, legal recognition, funding, and a host of other factors. This Article does not intend to address every possible scenario, but it provides a working understanding of the laws that will most commonly apply if a Confederate monument is being targeted for removal or other treatment. This Article focuses on commemorative structures, generally those located in public spaces that are divorced from the actual historic battlefield context. These structures differ from other types of historic resources in that they were expressly intended to signal present day viewpoints over preservation or protection of historical moments.⁸⁴ While the case of Confederate monuments may seem an exceptional one, the conversation below highlights concerns with preservation laws that

Public Squares, New Ones Are Quietly Being Erected, L.A. TIMES (Oct. 22, 2017), <https://www.latimes.com/nation/la-na-new-confederate-memorials-20171020-story.html> [<https://perma.cc/DN4J-FATM>]. See generally Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPPLEMENT 15 (2018) (discussing the controversial and complicated landscape surrounding the removal of Confederate monuments, particularly looking at the blurred line between public and private ownership of the monuments and the land).

80. SPLC, *supra* note 27, at 11.

81. See generally Owley & Phelps, *supra* note 79 (discussing these complications). We are also particularly intrigued by the issues that arise with Confederate monuments on private land. See *id.* at 21–23.

82. See, e.g., 54 U.S.C. § 300101 (Supp. V 2018).

83. See discussion *infra* Sections II.A., II.B.

84. See *Statement*, *supra* note 25.

give little room for reassessing which objects society seeks to protect through land-use regulation.

This Section begins by outlining the federal historic preservation laws that might apply to Confederate monuments. Continuing the federal inquiry, it then explores some related laws regarding environmental protection and protection for artwork. It then looks to the state and local historic preservation mechanisms. In particular, a flurry of new state laws prohibiting removal of statues and commemorative structures is a clear impediment to monument removal efforts. This Section concludes with private historic preservation endeavors in the form of preservation easements. For each case, this Article explains how the law works, how Confederate monuments fit within in the protective scheme, and the impacts on potential removal efforts.

A. Federal Law

Federal historic preservation laws play a role in monument removal, often requiring public participation regarding either removal or modification of monuments. These historic preservation laws operate in diverse contexts and their application hinges on a number of factors, including the type of resource (a building, object, structure, site, or district), its ownership, and its location. At the federal level, two primary laws are most likely to apply: the National Historic Preservation Act (NHPA)⁸⁵ and the National Environmental Policy Act (NEPA).⁸⁶

85. Pub. L. No. 113-287, 128 Stat. 3187 (2014) (codified as amended in scattered sections of 54 U.S.C.).

86. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.). Other preservation laws may apply in some scenarios. For example, the Department of Transportation Act applies if federal transportation funds helped to construct the monument or the area surrounding the monument. *See* 49 U.S.C. § 303(b) (2012); Monumental Task Force Comm., Inc. v. Foxx, 259 F. Supp. 3d 494, 511 (E.D. La. 2017) (rejecting a Department of Transportation Act claim raised in connection with the removal of statues in New Orleans). Other sections of the NHPA (particularly § 110 and the requirements related to the agency's responsibilities in caring for properties under its ownership) could also come into play. *See* 54 U.S.C. § 306101(a) (Supp. V 2018) (amended NHPA § 110). Section 110 requires federal agencies to review historic properties under their jurisdiction and plan for their appropriate care. *Id.* Section 110's impact, however, is diluted by case law holding that § 110(a) effectively lacks a remedy but could still be a hook to attempt to force an agency to comply with its obligations and force action. *See* Andrea Ferster, *Enforcing Section 110(a): Can a Legal Obligation Without a Remedy Be an Effective Tool for Preservation?*, PRESERVATION LEADERSHIP F. (July 15, 2015, 1:09 PM), <https://forum.savingplaces.org/blogs/special-contributor/2015/07/15/enforcing-section-110a-can-a-legal-obligation-without-a-remedy-be-an-effective-tool-for-preservation> [<https://perma.cc/AZ9Y-EXBC>] (explaining the impact of the holding in *National Trust for Historic Preservation v. Blanck*, 93 F. Supp. 908 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999)).

1. The National Historic Preservation Act

The National Historic Preservation Act was passed in 1966.⁸⁷ The main goals of the act are to incorporate the need to protect historic resources into our national consciousness and to advocate for the retention of historic structures and resources.⁸⁸ The NHPA is the wide-ranging preservation legislation that established the National Register of Historic Places (National Register).⁸⁹ The NHPA also requires consideration of the impacts of federal activity on historic resources through a consultation process, and it established the Advisory Council on Historic Preservation (ACHP)—the federal entity responsible for advising agencies on their compliance with the NHPA and for advocating for historic resources more generally.⁹⁰

The National Register is an official list of the buildings, structures, districts, sites, and objects that the federal government has deemed worthy of protection.⁹¹ The National Register contains over 90,000 individual listings (covering over one million properties) and is managed by the National Park Service.⁹² The designation process itself is state-led, with State Historic Preservation Offices (SHPOs) coordinating and submitting nominations.⁹³ To be eligible for the National Register, the resource must qualify as a building, structure, object, site, or district.⁹⁴ A monument would likely be classified as an object.⁹⁵ For a property to merit listing on the National Register, it must meet several criteria outlined by federal law.⁹⁶ This process requires an examination of a property's significance, age, and integrity.⁹⁷ National Park Service regulations instruct that it consider a property's "significance in

87. Pub. L. No. 89-665, 80 Stat. 915 (1966), *repealed by* National Park Service and Related Programs, Pub. L. No. 113-287, 128 Stat. 3187.

88. *See* BENDING THE FUTURE: 50 IDEAS FOR THE NEXT 50 YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES 1–6 (Max Page & Marla R. Miller eds., 2016) (providing overview of motivations for this landmark legislation).

89. *See* 54 U.S.C. § 302101.

90. *See* SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 106 (2012).

91. *See* 54 U.S.C. § 302101; *National Register of Historic Places*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/real-estate/historic-preservation/historic-building-stewardship/national-register-of-historic-places> [<https://perma.cc/DF5B-U8DM>].

92. *National Register of Historic Places*, *supra* note 91.

93. *How to List a Property*, NAT'L PARK SERV., <https://www.nps.gov/subjects/national-register/how-to-list-a-property.htm> [<https://perma.cc/ZV3J-MY75>].

94. 54 U.S.C. § 302101; *see also* 36 C.F.R. § 60.3 (2018) (defining some of these terms).

95. "An object is a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." 36 C.F.R. § 60.3(j). In certain cases, it may be difficult to distinguish between structures and objects. BRONIN & BYRNE, *supra* note 90, at 59.

96. *See, e.g.*, 54 U.S.C. §§ 302102, 302103, 302107.

97. *See How to List a Property*, *supra* note 93.

American history, architecture, archeology, engineering, and culture.”⁹⁸ Furthermore, listed objects must “possess integrity of location, design, setting, materials, workmanship, feeling, and association.”⁹⁹ Additionally, the property must fall under one or more of four criteria:¹⁰⁰ (a) “associat[ion] with events that have made a significant contribution to the broad patterns of our history;” (b) association with the lives of significant individuals; (c) architectural or artistic value; or (d) “have yielded, or may be likely to yield,” archaeological information/data.¹⁰¹ For Confederate monuments, based upon a cursory survey of monument nomination forms available online, criteria (a)¹⁰² and (c)¹⁰³ are the most likely to apply.

Several exceptions limit the number of listed properties.¹⁰⁴ The National Park Service’s regulations “[o]rordinarily” exclude from eligibility “cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years.”¹⁰⁵ While this language suggests that Confederate monuments would be excluded from the National Register, there are in fact many listed monuments. The public digital database for the National Register contains 101 listings with the word “Confederate” in the title.¹⁰⁶

98. *National Register Criteria for Evaluation*, NAT’L PARK SERV., https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_2.htm [<https://perma.cc/P84S-EK3T>].

99. *Id.*

100. This differs from the standards that apply to § 106 review under the NHPA, which apply to those properties that are eligible rather than listed. *See* 54 U.S.C. § 306108.

101. 36 C.F.R. § 60.4 (2018). In addition to qualifying under the criteria, the property must also retain sufficient historic integrity. *See National Register Criteria for Evaluation*, *supra* note 98 (explaining the seven factors under which historic integrity is evaluated).

102. *See, e.g.*, U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900, CLARKSVILLE CONFEDERATE MONUMENT (1999), <http://www.arkansaspreservation.com/National-Register-Listings/PDF/JO0102S.nr.pdf> [<https://perma.cc/D6ZR-3DSD>] (listing under criteria 9(a)).

103. *See, e.g.*, U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900, CONFEDERATE MONUMENT (1997), https://www.dhr.virginia.gov/VLR_to_transfer/PDFNoms/124-0183_Confederate_Monument_1997_Final_Nomination.pdf [<https://perma.cc/SGC3-9NXY>] (listing under criteria (c)).

104. *See, e.g.*, 36 C.F.R. § 60.4.

105. *Id.*; *see also* JOHN H. SPRINKLE, JR., CRAFTING PRESERVATION CRITERIA: THE NATIONAL REGISTER OF HISTORIC PLACES AND AMERICAN HISTORIC PRESERVATION 151–53 (2014) (discussing the debate over exclusions to the National Register to limit its scope).

106. *NPGallery Digital Asset Search*, NAT’L PARK SERV., <https://npgallery.nps.gov/nrhp> [<https://perma.cc/RDZ7-W7LB>] (insert “confederate” into “Resource Name” search field, then click “Search”). This simple search did not cover monuments named after specific people and those that did not have “confederate” in their title. For example, there are at least four monuments

One such monument is the “First Monument to the Unknown Confederate Dead”¹⁰⁷ in Union City, Tennessee, erected in 1869 in the local cemetery and listed in 1977.¹⁰⁸ In completing the form to request inclusion on the National Register, the Tennessee Historical Society checked the “OTHER (SPECIFY)” box for qualifying areas of significance and then typed in “[c]ommemorative.”¹⁰⁹ Yet, *commemorative* is actually an exception to listing.¹¹⁰ If commemorative value was the sole significance of this site, it should not have been eligible for listing.

Most listed monuments were built between 1890 and 1950 and were listed between 1975 and 1997.¹¹¹ The Rankin County Confederate Monument in Brandon, Mississippi, serves as a typical example. The local chapter of the United Daughters of the Confederacy erected the statue of an unknown Confederate soldier in the town square in 1907.¹¹² An excerpt of the rather long inscription includes an homage “to those who wore the grey” and a call for “states’ rights and home rule” to “rise again.”¹¹³ While petitioners supporting the listing of the Union City monument view the structure as commemorative, the narrative statement of significance for the Brandon monument suggests that the statue merits listing because it is “a locally important example of the extensive effort to memorialize the Confederacy which was a major expression of social and civic consciousness in the South . . . [and] part of the development of

to Robert E. Lee, suggesting many more listed sites despite the exception for commemorative structures.

107. *Id.* (insert “confederate” into “Resource Name” search field, then filter “State” to “Tennessee,” then click “Search”). It is possible that this is indeed the first such monument. Unlike other monuments listed in the National Register, this statue was constructed shortly after the Civil War and at the time of its listing in the National Register in 1977, no extant older monument had been located. *Id.*

108. U.S. DEP’T OF THE INTERIOR, FORM 10-300 (REV. 10-74), FIRST MONUMENT TO UNKNOWN CONFEDERATE DEAD (1977), <https://npgallery.nps.gov/NRHP/GetAsset/7742c469-5335-4244-9d4f-7f8675665c25> [<https://perma.cc/G9ZE-S279>].

109. *Id.*

110. 36 C.F.R. § 60.4 (2018).

111. Becky Little, *How the U.S. Got So Many Confederate Monuments*, HISTORY (Aug. 17, 2017), <https://www.history.com/news/how-the-u-s-got-so-many-confederate-monuments> [<https://perma.cc/U2HX-X79Z>]; NPGallery Digital Asset Advanced Search, NAT’L PARK SERV., <https://npgallery.nps.gov/NRHP/AdvancedSearch/> [<https://perma.cc/693N-XBBV>] (insert “confederate” into “Resource Name” search field, insert “1975” into “Beginning Year” search field, insert “1997” into “to End Year” search field, and then click “Search”).

112. U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900: RANKIN COUNTY CONFEDERATE MONUMENT § 7, at 1 (1997) <https://npgallery.nps.gov/NRHP/GetAsset/8df34646-daa8-4246-ab76-c47fa481fd4e/> [<https://perma.cc/HE5H-4TNL>]. Both public and private funds went towards the cost of the monument. *Id.* § 8, at 3.

113. *Id.* § 7, at 1.

a sense of a Southern regional identity during that period.”¹¹⁴ As such, the persons completing the nomination form justify the listing as a property associated with significant parts of American history.¹¹⁵ Yet, the history cited is not of the Civil War itself, but of later efforts to use Confederate memorials to create a post-conflict Southern identity.¹¹⁶ The form also lists the monument as being a locally important example of a sculpture even though it is “a conventional or stock sculptural piece.”¹¹⁷ While the nomination form acknowledges that the property is commemorative and therefore should be subject to the applicable criteria exception, it argues that the resource “merits National Register eligibility as an expression of the Confederate Memorial movement which was a historically significant social movement in the postbellum South,” which the Keeper of the National Register confirmed.¹¹⁸

Once a property is listed on the National Register, a host of other provisions come into play. Under the NHPA, the most likely provision to inhibit removing a Confederate monument is § 106, which outlines the requirement for federal agencies to consider the potential adverse effects of their “undertakings” on historic structures before proceeding with a project or approval.¹¹⁹ The consultation process of § 106 does not impose an affirmative obligation on any federal agency to avoid an outcome but requires consideration of impacts on historic structures before proceeding with a project.¹²⁰ While § 106 does not prevent federal funding of projects that significantly impact or even demolish designated historic structures, it does “require the agency to identify historic resources and explore alternative measures . . . that may mitigate or avoid whatever harm the project would have on the buildings.”¹²¹

114. *Id.* § 8, at 2.

115. *Id.* § 8, at 2–3.

116. *Id.* § 8, at 2.

117. *Id.* The Narrative of Significance also suggests that the statue is particularly significant because it is “the primary example of public statuary in Rankin County,” and “is the only major outdoor sculpture in Brandon, other than funerary monuments.” *Id.* Such a situation actually suggests an even greater concern about the role and symbol such a statue might play in the community.

118. *Id.*

119. 54 U.S.C. § 306108 (Supp. V 2018); see 36 C.F.R. § 800.1 (2018). See generally *Protecting Historic Properties: A Citizen’s Guide to Section 106 Review*, ACHP, <https://www.achp.gov/sites/default/files/documents/2017-01/CitizenGuide.pdf> [<https://perma.cc/4BWT-VMMS>] (summarizing this process).

120. Jess R. Phelps, *The National Historic Preservation Act at Fifty: Surveying the Forest Service Experience*, 47 ENVTL. L. 471, 483 (2017).

121. JULIA H. MILLER, *A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION* 5 (2008).

Section 106 applies to any federal “undertaking.”¹²² The statute defines an “undertaking” as a

project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a federal agency.¹²³

Once the action agency has determined that a specific action qualifies as an undertaking with the potential to affect historic properties, the agency begins consultation.¹²⁴ The first step in the consultation process is identification.¹²⁵ Identification involves determining the scope of the undertaking to assess the potential impacts on qualifying historic resources.¹²⁶ The identification process begins by establishing the area of potential effects.¹²⁷ The federal action agency (with the agreement of the state historic preservation office) assesses whether potential historic properties are within that geographic area.¹²⁸ The historic resources of concern under § 106 are those either designated or eligible for designation on the National Register.¹²⁹ Determining eligibility for designation can be complicated in any case but should theoretically be

122. See 54 U.S.C. § 300320.

123. *Id.*; see also 36 C.F.R. § 800.16(y) (defining “undertaking” similarly, but excluding the fourth category listed above). The ACHP has historically taken a broad view of this jurisdictional definition, with its former executive director concluding, “[t]hough any federal action is technically covered by the definition of ‘undertaking,’ the reality is that the more tenuous the federal nexus, the less likely an agency will take its Section 106 duties seriously.” John M. Fowler, *The Federal Preservation Program*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 35, 47 n.21 (Robert E. Stipe ed., 2003).

124. The parties that might be involved in a consultation vary, but in addition to the federal agency, the State Historic Preservation Office (SHPO) or Tribal Historic Preservation Officer, or the local government, amongst others, might be involved. See *Section 106 Applicant Toolkit*, ACHP, <https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit> [<https://perma.cc/86J4-7JEU>].

125. See 36 C.F.R. § 800.4.

126. *Id.*; see 800.16(d).

127. See *id.* §§ 800.4(a)(1), 800.16(d).

128. See *id.* § 800.4.

129. See *id.* § 800.4(c). This is a wider definition than applies under the tax incentives for historic properties or the historic rehabilitation tax credits as it also covers eligible, not just designated, resources. See Jess R. Phelps, “*A Tinge of Melancholy Lay upon the Countryside*”: *Agricultural Historic Resources within Contemporary Agricultural and Historic Preservation Law*, 33 VA. ENVTL. L.J. 56, 90–91 (2015) (profiling this distinction and the difficulty it presents in protecting historic agricultural resources through preservation easements).

particularly involved for commemorative properties such as Confederate monuments.¹³⁰

If a property is listed on the National Register of Historic Places, or even if the action agency determines it to be eligible for inclusion,¹³¹ the parties will move into the assessment phase of consultation. Assessment involves determining whether the undertaking will have an adverse effect on the historic resources.¹³² Section 106 explains that adverse effects occur “when an undertaking may alter, directly or indirectly, an[y] of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling or association.”¹³³ If the agency’s goal is removal of a property or significant object associated with the property, this will almost unavoidably have an adverse effect, which will require moving to the last phase of consultation: resolving the adverse effects.

The last step in the consultation process explores how to resolve adverse effects on the affected historic structures.¹³⁴ This phase generally involves robust discussion about other options for the project that would either avoid or mitigate the potential impacts to the historic resource.¹³⁵ Mitigation can come in a number of forms including documentation of the resource that will be altered or lost.¹³⁶ As one commentator notes, “[a]n agreed-upon outcome under Section 106 is not usually a pure preservation solution. . . . Rarely is the ‘no-build’ option given serious consideration, and the economic realities of the project are almost always dominant.”¹³⁷ Instead, the solution typically involves a negotiated solution balancing the project needs, the sensitivity of the resource, and the interests of the parties involved in the consultation.¹³⁸

130. See ADVISORY COUNCIL ON HISTORIC PRES., ACHP POLICY STATEMENT ON CONTROVERSIAL COMMEMORATIVE WORKS 2 (2018), <https://www.achp.gov/sites/default/files/policies/2018-06/controversial-commemorative-works-policy%20%281%29.pdf> [https://perma.cc/D9P8-P64K] (explaining the limitations on commemorative properties within the historic significance arena).

131. This expands the number of Confederate monuments at issue as it is not only those actually on the National Register but also those that an action agency might view as eligible.

132. See 36 C.F.R. § 800.5(a).

133. *Id.* § 800.5(a)(1).

134. *Id.* § 800.6.

135. See, e.g., S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 898–99 (2012) (summarizing this requirement in the tribal context).

136. See THOMAS F. KING, CULTURAL RESOURCES LAWS & PRACTICE 179–80 (3d ed. 2008) (summarizing possible options for resolving adverse effects).

137. Fowler, *supra* note 123, at 49.

138. See KING, *supra* note 136, at 57, 165–67.

To be effective, consultation must involve informed discussion of the competing interests concerning the project and the historic resources and a dialogue towards an agreed-upon solution.¹³⁹ In early 2018, the ACHP issued a policy statement on consultations involving “controversial commemorative works,” which includes, but is not limited to, monuments related to the Confederacy.¹⁴⁰ In the ACHP’s view, “[b]road civic involvement and public engagement should be pursued. [And] [p]arties on all sides . . . should be given the opportunity to participate in discussions, provide information, express concerns, and propose alternatives for consideration.”¹⁴¹ The alternatives suggested by the ACHP to resolve adverse impacts include: (1) retaining the work unchanged; (2) retaining the work and providing additional on-site interpretation; (3) “[m]odifying the . . . work to address community concerns while maintaining [its] overall integrity” (i.e., removing a part of the work that is objectionable); and (4) “[p]reserving the . . . work, but removing it from prominent display in a public space” to a museum or other suitable context.¹⁴² The consultation over any proposed relocation or modification of a public monument has the potential to be highly controversial.

To conclude consultation, the parties enter into a Memorandum of Agreement or a Programmatic Agreement, depending upon the complexity of the project.¹⁴³ The document contains the parties’

139. See generally Kathryn Sears Ore, Student Article, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RESOURCES L. REV. 205, 238–43 (2017) (discussing § 106 and attaining meaningful consultation).

140. See ADVISORY COUNCIL ON HISTORIC PRES., *supra* note 130, at 1.

141. *Id.* at 2.

142. See *id.* at 3 (providing treatment alternatives and practical examples of their application where available). These suggestions are close to those suggested by the National Trust for Historic Preservation, the national preservation advocacy organization. See *Statement*, *supra* note 25.

143. See 36 C.F.R. §§ 800.6(a)(4), 800.14(b) (2018). Memoranda of Agreement (MOAs) are for a specific project, while Programmatic Agreements (PAs) address complicated or ongoing undertakings. See ADVISORY COUNCIL ON HISTORIC PRES., TYPES OF AGREEMENT DOCUMENTS IN SECTION 106: WHAT THEY ARE AND WHEN THEY SHOULD BE USED 1 (2018), <https://www.achp.gov/sites/default/files/guidance/2018-09/TypesofAgreementDocumentsinSection106WhatTheyAreandWhenTheyShouldBeUsed.pdf> [https://perma.cc/N9HR-DCTY]. There are two types of PAs: project and program. *Id.* A project PA allows a project to proceed before the final decision on the undertaking is made but establishes parameters on the process and check-in points. *Id.* An example would be the acquisition of a linear right-of-way. The agency is not expected to make all of its decisions up front, so it can start and have a framework for evaluating the acquisitions downstream. A program PA addresses impacts for an entire class of agency undertakings—usually undertakings that are simple or similar to streamline consultation. See 36 C.F.R. § 800.6(a)(4); ADVISORY COUNCIL ON HISTORIC PRES., *supra*, at 2 n.2. For more information on the distinctions between the various ACHP agreement documents, see *Guidance*

agreement, including the federal action agency's decisions regarding mitigation and resolution of the project impacts.¹⁴⁴ If the parties fail to agree on how to resolve the adverse effects, they can terminate the consultation.¹⁴⁵ Terminating consultation results in the ACHP providing its comments and making formal recommendations to the action agency, which will have to show its consideration of the ACHP's input in making its final decision on the undertaking.¹⁴⁶ While the action agency must consider the ACHP's comments and recommendations, it is under no obligation to respond or adhere to them. Termination of consultation is rare, as the parties typically want to avoid potential political blowback, but in the monument context, this would be a possibility for a contested removal and a difficult political decision.¹⁴⁷

To summarize the consultation process and apply it to the monument context, the federal agency will first determine whether the project that would affect the monument is an undertaking. Here, there are at least two (likely interrelated) types of qualifying undertakings: (1) where federal funding is used for removal or modification and (2) where the monument is located on federal land.

Once the federal agency acknowledges the project as an undertaking, the identification stage requires considering whether the undertaking has the potential to affect a Confederate monument or related historic resources.¹⁴⁸ If not, the § 106 process ends there.¹⁴⁹ If there are impacts, the action agency must assess whether the impacts will be adverse.¹⁵⁰ "Adverse impacts" to Confederate monuments in the context of § 106 would center on alterations to those characteristics of the property that made it eligible for inclusion on the National Register.¹⁵¹ Designation of

Agreement Documents: Do You Need a Section 106 Agreement?, ACHP, https://www.achp.gov/do_you_need_a_section_106_agreement [<https://perma.cc/658G-VKZF>].

144. See 36 C.F.R. §§ 800.6(b)–(c).

145. *Id.* § 800.7.

146. See, e.g., ADVISORY COUNCIL ON HISTORIC PRES., COMMENTS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING THE RELEASE FROM SUSPENSION OF THE PERMIT TO DRILL BY SOLONEX LLC IN LEWIS AND CLARK NATIONAL FOREST, MONTANA 1–8 (2015), <https://www.doi.gov/sites/doi.gov/files/uploads/ACHP%20Rec.%20Letter%20re%20-%20B2M%20Lease.pdf> [<https://perma.cc/B58Y-SMV2>].

147. See Michael C. Blumm & Andrew Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 *ECOLOGY L.Q.* 609, 628 (2015) (exploring why so few consultations end with council comments).

148. See discussion *supra* notes 119–21.

149. See 36 C.F.R. § 800.4(d)(1).

150. See *id.* § 800.4(d)(2).

151. *Cf. id.* § 800.5(a)(1)–(2) (stating the definition of adverse effect and listing examples of this).

Confederate monuments is generally based on the cultural role the monument played in the community or the artistic value of a statue.¹⁵²

If the proposed undertaking could adversely impact the historic resource, the agency will need to consult with the SHPO or ACHP.¹⁵³ Removal or modification of a monument would be an adverse impact.¹⁵⁴ Consultation involves close discussion with impacted parties on how to identify, evaluate, and resolve any proposed project involving designated or eligible historic resources—including a commemorative structure.¹⁵⁵

Overall, § 106 and the consultation process could impact monument removal in two ways. First, as in *Monumental Task Committee, Inc. v. Foxx*,¹⁵⁶ a plaintiff could use § 106 as a vehicle to challenge removal if the removal project has a federal hook and parties fail to appropriately engage in the consultation process.¹⁵⁷ In *Monumental Task Force*, preservation organizations brought an action challenging New Orleans's decision to remove Confederate-era monuments under § 106.¹⁵⁸ The court, however, rejected this argument as the plaintiffs were unable to establish a “nexus between a federally-funded project or undertaking and the removal of the four monuments at issue.”¹⁵⁹ While § 106 does not impose a substantive bar against removal or modification, it does require agencies to engage and comply with this procedural mandate.¹⁶⁰ Second, the existence of § 106 alone could discourage removal through its requirements for a costly, controversial, and time-consuming process. Thus, § 106 has the power to complicate removal efforts, but this statute will not be outcome determinative or serve as a substantive bar against that eventual outcome.¹⁶¹

152. ADVISORY COUNCIL ON HISTORIC PRES., *supra* note 130.

153. *See* 36 C.F.R. § 800.6(a)–(b).

154. *Id.* § 800.5(a)(2)(ii)–(iii).

155. *See id.* §§ 800.5(d)(2), 800.6(a), 800.16(f).

156. 157 F. Supp. 3d 573 (E.D. La. 2016).

157. *Id.* at 580–82, 591 (rejecting the NHPA claim). This might not always be possible given the nature of the applicable monument. *See, e.g.*, *Shreveport Chapter #237 of United Daughters of the Confederacy v. Caddo Parish Comm'n*, No. 17-1346, 2018 WL 5666512, at *7–8 (W.D. La. Jan. 26, 2018) (rejecting United Daughters of the Confederacy's challenge to removal of a monument under either a private right of action under the National Historic Preservation Act or the Administrative Procedure Act as there was no undertaking).

158. *Monumental Task Force*, 157 F. Supp. 3d at 590.

159. *Id.* at 591.

160. *See, e.g.*, *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 772 (9th Cir. 2006).

161. There is a circuit split between courts as to whether the NHPA provides a private right of action or if the only cause of action is under the Administrative Procedure Act. *See* Amanda M. Marincic, Note, *The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nations*, 103 IOWA L. REV. 1777, 1793 (2018) (noting this split).

2. National Environmental Policy Act

The National Environmental Policy Act (NEPA) could also apply to an effort to remove or alter a Confederate monument. NEPA requires federal agencies planning a major federal action to consider and evaluate the project's impacts on the environment.¹⁶² While many are likely familiar with NEPA in the environmental law context, NEPA also requires agencies to consider impacts to cultural resources, including properties listed on the National Register of Historic Places.¹⁶³ NEPA requires federal agencies to assess these impacts if the project qualifies as “a ‘major Federal action significantly affecting the quality of the human environment.’”¹⁶⁴ If this standard, which is generally viewed as requiring more than the NHPA's undertaking standard, is met, the agency must prepare an environmental impact statement.¹⁶⁵ If the agency is unclear as to whether the proposed action will significantly impact the environment, the agency can first complete an environmental assessment to determine whether a full environmental impact statement is required.¹⁶⁶ If, based upon the environmental assessment, the agency determines that the action will not have a significant impact, the agency will issue a Finding of No Significant Impact or proceed to prepare the full impact statement.¹⁶⁷ Like § 106 of the NHPA, however, NEPA does not compel any particular outcome. It requires the agency to study the impacts of its proposed actions but does not dictate any particular action

162. See 42 U.S.C. § 4331 (2012) (recognizing the policy of the federal government to “use all practicable means and measures” to ensure the policies of § 4321 are achieved); Daniel R. Mandelker, *Thoughts on NEPA at 40*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10640, 10641 (2009).

163. *NEPA and Section 106 of the National Historic Preservation Act*, NAT'L PRESERVATION INST., <https://www.npi.org/NEPA/sect106> [<https://perma.cc/B3ER-9F6Z>] [hereinafter *NEPA and Section 106*]; see 40 C.F.R. § 1508.27(b)(8) (2018) (noting that NEPA requires consideration of the adverse impact on “districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places”); see also KING, *supra* note 136, at 55–57 (discussing the scope of the NEPA analysis and the consideration of impacts on the human environment).

164. *NEPA and Section 106*, *supra* note 163.

165. See Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1509–10 (2012); see also Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 246 (2000) (claiming that the procedures of NEPA, such as filing environmental impact statements, lack substance).

166. COUNCIL ON ENVTL. QUALITY EXECUTIVE OFFICE OF THE PRESIDENT & ADVISORY COUNCIL ON HISTORIC PRES., *NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106*, at 9 (2013), https://www.achp.gov/sites/default/files/2017-02/NEPA_NHPA_Section_106_Handbook_Mar2013_0.pdf [<https://perma.cc/MP2P-J5LB>] [hereinafter COUNCIL & ACHP].

167. *Id.* at 5, 9, 11.

or change of plan in response to the study. This requirement can serve as another potential path for advocates seeking to slow down a removal effort or to force additional scrutiny and possible mitigation or avoidance alternatives.¹⁶⁸

NEPA is likely to apply to Confederate monuments where the monument is located on federal land or the removal is being carried out with federal funds. The scope of the projects that will be covered under NEPA and the NHPA are very similar, but the NHPA provides more significant protection as it requires consultation regarding avoiding or reducing the harm, which provides more opportunity for a negotiated solution.¹⁶⁹ NEPA could, however, apply to a resource not protected under the NHPA; a cultural resource as defined under NEPA would not be eligible for the National Register, which provides another possible hook to challenge an effort to remove or relocate a Confederate monument.¹⁷⁰

3. Visual Artists Rights Act

The federal Visual Artists Rights Act (VARA)¹⁷¹ might prove an impediment for more recent monuments. VARA recognizes that an artist has moral rights in the works of art she creates.¹⁷² It acknowledges that artists inject a persona into a work of art that exists despite a “physical relinquishment” of the work to another.¹⁷³

VARA grants the creators of visual art (including statues) the right to prevent any “distortion, mutilation, or other modification of the work [that] would be prejudicial to [the creator’s] honor or reputation.”¹⁷⁴ The right is unassignable, nontransferable, and uninheritable, and may be waived only by written consent of the artist.¹⁷⁵ VARA protection lasts for

168. See, e.g., *Recent Past Pres. Network v. Latschar*, 701 F. Supp. 2d 49, 52–53 (D.D.C. 2010) (challenging demolition of historic property for failing to comply with NEPA). Although advocates won that round, the historic cyclorama (1963) was demolished in the spring of 2013. See *Cyclorama Center*, WORLD MONUMENTS FUND, <https://www.wmf.org/project/cyclorama-center> [<https://perma.cc/57HK-G4D4>].

169. Fowler, *supra* note 123, at 52.

170. The NHPA and NEPA review are often performed in parallel tracks given the degree of duplication. See *COUNCIL & ACHP*, *supra* note 166, at 4–11.

171. Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified as amended at 17 U.S.C. § 106A (2012)).

172. Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1935–36 (2000).

173. *Id.* at 1939.

174. 17 U.S.C. § 106A(a)(2) (2012).

175. *Id.* § 106A(e)(1). It is, however, common for a purchaser of a statue or artwork to request a VARA waiver. See Elizabeth Plaster, Note, *When Stuff Becomes Art: The Protection of Contemporary Art Through the Elimination of VARA’s Public-Presentation Exception*, 66 *DUKE L.J.* 1113, 1144 (2017) (discussing VARA waivers).

the lifetime of the artist.¹⁷⁶ The art must be a limited edition or have fewer than 200 copies, consecutively numbered, with identification of the artist either by signature or another mark.¹⁷⁷ The temporal limitation represents an impediment for VARA as many artists of Confederate statues died long ago. However, statues from the civil rights era and those currently being erected may find protection from VARA or related state laws.

In protecting the rights of artists, VARA has an exception for work for hire and mass-produced art.¹⁷⁸ Thus, a key issue for an artist of a Confederate monument who is seeking VARA protection is whether the monument was a work for hire, which would bring it outside the protection of the act. In *Carter v. Helmsley-Spear Inc.*,¹⁷⁹ the defendants argued that three sculptors had no right to prevent sculptures in a lobby from being destroyed because the sculptures were works for hire.¹⁸⁰ The trial court found that the plaintiffs were entitled to VARA relief.¹⁸¹ The Second Circuit agreed with the defendants, who had expressly contracted for the right to assign the artists additional projects that the plaintiffs did indeed complete.¹⁸² Further, the fact that the plaintiffs were paid a weekly salary, and had benefits such as life, health, and liability insurance, tipped the scales heavily in favor of the defendants.¹⁸³ It does not appear that many Confederate monuments would meet this definition of work for hire as they are usually purchased or commissioned one at a time. However, with only a few groups organizing the acquisition and erection of such monuments, it makes sense to investigate whether any artists work with these groups frequently enough to have their sculptures considered to be works for hire.

Another possible issue related to Confederate monuments is whether they would be of “recognized stature,” as is needed to qualify for VARA protection.¹⁸⁴ Although VARA itself does not define what “work of a recognized stature” is, courts will often employ a two-part test to answer this question.¹⁸⁵ First, the work must be viewed as meritorious.¹⁸⁶ Second,

176. 17 U.S.C. § 106A(d)(1) (2012).

177. *Id.* § 101 (defining “work of visual art”).

178. *Id.*

179. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

180. *See id.* at 316.

181. *Id.* at 322–23.

182. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 86–88 (2d Cir. 1995).

183. *Id.*

184. 17 U.S.C. § 106A(a)(3)(B) (2012); *see also* Robinson, *supra* note 172, at 1950 (discussing this standard application).

185. *See, e.g.*, Robinson, *supra* note 172, at 1950 (noting that this standard has “been widely quoted”).

186. *Id.*

the stature of the work must be recognized by experts or other members of the artistic community.¹⁸⁷

The NHPA, NEPA, and VARA are three federal preservation laws that can play a role in relocation and removal efforts. That is not to say that these are the only federal laws that might deter or delay removal, but these historic preservation laws function at a different level than others. They are generally calling for review and consideration of the resource in conjunction with federal, state, and local actors. The potential role of these laws is unclear, however, because they need a federal trigger to be brought to bear.

B. *State Laws*

State laws may also come into play in monument removal and modification efforts. Several state preservation laws could influence either the substance (decision to remove) or procedures (how to remove) involved. These requirements can come from general preservation laws or monument-specific state laws.

1. State Environmental Policy Acts

Many states have environmental policy acts that provide similar procedural protections as NEPA.¹⁸⁸ Most state environmental policy acts closely mirror NEPA and are only procedural.¹⁸⁹ They usually use the same threshold as NEPA and apply to major actions significantly affecting the environment, but they may be more lenient in determining what qualifies.¹⁹⁰ A handful of states, however, expand the environmental review process beyond NEPA. States may do so by expanding the types of activities that trigger review or by requiring consideration of more elements during the review process.

California does both, and even though there are not currently any Confederate monuments in California, an analysis of its structure provides a good sample of how state environmental protection acts operate. First, the California Environmental Quality Act (CEQA)¹⁹¹ requires environmental review for “‘projects’ . . . proposed to be carried-

187. *Id.*; see *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004) (holding that the plaintiff was not entitled to relief under VARA because she failed to offer expert evidence to support her argument that her swan sculpture was of a “recognized stature”).

188. BRONIN & BYRNE, *supra* note 90, at 197–98.

189. *See id.* at 197 (citing Indiana’s NEPA provision, IND. CODE §§ 13-12-4-1 to -10).

190. *See, e.g.*, MASS. GEN. LAWS ch. 30, §§ 61–62I (2017); *see also* Kenneth S. Weiner, *NEPA and State NEPA’s: Learning from the Past, Foresight for the Future*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10675, 10677 (2009) (noting that most state environmental policy acts are very similar to NEPA).

191. CAL. PUB. RES. CODE §§ 21000–21178 (West 2018).

out or approved by California public agencies.”¹⁹² Projects are discretionary actions with “potential impacts on the physical environment.”¹⁹³ Impacts on the physical environment include impacts on cultural resources, as the statute defines “environment” to include “the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.”¹⁹⁴ Unlike NEPA, CEQA does not require the project to be “major,” nor does it require the potential effects to be “significant,” making the threshold for triggering review much lower.¹⁹⁵ CEQA is an example of a state environmental policy act that requires consideration of more impacts than NEPA requires; it requires analyses of impacts on agricultural land and climate change.¹⁹⁶

CEQA requires specific consideration of a historic resource where that resource is historically significant and the project could “cause a substantial adverse change in the significance of [the] . . . resource.”¹⁹⁷ California’s approach contemplates a broader array of resources and is even more likely than the federal laws to protect statues as it covers objects and does not require official listing of the resource on either the state or national registers (although such listings would automatically qualify a resource as historic).¹⁹⁸

Beyond expanding the scope of what activities and impacts are considered, some state environmental policy acts impose substantive requirements. For example, CEQA requires agencies to “mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”¹⁹⁹ This requirement

192. RONALD E. BASS ET AL., *CEQA DESKBOOK* 3 (3d ed. 2012).

193. *See id.* at 3, 4; *see also* CAL. PUB. RES. CODE § 21065 (defining “project”). For a thorough discussion assessing whether something qualifies as a project, *see* BASS ET AL., *supra* note 192, at 32–36.

194. CAL. PUB. RES. CODE § 21060.5.

195. CEQA has many exemptions that lessen the burden of these broad requirements. BASS ET AL., *supra* note 192, at 36–52 (describing the various exemptions available). Additionally, while the statute does not require projects to have significant environmental impacts, the environmental review process focuses on “significant effects on the environment,” CAL. PUB. RES. CODE § 21002.1(a), and requires mitigation and avoidance only for “significant effects on the environment.” *Id.* § 21002.1(b).

196. *See, e.g.*, CAL. CODE REGS. tit. 14, § 15064.4 (2019); Governor’s Office of Planning & Research, *CEQA and Climate Change*, CA.GOV, <http://opr.ca.gov/ceqa/climate-change.html> [<https://perma.cc/H4TA-X9UG>] (describing the various places where the CEQA Guidelines require consideration, discussion, or mitigation of climate change impacts).

197. CAL. CODE REGS. tit. 14, § 15064.5(b).

198. BASS ET AL., *supra* note 192, at 152–53.

199. CAL. PUB. RES. CODE § 21002.1(b).

specifically applies to historic resources.²⁰⁰ California courts have applied the duty to mitigate impacts to historic resources rather strictly. In *League of Protection of Oakland's Architectural & Historic Resources v. City of Oakland*,²⁰¹ the California appellate court prohibited demolition of a house and explained that placing historic markers, writing reports, and documenting the home did not constitute adequate mitigation.²⁰²

While California law provides an easy example of a state law that has diverged and expanded from NEPA, it plays little role in the Confederate monument debate as there are currently no known public Confederate memorials in California.²⁰³ The states with environmental policy acts and large numbers of Confederate monuments are Georgia, Virginia, and North Carolina.²⁰⁴ As applied to historic resources, Georgia's Environmental Policy Act²⁰⁵ closely resembles § 106 of the NHPA.²⁰⁶ It applies to state agency actions including funding.²⁰⁷ An environmental review process is required for projects that "may significantly impact the quality of the environment," eschewing the "major" qualification of NEPA but requiring impacts to be significant.²⁰⁸ It specifically applies to the adverse impacts on "historical sites or buildings, or cultural resources."²⁰⁹

Virginia's Environmental Policy Act requires environmental review for "major state project[s]."²¹⁰ It also specifically acknowledges the need to protect historic resources and adds a substantive requirement to protect those resources in some circumstances.²¹¹ The statute requires consultation with the state's Department of Historic Resources and undertaking "reasonable efforts to avoid or minimize impacts to historic resources" for projects by local governments that cost between \$500,000 and \$2 million.²¹²

200. CAL. CODE REGS. tit. 14, § 15064.5.

201. 60 Cal. Rptr. 2d 821 (Ct. App. 1997).

202. *Id.* at 829.

203. SPLC, *supra* note 27, at 21 (recording zero monuments but six places named after Confederate figures).

204. *See id.* at 22–24, 28–30, 35–37.

205. 2004 Ga. Laws 463 (codified as amended GA. CODE ANN. §§ 12-16-1 to -23 (2018)).

206. *Georgia Environmental Policy Act*, GA. DEP'T NAT. RESOURCES, <https://georgiashpo.org/review-GEPA> [<https://perma.cc/X68J-97E7>].

207. *See id.*

208. *Id.*

209. GA. CODE ANN. § 12-16-3(1).

210. VA. CODE ANN. § 10.1-1188(A) (2018).

211. *Id.*

212. *Id.* ("[I]f the project involves a new location or a new disturbance that extends outside the area or depth of a prior disturbance, or otherwise has the potential to affect such resources adversely.").

While North Carolina's environmental review also applies to historic resources,²¹³ 2015 amendments to the statute increased the triggering threshold, and the statute now applies only to state actions with at least \$10 million in state funds or disturbing more than ten acres of state land.²¹⁴

As this section indicates, state environmental policy acts vary widely. In some cases, these laws could pose a significant additional barrier to modification or removal efforts, particularly to those monuments owned by states and those monuments located on state-owned land; these laws could provide a clear hook for those opposed to removal when triggered.

2. State Protections for Visual Artists

As discussed above, the federal Visual Artists Rights Act (VARA) may provide an avenue for the creators of Confederate monuments to fight against their modification or removal.²¹⁵ However, because of its temporal limit (the lifetime of the artist), VARA will only apply to the most recent of monuments. Artists may, however, be able to find more relief from state-level art protection laws, like California's Art Preservation Act²¹⁶ and the Massachusetts Artist Protection Act (MAPA).²¹⁷ In the southern states where this would be most likely to apply, Louisiana is the only state that has enacted a state version of VARA, which could provide another layer of protection or process if the artist is still living.²¹⁸

Not only do these statutes expand the number of years artwork can be protected from destruction, sometimes they also contain prohibitions on removal and relocation. In *Phillips v. Pembroke Real Estate*,²¹⁹ the court ordered an injunction that prevented the defendant from altering, destroying, moving, or removing several sculptures that were located in Eastport Park in Massachusetts.²²⁰ Phillips had created twenty-seven sculptures for a local park.²²¹ He had the authority to direct the placement of the artwork, materials used, and creation of walls and pathways that were incorporated into the pieces.²²² A few years later, Pembroke Park

213. N.C. GEN. STAT. § 113A-113(b)(4)(h) (2018).

214. *State Environmental Policy Act (SEPA)*, N.C. ENV'T'L QUALITY, <https://deq.nc.gov/permits-regulations/sepa> [<https://perma.cc/SL2A-RDJ3>].

215. See discussion *supra* Section II.B.2.

216. 1994 Cal. Stat. 6007 (codified as amended at CAL. CIV. CODE § 987 (West 2018)).

217. 1996 Mass. Acts ch. 450 (codified as amended at MASS. GEN. LAWS ch. 231, § 85S (2017)).

218. LA. STAT. ANN. §§ 51:2151–2156 (2018).

219. 288 F. Supp. 2d 89 (D. Mass. 2003).

220. *Id.* at 105.

221. *Id.* at 94.

222. *Id.*

Real Estate, the owner of the park, decided to make changes that included the removal and relocation of Phillips's work.²²³ Phillips brought suit under VARA and MAPA to prevent the destruction of his work.²²⁴ Phillips argued that his work was site-specific, and that to change the location of the work would destroy its purpose.²²⁵ Phillips could not obtain relief under VARA because the act's purpose is not "to preserve a work of visual art where it is, but rather to preserve the work as it is."²²⁶ However, Phillips prevailed under MAPA for those works where relocation of the pieces would impact the integrity and artistic value of the work.²²⁷

While Louisiana is the only former Confederate state that currently has such a law, it is useful to keep artists' rights in mind when considering the removal of statues with clear artistic merit.

3. Monument-Specific State Laws

Beyond the application of more traditional historic preservation and environmental laws, a number of states have enacted legislation to expressly limit the removal of Confederate monuments—particularly those located on land owned by local governments.²²⁸ The majority of these monument protection acts are relatively recent and have mostly been enacted in southern states.²²⁹ Currently, seven states have this type

223. *Id.*

224. *Id.* at 92.

225. *See id.* at 95.

226. *Id.* at 99 (emphasis omitted) (quoting Bd. of Managers of Soho Int'l Arts Condo., No. 01 Civ.1226 DAB, 2003 WL 21403333, at *10 (S.D.N.Y. June 17, 2003)).

227. *Id.* at 102, 105.

228. *See* Aneil Kovvali, *Confederate Statue Removal*, 70 STAN. L. REV. ONLINE 82, 82 (2017). We discuss these laws in the context of historic and cultural preservation laws as that is the tone and language used in the statutes, but it may be more appropriate to think of these as laws specifically seeking to articulate a position on the ideological struggle that is creating a narrative around Confederate monuments.

229. *See* Kasi E. Wahlers, *Recent Development, North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2181–82 (2016); Alfred Brophy, *North Carolina Heritage Protection Act*, FAC. LOUNGE (July 16, 2015, 12:14 AM), <http://www.thefacultylounge.org/2015/07/north-carolina-heritage-protection-act.html> [<https://perma.cc/HHE9-BHWY>].

of legislation. While Virginia's²³⁰ and Georgia's²³¹ laws date back to the early twentieth century, the laws of the other five states were enacted after 2000.²³² Three states have enacted monument protection acts since 2015 (Alabama, North Carolina, and Tennessee [modifying a slightly earlier act]).²³³ The primary thrust of state monument protection laws is to restrict the ability of local governments to modify or remove monuments without first obtaining state approval.²³⁴ Typically, the laws protect monuments located on public property.²³⁵ These laws also go beyond protecting structures of historic significance to include those not eligible for listing in the National Register in an effort to protect more Confederate monuments.²³⁶ It could be argued that these state laws are not even really historic preservation laws, but preemptive laws designed to remove decision-making authority from local governments regarding how to grapple with these commemorative structures.

230. Virginia's law is a bit more complex and less focused on the protection of memorials than on the authority of counties and local governments regarding war memorials. See Amanda Lineberry, Essay, *Payne v. City of Charlottesville and the Dillon's Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45, 45–48 (2018) (discussing the application of Virginia Code § 15.2-1812). Virginia is a Dillon's Rule state and as such, local governments cannot independently take action without express authority to do so from the state. See, e.g., John G. Grumm & Russell D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 120 (1974). The state did not clearly give authority to erect monuments to cities and towns until 1997. Lineberry, *supra*, at 46–56. Thus, all monuments erected before 1997 (the vast majority of them) that were erected by cities and towns (counties obtained this authority in 1904 and the state itself always had it), were either done under a specific state law authorizing that monument or were done without legal authority to do so. *Id.* The debates over Charlottesville's monuments, erected in the city in 1924, are wrapped up in this convoluted relationship between the state and local government. *Id.* at 47–48.

231. See GA. CODE ANN. § 50-3-1(b) (2018).

232. See ALA. CODE § 41-9-231(6) (2017); MISS CODE ANN. § 55-15-81 (2018); N.C. GEN. STAT. § 100-2 (2018); S.C. CODE ANN. § 10-1-165 (2018); TENN. CODE ANN. § 4-1-412 (2018); VA. CODE ANN. § 15.2-1812 (2018).

233. Alabama Memorial Preservation Act of 2017, 2017 Ala. Laws 354 (codified as amended at ALA. CODE §§ 41-9-230 to -237); Cultural History Artifact Management and Patriotism Act of 2015, N.C. Sess. Laws 170 (codified as amended at N.C. GEN. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36, 160A-400.13); 2018 Tenn. Pub. Acts 1033 (codified as amended at TENN. CODE ANN. §§ 4-1-401 to -419).

234. David A. Graham, *Local Officials Want to Remove Confederate Monuments—but States Won't Let Them*, ATLANTIC (Aug. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351/> [https://perma.cc/54WG-XBLN] (discussing this trend).

235. See, e.g., Kovvali, *supra* note 228, at 82–83 (discussing multiple statutes and the preemptive effect of them).

236. See, e.g., 2015 N.C. Sess. Laws 170 (requiring none of the official designations for protected properties and allowing protections of any objects of remembrance regardless of whether they meet any particular preservation standards or guidelines).

a. North Carolina

North Carolina's Cultural History Artifact Management and Patriotism Act of 2015²³⁷ serves as a good example of a state government seeking to preempt local authority. The act requires approval from the North Carolina Historical Commission before any Confederate monument can be "removed, relocated, or altered in any way."²³⁸ It prohibits the removal of any "object of remembrance located on public property . . . whether temporarily or permanently" unless done in accordance with the act.²³⁹ While seeming to delegate the decision to remove or relocate a monument to the Historical Commission, the statute ties the hands of the commission by allowing relocation only "to a site of similar prominence, honor, visibility, availability, and access that [is] within the boundaries of the jurisdiction" where the statue is located.²⁴⁰ The law specifies that a Confederate monument "may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location."²⁴¹ It also restricts relocations to situations where "appropriate measures" are undertaken to preserve the object or relocation is "necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects."²⁴²

While facially content-neutral, there is no question that the statute seeks to prevent the removal of Confederate monuments, having been passed during the debate over removal of a Confederate statue in Chapel

237. 2015 N.C. Sess. Laws 170 (codified as amended at N.C. GEN. STAT. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36, 160A-400.13).

238. N.C. GEN. STAT. § 100-2.1(a).

239. *Id.* § 100-2.1(b).

240. *Id.*

241. *Id.*

242. *Id.* The statute contains three exceptions: highway markers, objects that a building inspector has determined pose "a threat to public safety because of an unsafe or dangerous condition," and objects of remembrance on public land but owned by private parties and subject to a legal agreement between the private and public parties. *Id.* § 100-2.1(c). It is not clear how frequently the third category comes into play. Adam Lovelady gives the example of a Confederate monument placed on courthouse grounds by the Daughters of the Confederacy, explaining:

If [a] private organization still owns the monument and a private agreement governs removal and relocation, then that monument is not subject to the statutory limits on removal. In that case removal would be governed by the agreement between the organization and the local government on whose property the statue is located.

Adam Lovelady, *Statues and Statutes: Limits on Removing Monuments from Public Property*, COATES' CANONS: N.C. LOC. GOV'T L. (Aug. 22, 2017), <https://canons.sog.unc.edu/statues-statutes-limits-removing-monuments-public-property/> [<https://perma.cc/KDE8-6Z9Q>].

Hill, North Carolina.²⁴³ The inclusion of “patriotism” in the name of the act also signals that it is not focused on protecting examples of art and architecture. When this law hampered local government’s efforts to remove monuments, protestors tore down a statue of Robert E. Lee that had been in place outside the county courthouse since 1924.²⁴⁴ When Takiya Thompson confessed to helping to pull down the statue, she stated: “I chose to do that because I am tired of living in fear. I am tired of white supremacy keeping its foot on my neck and the neck of people who look like me[.]”²⁴⁵

Governor Roy Cooper has called on the legislature to repeal the state law protecting such monuments.²⁴⁶ As the legislature has not moved in that direction,²⁴⁷ Cooper instead has begun proceedings as outlined in the act, petitioning the state Historical Commission.²⁴⁸ Cooper would like to relocate some Confederate monuments to a historic battlefield, where they could be placed in context and perform an educational role.²⁴⁹ It is not clear under the law whether that would be deemed acceptable as a site of similar prominence or if it would be possible to meet the requirement of remaining in the same jurisdiction. In August 2018, the North Carolina Historical Commission voted to retain three monuments in Raleigh as it lacked the authority to recommend removal or relocation under state law.²⁵⁰

243. See Jonathan M. Katz, *Protester Arrested in Toppling of Confederate Statue in Durham*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/protester-arrested-in-toppling-of-confederate-statue-in-durham.html> [<https://perma.cc/R2ES-QEE3>].

244. *Id.*

245. *Id.*

246. E.g., Lynn Bonner, *NC Governor Has a New Site in Mind for 3 Confederate Monuments on Capitol Grounds*, NEWS & OBSERVER (Sept. 8, 2017, 5:58 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article172115977.html> [<https://perma.cc/5LUD-56S3>] (explaining that Cooper had “sent a formal request to move three Confederate monuments from the State Capitol grounds to a historic site in Johnston County”).

247. See Graham, *supra* note 234 (suggesting that it is highly unlikely that the Republican legislature that has already shown hostility to the Democratic governor would repeal the law, stating, “the legislature—which shortly after Cooper won a tight and contested election stripped him of a range of powers—responded, in effect, *fat chance*”).

248. Bonner, *supra* note 246 (“Machelle Sanders, secretary of the Department of Administration . . . sent the petition to the state historical Commission.”).

249. See Lynn Bonner, *These 11 People Will Debate Moving NC Confederate Monuments. One Says Request is ‘Political,’* NEWS & OBSERVER (Sept. 20, 2017, 12:30 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article174341606.html> [<https://perma.cc/5PSA-JMKM>].

250. Merrit Kennedy, *3 North Carolina Confederate Monuments Will Stay in Place, Commission Decides*, NPR (Aug. 22, 2018, 11:35 PM), <https://www.npr.org/2018/08/22/640923318/3-north-carolina-confederate-monuments-will-stay-in-place-commission-decides> [<https://perma.cc/LS8G-NZ9T>].

b. Alabama

Alabama's recently overturned Memorial Preservation Act of 2017²⁵¹ prevented local governments from “relocat[ing], remov[ing], alter[ing], renam[ing], or otherwise disturb[ing]” any public monument over forty years old.²⁵² The law contained no exceptions or mechanisms for approval, as seen in North Carolina, unless the monument was more than twenty but less than forty years old.²⁵³ Thus, for monuments erected between 1977 and 1997, local governments could seek approval for “the relocation, removal, alteration, or renaming” of monuments from the Committee on Alabama Monument Protection.²⁵⁴ There appears to be only one Confederate monument in Alabama erected between 1977 and 1997,²⁵⁵ the Confederate memorial in Centre, Alabama—a stone slab at the Cherokee County Courthouse.²⁵⁶ The law did not apply to any monuments dating after May 25, 1997. At least six Confederate-related monuments have been put in place since 1997 in Alabama.²⁵⁷ The statute offered no guidance on the standards the newly created Committee on Alabama Monument Protection should apply. The eleven-person committee was formed in August 2017 and was slated to be approved by the Alabama legislature in January 2018.²⁵⁸ Additionally, the statute did

251. 2017 Ala. Laws 354 (codified as amended at ALA. CODE §§ 41-9-230 to -237 (2018)).

252. ALA. CODE § 41-9-232; *see also* Kovvali, *supra* note 228, at 87 (“[T]he Alabama statute most strongly protects monuments that have been in place for forty years or more.”).

253. *See* ALA. CODE §§ 41-9-232(b), 41-9-235.

254. *Id.* § 41-9-235.

255. SPLC, *supra* note 27, at 19–20 (listing 107 “publicly supported spaces dedicated to the confederacy” in Alabama with years of establishment where available).

256. *Confederate Veterans Memorial – Centre, AL*, WAYMARKING.COM (Oct. 31, 2009, 1:47 PM), http://www.waymarking.com/waymarks/WM7JCC_Confederate_Veterans_Memorial_Centre_AL [<https://perma.cc/Y6UP-CE5R>] (describing monuments and historical markers and noting the memorial was installed on April 24, 1988, by a local chapter of the Sons of Confederate Veterans).

257. *See* SPLC, *supra* note 27, at 19–20 (listing a Town of Midway monument erected in 2010, a statue of Admiral Raphael Semmes in Mobile from 2000, a 2010 monument to the 10th Rifled Sea Coast Columbiad in Mobile, a 2006 Confederate monument at the courthouse in Moulton, a monument to General Joseph Wheeler that same year in Rogersville, and a 2002 monument in Prattville to the Prattville Dragoons); *see also* Connor Sheets, *New Confederate Memorial Unveiled in Alabama*, AL.COM (Aug. 27, 2017), https://www.al.com/news/index.ssf/2017/08/more_than_200_people_attend_un.html [<https://perma.cc/N8FM-C6Q2>] (describing the unveiling of a new “modest stone marker” commemorating unknown Confederate soldiers of Crenshaw County).

258. *See* Sherri Jackson, *Alabama Monument Protection Committee Named by State Officials*, CBS 42, <https://www.cbs42.com/news/alabama-monument-protection-committee-named-by-state-officials/867995886> [<https://perma.cc/L493-MPPK>] (last updated Aug. 17, 2017, 9:47 PM) (“The committee members still have to be approved by the Alabama Legislature which is not in session again until January [2018].”).

not provide funding or support for either monument upkeep or public safety costs related to potential protests and other actions.²⁵⁹

The City of Birmingham put this law to the test in its efforts to remove a Confederate monument in Linn Park.²⁶⁰ In the wake of the state law banning removal or relocation, Mayor William Bell placed a black wooden wall around the base of the statue in August 2017.²⁶¹ The City argued that this was not a violation of the Alabama Monument Protection Act because it did not actually alter the monument, which the city describes as being “offensive to many Birmingham residents.”²⁶² The state apparently disagreed, because the Attorney General sued the City, seeking large fines (potentially more than \$6 million depending on how one calculates each violation).²⁶³ The Alabama Attorney General interprets “altered” or “otherwise disturbed” to include “affixing tarps and placing plywood” around a memorial.²⁶⁴ The City also argued the complete ban on removal, relocation, or alteration of these monuments violates the equal protection clause of the Fourteenth Amendment.²⁶⁵

On January 14, 2019, Judge Michael Graffeo overturned the law based on its limitation on the city’s freedom of speech and lack of due process of law. On the First Amendment issue, the court described the message of the statue as an “homage to the Confederacy” and showed that the Memorial Preservation Act gave “absolute control and final authority

259. See Kyle Gassiott, *State of Alabama Fights Local Community over Confederate Statue*, MARKETPLACE (Mar. 14, 2018, 6:58 AM), <https://www.marketplace.org/2018/03/14/life/lawsuit-over-protest-confederate-statue-alabama-heads-court> [<https://perma.cc/WZE3-W3ZU>] (noting that state democratic representative Juandalynn Givan argued that “the law places an undue burden on communities because it forces them to keep a monument but doesn’t set aside any money for upkeep”).

260. See, e.g., Stephen Quinn, *Arguments Heard in Legal Battle over Birmingham’s Confederate Monument*, ABC 3340 (Apr. 13, 2018), <https://abc3340.com/news/local/arguments-heard-in-legal-battle-over-birminghams-confederate-monument> [<https://perma.cc/8N3N-SCFL>].

261. Erin Edgemon, *Birmingham Covers Confederate Monument as City Considers Removal*, AL.COM (Aug. 15, 2017), https://www.al.com/news/birmingham/index.ssf/2017/08/defy_state_law_and_remove_conf.html [<https://perma.cc/KE5A-QRDJ>] (documenting the construction of the wall with photos and text). Jonathan Austin, President of the Birmingham City Council, had advocated simply removing the monument and paying what he believed would be a \$25,000 fine for doing so. Hanno van der Bijl, *Judge to Hear Case over Downtown Confederate Monument*, BIRMINGHAM BUS. J. (Jan. 17, 2018, 8:04 AM), <https://www.bizjournals.com/birmingham/news/2018/01/17/judge-to-hear-case-over-downtown-confederate.html> [<https://perma.cc/NZ7S-CHXK>]. After the mayor decided to conceal the monument, a GoFundMe account was started to pay the fine of \$25,000 for the removal of the monument. *Id.*

262. Quinn, *supra* note 260.

263. *Id.*

264. Erin Edgemon, *AG Files Lawsuit Against Birmingham over Confederate Monument*, AL.COM (Aug. 16, 2017), https://www.al.com/news/birmingham/index.ssf/2017/08/ag_files_lawsuit_against_birmi.html [<https://perma.cc/45ZB-Z8WN>].

265. Quinn, *supra* note 260.

over the content of the message.”²⁶⁶ The court held that this violates the First Amendment, which guarantees the city “a right to speak for itself, to say what it wishes, and to select the views that it wants to express.”²⁶⁷ Additionally, the law provided no process for the city to have “notice and an adequate hearing” as guaranteed by the Fourteenth Amendment. The court viewed the act as providing “no process at all – no notice and no hearing,” explaining that the state even interpreted that law as giving it all the power to “decide what the CITY can and cannot do with its own property, Linn Park and the statuary inside it.”²⁶⁸ The state has announced its intention to appeal the ruling.²⁶⁹

Gubernatorial candidate Stacy George also disagreed with Bell’s actions and filed an ethics violation against the mayor, asserting he had covered the monument for “political reasons” in the run-up to the mayoral election—showing the political/contentious nature of many of these debates.²⁷⁰

c. Tennessee

The Tennessee Heritage Protection Act,²⁷¹ originally enacted in 2013 and first amended in 2016, prohibits local governments from “remov[ing], renam[ing], relocat[ing], alter[ing], rededicat[ing], or otherwise disturb[ing]” war memorials or military monuments on public property.²⁷² There is an exception, however, enabling local governments

266. *State of Alabama v. City of Birmingham*, CV 17-903426-MCG, Order on Cross Motions for Summary Judgment, Jan. 14, 2019 at 4, [https://www.scribd.com/document/397503678/Confederate-Monument-Ruling#from_embed_\[https://perma.cc/V2PT-QS94\]](https://www.scribd.com/document/397503678/Confederate-Monument-Ruling#from_embed_[https://perma.cc/V2PT-QS94]).

267. *Id.* at 4 (citations omitted). “Just as the STATE could not force any particular citizen to post a pro-Confederacy sign in his or her front lawn, so too can the STATE not commandeer the CITY’s property for the State’s preferred message.” *Id.* at 5–6.

268. *Id.* at 7.

269. Ian Steward, *Judge Throws Out Alabama Law that Protects Confederate Monuments*, NPR, Jan. 15, 2019, <https://www.npr.org/2019/01/15/685672038/judge-throws-out-alabama-law-that-protects-confederate-monuments> [<https://perma.cc/P9SH-RFLS>] (stating that the Alabama Attorney General’s office “said it still believes the law is constitutional and that it will appeal the ruling”).

270. See Mike Cason, *Stacy George Files Ethics Complaint Against Mayor Bell over Monument Cover*, AL.COM (Aug. 16, 2017), https://www.al.com/news/index.ssf/2017/08/stacy_george_files_ethics_comp.html [<https://perma.cc/SE2P-YBRZ>]. Bell was ultimately unsuccessful in his re-election bid. Erin Edgemon, *Randall Woodfin Is Birmingham’s Next Mayor*, AL.COM (Oct. 3, 2017, 4:00 PM), https://www.al.com/news/birmingham/index.ssf/2017/10/birmingham_mayoral_runoff_live.html [<https://perma.cc/LLW5-XJ7U>].

271. 2018 Tenn. Pub. Acts 1033 (codified as amended at TENN. CODE ANN. § 4-1-412 (2018)).

272. TENN. CODE ANN. § 4-1-412(b)(1). There is an exemption for public lands controlled by the state department of transportation. *Id.* § 4-1-412(e)(2).

to petition the Tennessee Historical Commission for a waiver.²⁷³ While the statute offers the Historical Commission no clear guidelines in deciding whether to grant a waiver, it explains that it can be done by a two-thirds vote of commissioners present and voting, and “may include reasonable conditions and instructions to ensure that a memorial is preserved and remains publicly accessible to the greatest extent possible.”²⁷⁴

The City of Memphis sought a waiver from the Tennessee Historical Commission for removal of a statue of Nathan Bedford Forrest from Health Sciences Park.²⁷⁵ When the Commission denied a waiver, the City of Memphis undertook a creative solution to remove statues of Nathan Bedford Forrest, Jefferson Davis, and James Harvey Mathes.²⁷⁶ It conveyed the public land where the statues sat to a private entity, Memphis Greenspace, Inc.²⁷⁷ As the prohibition on monument removal only applies to public land, the new private landowners were free to remove the statues. Within hours of the sale, the new owners removed the statues and put them in storage.²⁷⁸

The local branch of the Sons of Confederate Veterans sued the city.²⁷⁹ Litigation in Davidson County Chancery Court confirmed that the city had the right to sell the parks and that the nonprofit had the right to remove the statues.²⁸⁰ While the judge lifted the injunction that was preventing Memphis Greenspace from relocating the statues (which remain in storage “at an undisclosed location”),²⁸¹ the judge then stayed

273. *See id.* § 4-1-412(c)(1).

274. *Id.* § 4-1-412(c)(8)(B).

275. Ryan Poe, *Chancellor: Memphis Confederate Statues Takedown was Legal*, TENNESSEAN (May 16, 2018, 5:37 PM), <https://www.tennessean.com/story/news/government/city/2018/05/16/chancellor-memphis-confederate-statues-takedown-legal/617518002/> [<https://perma.cc/4M7G-VGUF>].

276. Daniel Connolly & Vivian Wang, *Confederate Statues in Memphis Are Removed After City Council Vote*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/statue-memphis-removed.html> [<https://perma.cc/8SFT-29NX>]; *see* Toby Sells, *Confederate Statues Ready to Go (Just Not to Shelby County)*, MEMPHIS FLYER (May 25, 2018, 1:06 PM), <https://www.memphisflyer.com/NewsBlog/archives/2018/05/25/confederate-statues-ready-to-go-just-not-to-shelby-county> [<https://perma.cc/L7JU-BYVX>].

277. *See* Connolly & Wang, *supra* note 276.

278. Poe, *supra* note 275 (“On Dec. 20, [2017,] the City Council approved the sale of Health Sciences Park and Fourth Bluff Park to Memphis Greenspace . . . for \$1,000 each. Within hours, the nonprofit removed the statues—including Forrest’s statue from its pedestal atop his grave—and stored them locally.”).

279. *See* Memorandum & Final Order Denying Injunction; & Order for Rule 62.01 Stay at 1, Sons of Confederate Veterans Nathan Bedford Forrest Camp 215 v. City of Memphis, No. CH-13-0785 (Tenn. Ch. 2017).

280. *Id.* at 14.

281. *Id.* at 3, 4.

the order, pending appeal by the Sons of Confederate Veterans.²⁸² The appeal was heard by a three-judge panel on February 26, 2019.²⁸³

Meanwhile, the Tennessee Comptroller's Office reviewed the sale of the parks on the request of the Lieutenant Governor and House speaker.²⁸⁴ The Comptroller concluded that the city had not violated open meetings laws and had "acted with the authority granted by *the Memphis Code of Ordinances* to sell the parks to a non-profit at less than market value."²⁸⁵ However, the City had not required Memphis Greenspace to submit an application to the City Real Estate Department before the conveyance of the land, as it should have based on the local ordinance.²⁸⁶ The purpose of that process was to ensure that the new landowner had adequate finances.²⁸⁷ As the City was able to demonstrate that it had other assurances of the financial capability of Memphis Greenspace and did not always require such applications before conveying land, the Comptroller's Office simply recommended that the City "enter into a formal memorandum of understanding . . . for the storage and protection of the historic figures and artifacts."²⁸⁸

The state legislature did not like the City's maneuverings and punished Memphis by "vot[ing] to remove \$250,000 earmarked for the Memphis bicentennial."²⁸⁹ Lest there be any doubts that this budgetary decision was a response to the removal action, state representative Andy Holt compared the city's actions to those of ISIS and voiced regret that the negative impact was "not in the tune of millions of dollars."²⁹⁰

After this punitive action against the City of Memphis, the state legislature amended the Tennessee Heritage Protection Act, imposing

282. *Id.* at 3–4; see also Poe, *supra* note 275 (reporting on this injunction).

283. Natalie Allison, *Sons of Confederate Veterans, Memphis Argue Over Confederate Statues in Court of Appeals*, MEMPHIS COM. APPEAL, Feb. 26, 2019, <https://www.commercialappeal.com/story/news/courts/2019/02/26/memphis-sons-confederate-veterans-nathan-bedford-forrest-statue-removal/2990743002/> [<https://perma.cc/G7NC-KV6T>] (describing oral arguments and main issues).

284. See JUSTIN P. WILSON, COMPTROLLER'S OFFICE REVIEWS SALE OF TWO MEMPHIS PARKS 1 (2018), <https://comptroller.tn.gov/content/dam/cot/administration/documents/press-releases/2018/20180214MemphisParksSale.pdf> [<https://perma.cc/SMT7-VALU>].

285. *Id.*

286. *Id.*

287. See *id.* ("The purpose of this application is to gauge an entity's financial strength and overall stability.")

288. *Id.*

289. Alex Horton, *Tennessee Lawmakers Punish Memphis for Removing Statue of Confederate and KKK Leader*, WASH. POST (Apr. 18, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/18/tennessee-lawmakers-punish-memphis-for-removing-statue-of-confederate-and-kkk-leader/?utm_term=.7271fec9eeba [<https://perma.cc/7DYZ-CU96>].

290. *Id.*

financial penalties on cities that remove historic monuments²⁹¹ and expressly prohibiting the strategy used by Memphis (“the sale or transfer of a memorial or public property containing a statue without first obtaining a waiver from the state Historical Commission”).²⁹² Further, the amended law contains a citizen suit provision, “allow[ing] ‘any entity, group or individual’ with a ‘real interest in a memorial’ to seek an injunction” in county court if it believes a local government is violating the law.²⁹³

While the terms of these laws are neutral on the content or message of the memorial, the clear target is protection of Confederate monuments.²⁹⁴ To the extent that state-level monument protection acts apply, these laws are substantial barriers to local governments grappling with the question of whether to remove or relocate a monument.²⁹⁵

291. Jordan Buie, *Senate Passes Bill that Would Punish Cities for Removing Historical Monuments*, TENNESSEAN (Apr. 25, 2018, 7:24 PM), <https://www.tennessean.com/story/news/politics/2018/04/25/tennessee-confederate-monuments-memphis-statues/549760002/> [https://perma.cc/3A8V-2JR6].

292. Joel Ebert, *Legislation in Response to Memphis’ Confederate Statue Removal Signed by Gov. Haslam*, TENNESSEAN (May 22, 2018, 9:18 AM), <https://www.tennessean.com/story/news/politics/2018/05/22/governor-signs-measure-bolstering-heritage-protection-act-into-law/565755002/> [https://perma.cc/3ZW9-34X2].

293. *Id.* The most likely group to bring such an action is the Sons of Confederate Veterans, which is not only responsible for many Confederate monuments in Tennessee but has been active in challenging removal efforts. See Maya Smith, *Sons of Confederate Veterans to Appeal Memphis Statue Ruling*, MEMPHIS FLYER (May 24, 2018, 12:17 PM), <https://www.memphisflyer.com/NewsBlog/archives/2018/05/24/sons-of-confederate-veterans-to-appeal-memphis-statue-ruling> [https://perma.cc/GX8T-85S3] (“The Sons of Confederate Veterans . . . appeal[ed] a ruling by the Davidson County Chancery Court that said Memphis acted legally in removing Confederate monuments.”); see also Memphis Brigade, Sons of Confederate Veterans, FACEBOOK (July 31, 2018), <https://www.facebook.com/SCVmemphis/> [https://perma.cc/27XC-CRVU] (containing calls to donate money to “help[] pay for attorney and court fees to continue the fight for the Forrest statue and gravesite”).

294. See Graham, *supra* note 234 (describing such laws as being “designed to prevent the removal of Civil War memorials”); see also Dakin Andone, *NAACP Slams Alabama Governor’s Campaign Ad About Law Protecting Confederate Monuments*, CNN, <https://www.cnn.com/2018/04/21/us/alabama-confederate-monuments-kay-ivey-campaign/index.html> [https://perma.cc/N88N-3XCA] (last updated Apr. 21, 2018, 3:15 PM) (“At the time the [Alabama] bill was passed, state Sen. Hank Sanders, a Democrat from Selma, said it was ‘clearly’ meant to protect Confederate memorials and monuments and honor the memory of white supremacists.”). *But see* Gassiott, *supra* note 259 (quoting one of the bill’s sponsors who asserts that the act was not specifically seeking to protect Confederate monuments as saying “[n]owhere in the legislation is the word ‘Confederacy,’” but instead, “this [legislation] covers all history here in Alabama”).

295. See Wahlers, *supra* note 229, at 2192–95 (providing three examples of attempts to apply North Carolina’s law to signage within a museum, a city’s seal, and statuary in the state capital). See generally Benjamin Wallace-Wells, *The Fight over Virginia’s Confederate Monuments*, NEW YORKER (Dec. 4, 2017), <https://www.newyorker.com/magazine/2017/12/04/the-fight-over->

C. Local Preservation Laws

Local preservation laws are generally the backbone of the regulatory preservation framework. Two types of local laws may govern the removal of Civil War monuments:²⁹⁶ (1) local preservation laws and (2) demolition delay ordinances.

1. Local Preservation Laws

Local historic districts (LHDs) are the historic preservation tool that most people are likely familiar with.²⁹⁷ This tool focuses on preventing the demolition or destruction of groups of properties where the significance is collective, rather than based on the importance of individual resources.²⁹⁸ Authorized under state enabling laws, LHDs are established through locally created and administered preservation ordinances.²⁹⁹ The local ordinances typically create a commission or reviewing entity tasked with issuing certificates of appropriateness for proposed modifications to resources within a designated district.³⁰⁰ There are more than 2,300 LHDs nationwide, including at least one district in virtually every state.³⁰¹

Although similar, landmark laws are less common than LHDs and differ in that individual properties, rather than whole neighborhoods or

virginias-confederate-monuments [<https://perma.cc/Q6JC-6VT4>] (profiling the litigation over the Charlottesville monuments under Virginia law).

296. See, e.g., Mark D. Brookstein, Note, *When History Is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI-KENT L. REV. 1847, 1848 (2001) ("[P]reservation law has focused primarily on two areas: first, whether historic designation amounts to a taking in violation of the Fifth Amendment; and second, whether a permit may be granted for the demolition of a building already designated a historic landmark." (footnote omitted)).

297. See, e.g., Tad Heuer, Note, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 768, 774–77 (2007) (describing the development of LHDs as a preservation tool).

298. MILLER, *supra* note 121, at 7–8; see also Grace Blumberg, Comment, *Legal Methods of Historic Preservation*, 19 BUFF. L. REV. 611, 616 (1970) ("Preservation of a few isolated old houses [in new regulatory districts] appears a pathetic and dreary effort; a visit to one of the 'antiquities' is likely to evoke discomfiting thoughts of foolish elderly aunts and musty corners.").

299. See, e.g., Paul W. Edmondson, Comment, *Historic Preservation Regulation and Procedural Due Process*, 9 ECOLOGY L.Q. 743, 746–47 (1981) (discussing state enabling legislation as a prerequisite to local historic district regulations).

300. See, e.g., MILLER, *supra* note 121, at 2–3.

301. CONSTANCE E. BEAUMONT, NAT'L TR. FOR HISTORIC PRES., A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES 1 (2002), <http://mrsc.org/getmedia/0E24E2FB-023D-45E0-A611-96B94FF43F35/toolkit.aspx> [<https://perma.cc/F7QK-6BCP>].

areas, are listed as landmarks.³⁰² Landmark laws focus on the most important resources of a community and then single these out for individualized review by an administering commission.³⁰³ Both LHDs and landmark laws use similar design-review principles and alteration-approval processes, making them functionally equivalent in their practical application to monuments.³⁰⁴

As of July 2018, only a few applications have been made to either LHDs or landmark commissions for the removal of a Confederate monument. One such request was made in 2015 in Rockville, Maryland, and is instructive.³⁰⁵ In 2015, Montgomery County applied to the Rockville Historic District Commission to remove a statue located in front of the county courthouse.³⁰⁶ The statue is of a solitary Confederate soldier with the following verse on the base: “That we through life may not forget to love the thin grey line,” a reference to the uniforms worn by the Confederate army.³⁰⁷ The statue itself dates to 1913, but it had been moved to the courthouse grounds in 1971.³⁰⁸ The request for a certificate of appropriateness fell under the district commission’s jurisdiction

302. See, e.g., John Nivala, *The Future for Our Past: Preserving Landmark Preservation*, 5 N.Y.U. ENVTL. L.J. 83, 83–84 (1996) (noting that landmark laws protect individual properties through discussion of the significant decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

303. See, e.g., *About LPC*, NYC: LANDMARKS PRESERVATION COMMISSION, <https://www1.nyc.gov/site/lpc/about/about-lpc.page> [<https://perma.cc/38GA-TGBD>].

304. An example of this blurring is that some communities use single resource historic districts (i.e., creating a historic district for a single property, which is essentially, although with a different operative structure, the equivalent of landmarking a property). See, e.g., *Historic Districts*, CITY ROCKVILLE, <http://www.rockvillemd.gov/2177/Historic-Districts> [<https://perma.cc/L7FR-M7PP>].

305. See Andrew Metcalf, *Rockville Historic District Commission Grants County’s Request to Move Confederate Statue*, BETHESDA MAG. (Sept. 18, 2015, 11:22 AM), <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Rockville-Historic-District-Commission-Grants-County-Request-to-Move-Confederate-Statue/> [<https://perma.cc/4UJ3-YJDK>]. This statue has been a long-term issue with opposition dating back to at least 1993. See *Confederate Soldier Statue*, MONTGOMERY HIST., <http://montgomeryhistory.org/confederate-soldier-statue/> [<https://perma.cc/2MD4-ZQF3>] (providing summary of media coverage and the issue).

306. Seth Denbo, *All History Is Local: Debating the Fate of a Confederate Soldier Statue in Maryland*, PERSP. HIST.: AHA TODAY (July 27, 2015), <http://blog.historians.org/2015/07/debating-the-fate-of-a-confederate-soldier-statue/> [<https://perma.cc/WA58-RMQM>].

307. Bill Turque, *Montgomery County Officials Want to Move Confederate Statue to Rockville Park*, WASH. POST (Sept. 23, 2015), https://www.washingtonpost.com/local/md-politics/montgomery-county-decides-on-new-site-for-confederate-monument/2015/09/23/ea7fad18-6227-11e5-9757-e49273f05f65_story.html?utm_term=.3f3b13b3423d [<https://perma.cc/PZ6V-RHZX>].

308. SHEILA BASHIRI, CITY OF ROCKVILLE, HISTORIC DISTRICT COMMISSION STAFF REPORT: CERTIFICATE OF APPROVAL HDC2016-00756, 29 COURTHOUSE SQUARE 8, 17 (2015). The Maryland Historical Trust also held a preservation easement on the courthouse, but the city concluded that the statue was not a protected feature under the terms of its easement. *Id.* at 16.

because the courthouse was, in 1984, designated as a single resource local historic district by the City of Rockville's historic district commission.³⁰⁹ The historic district commission concluded the statue was not a contributing element to the courthouse's historic significance (as it had been moved onto the site and was a commemorative property) and the decision to relocate (instead of demolish) the statue mitigated the impacts.³¹⁰ The statue's 1971 relocation gave the commission a basis for concluding that the 2015 removal did not have an impact on the historic resource (as the monument was not originally associated with the courthouse).³¹¹ Such a circumstance will not often occur.

The debate over Confederate memorial modification or removal may be exacerbated by the fact that most local preservation laws lack any form of public policy, or public interest exception or safety valve, that would allow demolitions or alterations when required by practical necessity.³¹² Some commentators advocate for broader adoption and application of practical necessity provisions to better balance competing interests, which would directly relate to the types of issues preservationists face in the debate over these monuments.³¹³ Absent such provisions, historic district commissions may grapple with how to address competing interests within the confines of their jurisdictional task—leaving commission members in a somewhat difficult position.

2. Demolition Delay Ordinances

Last, demolitions delay ordinances, although far less common, could also have an impact on a community's decision to remove a Confederate monument.³¹⁴ Demolition delay ordinances typically require the owner of a listed property to pause before carrying out a substantial demolition

309. See Miriam Bunow, *County Executive Plans to Move Confederate Statue*, PEERLESS ROCKVILLE (July 21, 2015), <http://www.peerlessrockville.org/2015/07/21/county-executive-plans-to-move-confederate-statue/> [<https://perma.cc/MB37-TJVB>].

310. BASHIRI, *supra* note 308, at 17–19.

311. *Id.*

312. See, e.g., J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENVTL L. REV. 343, 389–90 (2015).

313. See, e.g., J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 672, 687 (2012) (profiling the benefit of this type of provision and its application under Washington's landmarks law).

314. See, e.g., Elizabeth M. Tisher, *Historic Housing for All: Historic Preservation as the Inclusionary Zoning*, 41 VT. L. REV. 603, 621–22 (2017) (exploring application of demolition delay ordinances).

that would include moving the object or property.³¹⁵ The idea behind this delay is to allow preservation advocates to mobilize, purchase, or come up with other options for protecting the resource before it is lost.³¹⁶ To the extent that the ordinance defines removal as substantial demolition, a demolition delay ordinance could cause a considerable delay and allow monument advocates time to mobilize and develop an alternative plan.

Overall, preservation laws will likely play a role in many efforts to remove these commemorative structures. As is the general rule with preservation law, the strongest protections or legal requirements will be triggered by and apply through local preservation laws, although they may be practically limited by a community's will to enforce these requirements.³¹⁷ State and federal laws, which are important and potentially provide an opportunity for dialogue and alternative assessments, are generally only procedural barriers, not substantive ones. The exception to this, of course, is the relatively recent trend in some states to preempt some degree of local control through statewide monument-specific laws that impose affirmative protection at the state level.³¹⁸

D. *Private Preservation Laws*

In addition to governmental efforts to regulate and protect Confederate monuments, private laws and agreements, specifically conservation easements, can also restrict or limit Confederate monument removal. For the purposes of this Article, conservation easements are defined as "private" laws, but this line is often blurred as governmental entities, rather than private land trusts, sometimes hold these restrictions. This Article addresses these as private as they are secured through legal agreements rather than through regulatory means.

1. Preservation Easements

Conservation easements are one mechanism for protecting Confederate monuments.³¹⁹ Conservation easements protect several

315. See, e.g., KATHLEEN O'DONNELL, MASSACHUSETTS ENVIRONMENTAL LAW § 6.5.1 (4th ed. 2016) (profiling demolition delay bylaws in Massachusetts).

316. See Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 URB. LAW. 405, 411 (1998).

317. BRONIN & BYRNE, *supra* note 90, at 323–27 (exploring the impact of demolition delay bylaws).

318. See *supra* Section II.B.3.

319. See, e.g., SPECIAL COMM'N TO REVIEW BALT.'S PUB. CONFEDERATE MONUMENTS, REPORT TO MAYOR RAWLINGS-BLAKE 28 (2016), <https://www.baltimorecity.gov/sites/default/files/Confederate%20Monuments%20report.pdf> [<https://perma.cc/G89N-7XEP>] [hereinafter

types of resources, including the built and natural environment.³²⁰ These interests are labeled “preservation easements” when the primary goal of the restriction is protection of the built environment.³²¹ When the goal is to protect the landscape or scenic views, these interests are referred to as “conservation easements” (a term also used when discussing this form of property interest in a collective sense).³²² That is, preservation easements are a subset of the larger general category of conservation easements.

Landowners enter into conservation easements, a private mechanism for protecting targeted resources, by conveying the ability to modify, develop, or demolish a resource.³²³ When entering into a conservation easement, the landowner gives another party (typically a non-governmental organization or governmental body that serves as the conservation easement-holder) the ability to enforce this restriction.³²⁴

The classic “bundle of sticks” metaphor for property can be helpful: Think of the landowner as losing one of the sticks in her bundle, but instead of simply handing the stick to another person who can use it as she likes, the holder of the stick is its guardian, who agrees to monitor and enforce its terms for the duration of the property interest—which is typically perpetual.³²⁵ Landowners rarely hand over these sticks for free. Instead, they seek payments, permits, or other benefits in return for restricting their properties. A landowner’s primary motivation for donating a conservation easement is often the potential to qualify for

SPECIAL COMM’N] (profiling the City of Baltimore’s Confederate monuments protected by preservation easements held by the Maryland Historic Trust).

320. See, e.g., *Land Acquisition: Easements*, OPEN SPACE INST., <https://www.openspaceinstitute.org/what/land-acquisition/easements> [<https://perma.cc/UR6V-K8N2>] (profiling the various resources conservation easements can protect).

321. See, e.g., *Preservation Easements*, PRESERVATION LEADERSHIP F., <https://forum.savingplaces.org/learn/fundamentals/preservation-law/easements> [<https://perma.cc/T8AT-FB3R>].

322. BRONIN & BYRNE, *supra* note 90, at 534–35 (exploring terminology used to describe this form of property interest); see also ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 14–19 (2d ed. 2005) (profiling the variety of conservation easement types).

323. Jess R. Phelps, *Preserving Perpetuity: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World*, 43 ENVTL. L. 941, 945–47 (2013).

324. Jessica Owley, *The Future of the Past: Historic Preservation Easements*, 35 ZONING L. & PRAC. REP., Nov. 2012, at 1, 3; Jess R. Phelps, *Preserving Preservation Easements?: Preservation Easements in an Uncertain Regulatory Future*, 91 NEB. L. REV. 121, 128 (2012). The conservation easement holder has not only the ability to enforce the restriction, but the obligation and responsibility to do as required under the Internal Revenue Code and potentially under state charitable giving laws. See Phelps, *supra*, at 133–36.

325. See Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).

federal and state tax benefits, primarily the charitable deduction associated with any reduction in the property's value.³²⁶

Although some promote preservation easements as a way to protect historic resources through private action, the government still plays a significant role through its promotion, facilitation, and funding of conservation easements. This Section explores how conservation easements potentially work to protect Confederate monuments, focusing on the two primary pathways: (1) tax-incentivized conservation easements and (2) non-tax-incentivized conservation easements. This Article examines these categories separately because the public interest involved differs—suggesting distinct and material barriers to monument removal or alteration. The involvement of conservation easements in the Confederate monument debate suggests two things. First, the line between public and private in the context of Confederate memorials is even muddier than we thought, with a complicated array of property interests and public investments. Second, the layer of a conservation easements could present a further obstacle (and additional stakeholder) in the efforts to modify or remove monuments.

a. Tax-Incentivized Conservation Easements

Federal involvement in conservation easements can come in different forms. Sometimes the federal government creates programs financing acquisition of conservation easements.³²⁷ At times, it even serves as conservation easement holder.³²⁸ The most significant role, however, (and the one most salient for preservation easements) is as provider of tax incentives for donations of preservation interests.³²⁹ This governmental

326. See NAT'L TR. FOR HISTORIC PRES., BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP 34 (2008) (providing an overview of these incentives).

327. See, e.g., Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 44 *ECOLOGY L.Q.* 627, 650–52 (2017) (profiling federal Farm Bill programs designed to acquire these interests).

328. See, e.g., Jess R. Phelps, *Preserving National Historic Landmarks?*, 24 *N.Y.U. ENVTL. L.J.* 137, 180–83 (2016) (profiling the National Park Service's role as a holder of conservation easements protecting the historic Green Springs area of Virginia).

329. BRONIN & BYRNE, *supra* note 90, at 571–85 (providing an overview of the tax incentives); see also SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004*, at 13 (2005) (profiling the interconnectedness of public and private interests within conservation easements and dispelling the notion that conservation easements are less “governmental” than other forms of land acquisition, including fee acquisition by federal land management agencies).

role illuminates the public interest even in seemingly private endeavors and can complicate efforts to modify or remove monuments.³³⁰

While the tax incentive is unlikely to apply directly to protection of Civil War monuments (as explained below), it may apply to the properties on which monuments are located. Tax-incentivized conservation easements could protect Confederate monuments in two scenarios: (1) direct application or protection by preservation easements and (2) indirect application or protection through conservation easements.³³¹

The charitable deduction has driven many preservation easement donations.³³² No different in principle from a cash gift to a nonprofit through a pledge drive, a donated conservation easement falls under the general category of charitable donations.³³³ However, as a non-cash donation, one of the primary challenges is how to value the conveyed interest.³³⁴ The Internal Revenue Code and the Treasury Regulations instruct that these donations be appraised on a before-and-after basis.³³⁵ For a simplified example, take a hypothetical property worth \$1,000,000. An appraisal determines that this restriction reduced the property's market value to \$900,000. This suggests a non-cash charitable donation of \$100,000.

Depending on the magnitude of the restriction and the market value or development potential of the property, conservation easement donations can result in substantial charitable deductions and, as a result, have contributed to the protection of thousands of historic properties

330. See, e.g., Ian Duncan, *Baltimore Lacked Authority to Take Down Confederate Statues, and State Says It Could — but Won't — Order Them Restored*, BALT. SUN (Oct. 26, 2017, 2:45 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-confederate-monuments-letter-20171026-story.html> [<https://perma.cc/M9LP-WKSN>] (exploring the complicated legal issues involving the City of Baltimore's authority to remove four Confederate monuments/statues in late 2017).

331. In addition to the federal tax incentives explored in this section, state tax credits/deductions can also apply. See Philip M. Hocker, *Transferable State Tax Credits as a Land Conservation Incentive*, in WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE, 124, 124–27 (James N. Levitt ed., 2005).

332. Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 117–19 (2014).

333. *Id.* at 117.

334. See generally Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225 (2016) (exploring the challenges and issues valuation presents for easement donations).

335. See LAND TR. ALL. & NAT'L TR. FOR HISTORIC PRES., APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 30–33 (3d ed. 1999) (describing legal and practical issues when applying the before-and-after standard).

nationally.³³⁶ In 2014 alone, the most recent year for which reporting is available, the combined value of conservation easements, nationally, totaled \$3.2 billion dollars.³³⁷

To qualify for the tax deduction, the donation must: (1) consist of “a qualified real property interest;” (2) be made “to a qualified organization;” and (3) be made “exclusively for conservation purposes.”³³⁸ The first two requirements are similar for both preservation and conservation easements.

The first requirement, that the donation be of a qualified real property interest, mandates a perpetual restriction on the use of the property.³³⁹ The second requirement, that the donation be made to a qualified organization, means that the preservation easements must be held by either state or local governments or approved nongovernmental organizations.³⁴⁰ These nongovernmental organizations, typically called land trusts, are generally established under § 501(c)(3) of the Tax Code and have organizational purposes aligned with the purposes of the donation.³⁴¹

However, the third requirement, that the donation be made exclusively for conservation purposes, differs depending on the type of conservation easement involved. For a conservation easement to qualify for the charitable deduction, the landowner must demonstrate that it meets one of the statutorily defined “conservation purpose[s].”³⁴² The statute defines “conservation purpose[s]” as falling into one or more of the following four categories:

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems,

336. See generally Josh Eagle, *Notional Generosity: Explaining Charitable Donors’ High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47 (2011) (exploring the various motivating factors that fuel tax incentivized easement donations).

337. ADAM LOONEY, BROOKINGS INST., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 3 (2017), https://www.brookings.edu/wp-content/uploads/2017/05/looney_conservationeasements.pdf [<https://perma.cc/8B9T-BJ6X>] (charting this staggering number in the context of recent efforts by some promoters to syndicate conservation easements as an investment vehicle that the IRS recently called out as a listed activity for future enforcement action).

338. Treas. Reg. § 1.170A-14(a) (2018); see also *id.* § 1.170A-14(b)–(c) (defining “[q]ualified real property interest” and “[q]ualified organization” respectively).

339. *Id.* § 1.170A-14(b)(2).

340. *Id.* § 1.170A-14(c)(1).

341. *Id.*; see also C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 34–35 (2008) (discussing a public support requirement and the potential application of this requirement).

342. Treas. Reg. § 1.170A-14(d).

- (iii) the preservation of open space (including farmland and forest land) . . . or
- (iv) the preservation of an historically important land area or a certified historic structure.³⁴³

It is possible that a monument will be on land protected by a conservation easement under one of the first three categories. In such cases, the protection of the monument is more of a collateral or indirect effort rather than the heart of the restriction. In the context of Confederate monuments, section (iv), “the preservation of an historically important land area or a certified historic structure,” is likely to apply. To meet the conservation purposes requirement, the resource must be a “certified historic structure” or a “historically important land area.”³⁴⁴ Under the Internal Revenue Code, a certified historic structure is “any building, structure, or land area which is listed in the National Register [of Historic Places], or . . . is located in a registered historic district . . . and is certified . . . as being of historic significance to the district.”³⁴⁵ Thus, properties listed on the National Register automatically qualify.³⁴⁶

To be eligible for the National Register, the resource must qualify as a building, structure, object, site, or district.³⁴⁷ While these categories encompass most fixed (non-movable) resources, the tax code restricts its coverage to buildings, structures, or land areas.³⁴⁸ A monument would likely be classified as an object.³⁴⁹ Additionally, as explained above, to be eligible for listing on the National Register, the property must meet one or more of four criteria:³⁵⁰ (a) “associat[ion] with events that have made a significant contribution to the broad patterns of our history;” (b) association with the lives of significant individuals; (c) architectural or

343. I.R.C. § 170(h)(4)(A)(i)–(iv) (2012); *see* Treas. Reg. § 1.170A-14(d)(i)–(iv).

344. I.R.C. § 170(h)(4)(A)(iv); *see also* § 170(h)(4)(B) (listing special rules that apply to “buildings in registered historic districts”). The “historically important land area” prong under § 170(h)(4)(A)(iv) is infrequently invoked as it is often easier to protect land areas under open space or scenic purposes. The regulatory definition of historically important land area, however, actually does provide as its example a “Civil War battlefield with related monuments.” Treas. Reg. § 1.170A-14(d)(5)(ii)(A).

345. I.R.C. § 170(h)(4)(C)(i)–(ii); *accord* Treas. Reg. § 1.170A-14(d)(5)(iii)(A)–(B).

346. *See* Martha Jordan, *Repairing Façade Easements: Is this the Gift that Launched a Thousand Deductions?*, 22 AKRON TAX J. 101, 104 (2007) (discussing this process within the façade easement context).

347. 54 U.S.C. § 302102 (Supp. V 2018); *see* 36 C.F.R. § 60.3 (2018) (defining terms).

348. I.R.C. § 170(h)(4)(A)(iv), (C)(ii).

349. “An object is a material thing . . . that may be . . . movable yet related to a specific setting or environment.” 36 C.F.R. § 60.3(j). In certain cases, it may be difficult to distinguish between structures and objects. *See* BRONIN & BYRNE, *supra* note 90, at 59.

350. This differs from the standards that apply to § 106 review under the NHPA, which apply to those properties that are eligible rather than listed. *See* 54 U.S.C. § 306108.

artistic value; and (d) “have yielded, or may be likely to yield,” archaeological information or data.³⁵¹

Beyond the four eligibility criteria, several exceptions limit the number of listed properties.³⁵² National Park Service regulations “[o]rordinarily” exclude from eligibility “cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature and properties that have achieved significance within the past 50 years.”³⁵³

The bar against commemorative properties would bar many, if not most, monuments, and the fifty-year mark for eligibility would also apply to more recent monument efforts.³⁵⁴ There are, however, limited exceptions to these general exceptions.³⁵⁵

For monuments, “[a] property primarily commemorative in intent [can be eligible] if design, age, tradition, or symbolic value has invested it with its own exceptional significance,” which accounts for the listing of several Confederate monuments despite limitations that would otherwise seem to directly apply.³⁵⁶ For example, the Caddo Parish Confederate Monument (1902–06) in Shreveport, Louisiana, was listed under Criteria A “as one of four major Louisiana Monuments representing what is known by historians as ‘the Cult of the Lost Cause.’ . . . [The] monuments are Louisiana’s most important representations of the Memorial Period, or second phase (1883 to 1907), of the Civil War Commemorative Sculpture Movement.”³⁵⁷ This monument, located on the grounds of the Caddo Parish Courthouse, is

351. 36 C.F.R. § 60.4. In addition to qualifying under the criteria, the property must also retain sufficient historic integrity. See JAMES P. DELGADO & KEVIN J. FOSTER, U.S. DEP’T OF THE INTERIOR, NATIONAL REGISTER BULL. NO. 34, GUIDELINES FOR EVALUATING AND DOCUMENTING HISTORIC AIDS TO NAVIGATION 8 (1992) (explaining the seven factors under which historic integrity is evaluated).

352. See U.S. DEP’T OF THE INTERIOR, NATIONAL REGISTER BULL. NO. 15, HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 52 (1997).

353. 36 C.F.R. § 60.4; see also SPRINKLE, *supra* note 105, at 149–53 (discussing the debate over exclusions to the National Register to limit its scope).

354. NORMAN TYLER ET AL., HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 148–49 (2d ed. 2009).

355. See 36 C.F.R. § 60.4.

356. *Id.* § 60.4(f). A similar exception applies to properties achieving significance in the last fifty years, but this has been deemed a high bar. *Id.* § 60.4(g).

357. U.S. DEP’T OF THE INTERIOR, NPS FORM 10-900, CADDO PARISH CONFEDERATE MONUMENT, <https://www.nps.gov/nr/feature/places/pdfs/13001124.pdf> [<https://perma.cc/ULB6-4WK4>]. Note, the very qualities that may make this monument most objectionable are those that led to its listing in the National Register—demonstrating how complicated monument protection or removal efforts can oftentimes be.

thirty feet tall and depicts Confederate generals Robert E. Lee, Stonewall Jackson, and P.G.T. Beauregard, among others.³⁵⁸ Installed in 1905 by the Daughters of the Confederacy, according to the state historian, it is a “‘cenotaph,’ i.e. a sepulchral monument erected in memory of deceased persons whose bodies are buried elsewhere.”³⁵⁹ The Keeper of the National Register listed and approved this monument’s designation in early 2014.³⁶⁰

If the property is not on the National Register but is in a historic district, two requirements must be satisfied to meet the IRS’s conservation purposes requirement. First, the district must qualify as a registered historic district, and second, the property must contribute to the district or relate to the district’s general historic characteristics and significance.³⁶¹

Two types of historic districts meet the requirements: (1) National Register Historic Districts, and (2) locally created historic districts.³⁶² National Register districts qualify automatically, but locally created historic districts must be created pursuant to a local preservation law and certified by the National Park Service’s Certified Local Government Program.³⁶³

Simply being in the district is not enough, though. The landowner seeking the tax deduction must also demonstrate that the property contributes to the district or shares the general characteristics for which the district was created.³⁶⁴ To demonstrate this, the property owner will need to apply for a certification of significance from the National Park Service to establish the significance of the individual property.³⁶⁵ Thus, a property can qualify if it is individually listed on the National Register or if it contributes to a registered historic district.

To summarize, to qualify for the charitable deduction, the property has to be a certified historic structure that requires National Register status, which, despite apparent barriers, some monuments have obtained.

358. *Id.* at 4.

359. *Id.*

360. *Id.* at 2.

361. *Id.*

362. NAT’L PARK SERV., EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS 5–6 (2010), <https://www.nps.gov/tps/tax-incentives/taxdocs/easements-historic-properties.pdf> [<https://perma.cc/NW7E-KR2M>].

363. *Id.*

364. *See* I.R.C. § 170(h)(4)(C)(ii); ELIZABETH WATSON & STEFAN NAGEL, ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 5 (2007).

365. WATSON & NAGEL, *supra* note 364, at 5; *see also* *Historic Preservation Certification Application*, NAT’L PARK SERV., <https://www.nps.gov/tps/tax-incentives/application.htm> [<https://perma.cc/H3B9-KE8G>] (providing information and instructions on applying for this certification).

As a result, it is at least theoretically possible that a preservation easement donation protecting a monument could qualify for a charitable deduction.³⁶⁶

Even if a property meets the general Internal Revenue Code requirements, it is unlikely for a donation of a conservation easement solely protecting a Confederate monument to be claimed, absent unusual circumstances, because of: (1) the nature of ownership, (2) the valuation of any donations, and (3) other regulatory factors. The large majority of Confederate monuments, particularly those from the distant past, are located on public land.³⁶⁷ By virtue of their location, these resources are often owned or controlled by governmental or nonprofit actors.³⁶⁸ By both definition and operating structure, governmental and nonprofit actors lack taxable income.³⁶⁹ As the tax deduction for conservation easements relies on taxable income for its correlated benefit, these entities are not going to be able to claim a deduction, which in all reality, will limit its use as a preservation tool.³⁷⁰

For monuments located on private land, as noted above, the economic value embedded in these transactions is the primary driver.³⁷¹ In protecting a monument, it is not clear how much property value is lost. There may be very little, if any, reduction in property value associated

366. For new efforts to list Confederate monuments on the National Register, this process can take a substantial amount of time. *See, e.g.*, N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., NATIONAL REGISTER OF HISTORIC PLACES: RECOGNIZING AND DOCUMENTING NEW YORK STATE'S RICH AND DIVERSE HERITAGE 1–3 (2009), <http://www.landmarksociety.org/wp-content/uploads/2012/04/National-Register-Introduction-Packet.pdf> [<https://perma.cc/9KPW-ZXKN>] (explaining the process for designation and the approvals that have to be obtained; the process can often take several years and can involve, but does not require, hiring a consultant).

367. *See, e.g.*, Kathryn Casteel & Anna Maria Barry-Jester, *There Are Still More than 700 Confederate Monuments in the U.S.*, FIVETHIRTYEIGHT (Aug. 16, 2017, 1:38 PM), <https://fivethirtyeight.com/features/there-are-still-more-than-700-confederate-monuments-in-the-u-s/> [<https://perma.cc/3V63-68CR>] (“There are currently more than 700 monuments to the Confederacy in public places, located predominantly in the South.”).

368. Guelda Voien, *The Number—and Locations—of Confederate Monuments in the U.S. Prove How Much Work We Have Left to Do*, ARCHITECTURAL DIG. (Aug. 17, 2017), <https://www.architecturaldigest.com/story/confederate-monuments> [<https://perma.cc/5FHW-QJ27>] (noting examples of avenues and plaques on government and private properties, respectively).

369. *See Exemption Requirements - 501(c)(3) Organizations*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501c3-organizations> [<https://perma.cc/2ALR-48UR>] (describing exemption requirements under § 501(3)(c) of the Internal Revenue Code).

370. There may be non tax-incentivized preservation easements as discussed in the next section, but if not tax-incentivized they will not be limited by the IRS rules.

371. *See, e.g.*, Jess R. Phelps, *Reevaluating the Role of Acquisition-Based Strategies in the Greater Historic Preservation Movement*, 34 VA. ENVTL L.J. 399, 440–44 (2016) (exploring the role of economic value in shaping project design in historic preservation projects).

with conveying the right to modify a monument. The presence of a monument would not likely affect property values, so the before value will roughly equal the after value for any conservation easements. The transaction costs associated with drafting a conservation easement, finding a conservation easement-holder, and covering any required stewardship payments (to offset the perpetual costs of monitoring and enforcing the terms of the restriction) will likely outweigh any potential benefit provided by the actual tax incentive—making donation of a conservation easement solely protecting a Confederate monument to be an unlikely occurrence.

Other practical factors further limit the use of this tool, including public access requirements. To qualify for the tax deduction, “some visual public access to the donated property is required.”³⁷² If a monument is on private land without visual or physical public access, it would not be eligible for the tax deduction. A landowner could, however, open her property to the public as long as “the general public is given the opportunity on a regular basis” to view the protected features of the property.³⁷³ Depending upon the type and location of the monument, this could potentially be an issue in qualifying a donation, and there are likely other similar practical challenges to claiming a deduction for this resource type.³⁷⁴

The federal tax incentives, to the extent that they have been used to protect monuments, have largely protected these resources indirectly (through conservation easements protecting the land upon which they are located). Non-tax-incentivized preservation easements are more likely to protect these resources. As a result, there has likely been little tax expenditure to protect Confederate monuments through private efforts, and the majority of efforts to protect these resources have been funded through state or local grants (requiring conservation easements as a condition of funding) or for land preservation-related motivations. Both of these types of protections are discussed below.

The above Section examined the potential for a tax deduction for a Confederate monument encumbered by a conservation easement where the purpose of the conservation easement is historic preservation-focused. The Internal Revenue Code also allows deductions for conservation easements with three other types of conservation purposes: (1) outdoor recreation and education; (2) natural habitat for fish, wildlife,

372. Treas. Reg. § 1.170A-14(d)(5)(iv)(A) (2018).

373. *Id.* The regulations do not explain exactly how much access is required for it to be on a “regular basis.” *Id.*

374. For another example, for properties located in registered historic districts, the Pension Protection Act of 2006 added additional documentation and protection requirements for qualifying resources. *See* I.R.C. § 170(h)(4)(B) (2012).

or plants; and (3) open space.³⁷⁵ Protection of monuments under the outdoor recreation and education category is unlikely because the Treasury Regulations emphasize that the protection should be of “land areas” and the examples are hiking areas and waterways open to boating or fishing.³⁷⁶ Likewise, the natural habitat category will not apply directly to the protection of a monument or structure as the focus is on environmental systems.³⁷⁷ While a Confederate monument could exist on land with public recreation areas or relatively natural habitats, the purpose of any conservation easement on such land would not be protection of the monument itself.

The final category of open-space protection is the one most likely to interact with Confederate monuments.³⁷⁸ A donation can qualify under the open-space prong where the protection is: (1) “for the scenic enjoyment of the general public;” or (2) “pursuant to a ‘clearly delineated [governmental] conservation policy.’”³⁷⁹ The Treasury Regulations further specify that the donation must provide a “significant public benefit.”³⁸⁰ Preservation of land for scenic purposes qualifies for a tax deduction if the development of land “would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama that can be enjoyed . . . by[] the public.”³⁸¹ For the clearly delineated governmental policy prong, land fitting within a specific and defined governmental policy objective, such as the protection of farmland or a wild and scenic river, will also be potentially eligible.³⁸²

By the nature of the Civil War, most critical points of conflict were within the rural countryside.³⁸³ A conservation easement designed to protect a battlefield as open space or for scenic motivations could also protect a monument located on the protected land.³⁸⁴ Again, the protection of the monument would not be the driver for the donation, as its non-related scenic and open-space value would be the basis for this

375. *Id.* § 170(h)(4)(A)(i)–(iii).

376. Treas. Reg. § 1.170A-14(d)(2)(i).

377. *Id.* § 1.170A-14(d)(3).

378. *See* I.R.C. § 170(h)(4)(A)(iii).

379. LINDSTROM, *supra* note 341, at 43–44.

380. Treas. Reg. § 1.170A-14(d)(4)(i)(A).

381. *Id.* § 1.170A-14(d)(4)(ii)(A).

382. *See* I.R.C. § 170(h)(4)(A)(iii)(II); Treas. Reg. § 1.170A-14(d)(4)(iii)(A).

383. *See, e.g., Gettysburg Battlefield*, AM. BATTLEFIELD TR., <https://www.civilwar.org/visit/battlefields/gettysburg-battlefield> [<https://perma.cc/Y34J-DP6H>] (profiling the over 1,000 acres of protected farmland surrounding this critically important battlefield in rural Pennsylvania).

384. *See, e.g., Civil War Battlefield Conservation: Focus on Antietam*, CONSERVATION FUND, <https://www.conservationfund.org/projects/civil-war-battlefield-conservation-focus-on-antietam> [<https://perma.cc/RM3R-23UG>] (detailing conservation easement project protecting the historic Grove Farm—part of the Antietam battlefield in Western Maryland).

protection, but the value of the tax incentive could indirectly incentivize the monument's protection and leave a historic preservation organization or state or nonprofit organization committed to safeguarding this resource.³⁸⁵

It is hard to gauge how often this happens, but particularly given the battlefield focus of some land trusts and the targeted efforts of programs such as the federal American Battlefield Protection Program and land trusts such as the Civil War Trust,³⁸⁶ it is probable that a number of conservation easements protect Confederate and other monuments. Conservation easements, protecting a monument indirectly (or at least as a secondary objective), present a very real challenge to conservation easement-holders who have to balance and assess whether additional interpretation, modification, or removal of the monument is barred under the terms of the restriction.

b. Non-Tax-Incentivized Conservation Easements

As discussed above, conservation easements are a relatively recent legal development and are a creature of state law. For a conservation easement to exist as a legally enforceable property interest, it has to comply with the terms of the state's enabling legislation. For a variety of reasons, a landowner may wish to donate a conservation easement even if a federal tax deduction is not claimed. The Uniform Conservation Easement Act, the Uniform Laws Commission model legislation that is the basis for about half of states' enabling legislation, sets forth twelve purposes or values that a conservation easement can protect—including historic purpose or value (which is not defined).³⁸⁷ Even those states not basing their legislation on the uniform act do not deviate much from the act's broad coverage.³⁸⁸ Some states, however, have separate legislation specifically enabling historic preservation easements.³⁸⁹ The general trend of these state statutes is to provide a broad definition or authorization for a landowner and a nonprofit to agree whether the historic value of the site merits perpetual protection.³⁹⁰ In the monument

385. See, e.g., Linda Wheeler, *Civil War Trust: 'Don't Erase History,'* WASH. POST (Sept. 4, 2015), https://www.washingtonpost.com/news/house-divided/wp/2015/09/04/civil-war-trust-dont-erase-history/?utm_term=.aa489d58af81 [<https://perma.cc/3MGE-JV8R>] (profiling large conservation easement holder's position on Civil War monuments).

386. See *American Battlefield Protection Program*, NAT'L PARK SERV., <https://www.nps.gov/ABPP/> [<https://perma.cc/MS6H-P73A>]; *Saved Land*, AM. BATTLEFIELD TR., <https://www.battlefields.org/preserve/saved-land> [<https://perma.cc/4NTR-NNXQ>].

387. BRONIN & BYRNE, *supra* note 90, at 537–39.

388. *Id.*

389. See ROBERT H. LEVIN, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES 10 (2014) (summarizing conservation values generally).

390. See, e.g., CONN. GEN. STAT. §§ 47-42a to -42d (2018).

context, this allows conservation easements protecting monuments to exist as a valid and enforceable interest in real property in most states.

Local, state, and federal governments have protected Confederate monuments through their conservation easement programs. One pathway for this is as a condition of grant funding.³⁹¹ Historic preservation agencies often support the upkeep, maintenance, and repair of historic properties, including commemorative structures.³⁹² They often do so through grant programs. For example, a local neighborhood may have a neglected monument. The neighborhood group could apply to the historic preservation agency for a grant to cover all or part of the monument's restoration.³⁹³ Not surprisingly given the degree of public investment in restoring the resource, the historic preservation agency funding this work will often want some assurances that its investment will be protected. Thus, the agency will make the grant contingent on encumbering the monument with a preservation easement (for at least a meaningful, if not perpetual, term).³⁹⁴

An example of this comes from Baltimore, where the debate over the future of a number of Confederate monuments has been extremely controversial.³⁹⁵ In 2015, then-Mayor Stephanie Rawlings-Blake tasked a commission with reviewing the fate of four monuments owned by the city and located on city property: (1) the Roger B. Taney monument (1887); (2) the Confederate Soldiers and Sailors monument (1902); (3) the Confederate Women's monument (1915–17); and (4) the Lee and Jackson monument (1948).³⁹⁶ The Maryland Historical Trust (MHT), a

391. See, e.g., U.S. DEP'T OF THE INTERIOR, HISTORIC PRESERVATION FUND GRANT MANUAL 6–41 (2007), https://www.nps.gov/preservation-grants/manual/HPF_Manual.pdf [<https://perma.cc/P9J5-VBUB>] (providing an example of a grant).

392. See, e.g., *Massachusetts Preservation Projects Fund*, SECRETARY COMMONWEALTH MASS., <https://www.sec.state.ma.us/mhc/mhcmpff/mppfidx.htm> [<https://perma.cc/PD8D-DJB6>].

393. See, e.g., *Duluth Civil War Monument to be Restored*, DULUTH NEWS TRIB. (June 20, 2016, 10:00 PM), <http://www.duluthnewstribune.com/news/4078090-duluth-civil-war-monument-be-restored> [<https://perma.cc/HXL2-D8SV>] (noting that the city of Duluth gave a \$70,000 grant to a nonprofit group).

394. See, e.g., MD. DEP'T OF PLANNING, CONVEYANCE OF A PRESERVATION EASEMENT TO THE MARYLAND HISTORICAL TRUST 2, https://mht.maryland.gov/documents/PDF/easement/easement_procedures_conveyance_grants_2019.pdf [<https://perma.cc/7NYV-W5VQ>]. Conservation easements can also be obtained as a condition of permitting or mitigation for governmental approval. See *Preservation Easements*, CAMBRIDGE HIST. COMMISSION, <https://www.cambridge.ma.gov/historic/districtsHistoricProperties/preservationeasements> [<https://perma.cc/G6AL-XBG5>].

395. See Brentin Mock, *What to Do About Baltimore's Confederate Monuments*, CITYLAB (Sept. 15, 2016), <https://www.citylab.com/equity/2016/09/baltimores-confederate-monuments/500195/> [<https://perma.cc/828C-EPDT>].

396. See *Confederate Monuments*, CITY BALT., <https://chap.baltimorecity.gov/confederate-monuments> [<https://perma.cc/3PRJ-SQU3>]; see also *Timeline of Baltimore City Confederate Monuments*, SPECIAL COMMISSION REV. BALT.'S PUB. CONFEDERATE MONUMENT

state agency, held conservation easements on three of the four monuments.³⁹⁷ These conservation easements were conveyed in a single deed in 1984 through the state's cyclical outdoor bronze sculpture maintenance program and were a condition of the city receiving funding to maintain the statues.³⁹⁸ The conservation easement terms require MHT approval for any changes or modifications to the monuments.³⁹⁹ The range of monuments considered is particularly interesting given the array of funding mechanisms associated with their construction on public land, ranging from purely publicly supported to those placed through individual and non-profit donations.⁴⁰⁰ In addition to debating the future of the monuments, the commission appointed by Rawlings-Blake explored the legal requirements for removal, noting the very real limits on the city's authority resulting from the MHT preservation easements.⁴⁰¹

In the summer of 2017, newly elected Mayor Catherine Pugh ordered the removal of the monuments, which occurred on the night of August 16, through the morning of August 17.⁴⁰² Without obtaining MHT approval, Pugh declared removal necessary under a public nuisance theory, asserting that she needed to "protect her city" and to prevent future protest and vandalism to the monuments.⁴⁰³ MHT has since stated that this removal occurred without legal authority but that in this instance it will not seek to enforce the terms of its conservation easements or insist on restoration.⁴⁰⁴

The process and ability of a preservation easement-holder to approve a request to remove a monument will hinge upon the terms of the agreement and potentially upon the state's conservation easement enabling legislation.⁴⁰⁵ Most conservation easements provide some

<http://baltimoreplanning.wixsite.com/monumentcommission/monuments-timeline> [<https://perma.cc/XSS6-YP29>] (providing a timeline of when the four monuments were built).

397. SPECIAL COMM'N, *supra* note 319.

398. *Id.*

399. *Id.*

400. *See id.* at 21–28.

401. *Id.* at 28.

402. *See* Merrit Kennedy, *Baltimore Took Down Confederate Monuments. Now It Has to Decide What to Do with Them*, NPR (Aug. 28, 2017, 3:47 PM), <http://www.npr.org/sections/thetwo-way/2017/08/28/546131805/baltimore-took-down-confederate-monuments-now-it-has-to-decide-what-to-do-with-them> [<https://perma.cc/AVR4-L4M5>].

403. *See* Michelle Harris & Meredith Herzing, *Confederate Monuments in Baltimore "Quickly and Quietly" Removed*, BALT. MAG. (Aug. 16, 2017, 5:25 PM) <http://www.baltimoremagazine.com/2017/8/16/confederate-monuments-in-baltimore-quickly-and-quietly-removed> [<https://perma.cc/9NTW-SDP3>].

404. *See* Duncan, *supra* note 330.

405. *See generally* Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, 23 PROB. & PROP. 52 (2009) (providing an overview of some of the issues involved in amendment/termination of perpetual easements).

flexibility for the property owner and conservation easement-holder to mutually agree to a change, but the degree of change and the purposes that the conservation easement was intended to protect ultimately will place limits on this authority.⁴⁰⁶ Where the agreements are silent on modification or removal, the parties will need to follow the applicable state law process for amending or terminating the preservation easement, which may require obtaining court approval to terminate or modify the property interest.⁴⁰⁷ In some cases, the parties will need to go through a public process; for governmental holders, obtaining legislative approval may be necessary before any modification or disposal of governmental assets.

Relatedly, if the state fails to enforce the terms of the preservation easement, it may face a challenge from interested third parties seeking to enforce the preservation easement. A third party's ability to enforce a preservation easement will depend upon whether the party can establish standing.⁴⁰⁸ The ability of a third party to enforce the terms of a preservation easement will hinge on state law. In some states, such as Illinois, it may be possible for a third party to bring an action to enforce the terms of a restriction.⁴⁰⁹ Most states, however, have statutorily limited third-party standing—barring this form of action—or remain silent on this issue.⁴¹⁰ Overall, any effort to remove a protected monument will not be straightforward or simple and, if challenged, will require substantial legal and political effort to complete. Baltimore perhaps has been fortunate thus far that neither the MHT nor any other interested party has challenged these actions and, further, that the state did not attempt to enforce the terms of its preservation easement.

406. See Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145, 156–57 (2011) (discussing discretionary approvals provisions and their limits).

407. See, e.g., Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 WYO. L. REV. 1, 94 (2009).

408. See Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 759–60 (2005) (discussing third party standing and the ability of third parties to seek judicial enforcement of conservation easements generally).

409. LEVIN, *supra* note 389, at 38.

410. *Who Has Standing?: Conservation Easements in Pennsylvania Courts*, CONSERVATIONTOOLS.ORG, <https://conservationtools.org/guides/121-who-has-standing> [<https://perma.cc/2N7H-JR94>] (explaining the limitations on third-party standing under the state's Conservation and Preservation Easements Act (the state's enabling legislation)); see also Jessica Owley, *A New Conservation Easement Case from Maine's Highest Court Is a Lesson in Statutory Interpretation*, LPB NETWORK: LAND USE PROF BLOG (Jan. 27, 2017), http://lawprofessors.typepad.com/land_use/2017/01/a-new-conservation-easement-case-from-maines-highest-court-is-a-lesson-in-statutory-interpretation.html [<https://perma.cc/3MWX-4Y67>] (discussing the Maine Supreme Court's decision in *Estate of Robbins v. Chebeague & Cumberland Land Trust*, 151 A.3d 1185 (Me. 2017), which rejected third-party standing).

CONCLUSION

The events in Charleston and Charlottesville reignited the debate over Confederate monuments and their place in our landscape and collective memory. It is likely that the outcome of this debate will hinge on a number of factors, including content, location, and the community in which a monument is located. The easier cases for removal will likely be Confederate monuments located in public spaces not associated with a historic event, as these most clearly connote ideas of oppression. This Article seeks to be a step in untangling the complicated process of removal and providing insight into which laws a community may need to address before beginning that process. Additionally, lessons learned in the Confederate monument context can help in understanding and improving historic preservation law generally—moving away from its static and frozen approach to the cultural landscape. Historic preservation laws, in some material instances, limit the flexibility for possible future options. Four steps or recommendations could allow for more meaningful consideration of how to handle these options. This Article aims its four principal recommendations at the different actors involved across the many layers of these debates.

First, the National Park Service and the Keeper of the National Register should take more seriously the prohibition on listing commemorative structures. If Confederate monuments are simply memorials to the dead, there is no reason to list them. If they are indeed something beyond being purely commemorative, their listing should be avoided as against public policy as presenting a viewpoint. Such an approach will help with new petitions to list properties. For those already listed, the federal government should commence a revisitation process where it can reassess listed properties to determine whether they really meet the evaluation criteria (or to revise the nomination forms to capture a more complete historic narrative or context than was initially presented). Historic preservationists need to think more about looking at the past with a critical eye. De-designation of historic resources (or determining that a property no longer has historic significance) is rare unless the property has been physically altered, locking in past preservation determinations for posterity. Relatedly, National Register nominations, once created, are only rarely updated. This also freezes the initial rationale for why a property was listed on the National Register, which may be under- and over-inclusive as to its continued significance. Developing meaningful ways to reevaluate and reinterpret historic significance should be an area of future policy attention.

Second, state legislatures should overturn the monument laws that are clearly based on protection of Confederate monuments and overly

constrain local governments.⁴¹¹ These laws preempt local governments' abilities to make decisions on resources located on their own lands, where much of the dialogue over their future should actually occur. Local communities, being closest to the resources, are the most appropriate level for dialogue on a monument-to-monument basis, and state efforts to preempt local decision-making expressly frustrate this dialogue.

Third, local governments should make sure that their local historic preservation laws allow changes based on public safety or public interest considerations and remove the pressure on designation or approval processes.⁴¹² Without an express safety valve of this nature, advocates for and against monument removal must hash out the debate over the narrow landscape of historic significance without any consideration for what these monuments mean to current residents who interact with these structures. With a public interest exemption, a community could make the determination that non-preservation-based criteria should prevail. For example, Washington, D.C.'s preservation ordinance allows for the demolition or alteration of historic structures if "necessary in the public interest," as decided by the Mayor's agent.⁴¹³ This sort of provision could provide flexibility to allow for recontextualizing or removing a monument, depending on a community's decision on addressing its past.

Fourth, those seeking removal should participate in the environmental review processes as those processes provide the type of dialogue that local preservation laws often lack. Consulting under the NHPA or commenting under NEPA provides the opportunity to weigh in and offer alternatives to removal or modification and develop a consensus for their future treatment. This may mean that that relocation of a monument will be easier to obtain than demolition. This may involve finding a middle ground and lobbying for removing the structures to museums or other sites where they can be contextualized and moved out of certain types of public spaces, such as courthouse grounds, where they are often most objectionable.⁴¹⁴

411. See, e.g., W. Fitzhugh Brundage, *I've Studied the History of Confederate Memorials. Here's What to Do About Them*, VOX (Aug. 18, 2017, 9:40 AM), <https://www.vox.com/the-big-idea/2017/8/18/16165160/confederate-monuments-history-charlottesville-white-supremacy> [<https://perma.cc/5XQL-TAYK>] (explaining the role of these monument protection laws and arguing for repeal to allow for local decision making regarding retention/removal).

412. See, e.g., Byrne, *supra* note 313, at 673 (discussing this type of provision).

413. D.C. CODE ANN. § 6-1102(10) (2018).

414. Holland Cotter, *We Need to Move, Not Destroy, Confederate Monuments*, N.Y. TIMES (Aug. 20, 2017), <https://www.nytimes.com/2017/08/20/arts/design/we-need-to-move-not-destroy-confederate-monuments.html> [<https://perma.cc/B44N-MTRV>] (arguing for moving these monuments to museums). *But see* Noah Caldwell & Audie Cornish, *Where Do Confederate Monuments Go After They Come Down?*, NPR (Aug. 5, 2018, 8:08 AM), <https://www.npr.org/2018/08/05/633952187/where-do-confederate-monuments-go-after-they-come-down> [<https://>

Overall, one of the primary hallmarks of the preservation laws interacting with Confederate monuments is that they rarely contain flexible mechanisms for change. Thus, once a monument is designated as historic or is protected with a preservation easement, few mechanisms allow for a fresh look or a critical reevaluation. American heritage preservation laws generally view change as bad, whether the change is to a structure's physical appearance or the change regards how to fully evaluate significance based on evolving societal views. This legal structure therefore promotes a vision of heritage that is a relatively frozen approach to cultural protection. To allow for greater societal input and to represent a broader view of history, legislators should actively consider changes to current historic preservation laws. Historic significance is not etched in stone, and perhaps this latest round of monument disputes is an important reminder that our heritage preservation determinations should not be either.

perma.cc/E6CT-RLGX] (noting that many museums lack the space and resources to care for these monumental structures).

Understanding the Complicated Landscape of Civil War Monuments

JESSICA OWLEY* & JESS PHELPS**

This essay examines the controversy regarding confederate monuments and attempts to contextualize this debate within the current preservation framework. While much attention has been paid to this topic over the past year, particularly with regard to “public” monuments, such discussion has generally failed to recognize the varied and complicated property law layers involved—which can fundamentally change the legal requirements for modification or removal. We propose a spectrum or framework for assessing these resources ranging from public to private, and we explore the messy space in-between these poles where most monuments actually fall. By highlighting these categories, we provide an initial introduction of a typology for evaluating confederate monuments, serving as a foundation for an exploration into the nature of property law and monument protection.

INTRODUCTION	15
I. CONFEDERATE MONUMENTS: EMERGENCE, GROWTH, AND MEANINGS	16
II. TYPOLOGY OF CONFEDERATE MONUMENTS.....	18
A. CATEGORY ONE: PUBLIC SPACE, PUBLIC MONEY, PUBLIC SUPPORT.....	18
B. CATEGORY SIX: PRIVATE LAND, PRIVATE MONEY.....	21
C. CATEGORY TWO: PUBLIC LAND, PRIVATE MONEY.....	23
D. CATEGORY THREE: PRIVATE LAND, PUBLIC-ISH MONEY	25
E. CATEGORY FOUR: PRESERVATION EASEMENTS	26
F. CATEGORY FIVE: PUBLIC SUPPORT THROUGH PRESERVATION LAWS	29
CONCLUSION	33

INTRODUCTION

The controversy over confederate monuments gained greater national prominence in the aftermath of the events in Charlottesville, Virginia in August 2017.¹ As conservationists, our work had not previously considered such sites despite our many years of investigation into both land protection and historic preservation. While perhaps less surprised than others to learn of the extent of confederate monuments, we quickly understood that the landscape of such structures was broader and more

* Professor, SUNY Buffalo Law School; Profesora Visitante, Universidad Pontificia-Comillas (ICADE). We thank Al Brophy for his thoughts and conversation on this topic.

**Attorney, Dinse, Knapp & McAndrew, P.C., Burlington, Vermont.

1. Sheryl Gay Soltberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html?_r=0 [<https://perma.cc/2KKH-NMKY>] (discussing the events that ultimately led to the death of three people).

complicated than many realize. Much energy and discussion has (appropriately) focused on confederate monuments erected with public funds, placed on public lands, and protected by state and/or federal laws.² More recently, investigators have begun to detail the growth in confederate memorials paid for with private funds and placed on private lands.³ The legal issues surrounding these two types of monuments differ for obvious reasons, making approaches to their removal or modification different. However, these two examples are but ends of a complex spectrum of public/private intersections in the erection and protection of confederate monuments across the United States. We set forth a rough typology of confederate monuments based on their quality of being public or private. An understanding of the public/private nature of these monuments reveals the public interest involved and outlines which laws may come into play with monument removal.

I. CONFEDERATE MONUMENTS: EMERGENCE, GROWTH, AND MEANINGS

Although most Americans cannot tell you the dates of the Civil War, let alone name key figures or battles on either side,⁴ many feel an emotional link to what was the bloodiest conflict ever fought on American soil. The number of American lives lost outstrips our country's losses in any other conflict by both sheer number (620,000 is the low estimate) and percentage (a staggering 2% of the total population).⁵ With the devastation that this would have meant for families, it would not be surprising if in the aftermath of the war, communities erected monuments to lost loved ones.⁶ Yet, that is not the common origin of confederate monuments as described below.

2. See, e.g., Joe Marusak, *Remove Confederate Statues from Public Government Land*, *ACLU-NC Urges*, CHARLOTTE OBSERVER (Aug. 15, 2017), <http://www.charlotteobserver.com/news/politics-government/article167417007.html> [<https://perma.cc/4CG3-6NPU>]; Chris Lane, *Removing Confederate Monuments from Public Areas Does Not "Erase History,"* HOUSTON PRESS, Aug. 21, 2017, <http://www.houstonpress.com/arts/confederate-statues-have-no-business-in-public-spaces-anymore-9719724> [<https://perma.cc/8H6E-TPUU>].

3. Sabrina Tavernise, *A Boom in Confederate Monuments, on Private Land*, NY TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/confederate-monuments.html> [<https://perma.cc/FNR8-SMCZ>]; JUSTIN CURRY DAVIS, *FUNDING SOUTH CAROLINA'S MONUMENTS: THE GROWTH OF THE CORPORATE PERSON IN MONUMENT FINANCING* (Master's Thesis in Public History, University of South Carolina 2017), <https://search.proquest.com/openview/5c56a7010eb7ba0e51ae13aca2010beb/1?pqorigsite=gscholar&cbl=18750&diss=y> [<https://perma.cc/HDK6-H3WN>].

4. American Council of Trustees and Alumni, Press Release, Survey: Half of Americans Don't Know When the Civil War Took Place (Apr. 14 2015), https://www.goacta.org/news/survey_half_of_americans_dont_know_when_the_civil_war_took_place [<https://perma.cc/8X54-WG8Y>].

5. Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html> [<https://perma.cc/XX4Q-GX9C>]; J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIVIL WAR HIST. 307 (2011).

6. DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* (2008) (discussing the various responses to this violent conflict amongst mourners and their communities).

This piece examines the establishment of confederate monuments, adopting the definition of monuments from philosopher George Schedler:

[M]arkers or statues whose purpose is to pay homage to the conduct or character—usually courage or leadership—of some person or group. Minimally, a monument is either a marker with an inscription or a statue with no inscription designed to recall with affection, or at least with approval, something or some person.⁷

We specifically exclude from this category gravestones or protection of historic sites like battlefields, but include monuments erected on or near battlefields.

Hundreds of confederate monuments are scattered across thirty-one states.⁸ Two organizations are responsible for many of these monuments: [Sons of Confederate Veterans](#) and [United Daughters of the Confederacy](#). These organizations seek to honor the confederate dead whom they view as heroic and spread the organizations' view of the underlying conflict at the heart of the war, usually labeled the "Lost Cause" Movement.⁹ The Lost Cause theory asserts that the Civil War was not about slavery but a noble struggle to preserve states' rights and a Southern way of life.¹⁰ This view ignores the fact that the "Southern way of life" was built upon human chattel slavery.¹¹ Placement of confederate monuments worked and still works to normalize the Lost Cause view (a view almost entirely rejected or discredited by historians) and proliferate messages of black inferiority.¹²

Several confederate monuments were built during the failure of Reconstruction around 1877 to reaffirm the power of the white southerners as the messaging and content of the monuments often directly conveys.¹³ Indeed, many, if not most, confederate monuments have direct ties to white supremacy sentiments and movements and appeared long after the end of the Civil War. Monuments of this class then served as a symbol to blacks that they were not equals and to other whites that racist attitudes and behaviors would be condoned. In this light, it is unsurprising

7. George Schedler, *Are Confederate Monuments Racist?*, 15 INT'L J. APPLIED PHILOSOPHY 287 (2001).

8. Stephanie Meeks, President, Nat'l Trust for Historic Preservation, Statement on Confederate Monuments: Confronting Difficult History, June 29, 2017, <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials#.Wjf4C1WnGUk> [<https://perma.cc/DL8Y-24UW>].

9. Peter Galuska, Opinion, *The Women Who Erected Confederate Monuments are Stunningly Silent*, WASH. POST (Oct. 17, 2017), https://www.washingtonpost.com/opinions/the-women-who-erected-confederate-statues-are-stunningly-silent/2017/10/13/2e759dde-a920-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.100dc44c3f86 [<https://perma.cc/W3GV-MYRZ>].

10. *See, e.g.*, Nat'l Park Ser., Confronting Slavery and Revealing the "Lost Cause", <https://www.nps.gov/resources/story.htm%3Fid%3D217> [<https://perma.cc/ZF8T-S69W>].

11. *See Id.*

12. *See* Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1085 (1995).

13. SOUTHERN POVERTY LAW CENTER (SPLC), WHOSE HERITAGE? 14 (2016) (charting this over time).

that additional monuments appeared during the Jim Crow era and indeed sometimes in response to specific events, like the Supreme Court decision in *Brown v. Board of Education* and the assassination of Martin Luther King Jr.¹⁴ Unfortunately, the number of monuments is once again growing.¹⁵

II. TYPOLOGY OF CONFEDERATE MONUMENTS

The current narrative regarding the potential removal and/or relocation of confederate monuments generalizes and substantially oversimplifies the legal issues involved. Given the wide distribution of monuments, the laws that govern their removal and protection are not monolithic. The legal framework varies depending on where the monument is located (private versus public land), what types of land-use laws are at play, and who owns and/or paid for the monument's construction. Our analysis locates monuments along a spectrum ranging from purely public to purely private. There has been considerable public debate and action regarding public monuments. Conversely, private monuments have merited little attention because the legal issues associated with them are not overly complex. Completely missed has been the complicated middle ground where public and private elements mix. This section sets out six categories of confederate monuments based on the public and private interests involved. Beyond articulating the public and private ends of the spectrum, we provide context to the legal issues that the majority of these monuments encounter in the messy interstitial space between these two opposing poles.

A. *Category One: Public Space, Public Money, Public Support*

Our first category of monuments is the purely public model. These monuments tend to be the highest profile and have been the focus of many efforts at removal and modification. This category covers confederate monuments on public lands (federal, state, or municipal). Their construction was paid for with public funds, and they are often protected by law, particularly state and local historic preservation laws and laws governing the disposition of governmental property.

Many confederate monuments are in public squares, public parks, protected battlefields, courthouses, and elsewhere.¹⁶ A 2016 report from the Southern Poverty Law Center identified 718 confederate monuments (with 700 of these being on public land).¹⁷ The public display of such monuments conveys a message about a community; memorials are sacred patriotic spaces and offer conflicting views on who counts as heroes and villains. Public monuments give legitimacy to the ideals represented and one has to have sufficient political power to occupy these public spaces; the erection of such monuments indicates there is enough money and people willing to support these ideals.

14. *Id.*

15. Tavernise, *supra* note 3 (citing a North Carolina study that found twenty confederate monuments erected in that state since 2000).

16. Meeks, *supra* note 8.

17. SPLC, *supra* note 15, at 8.

One such example is the New Orleans monument to the Battle of Liberty Place. Built in 1891 by the city of New Orleans, it commemorates an 1874 uprising by members of a group called the White League challenging the legitimacy of



Figure 1: Battle of Liberty Place Monument
(photo by Michael Begley, in the public domain:
https://commons.wikimedia.org/wiki/File:Battle_of_Liberty_Place_Monument.jpg)

Reconstruction.¹⁸ Thus, while not a direct dedication to the Civil War, it addresses events in the aftermath of the war. During the time it was built, the city and state were working to disenfranchise blacks and confirm a policy of resistance to Reconstruction ideals.¹⁹ A plaque added to the monument in 1932 went even further explicitly referencing “white supremacy.”²⁰

In 1974, the city added a marker (but did not remove the plaque): “Although the ‘Battle of Liberty Place’ and this monument are important parts of New Orleans history, the sentiments in favor of white supremacy expressed thereon are contrary to the philosophy and beliefs of present-day New Orleans.”²¹ In 1981, the mayor of New Orleans tried to remove the monument, but the public protest was great, and he could not obtain city council approval.²² A street construction process forced its

18. Ed Kilgore, *New Orleans Pulls Down a Monument to Post-Civil War White Terrorism*, N.Y. MAG. (Apr. 25, 2017), <http://nymag.com/daily/intelligencer/2017/04/new-orleans-removes-monument-to-white-terrorism.html> [https://perma.cc/P6XB-WNDA].

19. See Gordon Chadwick, *New Orleans Historical*, The Battle of Liberty Place Monument, <http://neworleanshistorical.org/items/show/150> [https://perma.cc/CR7H-FEDE].

20. Levinson, *supra* note 12, at 1088.

21. Gordon Chadwick, *New Orleans Historical*, The Battle of Liberty Place Monument in the Late 20th Century, <http://www.neworleanshistorical.org/items/show/283> [https://perma.cc/FL6N-D989].

22. *Racism is Issue in Clash over New Orleans Monument*, N.Y. TIMES (Jan. 18, 1981),

temporary removal in 1989.²³ The mayor had agreed to replace the monument upon completion of the project.²⁴ When he took no action to remove it from storage, supporters of the White League sued.²⁵ They argued that because federal money was used for the street construction project, federal historic preservation laws required restoration of the monument.²⁶ In 1993, the parties agreed to put the monument on a less conspicuous but more historically accurate site and to remove the 1932 plaque referring to white supremacy.²⁷ At the base of the monument, the city added the names of the fallen Metropolitan Police (previously only the members of the White League had been listed).²⁸ The marker noted that the inscription did not express the current understanding of the war or attitudes of the community, yet it still claimed to be commemorating both sides of the battle, suggesting an equivalency between the violent racist acts and the police officers defending the city.²⁹

In 2015, Mayor Mitch Landrieu proposed complete removal of the monument, and the City Council agreed on the grounds that the monument was a public nuisance.³⁰ Again, supporters of the monument sued. They argued that removal of the monument would violate the 1993 agreement and federal historic preservation laws.³¹ The Eastern District of Louisiana held that while the settlement agreement required the monument to once again be displayed, it did not prohibit later removal where no federal funds were used or federal licenses of approvals required.³² The Fifth Circuit upheld the lower court, carving the way for its removal in March 2017.³³

<http://www.nytimes.com/1981/01/18/us/racism-is-issue-in-clash-over-new-orleans-monument.html> [<https://perma.cc/VZ9V-VGGG>].

23. Gordon Chadwick, *New Orleans Historical, The Battle of Liberty Place Monument in the Late 20th Century*, <http://www.neworleanshistorical.org/items/show/283> [<https://perma.cc/2KZS-QWKY>].

24. *Id.*

25. *Id.*

26. Frances Frank Marcus, *A New Orleans Monument to Strife Stirs Up More*, N.Y. TIMES (Mar. 31, 1993), <http://www.nytimes.com/1993/03/31/us/a-new-orleans-monument-to-strife-stirs-up-more.html> [<https://perma.cc/RQV4-6LKC>].

27. John E. DeSantis, *Confederate Insurgency Monument Stirs Controversy Over Race, History*, CHI. TRIB. (Apr. 2, 1993), http://articles.chicagotribune.com/1993-04-02/news/9304020396_1_liberty-monument-reconstruction-government-white-supremacy [<https://perma.cc/SX58-78PL>].

28. Gordon Chadwick, *New Orleans Historical, The Battle of Liberty Place Monument in the Late 20th Century*, <http://www.neworleanshistorical.org/items/show/283> [<https://perma.cc/8T8Z-7T89>].

29. Kilgore, *supra* note 18.

30. Merrit Kennedy, *Under Cover of Night, New Orleans Begins Dismantling Confederate Monuments*, NAT'L PUBLIC RADIO (Apr. 24, 2017), <http://www.npr.org/sections/thetwo-way/2017/04/24/525413502/under-cover-of-night-new-orleans-begins-dismantling-confederate-monuments> [<https://perma.cc/U6G5-9RRM>].

31. Kevin Litten, *New Orleans Confederate Monuments Can Come Down, Court Rules*, Mar. 6, 2017, TIMES-PICAYUNE, http://www.nola.com/politics/index.ssf/2017/03/confederate_monuments_appeals_1.html [<https://perma.cc/58BE-8R5W>].

32. *Monumental Task Force, Inc. v. Foux*, 240 F. Supp.3d 487 (E.D. La. 2017). The 2015 lawsuit also included some constitutional claims, but the court did not find them persuasive.

33. *Monumental Task Force, Inc. v. Chao*, 678 Fed. Appx. 250 (5th Cir. 2017).

Lawmakers in Baton Rouge unsuccessfully tried to pass legislation that would have prevented the monument's removal.³⁴ The monument was finally removed in the middle of the night on April 24, 2017, under heavy police guard and with workers covering their face to hide their identity because of fear of reprisals.³⁵

Where monuments are on public land, political lobbying and pressures on politicians may enable their eventual removal as events have demonstrated over the last year. While the publicness of these monuments is what likely most upsets people, it may also be the most vulnerable point for these monuments.³⁶ Public sentiment has been shifting away from support of these structures, recognizing them as potential symbols of injustice and as potential public nuisances because they can serve as rallying points for both white supremacists and those fighting against them.³⁷ Private organizations and landowners do not feel the same political pressure, and trespassing laws can serve to deter demonstrations on private property. In this light, it makes sense that public sites are under the greatest scrutiny, but they are not the only sites deserving of scrutiny.

B. Category Six: Private Land, Private Money

We jump ahead to category six to illustrate the two ends of our spectrum before describing the muddier middle ground. Thus, we go from fully public to fully private monuments. Some confederate monuments appear on exclusively private land. Building a confederate memorial on private land is certainly within a landowner's rights and generally protected by the First Amendment as long as the landowner complies with other laws, like nuisance and zoning ordinances. While local laws can control the time and manner of speech (through things like height restrictions, setback rules, etc.), they cannot prevent all or even many confederate memorials as this would result in potentially having to limit all monuments regardless of topic.³⁸

It is not clear how many private monuments exist. The Southern Poverty Law Center's 2016 Report identified eighteen, while a more recent *New York Times* article suggested more are being erected all the time.³⁹ Those known of are those most visible and therefore arguably the ones of most concern. The placement of these monuments on private land may show that the confederate monuments are not as

34. Katherine Sayre, *Monument Removal Bill Might be Dead in Louisiana Legislature*, TIMES-PICAYUNE (May 27, 2017), http://www.nola.com/politics/index.ssf/2017/05/confederate_monuments_bill_mig.html [<https://perma.cc/DU5T-LTGY>].

35. The initial contractor quit the job after receiving death threats and having someone set fire to the owner's car. Kennedy, *supra* note 30.

36. Although this differs by state as some state laws specifically protect public monuments. While a private landowner can decide to remove a monument unilaterally, public processes may be harder to navigate.

37. Public nuisance is the argument used by the City of Baltimore to remove several Civil War monuments. See Colin Campbell & Luke Broadwater, *Citing 'Safety and Security', Pugh Has Confederate Monuments Taken Down*, BALTIMORE SUN (Aug. 16, 2017), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-monuments-removed-20170816-story.html> [<https://perma.cc/49HV-7NZK>].

38. SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 409 (2012).

39. SPLC, *supra* note 15; Tavernise, *supra* note 3.

accepted now as they were before or may represent an attempt to avoid the legal and public process issues that have led to the removal of many monuments.

The siting of these monuments varies. Some landowners choose placements of their memorials for visibility. Others are located near historic sites or already established monuments. A particularly visual example can be found outside of Nashville, Tennessee. The twenty-five-foot fiberglass statue honors Nathan Bedford Forrest, a confederate soldier and the first Grand Wizard of the Ku Klux Klan.⁴⁰ Viewed easily from the highway, it was installed in 1998 by an individual citizen and is on private property.⁴¹ The only public action associated with the statue was an initial clearing of vegetation to make it more visible from the highway.⁴² A decade later in 2015, politicians and citizens seemed to change their view about the visibility of this monument when they petitioned the state Department of Transportation to plant vegetation to block the view of the statue.⁴³ The state agency denied the request asserting that it does not plant vegetation simply to block views of private land that people do not like.⁴⁴ While this policy makes sense, it is hard to reconcile with the fact that the agency originally cleared vegetation to increase its visibility.⁴⁵



Figure 2: Nathan Bedford Forrest
 (http://images.gawker.com/1310553686853971558/c_scale,fl_progressive,q_80,w_800.jpg;
 photo by Brent Moore, available [here](#))

40. Peter Holley, *The ‘Terrifying’ Confederate Statue Some Tennesseans Want to Hide*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/25/is-this-the-weirdest-confederate-statue-in-dixie/?utm_term=.417d819c6e5f [https://perma.cc/S4G3-LGTP].

41. *Id.*

42. Joey Garrison, *State Denies Nashville’s Request to Block I-65 Forrest Statue*, TENNESSEAN (July 20, 2015), <http://www.tennessean.com/story/news/politics/2015/07/20/state-denies-nashvilles-request-block-forrest-statue/30412745/> [https://perma.cc/B2ER-FCLR].

43. *See, e.g.*, Heidi Campbell, Opinion, *Conceal Nathan Bedford Forrest Statue from I-65*, TENNESSEAN (Aug. 15, 2017), <http://www.tennessean.com/story/opinion/2017/08/15/conceal-nathan-bedford-forrest-statue-65/570514001/> [https://perma.cc/YQ6G-K9ZT] (local mayor renewing call to visually block the statue); *TDOT denies request to block Nathan Bedford Forrest statue*, WKRN.COM (July 20, 2015), <http://wkrn.com/2015/07/20/tdot-denies-request-to-block-nathan-bedford-forrest-statue/> [https://perma.cc/LF2P-4R4X] (also providing an image of the statue as viewed from the highway).

44. Garrison, *supra* note 42.

45. While this is not a large public involvement or investment, it is notable that even in our most private category, we see public support for confederate monuments.

In December 2017, vandals coated the statue with pink paint. While not the first time the piece has been vandalized, this time the owner has declared that he will not remove the paint because he believes that it brings more attention to the work.⁴⁶

C. Category Two: Public Land, Private Money

In the realm between all public and all private, there are several variations. One common arrangement is confederate monuments located on public lands but paid for by a private organization that received permission to place it there. We find such monuments on federal, state, and municipal lands. For example, the federal government owns several former battlefields and forts managed by the National Park Service. Privately funded memorials have been frequently sited on such lands.⁴⁷

One example in this category of public land and private money is the confederate memorial in Boston Harbor.⁴⁸ In 1963, the Daughters of the Confederacy placed a marker on [Georges Island](#) to commemorate the confederate dead who died while imprisoned at Fort Warren, which is located on the island.⁴⁹ Georges Island is owned and managed by the state of Massachusetts through the Department of Conservation and Recreation and is a part of the [Boston Harbor Islands National Recreation Area](#).⁵⁰ Fort Warren is a designated National Historic Landmark.⁵¹ In 2017, the state of Massachusetts covered this monument to conceal it from view as outright removal would have required approval from the Massachusetts Historical Commission, by virtue of the overall site's historic designation and state ownership.⁵²

46. Natalie Neysa Alund & Natalie Allison, *Nathan Bedford Forrest Statue off I-65 Painted Pink, Owner Bill Dorris Won't Repair*, TENNESSEAN (Dec. 27, 2017, 12:31 p.m.), <http://www.tennessean.com/story/news/2017/12/27/nathan-bedford-forrest-statue-nashville-vandalized-pink/984740001/> [<https://perma.cc/Z5Z2-9B2Q>]. Alongside a written article, the website includes a video interview with the landowner who declares his display of the work to be within his first amendment rights. Additionally, without any apparent sense of irony, landowner Bill Dorris declares the vandals to be cowards, “anybody ride around with a sheet over his head must be a coward.”

47. See, e.g., David Snyder, *Honoring the South, Stirring up Old Battles*, WASH. POST (June 22, 2003), https://www.washingtonpost.com/archive/local/2003/06/22/honoring-the-south-stirring-up-old-battles/43404fb3-7e81-4ef8-9f90-3792adc6bd49/?utm_term=.8088b1840148 [<https://perma.cc/C3VA-4QNZ>].

48. Kevin Levin, CIVIL WAR MEMORY BLOG, *United Daughters of the Confederacy in Boston?*, (July 21, 2013), <http://cwmemory.com/2013/07/21/united-daughters-of-the-confederacy-in-boston/> [<https://perma.cc/32FP-28WK>].

49. Adam Reilly, *Does A Confederate Memorial Belong in Boston Harbor?* WGBH NEWS (June 8, 2017), <http://news.wgbh.org/2017/06/08/politics-government/does-confederate-memorial-belong-boston-harbor> [<https://perma.cc/47DA-XFX2>].

50. Nat'l Park Serv., *Boston Harbor Islands National Recreation Area*, <https://www.nps.gov/boha/learn/historyculture/facts-geor.htm> [<https://perma.cc/LS8K-YLXJ>].

51. The Cultural Landscape Found., *Fort Warren*, <https://tclf.org/georges-island-fort-warren>.

52. Louise Kennedy, *Why Boston Has a Confederate Monument—And Why You Can't See it Right Now*, WBUR, (Aug. 16, 2017), <http://www.wbur.org/artery/2017/08/16/boston-confederate-monument> [<https://perma.cc/MD38-X7HJ>].



Figure 3: Memorial to Confederate POWs on George's Island in Boston Harbor
(Photo by Bryan Simmons, in the public domain at <https://www.hmdb.org/marker.asp?marker=59205>.)

The mixture of public and private here presents some interesting conundrums. First, where monuments are not on fully private land—like the Nathan Bedford Forrest example—local politicians might be able to remove, modify, or, as in Boston, conceal them.⁵³ They can also add interpretive information or situate other statues nearby to respond to the subject matter. When political attitudes change, community members can pressure politicians to take action with respect to these monuments.

Additionally, the private organizations discussed here are not purely private actors or private individuals expending their own funds, but rather these are nonprofit organizations advancing their respective missions. Private nonprofit organizations receive many public benefits.⁵⁴ We have a well-established national policy of supporting the work of charitable organizations by both giving the organizations certain tax advantages and allowing income tax deductions to charitable organizations.⁵⁵ This added public lens into the situation does not appear to widen the political options available for securing removal or other remedies for confederate

53. Louise Kennedy, *Boston's Only Confederate Monument Will Move out of Public View*, WBUR (Oct. 3, 2017), <http://www.wbur.org/artery/2017/10/03/bostons-confederate-memorial-will-move> [<https://perma.cc/B572-BAM6>] (explaining that this monument was first boxed up and would be permanently moved out of public view).

54. See Michael Lipsky & Steven Rathgeb Smith, *Nonprofit Organizations, Government, and the Welfare State*, 104 *POLITICAL SCI. Q.* 625, 625-26 (1989), <http://www.jstor.org/stable/2151102>.

55. See generally Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *YALE L.J.* 299 (1976); Henry Hansmann, *The Effect of Tax Exemption and Other Factors on the Market Share of Nonprofit Versus For-Profit Firms*, *XL(1) NAT'L TAX J.* 71 (1987).

monuments. Yet, the argument that these monuments should be less controversial because they are less public rings hollow when one understands that the public has forgone tax revenue in exchange for them. One (admittedly politically unlikely) way to combat new creation of confederate monuments is to target the federal subsidies bestowed upon the nonprofits with an interpretation of public policy that excludes supporting such structures. The First Amendment implications of such actions, however, would be problematic. Moreover, this would not impact any monuments erected by private individuals, organizations, or corporations.

D. Category Three: Private Land, Public-ish Money

As noted above, there can be public economic support of confederate monuments even without the public consciously realizing it is subsidizing monuments through tax policy. Category three comes thus with the most variations. First, in our description of the location of the land as private, we mean not owned in fee simple by any layer or entity of government. The ownership patterns differ, however, with some land owned by private individuals, some owned by businesses or corporations, and some owned by nonprofit organizations. Second, in our labeling the money as “public-ish”, we note that the money to construct the monuments comes from a variety and mixture of sources, including private individuals, corporations, nonprofit organizations, and even public funds. The key feature of the organizations funding the project is that they receive public support.

One example in this category is the confederate monument behind the Georgetown Historical Society building in Delaware. The building houses the Marvel Carriage Museum. The Sons of Confederate Veterans erected the monument, with Robert Eldreth spearheading the project.⁵⁶ While located on private property, it is still property associated with public benefits, including favored tax status. In addition, the historical society has received state grants for support of its museum and mission.⁵⁷ This state money is the reason that the NAACP has called on the state of Delaware to stop the issuance of an \$11,500 Grant-in-Aid to the Historical Society.⁵⁸ Lawmakers have objected to the NAACP position because of the monument’s location on private land.⁵⁹ Further, the society raised special funds to support the Delaware Confederate monument.⁶⁰ No state funds go directly to the

56. Tavernise, *supra* note 1.

57. DJ McAneny, *NAACP Calls for Halt of State Grant Money to Georgetown Historical Society until Delaware Confederate Monument is Removed*, WDEL, (Aug, 16, 2017), http://www.wdel.com/news/naacp-calls-for-halt-of-state-grant-money-to-georgetown/article_db51f054-82c2-11e7-964c-8b3d4a3b1a18.html [https://perma.cc/8MYR-WX2E].

58. *Id.*

59. Glenn Rolfe, *Confederate Monument at Marvel Museum: Lawmakers Won’t Act on NAACP’s Request*, SUSSEX POST, Aug. 17, 2017, <http://sussexpost.com/news/confederate-monument-marvel-museum-lawmakers-wont-act-naacps-request/> [https://perma.cc/3LUR-QZSC].

60. Facebook page of the Georgetown Historical Society (post of Aug. 22, 2017), <https://www.facebook.com/Georgetown-Historical-Society-841715709225277/> [https://perma.cc/XY8V-NVCB].

payment for the monument nor its upkeep.⁶¹ Yet, public funds generally support the organization.



Figure 4: Georgetown Delaware Confederate Memorial
(Photo by Don Morfe, in the public domain, <https://www.hmdb.org/marker.asp?marker=105569>)

E. Category Four: Preservation Easements

Category four builds upon the same messy public-private mix of the previous two categories to examine the special case of land protected by conservation easements. Conservation easements generally involve a landowner agreeing to refrain from engaging in certain activities on her land with the goal of yielding an express conservation benefit. State law recognizes historic preservation as a valid conservation purpose, either through conservation easement enabling acts or separate historic preservation easement laws. Where the conservation benefit is historic preservation, we refer to these arrangements collectively as preservation easements. State law dictates the exact contours of the agreements, but they generally follow the same rules: A property owner conveys the ability to modify or demolish a structure.⁶² A non-governmental organization or governmental body holds the preservation easement, giving them the ability to enforce the restriction.

Landowner motivation for burdening land with a preservation easement may be largely altruistic, seeking to protect important architectural structures or other historic aspects of a property.⁶³ However, often landowners donate preservation easements to obtain tax benefits or to obtain development approvals.⁶⁴ While multiple tax advantages may come into play, the most significant is the ability to deduct the donation on federal income tax returns.⁶⁵ To qualify for the federal tax

61. Chris Flood, *NAACP: Remove Georgetown's Confederate Monument*, *CAPE GAZETTE*, (Aug. 18, 2017), 857.

62. Jessica Owley, *The Future of the Past: Historic Preservation Easements*, 35 *ZONING & PLANNING L. REP.* 1, 3-4 (Nov. 2012).

63. Dianna A. Stroman & Urs P. Kreuter, *Perpetual Conservation Easements and Landowners: Evaluating Easement Knowledge, Satisfaction and Partner Organization Relationships*, 146 *J. ENV'T'L MGMT.* 284, 285 (2014).

64. Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 *NEB. L. REV.* 1043 (2005).

65. There are also significant federal estate tax benefits and the possibility of reduced

deduction, a preservation easement must protect “an historically important land area or a certified historic structure.”⁶⁶ A certified historic structure could include confederate monuments if listed on the National Register.⁶⁷ There are many on the National Register.⁶⁸

The income tax benefits are based on the value that the landowner “lost” by agreeing to restrict her property.⁶⁹ A preservation easement that sought solely to protect a confederate monument might meet state property law requirements but would, for a variety of reasons, either not qualify for the National Register or not result in a loss in property value.⁷⁰ The value of the tax deduction would be difficult to calculate. If only protecting a monument, the value would be minimal. If the monument is protected as a part of a larger historic site or building, or even appears in a private park with open space and environmental interest, there might be value unrelated to the monument itself, so it is unlikely that a memorial alone would result in tax deductions.

As confederate monuments exist on private lands, or could be placed on private lands with historic significance, preservation easements could be utilized to protect either these monuments or associated resources in a blurring of private/public tools and status. The public interest involved in confederate monuments protected by preservation easements is a complicated discussion and comes with almost as many permutations as we have categories in this essay. All preservation easements represent a change to longstanding property law rules that prevented perpetual land restrictions where the benefit of the restriction is not held and enforced by an adjoining landowner. States passed laws allowing limited exceptions to this longstanding rule because of legislators’ beliefs that such arrangements would

local property taxes. JESSICA E. JAY, CONSERVATION EASEMENTS AND TAX BENEFITS 6, 8–9 (2019), <http://conservationlaw.org/publications/01-ConservationEasementsandBenefits.pdf> [<https://perma.cc/4L5P-ZXNZ>]; Land Trust Alliance, *Estate Tax Incentives for Land Conservation: Keeping Land in the Family*, <https://www.landtrustalliance.org/topics/taxes/estate-tax-incentives-land-conservation> [<https://perma.cc/XZ59-DVVQ>]. Recent changes in the tax code may lessen the allure of estate tax benefits. Phil Tabas, Presentation, Developing Tax Incentives and Financial Tools for Conservation, International Land Conservation Network 2018 Global Congress, Santiago, Chile January 25, 2018.

66. 26 U.S.C. § 170(h)(4)(A)(iv) (2011).

67. *Id.* § 170(h)(4)(C)(i).

68. According to the National Register of Historic Places NPGallery Database as of February 9, 2018, twenty-one entries contain “confederate” in the name of the resource. *National Register of Historic Places*, NATIONAL PARK SERVICE, <https://npgallery.nps.gov/NRHP/SearchResults/> [<https://perma.cc/M8X5-BUNR>]. These mostly appear to be objects or statues, as opposed to buildings or battlefields (although there are a few of those). *Id.* Eleven states (including Virginia and North Carolina) are not included in the database. *Id.*

69. Such value would be questionable when it comes to agreeing not to remove a confederate monument, but as explained in the text, any preservation easements over confederate monuments could cover larger parcels with historic or conservation benefit.

70. This assumes the monument would qualify under the National Register criteria. See National Parks Service, *How to Apply the National Register Criteria for Evaluation*, NATIONAL REGISTER BULLETIN (1999), https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_3.htm [<https://perma.cc/CXZ2-34XB>] (discussing the application of the National Register criteria with regard to these types of properties).

benefit the public through the protection of land with historical, cultural, recreational, or environmental value. Thus, use of this tool in a way that does not produce a public benefit goes against the purposes of the law and creates unwarranted encumbrances and limitations on land in violation of public policy.

The holders of preservation easements are either public entities or nonprofit conservation organizations, but the underlying landowner could be either a public or private entity. Where a public entity holds the preservation easement, there is actually a public property right involved. If the underlying land is owned by one public entity and the preservation easement is held by a different public entity, we can have complicated legal questions. At first glance, this may appear to fit into our first category of purely public, but where the public entities are not identical, their actions are more like those of private entities than public ones.

If the underlying land is private but the preservation easement is held by a public entity, we end up with a mixture of public and private land. It is unclear what would happen here. We have seen from our other categories that sometimes the nature of something as public can inspire vocal criticism and removal. But in other examples, we also see express limitations on public actors removing or altering confederate monuments.

Monuments encumbered with preservation easements tend to present complicated and unique structures, and our example in this section is no exception. In 2015, Baltimore Mayor Stephanie Rawlings-Blake tasked a commission with reviewing the fate of four confederate monuments in the city.⁷¹ The commission explored the legal requirements surrounding the monuments and determined that the Maryland Historical Trust (“MHT”), a state agency, held preservation easements on three of the four monuments.⁷² These preservation easements arose from inclusion of the statues in the state’s cyclical outdoor bronze sculpture maintenance program in 1984. All of the statues protected under that program are covered by preservation easements that require MHT approval for any changes or modifications.

In August 2017, Mayor Catherine Pugh ordered the removal of these monuments, which occurred on the evening/morning of August 16–17.⁷³ Press reports indicate that the mayor did this without the approval of the MHT to “protect her city” and to prevent future protest and vandalism to the monuments.⁷⁴ Despite lacking the legal authority to remove these monuments, it does not appear that the State of Maryland

71. SPECIAL COMMISSION TO REVIEW BALTIMORE’S PUBLIC CONFEDERATE MONUMENTS, REPORT ON BALTIMORE’S PUBLIC CONFEDERATE MONUMENTS (Aug. 16, 2016), https://mayor.baltimorecity.gov/sites/default/files/Confederate%20Monuments%20report_1.pdf [https://perma.cc/4M3E-C6RP].

72. *Id.*

73. Merrit Kennedy, *Baltimore Took Down Confederate Monuments. Now It Has to Decide What to Do with Them*, NAT’L PUBLIC RADIO, (Aug. 28, 2017, 3:47 p.m.), <http://www.npr.org/sections/thetwo-way/2017/08/28/546131805/baltimore-took-down-confederate-monuments-now-it-has-to-decide-what-to-do-with-t> [https://perma.cc/Q2LR-D856].

74. Michelle Harris & Meredith Herzing, *Confederate Monuments in Baltimore “Quickly and Quietly” Removed*, BALTIMORE MAG. (Aug. 16, 2017, 3:25 p.m.), <http://www.baltimoremagazine.com/2017/8/16/confederate-monuments-in-baltimore-quickly-and-quietly-removed> [https://perma.cc/389T-ZA5X].

or the MHT is planning to respond to this violation⁷⁵—perhaps demonstrating the political limits protecting such a resource through preservation easements held by a governmental agency.⁷⁶ A private nonprofit organization that held a preservation easement may be less likely to turn a blind eye to violations due to concerns about the precedent it might set or how such a decision might threaten the integrity of the organization, either through public perception or as a qualified easement-holder.⁷⁷



Figure 5: Jackson and Lee Monument
(Photo in the public domain, https://commons.wikimedia.org/wiki/File:Jackson_and_Lee_Monument,_Front.JPG#filelinks)

F. Category Five: Public Support through Preservation Laws

In some cases, the obstacle to removing controversial monuments turns not on whether the land or money involved is public or private, but on the laws that seemingly add a layer of public-condoned protection regardless of the underlying circumstances involving the site.

One thing that muddies the divide between public and private in the context of monuments is the protection of these resources under historic preservation laws. Four

75. It is possible, but far from clear, that others may be able to bring suit against the city or the state for violation of the preservation easement. In some cases, aggrieved parties may be able to bring an enforcement suit based on third-party beneficiary theories or other approaches. See generally Jessica Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT L. REV. 757 (2004).

76. See Ian Duncan, *Baltimore Lacked Authority to Take Down Confederate Statues, and State Says it Could — but won't — Order them Restored*, BALTIMORE SUN (Oct. 26, 2017, 2:45 pm), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-confederate-monuments-letter-20171026-story.html> [https://perma.cc/LUW3-RATL].

77. While perhaps no one is interested in the fight, a land trust that does not enforce its conservation easements could draw attention from the state attorney general, the Internal Revenue Service, and in some cases, the Land Trust Accreditation Commission.

levels of historic preservation can come into play. At the federal level, confederate monuments may receive protection under the National Historic Preservation Act (“NHPA”).⁷⁸ Part of this statute creates the National Register of Historic Places, mentioned above with reference to the federal tax code.⁷⁹ The National Register is the nation’s list of those places with historic significance and integrity.⁸⁰ The National Register criteria are broad but may, in some ways, have limited the number of monuments designated or eligible for designation. For example, the criteria considerations exclude historic resources constructed purely for commemorative purposes.⁸¹ The majority of monuments covered by the National Register are likely contributing elements to resources listed on the National Register, have been listed for their artistic value or design, or for significance acquired over time.⁸²

Beyond the National Register, the NHPA established section 106, which is triggered when projects have some sort of federal hook—that is something carried out, funded by, or permitted by the federal government.⁸³ In the monument context, this condition would be met for monuments located on federal lands or when using federal funds for removal or alteration. Once section 106 is triggered, the project proponents have to determine whether their projects will impact properties listed, or eligible for listing, in the National Register of Historic Places.⁸⁴ Where these conditions are met, section 106 requires the federal action agency to meaningfully consult with regard to the project and receive public input on how to carry out the project through the consultation process.⁸⁵

78. 54 U.S.C. § 300101 (1966). Passed in 1966, the NHPA is the first comprehensive federal preservation law and is still considered the “heart of federal historic preservation law.” BRONIN & BYRNE, *supra* note 38, at 106, 106-08 (providing overview of the impacts of the NHPA).

79. 54 U.S.C. § 302101 (2014); 36 C.F.R. § 60 (2012).

80. BRONIN & BYRNE, *supra* note 38, at 60-62 (2012) (providing overview of National Register criteria).

81. 36 C.F.R. § 60.4 (2012). This does not mean that monuments cannot of themselves be designated, but will have to qualify on some other basis.

82. National Parks Service, *supra* note 70 (discussing the application of the National Register Criteria with regard to these types of properties).

83. 54 U.S.C. § 306108 (2014). The National Environmental Policy Act also can apply as it requires consideration of major federal actions significantly impacting the human environment, which includes “aesthetic, historic, [and] cultural effects.” 40 C.F.R. § 1508.8(b) (2011).

84. 54 U.S.C. § 306108. If a property is a National Historic Landmark, the requirements under NHPA go further and require (1) planning, to the maximum extent possible, to minimize harm to the site, and (2) consultation with the Advisory Council on Historic Preservation and the National Park Service. 54 U.S.C. § 306107 (2014). Given the rarity of such landmarks, however, it is unlikely that many monuments are covered under this subcategory, unless as with the Boston Harbor example, the monuments are placed at an underlying site.

85. ADVISORY COUNCIL ON HISTORIC PRESERVATION, PROTECTING HISTORIC PROPERTIES: A CITIZEN’S GUIDE TO SECTION 106 REVIEW, <http://www.achp.gov/docs/CitizenGuide.pdf> [<https://perma.cc/X6ZG-X7W5>] 36 C.F.R. Part 800 provides the consultation process and relies heavily on the State Historic Preservation Officers as the backbone of the consultation process.

Beyond section 106, the NHPA also provides the standards that govern or shape, directly or indirectly, the application of other preservation laws, including state and local laws that tier off this status. It is generally these state and local laws that make removal of designated sites difficult.⁸⁶ Some states have state-equivalents to section 106 or to the National Environmental Policy Act (“NEPA”), which require projects with a state nexus to consult or to avoid impacts to listed sites.⁸⁷

More significantly, there are also state laws specifically protecting confederate war monuments. For example, Alabama recently passed the Alabama Memorial Preservation Act, which prohibits local governments from removing historic structures, including Civil War monuments that are over forty years old.⁸⁸ In 2015, North Carolina passed a similar law, which limits local governments’ ability to remove monuments.⁸⁹ A Tennessee law to this effect tied the City of Memphis’ hands when it tried to remove a monument to Nathan Bedford Forest. The city took the unusual step of conveying the land to a private nonprofit organization that stated its intent to remove the statute once it became the landowner.⁹⁰

Last, many local governments have historic preservation laws that potentially apply to monuments. The most common is local historic district regulations where local governments designate areas with collective historic significance. Property owners in historic districts must receive approval to modify or demolish structures. Some communities rely on landmarks laws. In contrast to the district model, landmarks laws designate individual historic sites as worthy of protection and, in many instances, require the owners of listed properties to seek approval to modify or demolish designated landmarks. Where local preservation laws protect monuments, anyone seeking to destroy, remove, or alter the monument must apply to the local historic district or landmarks commission for permission to do so.

Although we have not found many examples of requests for removal, one such request was made in Rockville, Maryland. In 2015, Montgomery County applied to the Rockville Historic District Commission to remove a statue located on the grounds of the county’s circuit courthouse.⁹¹ The statue was erected in 1913 on a traffic island

86. BRONIN & BYRNE, *supra* note 38, at 73.

87. *Id.* at 197–98. As noted, any effort to remove a monument may also require NEPA analysis, again, if it involves a major federal action affecting the quality of the human environment. *Id.* at 190–92 (discussing the application of NEPA and the interactions between the NHPA and NEPA).

88. Joshua Barajas, *Alabama Attorney General Sues Birmingham for Partially Covering Confederate Monument*, PBS NEWSHOUR (Aug. 17, 2017, 9:10 a.m.), <http://www.pbs.org/newshour/rundown/alabama-attorney-general-sues-birmingham-partially-covering-confederate-monument/> [https://perma.cc/3LXS-5RJG].

89. The Cultural History Artifact Management and Patriotism Act, N.C. GEN. STAT. § 100-2.

90. Theoretically, the organization could then reconvey the land to the city but it does not appear to be in the plans. This technique would not be available everywhere as some states (e.g., New York) prohibit the conveyance of public park or recreation lands to private parties, but this demonstrates some of the challenges presented by local and state preservation laws.

91. Andrew Metcalf, *Rockville Historic District Commission Grants County’s Request to Move Confederate Statue*, BETHESDA MAG. (Sept. 18, 2015, 11:22 AM), <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Rockville-Historic-District-Commission-Grants-Countys-Request-to-Move-Confederate-Statue/>

and was moved to the courthouse's grounds in 1971.⁹² Wording on its pedestal includes the phrase: "That we through life may not forget to love the thin gray line."⁹³

The statue came under the commission's authority because the historic courthouse is listed as a single resource historic district.⁹⁴ The commission allowed removal based upon its determination that the statue was not a contributing element to the courthouse itself and removal would not violate the applicable design review standards.⁹⁵ If Civil War monuments themselves are listed, historic district commissions will have to consider requests for removal under the standards provided under their ordinances, which may prove problematic.



Figure 6: Civil War Memorial, Rockville, Maryland courthouse
(Photo available at: https://www.flickr.com/photos/mr_t_in_dc/)

[<https://perma.cc/6P5T-9GXG>].

92. Seth Denbo, *All History Is Local: Debating the Fate of a Confederate Soldier Statue in Maryland*, AMERICAN HISTORICAL ASSOCIATION: AHA TODAY, (July 27, 2015), <http://blog.historians.org/2015/07/debating-the-fate-of-a-confederate-soldier-statue/> [<https://perma.cc/Z2FK-WXUR>].

93. *Id.* The "thin gray line" refers to the relatively small number of confederate soldiers (gray) in comparison to union soldiers (blue), and the use of the phrase is generally considering part of the Lost Cause mythology. James W. Loewen, *Why Do People Believe Myths About the Confederacy? Because Our Textbooks and Monuments Are Wrong*. WASH. POST (July 1, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/01/why-do-people-believe-myths-about-the-confederacy-because-our-textbooks-and-monuments-are-wrong/?noredirect=on&utm_term=.c7ca0d555b25 [<https://perma.cc/D66T-5TSC>]

94. City of Rockville, Historic District Commission Staff Report: Certificate of Approval HDC2016-00756, 29 Courthouse Square (Sept. 10, 2015), <http://rockvillemd.gov/DocumentCenter/View/12674> [<https://perma.cc/2ASA-5QGN>]. National Register status, of itself, does not result in protection of a resource or application of the local preservation law unless the community has incorporated this status by reference.

95. *Id.*

CONCLUSION

The presence and public support of confederate monuments is controversial because the monuments often represent a narrative of the past that is unsupported by evidence, while serving as a focal point for present discrimination and injustices. In the context of efforts to modify and remove the structures, this essay serves as an initial foray into articulating how property law arrangements and public investment can complicate the debate. Our typology highlights the complex nature of the interests involved in such structures, which helps to understand the laws regarding the modification and removal of these monuments. The examples above illuminate a tangled story of public and private. It is a story present throughout much of our society. We are often fixated on whether something is public or private, and draw lines between the two in an effort to help us navigate the legal and social world. But public and private is often a blurry line. Here we see how fuzzy this line can be even in the context of something that seems as set in stone or permanent as a monument. This fuzzy line may introduce both impediments to modification as well as produce opportunities.