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LAW IN THE SHADOWS OF CONFEDERATE MONUMENTS

Deborah R. Gerhardt*

Abstract

Hundreds of Confederate monuments stand across the United States. In recent years, leading historians have come forward to clarify that these statues were erected not just as memorials but to express white supremacist intimidation in times of racially oppressive conduct. As public support for antiracist action grows, many communities are inclined to remove public symbols that cause emotional harm, create constant security risks and dishonor the values of equality and unity. Finding a lawful path to removal is not always clear and easy. The political power brokers who choose whether monuments will stay or go often do not walk daily in their shadows. In recent years, eight Southern state legislatures enacted monument preservation legislation designed to thwart local removal efforts. These laws have prompted bitter conflicts, sometimes leading angry citizens to topple massive stone or bronze monuments themselves. The challenges present fertile ground for innovative lawyering. Creative applications of state property, nuisance and contract laws have led to removals notwithstanding the prohibitions of state preservation laws.

When state law blocks removal or contextualization, communities may look to federal law as a source for taking antiracist action. First Amendment doctrine governing expressive speech has not provided a fruitful solution. Despite the expressive nature of Confederate monuments, efforts to weaponize the First Amendment by both sides of the monument debate have failed, largely due to the government speech doctrine.

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Given the age and quality of most monuments, copyright law is also not likely to provide an effective federal claim.

The Federal Civil Rights Act offers an untapped but promising foundation for resolving these controversies. Title VI and Title VII could be used to challenge monuments that contribute to a hostile work or educational environment. Federal civil rights claims would supersede state legislation enacted to prevent removal of racially hostile symbols. Even when state law does not present removal barriers, communities who seek to take meaningful anti-racist action could ground their initiatives in the Civil Rights Act’s core value of equality. For all who are confronting this issue, this Article seeks to provide a legal and strategic framework for acknowledging history while reclaiming the symbolic heart of our public spaces and a means to assure that the symbols we elevate affirm shared contemporary values.

INTRODUCTION

The ideals of nations stand on pedestals. When regimes change, monuments topple, and new heroes are erected again in stone and metal. So goes the course of history. The case of controversial public monuments in the United States has defied this pattern. The Confederacy was defeated in 1865. The nation’s laws and values have evolved and changed. Yet for more than a century, monuments to the defeated order remain. While other nations systematically replace symbols in public spaces that speak contrary to contemporary values, strong forces in the United States have sought to preserve them as memorials and contemporary symbols of Southern pride. With renewed sensitivity to systemic forces blocking the progress of racial justice, those tides are changing.

Controversial public monuments are prompting productive civil discourse and reconsideration of history as it is memorialized and displayed in public spaces. As David Blight observed, “Never before has such a public debate occupied our consciousness about national memory.”¹ The power struggles over Confederate monuments reflect deep divides between those who want to preserve historical monuments to Confederate sacrifices as enduring symbols of Southern identity and others who believe that the symbolic centers of towns and universities should not feature movements that misrepresent history and conflict with contemporary values. Decisions to install these memorials were made long ago to tell one particular version of Civil War history. Other views persisted in the shadows but were often

ignored by those designing civic art and architecture, especially in the American South. “Public monuments and memory underwent an artistic and political revolution in the five or six decades after the Civil War, and the Confederate Lost Cause ideology fared far better than the story of Emancipation or even that of Union victory.”

The consequences of these choices continue to elevate a heroic view of white supremacy. Hundreds of Confederate monuments still stand across the United States. All of them invite a disunion of conflicting memories, honoring some and devaluing the others. Historians have long contended that these monuments were erected to express white supremacist intimidation. Certainly, there are strong arguments to be made for maintaining memorials to historical figures. Even some scholars who support equality have argued that the monuments should stand as a reminder of past injustices.

To preserve memorials, many states have enacted statutes prohibiting removal of controversial public monuments. These “preservation” laws privilege a sanitized heroic view of Confederate history while keeping others from contextualizing the past and exposing a false mythology. Consequently, many communities are faced with legal barriers against ensuring that public spaces reflect historic truth and unifying civic values. Absent contextualization, the Confederacy’s goal of preserving slavery remains hidden from view while their images of heroism persist. One may argue that the state preservation laws are designed to depoliticize the removal of monuments. The text and context of enactment may indicate otherwise. For example, in 2019, Georgia enacted a new version of a state preservation statute that extended additional protection to Confederate monuments by incorporating a ban against moving them from a place of public prominence to a museum and empowered localities to sue those who

2. Id.
4. See id. (“There is no doubt among reputable historians that the Confederacy was established upon the premise of white supremacy and that the South fought the Civil War to preserve its slave labor.”).
6. See infra Part II Section A.
damage monuments for up to three times the repair value. Governor Kemp signed the bill into law next door to a plantation built by slave labor.

No matter their intent, the legislators who enacted such state laws and exercise the power to choose whether the memorials stay or go from public squares often do not walk, every day, in their shadows. Those who live and work among these monuments experience daily reminders that they do not hold the power to influence or change their local public spaces. These stone ghosts of the Civil War create a haunting reminder that those in power would rather honor soldiers who fought against equality than those who lived and died fighting for it. Recent litigation has reflected some creative ways to shift power to localities seeking to remove controversial public monuments. As a countermeasure, some states tightened the loopholes in their legislation.

Meanwhile, conflicts between those with opposing views of maintaining Confederate monuments sometimes turn violent. On the night of August 11, 2017, “Unite the Right” protesters carrying torches marched through Charlottesville, Virginia chanting “Blood and Soil” and “Jews will not replace us.” Counter-protesters demanded they leave, and on the second day of a weekend with multiple acts of violence, a white supremacist drove his car into demonstrators injuring 19 and killing Heather Danielle Heyer. Since then, the potential for violence has added to the anxiety of living with these symbols in public spaces. After the 2020 murder of George Floyd by a white Minneapolis police officer, protests against racism have further empowered citizens to challenge the practices and symbols of

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8. Id.

9. See infra, Section C at 33.


those in power. Communities who live and work beneath these monuments are struggling to come up with ways to respond.

This Article provides a collection of both judicial and nonjudicial precedent. In this way, it paints a broad landscape of the legal strategies available to communities that seek to rethink the values elevated in the symbolic heart of public spaces. The discussion proceeds in four parts. Part I contextualizes contemporary challenges of public art against the history of creation, Iconoclasm and Reconstruction. Public monuments are erected by those with the power to control the depiction of community values. As culture and values evolve, communities confront the necessity of reflecting on the symbols at their symbolic centers. The cultural history and contemporary landscape of Confederate monuments are situated against historic and contemporary international norms of maintaining and destroying public art. Next, this section summarizes research from multiple disciplines documenting physical and psychological harms associated with exposure to exclusionary imagery.

Part II considers state and local laws as vehicles for preservation or removal of Confederate symbols. Eight Southern states have enacted legislation designed to make removal of monuments difficult. These statutes have led to an array of legal challenges at the state and local level. The story of UNC’s Silent Sam illustrates how these symbols can lead to conflicts involving state officials, local government, police, and citizens for which state law fails to provide a clear resolution.

After explaining why many communities cannot arrive at a satisfactory conclusion through claims based on state or local law, Part III considers whether federal law may provide a means for resolving conflicts over controversial monuments in public spaces. The First Amendment’s government speech doctrine gives state governments authority to make choices about practices on public land, and efforts of municipalities and individuals to preserve or remove monuments have failed to penetrate that essential government protection. The doctrine does permit exceptions. Federal preservation laws and copyright provisions governing sculpture have not proven to be effective federal tools. However, federal civil rights laws may provide a mechanism for local authorities to assure that their citizens work in environments free from constant exposure to art that creates a hostile work or educational environment. Those who seek removal of Confederate monuments may assert that they express dehumanizing and discriminatory messages. Because this strategy is grounded in federal law, it could supersede state legislation enacted to prevent removal without the approval of a handful of state actors.

Even when legal barriers are not present, communities must wrestle with the choice of maintenance, contextualization, or removal. To facilitate democratic discourse on these subjects, Section IV proposes a strategic framework for decision makers to use in assessing what to do when monuments speak to history but resonate uncomfortably with values of equality and anti-racism. The discussion concludes with an analysis of how the legal arguments may be situated in a strategic framework for deciding what to do with controversial public monuments that commemorate the Confederacy.

I. MONUMENTS, DYNAMIC VALUES AND THE ICONOCLASTIC IMPULSE

If you are white, you may have to work a bit harder to understand the effects of Confederate symbols in the contemporary landscape. Imagine a large imposing monument to someone or something that makes you feel unsafe, unwelcome, and threatened. It must be a symbol that makes you feel not seen for who you really are, that excludes you and makes it clear that you will never have a fair chance to prove your worth. It could be a massive portrait or sculpture of someone who hates your nation, religion, or political beliefs enough to demean and destroy them. Imagine living in a place where you must routinely confront symbols glorifying those who hate you. Each encounter is another reminder that those in power admire what they glorify. The message conveyed by “symbols of Confederate valor is that society was better when black lives were better relegated to the margins of communal life, better chained to the plantations of a bygone South.”

The impulse to elevate what we revere is a human desire manifest across cultures, geography, and time. Cultural history reflects repeated patterns of creation and destruction as the values of those in power evolved. “Public monuments do not arise as if by natural law to celebrate the deserving; they are built by people with sufficient power to marshal (or impose) public consent for their erection.” Public monuments may be felled by those who erected them, their successor, a conquering regime or by citizens who refuse to permit those in power to define their values. The statues, especially when studied in their original contexts, provide important windows into cultural, religious, scientific, and artistic knowledge. And yet the objects themselves never tell the whole story. Public art privileges the historical narrative of those in power. Those with access to public

coffers are the ones who choose what will be memorialized and what will be forgotten.

For every citizen that mourns the loss of a cultural treasure, there is another who may view such destruction as a creative and important means for rethinking historical narratives and assuring that public spaces reflect shared contemporary values. Some art historians prefer to avoid the topic of artistic destruction as it obscures a more idealistic view of art history that focuses on creation instead of destruction. ¹⁵ Yet, recent scholarship in art history, anthropology and archeology have turned new attention to the issue. The dismantling of monuments in public spaces also provides significant insights into culture, history, politics, and law.

Each elevation or intentional toppling is a symbolic act. As the following historical overview illustrates, destruction is especially complicated. Every act of destruction may be seen through multiple points of view. As cultures evolved and political regimes rose and fell, those in power (or those who sought to overthrow them) destroyed public art through acts that were too systematic and expressive to be considered mere vandalism. Each removal obliterates the art and preferences of yesterday’s leaders, depriving all of humanity with the opportunity to view and study the artifacts. On the other hand, each removal is often accompanied by the erection of new art that speaks to the contemporary audience and can therefore be viewed as a progressive act to assure that public spaces reflect contemporary values. The following historical overview provides a contextual backdrop for evaluating what to elevate and what to remove from contemporary public spaces.

A. The History of Maintaining and Destroying Public Monuments

Throughout history, as power shifted, public spaces were changed to reflect the values of contemporary society. The Greeks, Romans and Persians celebrated their gods and heroes by elevating them in sculptures of bronze and marble.¹⁶ The historical practice of elevating figures on monuments was meant “to deify those figures. That implication remains in the traditional figurative monuments we have today. Monuments to individuals—the ways they are scaled, represented, their poses—all essentially

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invoke idols.” To this day, those that survived offer the contemporary viewer a window into the lasting advances in art and science achieved in ancient times, and also the figures deemed worthy of honor.

Battles over political power targeted not just the vanquished leaders but the art and cultural artifacts glorifying their heroes and beliefs. The winners repeatedly destroyed the symbols that meant the most to those they had conquered. In ancient Greece, the artist Lysippos created “no less than fifteen hundred works of art, all of which were of such excellence that any one of them might have immortalized him.” Plutarch wrote that Alexander the Great thought only Lysippos sufficiently talented to create a statue in his honor, and that when he did so, the sculpture had eyes set so powerfully in glass and stone they had a “melting glance.” Citizens of the time believed that life-like artistry infused statues with magical power as though they were living breathing beings. We have only Plutarch’s words to imagine this extraordinary artistry because the Romans destroyed the Lysippos statue of Alexander the Great and all of the other 1500 works Lysippos created.

In 392 AD, after Roman Emperor Theodosius ordered the demolition of heathen temples, great works of Greek and Egyptian figures were “razed to the ground, and the images of their gods molten into pots and other convenient utensils for the use of the Alexandrian church... All the images were accordingly broken to pieces.” The Romans thought they were “inhabited by demons,” and to avoid their evil gaze, they destroyed them, believing that “[t]he only protection against the nefarious power of statues was in gouging their eyes, cutting their noses, or beheading them.”

This pattern of creation and destruction continued to play itself out as powers shifted in nations around the world. In India, General Pushyamitra Shunga directed a campaign of violence in 185 BCE that resulted in the assassination of the last Mauryan Emperor and the destruction of Buddhist temples and images.

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18. Id.
21. Id.
22. SOCRATES SCHOLASTICUS, ECCLESIASTICAL HISTORY 278 (1904).
Buddhism was built, destroyed and rebuilt as the nation’s leaders celebrated or suppressed Buddhism. As part of China’s twentieth century cultural revolution, “thousands of Chinese historical sites were destroyed to rid the country of capitalist and traditionalist influences.”

When the Syrian Emperor Leo III ordered the destruction of Roman sculptures, he did so because he believed “that God was punishing his empire for its veneration of icons, [and he] banned religious images.” Art historians have since lamented the destruction that his faith wrought:

“Until the middle of the ninth century, a cultural battle raged between those who sought to destroy and those who restored religious images. “We have almost no evidence” from this period, [Thomas F. X.] Noble said. “Countless works of art depicting Christ, Mary, various saints, and gospel scenes were either destroyed or painted over. For almost a century or more, Byzantine art fell victim to religious fanatics.” Historians who seek to understand the Iconoclast period of the Byzantine Empire have few original visual sources to rely on—instead, they are forced to construct their narratives from secondhand accounts.

In the first century, the Byzantine Orthodox Church banned religious imagery, leading to a decades-long campaign of religious persecution and destruction of offending art. In fifteenth-century Florence, artists and their patrons voluntarily piled up works for destruction by fire when the once treasured objects became known as “instruments of sensual pleasure and symbols of an immoral and unjust society.” This destructive force was rekindled in the “beeldenstorm” (image storm) or “iconoclastic fury” of 1566. With frightening speed, a violent wave of religious persecution and destruction of religious art and objects spread from Flanders throughout the Netherlands. As Western governments explored what was to

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27. Id.
28. Id.
31. Spicer, supra note 29, at 1007.
32. Id.
them the “New” World, their conquests of land also led to a “war of images . . . both neutralizing the instruments of indigenous belief and practice and . . . appropriating their symbolic potential.”

Religion has not been the only motive for destroying art. Especially in instances where a nation chooses to remove its own imagery, the destruction may be motivated by evolving political or cultural values as well. During the French Revolution in the late 1700s, the violence of the era extended to political art. This pattern of destruction continued into the twentieth century. The Nazis seized works by artists they deemed “degenerate” such as Max Beckmann, Ernst Ludwig Kirchner and Paul Klee. Nazi authorities displayed the works for ridicule and public destruction, while hiding others in secret. But after World War II, there was no similar trend. In the 1950s, while Americans were still erecting memorials to Confederate leaders, Germany made sure that Nazi crimes would be remembered but not glorified. Honorary memorials to Hitler and Nazism are absent from public spaces, although some monuments to Nazi party members and other prominent antisemites remain standing in Germany and elsewhere. Instead, memorials of their victims were erected to normalize horror, not pride, in the Holocaust and other Nazi atrocities. Although the cold iron gates of Auschwitz remain standing, they are contextualized, not to honor the fallen regime, but as a living memory of the violent inhumane acts that occurred there.

While we often think of monuments as permanent or at least long-lasting, some communities do opt for repeated creative destructions, removing and then elevating statues as political power and culture shift. Communist Europe once had monumental statues of Lenin and Stalin, but when these regimes were defeated, their celebration in stone was toppled as well. The largest Stalin monument was in Prague. It weighed 17,000

37. Id. at 52–53.
39. Id.
40. Id. at 9.
tons and soared 30 meters high—the equivalent of an 8-story building—and could be seen from virtually every part of the city. Built at the height of the Cold War, the imposing group of stone giants was a “frightening reminder of the Soviet dictator’s tyranny and communism’s seemingly unshakeable grip on the former Czechoslovakia.” Days before the unveiling in 1955, the sculptor who designed it committed suicide, leaving all his money to a school for blind children, grateful that they would not have to see it. Seven years later, the government (“under ‘pressure from Moscow’”) bombed it. For several months, a statue of Michael Jackson stood on the pedestal to promote his World HIStory tour, and in 1991, a giant metronome was installed. Since then, the site has become a hot spot for skateboarders. In less than 40 years, the high ground of the city was home to an ominous expression of political power, an American pop star and a sculpture keeping contemporary time.

Some destructions are simple acts of looting meant to knock down symbols to capitalize on their monetary value or reap the expressive returns of demolishing something of cultural value. In the twenty-first century, a series of widely reported destructions of art and artifacts have drawn public attention to the power of images and the reactive impulse to assert greater power by destroying them. For over 1400 years, the monumental Buddhas of Afghanistan’s Bamiyan valley stood at 175 and 120 feet tall. They were the world’s largest standing Buddhas carved in stone. In 2001, the Taliban bombed them. This stunning disregard for the region’s cultural heritage exposed their bold ambition to destroy anything that conflicts with their beliefs, in this case, the prohibition against figurative idolatry. The nations of the world united in condemning the Taliban for this immeasurable loss to cultural heritage.

Within the first month of invading Iraq in 2003, the United States military pulled down a 39-foot statue of Saddam Hussein in Baghdad’s

41. Id.
43. Wojcik, supra note 36.
44. Id.
45. Id.
46. Id.
Firdos Square with apparent consent and participation of Iraqi citizens. The looting of the Baghdad Museum followed, with citizens pillaging their own cultural history as the American military stood aside. The collection was dispersed as many objects were sold on the lucrative black market for stolen art and artifacts. Less than a decade later, the region saw "the tearing down of mausoleums and damaging [of] shrines at Timbuktu by Malian forces linked to al-Qaeda in July 2012, and the destruction of Shi’ite mosques and Christian churches since 2014 in territories held by ISIS, along with the smashing of artifacts in the Mosul Museum, bulldozing buildings at Nimrud, and blowing up temples at Palmyra."

When destruction is viewed as a historical pattern, it may be easier to understand why some historians and citizens oppose removing Confederate monuments and other controversial public art installations that reflect the values and view of history by those who elevated them. The impulse to preserve cultural history and artifacts of historical, artistic, and cultural significance is a neutral value that can be asserted irrespective of the subject depicted. Throughout history, the destruction of public sculpture often occurred alongside violent political and religious repression. For many conquerors, defeating the enemy or political opposition is not enough. Toppling monuments and other shared iconography can dilute cultural identity and collective memory. Confronting this pattern and the impulse to preserve a particular viewpoint is an important step in understanding the controversy of the many Confederate monuments that are the subject of debate in contemporary American culture.

B. Confederate Monuments, Lost Cause Mythology and Contemporary Values

Choices about what is honored and pulled down in the public landscape reflect the nation’s values and contemporary interpretations of its history. Immediately following the Civil War, memorials to the Confederacy were generally placed in cemeteries, often as simple obelisks or other objects of remembrance. Most of the tall celebratory Confederate

53. Spicer, supra note 29, at 1012.
monuments that tower over town squares and roadways were not erected immediately after the Civil War. The following chart, created by the Southern Poverty Law Center, depicts when memorials to the Confederacy were added to the nation’s public landscape:

Figure 1. Confederate Monument Installations 1854-2019

The large spike shows that the majority of Confederate monuments were installed between 1890 and 1940 during the era of lynching, poll taxes, and Jim Crow laws meant to keep Black citizens in inferior positions of power. State capitols and courthouses were the most common

locations for placing Confederate monuments, reinforcing the power dynamic as “white men made laws that served as a cudgel against African American equality.”\(^{58}\) The halls of justice were often the backdrop for racial violence as courthouse yards were deliberately chosen for public lynchings.\(^{59}\) Confederate monuments were erected where these violent acts occurred to make it clear who was in charge, who made the laws, who would be protected in court and who would not share these privileges. In 2017, the American Historical Association issued a statement explaining why so many of these monuments were erected:

Commemorating not just the Confederacy but also the “Redemption” of the South after Reconstruction, this enterprise was part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South. Memorials to the Confederacy 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. A reprise of commemoration during the mid-20th century coincided with the Civil Rights Movement and included a wave of renaming and the popularization of the Confederate flag as a political symbol. Events in Charlottesville and elsewhere indicate that these symbols of white supremacy are still being invoked for similar purposes.\(^{60}\)

While elevating lost cause mythology, Confederate monuments honor figures who fought to keep people enslaved.

The value of preserving history and culturally meaningful artifacts is a common theme among those who would choose to preserve Confederate monuments. Given global cultural outrage over the destruction of culturally meaningful antiquities and art, international law provides a sound basis for this inclination.\(^{61}\) International treaties forbid destruction of cultural heritage, “irrespective of the reasons why the city or its citizens object


\(^{59}\) Sherrilyn A. Ifill, On the Courthouse Lawn 1, 7–8 (2007).


\(^{61}\) E. Perot Bissell, Monuments to the Confederacy and the Right to Destroy in Cultural Property Law, 128 Yale L.J. 1130 (2019) (“The international law governing cultural property consists of multilateral treaties and customary international law. Because these have all emerged as the result of condemned acts or waves of destruction, they tend to prize cultural preservation above all else.”).
to the content of the monument.” In accordance with this view, some claim that despite contemporary understandings of the fallacies in Confederate mythology, the iconoclastic impulse is nihilistic and reflects cancel culture’s inability to handle historic complexity. Despite the intimidating use of burning crosses by the KKK, some defenders of Confederate monuments analogize them to the Christian cross, which is viewed as a sacred symbol despite its allusion to violence. Professor Guth, writing from a perspective of religious ethics, observes that Confederate monuments “(1) function as sacred symbols for certain audiences, (2) reveal the power to name and legitimize, (3) serve as sites of contested meaning and (4) function as realist reminders of the power of violence.” In a similar vein, Professor Newson argues that removing the monuments without the structural racism they exemplify will do nothing but assuage white guilt. Essentially, his point is that white supremacists are less dangerous in their KKK hoods because if we can identify them, we will know when they are present.

For some Southern families, the argument is much more personal. They lost many young men in the Civil War, whether or not they owned slaves, and some of these families believe that removing Confederate monuments would dishonor their sacrifice. Many of these young men are believed not to have had a proper burial, and some who would keep the monuments view them as making up for that loss. Women’s organizations like the United Daughters of the Confederacy do not see their cause as promoting racism. They assert that preserving Confederate

62. Id. at 1142 (explaining that the example of the Confederate memorials shows potential failings in this approach, insofar as it provides no standard by which a community might decide whether the removal or destruction of its cultural property might be appropriate).

63. Catesby Leigh, Why We Should Keep Confederate Statues Standing, THE FEDERALIST (July 1, 2020), https://thefederalist.com/2020/07/01/why-we-should-keep-confederate-statues-standing/ (noting that the citizens who pulled down the Confederate monument in Durham, North Carolina “for this staged media event [were] mainly white and youthful”).


65. Id.

66. Ryan Andrew Newson, Epistemological Crises Made Stone: Confederate Monuments and the End of Memory, 37 J. SOC. CHRISTIAN ETHICS 135, 135 (2017) (“This essay. . . suggests that at least some [monuments] should remain standing as signs of a crisis that remains with us, bent toward the goal of justice by means of remembering a devastating history under the aspect of God’s judgment.”).


monuments serves a critical memorial function: honoring those who fought and died in the Civil War.

Others defend the monuments as an important educational legacy. They make “visible for whites” the “invisibility of uninterrogated whiteness” and lead viewers to reflect “beyond the monuments to the larger issues of power disparity and structural injustice.”69 One white Southern scholar who taught at the University of North Carolina before its centrally located Confederate monument was removed, wrote that these monuments teach important lessons about Southern politics and remind us of the connection between the past and the present.70 If we take down Confederate monuments, Professor Brophy argued, “we erase the public record of the days of Jim Crow segregation.”71 A geography professor writes how he uses an unusual monument of a black Union soldier near a similar monument to a white Confederate, to reveal what their proximity in different parts of a cemetery teaches about “race, power, heritage and memory” in Norfolk, Virginia.72

All these arguments share a common deficiency. They speak as though their audience is an objective observer, dismissing the perspective of the people whom the monuments were meant to intimidate. The Confederate cult of personality excludes from historical narrative the lives of four million enslaved people who were also Southerners and merit inclusion in our nation’s memory and representation.

Confederate monuments amplify a message of legal inequality. The monuments celebrate a time when our nation’s laws validated and ensured that inequality would continue. They affirm and remind viewers of “the late-19th-century effort to deny basic rights of contract and movement to former slaves via murder, rape, arson and intimidation in the decades after the close of the Civil War.”73 They impose constant reminders of the nation’s refusal to confront systemic racism. The historian Greg Downs observed that “some of the memorials are so painful that their historical value is minimal compared to the pain they cause. It is hard to argue that communities should bear the burden of such pain for the edification of

69. Guth, supra note 64, at 379.
others.” While the legacy of slavery and Jim Crow laws may seem temporally remote for those who do not still routinely experience the cultural impact of those eras, Confederate monuments keep the pain of these historical inequities fresh and immediate for those who feel less welcome, less equal and less safe in their presence.

Although some may choose to see Confederate monuments as a window into history, many others see them as an enduring message of intentional inequality. “When a hierarchical relationship between two groups has endured across generations, the commemoration of figures that legitimized and struggled to defend this very hierarchy in the past can plausibly be understood as a symbolic statement in its defense today.” Those who argue for the maintenance of such monuments will be suspected of agreeing with the intent of those who placed them, thereby making some citizens feel uncertain about whether they will be treated equally in contemporary society:

Just as a child with no pictures of herself on the walls of the family home should be concerned about her college fund, (say) a black American may well wonder whether recent advances in political rights may not be rolled back as quickly as they came, as long as statues to her oppressors are thick on the ground, while monuments to her ancestors and liberation heroes remain few and far between.

Confederate monuments were intended to be much more than historic markers. They were “funded by Jim Crow governments to pay homage to a slave-owning society and to serve as blunt assertions of dominance over African-Americans,” and when they were first put up, were opposed “often by African-Americans, as instruments of white power.”

Inequalities in power often translate into inequalities in representation. The historic practice of elevating monuments is a physical manifestation of their intended message. “One way of visually suggesting exemplarity is by placing subjects at a commanding height, e.g., by depicting them in larger-than-life scale. This technique exploits the metaphorical association between the relation of being above and the relation of being...”

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74. Id.
better than.”78 The statue of Robert E. Lee on Richmond Virginia’s Monument Avenue, was intentionally set on high ground.79 Its original design was altered to assure that the statue would tower higher than a monument to George Washington.80 At the monument’s unveiling, a Black man observed, “‘The Southern white folks is on top—the Southern white folks is on top!'”81 The historian Kirk Savage explains how these words reflect “a stunningly clear statement of the case, which stripped the civilizing clothing off the monument and the ritual surrounding it, to lay bare its simple message of white domination.”82

The Lee monument in New Orleans featured a sixteen-and-a-half-foot bronze statue atop a sixty-foot-tall marble column. New Orleans’s Mayor Mitch Landrieu explained that Confederate statues in public squares:

are not just stone and metal. They are not just innocent remembrances of a benign history. These monuments purposefully celebrate a fictional, sanitized Confederacy; ignoring the death, ignoring the enslavement, and the terror that it actually stood for. . . . After the Civil War, these statues were a part of that terrorism as much as a burning cross on someone’s lawn; they were erected purposefully to send a strong message to all who walked in their shadows about who was still in charge in this city.83

Their continued presence is a constant reminder of both America’s “dark history — slavery, the Civil War, Jim Crow” and “the present-day perils of American racism — Ferguson, Charleston, Sandra Bland.”84 These monuments were erected at a time when Black citizens were terrorized by the Kl Klux Klan and public lynchings. “The core function of both Confederate monuments and spectacle lynching was to solidify the ideology of

80. Id.
81. Id. at 151.
82. Id. at 151-52.
racial difference and separation—bringing into the present, and maintaining the racial hierarchy of the antebellum past.”

An abundance of evidence demonstrates that Black Americans were deeply offended by the towering statues on Monument Avenue. Despite the constant threat of racial violence, Black citizens made their voices heard. W.E.B. DuBois wrote that an accurate historic label on every Confederate monument would read, “Sacred to the Memory of Those Who Fought to Perpetuate Human Slavery.” In 1932, a letter from a reader in Omaha to the editor of the Chicago Defender wrote that “Every time children . . . look at the Monuments it gives them a greater desire to carry out the wishes of their forefathers. If those monuments weren’t standing, the White South wouldn’t be so encouraged to practice hate and discrimination against our people.”

Statues glorifying those who fought for slavery can be painful reminders that there are those among us who still hold those values and that political leaders care more about not provoking them than asserting the will to recreate public spaces around unifying symbols. In the 1990s when the subject of adding a modest statue of hometown hero Arthur Ashe to Richmond’s Monument Avenue was raised at a Richmond City Council meeting, “Blacks could hardly contain the rage they felt about Monument Avenue.” Confederate monuments stand in direct contravention to the central teaching of Brown v. Board of Education. Instead of speaking to progress in seeking equality, these monuments honor “the Confederate cause and thus stigmatize—symbolically define African Americans as members of an inferior or dependent caste who are unworthy to participate in the larger White Community.”

Civic leaders who want to move their communities closer to America’s ideal of equality are doing the challenging work of rethinking their public spaces. Since 2015, three transformational events prompted serious reassessment of the Confederate monuments in contemporary American culture. The first occurred in Charleston, South Carolina.

Dylann Roof was an active participant in an online white supremacist hate group. On June 17, 2015, he decided to take “drastic action” to start a “race war.” When Roof walked into a Bible study group at the historic

85. HARTLEY, supra note 55, at 66-67.
86. Id.; see also COX, supra note 58, at 66-67.
87. Id.
88. Id. at 67.
89. Id. at 66.
90. HARTLEY, supra note 55, at 154.
91. Id. at 155.
93. Id.
Mother Emanuel A.M.E. Church in Charleston, South Carolina, the parishioners warmly welcomed him.94 He prayed with them.95 And then at the conclusion of the service, he took out a .45 Caliber Glock 41 and started shooting.96 Roof murdered nine congregants and injured one, all of them Black.97 Media reports after the incident showed that on April 27, 2015, he had posed for a photo holding the Glock he would use as a murder weapon in one hand and the Confederate flag in the other.98 His racist hatred was express and intentional, and the flag he carried was a clear and unequivocal reflection of his values.

Shocked by this incident, the nation was forced to reflect more seriously on the meaning of Confederate symbols. Soon after this shooting, the President of the University of Texas at Austin ordered the removal of two Confederate statues on the main mall of the campus.99 Several others remain standing.

After the Charleston massacre, the Southern Poverty Law Center (SPLC) began collecting and sharing information identifying memorials to the Confederacy. My study of removals began with isolating the SPLC data identifying the hundreds of Confederate monuments in public spaces apart from “battlefields, museums, cemeteries and other places that are largely historical in nature.”100 Their records reflect the subjects of each monument, the date each was unveiled, its location and whether it remains standing. In addition to statues, the SPLC data includes school names, military bases and other public symbols honoring the Confederacy.101 Most of them were dedicated before 1950.102

95. Id.
96. Id.
97. Id.
98. Andrew Knapp, FBI had resources to halt Dylann Roof’s gun buy, but it didn’t use them — and still doesn’t, THE POST & COURIER (Feb. 4, 2018), https://www.postandcourier.com/church_shooting/fbi-had-resources-to-halt-dylann-roof-s-gun-buy/article_452b95ea-0705-11e8-8bc9-8723f84ce9dd.html.
101. Id.
102. Id.
The SPLC data tracks removals in sufficient detail that one can see if a monument was relocated, removed entirely, or if the statue was removed and its base left in place. Figure 2 depicts a timeline, based on the SPLC data, illustrating how the timing of removals corresponds with major events that forced a public reckoning over race and imagery.

Each complete removal is depicted with a monument icon, and each removal of a statue with the base left in place is depicted with an icon of a base. As illustrated in Figure 2, from 1860 to 2015, only six Confederate monuments were removed from public spaces, one in 1923, 1998, 2009, and 2013 and two in 2012. After the AME Church massacre in 2015, eleven more were removed or relocated over the next two years before the “Unite the Right” rally in Charlottesville, Virginia prompted additional removals. After the city of Charlottesville, Virginia voted to remove statues of Robert E. Lee and Stonewall Jackson, white supremacist

104. Id. While Figure 2 details whether statues were removed in their entirety or the subject removed from its plinth, the textual descriptions refer to both of these actions, along with relocations (often to memorial settings such as battlegrounds, history museums or cemeteries) as removals because all of these result in removing Confederate imagery from shared public spaces. Complete information on the fate of each monument is updated regularly by the Southern Poverty Law Center and publicly available on its website.
groups held one of the largest rallies they had staged in decades. On August 11-12, 2017, “Unite the Right” protesters marched through Charlottesville carrying weapons and torches. They chanted “Blood and Soil” and “Jews will not replace us.” The next day, one of their members deliberately sped his car into a group of pedestrians, injuring 19 and killing Heather Heyer, a 32-year-old counter-protester who was passionate about equality.

A lawsuit to recover multiple claims for damages quoted the protesters to expose their motivation. The lawyers gathered evidence proving that the violence was planned and deliberate. Under the pretext of a “rally” they told each other, “If you want to defend the South and Western civilization from the Jew and his dark-skinned allies, be at Charlottesville on 12 August,” and, “Next stop: Charlottesville, VA. Final stop: Auschwitz.” Their online chats coordinated plans for violence motivated by hate:

- “I’m ready to crack skulls.”
- “If you don’t have a flame thrower you’re wrong.”
- “It’s going to get wild. Bring your boots.”
- “Studies show 999/1000 n***** and feminists fuck right off when faced with pepper spray.”
- “Bringing women to a protest/rally where we expect violence is fucking retarded … even if you aren’t expecting violence you should prepare for it.”

The violence and hatred for Blacks and Jews expressed for the purpose of preserving the Lee monument “intensified calls to remove Confederate statues across the country.” From then on, it would be difficult to disentangle any Confederate monument from racist hatred.

106. Id. (The demonstration was suffused with anti-black racism, but also with antisemitism. Marchers displayed swastikas on banners and shouted slogans like “blood and soil,” a phrase drawn from Nazi ideology. “This city is run by Jewish communists and criminal n*****,” one demonstrator told Vice News’ Elspeth Reeve during their march.).
107. Caron, supra note 11.
109. Id.
As leaders across the nation became acutely aware that any Confederate monument could be the catalyst for more violence, some decided the time for removal had come. President Fenves of the University of Texas at Austin ordered the removal of the remaining Confederate statues on the main mall of the campus.\(^\text{111}\) He unequivocally justified the removal on the ground that “Confederate monuments have become symbols of modern white supremacy and neo-Nazism.”\(^\text{112}\) Between the Unite to Right Rally in 2017 and May 2020, 46 more Confederate Monuments (39 in their entirety and 7 from their bases) were removed.

Then for 8 minutes and 46 seconds on May 25, 2020, a white police officer pushed his knee into the neck of George Floyd, who cried for mercy, pleaded he could not breathe and in his last moments, called to his dead mother.\(^\text{113}\) The officer’s partners did nothing to help Floyd while a 17-year-old girl filmed the entire awful ordeal.\(^\text{114}\) When the nation saw the footage, protests erupted against police brutality and other institutional policies designed to keep some citizens less equal than others.\(^\text{115}\) Anti-racist graffiti and renewed political efforts to tear down Confederate monuments again changed the way communities would see them.\(^\text{116}\) After Floyd’s death in May 2020, 101 monuments were removed before the end of that year (80 entirely), and an additional 18 (13 entirely) were taken down before the end of 2021.\(^\text{117}\) As illustrated in Figure 2, more Confederate monuments were taken down after George Floyd’s death in 2020 than in all previous years combined. Still, in 2022, more than 700 Confederate

\(\text{111. McMahon, 323 F. Supp. 3d at 877 (quoting Gregory L. Fenves, Confederate Statues on Campus, The University of Texas at Austin Office of the President) (Aug. 20, 2017), https://president.utexas.edu/messages/Confederate-statues-on-campus.}\)

\(\text{112. Id.}\)

\(\text{113. Hill et al., supra note 12.}\)


monuments continued to stand across the United States, raising difficult questions of law and politics for those who seek to keep or remove them from public squares.118 These monuments also raise questions about the choices our nation makes when deciding which historical narratives and values to elevate for public honor and remembrance.

The monumental landscape of the United States tells a story about white men.119 When children live and travel in America, only three of the top fifty elevated heroes are women, and half of the top 50 owned humans as slaves.120 Among these men, many fought for the Confederacy to preserve slavery. The sixth most common figure in the national landscape is Robert E. Lee.121 In 2021, the nation was more likely to encounter Lee elevated in stone or marble than Benjamin Franklin, Thomas Jefferson, Alexander Hamilton or Martin Luther King.122 Robert E. Lee foresaw the divisions that could result from celebrating Confederate leaders and advocated against it. In 1886, Lee wrote:

As regards the erection of such a monument as is contemplated; my conviction is, that however grateful it would be to the feelings of the South, the attempt in the present condition of the Country, would have the effect of retarding, instead of accelerating its accomplishment; & of continuing, if not adding to, the difficulties under which the Southern people labour.123

Lee received many proposals for memorials but turned them down because he thought they would “anger the victorious Federals.”124 In declining an invitation to meet with generals who were planning to memorialize the battle at Gettysburg, Lee wrote, “I think it wiser moreover not to keep open the sores of war, but to follow the examples of those nations who endeavored to obliterate the marks of civil strife and to commit to oblivion the feelings it engendered.”125

Lee’s views are worth remembering as citizens across America advocate for public landscapes that are unifying rather than divisive, that honor

118. SPLC Report, supra note 100.
120. Id.
121. Id. at 12.
122. Id.
contemporary values and celebrate the many diverse voices who advance science, human dignity and culture. Before turning to the legal tools that will help communities achieve that goal, it is important to consider the lasting harm that will result if the nation does nothing to reconsider whether its monuments reflect contemporary values.

C. Monumental Harm in the Public Landscape

Symbols reinforcing lost cause mythology inflict repeated psychological cuts into the welling-being of those targeted.

“Belonging is often inherently spatial, with demarcations of who does and does not belong written into the landscape. Thus, as a visual means of communication, our physical environments convey boundaries by (re)producing notions about who belongs.”

Constant exposure to monuments, streets, school, and towns honoring Confederates, and even brands like Aunt Jemima and Uncle Ben’s idealizing Lost Cause stereotypes can make it hard to find any space free of such reminders. Such repeated exposures have been analogized to environmental pollution:

The time and energy drain spent navigating hostile environments and dealing with racial microaggressions is a major cost to maintaining a hopeful disposition toward racial relations and social justice. Therefore, racism and racial microaggressions operate as psycho-pollutants in the social environment and add to the overall race-related stress for Black men, Black women, and other racially marginalized groups.

Harms from racist imagery are felt more acutely by the targeted group. “Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.” The exclusionary impact is particularly strong “where

126. Lucy Britt, Emily Wager & Tyler Steelman, Meanings and Impacts of Confederate Monuments in the U.S. South, DU BOIS REV. 105, 115 (2020).
the government not only tolerates racist speech, but is itself the speaker.”  

Social science research confirms that many do not see the harms experienced daily by the Black community. Nonetheless, the many crippling harms suffered by those who are targeted have been well-documented.

Much recent scholarship illuminates how serious the health toll can be from such stressors. Surveys show that “state protection of Confederate monuments leads to a diminished sense of belonging among Blacks, while leaving Whites unaffected.” The injury produced by discriminatory state action is more than the denial of a certain benefit. It is also “the thought and message of inferiority, of hatred and contempt, this is communicated by the discriminatory act and that afflicts the human spirit of the victim.”

Extensive research on exposure to exclusionary imagery shows that it can contribute to significant negative health impacts. For decades, scholars have reported that “negative effects of hate messages are real and immediate for the victims . . . ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.” A review of 21 studies published since 2007 on the “robust” relationship of microaggressions and mental health outcomes, revealed that “microaggressions are associated with various aspects of psychological functioning,” including “depressive symptoms, self-esteem, anger . . . substance use, overall psychological distress, rumination, stress, and overall psychological well-being.” These studies and others demonstrate significant associations between experiencing a racial microaggression and “higher levels of depression, anxiety, posttraumatic stress disorder symptoms, impaired psychological wellbeing, and decreased self-esteem.” Exposure to racist expression has also been linked

131. Britt, Wager & Steelman, supra note 126, at 105.
132. Monnica T. Williams, Microaggressions: Clarification, Evidence, and Impact, 15 PERSP. ON PSYCH. SCI. 3, 21 (2020) [hereinafter Williams, Microaggressions].
133. Britt, Wager & Steelman, supra note 126, at 105.
134. Forman, supra note 130, at 515 (quoting Lee Bollinger, The Tolerant Society: A Response to Critics, 90 COLUM. L. REV. 979, 980 (1990)).
136. Matsuda, supra note 129, at 2336.
137. Owen et al., supra note 135, at 69-70.
138. Monnica T. Williams, Matthew D. Skinta, Jonathan W. Kanter, Renée Martin-Willett, Judy Mier-Chairez, Marlena Debreaux & Daniel C. Rosen, A Qualitative Study of Microaggressions Against African Americans on Predominantly White Campuses, BMC PSYCH. 1, 2 (2020) (citations omitted) [hereinafter Williams et al., A Qualitative Study of Microaggressions]; Williams, Microaggressions, supra note 131, at 15 (citations omitted) (“Microaggressions
to “hypertension, hypothalamic-pituitary-adrenal (HPA) axis dysfunction, higher body mass index, and coronary heart disease.” Researchers working on the elusive question of causation have gathered evidence by controlling for other variables, such as negative affectivity. Multiple studies that “have examined the effects of microaggressions proactively to establish cause and effect” conclude that they pose a significant mental health concern. One study compared stressors from different sources and found that “[r]ace-related stress was a significantly more powerful risk factor than stressful life events for psychological distress.”

The cumulative effect of living in a culture filled with exclusionary imagery increases the potential negative effects of any single incident. “Although a single microaggression may not produce great harm (although some single instances have done just that), their chronic nature is a significant deleterious stressor.” While a single incident may lead to a mild reaction of confusion or worry, “a cumulative or chronic outcome [on an individual] may be internalization and subsequent anxiety and depression.” Repeated exposure can exacerbate prior harms and lead “to dysfunctional coping strategies, such as denial, withdrawal, and substance abuse.” Given that some triggers, like Confederate monuments, are built into our civic landscapes, they are daily reminders of government sanctioned inequality. When exposure to such demeaning symbols “are so common, they can be conceptualized as a form of chronic stress that may also result in physical problems, such as hypertension and impaired immune response.” A culture that targets only some citizens with constant stressors from different sources and found that “[r]ace-related stress was a significantly more powerful risk factor than stressful life events for psychological distress.”

The largely overlapping construct termed everyday racial discrimination are in fact associated with many negative mental-health consequences, including stress, anxiety, depression, symptoms of posttraumatic stress disorder, low self-esteem, obsessive-compulsive disorder, substance use, alcohol abuse, severe psychological distress, reduced self-efficacy, and suicide.

139. Williams et al., supra note 138, at 2.
140. Williams, supra note 133, at 4.
141. Id.
142. Shawn O. Utsey, Norman Giesbrecht, Joshua Hook & Pia M. Stanard, Cultural, Sociofamilial, and Psychological Resources that Inhibit Psychological Distress in African Americans Exposed to Stressful Life Events and Race-Related Stress, 55 J. COUNSELING PSYCH. 49, 49 (2008) (“Empirical evidence suggests that African Americans (herein, all nonimmigrant persons of African heritage living in the United States) are at increased risk for exposure to stressful life events. Moreover, the health consequences associated with this increased risk are exacerbated by daily encounters with individual, institutional, and cultural racism. Stressful life events and race-related stress have important consequences for the psychological and physical health of African Americans.”).
143. Williams, Microaggressions, supra note 132, at 4.
144. Owen et al., supra note 135, at 73.
145. Williams, Microaggressions, supra note 132, at 15.
146. Id.
reminders of their inferiority can feel inherently unequal because while some must prepare to confront and navigate these minefields daily, others are free to live in comfortable oblivion. Due to predictably selective impacts, “this systematic and everyday visual assault from these race-based visual microaggressions reinforce the dynamics of institutional racism, while perpetuating ideologies that subjugate Communities of Color.”

Acknowledging the disparate harms from Confederate imagery and committing to create spaces that reflect unity is essential if American landscapes are to reflect a genuine commitment to equality. Until that happens, the harms documented by social scientists are essential reading for citizens to understand the impact of the monumental landscape and the importance of elevating heroes that affirm a positive unifying identity. The next section sets forth the legal strategies that may be used to forge a path towards that future.

II. MONUMENT REGULATION THROUGH STATE AND LOCAL LAW

My consideration of law and Confederate monuments focuses on statues in honorary public spaces. A useful boundary, which I shall use here, was set by Jessica Owley and Jess Philps. They adopted a definition of monuments inspired by the philosopher George Schedler that includes markers, statues, or sculptures:

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, some thing or person.

In accordance with this definition and the work of other scholars, the legal discussion will exclude gravestones and statues contextualized in historic or memorial sites, such as cemeteries, museums, and battlefields. It also excludes films, text and music that are not on permanent public display.

Both installations and destructions are often more instrumental than aesthetic, and it is the political and cultural implications that are the focus of this discussion. In addition to debating the legal implications of removal, it is important to consider whether an object has inherent artistic, historic,

149. Id.
or cultural value that merits preservation. These considerations may also inform matters of legal consequence. Most states allow local municipal, school or county officials to choose the symbols that preside over the public spaces they govern. However, a minority of states do not grant that freedom; instead, they reserve this power for state officials. The states that deny local authorities the power to make symbolic choices are the primary focus of this section.

A. State Historic “Preservation” Statutes

As the minority population grows and the American public expresses greater support for racial equality, state legislators across the South have enacted historic preservation laws to make removal of Confederate monuments more difficult. These laws are not historic relics detached from contemporary law and politics. Mississippi enacted such a law in 1972.150 Since 1997, eight more Southern states (Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and Virginia) enacted laws prohibiting removal of historic monuments under many circumstances.151 Three other states (Texas, Louisiana and Florida) attempted to enact similar statutes but were thwarted in the legislative process.152 Political attitudes towards these laws reflect a common dynamic in which state legislatures, often controlled by conservative politicians from rural areas, adopt laws, policies and practices that take power away from civic institutions in more liberal urban areas.153 Consequently, these laws

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shift the balance of power so that local authorities lose control over the public spaces in which their citizens live and work. These laws have turned out to be effective barriers to removing controversial public monuments. Some of the statutes appear to have been drafted expressly to protect Confederate monuments. For example, the Mississippi law forbids removal of monuments to a list of wars including the “War Between the States.”

The North Carolina and Alabama statutes avoid reference to the Civil War or the Confederacy and therefore can be more readily supported by the argument that they are meant to preserve all historic objects and depoliticize any removal process. However, in practice, these statutes have been enacted and enforced, over and over again, for one primary purpose: to preserve a particular view of Southern Lost Cause history and prevent removal of monuments to the Confederacy. For states that have such legislation in place, removal provides seemingly insurmountable challenges. Even in states without such statutes, removal efforts can lead to litigation of state law claims. The remainder of this section sets forth state law approaches that have been asserted with varying degrees of success to support or thwart removal.

In considering the legal arguments, the history and harms outlined in Part I remain important. Legislative efforts to protect Confederate monuments magnify the original discriminatory message. When state governments endorse and protect Confederate monuments, “they signal whom they choose to remember and mourn, signifying that some are more worthy of remembrance than others.” Contemporary efforts to protect monuments reveal that those currently in power share the values of those who

156. See David W. Blight, Race and Reunion: The Civil War in American Memory 272–276 (2001) (“Jim Crow danced his steps at hundreds of Confederate monument unveilings and veterans’ parades. High atop his monument in Richmond, [Robert E.] Lee represented many of the inspirations Southerners now took from their heritage: a sense of pride and soldierly honor, and end to defeatism, and a new sense of racial mastery… Indeed, many of our controversies at the turn of the twenty-first century over the continuing presence of Confederate symbols, especially the battle flag, can be traced back to this era . . . ”).
originally erected them. “The presence of a Confederate monument on public property suggests support for an army that—regardless of the motivations of individual soldiers—fought to preserve slavery and the legalized social divisions between blacks and whites, which could unintentionally signal that divisions between blacks and whites are publicly sanctioned.”

The volatility of these shifting cultural and political tides was especially apparent in the Commonwealth of Virginia. In 1997, Virginia enacted a preservation statute designed to prevent removal of controversial public monuments, particularly those in its capital city of Richmond, which was also the capital of the Confederacy. Within 25 years, the law would be amended, opening the possibility for a transformation that those of us who have lived in Richmond, never thought we would live to see.

Richmond’s Confederate monuments were among the most notorious embodiments of the Lost Cause view of Southern history. Between 1890 and 1920, five massive Confederate figures were erected to soar over Monument Avenue, a greenway at the center of a stately street just west of downtown Richmond. Each massive statue on Monument Avenue would be impressive on its own, but the impact of each was magnified by their placement. Spaced a few short blocks apart, they formed a parade of Confederate giants along the grandest street in town. They gave the historic residential section of Richmond, known as the Fan, a distinctive character unlike any other in America. For more than a century, they reigned over the heart of Richmond, reinforcing William Faulkner’s observation, “The past is not dead. It’s not even past.”

The meaning of Monument Avenue changed modestly with the erection of the Arthur Ashe statue in the 1990s, but standing at less than half the height of the other monuments and surrounded by more modest homes, it looked like a relatively small low-cost attempt to show a less significant view of civic pride compared to its towering neighbors. Arthur Ashe had his place close to the ground as a tennis star beloved by children, but the relative height of the neighboring statues was a constant reminder of who holds the real glory and power.

After the Unite the Right rally in Charlottesville, the artist Kehinde Wiley found an extraordinarily innovative way to contextualize Monument Avenue by creating a work that was to stand in direct dialogue with the street’s unequivocal message about history, race and power. Wiley

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modeled his horse and rider to echo the size and posture of the Monument Avenue statue of Confederate Army General James Ewell Brown “J.E.B.” Stuart created by Frederick Moynihan in 1907. The clear reference challenges us to look at a young proud black man, not as a gang member, a victim or even a civil rights warrior but as a heroic young man riding proud on his horse. That spring, the Virginia legislature rewrote the 1997 law to permit local governments to remove public monuments.


Within weeks after the murder of George Floyd, citizens tore down the statue of Jefferson Davis on Monument Avenue.\textsuperscript{163} Levar Stoney, the Mayor of Richmond, was so horrified to learn that the police used tear gas to disperse the crowd, that he walked out to join the protestors and apologize.\textsuperscript{164} As he tried to speak to them at the foot of the Lee Monument, the crowd hurled insults and a bag of feces at him.\textsuperscript{165} A year later, Mayor Stoney reflected on the pain and frustration that boiled over that summer.\textsuperscript{166} He wrote,


\textsuperscript{165} Id.

\textsuperscript{166} Id.
Upon reaching the pedestal of the 60-foot-tall bronze and granite centerpiece to the Lost Cause, now adorned with graffiti and draped with demonstrators, I realized just how imposing and intimidating it must have been to previous generations of people who looked like me. Like the rest of the Confederate icons that defined Monument Avenue, it cast a long, dark shadow over our city. First erected in 1890, as part of a real estate development on the outskirts of downtown, the actual purpose was pure Jim Crow — to put Black people in their place. And that place never included the chair behind the desk in the mayor’s office.”

167. Id.
Robert E. Lee Monument
Richmond, Virginia
June 16, 2021
Facing reelection and warned that removal of the monuments could lead to an electoral loss in addition to municipal and personal liability, the mayor chose to act anyway. Immediately after the Virginia preservation law was repealed in July 2020, the city removed the three remaining Confederate statues it owned.168 The mayor wrote that as “[c]heers erupted

from hundreds who had gathered in the rain to witness its removal. Like other residents in our city that day, I cried. Over the next week, contractors removed 14 pieces of Confederate iconography throughout the city. 169

After the governor ordered removal of the Robert E. Lee statue owned by the Commonwealth, several lawsuits were filed seeking to prevent its removal, one by a group of mostly anonymous citizens claiming it would hurt their property values. 170 During the first week of September 2021, the Virginia Supreme Court upheld the lower court decisions affirming that the Commonwealth had the power to remove the monument. 171 On September 8, 2021, after 130 years, the 12-ton, 21-foot bronze monument of Lee on his horse was brought down from its 40-foot pedestal and taken away. 172

The path to removal in Virginia was cleared by the legislature’s choice to grant localities the power to choose what is elevated in their public spaces. When state laws prevent local decision-makers from exercising that authority, courts may be forced to step in to resolve removal questions asserted by litigants presenting a mix of federal and state claims. Before turning to the federal claims, the state claims that have been litigated are enumerated below.

B. Property Issues

Property rights have repeatedly been at issue in litigation considering the legality of removal or relocation of Confederate monuments. To work around a Tennessee statute prohibiting the removal of monuments on public property, the City of Memphis devised a strategy to sell the land on which Confederate monuments stood. 173 In 2016, the Memphis City

169. Stoney, supra note 164.
172. Id.
Council tried to move Confederate monuments from a city park to a Civil War battlefield site. The city struggled to obtain permission from the Tennessee Historical Commission to remove the statues, and the effort resulted in protracted litigation. To achieve its goals, the city put both the monuments and the parks where they were located up for sale. After considering several bids, the city sold them to the nonprofit Memphis Greenspace for $1,000.

Within hours of obtaining ownership, Greenspace removed the Confederate monuments of James Harvey Mathes, Jefferson Davis, and Nathan Bedford Forrest. On January 11, 2018, the Sons of Confederate Veterans (“SCV”) Nathan Bedford Forrest Camp #215 sued the City of Memphis and Greenspace challenging the removal. The plaintiffs sought injunctive relief under § 412(d) of the Tennessee Historical Preservation Act of 2013. Although the Court held that the SVC had standing to challenge the removal, the Court did not issue an injunction because each statue “was no longer on ‘public property’ and thus, was no longer a ‘memorial’ whose status could be preserved.” The City’s novel strategy succeeded. But at least in Tennessee, this was a one-time loophole. The Tennessee legislature revised the preservation statute so other local governments could not make similar sales, and penalized Memphis by cancelling a $250,000 appropriation earmarked for a bicentennial celebration. Democratic Representative Antonio Parkinson (who is Black) was booed by lawmakers for opposing the amendment, while in support of it, Republican Representative Andy Holt said, “Today is a demonstration

174. Id.
175. Id. at *1–2.
176. Id. at *2.
177. Id.
179. Id. at *3.
180. Id.; see also Tennessee Heritage Protection Act of 2013, ch. 75, TENN. PUB. ACTS (codified at TENN. CODE ANN. § 4-1-412 (West 2020)).
182. Id. at *8–9.
183. In 2018, the Tennessee legislature amended the Heritage Protection Act to include the following provision: “No memorial or public property that contains a memorial may be sold, transferred, or otherwise disposed of by a county, metropolitan government, municipality, or other political subdivision of this state.” TENN. CODE ANN. § 4-1-412(b)(2) (West 2020).
that bad actions have bad consequences, and my only regret about this is it’s not in the tune of millions of dollars.”

The Memphis story provides an important model both for those drafting non-removal legislation and those seeking to avoid it in states where the sales loophole has not been closed. Following the Memphis removal, the sales strategy has been adopted elsewhere. In Dallas, unable to find a home for a bronze statue of Robert E. Lee on horseback towering over a city park, the city put the monument up for auction. It sold for more than $1.4 million. The bill of sale contained one crucial condition: The statue cannot be displayed publicly in the Dallas-Fort Worth metropolitan area. The Lee monument was removed on June 22, 2020, over a year after the city planned to do so. The removal was stalled because of a lawsuit filed by an organization called “Return Lee to Lee Park.” After the trial court determined that the City had the power to remove the monument, the City sold it and an appeal trying to stop the sale was deemed moot.

Even when the possibility of selling a monument or its site is prohibited by state law, historic records documenting private ownership may empower a municipality to return a statue to its donor. If a locality can show that someone other than the state or city owns the object, removal may be an option. This strategy was asserted successfully in Pittsboro, North Carolina, where the town sought to remove a statue of a Confederate soldier outside the Chatham County courthouse.

187. Id.
190. Ayres, supra note 188.
192. See, e.g., supra text accompanying notes 173-77.
The bronze statue was sponsored by the United Daughters of the Confederacy (“UDC”) and installed in 1907.\footnote{Commemorative Landscapes of North Carolina: Confederate Monument, Pittsboro, DOCUMENTING THE AMERICAN SOUTH (last visited Aug. 3, 2020), https://docsouth.unc.edu/commland/monument/11.} In October of 2019, the Chatham County Board of Commissioners voted 4-1 to remove the statue and place it in storage.\footnote{Mann, supra note 193.} The Winnie Davis Chapter of the UDC sued seeking to enjoin the removal claiming that the monument was public property, gifted by the UDC to the county, and that removing it would violate the North Carolina Heritage Protection Act.\footnote{DOCUMENTING THE AMERICAN SOUTH, supra note 194.} The county’s lawyers submitted a license into evidence indicating that the monument was still owned by the UDC and the statue stood on public property by the permission of the county, which could be freely revoked.\footnote{Mann, supra note 193.} The Court agreed with the county’s interpretation.\footnote{Id.} Following the judgment, the statue was removed and placed in storage until the UDC could arrange to relocate it.\footnote{Id.}

Property deeds and legislative pronouncements on the use of land for memorial purposes have also been asserted as a foundation for maintaining monuments on public property. In Richmond, Virginia, one claimant attempted to prevent the removal of the towering monument to Robert E. Lee on Monument Avenue by asserting a property interest based on the deed of transfer his ancestors had given to the city of Richmond.\footnote{Gregory v. Northam, 862 S.E. 2d. 273, 274 (Va. 2021).} The deed that transferred the land where the statue reigned for 130 years stated:

The State of Virginia, party of the third part acting by and through the Governor of the Commonwealth and pursuant to the terms and provisions of the Special Statute herein before mentioned executes this instrument in token of her acceptance of the gift and of her guarantee that she will hold said Statue and pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted and that she will faithfully guard it and affectionately protect it.\footnote{Id.}

\footnote{195. Mann, supra note 193.}
\footnote{196. DOCUMENTING THE AMERICAN SOUTH, supra note 194.}
\footnote{197. Mann, supra note 193.}
\footnote{198. Id.}
\footnote{201. Id.}
William C. Gregory asserted that through this deed, his ancestors created an easement in gross. The Supreme Court of Virginia disagreed, and after concluding that Gregory had no property interest in the land or the monument as a matter of law, the Court affirmed the lower court’s decision permitting removal. A second group of plaintiffs, who owned land adjacent to the statue, argued that two deeds (one from 1877 and one from 1890) compelled the Commonwealth to maintain the monument in perpetuity to honor the original donative intent. On appeal, the Court held that such a construction was erroneous as a matter of law and public policy, and if upheld, would be an unconstitutional infringement on the government speech doctrine.

These examples demonstrate that privately owned but publicly displayed monuments may be removable, but historic research and litigation may be necessary to resolve whether the documentation supports such action. Generally, state preservation laws apply only to “publicly owned” memorials and therefore, permit removal of monuments owned privately. Local governments can elect to give back such monuments or terminate the right to display them.

202. See id.

203. Id. at 275.


205. Id. at 472.

206. See, e.g., GA. CODE ANN. § 50-3-1(b)(2)-(4) (West 2020). Description and use of state flag; duty to carry; preservation and protection of certain public monuments and memorials.

(2) It shall be unlawful for any person, firm, corporation, or other entity to mutilate, deface, defile, or abuse contemptuously any publicly owned monument located, erected, constructed, created, or maintained on real property owned by an agency or the State of Georgia. No officer or agency shall remove or conceal from display any such monument for the purpose of preventing the visible display of the same. A violation of this paragraph shall constitute a misdemeanor.

(3) No publicly owned monument erected, constructed, created, or maintained on the public property of this state or its agencies, departments, authorities, or instrumentalities or on real property owned by an agency or the State of Georgia shall be relocated, removed, concealed, obscured, or altered in any fashion by any officer or agency; provided, however, that appropriate measures for the preservation, protection, and interpretation of such monument or memorial shall not be prohibited.

(4) Any person or entity that damages, destroys, or loses a monument or that takes or removes a monument without replacing it shall be liable for treble the amount of the full cost of repair or replacement of such monument and may be subject to exemplary damages unless such person or entity was authorized to take such action by the public entity owning such monument. In addition to treble the cost of repair or replacement and possible exemplary damages, the person or entity shall also be liable for the attorney’s fees and court costs expended by the public entity owner of the monument or person, group, or legal entity in any action or proceeding required to establish liability and collect amounts owed. Should a public entity owner of the monument or person, group, or other legal entity prevail in any action under this Code section, such
In states without preservation statutes, public entities may have the authority to dispose of monuments like any other public property. However, the ownership issues are not always clear and may involve substantial historical research and legal interpretation. For example, the city council in Alexandria, Louisiana has considered removing a Confederate monument situated on its courthouse grounds since 1962. On June 23, 2020, the Alexandria City Council passed a resolution to file a declaratory judgment action in state court to obtain clarity on who owns the monument.

While the precedent outlined above may be helpful in some circumstances, it will not apply to many others. Hundreds of Confederate monuments owned by states and protected by preservation laws remain standing on centrally located public land. Those who seek to end the practice of privileging the Lost Cause historical narrative will be compelled to find other avenues in advocating for removal.

C. Public Safety and Nuisance Laws

Laws protecting public safety may also be relied upon to seek or thwart removal of divisive public monuments. In 2015, the City Council of New Orleans voted to remove Confederate monuments because they were “public nuisances.” The statues had been a source of division among city residents for years. One reporter observed, “statue supporters say they represent an important part of the state’s identity and culture — but in a city where 60 percent of the residents are African-American, many see the monuments as an offensive celebration of the Confederacy and the system of slavery it sought to preserve.” Removal was delayed because of litigation, but the city’s plan ultimately prevailed. Four of New Orleans’s Confederate monuments were removed during a 26-day period in 2017.

prevailing party shall timely pay for the cost of or repair or placement of the monument upon moneys being collected from the party damaging, destroying, or losing such monument.


208. Id.


Public safety concerns became more urgent in 2020 when, despite the Covid-19 pandemic, thousands of people in cities across the country participated in demonstrations against racially motivated police brutality in the wake of George Floyd’s death. That summer, public monuments became flashpoints for protests, sometimes resulting in violence and vandalism while aggravating already fraught relationships with police.\(^{212}\) To keep the peace and avoid the security costs of protecting the public from conflicts over divisive symbols, several cities approached the question of removal with new urgency. The City of Dallas had been trying to remove a Confederate memorial depicting a rebel soldier on an obelisk surrounded by Robert E. Lee, Stonewall Jackson, Albert Sidney Johnston and Jefferson Davis.\(^{213}\) A group of citizens and a city councilman sought an injunction preventing the city from “altering, removing, or destroying” it.\(^{214}\) The court granted the injunction, but ultimately the city prevailed.\(^{215}\) On June 12, 2020, a Dallas Court of Appeals permitted the emergency motion to remove the statue due to public safety concerns amid protests over Confederate monuments.\(^{216}\) That Texas never succeeded in enacting a preservation statute gave those favoring removal a smoother path, albeit one that still required litigation.

A similar incident occurred in Georgia, notwithstanding the existence of a preservation statute. The Georgia law prohibiting monument removal is not designed to protect people when monuments result in a public safety crisis, but it can be retrofitted for that purpose. Anyone who damages such a monument may be sued for treble damages and attorney’s fees. However, once violence has occurred or is threatened so that the monument itself is in danger, the state law permits removals that include plans for “preservation, protection, and interpretation.”\(^{217}\) Relying on this provision, the cities of Decatur and Lawrenceville sought removal of Confederate monuments. In Decatur, a 30-foot Confederate monument had been downtown for 112 years until it was

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214. Id.
215. Id. at *2.
dismantled on June 18, 2020.\(^{218}\) In the midst of protests over police brutality after George Floyd’s death, the City of Decatur argued that the monument that had become a “public nuisance” under Georgia law and requested permission to remove it.\(^{219}\) On June 12, 2020, the Court granted the City’s motion, noting that “the Confederate obelisk has become an increasingly frequent target of graffiti and vandalism… and a potential catastrophe that could happen at any time if individuals attempt to forcibly remove or destroy it.”\(^{220}\)

In Lawrenceville, Georgia, a Confederate monument was erected in 1993.\(^{221}\) On June 30, 2020, Gwinnett County Solicitor General Brian Whiteside sought judicial approval for its removal.\(^{222}\) Whiteside argued that relocation was necessary for public safety and would ensure that the monument was not damaged.\(^{223}\) A petition circulated demanding the monument’s removal, and outrage was expressed graphically by protestors who painted over and around it.\(^{224}\) Whiteside recommended that the county move the monument to the Gwinnett Environmental and Heritage Center.\(^{225}\) In February 2021, the statue was removed before the state judiciary issued a final decision on whether the removal complied with Georgia law.\(^{226}\)

The North Carolina preservation statute was drafted more narrowly and has not provided the same room for removal based on a public safety or nuisance argument. As provided in more detail below, Governor Cooper told the University of North Carolina that public safety interests permitted it to remove a towering Confederate monument at the heart of its campus.\(^{227}\) But the state legislature which allocates public university


\(^{222}\) Id.

\(^{223}\) Id.

\(^{224}\) Id.

\(^{225}\) Id.


\(^{227}\) See *infra* notes 265–68 and accompanying text.
funding disagreed, and the university bowed to pressure after its counsel did not agree that the governor’s opinion was a sufficient ground for removal.228

The question may be litigated now that the town of Louisburg, North Carolina, recently decided to move a Confederate monument from Main Street to a town cemetery where Confederate veterans are buried.229 The town asserted the nuisance argument that had succeeded in Georgia, arguing that “the removal of the statue would prevent it from being vandalized.”230 Larry Norman, a member of the local SCV chapter, sued for an injunction to prevent the city from removing the monument.231 Norman argued that the relocation violates a 2015 North Carolina law that “bars removing, relocating or altering monuments, memorials, plaques and other markers on public property without permission from the state Historical Commission except in certain circumstances.”232 The North Carolina statute was carefully drafted to limit exceptions based on nuisance or public safety arguments, permitting such claims to prevail only when “[a] building inspector or similar official has determined [that the monument] poses a threat to public safety because of an unsafe or dangerous condition.”233 The exception has been interpreted to apply only when the monument itself is structurally unsound. Accordingly, Norman argued that “the council was disingenuous in calling an emergency meeting to vote on moving the statue when it said it felt the monument was threatened in light of vandalism at other sites.”234

These examples demonstrate that public safety and nuisance laws provide a viable strategy for removal in many jurisdictions. However, state non-removal legislation, especially when drafted with exceedingly narrow exceptions like the law in North Carolina, may effectively thwart such efforts.

228. See infra note 266.
231. Id.
232. Quillin, supra note 229.
234. Quillin, supra note 229.
D. Sovereign Immunity

When a state’s preservation statute includes no mechanism for citizens to assert claims, sovereign immunity may block suits by citizens who go to court seeking to stop or facilitate removal. For example, Georgia’s statute makes it a misdemeanor to damage a monument and empowers the state to recover treble damages and attorney’s fees for covering the costs of repairs. On June 15, 2020, the SCV sued the town of Athens to try to prevent the town from moving a Confederate monument from downtown to a Civil War battle site. The Georgia statute creates a private right of action for removals conducted without government authority. The town argued that removal was necessary “to improve pedestrian safety.” The SCV responded that “the government’s justification was just a pretext, and that the monument could easily be moved a few feet along the median where it sits now to accommodate the government’s plan.” On July 9, 2020, the Superior Court denied their motion for an injunction, explaining that the doctrine of sovereign immunity prevents a citizen from suing the government in this situation.

When the halls of justice are barred, citizens may attempt to force creation of the reality they want to see. Frustration can lead to a public safety crisis that may be avoidable if citizens were afforded some mechanism to be heard. The next section illustrates what happens when citizens forcibly recreate their town’s symbolic landscape and the possible legal consequences that may result.

E. Citizen Action

In addition to conflicts with police or among protestors, the height and weight of monuments can present a significant danger to public health and safety. When citizens lose hope that their elected officials will ever

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237. GA. CODE ANN. §§ 50-3-1(b)(1), (4) (2020).
239. Id.
240. Id.
hire a professional crew to come in with a crane and safety straps, some have taken matters into their own hands. Since 2019, more than 10 monuments have been pulled to the ground by angry and frustrated citizens.242 The danger in pulling down these monuments became horribly clear in Portsmouth, Virginia, when a man suffered life threatening injuries after being struck in the head as a monument was pulled down by angry citizens.243 As fraught as these moments can be, the headlines do not capture the lasting divisions and harms that lead up to them or remain in their wake. A handful of angry citizens can turn a peaceful protest into a


243. Romero, supra note 241 (one observer reported, “It came and fully hit him in the head, and we could see that his skull was actually showing. . . He was convulsing on the ground.”).
backdrop for scenes of violence that may lead to civil actions for damages or criminal prosecutions.

As a professor at the University of North Carolina, I experienced how frustrated a community can become when forced to live and work with a racist symbol at its symbolic heart. Decades of protests and inaction from the University of North Carolina in Chapel Hill boiled over into an example of what citizen action looks like when laws force a community to display symbols that stand in stark conflict with prevailing community values. In 2015, North Carolina enacted a preservation statute prohibiting removal of public “objects of remembrance” unless a building inspector or “similar official” declares the object to be unsafe. The stress such statutes

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(a) Approval Required. – Except as otherwise provided in subsection (b) of this section, a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.

(b) Limitations on Removal. – An object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection. An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location. As used in this section, the term “object of remembrance” means a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina’s history. The circumstances under which an object of remembrance may be relocated are either of the following:

1. When appropriate measures are required by the State or a political subdivision of the State to preserve the object.

2. When necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects

Exceptions. – This section does not apply to the following:
can put on a public institution stands in sharp contrast to the freedom of private institutions.

As the UNC community struggled with the presence of a Confederate monument on its main quad, just eight miles down the road, Duke University took decisive action. The Duke Chapel towers above all other buildings at the heart of the University’s gothic west campus. The chapel’s grand entrance is flanked by figures including Thomas Jefferson, George Whitefield, and the poet Sidney Lanier.247 One of these figures was Robert E. Lee.248 Because Duke University is a private non-profit, its leadership had the power to decide whether to keep the Lee monument standing at the symbolic heart of the University.249 They chose to get rid of it a few days after protesters toppled a Confederate statue in downtown Durham. At night, without fanfare, a professional crew quietly removed it.250 Duke’s President Broadhead tied the action to an affirmation of contemporary values, stating, “We have a responsibility to come together as a community to determine how we can respond to this unrest in a way that demonstrates our firm commitment to justice, not discrimination; to civil protest, not violence; to authentic dialogue, not rhetoric; and to empathy, not hatred.”251 Duke’s decision to keep the space empty leaves a void that bears witness to the past representation and the choice to make a change.252 The void evokes remembrance of Duke University’s complicated history with the institution of slavery and holds a space open for reflecting on inequalities that persist.

While Duke acted quickly and decisively, the administrators running the University of North Carolina at Chapel Hill were paralyzed for months, caught in a mesh of conflicting interests and interpretations of the state preservation law. UNC’s McCorkle Place is among the most beautiful

. . . . An object of remembrance owned by a private party that is located on public property and that is the subject of a legal agreement between the private party and the State or a political subdivision of the State governing the removal or relocation of the object.
. . . . An object of remembrance for which a building inspector or similar official has determined poses a threat to public safety because of an unsafe or dangerous condition.

247. History & Architecture, DUKE UNIV. CHAPEL, https://chapel.duke.edu/about-chapel/history-architecture (last visited Jan. 3, 2022) (Lanier served in the Confederate army and was endorsed by the UDC).
249. See id.
250. See id.
251. Id.
vistas on any campus in America. Many are moved by its physical beauty which betrays no overt indication of the institution’s racist history. On one end of the quad students sip water from the Old Well and pose for photos. Many return to the spot to take wedding portraits. The grand quad is bordered by a wall, made from stones fit together carefully, as none are alike. Nothing on the main quad indicates that from 1793 through 1951, African Americans were barred from admission. 253 No marker reveals how much of the campus was built by enslaved persons and how many endowed chairs, buildings, streets, classrooms, dorms and plaques are named for those who owned slaves and fought to protect slavery as an institution. The stone wall surrounding the campus has no marker indicating its origin. But in the library’s digital archives, this description can be found in an unpublished dissertation:

Framing the university campus, passing just feet in front of the President’s house, the Soldiers Monument, and Battle-Vance-Pettigrew Dormitories, were fieldstone walls. Slaves built the rock walls that surrounded the university. They received nothing for the work of hauling the huge stones or the skill required to set them properly in place. The university paid their masters. The university educated the sons of slave owners, while slaves and the children of slaves, up until 1951, could not gain admission to UNC. 254

From 1913–2019, towering on his pedestal in the heart of UNC’s historic quad, the statue of an armed Confederate soldier stood eight feet above his pedestal, firmly holding a shotgun in both hands. He faced Franklin Street, the main road adjacent to campus, as though he were guarding the University from those who were not welcome. The UDC contributed money to fund the monument, but it was ultimately commissioned and purchased by the University. 255 On the pedestal was a plaque of a student dropping books to the ground to celebrate the righteousness of putting duty to the Confederate cause over his life and studies.


254. Id. at 115.

255. Susan Svrluga, Judge overturns UNC’s deal giving Silent Sam statue to a pro-Confederate group, WASH. POST (Feb. 12, 2020), https://www.washingtonpost.com/education/2020/02/12/judge-overturns-uncs-deal-giving-silent-sam-statue-pro-confederate-group/ (“[T]he United Daughters of the Confederacy contributed about a third of the $7,500 cost of the statue. Alumni raised the other two-thirds. The university contracted with the sculptor and paid for the statue, which was delivered to UNC and erected in 1913.”).
On June 2, 1913, at the monument’s public dedication, Confederate war veteran Julian S. Carr spoke to the gathered audience. He said, “The present generation, I am persuaded, scarcely takes note of what the Confederate soldier meant to the welfare of the Anglo Saxon race... if every State of the South had done what North Carolina did... the political geography of America would have been re-written.” He then told this story: “less than ninety days perhaps after my return from Appomattox, I horse-whipped a negro wench until her skirts hung in shreds, because upon the streets of this quiet village she had publicly insulted and maligned a Southern lady, and then rushed for protection to these University buildings.” From that moment, Carr’s words ensured that Silent Sam would echo a message of misogyny, violence, and indignity in addition to white supremacy. The statue’s erection was not an isolated incident of racism. In the same year that it was unveiled, the UDC “unanimously endorsed and promoted for use in schools a history of the KKK that praised the heroic work they did to preserve white supremacy. Putting up these statues was unambiguously part of the white supremacist movement of the Jim Crow era.”

For more than a century, Silent Sam held his position among dorms, administrative offices, classroom buildings and a favorite destination of school-age children, the Morehead Planetarium. In the 1960s, the statue became a focal point for repeated demonstrations protesting its message.

256. Julian S. Carr, Unveiling of Confederate Monument at University (June 2, 1913) (transcript on file with UNC-Chapel Hill Libraries). The transcript is also available online through a third party, Julian Carr’s Speech at the Dedication of Silent Sam, Dr. HILARY N. GREEN, PhD, https://hgreen.people.ua.edu/transcription-carr-speech.html (last visited Jan. 3, 2022).
257. Id.
258. Id.
and demanding its removal. These clashes were particularly active during the 1970s. After 2015, they became more frequent and more intense.

Protesting the Presence of Silent Sam
University of North Carolina at Chapel Hill
March 24, 2018

After the Unite the Right rally in Charlottesville, protests around Silent Sam increased in frequency and volatility. Weekly, anti-racist protesters would gather around the statue. Counter protesters carrying Confederate flags would also show up, leading the University to send safety warnings urging students and faculty to stay inside. Campus security and local police were charged with the unpleasant task of keeping protesters with Confederate flags separated from angry residents, students and faculty.


263. Id.

264. Id. See also Jennifer Calfas, Why UNC’s Toppled ‘Silent Sam’ Statue Has Been a Focus Point of Protest for Decades, TIME (Aug. 21, 2018), https://time.com/5373001/silent-sam-confederate-statue-unc-racist-history/.
University leadership sent a letter alerting North Carolina’s Governor Roy Cooper to UNC Chapel Hill’s escalating safety concerns following the Unite the Right Rally in Charlottesville. They wrote that they believed UNC did not have authority to remove Silent Sam and urged Governor Cooper to take action to protect the community from violence and the monument from being damaged. 265 Governor Cooper responded that the University may lawfully remove Silent Sam, but UNC’s Board of Governors disagreed that such action was permissible under the NC preservation statute, and caught between their Board and the Governor, UNC administrators chose not to act according to the authority the Governor indicated they had. 266

265. Letter from Margaret Spellings, President, U.N.C., Carol Folt, Chancellor, U.N.C.-Chapel Hill, Lou Bissette, Chair of Bd. of Trs, U.N.C. & Haywood Cochrane, Chair of Bd. of Tr.s, U.N.C.-Chapel Hill, to Roy Cooper, Governor of N.C. (Aug. 21, 2017), https://www.heraldsun.com/news/article168515182.ece/BINARY/UNCletter3.pdf (“The safety of our students is our highest priority. Given the substantial security threats that we face at UNC-Chapel Hill in connection with Silent Sam, we believe it is essential that the State of North Carolina take necessary steps to ensure safety. We would not be able to face parents whose students are harmed in a violent confrontation if we did otherwise.”).

The decision to leave Silent Sam in place, especially after the Governor’s letter, was impossible for the community to accept quietly. The Chair of the Carolina Black Caucus, O. J. McGhee, explained that the monument is a constant reminder that it “was erected purposefully to remind all who walked in its shadow, that no matter our advancements as a people, we would always be viewed as not equal and unwelcome.”\(^{267}\) Even as UNC leadership resisted the statue’s removal, its own website

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acknowledged that many see Silent Sam as “a glorification of the Confederacy and thus a tacit defense of slavery.” After the death of Heather Heyer in Charlottesville, many academic departments issued statements asserting from their disciplinary perspective why the divisive symbol should be removed.

Inspired by the strong feelings of the students in my Art Law seminar, I led the law faculty’s effort to draft a statement supporting removal. The statement, signed by 34 law professors, stated:

The undersigned UNC School of Law faculty respectfully request that the UNC administration take immediate action to remove the monument of an armed Confederate soldier, known as Silent Sam, looming at the heart of UNC’s main campus. While we do not favor shutting down the ability of individuals to voice disagreeable opinions, we believe that the statue sends a message of white supremacy that the university should refuse to endorse.

On June 2, 1913, at the monument’s public dedication, Confederate war veteran Julian S. Carr said, “The present generation, I am persuaded, scarcely takes note of what the Confederate soldier meant to the welfare of the Anglo Saxon race . . . if every State of the South had done what North Carolina did . . . the political geography of America would have been re-written.” He then told this story: “less than ninety days perhaps after my return from Appomattox, I horse-whipped a negro wench until her skirts hung in shreds, because upon the streets of this quiet village she had publicly insulted and maligned a Southern lady, and then rushed for protection to these University buildings.” From the moment of its dedication, Carr’s racist words cemented the monument as a symbol of white supremacy, violence and indignity. Even today, UNC’s website acknowledges that many see Silent Sam as “a glorification of the Confederacy and thus a tacit defense of slavery.” To many in our community, the armed soldier expresses the idea that some in our community are not equal.

This disparaging and marginalizing symbol has no place at the core of an inclusive learning environment. We also believe that the message it sends undercuts the University’s mission “to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders.” We are particularly concerned about the statue’s symbolism given the Board of Governors’ recent ban on representation or counsel by the Center for Civil Rights.

Maintaining this monument undercuts the value of equality protected by North Carolina law and the United States Constitution. We note that federal law obliges the University to provide an inclusive learning environment free of racial hostility. Out of concern for public safety, Chapel Hill Mayor Pam Hemminger called for the monument to be moved,
law school dean and most of his administrative team refused to sign it, and instead, the dean published a letter to the Raleigh News & Observer editor, assuring Silent Sam’s defenders that our statement represented only the signing individuals, not the law faculty as a whole.271

Maya Little, a graduate student of history at UNC, attended many of the demonstrations, handed out fact sheets and patiently explained the racial history of the University to all who would stop and listen. She was one of the leaders of the protest movement.272 I remember watching her respond to a white woman who said that without slavery, Blacks would not have learned to read. Little patiently explained that, in fact, slaves were not permitted to learn to read. But as North Carolina’s inaction continued, the protesters pushed harder to express their message, and Little was “arrested for covering Silent Sam with her own blood and red paint as a demonstration against the monument.”273 Frustrated by the disconnect between the professed values of the University and its inaction, a group of citizen activists pulled Silent Sam to the ground on August 20, 2018.274 While 250 UNC students, faculty and local residents watched, a group of protesters, using ropes and screens to hide their identities, pulled the monument down from its pedestal at 9:20 p.m.275 Local police stood back from the crowd, approaching only to make sure no one was hurt as Silent Sam crashed down.276 That night, multiple people were arrested for assault, disorderly

and North Carolina Governor Roy Cooper advised UNC that North Carolina law permits the University to remove or relocate the statue.

We stand with our students and faculty who have sought legal counsel to request the statue’s removal in order to affirm their dignity and equal place in our community. If the University remains uncertain of its legal ability to act, we ask it to seek a declaration in court to affirm UNC’s right to remove the statue. This path would spare our students and faculty from the distraction, expense and pain of suing their home institution. As our students and community look to the UNC administration and faculty for guidance, we must answer them with meaningful action. For all of these reasons, we request the immediate removal of this divisive symbol to affirm our commitment to the value of equality enshrined in the United States Constitution.


273. Id.

274. Id.

275. Id.

conduct and resisting police officers. In the 2017-2018 academic year, the University had to pay over $390,000 in additional security to maintain some semblance of peace on campus.

On December 3, 2018, Chancellor Carol Folt and the UNC Board of Trustees announced a plan to put Silent Sam in a new building on campus that would cost $5.3 million to build and $800,000 per year to maintain. Folt said the plan was the best option because it would adhere to state monument law, “protect public safety, preserve the monument and its history, and allow the University to focus on its core mission of education, research, economic stimulation and creating the next generation of leaders.” The Board of Governors rejected the idea because of “safety and cost concerns.”

In 2019, the SCV threatened to sue UNC and its Board of Governors over Silent Sam’s removal. On November 27, 2019, UNC announced that the parties had reached a settlement in which UNC would give the SCV Silent Sam and $2.5 million to preserve it in exchange for the SCV’s promise not to erect it in any county with a UNC campus. Once these terms were publicly disclosed, faculty, students, and community members were outraged. UNC historian William Sturkey said, “I don’t even have words for how insane this is . . . It’s like something out of a movie. Obviously, we should stop subsidizing the Confederacy.”

A group of UNC students, alumni and faculty hired counsel to intervene in the suit and stop the settlement. The goal of the lawsuit was to

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280. Id.


283. Id.


have a judge “nullify the consent order and dismiss the SCV’s complaint for lack of jurisdiction.” On February 12, 2020, Judge Allen Baddour dismissed the Silent Sam settlement, holding that the SCV lacked standing. Following the decision, the SCV expressed their desire to have Silent Sam re-erected on UNC’s campus. UNC Chancellor Kevin Guskiewicz refused to allow that to happen. Judge Baddour ruled that “the trust fund be dissolved and the money returned to the UNC system,” but the SCV did not fully comply because $82,000 had already been spent on attorney’s fees.

Although Silent Sam was gone, his pedestal continued to attract demonstrations until January 15, 2019, when Chancellor Folt had it removed on the same day she announced her resignation. In her resignation speech, Folt said she would serve until after graduation in May but before the end of that day, the Board of Governors announced that she would be leaving by January 31, 2019. When reporters asked whether the pedestal removal was associated with her resignation, she said, “That’s not how I’ve thought about it. I try to do the right thing regardless of that effect on my job situation.” However, Folt had mentioned that she was concerned about the safety of students at the pedestal site in her resignation announcement.

Silent Sam and his pedestal remain in storage at an undisclosed location. Unlike the empty space at Duke, the UNC campus has no marker

289. McClellan, supra note 284.
291. Id.
293. Barnett, supra note 292; Michaels et al., supra note 292.
294. Michaels et al., supra note 292.
295. Id.
296. Barnett, supra note 292; Michaels et al., supra note 292.
explaining this history. The final unpleasant chapter in UNC’s experience with its Confederate monument may have been avoided if University counsel and its leadership had the will to assert a federal basis for removal that could have preempted the Board’s interpretation of the state preservation statute. The next section explores that possibility.

III. FEDERAL LAW

Although precedent has developed in a way that blocks some paths towards removal, others remain open. First, this Part will explain why some federal legal doctrines, once thought promising, are now foreclosed. The expressive protections of First Amendment and Copyright law provide little if any room for private actions against state actors. Although the First Amendment has been asserted by both those who would seek to keep and remove controversial public monuments, the government speech doctrine has thwarted all of these claims. Typically, copyright law will also have limited, if any, impact on removal decisions. Many of the copyrights in Confederate monuments will have expired, and copyright law’s Visual Artist Rights Act has built in limitations that make it an unlikely source for asserting removal or maintenance. Federal preservation laws designed to protect historic memorials are sufficiently malleable to have little effect in the debate. Finally, this Part explores a federal alternative that may be more promising. The Civil Rights Act of 1964 may provide a basis for claims that Confederate monuments create a racially hostile work or educational environment, providing future litigants with grounds for removal when other federal and state arguments have failed.

A. First Amendment Claims

The First Amendment to the United States Constitution guarantees freedom of expression, but not in every context. This expressive right is personal. It was designed to prevent government censorship and does not guarantee anyone access to every platform for their message. In considering whether First Amendment analysis of a removal decision is warranted, one must first identify the speaker, the challenger, and the context. The First Amendment is implicated when the speaker is a private citizen and those shutting down the speech are government actors. A close reading of

297. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).
precedent is necessary to disentangle speech subject to constitutional scrutiny from expression that is insulated from First Amendment analysis.

Controversial public monuments that exist in public spaces are often installed by government actors. Generally, First Amendment analysis does not apply to government decisions about its own messaging. In *Pleasant Grove City v. Summum*, the Supreme Court considered whether a religious organization’s Free Speech rights were infringed when the City of Pleasant Grove refused to erect Summum’s proposed monument of the religion’s founding principles in a public park near a monument of the Ten Commandments. Summum was not trying to remove an existing monument; the religious organization sought to add a monument expressing their beliefs in seven aphorisms. The City’s refusal to accept the monument led to a First Amendment challenge.

The Supreme Court held that monuments on public land are “government speech” and therefore, not subject to First Amendment analysis. Although voters elect the government, their opinions on public monuments end after their ballots are cast. Once elected, state officials have the power to determine the expression that will dominate public spaces. The Court explained that “[a] monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.” Summum’s inability to add its perspective was found not to implicate private speech at all. Following this reasoning, the Court held that “the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.” The Court clarified that “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.

Private funding of public art does not change the analysis. Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that

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299. Id. at 465.
300. Id.
301. Id. at 466.
302. See id. at 464, 467–70.
303. See id. at 472.
304. Id. at 470.
305. See id. at 472.
306. Id. at 464.
307. Id. at 467.
the government accepts and displays to the public on government land.”  

The Court reasoned that “persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.”

However, *Summum* should not be read as a decision that fully insulates public monuments from constitutional scrutiny. The Court expressly left open the possibility that alternative grounds could be used to challenge government decisions about monuments. The Supreme Court unequivocally left space for exceptions, noting that its decision “does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.”

If the government were to erect a public monument that promotes a particular religious belief, courts would swiftly order it taken down if it violated the First Amendment’s Establishment Clause. This restraint has been invoked to prompt removal of a religious monument in a state government building. The Establishment Clause of the First Amendment, “made binding upon the States through the Fourteenth Amendment to the United States Constitution, provides that government ‘shall make no law respecting an establishment of religion.’”

In 2001, Chief Justice Moore of the Alabama Supreme Court erected a 5280-pound granite monument of the Ten Commandments in the rotunda of Alabama’s state courthouse. Those who entered the building seeking justice would encounter it immediately. Three lawyers filed suit asserting that the installation violated the Establishment Clause. In *Glassroth v. Moore*, the District Court held in favor of the plaintiffs and awarded them attorney’s fees. While *Glassroth* established that not all government monuments are immune from judicial scrutiny, it leaves open the question raised in *Summum* of what other “restraints” might be placed on government speech. This question

308. *Id.* at 470–71.
309. *Id.* at 471.
310. *Id.* at 468.
313. *Id.* at 1294. The building houses the Alabama Supreme Court, Court of Criminal Appeals, Court of Civil Appeals, and the Court of Civil Appeals. *Id.*
314. *Id.* at 1319. The Eleventh Circuit Court of Appeals affirmed the ruling although it remanded for an adjustment to the fee award. *Glassroth v. Moore*, 347 F.3d 916, 917 (11th Cir. 2003).
will be revisited in Section D which considers whether federal Civil Rights laws may provide an additional restraint.

Because the government speech doctrine leaves expressive choices to government officials, it provides a solid foundation for states to erect, keep, or remove public monuments. In *Walker v. Texas*, the Court applied the government speech doctrine to Confederate imagery after Texas refused to issue license plates featuring an image of the Confederate flag. The Fifth Circuit Court of Appeals held that this decision amounted to viewpoint-based discrimination in violation of the First Amendment. The Supreme Court reversed, holding that the license plate designs are government speech insulated from First Amendment scrutiny. The Court reasoned that historically, citizens have viewed license plates as content issued by states, similar to government issued identification cards like a driver’s license. Therefore, unlike the text of a bumper sticker which is selected individually, the message on a license plate would be viewed as coming from the government. Additionally, Texas has traditionally controlled the messages on state-issued plates. For all of these reasons, the Court held that a state may choose which viewpoints appear on state-issued plates, explaining that even if Texas issues plates celebrating a particular school, it need not issue a plate that is anti-education.

More recently, the Supreme Court clarified the boundaries of the government speech doctrine in another case involving race. In *Matal v. Tam*, the leader of an Asian American electronic dance band sought to reclaim the word “slants” and register it as a trademark. The United States Patent and Trademark Office (USPTO) denied Tam’s application on the ground that the term was disparaging to persons of Asian descent.

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317. *Walker v. Texas*, 576 U.S. 200, 208. The Court described the design as follows: “At the bottom of the proposed plate were the words ‘SONS OF CONFEDERATE VETERANS.’ At the side was the organization’s logo, a square Confederate battle flag framed by the words ‘Sons of Confederate Veterans 1896.’” *Id.* at 206. (“The Board explained that it had found ‘it necessary to deny th[e] plate design application, specifically the Confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable.’ The Board added ‘that a significant portion of the public associate the Confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.’”)(citations omitted).
320. *Id.* at 212.
321. *Id.*
322. *Id.* at 213.
323. 137 S Ct. 1744 (2017).
324. *Id.* at 1747.
and violated a provision of the Lanham Act that barred registration of words and symbols that may disparage a particular group of people. The Supreme Court found the Lanham Act’s disparagement bar to be an unconstitutional violation of the Free Speech clause of the First Amendment. It cautioned that “while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse.” Because trademarks originate from private speakers and federal registration does not amount to government endorsement of brand messaging, trademark registrations do not constitute government speech.

Notwithstanding this precedent, both sides of the Confederate monument debate have tried to assert First Amendment claims to advance their causes. Confederate organizations have tried to recruit the power of the First Amendment to oppose monument removals on the ground that removal eliminated speech of vital significance to them. In order to litigate a First Amendment challenge, an aggrieved plaintiff must first show standing through evidence that a personal expressive right was violated. Several federal courts have held that none exists in this context. Confederate organizations have argued that removal of Confederate monuments resulted in expressive harms. These claims failed because the plaintiffs were not able to demonstrate that their personal expressive rights were impacted by government removal of a monument.

After the University of Texas removed several Confederate monuments from its campus, the SCV and several individuals filed suit in federal

325. Id. at 1751.
326. Id. at 1765.
327. Id. at 1758.
328. Id. at 1759–60.
331. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining, in the First Amendment context, that plaintiff must have experienced a concrete and particularized injury in fact that is fairly traceable to the defendant and that is likely to be redressed by a favorable decision).
332. See e.g., McMahon v. Fenves, 946 F.3d 266, 270 (5th Cir. 2020).
333. Id. at 271–72
court claiming the removal violated their First Amendment rights. The individual plaintiffs were descendants of Confederate veterans, and one traced his lineage to an original donor of the monuments. The district court dismissed the case finding that “Subjective ideological interests—no matter how deeply felt—are not enough to confer standing.” The plaintiffs identified no particularized injuries to support their claims. In dismissing their complaint, the District Court explained that “a general action taken by the University to remove an inanimate object, which bears no relation . . . other than a shared ideological interest” fails to confer standing. The Fifth Circuit explained that the “fundamental and fatal flaw with Plaintiffs’ argument is that they conflate agreeing with speech with authoring speech,” and concluded that “ties” to the Confederacy were insufficient to establish standing.

Local governments have also tried to invoke *Summum* in seeking to remove Confederate monuments. In Lakeland, Florida, a twenty-six foot Confederate monument had presided over the city’s historic district since 1908. In 2018, Lakeland officials voted to move the statue to Veterans Park, prompting Southern heritage groups to sue the city. The plaintiffs claimed the relocation decision violated their First Amendment free speech rights and Fourteenth Amendment due process rights. The federal district court dismissed the First Amendment claim on the merits and the Fourteenth Amendment claim for lack of standing. On appeal, the Eleventh Circuit held that the plaintiffs lacked standing on both claims. It explained that the plaintiffs’ injuries were “neither concrete nor

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334. McMahon v. Fenves, 323 F. Supp. 3d 874, 878 (W.D. Tex. 2018), aff’d, 946 F.3d 266 (5th Cir. 2020) (“McMahon claims that the University’s removal of the statues and impending obscuration of the plinths of the statues violates his right to free speech under the First Amendment. In ‘abridging the political speech of the movement,’ McMahon claims that the University abridged his own right to hold a dissenting political viewpoint. . . . The Sons [of Confederate Veterans] also claim a First Amendment injury on behalf of its members because its members ‘dissenting political viewpoint [ ] was communicated by the Littlefield statues.’”).

335. Id. at 877–78.

336. Id. at 879–80.

337. Id. at 881.

338. McMahon v. Fenves, 946 F.3d 266, 272 (5th Cir. 2020).

339. Id. at 270–72.


341. Id.


343. Id. at 1278.

particularized” because their “assert[ed] interests in ‘preserving the history of the south,’ ‘vindicating the cause for which the Confederate Veteran fought,’ ‘protecting and preserving Memorials to American veterans,’ and ‘expressing their free speech from a Southern perspective’… [were] simply too vague, inchoate, and undifferentiated.”

In Alabama, the city of Birmingham wanted to change the message expressed by the fifty-two foot Confederate monument looming over one of the city parks. In an effort to comply with Alabama’s preservation statute, the city left the monument intact but installed twelve foot high plywood screens to obscure much of the monument from view. The State filed a declaratory judgment action demanding that the screens be removed. Pursuant to the preservation statute’s penalty provision, the State demanded a $25,000 penalty for each day the city obscured the monument from view.

The city asserted that Alabama’s preservation law violated the First Amendment by forcing it to engage in speech contrary to the will of its citizens. On cross motions for summary judgment, the trial court ruled in favor of the City because the Alabama law “impermissibly denied the City ‘its right to government speech’ by ‘forcing the City to speak’ a message it did not wish to convey . . . .”

The Appellate Court reversed, on the ground that municipalities do not have speech rights separate from the state. It supported this argument with Alabama and Supreme Court precedent, providing, “[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.” Quoting Summum, the Court explained that rather than giving the municipality rights, the government speech doctrine denies the municipality the ability to express “government speech” independent of the state, adding that “a

345. Id. at 1337 (internal alterations omitted).
348. Id. at 224.
349. Id.
350. Id.
351. Id. at 225 (holding that “the Act violated the City’s Fourteenth Amendment due-process rights because the Act . . . failed to provide a procedure by which the City could petition the committee for a waiver that would allow it to relocate, remove, alter, rename, or otherwise disturb the monument.”)
352. Id. at 233–34, 238.
353. Id. at 228 (quoting Williams v. Mayor & City Council of Baltimore, 289 U.S. 36 (1933)).
determination that a certain form of expression is government speech means that the ‘Free Speech Clause has no application.’”354 The Court rejected the argument that municipal corporations are analogous to private corporations which do have free speech rights like private individuals.355 The Court affirmed the constitutionality of the statute356 but awarded only a single $25,000 penalty.357

This precedent indicates that state governments hold the power to engage in government speech, while local governments, as political subdivisions of the state, do not share that freedom. When a state chooses to erect, maintain, or remove a monument, the government speech doctrine will often insulate its choices from First Amendment scrutiny. The Supreme Court’s interpretation of the government speech doctrine gives states the freedom to speak the view of those who hold power in state government while denying the expressive rights of civic organizations and municipalities. As the Supreme Court explained, “government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.”358

Given this precedent, one might be tempted to conclude that governments are immune from accountability with respect to the monuments they erect if government actors selected the message. However, the doctrine does have its limits. It is important to remember that the Establishment Clause provides important exceptions and that in Summum, the Supreme Court suggested there may be other restraints.359

Some state action may be the subject of constitutional analysis notwithstanding the government speech doctrine. Supreme Court precedent predating Summum provides that the First Amendment may constrain government speech if the government seeks to compel private persons to convey the government’s message.360 Alternatively, if a government were to open a public forum for monuments and prevent one position from being depicted, there would be a clear violation of the First Amendment because

354. Id. at 229 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009)).
355. Id. at 231-33.
356. Id. at 235.
357. Id. at 237.
359. Summum, 555 U.S. at 468-69.
360. See e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (holding that the state could not constitutionally require students to recite the Pledge of Allegiance because the state may not permissibly impose beliefs and attitudes in the minds of citizens); Wooley v. Maynard, 430 U.S. 705, 716 (1977) (holding that the state’s interest in disseminating an ideology does not outweigh an individual’s First Amendment right to choose not to be a bearer of a particular message).
the government would have engaged in viewpoint or content-based discrimination. Another possibility for regulation is triggered by religious imagery. Erecting a monument for a religious purpose that endorses a religious viewpoint may violate the Establishment clause of the First Amendment. In Part 0, we will consider whether the erection and maintenance of monuments may violate federal Civil Rights laws grounded in the Constitutional value of equality.

B. Federal Historic Preservation Laws

Federal laws governing the preservation of historic landmarks may provide grounds for prosecuting those who tear down or deface public monuments. On June 28, 2020, as Black Lives Matter protests occurred across the nation, President Donald Trump signed an executive order stating that his administration would “prosecute to the fullest extent permitted under Federal law . . . any person or any entity that participates in efforts to incite violence or other illegal activity in connection with the riots and acts of vandalism” targeting “revered American monuments such as the Lincoln Memorial.” Trump’s order described the Black Lives Matter protesters as “rioters, arsonists and left-wing extremists . . . that call for the destruction of the United States System of government.” Instead of emphasizing the many Confederate monuments that were targeted, the order stated:

Key targets in the violent extremists’ campaign against our country are public monuments, memorials, and statues. Their selection of targets reveals a deep ignorance of our history, and is indicative of a desire to indiscriminately destroy anything that honors our past and to erase from the public mind any suggestion that our past may be worth honoring, cherishing, remembering, or understanding. In the last week, vandals toppled a statue of President Ulysses S. Grant in San Francisco. To them, it made no difference that President Grant led the Union Army to victory over the Confederacy in the Civil War, enforced Reconstruction, fought the Ku Klux Klan, and advocated for the Fifteenth Amendment, which guaranteed freed slaves the right to vote. In Charlotte, North Carolina, the names of 507

363. Id.
veterans memorialized on a World War II monument were painted over with a symbol of communism. And earlier this month, in Boston, a memorial commemorating an African-American regiment that fought in the Civil War was defaced with graffiti. In Madison, Wisconsin, rioters knocked over the statue of an abolitionist immigrant who fought for the Union during the Civil War.\footnote{364}

While the order was correct in pointing out the indiscriminate nature of some of the violence, it unfairly portrayed those protesting in favor of equality as fundamentally anti-American. Instead of acknowledging that the protesters were advocating for the nation to honor the Constitutional ideal of equality, the order directed that action be taken against the “mobs” and local governments that, in his view, tolerated them. The order threatened to withhold government grants from state and local governments that “appear to have lost the ability to distinguish between the lawful exercise of rights to free speech and assembly and unvarnished vandalism,” privilege “the violent impulses of the mob over the rights of law-abiding citizens,” fail to “defend the fundamental truth that America is good, her people are virtuous, and that justice prevails in this country to a far greater extent than anywhere else in the world,” and accept “the idea that violence can be virtuous and have prevented their police from enforcing the law and protecting public monuments, memorials, and statues from the mob’s ropes and graffiti.”\footnote{365} These value propositions wholly ignore that when monuments were targeted by organized BLM protestors and civil rights activists, they were generally focused on statues to the Confederacy.

The legal provisions the order was meant to bolster, do not have much impact on the Nation’s monumental landscape. Federal preservation laws do not apply unless the state action involves federal funding to provide “a federal hook,” and even then, only “if parties fail to appropriately engage in the consultation process” can a plaintiff use the statutes “as a vehicle to challenge removal.”\footnote{366} When private actors or state officials seek to remove a monument, this “federal hook” may not be present.

\footnote{364. Id.}
For example, in *Monumental Task Comm’n., Inc. v. Foxx*, the plaintiffs asserted federal statutory causes of action claiming that removal of a Confederate monument would violate the Department of Transportation Act, the National Historic Preservation Act and the Veterans Memorial Preservation and Recognition Act. Because the statue was to be removed with private funding, the Court found no violation of the Transportation or National Historic Preservation Acts. It explained, “Plaintiffs have not demonstrated any nexus between a federally-funded project or undertaking and the removal of the monuments at issue.”

On federal property, more stringent restrictions apply. The Commemorative Works Act restricts the construction of new monuments and memorials on the National Mall. It states that a work honoring an individual “may not be authorized until after the 25th anniversary of the . . . death of the individual . . .” This statute would prohibit a sitting president from directly placing a self-referential statue in the U.S. Capitol, but the Act’s definition of a “commemorative work” does not include “any such item which is located within the interior of a structure or a structure which is primarily used for other purposes.” Recent amendments to this law have undercut Trump’s defense of Confederate memorials. In December 2020, Congress overrode Trump’s presidential veto to enact into law a

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368. 49 U.S.C. § 101 et seq.
371. Monumental Task Comm’n., Inc., 157 F. Supp. 3d at 590. (“As a locally-funded project, the removal of the monuments would not be subject to the DOT Act unless it was improperly segmented from a federally-funded project.”).
372. Id. at 591.
373. Phelps & Owley, supra note 366, at 652.
374. The Commemorative Works Act, 40 U.S.C. §§ 8901–8909 (2018). (“The purposes of this chapter are . . . to ensure that future commemorative works in areas administered by the National Park Service and the Administrator of General Services in the district of Columbia and its environs—(A) are appropriately designed, constructed, and located; and reflect a consensus of the lasting national significance of the subjects involved.”); Id. § 8901(4).
375. Id. § 8902(a)(1).
requirement that federal military bases be renamed if they honor a person who fought for the Confederacy.\textsuperscript{376}

Additional legislation is in place for specific locations of unique symbolic meaning. In 1857, the House of Representatives relocated its place of primary business from the rotunda to the larger chamber at the United States Capitol where it sits today.\textsuperscript{377} When they no longer needed the grand rotunda for legislative business, Vermont Representative Justin S. Morrill proposed that it house statues and busts, “as each State shall elect to be deserving of in this lasting commemoration.”\textsuperscript{378} On July 2, 1864, Congress enacted legislation permitting each state to furnish up to two statues in marble or bronze “of deceased persons who have been citizens thereof, and illustrious for their historic renown or for distinguished civic or military services such as each State may deem worthy of this national commemoration.”\textsuperscript{379} In 1870, the first statue was installed in the National Statuary Hall Collection, and by 1990, forty-five states had contributed two statues each.\textsuperscript{380}

Through this process, more than a dozen statues of Confederates or white supremacists\textsuperscript{381} were installed in the U.S. Capitol, including ones of Confederate cavalryman Joseph Wheeler, who led a massacre against hundreds of freed slaves in 1864,\textsuperscript{382} Charles B. Aycock, an instigator of the Wilmington massacre who was elected governor of North Carolina on a platform of white supremacy,\textsuperscript{383} and Roger Brooke Taney, who wrote the

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\textsuperscript{380} The National Statuary Hall Collection, supra note 378; The Art Collection, ARCHITECT CAP., https://www.aoc.gov/explore-capitol-campus/art?search&artist=All&collection%5B119%5D=119&state=All&location=All (last visited Oct. 8, 2021) (providing online access to search the collection by artist, type of object, donor state, and location within the Capitol).


\textsuperscript{382} Id.

Supreme Court’s infamous Dred Scott v. Sandford opinion that denied U.S. citizenship rights to all Black Americans.  

On July 22, 2020, the U.S. House voted 305 to 113 to remove all Confederate monuments from the Capitol building. The bill also sought to remove the bust of Taney and replace it with one of Thurgood Marshall because Taney’s authorship of Dred Scott renders him “unsuitable for the honor of display to many visitors to the United States Capitol.” The bill further sought “to remove all statues of individuals who voluntarily served the Confederate States of America” and prohibit depictions of “persons who served as an officer or voluntarily with the Confederate States of America or of the military forces or government of a State while the State was in rebellion against the United States.” The legislation was not acted upon by the Senate.

The legislation would have directed the Architect of the Capitol to identify existing statues that do not comply with the revised law and arrange for them to be returned to their home states within 120 days. Currently, for a state to initiate removal or replacement, its Governor and state legislature must agree on an appropriate substitute. Absent congressional action, states may independently petition to withdraw their contribution and substitute another. Although such action may seem unlikely, it has happened. In 2019, Arkansas petitioned to withdraw two figures who held racist beliefs and replace them with marble statues of the musician Johnny Cash and civil rights leader Daisy Lee Gatson Bates.

386. H.R. 7573, 116th Cong. (2020) (The law was intended to banish statues of Confederate figures and leaders who pushed white supremacist agendas from the Capitol.).
387. Id. § 1(a)(2).
388. Id. § 3(a).
389. Id.
390. Id. § 3(b)(1)-(2).
391. 2 U.S.C. § 2132(a)(1)-(2)(B) (2018). Guidelines for the Capitol statuary consider eligible subjects and material, details of the pedestal (for example, it must be hollow to reduce the statue’s weight), the inscription, the statue’s size and weight (for example, it should be “over life-size”), and even on the patina. ARCHITECT OF THE CAPITOL, OFFICE OF THE CURATOR, PROCEDURE AND GUIDELINES FOR REPLACEMENT OF STATUES IN THE NATIONAL STATUARY HALL COLLECTION 2-3 (2014), https://www.aoc.gov/sites/default/files/statueReplacement_guidelines_2014.pdf.
The National Historic Preservation Act (NHPA)\textsuperscript{393} and the National Environmental Policy Act (NEPA)\textsuperscript{394} govern monuments placed on the National Register. Places, buildings, and monuments may be added if they are of sufficient significance, quality, and integrity to meet the federal criteria.\textsuperscript{395} Once placed on the National Register, federal regulations restrict the ability to remove and relocate the object, however, one may petition for the item to be removed from the register to make relocation more practicable.\textsuperscript{396}

In sum, numerous federal laws have been enacted to protect historical monuments. While none of these federal statutes truly provides a basis to prevent or force removal, they do provide mechanisms for advocates to provoke reconsideration of public art and potential paths towards collaborative contextualization or removal.

C. Copyright Law

Due to their age, most Confederate monuments are unlikely to be protected by copyright law, but provisions protecting fine art may permit contemporary artists to enjoin demolition of their work. Works published without a copyright notice before 1976 immediately entered the public

\begin{itemize}
  \item[395.] See 36 C.F.R. § 60.4 (2020) (“The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and object that possess integrity of location, design, setting, materials, workmanship, feeling, and association and
  \begin{itemize}
    \item[(a)] that are associated with events that have made a significant contribution to the broad patterns of our history; or
    \item[(b)] that are associated with the lives of persons significant in our past; or
    \item[(c)] that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or that have yielded, or may be likely to yield, information important in prehistory or history; or
    \item[(d)] that have yielded, or may be likely to yield, information important in prehistory or history.”)
  \end{itemize}
  \item[396.] See 36 C.F.R. § 60.14(b)(1)-(2) (2020) (“Properties listed in the National Register should be moved only when there is no feasible alternative for preservation. When a property is moved, every effort should be made to reestablish its historic orientation, immediate setting, and general environment.”).
\end{itemize}
Public display alone does not amount to publication. But if a U.S. work was displayed in a matter that permitted unrestricted photography before 1989 and was not marked with a copyright notice, copyright protection would have been lost. Copyright in a work created by an independent artist (and not an employee) lasts throughout the artist’s life plus seventy years. Therefore, some Confederate monuments created in the twentieth century may remain protected. However, once a sculptor sells a copy of a work, the sculptor loses the ability to prevent a purchaser from destroying or moving the work unless it is protected by the Visual Artist Rights Act (“VARA”). VARA grants artists the exclusive right “to prevent any destruction of a work of recognized stature” and may be used to stop or punish destruction of public art such as graffiti. However, in many cases, VARA would not apply to Confederate monuments.

As noted above, some works will have entered the public domain by publication without notice or because their copyright term expired. VARA does not protect works in the public domain. Another limitation is that VARA does not cover all works currently protected by U.S. copyright law, such as “works made for hire.” VARA only protects works created by independent artists, not those created by employees in the scope of their employment. Confederate monuments created by firms would be excluded from VARA’s protections based on the identity of the copyright owner. Many monuments fall in this category as the Monumental Bronze Company of Bridgeport, Connecticut sold generic statues of soldiers through trade catalogues, and then offered purchasers the opportunity

397. See Act of Mar. 4, 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (repealed 1976) (providing that “[a]ny person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor”).


405. Id.
to affix their own text. Sculptures qualify as “works of visual art” under VARA only if they are created by an independent artist and exist “in a single copy . . . [or] in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.”

When a work falls within this limited definition, VARA may empower an artist to prevent the work from being modified or destroyed. However, the rights granted by VARA are limited compared to other copyrights. Generally, an artist’s copyright endures for his or her life plus 70 years. The moral rights conferred by VARA must be asserted by the artist and expire immediately upon the artist’s death. Because so many Confederate monuments were designed and installed early in the twentieth century, most of the artists who created them would not be alive to assert rights under the Act, and many of the copyrights that once existed in such works will have expired, leaving the work in the public domain and the right of public display in the hands of anyone who owns the object. However, a living sculptor of a monument may have a claim against anyone who “distorted, mutilated or modified” the work. Such a claim could be brought, for example, by Kehinde Wiley during his life, if Rumors of War suffered from vandalism, destruction, or other acts prohibited by VARA.

Another limitation is that a VARA claim may only be asserted by the original artist, and to honor contemporary values, an artist may choose not to assert these rights. Destruction of art may be viewed as a further act of creation adding meaning to the original. Several examples of artists choosing not to assert rights under VARA have been widely publicized. Sam Durant created a wooden “Scaffold” to provoke reflection on capital punishment and to commemorate the appalling treatment of the Dakota

408. Id. § 106A.
409. Id. § 302(a).
410. Id. § 106A(d)(1). The statute does provide a potentially longer duration for certain works. It states that for “works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.” § 106A(d)(2).
411. Id.
412. Id. § 106A(b).
people at the hand of the U.S. government. Durant’s Scaffold was built of wood to replicate the structure where 38 members of the Dakota tribe were executed in 1862. After Scaffold was erected in the Minneapolis Sculpture Garden adjacent to the Walker Art Center, members of the Dakota tribe were deeply offended by it and asked for it to be taken down. Instead of asserting his moral rights under VARA, Durant consented to the removal and burial of Scaffold to honor the wishes of contemporary Dakota elders who insisted the wood not be burned. Durant assigned all of his intellectual property rights in the work to the Dakota people and stated, “I have learned a tremendous amount in this process, and I will not make this type of mistake in my work again, I hope.”

Like other assets, intellectual property rights generally may be transferred. However, VARA limits this possibility as well. Although VARA rights may be waived, they may not be assigned like other copyrights. One who purchases such a work does not obtain a right to bring claims under the Visual Artists Rights Act but can obtain a waiver from the artist to prevent assertion of such claims in the future.

Very few of the constitutional and statutory arguments discussed above provide clear paths to victory for anyone asserting a claim in these debates. Given that the First Amendment, federal preservation laws and copyright law do not hold much potential for resolving monument debates, the next issue to consider is whether federal Civil Rights laws provide an alternative foundation for legal action.

D. Federal Civil Rights Act

The Federal Civil Rights Act of 1964 created a means for challenging racially hostile work and educational environments. Title VI provides that, “No person in the United States shall, on the ground of race, color,
or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” President John F. Kennedy explained that the Act was designed to free U.S. citizens from the necessity of living under institutionalized racism:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.

Title VI applies to educational institutions including colleges and universities if any part of the organization receives federal funding. A plaintiff may demonstrate a violation of Title VI if an educational institution (1) has a racially hostile environment; (2) receives notice of the problem; and (3) does not respond adequately to redress it. The Department of Education defines a “racially hostile environment” as “one in which racial harassment is ‘severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by the recipient.’”

All schools receiving federal funds must publish anti-discrimination policies that protect students and employees. To make compliance easy, the United States government issues form posters so that information about rights against discrimination may be printed and displayed easily. Title VI of the Civil Rights Act also requires institutions to post non-discrimination policies as a condition of receiving federal money. But posting

423. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998) (citing Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (March 10, 1994)).
424. Id.
427. See 34 C.F.R. § 100.4(b) (2011) (“Every application by a State or a State agency for continuing Federal financial assistance to which this regulation applies . . . shall as a
policies articulating a commitment to equality is not enough. Federal law requires federally funded organizations to live by those values.

Both actions that an institution takes and those that it permits may be the basis of a Title VI claim. Visual imagery may contribute to a racially hostile environment. The displays leading to liability need not be long-term fixtures like monuments. Temporary images, when left unaddressed, have been deemed sufficient. Similarly, the images need not be at the symbolic center of an institution. Avoidable images, such as racist social media posts, have been found to contribute to a racially hostile environment when left unaddressed. The images need not be displayed by the organizations’ leadership. Schools have been found to contribute to a racially hostile environment for failing to reprimand students who drove cars to school displaying Confederate flags or violated school dress codes by wearing t-shirts displaying Confederate imagery. If an organization knows that community members are displaying racist imagery and fails to sanction the discriminatory conduct, it can be held responsible for contributing to a racially hostile environment.

condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

428. Monteiro, 158 F.3d at 1034 (“When a district is ‘deliberately indifferent’ to its students’ right to a learning environment free of racial hostility and discrimination, it is liable for damages under Title VI.”).

429. See, e.g., id. (finding a viable claim for hostile racial environment where, inter alia, racial slurs were written on the school walls); Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cty., 334 F.3d 928, 932 (10th Cir. 2003) (noting that the presence of racial slurs and graffiti and the allowance by the school of students wearing clothing with the “Confederate flag, swastikas, KKK symbols, and hangman nooses” or having such symbols on their cars could create a racially hostile educational environment and remanding for the district court to find whether the school acted with deliberate indifference); Green v. Jacksonville State Univ., 2017 WL 2443491, at *7, *15 (N.D. Ala. June 6, 2017) (denying school’s motion to dismiss hostile racial environment claim where Confederate flags were placed on students’ cars).

430. See, e.g., Estate of Olson v. Fairfield City Sch. Dist. Bd. of Educ., 341 F. Supp. 3d 793, 804-05, 808 (S.D. Ohio 2018) (finding that the estate of an Asian-American student had sufficiently pled a Title VI claim where she was subjected to physical and verbal abuse at school and cyberbullying on social media).

431. See, e.g., Bryant, 334 F.3d at 932; Green, 2017 WL 2443491, at *7.

432. See, e.g., Bryant, 334 F.3d at 932.

433. See id. (“[W]hen administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional
graffiti have all been found to be evidence that can contribute to a Title VI offense. Given that temporary racist displays may constitute evidence of a hostile environment, permanent displays of Confederate imagery should be sufficient as well. If institutions may be held responsible for acts of students, they should certainly be held responsible for the conduct of their leaders.

If they are, Title VI may be used by educational institutions as a basis for removing Confederate monuments notwithstanding state “preservation” laws that restrict such removal. Federal law is the “supreme law of the land” and supersedes inconsistent state statutes and actions which must be set aside when federal law is violated. As the Supreme Court noted, “In two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law.” Title XI provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Therefore, civil rights claims may preempt state laws that conflict with federal law. Such conflicts may occur in two ways, either “because ‘compliance with both federal and state regulations is a physical impossibility,’ or because the state law stands ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Although preemption doctrine is complex and nuanced, the argument for

discrimination and make the intentional choice to sit by and do nothing, they can be held liable under § 601.”).

434. See, e.g., id. at 932-34; Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 667 (2d Cir. 2012); T.E. v. Pine Bush Cent. Sch. Dist., 58 F. Supp. 3d 332, 362, 366 (S.D.N.Y. 2014) (holding that a reasonable jury could find racist graffiti, such as swastikas, indicative of racial harassment and reasoning that a jury could find the school officials’ failure to adequately address the graffiti and other racial harassment as deliberately indifferent).

435. U.S. CONST. art. VI, cl. 2.

436. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987) (plurality opinion). Title VII states: “Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.” 42 U.S.C. § 2000e-7 (2018).


preemption may be especially strong with respect to removal of Confederate monuments. A preemption argument could succeed if refusing to remove a Confederate monument to comply with a state preservation law results in a racially hostile environment that violates federal civil rights law. This preemption argument was proposed twice in recent years, but neither instance led to a judicial decision.

The first attempt was in 2017, when Hampton Dellinger, a prominent North Carolina lawyer, agreed to represent a group of Black students and faculty at UNC who were frustrated by the University's failure to take meaningful action to remove Silent Sam.439 Dellinger's childhood home was a few blocks from Silent Sam, so he literally grew up in its shadow. On behalf of his clients, Dellinger wrote a letter to the University Administration, explaining that:

As you know, UNC students have repeatedly and vigorously pled for [Silent Sam’s] removal. Just last month, several student groups again demanded Silent Sam come down, noting that they have asked University officials “over and over again” for its removal and that its presence makes “[m]inority students walk on this Campus in fear.” Students, they explained, see Silent Sam as it was originally intended, as a “method of white supremacist intimidation.” Or as another student coalition put it in explaining the call for Silent Sam’s removal: we “do not want to see racism celebrated.” Silent Sam’s message of racism and white supremacy is compounded by the failure of current campus leaders to remove the messenger. Some argue that Silent Sam must remain as a result of the General Assembly’s 2015 law prohibiting the removal of military monuments. But that position is wrong as it ignores UNC’s overriding obligation to comply with federal anti-discrimination laws. UNC is not only free to remove Silent Sam in order to adhere to federal law, it is legally obligated to do so.440

Before these arguments could be litigated in court, Silent Sam was pulled down by protestors, rendering the matter moot.441 But the arguments echo as viable options to those who would prefer to learn and live outside the shadows of Confederate monuments.

440. Id.
441. Documentary footage of this incident can be seen in the trailer for a film by Suki Hawley and Michael Galinsky, “The Commons” available at the following link: https://vimeo.com/312003625
In 2020, the assertion that Confederate imagery contributed to a racially hostile environment was raised again at the Virginia Military Institute (“VMI”), a public military academy in Lexington, Virginia. VMI students reported being subjected to lynching threats, a requirement to salute Confederate imagery and a white professor sharing fond memories of her father’s experiences in the Ku Klux Klan. After the allegations were reported in the Washington Post, VMI fired its superintendent, replaced him with the first Black person ever to serve in that role, and created a permanent diversity office. On a snowy December morning in 2020, VMI brought a crane in to remove its Stonewall Jackson monument, and in doing so, avoided litigating whether its continued presence would contribute to a racially hostile educational environment.

Schools are not the only institutions where the Civil Rights Act may prove effective in challenging the presence of Confederate monuments in public spaces. Title VII also provides a potentially powerful cause of action for those whose work environment is fraught with racial hostility. The standards of proof are similar to those in Title VI claims. Therefore, those forced to work in a racially hostile work environment created by Confederate symbols may also consider filing a Title VII claim. In support, the research outlined in Section I may be relied upon to document the adverse health consequences that can result from repeated exposure to racist imagery.

Given the limitations inherent in other federal claims and the difficulty of taking any meaningful removal action in states with “preservation” statutes, the Civil Rights Act provides a promising alternative for those who seek to substitute divisive controversial monuments with those that can unite citizens around shared values.

IV. STRATEGIC POLICY CONSIDERATIONS

Public monuments symbolize not just what we value, but what the nation most honors and wishes to elevate. Charles Reagan Wilson suggested that Confederate monuments raise another question about identity: “Are we one people or two?” Before demanding removal or contextualization, it is important to take seriously the claim that tearing down controversial public monuments may be a “Stalinist” attempt to erase history.


443. Id.

444. Guardians Ass’n v. Civil Serv. Comm’n of N.Y., 463 U.S. 582 (1983) (illustrating how courts often use Title VII proof scheme for Title VI claims).

445. Id. at 27.
that should be avoided at all costs. Mysteries are intertwined with civic identity and connections to those who came before us. They also speak volumes about contemporary civic values. If there were no removal barriers, nothing would prevent U.S. Presidents from substituting stone monuments of themselves in the grand chair of the Lincoln memorial.

For many Southerners, “to cut that tie with the symbols, with the genealogy, is for them a kind of cultural death.” For others, they represent “long-suppressed histories and memories of violence against those deemed ‘non-white’ — the kind of knowledge these statues once sealed awe in their castings, and when erected, placed beyond all questioning.” When Charlottesville, Virginia removed the two monuments that prompted the 2017 Unite the Right rally, one observer saw the removal as an affront to public discourse about historic memory. Jock Yellot, the director of the Monument Fund that filed the lawsuit opposing removal, said, “If you take it down, there’s nothing left to talk about — just an empty space . . . . There’s nothing to take a picture of, no reason for a tourist to come here, and that is a loss to the city.” In considering divergent views of removal, contextualization and maintenance, the notion of a unified national identity may seem elusive.

Before civic identity is honored through public art and statues, the first step must begin with unifying values. Honoring founding and inspirational heroes serves the value of preserving historical memory. Depicting the value of historical remembrance requires taking an honest look at what we celebrate and determining whether the images and statues genuinely reflect historical contributions. The overwhelming majority of statues in U.S. public spaces depict white men. If our monuments are to reflect an inclusive story of American history, we need to remember the contributions of women and people of color and consider why they are so often absent from honorary imagery.

Like other interpretations of history, interpretations of public spaces will evolve. In recognition of that spirit, the American History Association gave this response to the debate on whether removal of Confederate monuments erases history. It explained:

History comprises both facts and interpretations of those facts. To remove a monument, or to change the name of a school or street, is not to erase history, but rather to alter or call attention

447. Id.
449. Spencer & Levenson, supra note 110.
to a previous interpretation of history. A monument is not history itself; a monument commemorates an aspect of history, representing a moment in the past when a public or private decision defined who would be honored in a community’s public spaces.  

Therefore, the Association takes the position that removing “monuments is neither to ‘change’ history nor ‘erase’ it. What changes with such removals is what American communities decide is worthy of civic honor.”

At a time when inappropriate expression may result in brutal shaming through cancel culture, no historic figure is immune from critical reconsideration. Therefore, some citizens understandably fear the slippery slope. If Lee is removed, Washington and Jefferson and other founders of our nation may be taken down next. Given that all humans are flawed, would anyone be sufficiently worthy of elevation? Taken to its logical conclusion, no one would be left to honor.

When law does not provide an obstacle, it may still provide a model. In front of courthouses and in the center of towns, it makes sense to elevate persons whose life story teaches and inspires civic virtues. Even when law does not thwart removal, communities must reexamine whether the statues and monuments at the heart of civic organizations reflect the highest ideals of our nation. Confederate monuments have been removed in many public squares because the communities who walk beneath them have chosen not to elevate those who fought for white supremacy.

Once the original intention of the creators and funders are identified, the community may then consider whether that meaning is consistent with contemporary values. Does the monument glorify white supremacy through its design or subject matter? In reflecting on Confederate monuments in public spaces, one must not evade the important question of whether there are some destructions of monuments that are permissible, and if so, what principles can guide the choice of what may stand and what must go. When is creative destruction a social good and when is it, on balance, a harmful destruction of past memory?

The Taliban destruction of the Bamiyan Buddhas is deeply problematic given their unique cultural and historical significance. When a particular monument is a unique antiquity or generally viewed as having unique artistic, historic, or archaeological value, the arguments for its maintenance are necessarily more compelling. In criticizing the destruction, one must consider iconoclastic acts in historical context. In that spirit,

450. AHA Statement on Confederate Monuments, supra note 60.
451. Id.
those who object to removal and destruction of monuments claim that removal is an "act of the clearest Stalinism, of intellectual vandalism."453 Destruction may obliterate something of artistic value or erase shared symbols of cultural identity.

Many Confederate monuments, however, do not have unique cultural or artistic value. As noted above, generic soldiers could be ordered from catalogs. Even for those considered to be of high artistic quality, the artistry in their design may be evaluated holistically with the intention behind their creation. Sandy Levinson questioned whether such monuments are really art at all and noted that "those with political power within a given society organize public space to convey (and thus to teach the public) desired political lessons."454 Changes in political regimes often lead to changes in public spaces. "States always promote privileged narratives of the national experience and thus attempt to form a particular kind of national consciousness, yet it is obvious that there is rarely a placid consensus from which the state may draw."455

For other monuments, the physical depiction matters as well. Even if a subject is deemed worthy of continued honor, a particular rendition may signal a message out of sync with contemporary values. Soon after the death of George Floyd, the National History Museum removed a statue of Theodore Roosevelt astride a horse and flanked by two men on foot—one Black and one Indigenous. The bronze monument stood at the museum’s front door since 1940.456 The museum published the following statement to explain the removal: "The American Museum of Natural History has asked to remove the Theodore Roosevelt statue because it explicitly depicts Black and Indigenous people as subjugated and racially inferior." Mayor Bill de Blasio said in a statement, "The City supports the Museum’s request. It is the right decision and the right time to remove this problematic statue."457

Removal and destruction are not the only options. Context also matters. An object’s placement and surroundings may signal whether those currently in power share the values it reflects. A statue of a fallen Confederate soldier carries different meaning over a grave than it does on a courthouse lawn or at the symbolic heart of a public university. An object that reflects the values and practices of an historic era may have value as an

454. Id. at 7.
455. Id. at 7-8.
457. Id.
instructive counterpoint to contemporary values. The maintenance of the Anne Frank House, the gates and gas chambers of Auschwitz, and the rebuilt slave quarters at Monticello serve specific historic and educational purposes that teach us about the past while respecting contemporary values. These memorial spaces remind us how far our nations have moved from what was acceptable by those who had power in another time.

Statues may be moved or contextualized to clarify that they reflect the values of the past, not the present. As the Supreme Court observed in Summum, “the message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity.”\footnote{458} The Court illustrated this point with the Statue of Liberty which the French Republic gave to “express republican solidarity and friendship” with the United States.\footnote{459} On October 28, 1886, the Statue was unveiled.\footnote{460} At its dedication, President Cleveland described Lady Liberty “as an emblem of international friendship and the widespread influence of American ideals.”\footnote{461} It wasn’t until after 1903 when Emma Lazarus’ open-hearted poem “The New Colossus” was affixed to the base that the statue’s meaning shifted to become a beacon welcoming immigrants.\footnote{462}

The meanings of public monuments can change over time, both as symbols in themselves and whether they stand alone or speak in context with their surroundings. Plaques may add historical interpretation by those in control of the message. In this way, even a benign object can convey a dehumanizing or benevolent message. The meaning of a bare obelisk in New Orleans was inextricably connected to racism by an inscription which proclaimed in capital letters, “United States troops took over the state government and reinstated the usurpers but the national election November 1876 recognized white supremacy in the south and gave us our state.”\footnote{463}

Contextualization can also occur through the setting and surroundings. One model for recontextualizing Confederate monuments can be seen in parks of fallen monuments in Eastern Europe. In 1991, after the collapse of the Soviet Union, citizens armed with hammers and cranes tore down and broke monuments to Stalin, Lenin, and other Soviet leaders.\footnote{464}

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\begin{itemize}
  \item \textsuperscript{458} Pleasant Grove City v. Summum, 555 U.S. 460, 477 (2009).
  \item \textsuperscript{459} Id.
  \item \textsuperscript{460} Id.\footnote{\textsuperscript{461} (citing INAUGURATION OF THE STATUE OF LIBERTY ENLIGHTENING THE WORLD 30 (1887)).}
  \item \textsuperscript{461} Id.
  \item \textsuperscript{463} James W. Loewen, Lies Across America: What Our Historic Sites Get Wrong 229 (1999).
\end{itemize}
While some were moved to museums, many were dumped in a yard near the Moscow River in the center of the city. Weeds grew up around them, and contemporary sculptures were added to the park for context. A pink granite Stalin monument (its damaged nose left broken) stands next to an installation of 282 stone heads in a metal cage, symbolizing the brutal dictator’s Soviet victims.\textsuperscript{465} The sculptor, Yevgeny Chubarov, agreed to donate the work only if it would be displayed next to the Stalin sculpture.\textsuperscript{466} Although the “Muzeon Park of Arts” contains many apolitical modern works, it is widely known for its recontextualization of the dethroned Soviet leaders, and is now referenced in travel guides as the “Park of the Fallen Heroes” or “Fallen Memorial Park.”\textsuperscript{467} In Estonia, Hungary and Lithuania, similar parks display groups of toppled statues that were erected during the Soviet occupation and have since been relocated.\textsuperscript{468} These parks “dethrone dominant historical narratives that, in their traditional places of power, are tacitly endorsed.”\textsuperscript{469}

A similar recontextualization has been proposed for Confederate monuments. Two prominent geography scholars “envision a cemetery for the American South where removed Confederate statues would be displayed, perhaps, in a felled position – a visual condemnation of the white supremacy they fought to uphold.”\textsuperscript{470} Others have suggested buying the monuments and placing tombstones “written by the descendants of those they enslaved.”\textsuperscript{471} Recontextualized in this way, the felled and crumpled monuments . . . would create a somber commemorative atmosphere that encourages visitors to grieve without revering their legacy. A carefully planned and aesthetically sensitive Confederate monument graveyard could openly and purposefully undermine the power these monuments once held and acknowledging, rather than hide, the Confederacy’s roots in slavery.\textsuperscript{472}


\textsuperscript{466} Id.

\textsuperscript{467} Patowary, \textit{supra} note 464.


\textsuperscript{469} Id.

\textsuperscript{470} Id.

\textsuperscript{471} Id.

\textsuperscript{472} Id.
Contemporary artists like Kehinde Wiley and Michael Richards\(^{473}\) have created important work to help us rethink representation and memory in our public spaces. On a visit to Richmond, Virginia in 2016, Kehinde Wiley was inspired to create an extraordinarily innovative response to Monument Avenue. As noted above, *Rumors of War* challenges us to think about history, race, and power.\(^{474}\) In describing his artistic vision, Wiley wrote:

> In these toxic times art can help us transform and give us a sense of purpose. This story begins with my seeing the Confederate monuments. What does it feel like if you are Black and walking beneath this? We come from a beautiful fractured situation. Let’s take these fractured pieces and put them back together.\(^{475}\)

In 2020, *Rumors of War* was erected in front of the Virginia Museum of Art not far from Monument Avenue.\(^{476}\) In the summer of 2021, when I first had a chance to visit the work, I stepped back a few feet to get the whole thing in my camera lens. As I fiddled with my angle, I was interrupted by a white man who appeared suddenly and warned me to move—that this was private property. I had not realized I had stepped a foot off the public museum grounds and onto property owned by the United Daughters of the Confederacy. The land had once belonged to the state, until it gifted this prime location to the UDC and contributed money to building its white brick headquarters.\(^{477}\)

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475. Id.


477. Cox, supra note 58, at 74.
In the spring of 2020, the Virginia legislature revised the 1997 law to permit local governments to remove monuments that are not situated in cemeteries or on the campus of the Virginia Military Institute. By that summer, the Stuart monument was toppled by citizens of Richmond. Kehinde Wiley’s *Rumors of War* remains standing. Although it no longer stands in conversation with the Confederate statues on Monument Avenue, it still speaks to their memory, and in context with its two neighbors.

Some claim that removal is too slippery of a slope. Removal fever may go too far, erasing from our public spaces Washington, Jefferson and Lincoln given their less than perfect histories with respect to equality. Faced with this kind of discourse, some commentators have advocated for a balancing test. Rather than focusing on qualities that exclude a subject from honor, decision-makers may examine a person’s legacy holistically to discern whether—on balance—it continues to affirm contemporary values. Brett Stephens considered the arguments for and against removal and concluded, “Some deserve to be toppled. But monuments to those who sought to make the union more perfect should stand.” In order to decide whether monuments to each of these individuals might stand, the subject’s

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character and contributions may be weighed to determine whether on balance, the subject had an impact worthy of continued celebration. These are questions for each generation to ask and answer as they reimagine their public spaces.

V. CONCLUSION

Abraham Lincoln admonished citizens to “[l]eave nothing for tomorrow which can be done today.”480 He feared that popular sovereignty “enables the first few, to deprive the succeeding many, of a free exercise of the right of self-government.”481 For those who walk in the shadows of Confederate monuments, these words uttered before Reconstruction resonate with deep contemporary meaning. In order to self-govern, citizens must be free to reexamine the meaning of symbols that reign over our public spaces. Given the limitations of federal First Amendment and copyright doctrine and the challenges presented in states with “preservation” statutes, Civil Rights laws provides the most promising alternative for those who seek to substitute divisive controversial monuments with those that can unite citizens around shared values. Kehinde Wiley’s reconstruction of the Stuart monument in Richmond and the parks of fallen monuments amid contemporary works that comment on them show that removal from public spaces does not mean that history will be forgotten. It does ensure that our public spaces reflect a continued engagement with history. For our nation to remain democratic, we must be both free and willing to reflect on our values, what we want to elevate in their honor, and whether yesterday’s decisions make sense for today and tomorrow.

480. ABRAHAM LINCOLN, Fragment: Notes for a Law Lecture (July 1, 1850), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN, 1809-1865, at 81 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds. 1953).
481. Id. at 268.