

12-17-2020

## The Life and Death of Confederate Monuments

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### Recommended Citation

Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 Buff. L. Rev. 1393 (2020).

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# Buffalo Law Review

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VOLUME 68

DECEMBER 2020

NUMBER 5

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## **The Life and Death of Confederate Monuments**

JESSICA OWLEY† & JESS PHELPS††

### ABSTRACT

Confederate monuments have again received increased attention in the aftermath of George Floyd’s tragic death in Minneapolis, Minnesota, on May 25, 2020. Momentum and shifting public opinion are working toward the removal of these problematic monuments across the country. This Article seeks to provide insight for monument-removal advocates: specifically focusing on the legal issues associated with the “death” or removal of these monuments, how property law shapes and defines these efforts, and briefly examining what happens to these statues after removal. Our exploration of Confederate monuments reveals that some removal efforts occur outside of legally created processes. Both public and private entities choose to remove monuments in the face of legal barriers that either bar or slow removal. This mismatch between law and action (particularly by public actors) should lead communities to question the laws designed to keep monuments in place and

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†Professor, University of Miami School of Law. Thank you to Carl Tobias, for insight into the Richmond, Virginia monument debates; Peter Byrne, for pushing us; and Sean Hughes and Ayana Parker, for research assistance.

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whose voices should be heard during these discussions. Communities must also seriously consider their obligations regarding these monumental legacies and ensure that their removal strategies effectively address the root issues and do not simply relocate the issue to another public forum or community.

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I. INTRODUCTION<sup>1</sup>

Confederate monuments have too long served as prominent public symbols of white supremacy, emphasizing and reinforcing systemic racism in the United States.<sup>2</sup> They are rallying points for the alt-right, gathering places for the KKK, and inspiration for white supremacists such as Dylann Roof. We agree with most Americans that the time for their removal is long past.<sup>3</sup>

We first wrote about Confederate monuments in the months following the 2017 Unite the Right rally in

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1. Authors' Note: We were nearing completion of this Article when Confederate monuments began coming down in substantially greater numbers in the summer of 2020. As of this writing, all but one of our five profiled monuments have been removed from at least their initial public spaces. While we walk readers through some of the laws that come into play during typical removal efforts, we also note that in the end communities are finding ways to remove despite apparent legal obstacles. However, our examples are ones where the local governments were in favor of removal and the monuments had particularly high profiles. Hundreds of Confederate monuments remain, often without contextualization. We hope communities are able to draw upon the experiences described here to continue the removal efforts.

2. See, e.g., Annette Gordon-Reed, *Must We Allow Symbols of Racism on Public Land*, HARV. GAZETTE (June 19, 2020), <https://news.harvard.edu/gazette/story/2020/06/historian-puts-the-push-to-remove-confederate-statues-in-context>.

3. See Tim Malloy & Doug Schwartz, *68% Say Discrimination Against Black Americans A "Serious Problem," Quinnipiac University National Poll Finds; Slight Majority Support Removing Confederate Statues*, QUINNIPIAC U. POLL (June 17, 2020), [https://poll.qu.edu/images/polling/us/us06172020\\_unob16.pdf](https://poll.qu.edu/images/polling/us/us06172020_unob16.pdf) (reporting that the number of Americans supporting removal has increased to 52%; up 17% since 2017); Scott Calvert & Valerie Bauerlein, *After Confederate Monuments Fall, Where Do They Go?*, WALL STREET J. (July 23, 2020, 9:00 AM), <https://m.wsj.net/video/20200722/072120seibpollstatue2/hls/manifest-hd-wifi.m3u8> (The video associated with the article reports the results of a WSJ/NBC poll finding that only 16% of Americans support keeping the monuments in place as they are, 10% support removing and disposing, 31% support removing and relocating to in museums or private property, and 41% support leaving in place but contextualizing). Even prominent historians and preservation organizations are now advocating for their removal from public spaces. See, e.g., *SAH Statement on the Removal of Monuments to the Confederacy from Public Spaces*, SAH NEWS (June 19, 2020), <https://www.sah.org/about-sah/news/sah-news/news-detail/2020/06/19/sah-statement-on-the-removal-of-monuments-to-the-confederacy-from-public-spaces>.

Charlottesville, Virginia, and the associated violent crimes and subsequent efforts to address public Confederate monuments across the South.<sup>4</sup> We began our investigation into this issue by studying the complicated public and private property interests in the monuments and how layered public and private interests complicate ownership of these statues.<sup>5</sup> As property law scholars, we are particularly intrigued by how different patterns of ownership of both the underlying land and the monuments impact the legal tools available for their removal.

We followed that work with a project describing how land conservation and historic preservation laws might factor into removal efforts.<sup>6</sup> At the time of that writing, removal efforts were slowly plodding along, with many tangled in litigation and in lengthy and complex state approval processes. We were largely anticipating what legal issues these efforts might face as advocates worked through varied public processes to achieve their goals. After the murder of George Floyd by Minneapolis police officers in May 2020, removal efforts accelerated. Across the country and beyond, communities increasingly began to recognize Confederate monuments (and others) as symbols of hate, not of heritage.

We are periodically contacted by local governments and community activists seeking guidance in removal efforts, and we write this Article with their efforts in mind. This Article outlines the birth, death, and, to the extent currently possible, the afterlife of Confederate monuments<sup>7</sup> and the

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4. See Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPP. 15, 18–26 (2018) [hereinafter Owley & Phelps, *Understanding the Landscape*].

5. *Id.*

6. See Jess Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 642–50 (2019) [hereinafter Phelps & Owley, *Etched in Stone*].

7. The authors turn to this question in Jessica Owley & Jess Phelps, *The Afterlife of Confederate Monuments* (Nov. 12, 2020) (unpublished manuscript) (on file with authors).

various waypoints that guide a community seeking to responsibly grapple with its monumental legacy. We begin by outlining the circumstances that led to their creation and placement in prominent community spaces, particularly within the South. We briefly discuss the life of the monuments, focusing on how they served as symbols of white supremacy reinforcing Jim Crow ideas of segregation and subjugation, even long after the end of the Jim Crow era. The death (and the related afterlife) of Confederate monuments interests us most and, as a result, forms the bulk of this Article.

We then examine how these monuments actually come down, what legal issues are implicated, and what happens to the monuments after removal. We offer an outline of the legal issues that arise with removal. We then discuss laws and strategies for communities that want to remove monuments but are delayed or prevented by legal impediments. We save for another day discussions of how citizens can work to remove monuments when their local government officials are in opposition to these efforts. Happily, we feel we can do so because the number of such cases is dwindling as the tide in favor of Confederate monument removal seems to be in the ascendancy.

While we carefully walk through various laws to consider when seeking monument removal, we also recognize that removal is occasionally happening outside these processes. Both private citizens and public officials have been frustrated by the obstacles (and pace) of official removal processes. Local governments invoke theories of nuisance abatement and public safety to support removal without going through the formal legal processes that would typically be required for such an action.<sup>8</sup> Activists and community

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8. See, e.g., Andrew Lawler, *The Black, Millennial Mayor Who Tore Down His City's White Monuments*, POLITICO (Aug. 9, 2020, 7:00 AM) <https://www.politico.com/news/magazine/2020/08/09/richmond-mayor-monuments-392706> (profiling Mayor Stoney's response to the Confederate monument debate in Richmond).

members simply tired of government inaction—or continued government reinforcement of racist ideals—have toppled some statues and effectuated their own removal processes.<sup>9</sup> Using five detailed examples, we show what legal obstacles may arise, while giving some voice to the frustration with the legal processes that has led some community members to take action into their own hands.

We close with some initial thoughts on the afterlife of the monuments. Deciding where these monuments should go once removed is as complicated as is a decision for removal. Some communities are simply selling the monuments, which may create additional issues and could create unintended consequences. Some are giving them to other communities that welcome the monuments in new public spaces. Others seek to put these monuments in a museum or at cultural sites or cemeteries where they can be interpreted and contextualized. For many, they remain in storage without a clear destination in place as communities work through their complicated inheritance. We strongly urge communities to give careful consideration to how they dispose of monuments to avoid merely relocating the controversy beyond the community's geographical bounds and, as a result, failing to address the root issues associated with these statues.

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9. See, e.g., Colin Dwyer, *Protestors Fell Confederate Monument in D.C., Provoking Trump's Fury*, NPR (June 20, 2020, 10:29 AM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/20/881199628/protesters-fell-confederate-monument-in-d-c-provoking-trumps-fury> (profiling protestors' removal of a monument to General Albert Pike, the sole Confederate monument within Washington D.C. city limits).

## II. THE BIRTH OF CONFEDERATE MONUMENTS

The Civil War has a profound and continual cultural resonance and is, in many ways, the defining event of American history.<sup>10</sup> Monuments to the Civil War occur throughout the country across the North and South.<sup>11</sup> Currently, hundreds of Confederate monuments are scattered across at least thirty-one states.<sup>12</sup> The Southern Poverty Law Center (SPLC) produced a report in 2016 in the wake of the Dylann Roof shooting in Charleston, South Carolina, documenting Confederate place names and symbols in public spaces.<sup>13</sup> The SPLC updated that report in February 2019 finding 1,747 Confederate place names and symbols.<sup>14</sup> Of these listings, 780 were Confederate monuments and statues.<sup>15</sup> The bulk of these are located in Georgia, Virginia, and North Carolina.<sup>16</sup> But, this list is

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10. James McPherson, *A Defining Time in Our Nation's History*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/brief-overview-american-civil-war> (last visited May 24, 2019) (“[t]he Civil War is the central event in America’s historical consciousness”).

11. *In This State, A Little History of those Ubiquitous Civil War Memorials*, VT DIGGER, <https://vtdigger.org/2013/02/24/in-this-state-the-history-of-those-ubiquitous-civil-war-monuments-gracing-vermont-greens> (last visited May 24, 2019) (profiling these monuments across Vermont). *See generally* THOMAS J. BROWN, *CIVIL WAR CANON: SITE OF CONFEDERATE MEMORY IN SOUTH CAROLINA* (2015) (profiling the memorial legacy across the state).

12. *National Trust for Historic Preservation Statement on Confederate Monuments*, NAT’L TR. FOR HISTORIC PRESERVATION (June 18, 2020), <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials>; *see also* Kevin Waite, *The ‘Lost Cause’ Goes West: Confederate Culture and Memory in California*, 97 CAL. HIST. 33–49 (2020) (explaining how Confederate monuments came to exist in California at the end of the nineteenth/early twentieth century).

13. *See* SOUTHERN POVERTY LAW CENTER, *WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY* (2016), [https://www.splcenter.org/sites/default/files/com\\_whose\\_heritage.pdf](https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf).

14. *Id.* at 5; *Whose Heritage? Public Symbols of the Confederacy*, SOUTHERN POVERTY L. CTR. (Feb. 1, 2019) [hereinafter SPLC (2019)], <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>.

15. *Id.* at 5.

16. *See id.*

likely underinclusive and incomplete. From 2015 to 2019, 114 statues were removed.<sup>17</sup> In May and June of 2020 alone, organized efforts led to the removal of over 50 more.<sup>18</sup> Even with these removals, hundreds of Confederate monuments remain across the South. Many monuments are in prominent public locations, such as on the grounds of county courthouses where they send a message of continued inequality, which is the root problem of these particularly troubled monuments.

Confederate monuments differ from other war memorials. Shortly after the Civil War, the former Confederacy erected few monuments dedicated to lost loved ones.<sup>19</sup> Monument style, placement, and message began to change during Reconstruction and its aftermath as civic organizations (mostly run by women) began to erect

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17. Sarah Mervosh, *What Should Happen to Confederate Statues? A City Auctions One for \$1.4 Million*, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/us/confederate-statues-dallas-nashville.html?action=click&module=RelatedLinks&pgtype=Article>.

18. Alisha Ebrahimji, Lauren M. Johnson & Artemis Moshtagian, *Confederate Statues are Coming Down Following George Floyd's Death. Here's What We Know*, CNN (July 1, 2020 3:45 PM), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> (describing flurry of removals but without providing numbers). Wikipedia contributors have been maintaining a list that had reached over sixty removals or planned removals as of June 25, 2020 (one month from the death of George Floyd); *List of Monuments and Memorials Removed During the George Floyd Protests*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_monuments\\_and\\_memorials\\_removed\\_during\\_the\\_George\\_Floyd\\_protests](http://en.wikipedia.org/wiki/List_of_monuments_and_memorials_removed_during_the_George_Floyd_protests) (last visited June 25, 2020) (formulating a list that had reached over sixty removals or planned removals as of June 25, 2020). We acknowledge the unreliability of Wikipedia as a source but have not found any other comprehensive list of removed monuments. Another source of information on monument removal is Professor Hilary Green's google map of monument removals (both actual and promised). *UA Professor Creates Interactive Map of Confederate Monument Removals*, U. ALA., <https://as.ua.edu/2020/07/21/ua-professor-creates-interactive-map-of-confederate-monument-removals> (last visited Aug. 20, 2020).

19. See generally Lisa Desjardins, *Robert E. Lee Opposed Confederate Monuments*, PBS NEWSHOUR (Aug. 15, 2017, 1:55 PM), <https://www.pbs.org/newshour/nation/robert-e-lee-opposed-confederate-monuments> (profiling Lee's reticence regarding monuments in the immediate aftermath of the conflict).

monuments as acts of defiance to what they viewed as Northern occupiers and aggressors.<sup>20</sup> With these monuments, civic groups sought to encourage Southern citizens to feel proud of their struggle and to recast what the conflict actually sought to achieve.<sup>21</sup> These monuments were an important part of a comprehensive effort to rewrite the history of the Civil War and perpetuate the myth of the Lost Cause.<sup>22</sup> Not surprisingly, African-Americans (and others) have long opposed these monuments that have sought to advance this revisionist history.<sup>23</sup>

Ladies' memorial organizations came to life throughout the South in 1865-1866 and played pivotal roles in shaping the Southern view of the war and antebellum life through the development of this powerful counter-narrative.<sup>24</sup> Women led this charge, in part perhaps because of the fear, particularly during Reconstruction, that similar action by men would lead to charges of treason.<sup>25</sup> They also sought to keep "alive a sense of white southern solidarity" first through cemeteries and memorial days then later through

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20. CAROLINE E. JANNEY, BURYING THE DEAD BUT NOT THE PAST: LADIES' MEMORIAL ASSOCIATIONS AND THE LOST CAUSE 2 (2008) (indicating that an overwhelming goal of these organizations was "keeping alive a sense of white southern solidarity").

21. CAITLIN RIVAS, UNDERSTANDING THE ARCHIVIST'S ROLE IN THE CONTEXTUALIZATION, REMOVAL, AND RELOCATION OF CONFEDERATE MONUMENTS AT CULTURAL HERITAGE INSTITUTIONS 5-7 (2019).

22. James McPherson, *What Caused the Civil War?*, 4 NORTH & SOUTH 12, 12-22 (2000).

23. See, e.g., Ashleigh Lawrence-Saunders, *Beyond Monuments: African Americans Contesting Civil War Memory*, BLACK PERSP. (Oct. 16, 2017), <https://www.aaihs.org/beyond-monuments-african-americans-contesting-civil-war-memory>.

24. JANNEY, *supra* note 20, at 6-7. There were approximately 70-100 such organizations throughout the South with an average of fifty members per organization. *Id.* at 8-9. The organizations did not talk about race that frequently (perhaps due to their assumption of white supremacy). This stands in contrast with the United Daughters of the Confederacy, which ultimately emerged from these earlier organizations. *Id.* at 13.

25. *Id.* at 12.

monuments and plaques.<sup>26</sup> Post-war Southerners sought to present the war in “the best possible terms,” which led to a romanticizing of the “Old South” in a way that distorted the facts.<sup>27</sup> In a combination of nostalgia and rejection of Reconstruction and the post-Civil War order, ladies’ memorial organizations led the way in the collective forgetting of the role slavery played in the conflict.<sup>28</sup> Creating “a more honorable version of events,” Southerners developed the Lost Cause narrative minimizing the profound evils associated with this abhorrent period of our history—often suggesting that former slaves were treated well and were better off under this system than under their post-war circumstances.<sup>29</sup>

The Lost Cause is the general label given to the myth crafted by Southerners seeking to suggest a certain nobility to the struggle, which is augmented perhaps by the military success the Confederacy achieved in the earlier years of the conflict against a much better financed, industrialized, and populous North.<sup>30</sup> They frame the debate as protecting states’ rights and a Southern way of life.<sup>31</sup> They suggest the conflict was about federalism and individualism when the war centered on preserving human chattel slavery as the economic basis for society—concerns over the survival of which were paramount in South Carolina’s succession after Abraham Lincoln’s election in 1860, which precipitated other states’ election to succeed and join the Confederacy.<sup>32</sup>

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26. *Id.* at 3 (explaining the efforts of these organizations to “mourn their failed cause”).

27. *Id.*

28. *Id.*

29. *Id.*

30. Matthew Wills, *Origins of the Confederate Lost Cause*, JSTOR DAILY, (July 15, 2015), <https://daily.jstor.org/origins-confederate-lost-cause>.

31. James Horton, *Confronting Slavery and Revealing the Lost Cause*, NAT’L PARK SERV., <https://www.nps.gov/articles/confronting-slavery-and-revealing-the-lost-cause.htm> (last updated Mar. 10, 2017).

32. Ned Crankshaw et al., *The Lost Cause and Reunion in the Confederate*

Although the Civil War ended in 1865, the boom time for Confederate monuments did not come until 1889-1920, almost a generation after the conflict.<sup>33</sup> By 1890, the role of the monuments shifted from vehicles for mourning to structures to honor the Southern way of life and to advance the Lost Cause narrative.

Probably the most famous Confederate monument is the Robert E. Lee Monument on Monument Avenue in Richmond, Virginia.<sup>34</sup> Upon Lee's death in 1870, women's memorial organizations and veterans groups in the Richmond area began fundraising and organizing efforts, eventually forming a special Lee Monument Association to raise money for a grand monument.<sup>35</sup> It took twenty years of fundraising to eventually cover the \$77,500 cost of the massive monument that was finally erected in 1890.<sup>36</sup> Lee's death set off a move to honor specific Confederate generals and others regarded as heroes of the Confederacy. This move came from veterans as well as the ladies' associations seeking to honor those their relatives served under and to reinterpret the conflict.<sup>37</sup>

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*Cemeteries of the North*, 35 *LANDSCAPE J.* 1, 5 (2016), [http://ukla.ca.uky.edu/files/the\\_lost\\_cause\\_and\\_reunion\\_in\\_the\\_confederate\\_cemeteries\\_of\\_the\\_north.pdf](http://ukla.ca.uky.edu/files/the_lost_cause_and_reunion_in_the_confederate_cemeteries_of_the_north.pdf).

33. SPLC (2019), *supra* note 14, at 11.

34. *National Register of Historic Places Registration Form: Robert E. Lee Monument*, NAT'L PARK SERV. (Jan. 5, 2007) [hereinafter *Robert E. Lee Monument Listing*], [https://www.dhr.virginia.gov/VLR\\_to\\_transfer/PDFNoms/1270181\\_Lee\\_Monument\\_2006\\_nomination\\_final.pdf](https://www.dhr.virginia.gov/VLR_to_transfer/PDFNoms/1270181_Lee_Monument_2006_nomination_final.pdf).

35. The history of Richmond's Lee monument is particularly interesting as it also highlighted a power struggle between women's organizations who had been leading the way in memorialization and crafting the Lost Cause narrative and veterans' groups who wanted to become more involved in honoring their former commanders. *Id.* The women proved to be much better at fundraising and were the ones who ultimately chose the sculptor. *Id.*

36. Pl.'s Am. Compl. at 6, *Gregory v. Northam*, No. 20-2441-6 (Va. Cir. Ct. July 8, 2020).

37. For example, when Confederate veteran White moved to Maryland and started a ferry business, he named the ferry crossing the Potomac the General Jubal Early after the general he served under (interestingly a general who had been demoted by Lee for being a poor leader but who later played a central role in developing and disseminating the Lost Cause narrative). See Rebecca Tan, *A*

This Confederate monument boom also coincided with the passage of Jim Crow laws across the South, suggesting the statues served as symbols of white supremacy and sought to reinforce a segregated society.<sup>38</sup> As one commenter explains, the monuments conveyed the idea that the races were not equal even in a society that no longer thought slavery to be morally right.<sup>39</sup> Another stated, “[t]he dream version of the Old South never existed. Any manufactured monument to that time in that place tells half a truth at best. The ideas and ideals it purports to honor are not real.”<sup>40</sup> The political will that enabled these monuments to be placed in front of courthouses, state capitals, schools, town squares, and other public civic places shows that communities in the Jim Crow-era wanted clear visual images in important public spheres emphasizing white supremacy and the subjugation of Black communities as part of the post-Civil War order.<sup>41</sup> Lastly, this boom also may have been driven by the beginnings of the recovery of the Southern economy after the devastation of the war as, in its aftermath, the South generally lacked the resources to devote to monument construction, but was necessarily focused on economic recovery.

The various ladies’ memorial associations eventually developed into the United Daughters of the Confederacy

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*Confederate Statue is Toppled in Rural Maryland, Then Quietly Stored Away*, WASH. POST (July 4, 2020, 4:40 PM) [https://www.washingtonpost.com/local/whites-ferry-confederate-statue/2020/07/04/e717b18e-bb3c-11ea-bdaf-a129f921026f\\_story.html](https://www.washingtonpost.com/local/whites-ferry-confederate-statue/2020/07/04/e717b18e-bb3c-11ea-bdaf-a129f921026f_story.html).

38. SPLC (2019), *supra* note 14, at 15.

39. *National Register of Historic Places Multiple Property Documentation Form: Civil War Sculpture in Arkansas, 1886-1934*, NAT’L PARK SERV. E-4 (Mar. 28, 1996) [hereinafter *Arkansas Listing*], [https://npgallery.nps.gov/NRHP/GetAsset/NRHP/64500015\\_text](https://npgallery.nps.gov/NRHP/GetAsset/NRHP/64500015_text).

40. Caroline Randall Williams, *You Want a Confederate Monument? My Body is a Confederate Monument*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/26/opinion/confederate-monuments-racism.html>.

41. Kali Holloway, Make it Right Project, Statement at the US/ICOMOS Webinar: Confederate Monuments: Past, Present, and Future (Aug. 13, 2020).

(UDC), with local chapters throughout the South.<sup>42</sup> Sons of Confederate Veterans (SCV) arrived a few years later.<sup>43</sup> Together, these two groups are responsible for the vast majority of Confederate monuments.<sup>44</sup> They are still active today with branches throughout the South.<sup>45</sup> Both groups, as well as others, occasionally erect new monuments.<sup>46</sup> As detailed in our examples below, not only did these two organizations lobby and raise money for the initial placement of the monuments, but they are often the most vocal opponents of their removal often challenging such actions in court.<sup>47</sup>

### A. Key Questions

Monument removal disputes are complicated legally and politically, the latter for obvious reasons, as many people view and perceive these monuments very differently.<sup>48</sup> A complex mosaic of public and private law applies. Various federal, state, and local laws may be involved depending on a monument's location and how it was initially funded or conveyed. In studying Confederate monuments, we

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42. Anderson R. Rouse, *Ladies Memorial Associations*, ESSENTIAL CIV. WAR CURRICULUM, <https://www.essentialcivilwarcurriculum.com/ladies-memorial-associations.html> (last visited Sept. 13, 2020).

43. *What is the Sons of Confederate Veterans?*, SONS CONFEDERATE VETERANS, <https://scv.org/what-is-the-scv> (last visited July 24, 2020).

44. SPLC (2019), *supra* note 14.

45. See, e.g., Katy Waldman, *Guardians of White Innocence*, SLATE (Sept. 25, 2017), <https://slate.com/news-and-politics/2017/09/the-sons-of-confederate-veterans-are-the-guardians-of-white-innocence.html>.

46. Sabrina DeTavernise, *A Boom in Confederate Monuments, on Private Land*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/confederate-monuments.html>.

47. Kali Holloway, *Time to Expose the Women Still Celebrating the Confederacy*, DAILY BEAST (Nov. 12, 2018 10:51 AM), <https://www.thedailybeast.com/time-to-expose-the-women-still-celebrating-the-confederacy>.

48. Brian Palmer & Seth Freed Wessler, *The Costs of the Confederacy*, SMITHSONIAN MAG. (Dec. 2018), <https://www.smithsonianmag.com/history/costs-confederacy-special-report-180970731> (citing the long disagreement and objection to these monuments from the African American community).

recognized several veins of laws that should be explored in removal efforts, and those laws are discussed in the following Section. We also learned, however, that the factual background of the individual monuments can impact removal processes.

In earlier work, we discussed how the location of a monument on public, private, or publicly supported private land can trigger different laws and processes.<sup>49</sup> It is also important to look at the underlying circumstances of a monument and learn the history behind how it ended up where it ended up and who paid for its installation, as this may have an impact on who has rights to the monument post-removal. While this Section discusses important factors to consider regarding the origins of the monuments, the following Sections and examples illustrate why seemingly small historical considerations matter and can present opportunities or otherwise direct seemingly identical monument removal efforts along different paths. Although many of the monuments are quite similar, depicting a solitary Confederate soldier, battles to remove these granite soldiers occur on different battlefields and use different tactics.

### 1. Where is the Monument?

The location of a Confederate monument generally plays the most significant role in removal efforts. Our focus in this Article is on Confederate monuments located on public land, the location of the vast majority of Confederate monuments in the United States.<sup>50</sup> Public displays of such monuments convey messages about a community and its values.<sup>51</sup>

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49. Owley & Phelps, *Understanding the Landscape*, *supra* note 4, at 15.

50. If you are interested in monuments on private land, see Jessica Owley, Jess R. Phelps & Sean Hughes, *Private Confederate Monuments*, 25 LEWIS & CLARK L. REV. (forthcoming 2021).

51. See, e.g., Beth Jacobs, *Confederate Monuments that Remain*, HUM. RTS. MAG. (May 16, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future/confederate-monuments](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/confederate-monuments).

Memorials are sacred patriotic spaces and offer conflicting views on who counts as heroes or villains within our shared history. They project these ideals forward to the next generation.<sup>52</sup> In short, public monuments give legitimacy to the ideals represented.<sup>53</sup> The ability of public monuments to essentially speak and convey a message or historical viewpoint is what has made public monuments particularly controversial.<sup>54</sup>

Over the years, members of the public have interacted with Confederate monuments in different ways. Depending on the location of the monument and the skill of the artists, they may either be revered or forgotten. Some are harder to miss than others.

Take the prominent example of Stone Mountain, Georgia.<sup>55</sup> In a state-owned (but privately operated) park outside of Atlanta,<sup>56</sup> Jefferson Davis, Robert E. Lee, and Stonewall Jackson are depicted on horseback in the largest high-relief sculpture in the world.<sup>57</sup> It is both a tourist

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52. DELL UPTON, WHAT CAN AND CAN'T BE SAID: RACE, UPLIFT, AND MONUMENT BUILDING IN THE CONTEMPORARY SOUTH (2015); Mary J. Dolan, *Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summun*, 58 CATH. UNIV. L. REV. 7, 8–9 (2008) (discussing the speech attributes embodied in a community's decision to accept a donated monument).

53. See, e.g., Kevin M. Levin, *Why I Changed My Mind About Confederate Monuments*, THE ATLANTIC, (Aug. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/08/why-i-changed-my-mind-about-confederate-monuments/537396> (explaining that “[e]mpty pedestals can offer the same lessons about racism and war as the statues do.”).

54. Nuala Johnson, *Cast in Stone: Monuments, Geography, and Nationalism*, 13 ENV'T & PLANNING 51, 55–56 (1995).

55. Katherine P. Zakos, *Truth is Marching On: The Lasershow Spectacular at the Stone Mountain Confederate Memorial and the Changing Narratives of History*, 10 J. HERITAGE TOURISM, at 280, 280–95 (2015) (summarizing the history of this site).

56. See *What is SMMA?*, STONE MOUNTAIN MEM'L ASS'N, <https://stonemountainpark.org/about-us/what-is-smma> (last visited Sept. 15, 2020) (explaining the ownership and operation of this controversial site).

57. See, e.g., Grace Elizabeth Hale, *Granite Stopped Time: The Stone Monument Memorial and the Representation of White Southern Identity*, 82 GA. HIST. Q. 22, 23 (1998).

destination and a key location for the white supremacy movement.<sup>58</sup> Stone Mountain, as a Confederate monument, started off as private land.<sup>59</sup> It is believed to be the birthplace of the modern KKK and, for years, was a meeting place for the organization.<sup>60</sup> The family that owned the site leased part of the land to the UDC while conveying a perpetual easement to the KKK for its gatherings.<sup>61</sup> The state of Georgia acquired the land in 1958, and then terminated the easement.<sup>62</sup> The carving is explicitly protected by state law, and Stone Mountain Park is Georgia's most visited tourist attraction.<sup>63</sup> Even removal advocates acknowledge the logistical difficulties here. Removal and relocation is not possible. Destruction would be difficult and expensive (and would also require a change to state law). Adding context is desirable but it will be hard to meaningfully counter the sheer dominance of these figures with signage or interpretation.

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58. See, e.g., Lorraine Boissoneault, *What Will Happen to Stone Mountain, America's Largest Confederate Memorial*, SMITHSONIAN MAG. (Aug. 22, 2017), <https://www.smithsonianmag.com/history/what-will-happen-stone-mountain-americas-largest-confederate-memorial-180964588>.

59. Debra McKinney, *Stone Mountain: A Monumental Dilemma*, SOUTHERN POVERTY L. CTR. (Feb. 10, 2018), <https://www.splcenter.org/fighting-hate/intelligence-report/2018/stone-mountain-monumental-dilemma>.

60. Steve Hendrix, *Stone Mountain: The Ugly Past, and Fraught Future, of the Biggest Confederate Monument*, WASH. POST (Sept. 19, 2017, 2:35 PM), <https://www.washingtonpost.com/news/retropolis/wp/2017/09/19/stone-mountain-the-ugly-past-and-fraught-future-of-the-biggest-confederate-monument>.

61. For over forty years, Stone Mountain had the dubious honor of being sacred soil for members of the Klan. In 1923, Sam Venable (the owner) granted to the Atlanta Klavern an easement to the top of the mountain to hold their annual rallies. The Klan used the easement until the state took possession of the mountain in 1958 and canceled the easement. See DAVID B. FREEMAN, *CARVED IN STONE: THE HISTORY OF STONE MOUNTAIN* 52–53 (1997).

62. *Id.*

63. Richard Fausset, *Stone Mountain: The Largest Confederate Monument Problem in the World*, N. Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/18/us/stone-mountain-confederate-removal.html>.

a. *Cemeteries*

On the other end of the spectrum, many monuments have quieter and more subdued homes in cemeteries. These monuments are generally in a funereal style and convey messages of grief associated with the staggering losses incurred by Confederate forces during the conflict. Both the location and style of these monuments has made them less controversial as is perhaps the fact that these are more clearly associated with loss of life and commemorating the dead.<sup>64</sup>

Some cemetery monuments, however, have recently garnered public attention though including the Confederate mound at the Oak Woods Cemetery in Chicago's Hyde Park neighborhood.<sup>65</sup> This thirty-foot granite monument was dedicated in 1895 to the 4,000 or so Confederate soldiers who died while prisoners of war at the nearby Camp Douglas (an internment camp).<sup>66</sup> Some local advocates have called for the removal of the monument because the figure towers over the graves of several notable African Americans, including journalist and anti-lynching activist Ida B. Wells.<sup>67</sup>

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64. Julie Bosman, *Battle Over Confederate Monuments Moves to the Cemeteries*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/confederate-monuments-cemeteries.html>. For example, in recent years, the federal government has paid substantial sums (more than it has paid to commemorate Northern losses) to provide burial markers for unmarked Southern dead, which has generally elicited comparatively little controversy. Steven I. Weiss, *You Won't Believe What the Government Spends on Confederate Graves*, THE ATLANTIC, (July 19, 2013), <https://www.theatlantic.com/politics/archive/2013/07/government-spending-confederate-graves/277931>.

65. Nat'l Cemetery Admin., *Confederate Mound*, U.S. DEPT. OF VETERANS AFF., [https://www.cem.va.gov/cems/lots/confederate\\_mound.asp](https://www.cem.va.gov/cems/lots/confederate_mound.asp) (last visited Sep. 19, 2020); Rachel Hinton, *Community Organizers Want Confederate Monument Removed from Oak Woods Cemetery*, CHI. SUN TIMES (Apr. 7, 2018, 10:40 PM), <https://chicago.suntimes.com/2018/4/7/18406056/community-organizers-want-confederate-monument-removed-from-oak-woods-cemetery>.

66. *Confederate Mound at Oak Woods Cemetery, Chicago, Illinois*, NAT'L PARK SERV., [https://www.nps.gov/nr/travel/national\\_cemeteries/illinois/confederate\\_mound\\_oak\\_woods\\_cemetery.html](https://www.nps.gov/nr/travel/national_cemeteries/illinois/confederate_mound_oak_woods_cemetery.html). (last visited Sept. 15, 2020).

67. Kali Holloway, *Announcing the Launch of the Make It Right Project*, INDEP. MEDIA INST. (Jun. 3, 2018), <https://independentmediainstitute.org/make->

While some of these monuments are located in private cemeteries,<sup>68</sup> not all are. For example, the UDC and SCV erected a Confederate monument in Arizona in 2010 in the state-owned Southern Arizona Veterans' Cemetery.<sup>69</sup> Others are located in federal cemeteries or mark locations of mass graves or burials.<sup>70</sup> An example of this is Point Lookout in Maryland, a prominent prisoner of war camp for Confederate soldiers.<sup>71</sup> Until recently, there was also a monument on Georges Island in Boston Harbor on National Park Service administered land (erected in 1963).<sup>72</sup> These monuments to

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it-right-project-announcement. A coalition of activists is working to remove the Confederate statue and replace it with a monument to Wells. Funds were raised for the Wells monument, which was slated to go up in 2019. *Ida B Wells Monument*, IDA B WELLS MONUMENT, <http://idabwellsmonument.org/newsite4/> (last visited Aug. 13, 2020); Taylor Telford, *Ida B. Wells Was a Legend. \$300,000 Has Been Pledged for a Monument Honoring Her*, WASH. POST (July 17, 2018, 5:15pm), [https://www.washingtonpost.com/lifestyle/style/ida-b-wells-was-a-legend-300000-has-been-pledged-for-a-monument-honoring-her/2018/07/17/500be738-89e8-11e8-85ae-511bc1146b0b\\_story.html](https://www.washingtonpost.com/lifestyle/style/ida-b-wells-was-a-legend-300000-has-been-pledged-for-a-monument-honoring-her/2018/07/17/500be738-89e8-11e8-85ae-511bc1146b0b_story.html) (also stating that there are only forty monuments to Black women in the United States).

68. See, e.g., Cydney Henderson, *Here Are the Six Confederate Monuments in Arizona*, ARIZ. REPUBLIC (Aug. 17, 2017), <https://www.usatoday.com/story/news/local/arizona/2017/08/16/z-arizona-confederate-monuments/570467001> (noting that the Arizona Confederate Veterans Monument is located in Greenwood Memory Lawn Cemetery, a private cemetery, and was dedicated in 1999).

69. Antonia Noori Farzan, *Here's the Real History Behind Arizona's Confederate Monuments*, PHOENIX NEW TIMES (Jun. 7, 2017), <https://www.phoenixnewtimes.com/news/arizona-confederate-monuments-state-capitol-greenwood-cemetery-southern-arizona-veterans-cemetery-9392610>.

70. Cemeteries housing Confederate dead have also played an important role in promoting the Lost Cause narrative even in the North. See generally Crankshaw et al., *supra* note 32 (profiling this role). The federal government has also worked collaboratively with Confederate heritage groups to place markers on federal land associated with burials. See Grace Oldham, *Confederate Monuments in Arizona: How Many are Left?*, ARIZ. REPUBLIC (July 25, 2020), <https://www.azcentral.com/story/news/local/arizona/2020/07/25/at-least-3-confederate-monuments-believed-standing-arizona/5495100002> (providing an overview/status update on Confederate monuments remaining in place in Arizona, including one placed collaboratively between the United States Forest Service and the Sons of Confederate Veterans).

71. *Point Lookout Confederate Cemetery Ridge, Maryland*, NAT'L PARK SERV., [https://www.nps.gov/nr/travel/national\\_cemeteries/maryland/point\\_lookout\\_confederate\\_cemetery.html](https://www.nps.gov/nr/travel/national_cemeteries/maryland/point_lookout_confederate_cemetery.html) (last visited Sep. 15, 2020).

72. Adam Reilly, *Does a Confederate Monument Memorial Belong in Boston*

Confederate dead have had a mixed fate as far as drawing public scrutiny and calls for removal. Point Lookout, with its clearer funerary purpose, marking a mass burial (coupled perhaps with its far less urban location), has remained seemingly free from controversy, while Boston's monument, with its less direct tie (and perhaps due to its location in a progressive city), was first covered, and finally removed in October 2017.<sup>73</sup>

Virginia passed a law in April 2020 that allows local governments to remove Confederate monuments, but this authority did not extend to those in cemeteries even if publicly owned.<sup>74</sup> And, as noted above, some newer monuments have also appeared in cemeteries. Interestingly, we are also beginning to see a push to relocate some Confederate monuments to cemeteries, as they are seen as acceptable locations for memorializing and mourning and perceived to be a more appropriate context for monuments removed from other public spaces.<sup>75</sup>

#### b. *Government Buildings*

Monuments associated with government buildings play a different role and send a different message.<sup>76</sup> Monuments

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*Harbor?*, WGBH (June 8, 2017), <https://www.wgbh.org/news/2017/06/08/politics-government/does-confederate-memorial-belong-boston-harbor> (exploring the history behind a monument placed, in 1963, by Boston's now defunct UDC chapter during the centennial of the war to commemorate thirteen Confederate soldiers who died captivity at Georges Island).

73. Louise Kennedy, *Boston's Only Confederate Memorial Will Move out of Public View*, WBUR (Oct. 3, 2017), <https://www.wbur.org/artery/2017/10/03/bostons-confederate-memorial-will-move> (explaining that this monument has been moved to storage).

74. S. B. 183, 2020 Leg., Reg. Sess. (Va. 2020).

75. See, e.g., Scott Jaschik, *University of Mississippi Will Move Confederate Monument*, INSIDE HIGHER ED (June 19, 2010), <https://www.insidehighered.com/quicktakes/2020/06/19/university-mississippi-will-move-confederate-monument> (profiling Ole Miss's decision to locate a Confederate monument from the campus center to the university's cemetery).

76. For a related issue, there is also a current debate over the naming of prominent military bases after Confederate generals in the run up to the first world war. See Michael Paradis, *The Lost Cause's Long Legacy*, THE ATLANTIC

appear in front of or inside courthouses and have done so for, in many instances, over a century. For example, the Jackson Guards Memorial was placed on the grounds of the Jackson County Courthouse in Newport, Arkansas, in 1914.<sup>77</sup> We also see some in state capitol buildings like the Jefferson Davis monument in Frankfort, Kentucky.<sup>78</sup> In Winston-Salem, North Carolina, a Confederate monument similarly stood in front of the county courthouse for over a century until it was removed in 2019.<sup>79</sup> Others remain in place. For example, a Confederate monument in Murray, Kentucky, depicts General Robert E. Lee atop a granite slab base supported by a four-columned canopy.<sup>80</sup> The statue is currently located in the northeast corner of the Calloway County Courthouse's grounds.<sup>81</sup>

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(June 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/the-lost-causes-long-legacy/613288> (placing these naming conventions in historical perspective as part of the Lost Cause movement at the turn of the twentieth century).

77. *National Register of Historic Places Registration Form: Jackson Guards Memorial*, NAT'L. PARK SERV. (Apr. 26, 1996), <http://www.arkansaspreservation.com/National-Register-Listings/PDF/JA0496S.nr.pdf>.

Interestingly, the fact that the statue was financed fully by donations supported its registration on the National Register because it indicated widespread support throughout the state of the sentiments expressed thereon within the commemoration movement generally. It was moved to a public park in 1965, and in 2017 it was moved again within the park in preparation for relocation to a museum.

78. Sarah Hansen, *Jefferson Davis Statue Removed From Kentucky State Capitol as Confederate Monuments Fall*, FORBES (June 13, 2020 1:47 PM), <https://www.forbes.com/sites/sarahhansen/2020/06/13/jefferson-davis-statue-removed-from-kentucky-state-capitol-as-confederate-monuments-fall/?sh=73a9f13b1d64>.

79. Sarah Newell, *As Confederate Statue Comes Down, Onlookers Cheer—or Criticize the Move*, WINSTON-SALEM J. (Mar. 12, 2019), [https://www.journalnow.com/news/local/as-confederate-statue-comes-down-onlookers-cheer-or-criticize-the-move/article\\_c6e24155-a8cf-5e83-9cf8-92fed296488a.html](https://www.journalnow.com/news/local/as-confederate-statue-comes-down-onlookers-cheer-or-criticize-the-move/article_c6e24155-a8cf-5e83-9cf8-92fed296488a.html) (exploring the history of this monument and its relocation to a cemetery). The courthouse had been conveyed into private ownership a few years earlier, making removal possible without the constrictions of the state monument protection law.

80. *Murray, KY*, TRAILS-R-US, <http://www.trailsrus.com/monuments/reg1/murray.html> (last visited Sept. 15, 2020).

81. *Id.*

Although many of these monuments have been in place for years, monuments are still periodically installed on government land. In 2016, for example, the SCV dedicated a new black marble obelisk on Courthouse Hill in Dahlonega, Georgia.<sup>82</sup> Placing such monuments alongside or inside government buildings suggests that the government supports and honors the positions and legacies of the men depicted, or the Confederacy in general.<sup>83</sup> When they were erected during the Jim Crow and Civil Rights eras, they specifically served to reinforce a message that government and justice was there to serve the white communities.<sup>84</sup> Erecting new Confederate monuments today, when many people have a clear understanding of the role they play in society and the myth of the Lost Cause, is particularly problematic and troubling.

### c. *Town Squares*

Related to the effort to place monuments on courthouse grounds, the UDC set an explicit goal of trying to get Confederate monuments in town squares throughout the South.<sup>85</sup> Those monuments located in town squares or on

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82. Jenny Jarvie, *As Monuments to the Confederacy Are Removed from Public Squares, New Ones Are Quietly Being Erected*, L.A. TIMES, (Oct. 22, 2017), <https://www.latimes.com/nation/la-na-new-confederate-memorials-20171020-story.html>; *New Confederate Monument to be Dedicated in Dahlonega, GA*, PRATTVILLE DRAGONS (May 24, 2016), <http://theprattvilledragoons.blogspot.com/2016/06/new-confederate-monument-to-be.html>.

83. Karen L. Cox, *The Whole Point of Confederate Monuments is to Celebrate White Supremacy*, WASH. POST (Aug. 16, 2017), <http://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-confederate-monuments-is-to-celebrate-white-supremacy>.

84. See, e.g., Miles Parks, *Confederate Statues Were Meant to Further a 'White Supremacist Future'*, NPR (Aug. 20, 2017, 8:31 AM), <https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future> (arguing that to construct these monuments especially in front of courthouses, was a “power play” meant to intimidate those looking to come to the “seat of justice or the seat of the law”).

85. *Arkansas Listing*, *supra* note 39 (noting this emphasis on public locations).

public streets are particularly visible.<sup>86</sup> In some towns, the monuments stand in traffic circles and central boulevards where citizens have no choice but to pass them on a daily basis. Monuments located in public spaces or parks serve as continual reminders to the citizens being oppressed while giving support to others that their views are legitimate and safe.<sup>87</sup>

Consider Richmond's Monument Avenue, the nation's only grand residential boulevard with monuments of its scale.<sup>88</sup> This central boulevard is a focal point of Richmond life.<sup>89</sup> The statues have had a dominant, yet controversial place in the community.<sup>90</sup> As soon as traffic lanes began to be paved with their distinctive asphalt paving blocks in 1907, the street came to be one of the most fashionable places to live in Richmond.<sup>91</sup> The avenue played a central role in the image of the city; serving as both a tourist attraction and focal point in how the City both saw itself and wished to be viewed.

d. *Universities*

Southern universities, particularly public institutions,

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86. See, e.g., W. Fitzhugh Bundage, *I've Studied the History of Confederate Memorials. Here's What to do About Them*, VOX (Aug. 18, 2017, 9:40 AM) <https://www.vox.com/the-big-idea/2017/8/18/16165160/confederate-monuments-history-charlottesville-white-supremacy>.

87. See, e.g., Matthew Teutsch, *The Problem with Confederate Monuments in Public Spaces*, BLACK PERSP. (July 26, 2017), <https://www.aaihs.org/the-problem-with-confederate-monuments-in-public-spaces>.

88. *Monument Avenue Historic District*, NAT'L PARK SERV., <https://www.nps.gov/nr/travel/richmond/monumentavehd.html> (last visited Feb. 24, 2020).

89. MELINDA CAMERON HAPEMAN ROSE, *DESEGREGATING MONUMENT AVENUE: ARTHUR ASHE AND THE MANUFACTURING OF A NEW SOCIAL REALITY IN RICHMOND, VIRGINIA* (2002).

90. Tina Griego, *Past and Present: The Many-Sided History of the Monument Avenue Debate*, RICH. MAG. (June 25, 2015), <https://richmondmagazine.com/news/news/monument-ave-history>.

91. *Monument Avenue Historic District*, *supra* note 88.

were also popular sites for Confederate monuments.<sup>92</sup> Perhaps the best known example, the Silent Sam statue, stood at UNC–Chapel Hill for over a hundred years until its recent and complicated removal.<sup>93</sup> In Louisville, the Kentucky Woman’s Monument Association erected a Confederate monument in 1865 and gifted it to the city of Louisville.<sup>94</sup> The city placed the seventy-foot tall obelisk (now removed) on the grounds of the University of Louisville.<sup>95</sup> Similarly, Confederate monuments and memorabilia have always been closely tied to the University of Mississippi.<sup>96</sup> The UDC Albert Sidney Johnston Chapter erected a Confederate monument in 1906 on the University of Mississippi’s campus.<sup>97</sup> The statue depicts a Confederate soldier on top of a marble obelisk. One panel of the statue reads, “To our Confederate dead 1861-1865,” while another side reads, “To the heroes of Lafayette County who made glorious many a battlefield.”<sup>98</sup> Since 2016, the university has

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92. See Caroline Janney, *United Daughters of the Confederacy*, ENCYCLOPEDIA VA., [https://www.encyclopediavirginia.org/United\\_Daughters\\_of\\_the\\_Confederacy#start\\_entry](https://www.encyclopediavirginia.org/United_Daughters_of_the_Confederacy#start_entry) (profiling the dispute of Vanderbilt’s renaming of Confederate Memorial Hall, which resulted in a \$1.2 million award to the UDC for breach of contract (the current value of the original gift)).

93. *A Guide to Resources About UNC’s Confederate Monument: Timeline*, U. N.C. ARCHIVES (2016), <https://exhibits.lib.unc.edu/exhibits/show/silent-sam/timeline>; Michael Kennan Gutierrez, *UNC’s Silent Sam and Honoring the Confederacy*, WE’RE HIST. (July 7, 2015), <http://werehistory.org/silent-sam>.

94. *UofL Removes Confederate Monument*, U. LOUISVILLE (Apr. 29, 2016), <https://louisville.edu/sustainability/news/uofl-removes-confederate-monument>.

95. Jacob Ryan, *The Town that Wanted Louisville’s Confederate Monument*, WFPL (Aug. 18, 2017), <https://wfpl.org/the-town-that-wanted-a-confederate-monument>.

96. Emily Wagster Pettus, *Board Delays Vote on Moving Confederate Monument at Ole Miss*, A.P. NEWS (Jan. 16, 2020), <https://apnews.com/6d8cf1e734772595899443c1b10c4cd0>.

97. Andy Belt, *The Oxford, Confederate Statues—The History and Creation of Two Lafayette County Monuments*, OXFORD EAGLE (Sep. 25, 2017, 9:48 AM), <https://www.oxfordeagle.com/2017/09/25/statues-history-creation-two-lafayette-county-monuments>.

98. *Id.* The nickname for the university’s athletic teams remains the Rebels, but the university retired its Colonel Reb mascot in 2003 amid criticism that the

installed plaques to provide historical context about the Confederate monument and about slaves who built some campus buildings before the Civil War.<sup>99</sup> In 2020, the University of Mississippi elected to relocate this monument to the university's cemetery.

e. *Battlefields and Museums*

Some monuments appear in places where the context makes more sense. We see them near battlefields,<sup>100</sup> birth places,<sup>101</sup> and in museums.<sup>102</sup> Many monuments are in places designated as historic sites; commemorating deaths at a battlefield with a somber obelisk feels quite different than a large statue of Robert E. Lee riding into battle in the middle of the town square or on the courthouse steps. Many examples appear at the Gettysburg battlefield, where a wide array of monuments exist and were erected in the period before clear rules and requirements were in place to evaluate whether to allow a monument's installation on the battlefield.<sup>103</sup> Other types of monuments are located on

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bearded old man looked like a plantation owner.

99. *Id.*

100. *Protect and Interpret Confederate Monuments on Civil War Battlefields*, CIV. WAR MEMORY (Aug. 7, 2020), <http://cwmemory.com/2020/08/07/protect-and-interpret-confederate-monuments-on-civil-war-battlefields>.

101. Reid Epstein, *A Liberal Town Built Around Confederate Generals Rethinks Its Identity*, N.Y. TIMES (July 26, 2020), <https://www.nytimes.com/2020/07/26/us/politics/lexington-va-confederate-generals.html> (profiling the Confederate legacy of Lexington, Virginia, where Robert E. Lee and Stonewall Jackson both had prominent roles and where both are buried).

102. Janeen Bryant, Benjamin Filene, Louis Nelson, Jennifer Scott & Suzanne Seriff, *Are Museums the Right Homes for Confederate Monuments?*, SMITHSONIAN MAG. (May 7, 2018), <https://www.smithsonianmag.com/history/are-museums-right-home-confederate-monuments-180968969>.

103. J. Peter Byrne, *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws*, SSRN (June 22, 2020), <https://ssrn.com/abstract=3633473>; see *Gettysburg, Confederate Monuments*, NAT'L PARK. SERV., <https://www.nps.gov/gett/learn/historyculture/confederate-monuments.htm> (last visited Sept. 15, 2020) (noting over 1,200 monuments located on the battlefield). Even these monuments are now being reevaluated. See *House Committee Considering Bills to Remove Confederate Statues from National Park System*, NAT'L PARK TRAVELER (July 20, 2020, 1:30

federally owned land such as historic sites, defense installations, and other structures where these monuments have been installed over the past century (again, most in times before review processes imposed more control or guidance on monument installation).<sup>104</sup>

As illustrated by the categories and examples in this Section, setting matters. The placement of Confederate monuments has been calculated, not haphazard or opportunistic. The location affects the messaging but can also play a role in the removal process as highlighted by our examples below.

## 2. Who Paid for the Monument?

We do not always know who originally paid for a Confederate monument, as these records, in many instances, are not readily available (or may no longer exist). Unfortunately, it is difficult to determine what mixture of public and private funding went into the placement of the monuments particularly as many of these were erected more than one hundred years ago.<sup>105</sup> In some towns, collections were taken up to pay for the monument. In other places, the funding came from federal, state, and local governments. Often, private organizations paid for these monuments (frequently UDC and SCV chapters).<sup>106</sup> In some circumstances, these private groups continue to maintain the

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AM), <https://www.nationalparkstraveler.org/2020/07/house-committee-considering-bills-remove-confederate-statues-national-park-system>.

104. *Confederate Symbols: Relation to Federal Lands and Programs*, CONG. RES. SERV., <https://fas.org/sgp/crs/misc/R44959.pdf> (last updated July 28, 2020).

105. Sarah Vogelsohn, *They May Sit on Public Land. But Not All Monuments are Publicly Owned*, VA. MERCURY (July 2, 2020), <https://www.virginiamercury.com/2020/07/02/they-may-sit-on-public-land-and-be-governed-by-state-laws-but-not-all-confederate-monuments-are-publicly-owned>.

106. Robert Sullivan, *It's Hard to Get Rid of a Confederate Memorial in New York City*, NEW YORKER, (Aug. 23, 2017), <https://www.newyorker.com/culture/culture-desk/its-hard-to-get-rid-of-a-confederate-memorial-in-new-york-city> (profiling the reach of these groups' monument efforts—starting in the South but expanding to California, New York, and Wisconsin).

monuments and even erect new ones.<sup>107</sup>

The origin of the monuments can often affect the laws governing them.<sup>108</sup> For example, sometimes the original funders retained a property interest in the monument or the monument may be entirely privately owned but sit on public land.<sup>109</sup> Alongside this private ownership comes “restrictions and limitations laid out in century-old agreements or articulated only in sources like meeting minutes or contemporary accounts.”<sup>110</sup> These complicated ownership patterns can affect disputes over rights to remove monuments as we detail below. Removal efforts can be assisted when groups have researched the history of the monuments and can address these questions proactively. Historical information can help clarify what entities might have rights or obligations related to the monuments.

Even when the source of funding plays no role legally, it may be significant from an emotional or rhetorical stance. Some groups who provided funding for monuments or their

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107. According to the *Washington Post*, the UDC has been responsible for erecting more than 700 monuments and other memorials to the Confederacy across the South, far more than any other group. Peter Galuszka, *The Women Who Erected Confederate Statues are Stunningly Silent*, WASH. POST (Oct. 13, 2017), [https://www.washingtonpost.com/opinions/the-women-who-erected-confederate-statues-are-stunningly-silent/2017/10/13/2e759dde-a920-11e7-b3aa-c0e2e1d41e38\\_story.html?utm\\_term=.fcfd946ecd89](https://www.washingtonpost.com/opinions/the-women-who-erected-confederate-statues-are-stunningly-silent/2017/10/13/2e759dde-a920-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.fcfd946ecd89).

108. Historical research into a monument may be helpful in addressing this issue. In many instances, the best source of information will be looking to the newspapers of the time and seeing if there are articles related to the installation of the monument. Even small towns during the period of the installation had active local newspapers, and the installation was often a major event with speeches and a ceremony that would have made the paper. The Library of Congress's Chronicling America database is a good starting point for trying to identify more of this history: CHRONICLING AM., <https://chroniclingamerica.loc.gov>.

109. See, e.g., Zachary Horner, *County Attorney: 'More Likely Than Not,' UDC Owns Confederate Monument*, CHATHAM NEWS & REC. (Sept. 18, 2019, 10:05 AM) <https://www.chathamnewsrecord.com/stories/county-attorney-more-likely-than-not-udc-owns-confederate-monument,2954> (profiling the ownership issues related to a North Carolina monument).

110. Vogelsong, *supra* note 105.

upkeep argue they should have a continued say or vote in the way the monument is either preserved or, as increasingly is the case, disposed.<sup>111</sup> In this way, supporters assert a continued ownership right.<sup>112</sup> Of course, that misunderstands both the economic and symbolic elements of a Confederate monument on public land. Economically, governments generally pay for their upkeep, and in more recent times, provide police protection against removal or vandalism.<sup>113</sup>

Many Confederate monuments were erected by private heritage groups who organized subscription campaigns for individual projects.<sup>114</sup> State and local governments would often chip in as well (sometimes at the end of a larger fundraising campaign to help the proponents get to the final

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111. Renss Greene, *Daughters of the Confederacy to Reclaim Courthouse Statue*, LOUDOUN NEWS (June 30, 2020), <https://loudounnow.com/2020/06/30/daughters-of-the-confederacy-to-reclaim-courthouse-statue> (profiling the decision to return a monument to the UDC in Virginia despite the county having spent thousands of dollars within the last decade on its restoration).

112. See Emily R. West, *Not Every Fight Over a Confederate Monument Ends with a Statue Coming Down*, THE TENNESSEAN (July 30, 2020, 6:06 PM), <https://www.tennessean.com/story/news/local/williamson/2020/07/30/not-all-confederate-monument-fights-end-removal/5357923002> (discussing thirty years of efforts to remove a monument in Franklin, Tennessee, which resulted in a determination that the monument could not be removed as it was owned by the UDC). The Confederate monument in Franklin, Tennessee, is now the subject of litigation where the City of Franklin is arguing that they now own the monument (and the underlying land through adverse possession). See Emily R. West, *City of Franklin: Judge Needs to Decide Who Owns Monument*, THE TENNESSEAN, (June 18, 2020, 2:09 PM), <https://www.tennessean.com/story/news/local/williamson/2020/06/18/franklin-tn-public-square-judgment-daughters-of-confederacy/3214928001>.

113. Palmer & Wessler, *supra* note 48; David A. Graham, *Local Officials Want to Remove Confederate Monuments—But States Won't Let Them*, THE ATLANTIC (Aug. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351>.

114. Harold Holzer, *How Northern Publishers Cashed in on Fundraising for Confederate Monuments*, SMITHSONIAN MAG. (July 7, 2019, 9:00 AM), <https://www.smithsonianmag.com/history/northern-printmakers-made-money-fundraising-confederate-monuments-180975257> (profiling fundraising efforts for Confederate monuments and strategies generally).

goal).<sup>115</sup> For example, the Jackson Guards Memorial formerly on the grounds of the Jackson County Courthouse in Newport, Arkansas, is purportedly the only Confederate memorial built in that state fully from private subscription (that is, without the use of public funds).<sup>116</sup> The money was largely raised from veterans and other citizens.<sup>117</sup> All other monuments in the state received at least some level of public financial support.<sup>118</sup>

### 3. Who Owns the Monument Today?

Related to the question of who paid for the monument, complicated discussions arise when the organizations that helped pay for the monument claim to retain ownership or control of it. Sometimes the organization explicitly retained ownership or there is lack of evidence of formal gift to the host community. In Parker County, Texas, the county attorney argued because the UDC chapter that paid for the monument did not actually gift the monument to the county, the UDC retained ownership.<sup>119</sup> Sometimes deed restrictions give these groups some rights of control even without ownership, which presents additional complications for removal efforts.<sup>120</sup> Some organizations may assert that they

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115. Charles C. Davis, *Confederate Monuments*, NCPEDIA (Jan. 1, 2006), <https://www.ncpedia.org/confederate-monuments> (noting the state of North Carolina's role in funding many of these statues).

116. *Arkansas Listing*, *supra* note 39, at E-23.

117. *National Register of Historic Places Registration Form: Jackson Guard Memorial*, NAT'L PARK SERV. (Apr. 26, 1996), <http://www.arkansaspreservation.com/National-Register-Listings/PDF/JA0496S.nr.pdf>.

118. To take another prominent example, Stone Mountain relied on funding from many sources ranging from private donations to the federal government's issuance of special coins to fund the carving—showing the range of sources that contributed to these commemorative works. Boissoneault, *supra* note 58.

119. Autumn Owens, *No Action Taken Over Confederate Statue, Questions Arise Over the Monument's Owner*, WEATHERFORD DEMOCRAT (June 22, 2020), [https://www.weatherforddemocrat.com/covid-19/no-action-taken-on-confederate-statue-questions-arise-over-monuments-owner/article\\_bedba016-b4bd-11ea-b628-8f0ddb7a3af0.html](https://www.weatherforddemocrat.com/covid-19/no-action-taken-on-confederate-statue-questions-arise-over-monuments-owner/article_bedba016-b4bd-11ea-b628-8f0ddb7a3af0.html).

120. See Josh Janney, *Foundation: Signage to Be Added to Confederate Statue*

have a reversionary interest in the monuments and that upon removal, the monument should revert to their ownership.

During the period when most monuments were erected, there were often no clear protocols dictating or governing how local governments accepted monuments for installation on public lands. There may also be ambiguity as to whether the heritage groups conveyed the monument as a gift and whether this gift was conditioned on public display or on other factors or if the group simply retained ownership. Today, an accepting governmental unit would likely seek to clarify title by voting to accept a donation of a commissioned work or obtain a bill of sale (or document this relationship through a formal donation agreement). In short, there would be some form of public process to formally accept the monument, to confirm ownership, and to approve its location on public property.

In our research, there is often little documentation of the history of these monuments from an ownership perspective—other than general references to the funding or who commissioned the work.<sup>121</sup> In most instances, neither the donor nor the accepting authority have clear records demonstrating the conditions, if any, upon which the monument was conveyed. However, we have seen multiple cases where either the UDC or SCV has stepped up to claim some ownership interest in a monument, often to the surprise of the local government.

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*Site*, WINCHESTER STAR (June 19, 2020), [https://www.winchesterstar.com/winchester\\_star/foundation-signage-to-be-added-to-confederate-statue-site/article\\_ac041838-63c4-5001-b08a-3c6eec38acad.html](https://www.winchesterstar.com/winchester_star/foundation-signage-to-be-added-to-confederate-statue-site/article_ac041838-63c4-5001-b08a-3c6eec38acad.html) (noting the Shenandoah Valley Battlefields Association's view that they are prohibited from removing a Confederate monument in Winchester, Virginia, by both a deed restriction and a preservation easement).

121. The documentation is generally scarcer the more typical or commonplace a monument is. While there may be good records related to Monument Avenue, the solitary Confederate soldier on the grounds of a county courthouse is unlikely to have as much background.

## B. *Examples*

Throughout this Article, we draw on several specific examples of Confederate monuments to highlight the types of issues that arise and the questions that should be asked by advocates and communities seeking to remove monuments. While other examples are mentioned here and there, five particular monuments serve as the backdrop for this discussion and we return to them repeatedly. We introduce (or reintroduce) them here to give you an idea of when and where these monuments occur and then discuss various issues associated with these five monuments in the sections that follow.

1. Richmond's Monument Avenue [five monuments erected between 1890-1929, four removed in 2020, one remains]

In Richmond, Virginia, five Confederate statues long lined the boulevard of one of the city's most prestigious addresses, Monument Avenue. Richmond's Monument Avenue was the most significant mixture of Confederate monumental art and the apotheosis of the trend during the early decades of the twentieth century of using public art to support the Lost Cause movement in connection with rebuilding Southern society. The monuments have been home to celebrations of Lee's birthday and to Confederate-themed events. The monuments had been considered a local attraction.<sup>122</sup> As of November 2020, all the monuments have been vandalized, four have been removed, and one remains standing but clouded by pending judicial proceedings.<sup>123</sup>

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122. Erik Ortiz, *Northam Announces Robert E. Lee Statue, Confederate Monuments in Richmond Will be Removed*, NBC NEWS [hereinafter Erik Ortiz], <https://www.nbcnews.com/news/us-news/northam-announces-robert-e-lee-statue-confederate-monuments-richmond-will-n1224846> (June 4, 2020, 1:19 PM).

123. See Aimee Ortiz, *Richmond Removes Confederate Statues from Monument Avenue*, N.Y. TIMES [hereinafter Aimee Ortiz], <https://www.nytimes.com/2020/07/02/us/stonewall-jackson-statue-richmond.html> (July 9, 2020).

The remaining statue is the grandiose depiction of Robert E. Lee on horseback mentioned above. Robert E. Lee was commander of the Army of Northern Virginia and, in many ways, the symbol of the Lost Cause Movement, which coalesced around his memory after his death in 1870.<sup>124</sup> Erected in 1890, the sixty-one-foot monument was the first statue on the avenue and the impetus for the others in the area.<sup>125</sup> The sculpture and base were designed by famous French artists (Jean Antonin Mercie and Paul Pujol respectively).<sup>126</sup> Several craftspeople, artisans, and engineers were also involved in its design and construction, and the artistic merit of the piece is undeniable.<sup>127</sup>

In 1907, Lee's statue was joined by depictions of Jefferson Davis (the first and only President of the Confederacy) and J.E.B. Stuart (a prominent general who commanded cavalry regiments under Lee).<sup>128</sup> Designed by Richmond architect William C. Noland and sculptor Edward V. Valentine, the Jefferson Davis monument featured thirteen columns representing the eleven Southern states that seceded from the Union plus the two states that sent delegates to the Confederate Congress.<sup>129</sup> Each of the monuments on the avenue had its own monument

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124. Eric Foner, *The Making and the Breaking of the Legend of Robert E. Lee*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/books/review/eric-foner-robert-e-lee.html>; see Adam Serwer, *The Myth of the Kindly General Lee*, THE ATLANTIC (June 4, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-myth-of-the-kindly-general-lee/529038/>.

125. *Monument Avenue Commission*, VA. HIST. SOC'Y (Aug. 9, 2017) [hereinafter *Monument Avenue Commission*], <https://static1.squarespace.com/static/597a220f579fb3cca0ab3454/t/59ba83c47eff41a09686fd60/1505395655892/MAC+Program+August+9.pdf>.

126. *Id.*

127. *Robert E. Lee Monument Listing*, *supra* note 34.

128. *Monument Avenue Commission*, *supra* note 125.

129. *Monument Avenue Historic District*, LIVING PLACES [hereinafter *Monument Avenue Historic District*], [https://www.livingplaces.com/VA/Independent\\_Cities/Richmond\\_City/Monument\\_Avenue\\_Historic\\_District.html](https://www.livingplaces.com/VA/Independent_Cities/Richmond_City/Monument_Avenue_Historic_District.html) (last visited July 22, 2020).

association or committee that lobbied for, raised money for, and coordinated the monument's construction and placement. Work on the Jefferson Davis Monument Association began ten days after Davis's death in 1889 and was backed by the United Confederate Veterans and the local chamber of commerce.<sup>130</sup> The UDC took over the project in 1902, and the Richmond city council chose the site.<sup>131</sup> The costs of the monument were covered mostly from private fundraising efforts by Confederate veterans and supporters.<sup>132</sup>

Frederick Moynihan designed and unveiled the statue of J.E.B. Stuart in the center of Stuart Circle.<sup>133</sup> The bronze statue stood fifteen-feet tall and was mounted on a large granite pedestal. The statue depicted J.E.B. Stuart sitting atop a northward facing horse and was the most animated of the Monument Avenue statues.<sup>134</sup> Fitzhugh Lee (nephew of Robert E. Lee, former Confederate general himself, and Virginia governor from 1886-1890) founded the Stuart Monument Association, which worked closely with veterans in its fundraising efforts.<sup>135</sup> Some funding also came from the city.<sup>136</sup>

A monument to Thomas "Stonewall" Jackson designed by William Sievers followed in 1919.<sup>137</sup> It was a thirty-seven-foot tall equestrian bronze on a granite base.<sup>138</sup> His widow

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130. *Monument Avenue Commission*, *supra* note 125.

131. *Id.*

132. *See id.*

133. *Monument Avenue Historic District*, *supra* note 129 (noting that Moynihan, a sculptor from New York, worked with a local sculptor to make the statue).

134. J.E.B. Stuart on Monument Avenue in Richmond, VA. PLACES, <http://www.virginiaplaces.org/vacities/monavestuart.html> (last visited Sept. 30, 2020).

135. *Monument Avenue Commission*, *supra* note 125.

136. *Id.*

137. *Id.*

138. *Id.*

was part of the fundraising efforts of the Jackson Monument Corporation, alongside the UDC.<sup>139</sup>

Sievers also sculpted the final Confederate monument added to Monument Avenue, that of Confederate Admiral Matthew Fontaine Maury, made public on Armistice Day, November 11, 1929.<sup>140</sup> A more technically complicated statue, Maury sits on a pedestal holding sea charts and a compass.<sup>141</sup> A large globe sits on a pedestal behind him surrounded by rough waters and figures in a storm with a man, woman, boy, dog, and cow in distress. The entire monument is thirty-feet tall.<sup>142</sup> It was paid for by a mixture of public and private funds. The Maury Monument Association marshalled money from the city, the state, the UDC, school children, and others.<sup>143</sup>

In contrast to the Confederate monuments, a monument to Arthur Ashe, a prominent African American tennis player, was erected on Monument Avenue in July 1996.<sup>144</sup> The twelve-foot statue features Ashe in athletic wear, holding a tennis racket in one hand and books in the other, while children sit at his feet.<sup>145</sup> The monument is located about a mile and a half from the Robert E. Lee and J.E.B. Stuart Monument. It also has been the target of vandals, with one man spray painting WLM (for “White Lives Matter”) on its base.<sup>146</sup>

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139. *Id.*

140. Matthew Mace Barbee, *Matthew Fontaine Maury and the Evolution of Southern Memory*, 120 VA. MAG. HIST. & BIOGRAPHY 373, 383 (2012).

141. *Id.* at 389.

142. *Monument Avenue Commission*, *supra* note 125.

143. *Id.*

144. *Arthur Ashe Jr. Monument*, AFROVIRGINIA: VA. HUMAN., <http://places.afrovirginia.org/items/show/26> (last visited Sept. 30, 2020).

145. *Id.*

146. Sandra E. Garcia, *Arthur Ashe Statue in Virginia Vandalized with ‘White Lives Matter’*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/us/arthur-ashe-statue-vandalized.html>.

## 2. Jefferson Davis Statue at the Kentucky State Capitol [1936-2020]

A marble, fifteen-foot tall statue of Jefferson Davis long stood in the State Capitol Rotunda in Frankfort, Kentucky.<sup>147</sup> It was built during the Jim Crow era. The UDC raised most of the money along with \$5,000 from the state to commission this work.<sup>148</sup> It was accepted by Governor Happy Chandler and unveiled in 1936.<sup>149</sup>

This statue had been controversial for many years. Some past governors opposed removal, with former Governor Matt Bevin suggesting that removing the monument would be a “sanitization of history.”<sup>150</sup> Other governors had been interested in removing the statue, but had been unable to do so due to a state law requiring approval by the state’s Historic Properties Advisory Committee for modifications to state historic sites.<sup>151</sup> In June 2020, the state’s Historic Properties Advisory Committee, which has jurisdiction over state-owned properties, voted to remove this statue by an 11-to-1 margin and approved moving it to Jefferson Davis State Park in Fairview, Kentucky.<sup>152</sup> The statue has not yet been relocated and is presumably in storage pending this relocation.

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147. Capitol Rotunda Statuary, KY.GOV, <https://historicproperties.ky.gov/hp/ncs/Pages/crs.aspx> (last visited Sept. 30, 2020).

148. *See id.*

149. *Id.*

150. Martin Pengelly, *Kentucky Confederate Statue Removal Reveals Evidence of Jim Crow Past*, THE GUARDIAN (June 13, 2020, 4:27 PM), <https://www.theguardian.com/us-news/2020/jun/13/jefferson-davis-statue-removal-kentucky-jim-crow>.

151. K.R.S. § 11.026-027; Joe Sonka, *Kentucky Commission Votes to Remove Statue of Jefferson Davis from State Capitol*, LOUISVILLE COURIER J. (June 12, 2020, 1:32 PM), <https://www.courier-journal.com/story/news/politics/2020/06/12/state-commission-votes-remove-jefferson-davis-statue-capitol/3174540001>.

152. Phillip M. Bailey, *‘Sins of Our Past’: After 84 Years, Jefferson Davis Statue Removed from Kentucky Capitol*, LOUISVILLE COURIER J. (June 13, 2020, 8:55 AM), <https://www.courier-journal.com/story/news/politics/2020/06/13/confederate-statues-jefferson-davis-removed-kentucky-capitol/3179569001>.

### 3. Nathan Bedford Forrest in Memphis' Health and Sciences Park [1905-2017]

A statue of Nathan Bedford Forrest was the centerpiece of a Memphis city park and also served as the final resting place of Forrest and his wife. The site was designated as Bedford Forrest Park in 1899 but wasn't completed or dedicated until May 1905.<sup>153</sup> The park's landscape architect based his design around a large bronze equestrian statue of Forrest, designed by Charles Henry Niehaus.<sup>154</sup> In 1904, the remains of Forrest and his wife were reinterred in the pedestal from their former location at Elmwood Cemetery.<sup>155</sup>

Of the \$35,000 total cost, the Forrest Monument Association raised \$20,000.<sup>156</sup> While the statue was largely paid for with private funds, the park was a development project of the city. The development of the park is so intertwined with honoring Forrest that describing the monument as privately funded and driven misses the mark and the complicated interplay between private/public interest.<sup>157</sup>

Forrest Park, now named Health and Sciences Park, was listed on the National Register of Historic Places in 2009, with the central statue of Forrest as a contributing

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153. *National Register of Historic Places Supplementary Listing Record, Forrest Park Historic District*, NAT'L PARK SERV. (Mar. 4, 2009) [hereinafter *Forrest Park Listing*], <https://npgallery.nps.gov/GetAsset/4aba74de-2316-4d1e-a8ea-8e7f5172a170>.

154. *Equestrian Statue of General Forrest*, SMITHSONIAN INST. [hereinafter *Equestrian Statue*], <https://siris-artinventories.si.edu/ipac20/ipac.jsp?session=1504L1F54R378.3430&profile=ariall&source=~!siartinventories&view=subscriptionssummary&uri=full=3100001~!18120~!42&ri=2&aspect=Browse&menu=search&ipp=20&spp=20&staffonly=&term=Outdoor+Sculpture+--+Tennessee+--+Memphis&index=OBJEC&uindex=&aspect=Browse&menu=search&ri=2> (last visited July 5, 2020).

155. *Forrest Park Listing*, *supra* note 153. Nathan Bedford Forrest died in 1877 and Mary Forrest passed away in 1893. *Id.*

156. *Equestrian Statue*, *supra* note 154.

157. See *Forrest Park Listing*, *supra* note 153, § 8, 7.

resource.<sup>158</sup> Much of the nomination form concentrates on the landscape architecture of the park and the development generally of city parks during the park's period of significance, but the discussion of Forrest presents an interesting picture of the man and the statue. It describes Forrest as a "bold and brilliant cavalry officer," while also explaining that his fortune was built as a plantation owner and slave dealer who became the first Grand Wizard of the Ku Klux Klan after the war.<sup>159</sup>

The statue was removed in 2017 in a complicated maneuver that involved transferring ownership of the park to a private entity. The related litigation was finally settled in 2018 with an agreement that included conveying the statue (and two others from another city park) to the Tennessee chapter of the SCV.<sup>160</sup> The remains of Forrest and his wife are also being disinterred from Health and Sciences Park and are apparently slated for reburial in Columbia, Tennessee.<sup>161</sup>

#### 4. Silent Sam in Chapel Hill, North Carolina [1913-2018]

Silent Sam was located on the University of North Carolina's Chapel Hill campus, at the "front door" to the university.<sup>162</sup> The North Carolina division of the UDC and

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158. *See id.* Interestingly, the nomination does not suggest that the listing is merited based on the artistic value of the statue as was seen with the Lee Monument in Richmond (and many other Confederate monuments) even though the artistic value of the work has long been recognized. *Id.*

159. *Id.*

160. Bill Dries, *Greenspace Nonprofit Details Offers for Confederate Monuments*, MEMPHIS DAILY NEWS (Jan. 19, 2018), <https://www.memphisdailynews.com/news/2018/jan/19/greenspace-nonprofit-details-offers-for-confederate-monuments>.

161. James Bennett, *Nathan Bedford Forrest's Remains Could Move to Columbia Museum*, DAILY NEWS J. (May 14, 2020, 7:00 AM), <https://www.dnj.com/story/news/2020/05/14/nathan-bedford-forrests-remains-could-move-columbia-museum/5185546002>.

162. Susan Svrluga, *Hundreds of UNC Faculty Members Urge Officials Not to Restore Silent Sam Statue to its Original Location*, WASH. POST (Sept. 5., 2018), <https://beta.washingtonpost.com/education/2018/09/06/hundreds-unc-faculty->

the university erected the monument in 1913 to honor the UNC alumni who had served the Confederacy.<sup>163</sup> Money for the monument came from the university, its alumni, and the UDC.<sup>164</sup> The statue depicts a young soldier grasping his rifle above a relief of a woman—which represents the state of North Carolina—encouraging a student to drop his books and join the war effort.<sup>165</sup> Called simply “the Confederate Monument” for many years, the earliest known use of the name “Silent Sam” is from 1954, in the campus newspaper *The Daily Tar Heel*.<sup>166</sup>

Protests against UNC’s Silent Sam date to at least the Civil Rights movement of the 1960s.<sup>167</sup> In April 1968, following the assassination of Dr. Martin Luther King Jr., demonstrators splashed the statue with paint and tagged it with graffiti.<sup>168</sup> In November of 1971, the Black Student Movement and the Afro-American Society of Chapel Hill High School held a gathering and protested at Silent Sam in memory of James Cates, a young Black man murdered on UNC’s campus by members of a white motorcycle gang on November 20, 1970, and William Murphy, a Black man shot and killed by a highway patrolman in Ayden, North Carolina, on August 6, 1971.<sup>169</sup>

In dealing with the aftermath of the Charlottesville

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members-urge-officials-not-restore-silent-sam-statue-its-original-location/?noredirect=on.5.

163. *Id.*

164. Gutierrez, *supra* note 93.

165. *Confederate Monument (a.k.a. Silent Sam)*, U. N.C., [https://web.archive.org/web/20160202152855/http://museum.unc.edu/exhibits/public\\_art/confedconf\\_e\\_memorial](https://web.archive.org/web/20160202152855/http://museum.unc.edu/exhibits/public_art/confedconf_e_memorial) (last visited Feb. 2, 2016).

166. *Id.*

167. *A Guide to Resources About UNC’s Confederate Monument: Timeline*, U. ARCHIVES UNC CHAPEL HILL [hereinafter *UNC’s Confederate Monument: Timeline*], <https://exhibits.lib.unc.edu/exhibits/show/silent-sam/timeline> (last visited Nov. 12, 2020).

168. *Id.*

169. *Id.*

protests in 2017, Governor Roy Cooper granted UNC permission to remove Silent Sam, but the university left the statue up. UNC students and community members held a rally demanding the removal of the Confederate monument.<sup>170</sup> The day before the fall semester was scheduled to begin in August 2018, the statue was pulled down by roughly 250 protestors (including students) during a rally called “Until They All Fall.”<sup>171</sup> The rally was in protest of Silent Sam’s continued presence on campus and in support of doctoral student and activist Maya Little, who was, facing honor court charges for an April demonstration in which she poured red paint and her own blood on the monument.<sup>172</sup> The university’s chancellor later removed the statue’s pedestal and other remnants, placing these items in storage before she resigned.<sup>173</sup>

In November 2019, UNC conveyed possession of Silent Sam to the state chapter of SCV.<sup>174</sup> The next day, the UDC, conveyed its reversionary interests to the SCV.<sup>175</sup> This initial settlement granted the SCV the statue as well as \$2.5 million for its “care and preservation” on the condition that the statue would not be displayed within the county (or any counties with a current UNC-system campus).<sup>176</sup> However,

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170. *Id.*

171. 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>.

172. *UNC’s Confederate Monument: Timeline*, *supra* note 167.

173. Lisa Philip, *UNC Chancellor Announces Removal of Remaining Silent Sam Monument, Then Resigns*, NPR (Jan. 15, 2019), <https://www.npr.org/2019/01/15/685656027/unc-chancellor-announces-removal-of-remaining-silent-sam-monument-then-resigns>.

174. Brief for Alyassa Boyd et al. as Amici Curiae at 4, N.C. Div. of Sons of the Confederacy v. Univ. of N.C., No. 19-CVS-1579 (N.C. Super. Ct. Jan. 29, 2020), [https://www.wunc.org/sites/wunc/files/202001/prop-int\\_amicus\\_brief\\_19\\_cvs\\_1579.pdf](https://www.wunc.org/sites/wunc/files/202001/prop-int_amicus_brief_19_cvs_1579.pdf).

175. *Id.*

176. Molly Olmstead, *Judge Voids UNC’s \$2.5 Million Settlement with the Sons of Confederate Veterans over Silent Sam*, SLATE (Feb. 12, 2020, 3:40 PM),

the settlement was challenged by students and faculty, and ultimately reversed because the SCV lacked standing.<sup>177</sup> Today, Silent Sam remains in an undisclosed storage facility.<sup>178</sup>

#### 5. Soldiers & Sailors Monument in Birmingham's Linn Park [1905-2020]

The UDC erected the Confederate Soldiers & Sailors Monument in Birmingham's Linn Park (known as Capitol Park at the time) in 1905.<sup>179</sup> The base of the monument was created for the 1894 Reunion of United Confederate Veterans.<sup>180</sup> On May 29, 1896, eleven days after the landmark case *Plessy v. Ferguson* was decided, the UDC decided to raise money to complete the monument that had largely been a forgotten slab of rock sitting in a park.<sup>181</sup> The obelisk stands fifty-two-feet tall and has two relief sculptures: a musket and crossed sabers on the east face honor Confederate soldiers and an anchor on the west face honors Confederate sailors.<sup>182</sup> Architect Charles Wheelock designed the monument.<sup>183</sup> On April 26, 1905, a crowd of

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<https://slate.com/news-and-politics/2020/02/silent-sam-unc-sons-of-confederate-veterans.html>.

177. Michael Levenson, *Toppled but Not Gone, U.N.C. Grapples Anew With the Fate of Silent Sam*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/unc-silent-sam-statue-settlement.html>.

178. *Id.*

179. Mark Almond, *A Close-Up Look at Birmingham's Embattled Confederate Monument*, AL.COM (Jul. 2, 2015), [https://www.al.com/news/birmingham/2015/07/a\\_close-up\\_look\\_at\\_birminghams.html](https://www.al.com/news/birmingham/2015/07/a_close-up_look_at_birminghams.html).

180. Brentin Mock, *Alabama Can't Make Birmingham Display Confederate Monument*, CITYLAB (Jan. 16, 2019, 5:03PM), <https://www.bloomberg.com/news/articles/2019-01-16/alabama-lost-birmingham-s-linn-park-confederate-statue>.

181. *Id.*

182. Almond, *supra* note 179.

183. Michael A. Davis, In Remembrance: Confederate Funerary Monuments in Alabama and Resistance to Reconciliation, 1884-1923, at 7-73 (May 10, 2020) (M.A. thesis, Auburn University), [https://etd.auburn.edu/bitstream/handle/10415/11118/Davis\\_Michael\\_44.pdf?sequence=1](https://etd.auburn.edu/bitstream/handle/10415/11118/Davis_Michael_44.pdf?sequence=1).

more than 1,000 attended the unveiling ceremony.<sup>184</sup>

Birmingham had tried for years to remove the statue but was stymied by a state law protecting Confederate monuments and associated litigation.<sup>185</sup> After the statue was damaged in protests on May 31, 2020, the city began to dismantle it on the night of June 1, 2020.<sup>186</sup> The city decided that a one-time \$25,000 fine for violating state law was a small price to pay for removal.<sup>187</sup>

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184. *Id.*; Nathan Watson, *A History of the Confederate Monument in Birmingham's Linn Park*, BHAM NOW (June 2, 2020), <https://bhamnow.com/2020/06/02/a-history-of-the-confederate-monument-in-birminghams-linn-park>.

185. Audra D.S. Burch, *Birmingham Mayor Orders Removal of Confederate Monument in Public Park*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/george-floyd-birmingham-confederate-statue.html>.

186. Watson, *supra* note 184. The protestors tried to topple the statue, including trying to pull it down with a truck, but they could not move it. *Id.*

187. William A. Bell Sr., Former Mayor of Birmingham, Alabama, Statement at the US/ICOMOS Webinar: Confederate Monuments: Past, Present, and Future (Aug. 13, 2020). It was previously unclear whether the \$25,000 would be a one-time fee or a daily penalty. The Alabama Supreme Court clarified it would be a one-time fee in the summer of 2020. If the penalty provision under this law had been clarified earlier, monuments throughout Alabama would have likely come down sooner.

### III. THE “DEATH” OF CONFEDERATE MONUMENTS

Confederate monuments have been threatened with removal in the past, but the protests beginning in May 2020 have resulted in substantially more removals and increased attention on remaining monuments across the South. While some monuments have been toppled by protestors, others have been or are targeted for removal by advocates following local or state-mandated process. Even if a law does not actually bar removal, it may still complicate these efforts and require an additional layer of review. This Section focuses on several issues advocates face.

#### A. *Historic Preservation Laws*

Historic preservation laws potentially provide a tool for those seeking to prevent monument removal.<sup>188</sup> Historic preservation laws have not been a material barrier, at least to date, to removal efforts,<sup>189</sup> but there are a few issues that advocates should be aware of so as to head them off to expedite this process. This Section does not provide an exhaustive treatment of the potential application of historic preservation laws to Confederate monuments, as we covered

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188. See generally Phelps & Owley, *Etched in Stone*, *supra* note 6. A prominent, although unsuccessful, example is Liberty Place. In 2015, New Orleans Mayor Mitch Landrieu called for the City Council to remove four Confederate monuments based on their status as public nuisances. Landrieu invoked a 1993 law that outlined conditions under which a Confederate monument would be considered a public nuisance. What could happen to removed monuments was not clear, but the ordinance said that they “may be displayed indoors at an appropriate facility,” stored, or donated. Within four hours of removal, the city was sued. Monument supporters argued removal would violate both historic preservation laws and the 1993 ordinance. The historic preservation laws were implicated because federal funds were used in the removal. The Eastern District of Louisiana held that while the law required the city to display the monument, the city could remove later if it did not use federal funds. See Adam Swensek, *Confederate-Monument Removals Slowed by Knot of Legal Issues*, A.B.A. (Dec. 2019); <https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/efforts-to-remove-confederate-monuments-slowed-by-knot-of-legal-> (summarizing the comments of webinar speakers).

189. Byrne, *supra* note 103.

this in an earlier work, but provides considerations to keep in mind throughout the removal process.<sup>190</sup>

Many Confederate monuments are designated on the National Register of Historic Places, the nation's "honor roll" recognizing resources of historic significance. Designation on the National Register does not itself prevent the removal of a monument, as a designated resource can still be removed from its setting, destroyed, or even demolished.<sup>191</sup> However, designation may trigger protection under a local or state law.<sup>192</sup> Specifically, many state and local laws rely on National Register status to determine whether a resource merits preservation. As a result, a monument's removal, in some instances, may need to be voted on by a historic district or landmarks commission.<sup>193</sup> Notably, a procedural statute such as section 106 of the National Historic Preservation Act (NHPA) could also be triggered if there is a federal nexus (such as federal funding for the monument), but this only requires that a resource be eligible for designation, not actual designation, to be triggered, so the actual nomination does not have a determinative effect.<sup>194</sup> Historic designation has been a source of confusion in many monument debates, but

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190. In the summer of 2020, many prominent preservation advocacy groups came out in favor of some degree of public monument removal. *See, e.g., Our Statement on Confederate Monuments*, PRESERVATION N.C., <https://www.presnc.org/news/statement-confederate-monuments> (last visited Sept. 12, 2020).

191. *See, e.g., Why the COV Can Remove Richmond's Lee Monuments Despite Its Designation to the Federal and State Historic Register*, VA. DEP'T OF HIST. RESOURCES, <https://www.dhr.virginia.gov/articles-blogs-contributions-in-newsletters/why-the-cov-can-remove-richmonds-lee-monument-despite-its-designation-to-the-state-and-federal-historic-registers> (last updated Sept. 1, 2020) (explaining this distinction and also noting that removal may impact actual designation down the line, but that will be determined in due course).

192. *See, e.g., National Register of Historic Places*, NAT'L TR. FOR HISTORIC PRESERVATION, <https://forum.savingplaces.org/learn/fundamentals/preservation-law/federal/nrhp> (explaining that this status could trigger local review).

193. *See id.*

194. *See, e.g., Section 106 Applicant's Toolkit*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit> (last visited Sept. 15, 2020).

thus far, eligibility or listing has not prevented removal for most monuments.<sup>195</sup>

Further, under the National Register eligibility criteria, monuments should generally not be designated, at least not for their commemorative value.<sup>196</sup> Monuments are commemorative properties, which the drafters of the National Register excluded as they viewed monuments as having the potential, by sheer numbers, to be overrepresented and dilute the recognition the National Register was intended to provide.<sup>197</sup> There are, however, exceptions if the monument is listed not for being a monument, but for its artistic or cultural importance.<sup>198</sup> Many monuments were sculpted by artists of great ability and reputation, such as Richmond's Robert E. Lee statue or Stone Mountain. For more typical monuments (such as the solitary Confederate soldier), many have been designated, either singularly or as part of larger multi-resource nominations, for their significance to the Lost Cause monument movement during the Jim Crow period.<sup>199</sup> Hence, somewhat ironically, they have been designated based upon the actual viewpoint or the purpose that is now leading to

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195. As we raised in our earlier work, an ongoing issue with the National Register is the actual language of the National Register nominations that determined many Confederate monuments eligible for this status. Many nominations of these resources are quite dated and there isn't much attention paid to updating these nomination forms once the designation is in place or reevaluating the historic case that was made or why these resources have significance. See Phelps & Owley, *Etched in Stone*, *supra* note 6.

196. See U.S. DEPARTMENT OF THE INTERIOR, NAT'L REG. BULLETIN: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 39–43 (1990) (discussing how Criteria Consideration F is applied for evaluating monuments).

197. JOHN H. SPRINKLE, JR., CRAFTING PRESERVATION CRITERIA: THE NATIONAL REGISTER OF HISTORIC PLACES AND AMERICAN HISTORIC PRESERVATION 151–53 (2014) (explaining the debates around these limits generally).

198. 36 C.F.R. § 60.4 (2012).

199. See, e.g., VIRGINIA DEPARTMENT OF HISTORIC RESOURCES, DHR AND THE ROLE OF THE REGISTERS IN THE RECORDATION OF CONFEDERATE MEMORIALS AND MONUMENTS IN VIRGINIA, <https://www.dhr.virginia.gov/wp-content/uploads/2018/05/DHRs-War-Memorials-Workgroup-Pres-v3.0-July-2018.pdf> (July 2018).

their relocation and removal.

Two points should be kept in mind: historic preservation laws may trigger a procedural consultation process, and state laws are the ones most likely to hamper or delay removal efforts. First, procedural laws may be triggered by a removal effort. If a monument (1) is designated (or eligible for designation) on the National Register and (2) there is a federal nexus to the project, the NHPA may trigger a consultation process.<sup>200</sup> A similar consultation process may apply under state preservation statutes. Consultation helps determine whether a historic property will be impacted by the proposed undertaking or project. To expedite removal, it may be helpful to argue that a monument is not an eligible resource.

Second, local historic district laws can control designs and changes to certain monuments. There may be a local body tasked with approving alterations or demolition of historic resources (whether advisory or with regulatory control).<sup>201</sup> The existence of such laws may require advocates for removal to work through the process.<sup>202</sup> While there have

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200. Other procedural laws may also apply in some circumstances. Procedural laws, as they sound, are laws that do not require a particular outcome but do require that public input or a consultation process be followed if a triggering threshold is met. A primary example of this type of law are the National Environmental Policy Act (NEPA) and state environmental policy acts. Although a failure to comply with NEPA has been asserted in at least one lawsuit challenging the legality of Confederate monument removal, plaintiffs could not establish a federal connection (federal land, federal funds for the monument or its removal). If such a procedural law is triggered, consultation will likely involve public input and discussion over the future of the monument. This may result in some pressure to minimize impacts to the monument including likely consideration of possible options for relocation.

201. See, e.g., Emily Cole, *Historic Preservation Commission Discusses Confederate Marker*, NEWS TRIB. (July 15, 2020, 12:06 AM), <https://www.news-tribune.com/news/local/story/2020/jul/15/historic-preservation-commission-discusses-confederate-marker/834356>.

202. See, e.g., Kimberley C. Moore, *Lakeland Historic Preservation Board OKs Confederate Statue Move*, JACKSONVILLE.COM, <https://www.jacksonville.com/news/20180726/lakeland-historic-preservation-board-oks-confederate-statue-move> (July 27, 2018, 9:20 AM).

been few cases where a local historic preservation law has been an impediment to monument removal to date, this is still an issue that should be reviewed and addressed proactively to avoid delay.

A good example of how these issues play out is the Robert E. Lee Monument in Richmond, which was listed on the National Register in 2007.<sup>203</sup> The Robert E. Lee Monument was found to be significant at the state level and eligible for designation on the National Register under two criteria.<sup>204</sup> It met Criterion A for its close association with major historical developments in the region and the nation in the three decades following the Civil War as well as its close association with an important historical event, the unveiling of the statue.<sup>205</sup> The monument is also designated significant under Criterion C by reason of its outstanding artistic quality and design.<sup>206</sup>

The monument is also part of a National Register Historic District. The Monument Avenue Historic District is a fourteen-block area that includes the five Confederate monuments and the surrounding neighborhood.<sup>207</sup> The district has been listed as a state landmark district since 1969.<sup>208</sup> The district was added to the National Register in 1970 and designated as a National Historic Landmark in 1997.<sup>209</sup> These designations are only partly based on significance of the statues; the National Register district nomination focuses on the layout of the boulevard and the architectural style of the mansions, churches, and homes in

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203. *Robert E. Lee Monument Listing*, *supra* note 34.

204. *Id.*

205. *Id.*

206. *Id.*

207. *127-0174 Monument Avenue Historic District*, VA. DEPT OF HISTORIC RESOURCES, <https://www.dhr.virginia.gov/historic-registers/127-0174/> (last updated Aug. 9, 2019).

208. *Id.*

209. *Id.*

the area.<sup>210</sup> The district's 1997 designation as a National Historic Landmark was based on "its significance in the areas of architecture, community planning and commemoration."<sup>211</sup>

On June 4, 2020, Governor Northam announced his intention to remove the statue (as the statue is owned by the State of Virginia). On June 15, 2020, six Monument Avenue residents filed suit in state court, challenging the Governor's decision: *Taylor v. Northam*. Only 96-year old activist Helen Marie Taylor appeared as a named plaintiff in the initial suit because other plaintiffs feared for their safety.<sup>212</sup> Plaintiffs asserted that removing the statue would hurt property values and endanger tax benefits available to them for living within a historic district.<sup>213</sup> Among other things, they argued that removal of the monument would lead to de-designation of the district, which would affect their property values and ability to access tax benefits.<sup>214</sup> The complaint also claimed that some Monument Avenue residents had faced "serious personal injury" that required medical attention "simply because those residents commented to the (proponents of taking down the monuments) as they were damaging public property that those actions were unlawful or inappropriate."<sup>215</sup>

State Attorney General Mark Herring said that the

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210. *See id.*

211. *Id.*; see also *National Historic Landmark Nomination: Monument Avenue Historic District*, NAT'L PARK SERV. (June 27, 1997), <https://npgallery.nps.gov/GetAsset/4e28a156-9c67-42e6-aa88-6fef548210ac>.

212. Justin Mattingly, *Six Monument Avenue Residents Sue to Stop Lee Statue's Removal; New Case Moved to Federal Court*, RICH. TIMES-DISPATCH (June 15, 2020) [hereinafter Mattingly (June 15, 2020)], [https://richmond.com/news/virginia/six-monument-avenue-residents-sue-to-stop-lee-statues-removal-new-case-moved-to-federal/article\\_cf0be699-55d0-56df-9fa6-8ac9039e32ea.html](https://richmond.com/news/virginia/six-monument-avenue-residents-sue-to-stop-lee-statues-removal-new-case-moved-to-federal/article_cf0be699-55d0-56df-9fa6-8ac9039e32ea.html).

213. *Id.*

214. Complaint for Declaratory and Injunctive Relief, *Taylor v. Northam*, No. 20-2489-7 (Va. Cir. Ct. June 15, 2020).

215. Mattingly (June 15, 2020), *supra* note 212.

lawsuit's arguments, specifically that removing the statue is in conflict with federal historic preservation law, warranted the case being heard in federal court rather than state court and filed a notice of removal in the United States District Court for the Eastern District of Virginia.<sup>216</sup> It was not clear from the original complaint whether the plaintiffs raised federal historic preservation law-related issues in an attempt to demonstrate standing in the case or because they believed there to be an actual cause of action rooted in federal historic preservation law. Herring appeared to believe plaintiffs were asserting the latter. Plaintiffs disagreed. On June 17th, the plaintiffs voluntarily withdrew the case from federal court, asserting that their case was not based on federal law and instead involved a "state issue."<sup>217</sup>

On July 21, 2020, the plaintiffs re-filed the lawsuit in state court.<sup>218</sup> This is the third lawsuit from this neighborhood group.<sup>219</sup> The complaint reiterates claims from previous complaints that taking down the statues would decrease property values and hurt their ability to access

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216. Notice of Removal, Taylor v. Northam, No. 3:20-cv-00440 (E.D. Va. June 15, 2020); Mattingly (June 15, 2020), *supra* note 212.

217. See Notice of Voluntary Dismissal, Taylor v. Northam, No. 3:20-cv-00440 (E.D. Va. June 17, 2020); Justin Mattingly, *Monument Avenue Residents Withdraw Federal Suit Supporting Lee Statue, Want Case Consolidated Locally*, RICH. TIMES-DISPATCH (June 17, 2020), [https://richmond.com/news/virginia/monument-avenue-residents-withdraw-federal-suit-supporting-lee-statue-want-case-consolidated-locally/article\\_148731eb-fff0-52c0-8165-e228291d0abd.html](https://richmond.com/news/virginia/monument-avenue-residents-withdraw-federal-suit-supporting-lee-statue-want-case-consolidated-locally/article_148731eb-fff0-52c0-8165-e228291d0abd.html).

218. Justin Mattingly, *Monument Avenue Residents Re-File Lawsuit Challenging Removal of Lee Statue*, RICH. TIMES-DISPATCH (July 22, 2020) [hereinafter Mattingly (July 22, 2020)], [https://richmond.com/news/virginia/monument-avenue-residents-re-file-lawsuit-challenging-removal-of-lee-statue/article\\_fd9c014d-f354-53f6-b2b4-11fc919da562.html](https://richmond.com/news/virginia/monument-avenue-residents-re-file-lawsuit-challenging-removal-of-lee-statue/article_fd9c014d-f354-53f6-b2b4-11fc919da562.html). In this new filing, there were only five plaintiffs instead of six. This time the plaintiffs were all named, but Taylor remains the first named plaintiff.

219. *Id.* William F. Davis also filed suit pro se in federal court in June 2020 centered on claims based on the landmark laws. Davis v. Northam, No. 3:20-cv-00403-HEH, 2020 U.S. Dist. LEXIS 131540, at \*3 (E.D. Va. July 24, 2020). Davis appears to have conflated federal laws regarding removing a monument's listing on the National Register with the physical removal of a monument. *Id.* at \*7. Judge Henry Hudson dismissed the case without prejudice for lack of standing and failure to state a cause of action. *Id.* at \*8.

historic preservation-related tax incentives.<sup>220</sup> With this complaint, the residents only invoke the potential loss of historic district status to demonstrate that they have standing to bring suit. Plaintiffs' main arguments center on an 1887 deed and 1889 statute, described below.<sup>221</sup> Judge W. Reilley Marchant presided over the case.<sup>222</sup> He initially found the plaintiffs likely to succeed on the merits and granted multiple injunctions preventing removal.<sup>223</sup> The state filed a motion to dismiss that was mostly denied, but the court did not find the plaintiffs' status as homeowners in a historic district adequate to give them standing for all of their claims.<sup>224</sup> The homeowners were permitted to pursue their causes of action related to the state law initially accepting the statue and state art protection laws.<sup>225</sup> The court did allow specific plaintiffs that were related to the original parties to the deed restriction to pursue that claim. As is explained in more detail below, the court eventually found in favor of the state and briefly lifted the injunction against removal before putting it back in place pending appeal.<sup>226</sup>

Notably, this case invoked both federal and state historic

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220. Mattingly (July 22, 2020), *supra* note 218.

221. See discussion *infra* Section III.C.1.

222. See Justin Mattingly, *Lee Statue Will Continue to Stand for Now as Richmond Judge Prepares Written Ruling*, RICH. TIMES-DISPATCH (July 23, 2020), [https://richmond.com/news/virginia/lee-statue-will-continue-to-stand-for-now-as-richmond-judge-prepares-written-ruling/article\\_8f226f7d-b316-57c2-9def-0e8810a1ab26.html](https://richmond.com/news/virginia/lee-statue-will-continue-to-stand-for-now-as-richmond-judge-prepares-written-ruling/article_8f226f7d-b316-57c2-9def-0e8810a1ab26.html).

223. See Order, Taylor v. Northam, No. CL20003339-00 (Va. Cir. Ct. Aug. 3, 2020).

224. Order, Taylor v. Northam, No. CL20003339-00 (Va. Cir. Ct. Aug. 25, 2020).

225. *Id.*

226. Frank Green, *Attorney: Legal Brief Urging Removal of Lee Statue Will Be Filed by More Than 50 Nearby Residents*, RICH. TIMES-DISPATCH (Oct. 29, 2020), [https://richmond.com/news/state-and-regional/attorney-legal-brief-urging-removal-of-lee-statue-will-be-filed-by-more-than-50/article\\_1fbaea85-006a-5abb-a112-70e895cff352.html?utm\\_medium=social&utm\\_source=email&utm\\_campaign=user-share](https://richmond.com/news/state-and-regional/attorney-legal-brief-urging-removal-of-lee-statue-will-be-filed-by-more-than-50/article_1fbaea85-006a-5abb-a112-70e895cff352.html?utm_medium=social&utm_source=email&utm_campaign=user-share).

preservation laws, but these laws did not bar removal of the monuments and plaintiffs then moved onto other property-based arguments. Loss of historic status was raised in an attempt to show potential economic harm for standing purposes (which is the converse of the argument or concern many raise about historic designation—that it will negatively impair property values). Overall, as the litigation over the Lee monument demonstrates, historic preservation laws will likely not frustrate a removal effort in most instances, but will still have to be carefully navigated and addressed to cut off this line of argument.

### B. *The Statue Statutes*

One of the primary barriers, although one that appears increasingly surmountable, are state monument protection laws, or state statue statutes. Although cloaked in the terminology of historic preservation or cultural protection laws, the real purpose of the majority of these laws is to protect Confederate monuments, or more specifically, to prevent local governments from removing Confederate monuments without state approval.<sup>227</sup> Eight states have some form of monument protection law; all are southern states: Kentucky, Tennessee, Virginia, Georgia, North Carolina, South Carolina, Alabama, and Mississippi.<sup>228</sup> Virginia's dates back to 1904, but Alabama's is only from 2017. Written in terms that suggest they protect a wide array of monuments, these laws have almost exclusively been used to protect Confederate monuments.<sup>229</sup> This Section does not

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227. Byrne, *supra* note 103, at 2 (asserting it would be misleading to list these laws as historic preservation laws).

228. See generally Zachary Bray, *Monument of Folly: How Local Governments Can Challenge Confederate "Statue Statutes"*, 91 TEMP. L. REV. 1 (2018) [hereinafter Bray, *Monument of Folly*] (profiling statue statutes generally and noting that local governments have many paths for removing a monument ostensibly protected by one of these laws).

229. See Zachary Bray, *We Are All Growing Old Together: Making Sense of America's Monument-Protection Laws*, 61 WM. & MARY L. REV. 1259, 1291 (2020) (providing an example in South Carolina where it was used to prevent changes

detail the workings of all such statutes but instead discusses them through the lens of our examples with a focus on the procedural aspects of the laws.<sup>230</sup>

### 1. Virginia

Until July 1, 2020, Virginia cities and counties were not allowed to remove, modify, or add historical context to official war memorials.<sup>231</sup> Virginia's statue statute focused on the authority of counties and local governments.<sup>232</sup> As a Dillon's Rule state, Virginia's local governments cannot independently take action without express authority to do so from the state.<sup>233</sup> A 1904 law had prohibited any changes to the monuments.

In 2017, public officials wanted to remove the monuments in Richmond but were hampered by this state law. With removal prevented, which had become a political issue, then-Governor Terry McAuliffe sought to control the rallies in favor of retaining the monuments and the protests against them by restricting crowd sizes (down to 500 from 5,000), requiring permits for gatherings, and prohibiting guns at permitted events.<sup>234</sup> McAuliffe stated that the restrictions "will balance First Amendment rights and ensure that all Virginians remain safe."<sup>235</sup>

In April 2020, Governor Ralph Northam signed a bill into law that granted Virginia localities the power to remove their

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to segregated World War I and World War II monuments).

230. For an excellent overview of the state statue statutes, see Bray, *Monument of Folly*, *supra* note 228, at 20–44.

231. Amanda Lineberry, Essay, *Payne v. City of Charlottesville and the Dillon's Rule Rationale for Removal* 104 VA. L. REV. ONLINE 45, 46–56 (2018).

232. *See id.* at 45–48 (discussing the application of Virginia Code § 15.2-1812).

233. *See, e.g.*, John G. Grumm & Russell D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 120 (1974).

234. Matthew Haag, *Virginia Restricts Protests at Lee Monument in Richmond After Clashes*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/robert-e-lee-monument-richmond-virginia.html>.

235. *Id.*

Confederate monuments.<sup>236</sup> Under the new law, localities must first publish their intent to “remove, relocate, contextualize or cover” any monuments on public property.<sup>237</sup> Prior to removal, the local government must provide thirty-days’ notice and hold a public hearing.<sup>238</sup> After a vote to remove, local governments must wait thirty days to find a new place for the statue or memorial. If a community votes to relocate, they must, “for a period of 30 days, offer the monument or memorial for relocation and placement to any museum, historical society, government, or military battlefield.”<sup>239</sup>

The law also allows removal to occur by voter referenda.<sup>240</sup> After the law went into effect on July 1, 2020, six counties placed removal referenda on the November 2020 ballot proposing to remove the Confederate monuments in front of their county courthouses.<sup>241</sup> In the November 2020 elections, fifty-five percent of voters in Charles City County, Virginia voted not to remove the Confederate statue in front of the county courthouse.<sup>242</sup> The other five counties (in

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236. Mikaela Lefrak, *Virginia Grants Cities the Power to Remove Their Confederate Statues*, AM. U. RADIO (Apr. 12, 2020), <https://wamu.org/story/20/04/12/virginia-grants-cities-the-power-to-remove-their-confederate-statues>.

237. Act of Apr. 10, 2020, ch. 1100, sec. 183, § 15.2-1812(A)-(B), 2020 Va. Acts. (effective July 1, 2020).

238. *Id.* § 15.2-1812(B).

239. *Id.* (explaining that while the local government must offer it to such groups for thirty days, it has the “sole authority” to determine the final destination).

240. *See id.* § 15.2-1812(C).

241. *See* Michael Martz, *Charles City to Let Voters Decide Fate of Confederate Monument*, RICH. TIMES-DISPATCH (July 30, 2020), [https://richmond.com/news/virginia/charles-city-to-let-voters-decide-fate-of-confederate-monument/article\\_2c5084de-370c-51f3-b068-fd5827533ece.html?utm\\_campaign=snd-autopilot&utm\\_medium=social&utm\\_source=twitter\\_RTDNEWS](https://richmond.com/news/virginia/charles-city-to-let-voters-decide-fate-of-confederate-monument/article_2c5084de-370c-51f3-b068-fd5827533ece.html?utm_campaign=snd-autopilot&utm_medium=social&utm_source=twitter_RTDNEWS).

242. Andrew Cain, *Update: Charles City Votes No in Advisory Referendum on Moving Confederate Statue*, RICH. TIMES-DISPATCH (Nov. 3, 2020), [https://richmond.com/news/state-and-regional/govt-and-politics/update-charles-city-votes-no-in-advisory-referendum-on-moving-confederate-statue/article\\_fe12b0c7-9077-5c4a-aeec-ad3028121430.html](https://richmond.com/news/state-and-regional/govt-and-politics/update-charles-city-votes-no-in-advisory-referendum-on-moving-confederate-statue/article_fe12b0c7-9077-5c4a-aeec-ad3028121430.html).

largely conservative districts) voted overwhelmingly to retain Confederate monuments in their current locations.<sup>243</sup> Notably, communities were not even in support of moving the Confederate monuments to other locations, such as Franklin County's proposal to relocate to "a location of appropriate historical significance."<sup>244</sup>

This 2020 law did not apply to the controversial Robert E. Lee statue because it sits on state land, not city property like the others on Monument Avenue. Even for the monuments covered by the act, community members did not have the patience to go through either the process of a noticed hearing or voter referendum. The Jefferson Davis statue on Monument Avenue, for example, was toppled by protestors one week after Richmond Mayor Levar Stoney announced he was going to push for legislation for removal.<sup>245</sup> Following the Jefferson Davis statue incident, Mayor Stoney removed the three remaining Confederate memorials on city-owned land on Monument Avenue on July 1, 2020, invoking a state of emergency brought on by a combination of Black Lives Matter protests and the coronavirus pandemic, making removal a public safety issue (leaving only the Lee monument in place on Monument Avenue).<sup>246</sup> An anonymous citizen sued the mayor for his

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243. *Referendum Results: Confederate Monuments Projected to Stay Put in 6 Virginia Counties*, ABC8NEWS, <https://www.wric.com/news/politics/2020-election/referendum-results-confederate-monuments-projected-to-stay-put-in-6-virginia-counties> (Nov. 5, 2020, 6:33 AM).

244. Mike Allen, *Franklin Among Six Va. Counties Holding Confederate Monument Referendum*, ROANOKE TIMES (Oct. 31, 2020), [https://roanoke.com/news/local/franklin-among-six-va-counties-holding-confederate-monument-referendum/article\\_2b92b0a2-1b0f-11eb-baec-b35022ebe597.html](https://roanoke.com/news/local/franklin-among-six-va-counties-holding-confederate-monument-referendum/article_2b92b0a2-1b0f-11eb-baec-b35022ebe597.html).

245. Peter Beaumont, *Protesters Topple Statue of Confederate President in Virginia*, THE GUARDIAN (June 11, 2020, 6:28 AM), <https://www.theguardian.com/us-news/2020/jun/11/protesters-topple-statue-of-confederate-president-in-virginia>.

246. Laura Vozzella, *Richmond Judge Dismisses One Confederate Monument Lawsuit, Allows Another to Stand*, WASH. POST (Aug. 3, 2020, 6:49 PM), <https://www.washingtonpost.com/local/virginia-politics/richmond-judge-dismisses-one-confederate-monument-lawsuit-allows-another-to-stand/2020/08/>

failure to follow the state process.<sup>247</sup> On August 3, 2020 (more than a month after removal), the Richmond City Council unanimously voted to remove the statues in an attempt to cure the mayor's procedural misstep.<sup>248</sup> The lawsuit against Mayor Stoney was ultimately dismissed on justiciability grounds, with the court not deciding whether the mayor's actions were proper under state law.<sup>249</sup>

## 2. Kentucky

In 2002, Kentucky passed the Kentucky Military Heritage Act, a state law restricting the ability of local governments to alter, destroy, remove or transfer "a site designated as a military heritage site" without permission from the Military Heritage Commission.<sup>250</sup> To remove a Confederate monument, a local government must first ask the Commission to either remove the site from the list or give special permission for its removal despite its listed status.<sup>251</sup>

Notably, the statute only protects Confederate monuments that have previously received special designation.<sup>252</sup> Thus, the Military Heritage Commission must have first placed the monument on the state list of

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03/01c54200-d599-11ea-930e-d88518c57dcc\_story.html.

247. Gregory S. Schneider, *Virginia Supreme Court Throws Out Injunction Against Richmond's Removal of Confederate Statues*, WASH. POST (Aug. 27, 2020, 3:42 PM), [https://www.washingtonpost.com/local/virginia-politics/virginia-court-ruling-confederate-richmond/2020/08/27/3a6a9224-e86b-11ea-970a-64c73a1c2392\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-court-ruling-confederate-richmond/2020/08/27/3a6a9224-e86b-11ea-970a-64c73a1c2392_story.html); Mark Robinson, *Anonymous Plaintiff Asks Supreme Court to Return Richmond's Confederate Statues to Their Pedestals*, DAILY PROGRESS (Aug. 25, 2020), [https://dailyprogress.com/news/state-and-regional/crime-and-courts/anonymous-plaintiff-asks-supreme-court-to-return-richmonds-confederate-statues-to-their-pedestals/article\\_b031c6d7-c620-5d29-b8d2-c34a0a060eef.html](https://dailyprogress.com/news/state-and-regional/crime-and-courts/anonymous-plaintiff-asks-supreme-court-to-return-richmonds-confederate-statues-to-their-pedestals/article_b031c6d7-c620-5d29-b8d2-c34a0a060eef.html).

248. *See id.*

249. Roberto Roldan, *VA Supreme Court Throws Out Confederate Monument Injunction Against Stoney*, VMP NPR PBS (Aug. 27, 2020), <https://vpm.org/news/articles/16033/va-supreme-court-throws-out-confederate-monument-injunction-against-stoney>.

250. KY. REV. STAT. ANN. § 171.788 (West 2002).

251. *See* KY. REV. STAT. ANN. § 171.786 (West 2002).

252. § 171.788.

heritage sites, which only occurs after a complicated application and registration process.<sup>253</sup> Because few sites are so designated, most Confederate monuments in Kentucky are not covered by this law. Zachary Bray reports that fewer than thirty sites have applied for protected status, with many prominent Confederate monuments not included, demonstrating the limited application of this specific state statute statute.<sup>254</sup>

State-owned properties go through a different process and are governed by a different law. A 1980 law established the Historic Properties Advisory Commission (HPAC) “to provide continuing attention to the maintenance, furnishings, and repairs” of certain state-owned historic sites.<sup>255</sup> The Kentucky HPAC is comprised of fourteen members, including the State Curator, the Director of the Kentucky Historical Society, and the Director of the Executive Mansion.<sup>256</sup> The State Capitol building containing the Jefferson Davis statue comes under the HPAC’s jurisdiction. The law gives the HPAC “final authority over articles placed in the properties.”<sup>257</sup> For several years, the HPAC blocked attempts to remove the Jefferson Davis statue. In 2015, the HPAC voted 7-2 to keep the statue in the rotunda.<sup>258</sup> After the Charlottesville tragedy in 2017, the HPAC consented to removing the plaque that called Davis a war hero, but not to removal.<sup>259</sup>

In 2020, Governor Andy Beshear was finally successful in navigating the removal process. He requested HPAC approval to remove the statue that June.<sup>260</sup> The process went

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253. See Bray, *Monument of Folly*, *supra* note 228, at 39–40.

254. *Id.* at 40.

255. KY. REV. STAT. ANN. § 11.026 (West 2020).

256. KY. REV. STAT. ANN. § 171.782 (West 2002).

257. KY. REV. STAT. ANN. § 11.027 (West 2015).

258. Bailey, *supra* note 152.

259. *Id.*

260. Austin Horn, *Jefferson Davis Statue Voted Out of Kentucky State Capitol*,

surprisingly smoothly with an 11-to-1 vote in favor. The HPAC members said in the meeting that the statue will be moved to the Jefferson Davis State Historic Site, a state park near Fairview, Kentucky, where Davis was born.<sup>261</sup>

Although not the state statue statute, this state law delayed removal efforts. Changing views on the HPAC led to a swift and relatively non-controversial removal in 2020. The HPAC may have been partially persuaded by the proposal to relocate the statue to a state park, something that has not yet occurred.<sup>262</sup>

### 3. Tennessee

The Tennessee Heritage Protection Act was passed in 2013, motivated by a desire to protect Confederate monuments while covering all “memorial[s] regarding a historic conflict, historic entity, historic event, historic figure, or historic organization . . . on public property.”<sup>263</sup> It prohibits not only removal of such memorials, but also relocation, alteration, rededication, or disturbance unless one first obtains a waiver from the Tennessee Historical Commission (THC).<sup>264</sup> The statute also creates a cause of action for injunctive relief to enforce monument protection for anyone who can show an “aesthetic, architectural, cultural, economic, environmental, or historic injury.”<sup>265</sup>

Unlike the Kentucky law, monuments in Tennessee need

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NPR (Jun. 12, 2020, 4:35 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/12/876220211/jefferson-davis-statue-to-be-removed-from-kentucky-state-capitol>.

261. *Id.*

262. See Jack Brammer, *What Happened to the Jefferson Davis Statue Ousted from the Kentucky Capitol?*, LEXINGTON HERALD LEADER (Jun. 15, 2020, 2:41 PM), <https://www.kentucky.com/news/politics-government/article243544337.html> (explaining that the monument is in storage pending relocation to a state park).

263. TENN. CODE ANN. § 4-1-412(b)(1) (2018).

264. § 4-1-412(b)(1), (c)(1).

265. § 4-1-412(d). Notably, the statute does not clarify what such injuries might look like. It is not clear what one needs to demonstrate, for example, to show that they have suffered an injury related to history or architecture.

not meet a listing threshold and are not required to go through a formal application and registration process. Instead, all memorials meeting the statutory description are automatically protected. To obtain a waiver (allowing removal), a local government must demonstrate a “material or substantial need . . . based on historical or other compelling public interest.”<sup>266</sup> Thus far, the THC has not been willing to grant waivers.

After being denied waivers to remove statues in its city parks, Memphis found a creative solution. The Tennessee Heritage Protection Act only applies to monuments on public property. Therefore, Memphis decided to convey its parks containing Confederate monuments to private entities who would then be free to remove them. On December 20, 2017, Memphis transferred two parks (including Health and Sciences Park containing the Nathan Bedford Forrest statue) to Memphis Greenspace for \$1,000 each. The statues were then removed that same evening.

While many applauded Memphis for its clever maneuverings, not everyone approved. The state legislature denied the city funding for other various initiatives, and then changed the state law so other municipalities could not follow their model. Shortly thereafter, the SCV filed a petition with the THC accusing the city of violating state law. Memphis Greenspace reached a settlement with the SCV after months of legal battling.<sup>267</sup> Memphis Greenspace transferred ownership of the statues to the SCV and descendants of the Confederate soldiers on December 12, 2019.<sup>268</sup> Private donations covered the cost to remove, store,

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266. § 4-1-412(c)(2).

267. See Katherine Burgess, Samuel Hardiman & Ryan Poe, *Sons of Confederate Veterans Takes Possession of Memphis Statues*, MEM. COMM. APPEAL (Dec. 17, 2019, 12:53 PM), <https://www.commercialappeal.com/story/news/local/2019/12/17/sons-confederate-vets-take-memphis-statues/2676510001>.

268. Joyce Peterson, *Group Plans to Re-Erect Memphis Confederate Statues*, WCM ACTION NEWS 5 (Dec. 18, 2019, 10:34 PM), <https://www.wmcactionnews5.com/2019/12/19/group-plans-re-erect-memphis-confederate-statues>.

and transfer the statues to the SCV.<sup>269</sup>

Soon after the SCV dropped the pending lawsuit, the parties also decided to remove the remains of Forrest and his wife that were interred under the Forrest monument.<sup>270</sup> Both parties agreed to disinter the remains, with the SCV responsible for their reinternment.<sup>271</sup> Donnie Kennedy, a spokesman for the group stated, “[w]e are pleased to say that the statues and the bodies of the general and his wife will be placed somewhere that that will be honored and respected as all American veterans and citizens should be respected.” He did not specify where they would be moved to.<sup>272</sup>

The Forrest family’s attorney, H. Edward Phillips, stated that the headstone is being held in a secure location a couple of counties outside of Davidson County.<sup>273</sup> Phillips said they are keeping the location of the monument private due to safety concerns.<sup>274</sup> The SCV are holding the monument for the Forrest family.<sup>275</sup> The SCV also has custody of the Jefferson Davis statue and the James Mathis bust removed from another city park.<sup>276</sup> Phillips says the SCV agrees the monument should be placed in a safe location outside of the public realm where those who choose to may visit the

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269. *Id.*

270. Melissa Alonso & Amanda Jackson, *Remains of Confederate General Nathan Bedford Forrest and his Wife Will be Removed from a Memphis Park*, CNN (May 13, 2020, 8:46 PM), <https://www.cnn.com/2020/05/13/us/nathan-bedford-forrest-body-to-be-moved-trnd/index.html>.

271. *Id.*

272. *Id.*

273. Stephanie Langston, *Nathan Bedford Forrest Monument Removed from Memphis Could Resurface in Middle Tennessee*, WKRN.COM (Jun. 11, 2020, 5:02 PM), <https://www.wkrn.com/news/local-news/nathan-bedford-forrest-monument-removed-from-memphis-could-resurface-in-middle-tennessee>.

274. *Id.*

275. *Id.*

276. Joyce Peterson, *Group Plans to Re-erect Memphis Confederate Statues*, WCM ACTION NEWS 5 (Dec. 18, 2019, 10:34 PM), <https://www.wmcactionnews5.com/2019/12/19/group-plans-re-erect-memphis-confederate-statues/>.

gravesite and monuments.<sup>277</sup> The new National Confederate Museum in Columbia, Tennessee, is one location they are considering.<sup>278</sup>

#### 4. Alabama

On May 25, 2017, the governor of Alabama, Kay Ivey, signed the Alabama Memorial Preservation Act (AMPA) into law.<sup>279</sup> The act prohibits local governments from moving or altering historic monuments on public property that have been in place for forty years or more.<sup>280</sup> An entity that moves or renames a monument or building without a waiver would be subject to a \$25,000 fine as determined by the attorney general.<sup>281</sup>

In 2017, in the aftermath of the riots in Charlottesville, Mayor William Bell of Birmingham decided the monument in Linn Park should be covered because the state law prohibited him from removing the statue.<sup>282</sup> Tall plywood walls were installed around its base, obscuring inscriptions on the pedestal.<sup>283</sup> Alabama Attorney General Steve Marshall sued the city arguing that the plywood barriers violated AMPA. Jefferson County Circuit Judge Michael Graffeo rejected these arguments and overturned the law saying that it violated the city's rights under the First and Fourteenth Amendments of the Constitution.<sup>284</sup> Judge

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277. Langston, *supra* note 273.

278. *Id.*

279. Mike Cason, *Gov. Kay Ivey Signs Bill Protecting Confederate Monuments*, AL.COM (May 25, 2017), [https://www.al.com/news/birmingham/2017/05/gov\\_kay\\_ivey\\_signs\\_bill\\_protec.html](https://www.al.com/news/birmingham/2017/05/gov_kay_ivey_signs_bill_protec.html).

280. *Id.*

281. *Id.*

282. See Ian Stewart, *Judge Throws Out Alabama Law That Protects Confederate Monuments*, NPR (Jan. 15, 2019, 5:52 PM), <https://www.npr.org/2019/01/15/685672038/judge-throws-out-alabama-law-that-protects-confederate-monuments>.

283. *Id.*

284. See *id.*

Graffeo held that by forcing the city to leave the monument alone, the state was infringing on Birmingham's right to free speech.<sup>285</sup> "A city has a right to speak for itself, to say what it wishes, and to select the views that it wants to express," Graffeo added.<sup>286</sup> He said the law did not provide adequate ways for the city to reject the monument's "message of white supremacy."<sup>287</sup>

On November 27, 2019 the Alabama Supreme Court reversed the circuit court's decision.<sup>288</sup> In a 9-0 ruling, the justices held the plywood screen "altered" or "otherwise disturbed" the monument by obstructing the view.<sup>289</sup> As to Birmingham's argument that it has a right to free speech, the court ruled "the city cannot assert any substantive constitutional rights against its creator state."<sup>290</sup> The court also imposed a \$25,000 fine on the city.<sup>291</sup> While the state had argued that the fine should be \$25,000 per day, the court held that it was a one-time fine of \$25,000.

The city did not remove the plywood screen and instead removed the statue on June 1, 2020, on the basis of seeking to avoid civil unrest. On June 2, 2020 state Attorney General Marshall filed a civil lawsuit against the city, arguing that the removal violated AMPA.<sup>292</sup> Mayor Randall Woodfin said

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285. See *Alabama v. City of Birmingham*, No. 17-903426-MGG, slip op. at 6–7 (Ala. Cir. Ct. Jan. 14, 2019).

286. Stewart, *supra* note 282.

287. *Id.*

288. See Leah Asmelash & Jamiel Lynch, *Alabama Supreme Court Says the City of Birmingham Broke the Law When it Covered a Confederate Monument with Plywood*, CNN (Nov. 27, 2019, 6:13 PM), <https://www.cnn.com/2019/11/27/us/alabama-birmingham-confederate-monuments-trnd/index.html>.

289. Mike Cason, *Alabama Supreme Court Upholds Confederate Monument Law*, AL.COM (Nov. 27, 2019), <https://www.al.com/news/2019/11/alabama-supreme-court-says-birmingham-violated-historic-monuments-law.html#:~:text=The%20Alabama%20Supreme%20Court%20today,in%20favor%20of%20the%20city.>

290. Asmelash & Lynch, *supra* note 288.

291. Cason, *supra* note 289.

292. Erik Ortiz, *supra* note 122.

the expected \$25,000 fine for removing the statue would be much more affordable than the cost of continued unrest in the city.<sup>293</sup> Other communities in Alabama have since relied on this case and have been willing to pay this fine to remove monuments from their towns and cities.<sup>294</sup>

Overall, state statue statutes may present barriers to removal, but as demonstrated by these examples, these laws are becoming increasingly porous and communities are finding ways to navigate these laws within their removal efforts.

### C. Deed Restrictions

As we have profiled, many of the monuments that exist in public spaces have been funded, in whole or part, by private organizations or entities. Many of these entities, in donating the monument for installation in a public area, wished to have some degree of ongoing control over the monument by conditioning the gift or placing deed restrictions on the monument or surrounding setting. The idea of the deed restriction was that the donor organization would be able to ensure that the monument remained in place as intended and directed by the donative intent of the parties.

#### 1. Monument Avenue

The Robert E. Lee Monument in Richmond, again, provides an example. The Lee Monument Association initially raised the money for the statue and local supporters

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293. Bob D'Angelo, *City Officials Removing Confederate Monument from Birmingham Park*, KIRO 7, <https://www.kiro7.com/news/trending/city-officials-removing-confederate-monument-birmingham-park/OJV66XVZR5FHLHIPO3BD6GDVC4> (June 2, 2020, 8:26 AM); Erik Ortiz, *'I Chose My City': Birmingham, Alabama, Removes Confederate Monument, Faces Lawsuit*, NBC NEWS (June 3, 2020, 5:32 PM), <https://www.nbcnews.com/news/us-news/i-chose-my-city-birmingham-alabama-removes-confederate-monument-faces-n1223511>.

294. See US/ICOMOS Webinar: Confederate Monuments: Past, Present, and Future (Aug. 13, 2020) (comments of William Bell).

of the effort (Otway Allen and family) donated the land.<sup>295</sup> The Allen family transferred land for the monument site to the Lee Monument Association in 1887.<sup>296</sup> At the completion of the monument, the Association transferred the land to the Commonwealth of Virginia in an 1890 deed.<sup>297</sup> The Allen family heirs (Otway Allen passed away in the intervening years) also signed the 1890 deed, giving their “approval and consent” even though they were neither the grantors nor grantees.<sup>298</sup> Then-governor P.W. McKinney was also the president of the Lee Monument Association and therefore signed the deed as both the grantor and the grantee.<sup>299</sup> The 1890 deed stated that the Commonwealth would hold the “Statue and pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted” and would “faithfully guard it and affectionately protect it.”<sup>300</sup>

Shortly before the 1890 deed was executed, the Virginia State Legislature passed a joint resolution authorizing the governor to accept the gift of the monument.<sup>301</sup> The resolution also stated that the monument, pedestal, and land should be held “perpetually sacred to the monumental

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295. See Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Permanent Injunction or, in the Alt., to Enlarge Existing Temp. Injunction at 3–4, Gregory v. Northam, No. 20-2441 (Va. Cir. Ct. June 16, 2020) (the 1887 and 1890 deeds are attached to the motion as exhibits).

296. *Id.* at 4.

297. *Id.* at 5.

298. *See id.*

299. *Id.* It is unclear why the Allen heirs signed this deed at all. It may have been to add a signatory other than McKinney (who was signing for both grantor and grantee entities) or to symbolize support of the original donor to the later conveyance, perhaps confirming that the transfer would not violate charitable trust principles.

300. First Amended Complaint for Declaratory Judgment and Injunctive Relief at 3, ¶ 9, Gregory v. Northam, No. 20-2441-6 (Va. Cir. Ct. July 8, 2020).

301. Complaint for Declaratory Judgment and Injunctive Relief at 3, ¶ 7, Gregory v. Northam, No. 20-2441-5 (Va. Cir. Ct. June 8, 2020).

purpose to which they have been devoted.”<sup>302</sup>

Since before its unveiling in 1890, some Richmond community members objected to this homage to the Confederacy playing such a central role in their town.<sup>303</sup> Graffiti and protests began in earnest after incidents in Charlottesville in 2017. It took protests over the murder of George Floyd in 2020 for the government to take removal efforts seriously. On June 4, 2020, Virginia Governor Ralph Northam announced that he had decided to remove the monument and that he would be exploring other venues for it.<sup>304</sup>

On June 8, 2020, William C. Gregory, the great-grandson of two signatories of the 1890 deed (the Allen heirs), filed a complaint in state court arguing that under the terms of the 1890 deed and the 1889 resolution, the state must consider the monument and the area around it “perpetually sacred” and “faithfully guard it and affectionately protect it.”<sup>305</sup> The lawsuit claimed the state failed in this duty as demonstrated by graffiti on the statue.<sup>306</sup> Hours after the lawsuit (*Gregory v. Northam*) was filed, Richmond Circuit Court Judge Bradley B. Cavedo granted a ten-day injunction, finding a likelihood of irreparable harm to plaintiffs if the statue is removed and little harm to defendants, temporarily stopping

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302. *Id.* (Exhibit B containing the 1889 Act of Assembly).

303. Steve Hendrix & Lynda Robinson, *When Confederate Gen. Robert E. Lee's Statue Arrived in Richmond in 1890, it Was Greeted by 10,000 Admirers*, WASH. POST (June 3, 2020, 6:44 PM), <https://www.washingtonpost.com/history/2020/06/03/lee-statue-richmond-confederacy-history/>.

304. *Id.* at 5, ¶ 15.

305. Justin Mattingly, *Two Lawsuits Challenge Lee Statue's Removal; Northam Says 'Divisive' Monument 'Needs to Come Down'*, RICH. TIMES-DISPATCH (June 9, 2020) [hereinafter Mattingly (June 9, 2020)], [https://richmond.com/news/virginia/watch-now-two-lawsuits-challenge-lee-statues-removal-northam-says-divisive-monument-needs-to-come/article\\_ab073021-aea5-55f0-96e4-c8ccc47cd361.html](https://richmond.com/news/virginia/watch-now-two-lawsuits-challenge-lee-statues-removal-northam-says-divisive-monument-needs-to-come/article_ab073021-aea5-55f0-96e4-c8ccc47cd361.html).

306. See Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 301, at 5, ¶ 16 (asserting that the Commonwealth's failure to guard the site was a breach of duty as outlined in the deed and statute).

removal.<sup>307</sup> Judge Cavedo concluded that it was “in the public interest to await resolution of this case on the merits prior to removal.”<sup>308</sup>

On June 18, Judge Cavedo extended the June 8th order indefinitely but found the complaint flawed over questions of legal standing, which he gave the plaintiffs twenty-one days to address.<sup>309</sup> When lawyers for the state objected, the judge said the statue “belongs to the people.”<sup>310</sup> After granting these injunctions, Judge Cavedo realized his home was within the Monument Avenue Historic District and recused himself.<sup>311</sup>

On July 23, 2020, newly assigned Richmond Circuit Court Judge W. Reilly Marchant held hearings in both the *Gregory v. Northam* case discussed here, and the *Taylor v. Northam* case discussed above, regarding the application of various historic protection laws. On August 3, 2020, Judge Marchant dismissed the *Gregory* case for lack of standing but allowed the *Taylor* case to go forward based on the language of the deed and statute. Judge Marchant then issued a ninety-day injunction and denied the state’s motion to dismiss on these claims. He held that the plaintiffs were likely to succeed on the merits and issued a continuing

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307. Scott Neuman, *Virginia Judge Blocks Plan to Remove Statue of Robert E. Lee*, NPR (June 9, 2020, 5:40 AM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/09/872707016/virginia-judge-blocks-plan-to-remove-statue-of-robert-e-lee>.

308. Mattingly (June 9, 2020), *supra* note 305.

309. Gregory S. Schneider, *Richmond Judge Extends Order Barring Removal of Lee Statue Indefinitely*, WASH. POST. (June 18, 2020, 4:00 PM), [https://www.washingtonpost.com/local/virginia-politics/richmond-lee-statue-removal/2020/06/18/492203ac-b106-11ea-856d-5054296735e5\\_story.html](https://www.washingtonpost.com/local/virginia-politics/richmond-lee-statue-removal/2020/06/18/492203ac-b106-11ea-856d-5054296735e5_story.html).

310. *Id.*

311. Justin Mattingly, *Richmond Lawyer Files State Complaint Against Former Judge in Lee Statue Case*, RICH, TIMES-DISPATCH, (July 24, 2020), [https://richmond.com/news/local/richmond-lawyer-files-state-complaint-against-former-judge-in-lee-statue-case/article\\_716db7ed-49cd-5d3a-8799-72e1ca293121.html](https://richmond.com/news/local/richmond-lawyer-files-state-complaint-against-former-judge-in-lee-statue-case/article_716db7ed-49cd-5d3a-8799-72e1ca293121.html); Sarah Rankin & Denise Lavoie, *Judge: No Immediate Ruling on Robert E. Lee Statue Removal*, ASSOCIATED PRESS (July 23, 2020), <https://apnews.com/19d4a8944cf33edb02cf2f49738ccae1>.

injunction.

Trial was held October, 19, 2020.<sup>312</sup> The court found in favor of the state and lifted the injunction.<sup>313</sup> The court held that the restrictive covenant was unenforceable because it is contrary to public policy, as established by various acts of the legislature supporting the removal of Confederate monuments, names, and imagery. In particular, the court found the decision to remove the state of Virginia's Lee statue from the U.S. Capitol showed an intention to disavow Lee and the Lost Cause narrative.<sup>314</sup> Plaintiffs immediately filed an appeal.<sup>315</sup> The court then reissued the injunction pending appeal and the Lee monument remains standing.<sup>316</sup> Richmond Law professor Carl Tobias believes the case is likely to end up in the Virginia Supreme Court and final resolution could take at least another year.<sup>317</sup> A former city council member, Sa'ad El-Amin, filed a motion to intervene in late August.<sup>318</sup> He explained to reporters his reason for seeking to intervene:

At this point in the proceedings, people of African descent have no voice, no participation, nor any direct involvement in this litigation because the parties, the lawyers and the court are white . . . . This is no different than when the decisions were made in 1890

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312. Kaelan Deese, *Robert E. Lee Statue Will Stand in Richmond Until at Least October as Judge Sets Trial Date*, THE HILL (Aug. 26, 2020 12:10 PM), <https://thehill.com/homenews/state-watch/513739-robert-e-lee-statue-will-stand-in-richmond-until-at-least-october-as>.

313. Order, Taylor v. Northam, No. CL20003339-00 (Va. Cir. Ct. Oct. 27, 2020).

314. Opinion Letter Taylor v. Northam, No. CL20003339-00 (Va. Cir. Ct. Oct. 27, 2020).

315. Notice of Appeal, Taylor v. Northam, No. CL20003339-00 (Va. Cir. Ct. Oct. 29, 2020).

316. Order, Taylor v. Northam, No. CL20003339-00 (Va. Cir. Ct. Oct. 29, 2020).

317. Deese, *supra* note 312; email from Carl Tobias to Jessica Owley (Oct. 30, 2020) (on file with author).

318. *Richmond City Circuit - Civil Division: Pleadings/Orders Detail, Case Number: No. CL20003339-00*, VA. CTS. CASE INFO., <http://ewsocis1.courts.state.va.us/CJISWeb/CaseDetail.do> (last visited Sept. 13, 2020) (displaying a motion, with remarks "EL AMIN INTERVENE AS A DEF," filed August 27, 2020).

to erect and install the statue.<sup>319</sup>

## 2. Silent Sam

The fate of Silent Sam has also been tied to the original conveyance of the monument. Although it was initially placed at the university by the UDC, it was the SCV who challenged UNC's decision to remove the statue. The North Carolina division of the SCV asserted ownership of the statue based on the UDC conveying its rights in the monument to the organization.<sup>320</sup>

On that basis, the SCV sued, arguing that it was the true owner of the monument and UNC did not have the right to dispose of it. In November 2019, the SCV and UNC announced a settlement.<sup>321</sup> UNC agreed to give ownership and possession of Silent Sam to the SCV, and said it would fund a \$2.5 million charitable trust for the care and preservation of the statue.<sup>322</sup> This would mean that the SCV would own all rights, title, and interests in the monument.<sup>323</sup> The SCV agreed to forever maintain possession of the monument outside any of the fourteen counties currently containing a UNC system constituent institution.<sup>324</sup> The money for the trust did not include any state funds.<sup>325</sup>

With that agreement, UNC thought it had settled the

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319. Jeremy M. Lazarus, *Former City Councilman Pushing African-American Perspective Missing in Lee Statue Lawsuit*, RICH. FREE PRESS, (Aug. 27, 2020), <http://richmondfreepress.com/news/2020/aug/27/former-city-councilman-pushing-african-american-pe>.

320. See Nicholas Bogel-Burroughs & Mihir Zaveri, *University of North Carolina Gives 'Silent Sam' Statue to Confederate Group*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/27/us/unc-silent-sam.html?action=click&module=RelatedLinks&pgtype=Article>.

321. *Id.*

322. *Id.*

323. *UNC System Reaches Settlement Allowing for Disposition of Silent Sam*, U. N.C. SYS. (Nov. 27, 2019), <https://www.northcarolina.edu/news/2019/11/UNC-System-reaches-settlement-allowing-disposition-silent-sam>.

324. *Id.*

325. *Id.*

issue. However, the settlement agreement angered professors, students, and alumni.<sup>326</sup> In February 2020, Judge Allen Baddour, the same judge who had previously approved the settlement agreement, voided the deal.<sup>327</sup> He stated that the SCV lacked standing to file the original lawsuit.<sup>328</sup> The SCV had obtained an assignment of all rights and interests, both legal and equitable, from the UDC with respect to the monument.<sup>329</sup> But the court ultimately found that the UDC did not retain any rights in the monument and therefore had nothing to convey. The SCV had failed to establish that the unincorporated association of the UDC ever owned the statue, or, if it had been owned by the UDC, that the organization intended the statue to be anything more than a gift to UNC or that the association otherwise retained any rights in the statue after it was placed on UNC's campus.<sup>330</sup> Even if ownership was established, the plaintiff also failed to present facts that establish that the modern UDC (from which the SCV received the assignment and which was incorporated in 1992) is a successor-in-interest to the unincorporated association of 1913.<sup>331</sup>

Judge Baddour ordered that the trust be dissolved and the money be returned to the UNC system.<sup>332</sup> UNC will not get all the money back because some of it had already been spent on legal fees and other costs.<sup>333</sup> The SCV has returned

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326. Michael Levenson, *Toppled but Not Gone: U.N.C. Grapples Anew With the Fate of Silent Sam*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/unc-silent-sam-statue-settlement.html>.

327. *Id.*

328. *Id.*

329. Order, Findings of Fact at 2, ¶ 3, N.C. Div. Sons of Confederate Veterans, Inc. v. Univ. of N.C., No. 19 CVS 1579 (N.C. Super. Ct. Feb. 20, 2020).

330. *Id.* at Conclusions of Law, 2, ¶ 3.

331. *Id.*

332. Kate Murphy, *Judge Says Most—But Not All—of \$2.5 Million from Silent Sam Deal Must Go Back to UNC*, NEWS & OBSERVER (Apr. 8, 2020), <https://www.newsobserver.com/news/local/education/article241867311.html>.

333. *Id.*

Silent Sam to UNC, and the UNC System and the Board of Governors must again decide what to do with the statue. They have, however, pledged that Silent Sam will not return to campus.<sup>334</sup>

### 3. Other sites (Winston-Salem and Charlottesville)

A removal effort in Winston Salem, North Carolina follows a fairly similar pattern as seen with the Nathan Bedford Forrest monument in Memphis. In 1905, the UDC installed a statue of a lone Confederate soldier in front of the county courthouse. The county sold the courthouse to a private developer (Winston Courthouse, LLC) in 2014 for conversion to luxury apartments, and the new owners eventually requested the statue be moved.<sup>335</sup>

Removal was not blocked by North Carolina's 2015 monument protection law because the land was no longer public property.<sup>336</sup> The UDC argued however that the monument itself was still county property and removal should have been prevented by the state's monument protection law. The public officials asserted that they had never become the owners of the statue and that the UDC was therefore still the owner. The Forsyth County Superior Court sided with the public officials and ordered the UDC to remove the monument.<sup>337</sup> The city agreed to fund the removal.<sup>338</sup> City leaders also declared it a public nuisance, giving the city authority to remove it without filing a legal

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334. Joe Killian, *Silent Sam Lawsuit Dismissed, Statue Returned to Custody of UNC-Chapel Hill*, PROGRESSIVE PULSE, (May 4, 2020), <http://pulse.ncpolicywatch.org/2020/05/04/silent-sam-lawsuit-dismissed>.

335. Erika Williams, *Confederate Statue Removed From NC Courthouse Grounds*, COURTHOUSE NEWS SERV. (Mar. 12, 2019), <https://www.courthousenews.com/confederate-statue-removed-from-nc-courthouse-grounds>.

336. See Newell, *supra* note 79 (exploring the history of this monument and its relocation to a cemetery).

337. Williams, *supra* note 335.

338. *Id.*

notice.<sup>339</sup> The statue will go to Salem Cemetery, “a very dignified location,” explained Winston-Salem Mayor Allen Joines.<sup>340</sup>

Yet another example comes from Charlottesville, Virginia. Paul Goodloe McIntire, a prominent local philanthropist, gifted a Robert E. Lee monument to the city in 1924 (having donated land to the city to create Lee Park six-years earlier).<sup>341</sup> The 1918 deed conveying the land required that a sculpture of Lee be installed and maintained in Lee Park.<sup>342</sup> It was the city’s proposed removal of this statue in 2017 that led to the infamous Unite the Right rally.<sup>343</sup> The SCV, the Monument Fund, and a small group of local citizens filed a complaint in 2017 asserting removal would violate the terms and conditions of McIntire’s gift.<sup>344</sup> Judge Richard Moore ruled in favor of the plaintiffs and agreed to a temporary injunction.<sup>345</sup> In 2019, Judge Moore also ruled that removing the Lee statue would violate the state’s statue statute.<sup>346</sup> He issued a permanent injunction

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339. *Id.*

340. *Id.*

341. Allison Anna Tait, *Latest Legal Hurdle to Removing Confederate Statues in Virginia: The Wishes of Their Long-Dead White Donors*, 100 DAYS APPALACHIA (June 23, 2020), <https://www.100daysinappalachia.com/2020/06/latest-legal-hurdle-to-removing-confederate-statues-in-virginia-the-wishes-of-their-long-dead-white-donors>.

342. *Id.*

343. Shannon Von Sant, *Judge Blocks Removal of Confederate Statue that Sparked Charlottesville Protest*, NPR (Sep. 14, 2019), <https://www.npr.org/2019/09/14/760876494/judge-blocks-removal-of-confederate-statue-that-sparked-charlottesville-protest>; see Matthew Haag, *Judge Orders Tarps Removed from Confederate Statues in Charlottesville*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/us/charlottesville-confederate-monuments.html>.

344. Complaint at 15, ¶ 53, *Payne v. Charlottesville*, 2017 WL 11461042 (Va. Cir. Ct. Mar. 20, 2017).

345. Von Sant, *supra* note 343.

346. *Id.*; *Judge Halts Removal of Lee Statue for 6 Months*, WDBJ (May 4, 2017, 7:48 AM), <https://www.wdbj7.com/content/news/Judge-halts-removal-of-Lee-statue-for-6-months-421283663.html>.

preventing its removal and extended the injunction to a Stonewall Jackson monument, which city leaders also wanted to remove.<sup>347</sup>

After the 2020 passage of state law allowing local governments to remove statues, there may be a path to removal but the previously-issued injunction remains in place pending an appeal of the permanent injunction, which challenges the merits ruling, standing, and an award of over \$300,000 in attorneys' fees to the plaintiffs.<sup>348</sup>

#### D. *President Trump's Executive Order*

President Trump believed the federal government should play a central role in protecting national monuments, including prosecuting protesters and withholding funding from states who fail to protect the monuments on their land. Trump's views and position on this issue are readily apparent, as he often announced presidential positions by tweet. In the aftermath of the events in Charlottesville, Trump's tweets suggested that both violent white supremacists and peaceful protesters had views worthy of support.<sup>349</sup> He complained that the "history and culture" of the country was being "ripped apart with the removal of our

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347. Von Sant, *supra* note 343.

348. See Tyler Hammel, *Fate of Charlottesville Statues Still Awaits Court Decisions*, DAILY PROGRESS (July 2, 2020), [https://dailyprogress.com/news/local/fate-of-charlottesville-statues-still-awaits-court-decisions/article\\_59e23922-c2d1-5b77-847c-304b578c0b40.html](https://dailyprogress.com/news/local/fate-of-charlottesville-statues-still-awaits-court-decisions/article_59e23922-c2d1-5b77-847c-304b578c0b40.html). The appeal is scheduled to be heard in November 2020. Tyler Hammel, *Monument Fund, Other Plaintiffs Rebuff City's Statues Appeal*, DAILY PROGRESS (Oct. 17, 2020), [https://dailyprogress.com/news/local/crime-and-courts/monument-fund-other-plaintiffs-rebuff-citys-statues-appeal/article\\_6bbbf8-0f52-11eb-a6ed-6bc2dea14093.html](https://dailyprogress.com/news/local/crime-and-courts/monument-fund-other-plaintiffs-rebuff-citys-statues-appeal/article_6bbbf8-0f52-11eb-a6ed-6bc2dea14093.html). Continually updated court documents in the case can be found at *Payne v. City of Charlottesville*, UVA SCHOOL OF LAW, <http://statues.law.virginia.edu/litigation/payne-v-charlottesville> (last visited Nov. 11, 2020).

349. See Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames 'Both Sides'*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html>.

beautiful statues and monuments.”<sup>350</sup>

In his reactions to the monument removal efforts and Black Lives Matter protests in June 2020, Trump came out strongly in favor of maintaining Confederate monuments and place names. On June 10, 2020, he tweeted that the administration would not rename military bases despite recommendations from leadership within the armed forces to do so.<sup>351</sup> Shortly thereafter, White House Press Secretary McEnany said renaming bases would suggest that they had been racist institutions and such a suggestion would demoralize deployed troops.<sup>352</sup>

Trump fully embraced the Confederacy and the rhetoric of the Neo-Confederates.<sup>353</sup> On June 26, 2020, Trump issued an executive order regarding the protection of monuments in which he called Black Lives Matter protesters “rioters, arsonists, and left-wing extremists.”<sup>354</sup> He identified them as

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350. Joshua Barajas, *In 3 Tweets, Trump Defends ‘Beautiful’ Confederate Monuments*, PBS NEWS HOUR (Aug. 17, 2017 10:56 AM), <https://www.pbs.org/newshour/politics/in-3-tweets-trump-defends-beautiful-confederate-monuments>.

351. Donald J. Trump (@realDonaldTrump), TWITTER (June 10, 2020, 1:40 PM), <https://twitter.com/realDonaldTrump/status/1270787974880526337>.

352. See Peter Baker & Helene Cooper, *Trump Rejects Renaming Military Bases Named After Confederate Generals*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/trump-rejects-renaming-military-bases.html>. General Petraeus appears to disagree. See David Petraeus, *Take the Confederate Names Off Our Army Bases*, THE ATLANTIC (June 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/take-confederate-names-off-our-army-bases/612832>.

353. See Maureen Dowd, *Trump, Not So Statuesque*, N.Y. TIMES (June 27, 2020), <https://www.nytimes.com/2020/06/27/opinion/sunday/trump-statues-2020-reelection.html> (“Yes, the kid from Queens enjoys his newfound status as a son of the Confederacy.”). Many commenters agree that Trump publicly embraces racist views and stokes conflict. See, e.g., Orin Kerr (@OrinKerr), TWITTER (June 28, 2020), <https://twitter.com/OrinKerr/status/1277302587058843649> (“Historians will not struggle to explain why widespread public recognition of racism happened to coincide with the Trump Presidency.”).

354. Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence, 85 Fed. Reg. 40,081 (July 2, 2020) [hereinafter Monument Executive Order].

Marxists,<sup>355</sup> asserting that those protesting Confederate monuments are ignorant of our history and seek “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.”<sup>356</sup> The executive order suggested that local governments have surrendered to mob rule and lost “the will or desire” to stand up and “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 in the world.”<sup>357</sup> As Black men are murdered on camera, it is insulting to so cavalierly discount the frustrations and rage felt by the protestors.

The reach of the executive order is uncertain as the President’s power does not likely extend to controlling statues not on federal land. The executive order declares it “the policy of the United States to prosecute to the fullest extent permitted under Federal law . . . any person or any entity that destroys, damages, vandalizes, or desecrates a monument, memorial, or statue within the United States or otherwise vandalizes government property.”<sup>358</sup> The use of the broader term “government property” instead of “federal property” suggests that Trump wanted the order to be interpreted broadly to encompass all public land. However, presidential authority is constrained to federal property.

It is not clear how the order differs from the existing Veterans’ Memorial Preservation Act, under which the President claimed that he had “authorized the Federal Government to arrest anyone who vandalizes or destroys any

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355. *Id.* (also calling protestors terrorists and suggesting that they all call “for the destruction of the United States system of government”).

356. *Id.*

357. *Id.* at 40,082 (further asserting that “[s]ome particularly misguided public officials even appear to have accepted 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.”).

358. *Id.*

monument, statue or other such Federal property in the U.S. with up to 10 years in prison.”<sup>359</sup> In essence, the order directs the attorney general to enforce the already-existing law and asks the Department of Justice to prioritize “the investigation and prosecution.”<sup>360</sup> While it is not clear how far the Trump Administration will take this in its waning days, a July 2020 memo to the Department of Homeland Security instructs its officers to surveille Confederate monuments.<sup>361</sup>

The executive order also calls for “limiting federal grants for jurisdictions and law enforcement agencies that permit the desecration of monuments, memorials, or statues.”<sup>362</sup> This language demonstrates how Trump sought to use his authority to reach monuments on property owned by state and local governments. While he was unable to prosecute offenders directly, he threatened withholding federal funds for communities that do not prevent damage to the monuments. The President made a similar threat to withhold funds from sanctuary cities, which limit their cooperation with federal immigration agents.<sup>363</sup> This year, an appeals court blocked it.<sup>364</sup> Executive orders remain in place until revoked, which limits the long-term impact of

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359. Nikki Carvajal, Sarah Westwood & Caroline Kelly, *Trump Says He Signed Executive Order to Protect Monuments*, CNN (June 26, 2020, 9:19 PM), <https://www.cnn.com/2020/06/26/politics/trump-signs-monuments-executive-order/index.html>.

360. *Id.*

361. Steve Vladeck & Benjamine Wittes, *DHS Authorizes Domestic Surveillance to Protect Statues and Monuments*, LAWFARE (July 20, 2020, 2:33 PM), [https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments?fbclid=IwAR0712EhJi6RBG3O9lodTWUOkLqrN-MtTnvhS\\_37dkjIWwMF65fQ3jei1k0](https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments?fbclid=IwAR0712EhJi6RBG3O9lodTWUOkLqrN-MtTnvhS_37dkjIWwMF65fQ3jei1k0) (suggesting that DHS will be gathering information about any activity related to monuments and threats to monuments).

362. Monument Executive Order, *supra* note 354, at 40083.

363. Michael D. Shear, *Trump Issues Executive Order Targeting Vandalism Against Monuments*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/trump-monuments-executive-order.html>.

364. *Id.*

such policy decisions. President-Elect Biden should revoke this misguided executive order upon taking office.

Alongside this issue is a debate over Confederate monuments on federal land in Washington D.C. Every state is allowed two statues for display in the U.S. Capitol's national statuary hall.<sup>365</sup> In June 2020, eleven of the statues on display were Confederate generals.<sup>366</sup> On July 22, 2020, the House of Representatives voted 305 to 113 to remove the Confederate statues from the U.S. Capitol.<sup>367</sup> Senate Majority Leader Mitch McConnell is unlikely to allow the bill to receive a vote in the Senate, calling the move "clearly a bridge too far" and an attempt to "airbrush the Capitol."<sup>368</sup> He has also contended that the decision should be left to the states, and some states are moving in that direction and are seeking to replace their state's submissions.<sup>369</sup>

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365. See *National Statuary Hall Collection by Location*, ARCHITECT CAP., <https://www.aoc.gov/explore-capitol-campus/art/statuary-hall-collection-by-location> (last visited Aug. 2, 2020).

366. James Bikales, *Here are the Confederate Statues in the Capitol*, THE HILL (June 12, 2020 5:23PM), <https://thehill.com/homenews/house/502521-here-are-the-confederate-statues-in-the-capitol>.

367. Catie Edmondson, *House Votes to Remove Confederate Statues from U.S. Capitol*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/us/politics/confederate-statues-us-capitol.html>.

368. *Id.*

369. See, e.g., Mitchell Miller, *Virginia Takes Key Step to Remove Robert E. Lee Statue From US Capitol*, WTOP NEWS (July 24, 2020, 3:10 PM), <https://wtop.com/congress/2020/07/virginia-takes-key-step-to-remove-robert-e-lee-statue-from-u-s-capitol>.

## IV. DE FACTO V. DE JURE

The procedures and laws detailed above create different levels of difficulty in facilitating monument removal efforts. In some cases, as long as the local government agrees, removal can be carried out relatively quickly. In other cases, the governor needs to agree to expedite removal. Some, largely state, laws add procedures that can slow down removal processes. In a few cases, removal is complicated by state legislatures or judicial proceedings. We have some examples where the communities plod their way through the process and comply with all laws before removing a monument. But in other communities, the pace of legal processes has been too slow or the corresponding government entities are not on board with removal. This has led both private citizens and public officials to act outside these laws to effectuate removal.

A. *Monument Avenue*

Returning to our favorite street in Virginia, four statues came down without the process outlined by the new state law. The April 2020 state law allowing cities to remove monuments did not take effect until July 1, 2020, and even after that date, removal would have required a notice and hearing process. One Monument Avenue statue was removed by protestors and three by the City of Richmond. First, protestors knocked down the Jefferson Davis statue on June 10, 2020,<sup>370</sup> only days after the mayor said he was going to push for legislation for removal.<sup>371</sup> Instead, protestors

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370. Zach Joachim & Johanna Alonso, *Statue of Jefferson Davis Torn Down on Monument Avenue*, RICH. TIMES-DISPATCH (June 10, 2020), [https://www.richmond.com/news/local/watch-now-statue-of-jefferson-davis-torn-down-on-monument-avenue/article\\_64865aee-76bc-54e1-8e90-2fa749f8877b.amp.html](https://www.richmond.com/news/local/watch-now-statue-of-jefferson-davis-torn-down-on-monument-avenue/article_64865aee-76bc-54e1-8e90-2fa749f8877b.amp.html).

371. Peter Beaumont, *Protesters Topple Statue of Confederate President in Virginia*, THE GUARDIAN (June 11, 2020 6:28 AM), <https://www.theguardian.com/us-news/2020/jun/11/protesters-topple-statue-of-confederate-president-in-virginia>.

toppled the statue. The police were on the scene, and a tow truck came to pick up the pieces around 11:30 p.m.<sup>372</sup> No arrests were made.<sup>373</sup> Buoyed by their success, protestors returned the next day in an effort to remove the J.E.B Stuart statue. They tied ropes around it, but were not successful in pulling it from its pedestal.<sup>374</sup> The Richmond Police Department sent out a message via Twitter that the assembly at the Stuart monument was unlawful.<sup>375</sup> Officers blocked off the monument from the protestors.<sup>376</sup> The monuments are large and heavy, and removal without proper equipment is both difficult and dangerous. The Robert E. Lee statue likely remains standing because it is large and high off the ground, making any removal a complicated and expensive ordeal.

The local government also chose not to invoke the state removal law and its sixty-day process. While the removal notice and hearing process give substantial power to local governments and do not appear to be a great impediment to removal, the city deemed it unsafe to wait. On July 1, 2020, the Richmond City Council put off a vote to remove the Confederate monuments from Monument Avenue.<sup>377</sup> In that meeting, Mayor Stoney introduced a resolution calling for the immediate removal of Confederate statues in

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372. Joachim & Alonso, *supra* note 370.

373. *Id.*

374. Justin Mattingly & Eric Kolenich, *City Council Members Call for Immediate Removal of Confederate Monuments After Police Intervene When Protesters Try to Pull Down J.E.B. Stuart Statue*, RICH. TIMES-DISPATCH (June 21, 2020), [https://www.richmond.com/news/local/updated-city-council-members-call-for-immediate-removal-of-confederate-monuments-after-police-intervene-when/article\\_01879114-10e3-56d1-be28-e6acd773a648.html](https://www.richmond.com/news/local/updated-city-council-members-call-for-immediate-removal-of-confederate-monuments-after-police-intervene-when/article_01879114-10e3-56d1-be28-e6acd773a648.html).

375. *Id.*

376. *Id.*

377. Brendan King & Shannon Lilly, *City Council Delays Vote on Confederate Monument Removal*, WTVR CBS 6 (July 1, 2020, 12:44 PM), <https://www.wtvr.com/news/local-news/city-council-to-likely-vote-on-confederate-monument-removal-thursday>.

Richmond.<sup>378</sup> The vote was supposed to happen July 2, 2020, but Mayor Stoney argued that because Richmond was under a state of emergency and he is in control of emergency management, he had the right to remove the statues based on public safety concerns.<sup>379</sup> Work crews removed the Stonewall Jackson statue from its pedestal two hours after the meeting.<sup>380</sup> Hundreds of people gathered to witness its removal.<sup>381</sup> In a statement, Mayor Stoney said he was using his emergency powers to order the immediate removal of “multiple monuments in the city, including Confederate statues.”<sup>382</sup>

Community members filed suit challenging the mayor’s removal of the monuments. The legality of the mayor’s actions is not clear. Richmond City Attorney Haskell Brown said, based on the city charter, the City Council could not legally have voted on the mayor’s resolution because it had not been publicly noticed for the special meeting.<sup>383</sup> On August 3, 2020, the City Council belatedly voted unanimously to remove the statues that had already been removed.

Mayor Stoney did not rely on the new law enabling local governments to remove Confederate monuments, which would have led to a delay of at least sixty days, but instead invoked emergency powers to protect public safety and

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378. Scott Wise & Brendan King, *Stonewall Jackson Statue Removed From Monument Avenue*, WTVR CBS 6 (July 1, 2020, 1:24 PM), <https://www.wtvr.com/news/local-news/crews-appear-ready-to-remove-confederate-monuments-in-richmond>.

379. *Id.*

380. Wise & King, *supra* note 378.

381. Denise Lavoie & Alan Suderman, *Stonewall Jackson Removed From Richmond’s Monument Avenue*, AP NEWS (July 1, 2020), <https://apnews.com/b27b2bfce3ecef13c917a69a59cd9da#:~:text=Stonewall%20Jackson%20from%20its%20concrete,came%20weeks%20after%20Virginia%20Gov.>

382. Wise & King, *supra* note 378.

383. King & Lilly, *supra* note 377.

“expedite the healing process.”<sup>384</sup> The mayor estimated a cost of \$1.8 million to remove the statues.<sup>385</sup> He said the money would come from the Department of Public Works, but it would be reimbursed by a private fund.<sup>386</sup> The Maggie Walker Community Land Trust is acting as the agent for The Fund to Move the Monuments.<sup>387</sup> The newly formed initiative aims to gather enough private donations to cover the costs that are incurred in relation to the removal of the monuments. Today, the Stuart, Maury, and Jackson statues are in storage at an undisclosed location and their fate is unknown; the Davis statue may be in storage or may have been disposed of due to the damage; and the Lee monument, of course, remains standing.

### B. *Jefferson Davis*

The Jefferson Davis monument in the Capitol Rotunda in Kentucky was finally removed via the legal processes established by the state. The fact that the statue was inside the Capitol Rotunda likely explains why it had not been a significant focus of protestors. Illegal monument removal would not have been easily accomplished, and such a controlled space also may not have made the monument an easy rallying point or protest zone.

### C. *Nathan Bedford Forrest Monument from Memphis’ City Park*

The removal of Memphis’ Forrest Monument is another example of local governments finding state laws only a facial

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384. *Stonewall Jackson Statue Being Removed Following Order From Mayor Stoney*, NBC12 (July 1, 2020, 3:12 PM), <https://www.whsv.com/app/2020/07/01/stonewall-jackson-statue-being-removed-following-order-from-mayor-stoney>.

385. King & Lilly, *supra* note 377.

386. *Id.*

387. Jack Jacobs, *Nonprofit Aims to Cover Cost to Remove City-Owned Confederate Monuments*, RICH. BIZSENCE (July 2, 2020), <https://richmondbizsense.com/2020/07/02/nonprofit-aims-to-cover-cost-to-remove-city-owned-confederate-monuments>.

impediment to removal. The state law led to clever, but complicated, legal maneuvers where a city chose to give up title to city parks to remove unwanted monuments. Clearly, the state laws governing removal processes did not provide Memphis citizens an avenue to control the images in their town. Instead, they went outside the established procedure, resulting in reprisals and lawsuits from the state legislature.

#### D. *Birmingham's Linn Park*

On May 31, 2020, protestors in Birmingham took down the plywood barricade at the base of the monument.<sup>388</sup> The demonstrators began to chip away at the monument with anything they could find.<sup>389</sup> Chains and ropes were then placed around the monument in an attempt to bring it down, even using a pickup truck to help pull it, but the rope broke on the first attempt.<sup>390</sup> Demonstrators also spray painted the base and chipped away at the inscriptions at the bottom.<sup>391</sup> Mayor Randall Woodfin made a pact to take the monument down within twenty-four hours to put an end to further unrest.<sup>392</sup> The city removed the statue the next day.<sup>393</sup> On June 2, 2020, state Attorney General Marshall filed a civil lawsuit against the city, arguing that the removal violated the state's statue statute.<sup>394</sup> Mayor Randall Woodfin said the expected \$25,000 fine for removing the statue would be much more affordable than the cost of continued civil unrest in the city.<sup>395</sup>

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388. Anna Beahm, *In Birmingham: Fires, Windows Shattered at Banks, Businesses as Reporters Attacked*, AL.COM (May 31, 2020), <https://www.al.com/news/2020/05/protesters-trying-to-take-down-confederate-monument-in-birmingham.html>.

389. *Id.*

390. *Id.*

391. *Id.*

392. Erik Ortiz, *supra* note 122.

393. *Id.*

394. *Id.*

395. *115 Year Old Confederate Monument Removed From Downtown*

As in Richmond, we see a mayor frustrated by laws requiring a monument to stay in place. Working outside the state monument preservation laws, the mayors invoke ideas of emergency and nuisance. Local governments invoke public nuisance where state statute statutes prevent or delay removal.<sup>396</sup> In another example, a monument in DeKalb County, Georgia, was removed on June 20, 2020 after a Superior Court judge declared the monument a public nuisance and gave the county two weeks to remove it.<sup>397</sup> Judge Seeliger held that the obelisk had become an increasingly frequent target of graffiti and vandalism, “a figurative lightning rod for friction among citizens, and a potential catastrophe that could happen at any time if individuals attempt to forcibly remove or destroy it.”<sup>398</sup> He directed that the obelisk be removed undamaged and stored “out of public view.”<sup>399</sup> The order came in response to a motion from the Decatur City Attorney.<sup>400</sup> It was quickly removed by the county and appears to currently be in an undisclosed storage location.

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*Birmingham*, ABC 33/40 NEWS (June 2, 2020), <https://abc3340.com/news/local/confederate-monument-in-linn-park-being-removed> (describing the mayor as saying “it costs less to pay the fine than to have constant civil unrest”).

396. See R. Robin McDonald, *‘Erected to Intimidate’: Confederate Monument Removed from DeKalb County Courthouse*, LAW.COM (June 19, 2020, 1:34 PM), <https://www.law.com/dailyreportonline/2020/06/19/erected-to-intimidate-confederate-monument-removed-from-dekalb-county-courthouse/?slreturn=20200702171449> (describing DeKalb county’s invocation of public nuisance despite Georgia’s 2019 law protecting confederate monuments). Georgia’s law requires local governments to make efforts to relocate monuments to sites of similar prominence.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

## V. THE AFTERLIFE

Early on in this struggle, some people argued that contextualization was all that was needed—explanations regarding the context in which the monument was erected and the viewpoint which it was expressing. Contextualization had been the approach for addressing Confederate monumental art for several decades. For some monuments, communities added plaques seeking to give additional facts or provide a more accurate version of history while retaining the monuments.<sup>401</sup> Others placed additional statues alongside the offensive ones, such as Richmond's addition of Arthur Ashe to Monument Avenue.<sup>402</sup> But maintaining the monuments in their central locations still sent the message that these figures and events were worthy of reverence. Even the National Trust for Historic Preservation agrees that it is time for removal for many monuments in public spaces,<sup>403</sup> while it recognizes that in some locations (perhaps Stone Mountain or in states where

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401. An example of this is the former Battle of Liberty Place Monument in New Orleans. This monument, erected in 1891, commemorated an 1870 uprising by a group called the White League against Reconstruction. This monument had express language indicating this group's defense of White Supremacy. New Orleans added a plaque to provide context for this monument as early as the 1970s. Removal efforts finally succeeded in 2017. *See, e.g.,* Merrit Kennedy, *Under Cover of Night, New Orleans Begins Dismantling Confederate Monuments*, NPR (Apr. 24, 2017, 3:52 PM), <http://www.npr.org/sections/thetwo-way/2017/04/24/525413502/under-cover-of-night-new-orleans-beginsdismantling-confederate-monuments>.

402. *See* Johnathan I. Lieb, *Separate Times, Shared Spaces: Arthur Ashe and the Politics of Richmond, Virginia's Symbolic Landscape*, 9 *CULTURAL GEOGRAPHIES* 286, 286–87, 290 (2002).

403. *National Trust for Historic Preservation Statement on Confederate Monuments*, NAT'L TR. HISTORIC PRESERVATION (June 18, 2020), [https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials?utm\\_medium=email&utm\\_source=update#.XvkdQChKiUm](https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials?utm_medium=email&utm_source=update#.XvkdQChKiUm) (“We believe that removal may be necessary to achieve the greater good of ensuring racial justice and equality.”). The press release continues by supporting “their removal from our public spaces when they continue to serve the purposes for which many were built—to glorify, promote, and reinforce white supremacy, overtly or implicitly,” suggesting there may be some circumstances where they may be able to remain. *Id.*

laws prevent removal), contextualization may be the only option. The National Trust for Historic Preservation's preferred relocation sites are "museums or other places where they may be preserved so that their history as elements of Jim Crow and racial injustice can be recognized and interpreted."<sup>404</sup>

As monuments are removed from various urban centers, there is an effort to find them new homes. Some advocate for removal to museums (to provide the necessary historic context), or cemeteries (to reflect a more commemorative purpose). Some monuments, however, have been placed on public lands in new host communities that are more receptive to the messaging these monuments convey.<sup>405</sup>

Many of those monuments discussed above are simply in limbo, awaiting their fate while sitting in undisclosed storage locations.<sup>406</sup> For example, of the five Confederate monuments on Monument Avenue, one remains in place, one was destroyed when toppled by protesters, and three are in an unidentified storage site after removal by the city.<sup>407</sup> Monuments now linger in storage in Denton, Texas;<sup>408</sup> Little

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404. *Id.*

405. See Jonah Engel Bromwich, *Confederate Monument, Shunned by One Kentucky City, Is Welcomed in Another*, N. Y. TIMES (May 30, 2017), <https://www.nytimes.com/2017/05/30/us/kentucky-confederate-statue-brandenburg.html> (providing an example of a Confederate monument moved from one Kentucky city to another).

406. See Calvert & Bauerlein, *supra* note 3.

407. Aimee Ortiz, *supra* note 123.

408. Denton, Texas, county commissioners voted to remove and relocate their community's monument. It was removed on June 25, 2020 but it is not clear where it will ultimately go. Mark Smith, *The Denton Confederate Memorial Has Been Removed*, CROSS TIMBERS GAZETTE (June 25, 2020), <https://www.crosstimbersgazette.com/2020/06/25/the-denton-confederate-memorial-has-been-removed>.

Rock, Arkansas;<sup>409</sup> Baltimore, Maryland;<sup>410</sup> New Orleans, Louisiana;<sup>411</sup> and Boston, Massachusetts.<sup>412</sup> Some have been in storage for a few years, others have only recently arrived. Some of those in warehouses await transfers to known locations, but many remain without a plan as communities debate where they should go with no clear solution in sight.

Some Confederate monuments have been moved to more receptive communities. Indeed, Virginia's 2020 removal-enabling statute seems to encourage this by allowing local governments to proffer themselves as new homes to removed monuments. When movements among local governments occur, the monuments remain on public land but now in a community with less vocal opposition to it. In Kentucky, one monument was moved from the University of Louisville to the town of Brandenburg.<sup>413</sup> The Jefferson Davis monument is moving from the capitol building in Frankfort to a state historic park near Fairview, Kentucky (the Jefferson Davis State Historic Site). It cost the state \$225,000 to remove the

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409. Memorial to Company A in Little Rock, Arkansas, was removed on June 18, 2020, and placed in storage until a location can be found for it. Nyssa Kruse, *Confederate Statue in Little Rock Removed, Officials Say; Monument's Base Vandalized Days Earlier*, ARK. DEMOCRAT GAZETTE (June 18, 2020, 10:05 PM), <https://www.arkansasonline.com/news/2020/jun/18/confederate-statue-little-rock-removed-thursday-va>. There is also another in Pine Bluff, Arkansas, where the warehouse location is kept secret for fears of vandalism. Dale Ellis, *Pine Bluff Confederate Statue Comes Down in Agreement*, ARK. DEMOCRAT GAZETTE (June 10, 2020, 12:01 PM), <https://www.arkansasonline.com/news/2020/jun/20/pine-bluff-confederate-statue-comes-down-agreement>.

410. Baltimore removed its monuments in 2017 and has still not determined their fate. Calvert & Bauerlein, *supra* note 3.

411. Several pieces were removed from public spaces in 2017 and now sit "in a plywood shed at a city yard." *Id.* (stating that New Orleans officials hope to convene a panel of historians to help determine an appropriate fate for the monuments).

412. Boston's Confederate Memorial was placed in storage after being removed in 2017. Lousie Kennedy, *Boston's Only Confederate Monument Will Move Out of Public View*, WBUR (Oct. 3, 2017), <https://www.wbur.org/artery/2017/10/03/bostons-confederate-memorial-will-move>. It isn't clear what will happen with it. *Id.*

413. Bromwich, *supra* note 405.

statue that is now being stored in anticipation of its eventual move.<sup>414</sup> There seems to be no objection to the fact that the statue will still be displayed on state land. The Jefferson Davis State Historic Site is already home to an incredibly large monument—a 351-foot-tall obelisk that one can enter and ride up in an elevator, similar to the Washington Monument in Washington D.C. The monument and surrounding land became a state historic site in 1924. It used to be called a shrine—which provides some information about the style and manner of the land and corresponding monument.

But some communities have rejected offers of monuments. The Dick Dowling Statue,<sup>415</sup> a prominent early local citizen depicted in his Confederate uniform, in Houston was to be relocated to a state historic site (a battleground) in Port Arthur, but the mayor that town objected to the relocation of Houston's monument to their community.<sup>416</sup> And, while Baltimore officials spoke of moving monuments to Lake Roland Park, county officials there said they wouldn't accept them.<sup>417</sup>

Additionally, as has been seen throughout this Article, some monuments are being conveyed to heritage groups. In some cases, this is because those groups are viewed as the original owner or as having some ownership interest. But there are a few examples where the SCV and UDC are receiving statues that they have not been previously associated with. Many courts and communities see heritage

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414. Tom Kenny, *State Paid \$225,000 to Remove Jefferson Davis Statue from Rotunda*, ABC36WTVQ (July 2, 2020), <https://www.wtvq.com/2020/07/02/state-paid-225000-to-remove-jefferson-davis-statue-from-rotunda>.

415. *Dick Dowling*, HOUS. PARKS & RECREATION DEP'T, <https://www.houstontx.gov/parks/artinparks/dickdowling.html> (last visited Sept. 20, 2020); see also *Dowling's Statue*, RICE UNIV., <https://exhibits.library.rice.edu/exhibits/show/dick-dowling/afterlives-of-dick-dowling/3> (last updated Apr. 3, 2012).

416. *Mayor Bartie Angered at Plan to Relocate Dowling Statue from Houston to Port Arthur*, KFDM (June 12, 2020), <https://kfdm.com/news/local/mayor-bartie-angered-at-plan-to-move-dowling-statue-from-houston-to-port-arthur>.

417. Calvert & Bauerlein, *supra* note 3.

groups as appropriate owners because of their interest in caring for (and paying for) the monuments without displaying them on public lands.

There are also a few publicized examples of monuments being conveyed to private individuals. In Memphis, city officials were able to convey the monuments to the descendants of Nathan Bedford Forrest and Confederate Army Chaplain James Mathis. The Forrest descendants plan to display the statue publicly.<sup>418</sup> Conversely, some communities are prohibiting conveyance to private parties and that may in part be due to experiences in Texas and Maryland. In Texas, the City of Dallas ordered removal of a Confederate monument in 2019. The city sought a proper recipient, initially planning to donate it to a museum or other place that could contextualize the monument. When the city couldn't find an appropriate site, it sold the monument at auction. While the asking price was intended only to cover the cost of removal, it ended up selling for \$1.4 million. A real estate attorney named Rob Holmes bought it, and today it is displayed at a golf course.<sup>419</sup> In Maryland, a monument of a Confederate soldier was transferred to a private landowner who then displayed the monument (now mostly removed) in such a public location, substantially more visible than its prior location, that local officials regretted the move.<sup>420</sup>

Cemeteries also appear attractive homes for Confederate monuments. The statue removed from the Winston-Salem courthouse is to be relocated to a privately owned cemetery with several Confederate graves and markers.<sup>421</sup> The UDC has agreed to remove monuments in Salisbury and Louisburg, North Carolina; both will be moved to a

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418. *Id.*

419. Mervosh, *supra* note 17.

420. More information about both these monuments appears in Owley, Phelps & Hughes, *supra* note 50.

421. Mervosh, *supra* note 17; Newell, *supra* note 79.

cemetery.<sup>422</sup> The John Castleman monument in Louisville, Kentucky, that was removed by the city on June 8, 2020, is supposed to go to his burial site at Cave Hill Cemetery.<sup>423</sup> The Confederate monument from Oxford, Mississippi, is to go to the cemetery at the University of Mississippi.<sup>424</sup> But not all cemeteries are willing to accept the monuments, even if Confederate soldiers are buried there. Baltimore's monuments were rejected by a private cemetery where Confederate soldiers are buried, with the cemetery's president saying he would "unequivocally" oppose any monuments on their grounds.<sup>425</sup>

While many talk of sending Confederate monuments to museums, few seem to actually be headed in that direction. In part, this may be due to their size and weight.<sup>426</sup> The Jefferson Davis monument that is being moved to a state historic site will hopefully receive museum-like treatment with interpretation explaining not only the role of Jefferson Davis in the Civil War but the role of the monument itself as part of the Lost Cause era. The Spirit of the Confederacy Monument in Houston, Texas, was removed by the city on June 17, 2020, and the plan is to move it to the Houston Museum of African American Culture. Several monuments are headed to Los Angeles where LAXART, a nonprofit art

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422. Joe Marusak, *Salisbury Approves Plan to Remove Divisive Confederate Statue. Here's What's Next*, CHARLOTTESVILLE OBSERVER (June 17, 2020, 2:47 PM), <https://www.charlotteobserver.com/news/local/article243595272.html>; Martha Quillin, *Confederate Statue has Literally Divided NC Town's Main Street for Years. But No More.*, NEWS & OBSERVER, <https://www.newsobserver.com/news/local/article243749532.html> (June 2, 2020, 2:52 PM).

423. Ben Tobin, *Louisville's Controversial Castleman Statue Becomes Latest Confederate Relic to be Removed*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/06/08/john-b-castleman-statue-louisville-taken-down-cherokee-triangle/5318612002> (June 8, 2020, 11:30 AM).

424. Sarah Fowler, *Confederate Statue on Ole Miss Campus Relocated*, CLARION LEDGER, <https://www.clarionledger.com/story/news/2020/07/14/confederate-monument-ole-miss-statue-being-relocated-cemetery/5433553002> (July 14, 2020, 3:12 PM).

425. Calvert & Bauerlein, *supra* note 3.

426. *Id.*

center, is planning an exhibit on monuments for January 2022.<sup>427</sup> But this would only be a temporary display with the monuments once again looking for a home at the close of the exhibition.

## VI. CONCLUSION

There is, and has been, a lifecycle for Confederate monuments, both individually and collectively, that appears to be trending towards the death of, and a hopefully responsible afterlife for, these troubling monuments to an unfortunate past. As individuals; communities; and local, state, and federal governments grapple with this difficult inheritance, tough decisions will have to be made as far as how to grapple with this legacy and the future of monumental art in this country. Monuments are intended to speak, resonate, and project those attributes, viewpoints, and exemplars that society values or otherwise holds high. New locations must pay special attention to the treatment of these relocated monuments to ensure that they do not repeat the same injuries on new ground.

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<sup>427</sup> *Id.* They are also interested in pieces that have been damaged and defaced by protesters. *Id.*