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# Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes"

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## ARTICLES

### **MONUMENTS OF FOLLY: HOW LOCAL GOVERNMENTS CAN CHALLENGE CONFEDERATE “STATUE STATUTES”**

*Zachary Bray\**

#### ABSTRACT

*Monuments to the Confederacy and former Confederate figures have been prominently displayed in parks, courthouse squares, and other public spaces of many American towns and cities for many years. Their history is inextricably linked with patterns of institutionalized racism, including but not limited to the rise of Jim Crow and resistance to the integration of public schools. In recent years, the continued display of these monuments has given rise to intense controversy and outbreaks of violence. In response, some local governments have sought to remove or modify Confederate monuments in public spaces, but in several states, local governments face statutory restraints on removing or modifying these monuments. More specifically, some local governments must reckon with statutes designed to preserve the public display of these monuments in places of honor and respect. These “statue statutes” are frequently described as “impossible” barriers for local governments that wish to modify or remove Confederate monuments.*

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*This Article argues that the conventional wisdom about the statue statutes is wrong. Contrary to their reputation, these statutes are so poorly drafted that many local governments could remove or modify Confederate monuments in public spaces, should they wish to do so. Although the statue statutes will prove less effective than many have supposed, it would be best to get rid of them altogether. This Article begins by explaining why this should be done: it reviews the myriad arguments in favor of repealing the statue statutes or striking them down as unconstitutional. But the process of rooting out the statue statutes altogether will take time—perhaps a great deal of time—and the prospects of success, at least in the short term, are uncertain at best.*

*In the meantime, local governments that wish to tear down Confederate monuments must figure out how to do so within the statutes' constraints. This Article explains how this can be done: it shows that the protections that the statue statutes ostensibly afford Confederate monuments in public spaces are far weaker than many suppose. As this Article shows, local governments in many jurisdictions with statue statutes have far more freedom to move, modify, or get rid of Confederate monuments in public spaces than many have supposed. This Article concludes by explaining why arguments for the present frailty of many statue statutes complement arguments for their abolition. Those who wish to get rid of statue statutes and move, modify, or get rid of the monuments the statutes protect should take what actions they can under the existing statutes even as they work to get rid of the statutes altogether.*

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## INTRODUCTION

For more than a century, a Confederate monument dedicated to the “rank and file of the Armies of the South” stood in Louisville, Kentucky.<sup>1</sup> Over seventy feet tall and weighing over one hundred tons, the imposing monument was built with private funds in 1895<sup>2</sup>—three decades after the end of the Civil War, three years after Kentucky enacted a separate coach law that brought Kentucky’s Jim Crow regime in line with other southern states,<sup>3</sup> and one year before the Supreme Court decided *Plessy v. Ferguson*.<sup>4</sup> The monument was originally placed in front of a reform school on the city’s outskirts, where it remained for its first six decades of existence.<sup>5</sup>

In 1954, the year that the Supreme Court decided *Brown v. Board of Education*,<sup>6</sup> the monument was moved to a more central location, nearly adjacent to the University of Louisville.<sup>7</sup> There it remained for several more decades.<sup>8</sup> In April 2016, just over ten months after a white supremacist and Confederate memorabilia enthusiast committed the Charleston church massacre,<sup>9</sup> Louisville’s mayor and the university’s president announced plans to

1. *Sons of Confederate Veterans, Ky. Div. v. Louisville Jefferson Cty. Metro Gov’t*, No. 16-CI-2009, slip op. at 1 (Ky. Cir. Ct. June 16, 2016).

2. Chico Harlan, *A 121-Year-Old Confederate Monument Was Coming Down. This Kentucky Town Put It Back Up.*, WASH. POST (Aug. 20, 2017), [http://www.washingtonpost.com/national/a-121-year-old-confederate-monument-was-coming-down-this-kentucky-town-put-it-back-up/2017/08/20/7a397fc6-85b0-11e7-a50f-e0d4e6ec070a\\_story.html](http://www.washingtonpost.com/national/a-121-year-old-confederate-monument-was-coming-down-this-kentucky-town-put-it-back-up/2017/08/20/7a397fc6-85b0-11e7-a50f-e0d4e6ec070a_story.html) [<http://perma.cc/YU4P-F46U>].

3. Anne E. Marshall, *Kentucky’s Separate Coach Law and African American Response, 1892–1900*, 98 REG. KY. HIST. SOC’Y 241, 241–42 (2000).

4. 163 U.S. 537 (1896).

5. *Sons of Confederate Veterans, Ky. Div.*, slip op. at 1.

6. 347 U.S. 483 (1954).

7. *Sons of Confederate Veterans, Ky. Div.*, slip op. at 1.

8. *Id.*

9. In June 2015 nine people were killed during evening Bible study at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, by a gunman who repeatedly expressed enthusiasm for Confederate memorabilia on social media. Nick Corasaniti et al., *Church Massacre Suspect Held as Charleston Grieves*, N.Y. TIMES (June 18, 2015), <http://nyti.ms/1MNwpAr> [<http://perma.cc/YWP4-279Y>]. The Charleston massacre sparked a near-immediate backlash against the continued display of Confederate images in public places in South Carolina and elsewhere, followed by a groundswell of reactive support for Confederate images in public places. Compare, e.g., Ben Brumfield & Catherine E. Shoichet, *Protesters To Chant ‘Take It Down’ as S.C. Legislators Meet over Flag*, CNN (June 23, 2015, 3:32 PM), <http://www.cnn.com/2015/06/23/us/charleston-church-shooting-main/index.html> [<http://perma.cc/HP4N-M4UT>] (“[L]ess than a week after the massacre of innocents in a Charleston church by a man who venerates the [Confederate] flag, voices from all parts of the political spectrum are rising . . . to say the flag must no longer fly over public buildings.”), with, e.g., Mason Adams, *How the Rebel Flag Rose Again—And Is Helping Trump*, POLITICO (June 16, 2016), <http://www.politico.com/magazine/story/2016/06/2016-donald-trump-south-confederate-flag-racism-charleston-shooting-213954> [<http://perma.cc/F4LH-RHJ5>] (noting that over 360 Confederate

relocate the monument to an unspecified alternative location.<sup>10</sup> According to Louisville's mayor, moving the monument had become necessary because it no longer had a "place in a compassionate, forward leaning city."<sup>11</sup>

In May 2016, concerned that the monument would be moved to a less prominent site or destroyed, the Kentucky Division of the Sons of Confederate Veterans filed suit to stop its removal.<sup>12</sup> The plaintiffs based their arguments, in part,<sup>13</sup> on a Kentucky statute that prohibits the alteration, destruction, or removal of "military heritage site[s],"<sup>14</sup> which expressly include monuments to "activities engaged in by the Confederate States of America."<sup>15</sup> Although the court granted the plaintiffs a temporary restraining order, it ultimately concluded that the statute did not protect the monument from removal.<sup>16</sup> In June 2016 the court granted the City of Louisville's motion to dismiss the suit.<sup>17</sup> The monument was moved to neighboring Brandenburg, a small town in a nearby county that periodically hosts Civil War reenactments of a Confederate general's raids across the Ohio River.<sup>18</sup> Brandenburg's elected officials were eager to take the monument, as were many (but not all) of Brandenburg's residents.<sup>19</sup> At the monument's festive rededication ceremony in its new home, hundreds of happy local citizens and monument supporters outnumbered roughly a dozen protesters.<sup>20</sup>

The story of this monument—once Louisville's and now Brandenburg's—is typical, in many ways, of the history of and recent conflicts over Confederate monuments in this country. Like the Louisville monument, in recent years many monuments to the Confederacy or famous Confederates have been altered or removed from public places where they once stood in former Confederate states,<sup>21</sup> former border states,<sup>22</sup> and states with little apparent connection to the

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flag rallies occurred around the South in the six months after the Charleston shooting).

10. *Sons of Confederate Veterans, Ky. Div.*, slip op. at 1. The University of Louisville was involved because of its proximity to the monument and because it planned to cover the cost of the monument's removal with private funds given to a university foundation. *Id.* at 2.

11. Harlan, *supra* note 2.

12. *Sons of Confederate Veterans, Ky. Div.*, slip op. at 2.

13. *Id.* at 5.

14. KY. REV. STAT. ANN. § 171.788(1) (West 2018).

15. *Id.* § 171.780(2).

16. *Sons of Confederate Veterans, Ky. Div.*, slip op. at 7.

17. *Id.* at 2, 7–8.

18. Meade County Civil War Heritage Ass'n, BRANDENBURG CIVIL WAR REENACTMENT, <http://www.brandenburgreenactment.com/> [<http://perma.cc/ZHM2-W9S4>] (last visited Nov. 1, 2018).

19. Jonah Engel Bromwich, *Confederate Monument, Shunned by One Kentucky City, Is Welcomed in Another*, N.Y. TIMES (May 30, 2017), <http://nyti.ms/2siFRHU> [<http://perma.cc/3WMM-6AJK>].

20. Harlan, *supra* note 2.

21. *E.g.*, Christopher Mele, *New Orleans Begins Removing Confederate Monuments, Under Police Guard*, N.Y. TIMES (Apr. 24, 2017), <http://nyti.ms/2pdsxqd> [<http://perma.cc/3ZZH-39QW>].

22. *E.g.*, Toriano Porter & Joe Robertson, *Vandalized Confederate Monument in KC Is Boxed Up Ahead of Removal*, KAN. CITY STAR (Aug. 20, 2017, 5:23 PM), <http://www.kansascity.com/news/local/article168249392.html> [<http://perma.cc/WK6G-V4WF>].

Confederacy.<sup>23</sup> Some of these removals occurred after significant and prolonged debate that attracted national attention,<sup>24</sup> while other monuments were bundled away quickly and quietly with relatively little conflict over their removal or ultimate destination.<sup>25</sup> But like the Brandenburg monument, many other monuments to the Confederacy or famous Confederates remain in public places, even when they have provided a focus for tragic violence that has transfixed the country.<sup>26</sup>

Despite this legacy of institutionalized discrimination and violence, support for retaining Confederate monuments in public spaces remains high, especially in those states where the bulk of the monuments are located.<sup>27</sup> In many recent regional and national polls, at least a plurality of respondents favor preserving Confederate monuments in public spaces,<sup>28</sup> although in some areas local majorities are strongly against Confederate monument preservation.<sup>29</sup> More specifically, in university towns and relatively large and diverse urban areas, such as Louisville, *opposition* to Confederate monuments tends to be relatively strong, and local officials are often willing to take action to remove or alter

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23. See, e.g., Angela Brandt, *City of Helena To Remove Confederate Fountain*, HELENA INDEP. REC. (Aug. 16, 2017), [http://helenair.com/news/local/city-of-helena-to-remove-confederate-fountain/article\\_606b058a-4e09-5802-a7b8-dc07f2b0a27e.html](http://helenair.com/news/local/city-of-helena-to-remove-confederate-fountain/article_606b058a-4e09-5802-a7b8-dc07f2b0a27e.html) [<http://perma.cc/88ME-Q9AD>].

24. See, e.g., Jelani Cobb, *The Battle over Confederate Monuments in New Orleans*, NEW YORKER (May 12, 2017), <http://www.newyorker.com/news/daily-comment/the-battle-over-confederate-monuments-in-new-orleans> [<http://perma.cc/925E-UGG8>].

25. See, e.g., Colin Campbell & Luke Broadwater, *Citing ‘Safety and Security,’ Pugh Has Baltimore Confederate Monuments Taken Down*, BALT. SUN (Aug. 16, 2017, 5:20 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-monuments-removed-20170816-story.html> [<http://perma.cc/B9TB-6ZPF>] (“We moved quickly and quietly . . . . There was enough grandstanding, enough speeches being made.” (quoting Baltimore Mayor Catherine Pugh)).

26. See, e.g., Paul Duggan, *Charlottesville Judge Orders Shrouds Removed from Confederate Statues*, WASH. POST (Feb. 27, 2018), [http://www.washingtonpost.com/local/crime/charlottesville-judge-orders-shrouds-removed-from-confederate-statues/2018/02/27/3592ae10-1bf6-11e8-9de1-147dd2df3829\\_story.html](http://www.washingtonpost.com/local/crime/charlottesville-judge-orders-shrouds-removed-from-confederate-statues/2018/02/27/3592ae10-1bf6-11e8-9de1-147dd2df3829_story.html) [<http://perma.cc/Z8GE-V76B>].

27. E.g., *Early Exit Polls: Virginia Voters Favor Keeping Confederate Monuments*, NBC NEWS (Nov. 7, 2017, 5:45 PM), <http://www.nbcnews.com/card/nbc-news-early-exit-polls-virginia-voters-favor-keeping-confederate-n818641> [<http://perma.cc/PDP5-HGM2>]; Alex Seitz-Wald, *NBC News Poll: The South, Once a Conservative Bastion, Is Changing*, NBC NEWS (Apr. 12, 2018, 2:39 AM), <http://www.nbcnews.com/politics/elections/nbc-news-poll-south-once-conservative-bastion-changing-n864441> [<http://perma.cc/F7MN-U9VR>] (“[A] strong majority of Southerners—61 percent—oppose removing Confederate monuments and statues from public spaces, while just 36 percent support their removal.”).

28. E.g., Chris Kahn, *A Majority of Americans Want To Preserve Confederate Monuments: Reuters/Ipsos Poll*, REUTERS (Aug. 21, 2017, 5:51 PM), <http://www.reuters.com/article/us-usa-protests-poll/a-majority-of-americans-want-to-preserve-confederate-monuments-reuters-ipsos-poll-idUSKCN1B12EG> [<http://perma.cc/CE4Z-CZFZ>].

29. See, e.g., Antonio Olivo, *After Charlottesville, Va. Democrats See Chance To Change 114-Year-Old Monuments Law*, WASH. POST (Aug. 25, 2017), [http://www.washingtonpost.com/local/dc-politics/after-charlottesville-va-democrats-see-opening-to-change-114-year-old-monuments-law/2017/08/25/5e97e766-880e-11e7-a94f-3139abce39f5\\_story.html](http://www.washingtonpost.com/local/dc-politics/after-charlottesville-va-democrats-see-opening-to-change-114-year-old-monuments-law/2017/08/25/5e97e766-880e-11e7-a94f-3139abce39f5_story.html) [<http://perma.cc/EAR3-SKFM>] (noting that in Virginia most cities are relatively diverse and liberal politically, while the populations of rural and exurban areas, and the state government as a whole, tend to be more conservative and solicitous of the state’s Confederate past).

them.<sup>30</sup> On the other hand, in rural, exurban, and some suburban areas, such as Brandenburg, *support* for Confederate monuments tends to be relatively high, both among the general public and local officials.<sup>31</sup>

This pronounced split in opinions on Confederate monuments can be understood, in part, as an example of a wider and widening rural-urban divide. This rural-urban split is partly cultural, as Americans on either side of it increasingly feel estranged from their fellow citizens.<sup>32</sup> But it is also structural, because local governments are and historically have been systematically disadvantaged by the American federal framework.<sup>33</sup>

In the case of debates over Confederate monuments in public places, it is easy for the cultural and structural issues behind the wider rural-urban divide to boil over, because the resolution of these debates often appears to be particularly arbitrary for the losing side.<sup>34</sup> In general, those who disagree with preservation decisions often find them to be arbitrary because the preservation of physical objects and spaces frequently depends on relatively open-ended and elastic values.<sup>35</sup> Preservation decisions in prominent public spaces are even more likely to *be* arbitrary when, as with the preservation of Confederate monuments, they relate to historical narratives that marginalize minority communities.<sup>36</sup>

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30. See, e.g., Mitch Landrieu, Mayor, New Orleans, Address at Gallier Hall (May 19, 2017), <http://www.youtube.com/watch?v=t0jQTHis3f4> [<http://perma.cc/U8M5-BMSH>] (transcript available at [http://www.nola.com/politics/index.ssf/2017/05/mayor\\_landrieu\\_speech\\_confeder.html](http://www.nola.com/politics/index.ssf/2017/05/mayor_landrieu_speech_confeder.html) [<http://perma.cc/FZ46-APP6>]) (noting, in a speech celebrating the removal of monuments to the “Lost Cause of the Confederacy,” the “searing truth” that the removed monuments were as much a part of post-Reconstruction racial terrorism “as a burning cross on someone’s lawn”).

31. See, e.g., Seth McLaughlin, *Confederate Heritage Stands Strong in Parts of Rural Virginia*, WASH. TIMES (Oct. 15, 2017), <http://www.washingtontimes.com/news/2017/oct/15/confederate-statues-still-stand-in-rural-virginia/> [<http://perma.cc/HT5G-9V4T>] (quoting Joyce Kistner, the chair of the Bristol, Virginia, chapter of the United Daughters of the Confederacy, who noted that the chapter has “had the support of the community from the beginning” and that “[e]verybody has appreciated [the local Confederate monument]”).

32. See, e.g., Jose A. DelReal & Scott Clement, *Rural Divide*, WASH. POST (June 17, 2017), <http://www.washingtonpost.com/graphics/2017/national/rural-america/> [<http://perma.cc/PZ76-LS5T>] (exploring the results of a Washington Post-Kaiser Family Foundation survey finding a growing sense of estrangement held by those living in rural areas from people who live in urban areas); see also KIM PARKER ET AL., PEW RESEARCH CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES 41 (2018) (finding that majorities of both urban and rural Americans “say people who don’t live in their type of community have a very or somewhat negative view of those who do”).

33. See, e.g., Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1167 (2018) [hereinafter Schragger, *American Cities*] (analyzing the enduring nature of anti-urbanism in American federalism, and arguing that this “structural anti-urbanism reflects and reinforces the widening political gap between American cities and other parts of the country”).

34. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 476–77 (1981).

35. See *id.*

36. Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 3 (noting that public places often enshrine “selective and misleading versions of the past in solid, material forms,” which can “marginalize certain communities—particularly African American communities—and transmit ideas about racial power across generations”).

Similarly, decisions about the preservation and presentation of historic sites or figures are likely to reflect both past and contemporary perspectives about status and political power in ways that may seem to disenfranchise those disappointed with the preservation decision.<sup>37</sup> Accordingly, disputes about Confederate monuments in public places have been and are likely to remain bitterly contentious: these disputes tend to concentrate the worst aspects of debates about preservation even as they provide a natural focus for our widening rural-urban divide.

In some states, legal issues about the relative power of state and local authorities have combined with the underlying causes of the recent monument disputes in a particularly toxic way.<sup>38</sup> More specifically, many of the most intense conflicts have taken place in states with statutes that restrict the ability of local communities to alter monuments to the Confederacy in public places. Indeed, one such statute was involved in the lawsuit over the Louisville-Brandenburg monument.<sup>39</sup> In contrast, many local governments in states without such statutes have disposed of or altered high-profile Confederate monuments in relatively short order.<sup>40</sup> Following Richard Schragger's recent work on the invasion of Charlottesville by white supremacists, this Article refers to these state controls over Confederate monuments as "statue statutes."<sup>41</sup>

Many of these statue statutes are relatively recent, though some date back a decade or more, and the earliest version of one such statute dates back over a century.<sup>42</sup> Regardless of their age, none of the statue statutes faced significant

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37. J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENVTL. L.J. 203, 206, 268 (2009) ("Decisions about preservation and presentation of a historic site . . . will always reflect the perspectives of contemporary society, especially those with power.").

38. The states in question are Virginia, Tennessee, Alabama, Georgia, North Carolina, Mississippi, Kentucky, and South Carolina.

39. See *supra* notes 10–20 and accompanying text for a discussion of the monument's removal.

40. Compare, e.g., John Sharp, *How Alabama Could Become 'Ground Zero' in Renewed Battle over Confederate Symbols*, AL.COM (Apr. 22, 2018), [http://www.al.com/news/index.ssf/2018/04/confederate\\_monuments\\_battle.html](http://www.al.com/news/index.ssf/2018/04/confederate_monuments_battle.html) [<http://perma.cc/4DRD-4WQY>] (describing the connection between Alabama's very recent statue statute and the intense conflicts over Confederate monuments around the state), and Benjamin Wallace-Wells, *The Fight over Virginia's Confederate Monuments*, NEW YORKER (Dec. 4, 2017), <http://www.newyorker.com/magazine/2017/12/04/the-fight-over-virginias-confederate-monuments> [<http://perma.cc/9ZR2-LC3U>] (describing the protracted conflict, violence, and death surrounding Confederate monuments in Virginia, the state with the oldest statue statute), with, e.g., Campbell & Broadwater, *supra* note 25 (describing the 2017 removal of high-profile Confederate monuments in Baltimore, Maryland, a state without a statue statute), and Mele, *supra* note 21 (describing the 2017 removal of high-profile Confederate monuments in New Orleans, Louisiana, a state without a statue statute).

41. See Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 63 (2018) [hereinafter Schragger, *When White Supremacists Invade*] (referring briefly to Virginia's "statue statute" in the context of a discussion about the lack of legal authority available to local governments faced with armed aggressors).

42. For more detail on the history of various statue statutes, see *infra* Section II. Many of the relatively recent statue statutes are sometimes titled and referred to by some commentators as "Heritage Protection Acts," because versions of that phrase pop up in the acts' titles for some of the statue statutes passed in the last decade or so. E.g., Alfred Brophy, *Wahlers on NC Monument Protection Act*, FAC. LOUNGE (Nov. 28, 2015, 11:38 AM), <http://www.thefacultyounge.org/2015/11/>

controversy until roughly 2015, when many communities began to reconsider the public display of Confederate flags and monuments after the Charleston church massacre.<sup>43</sup> All of the statue statutes seek to strip authority away from local governments that might wish to remove or alter monuments on their own authority,<sup>44</sup> and in so doing they fire the rural-urban divide that provides so much of the fuel for the underlying conflicts.<sup>45</sup>

Because many of the conflicts over Confederate monuments are relatively recent, the statue statutes that help exacerbate some of the worst monument conflicts have not received the attention they deserve. Moreover, much of the ink that has been spilled on these statutes tends to focus not on the merit of their underlying purpose, or lack thereof, but rather on their alleged strength. In other words, it is frequently said or written that the statue statutes make it terribly difficult, or even impossible, for local governments to move or modify Confederate monuments in public places.<sup>46</sup> But, as one scholar has already noted

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wahlers-on-nc-monument-protection-act.html [http://perma.cc/46L5-W4FR]. This Article will refer to all such restrictions as “statue statutes,” since the original versions of some of the statutes considered here are years older—or, in Virginia’s case, over a century older—than the relatively recent Heritage Protection Acts.

43. See, e.g., Olivo, *supra* note 29 (noting that Virginia’s statue statute “went largely unchallenged” from 1904 “until a 2015 legal dispute in Danville,” was sparked “over the removal of a Confederate flag”).

44. See *id.*

45. See David A. Graham, *Local Officials Want To Remove Confederate Monuments—But States Won’t Let Them*, ATLANTIC (Aug. 25, 2017), <http://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351/> [http://perma.cc/959V-EKPC] (noting that a statue statute imposed by the state legislature “can prevent [local] officials . . . from removing Confederate monuments, but it is unlikely to change minds of left-leaning electorates in cities like Chapel Hill and Birmingham”).

46. Examples abound of government officials, state legislators, lawyers, and reporters who emphasize the perceived strength of statue statutes and the difficulty that local governments have faced and will face if they attempt to remove monuments protected by these statutes. E.g., Jackson Baker, *Author of Heritage Protection Act Cautions City About ‘Consequences’*, MEMPHIS FLYER (Sept. 7, 2017, 12:16 PM), <http://www.memphisflyer.com/JacksonBaker/archives/2017/09/06/author-of-heritage-protection-act-cautions-city-about-consequences> [http://perma.cc/EY2D-F7LV] (quoting the author of Tennessee’s statue statute, who threatened dire consequences for the Memphis City Council should it remove certain Confederate monuments); Jeffrey C. Billman, *The Mayor of New Orleans Explains Why North Carolina’s Monuments to White Supremacy Need To Come Down*, INDY WEEK (Durham, N.C.) (May 23, 2017, 3:46 PM), <http://www.indyweek.com/editor/archives/2017/05/23/the-mayor-of-new-orleans-explains-why-north-carolinas-monuments-to-white-supremacy-need-to-come-down> [http://perma.cc/S77Y-2KHW] (noting that North Carolina’s statue statute makes “it nearly impossible” to alter or remove Confederate monuments “from public spaces”); Jessica Bliss & Holly Meyer, *In the South, Confederate Monuments Often Protected, Hard To Remove Thanks to State Laws*, TENNESSEAN (Aug. 17, 2017, 6:00 AM), <http://www.tennessean.com/story/news/2017/08/17/south-confederate-monuments-often-protected-hard-remove-state-laws/573226001> [http://perma.cc/WEQ3-XBZ2] (noting that statue statutes prevent Confederate monuments “from being taken down or altered without great difficulty”); Graham, *supra* note 45 (noting that “[a]cross the South, citizens are rising up and demanding that their towns and cities remove Confederate monuments,” while in those cities located in states with statue statutes, “local officials are reckoning with the fact that they don’t actually have the power to do that”); Josh Magness, *There’s a Push To Remove Confederate Statues. In Some States, That’s Hard or Illegal*, CHARLOTTE OBSERVER (Aug. 17, 2017, 8:58 AM), <http://www.charlotteobserver.com/news/nation-world/national/article167692922.html> [http://perma.cc/

with respect to Virginia’s statute statute,<sup>47</sup> and as this Article shows for many of the state statute statutes,<sup>48</sup> this widely held view about the impenetrability of statute statutes is incorrect.

Until now, the flaws inherent in the statute statutes have been difficult to see. The true weaknesses of these statutes have been obscured in part by “arcane issues of state law,”<sup>49</sup> which, as Section II shows, are time-consuming to unpack for several reasons. First, many of the statutes were drafted at different times, which means that their structure and language vary widely. This has obscured some of the opportunities for local government action under the statute statutes, helping to conceal even those opportunities for local action that recur across multiple statute statutes. Moreover, most of the challenges to the statutes to date have focused on individual statutes as state-specific obstacles to individual local government actions. This is understandable, but it tends to obscure some of the weaknesses that are common to many of the statutes from different jurisdictions—weaknesses explored in the remainder of this Article. Given the similarities in the legislative history, text, and structure of many statute statutes, local governments that wish to remove ostensibly protected monuments have

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/78C4-TGDM] (“Despite the seeming momentum to remove [Confederate monuments], a handful of Southern states have laws that make taking down the controversial Confederate monuments incredibly challenging—if not impossible.”); Jacob Reynolds, *Georgia State Law Makes It Difficult To Completely Remove or Hide Confederate Monuments*, WMAZ (Aug. 17, 2017, 8:25 AM), <http://www.13wmaz.com/article/news/local/georgia-state-law-makes-it-difficult-to-completely-remove-or-hide-confederate-monuments/464932603> [<http://perma.cc/TZ83-XMG6>] (concluding that Georgia’s statute statute “may make it impossible for any cities and counties to completely remove or destroy existing Confederate monuments”); Jessica Schladebeck, *It’s Illegal for America To Tear Down All of Its Confederate Past*, N.Y. DAILY NEWS (Aug. 17, 2017), <http://www.nydailynews.com/news/national/impossible-america-tear-confederate-article-1.3420524> [<http://perma.cc/2PYZ-3UPK>] (claiming that statute statutes “make it next to impossible for America to tear down all that links it to its Confederate past”); Kaeli Subberwal, *Several States Have Erected Laws To Protect Confederate Monuments*, HUFFINGTON POST (Aug. 18, 2017, 9:09 PM), [http://www.huffingtonpost.com/entry/states-confederate-statue-laws\\_us\\_5996312be4b0e8cc855cb2ab](http://www.huffingtonpost.com/entry/states-confederate-statue-laws_us_5996312be4b0e8cc855cb2ab) [<http://perma.cc/5DGX-AUVE>] (noting that a “maze of statutes” may make conversations about statue removal “moot” in several states); Dan Whisenhunt, *Decatur City Leaders Grappling with Calls To Remove Confederate Monument*, DECATURISH (Aug. 15, 2017), <http://deaturish.com/2017/08/decatur-city-leaders-grappling-with-calls-to-remove-confederate-monument> [<http://perma.cc/4W6R-AV35>] (quoting city leaders and state legislators, including one state senator who “had forgotten” about Georgia’s statute statute but concluded “[o]bviously [legislators] would need to eliminate that before the locals can take action”).

47. Rich Schragger, Opinion, *Is Charlottesville’s Robert E. Lee Statue Illegal?*, RICH. TIMES-DISPATCH (Aug. 30, 2017) [hereinafter Schragger, *Robert E. Lee*], [http://www.richmond.com/opinion/their-opinion/guest-columnists/rich-schragger-column-is-charlottesv-ille-srobert-e-lee-statue/article\\_888d6495-6176-5cea-9278-71018d293f2a.html](http://www.richmond.com/opinion/their-opinion/guest-columnists/rich-schragger-column-is-charlottesv-ille-srobert-e-lee-statue/article_888d6495-6176-5cea-9278-71018d293f2a.html) [<http://perma.cc/2B2Y-6B3H>].

48. See *infra* Section II.

49. Micah Schwartzman & Nelson Tebbe, *Charlottesville’s Monuments Are Unconstitutional*, SLATE (Aug. 25, 2017, 9:07 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/charlottesville\\_s\\_monuments\\_are\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/charlottesville_s_monuments_are_unconstitutional.html) [<http://perma.cc/GHU6-GPGV>]. Schwartzman and Tebbe pointed out the larger constitutional principles at stake in the Charlottesville monument conflict, beyond the “arcane issues of state law” related to Virginia’s statute statute. *Id.* The arguments that Schwartzman and Tebbe raised about the unconstitutionality of statute statutes are discussed in detail in Section I, *infra*.

much to gain from greater coordination of challenges across multiple jurisdictions.<sup>50</sup>

Upon closer inspection, the truth emerges: the protections that statue statutes provide for Confederate monuments are far less extensive than many have imagined, hoped, or feared.<sup>51</sup> Many local governments may be able to move their Confederate monuments to less prominent locations, or place monuments into a more appropriate and less celebratory context, even if some statue statutes survive in something like their current form. Perhaps most importantly, this Article may help local governments and sympathetic state officials in different jurisdictions coordinate their efforts to exploit the various opportunities for local action that are common to multiple statue statutes across different jurisdictions.

Pointing out the practical weaknesses of the statue statutes should not be interpreted as a defense of or an attempt to rehabilitate either the statue statutes or the monuments they protect. Writing almost a century and a half ago, Frederick Douglass called the first wave of “[m]onuments to the ‘lost cause’” that were going up around the former Confederacy “monuments of folly,” which could only create a “needless record of stupidity and wrong” and serve “little or no purpose” in the future beyond “cultivating hatred.”<sup>52</sup> Sections I and II of this Article show that Douglass’s criticism also applies to the more recent statue statutes enacted to protect these monuments. The execution of the statue statutes is frequently shoddy, creating opportunities for local governments to move against protected monuments. But the purpose behind these statutes—to strip away local control over public spaces and to protect monuments originally raised to discrimination and institutionalized violence<sup>53</sup>—is far worse.

It would be best, therefore, if state legislatures simply did away with the statue statutes altogether, publicly repudiating the statutes themselves and affirming the rights of local governments to remove or modify the physical and monumental legacies of discrimination and violence that the statutes purport to protect. The second-best outcome would be for courts to conclude that the statue

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50. See *infra* notes 115–116, 125, 156, 180–182, 216–217, 263, 317 and accompanying text for examples of the disparate past and pending challenges to the various statue statutes in different states.

51. See *infra* Section II for a review of each state statue statute and the opportunities for local government action.

52. *Monuments of Folly*, NEW NAT’L ERA (D.C.), Dec. 1, 1870, at 3.

53. For a brief examination of the history and purpose behind many Confederate monuments themselves and the inseparable relationship between these monuments and campaigns to impose systems of legal discrimination and extrajudicial violence, see *supra* and *infra* notes 1–11, 64–70, 76–78 and accompanying text.

The facial language of most statue statutes does not, of course, refer to this history, nor indeed do most statue statutes single out the Confederacy or Confederate history. Rather, the statue statutes tend to refer to American military history generally, or a long list of military conflicts and/or historical periods that include the Civil War and the Confederacy. See *infra* notes 126–140, 174–176, 197–198, 218–228, 234–236, 244–245 and accompanying text for examples of this wording. But a close examination of the statue statutes’ histories, legislative or otherwise, shows that they were designed with a near-exclusive focus on public monuments to the Confederacy and a desire to strip control from local governments that might wish to amend or remove such monuments in light of their troubled past and present. See *infra* notes 128, 143, 164–165, 197–198, 220–225 and accompanying text.

statutes are unconstitutional, adopting one or more of the arguments reviewed in Section I of this Article. Readers can judge for themselves how likely either of these outcomes might be in the near future. But as far as the prospect of repeal goes, it should be noted that many executive officials, state legislators, and academics in states with statue statutes tend to view the prospect of revision as unlikely, at least in the next few years.<sup>54</sup> It must also be remembered that despite intense local opposition in many cities and towns, substantial majorities of the American public favor retaining most existing Confederate monuments in public spaces—by a ratio of two to one, according to some recent polls<sup>55</sup>—and the margins are even greater in states with large numbers of Confederate monuments.<sup>56</sup>

As Sections I and III of this Article show, the relevant state legislatures or courts may entirely undo most or all of the statue statutes. But unless and until this hope is realized, local governments that wish to remove or modify existing Confederate monuments must either give up or find a path forward within the existing statutes' constraints. Given the way that statue statutes are usually described—as “impossible” obstacles to removing or modifying Confederate monuments, “regardless of the desires of local municipalities”<sup>57</sup>—it would be easy for ordinary citizens and elected officials who want to get rid of Confederate monuments to grow discouraged or even give up entirely. However, as this Article shows, giving up in the face of statue statutes is a mistake.

Instead of giving up, local governments that wish to modify or get rid of Confederate monuments in public places should be encouraged to challenge the relevant statue statutes. Many local governments may be able to challenge existing statue statutes in a coordinated fashion, exploiting the opportunities for local action that are common across multiple jurisdictions and using their collective action to alter public opinion in their respective states and around the

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54. *E.g.*, Michael Jones, *Petition Seeks Change in Ga. Law that Protects Confederate Monuments*, WABE (Atlanta) (Aug. 15, 2017), <http://www.wabe.org/petition-seeks-change-ga-law-protects-confederate-monuments> [<http://perma.cc/435Q-LNJJ>] (quoting state representatives and academics hostile to Georgia's statue statute who uniformly conclude that amending or abolishing the statute is improbable in the next few years); *see also* Kirk Brown et al., *Gov. McMaster Doubts Efforts To Remove Confederate Monuments Will Spread to South Carolina*, HERALD (Rock Hill, S.C.) (Aug. 14, 2017, 11:13 PM), <http://www.heraldonline.com/latest-news/article167231897.html> [<http://perma.cc/4BXU-ECJU>] (quoting South Carolina Governor Henry McMaster and South Carolina House of Representatives Speaker Jay Lucas, who each ruled out any changes or exceptions to the state's statue statute in the foreseeable future).

55. *See, e.g.*, Kahn, *supra* note 28 (noting that 54% of respondents thought Confederate monuments “should remain in all public spaces” while only 27% thought the monuments “should be removed from all public spaces”).

56. *See* NPR/PBS NEWSHOUR/MARIST POLL NATIONAL TABLES, “DO YOU THINK STATUES HONORING LEADERS OF THE CONFEDERACY SHOULD REMAIN/BE REMOVED” 9 (Aug. 2017) (noting that 66% of respondents in the South thought such monuments should remain); *see also supra* notes 27–32 and accompanying text (gathering similar polls).

57. Melba Newsome, *Is Removing Confederate Monuments like Erasing History?*, NBC NEWS (Apr. 25, 2017, 4:28 AM), <http://www.nbcnews.com/news/nbcblk/are-removing-confederate-monuments-erasing-history-n750526> [<http://perma.cc/7R7R-RSJB>]; *see also supra* note 46 (gathering numerous similar sources).

nation. As this Article shows, when we tug at the seams of the statue statutes, we find room for local governments to remove or modify many existing Confederate monuments in public spaces even if the statutes remain in place indefinitely. In other words, even if this Article's modest effort does not entirely unstitch the statue statutes, it does show that the statutes' protections for Confederate monuments are more threadbare than their defenders imagine and their opponents fear. As a result, local governments that wish to remove or modify existing Confederate monuments in jurisdictions with statue statutes have more options than many have supposed and reported.

In addition, by pointing out the thin and ragged nature of the protections existing statue statutes provide, this Article seeks to encourage state legislators to reconsider the existence of statue statutes in jurisdictions where they have been enacted and to deter the passage of additional statue statutes where such bills have been considered, but not enacted, in recent years.<sup>58</sup> Striking the statue statutes from the books may take a long time. But because these statutes, at least in their current form, leave many avenues open for local governments to remove or modify existing monuments, legislators in states that either already have or are considering such statutes should ask themselves: What useful purpose, if any, does this legislation serve? As this Article shows, when the histories and effects of the statue statutes are examined in detail, it is hard to avoid the conclusion that—like the monuments they ostensibly protect—these statutes serve little or no purpose worth defending, but rather perpetuate a long history of institutionalized racism and violence.<sup>59</sup>

The remainder of this Article proceeds in three sections. Section I provides short histories of Confederate monuments in public spaces and the statue statutes that purport to protect these monuments, and a short summary of some constitutional arguments advanced by other scholars, which, if adopted, would do away with the statue statutes altogether. Section II provides a close and critical examination of the various statue statutes themselves and identifies opportunities within each state's statute that some or all local governments might exploit to remove or modify at least some Confederate monuments in public spaces. Finally, Section III provides arguments against the statue statutes' potential rehabilitation. More specifically, Section III suggests that courts should

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58. For example, in 2017 the Arkansas legislature considered a statue statute, the Arkansas Military Heritage Protection Act, which passed the relevant committees in both houses but failed to pass the full legislature. To Create the Arkansas Military Heritage Protection Act, H.B. 1297, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), <http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=HB1297> [<http://perma.cc/U7FY-T4FC>]. To take another example, Louisiana's state legislature has considered multiple statue statutes in recent years, though to date all have failed to pass. See Julia O'Donoghue, *Confederate Monument Protection Effort Stalls in Louisiana Legislature—For Now*, TIMES-PICAYUNE (New Orleans) (Apr. 14, 2016), [http://www.nola.com/politics/index.ssf/2016/04/confederate\\_monument\\_bill\\_pass.html](http://www.nola.com/politics/index.ssf/2016/04/confederate_monument_bill_pass.html) [<http://perma.cc/R2GK-KLXW>].

59. Cf. *Monuments of Folly*, *supra* note 52 (arguing that “there [would be] little or no purpose in [the] erection” of the earliest Confederate monuments, because the monuments would fail to alter the verdict of history upon their subjects and serve only to foster “the keen remembrance of . . . enormous wrong[s]” that “they must necessarily perpetuate”).

not accept the vague appeals to intrastate preemption that some states have already offered in early attempts to close off opportunities for local action under the statue statutes. Section III also argues that attempts to repair the broken statue statutes by eliminating opportunities for local action should only make the statutes more vulnerable to the constitutional challenges outlined in Section I.

I. BROKEN FROM THE BEGINNING: THE HISTORY AND FUNDAMENTAL FLAWS OF CONFEDERATE MONUMENTS AND THE STATUE STATUTES

Like the Louisville-Brandenburg monument,<sup>60</sup> the history of most Confederate monuments is intimately and inextricably bound up with campaigns of racial intimidation and violence designed to overturn Reconstruction, to establish Jim Crow, and to resist integration after *Brown v. Board of Education*.<sup>61</sup> Section I begins by briefly reviewing the historical relationship between public Confederate monuments and patterns of systematic oppression and violence.<sup>62</sup> Section I then reviews arguments advanced by others that the statue statutes are unconstitutional in light of the messages of oppression and violence that many Confederate monuments were designed to reinforce.<sup>63</sup>

A. *The Troubling History Behind Confederate Monuments and Statue Statutes*

A recent comprehensive survey and report prepared by the Southern Poverty Law Center (SPLC) on Confederate monuments across the nation helps to illustrate how the dedication of Confederate monuments spiked in two distinct periods. The first period, from around 1900 through the 1920s, encompassed the enactment of Jim Crow laws and the revival of the Ku Klux Klan as the “Invisible Empire.”<sup>64</sup> The second period, from the mid-1950s through the late 1960s, encompassed both the modern civil rights movement and widespread

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60. See *supra* notes 1–20 and accompanying text.

61. See *Coleman v. Miller*, 885 F. Supp. 1561, 1565 (N.D. Ga. 1995) (noting that in Georgia, “expressions of interest in Confederate history” and the erection and defense of Confederate symbols and monuments in public places “coalesced with public outcry in reaction to desegregation mandates by the Supreme Court”); Cloney, *supra* note 36, at 10–13 (describing the ways in which Confederate monuments cemented post-Reconstruction threats of violence and patterns of racial stratification); Sophie Abramowitz et al., *Tools of Displacement: How Charlottesville, Virginia’s Confederate Statues Helped Decimate the City’s Historically Successful Black Communities*, SLATE (June 23, 2017, 3:20 PM), [http://www.slate.com/articles/news\\_and\\_politics/history/2017/06/how\\_charlottesville\\_s\\_confederate\\_statues\\_helped\\_decimate\\_the\\_city\\_s\\_historically.html](http://www.slate.com/articles/news_and_politics/history/2017/06/how_charlottesville_s_confederate_statues_helped_decimate_the_city_s_historically.html) [<http://perma.cc/MY9U-USEX>] (arguing that the Charlottesville monuments were built atop land confiscated from prosperous African American residents of Charlottesville and subsequently served to mark off “areas of political and financial power as part of the ideology of the Lost Cause” of the Confederacy); Mele, *supra* note 21 (noting that one of the four monuments removed by New Orleans expressly commemorated the 1874 “Battle” of Liberty Place, honoring members of the Crescent City White League who fought against the then-racially integrated New Orleans Police Department).

62. See *infra* Part I.A.

63. See *infra* Part I.B.

64. BOOTH GUNTER ET AL., S. POVERTY LAW CTR., *WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY* 12–15 (2016).

resistance to desegregation.<sup>65</sup>

The SPLC report details the correlation between the dedication of Confederate monuments and periods of intense racial discrimination and violence.<sup>66</sup> But many other thoughtful observers have long noted the link between these monuments and institutionalized discrimination.<sup>67</sup> For example, during travels through Atlanta and the Carolinas in 1931, W. E. B. Du Bois wrote of the unavoidable and mutually reinforcing connection between the sheer number of physical monuments to the Confederacy in public spaces—“awful things” that should have been dedicated “to the memory of those who fought to Perpetuate Human Slavery”—and the similar omnipresence of both “the rules of ‘Jim-Crow’” and the prevailing “custom of murder.”<sup>68</sup>

Notwithstanding this intimate and inextricable connection between Confederate monuments in public civic spaces and the nation’s deeply fraught history of segregation, intimidation, and violence, the continued presence of these monuments in public spaces remains popular.<sup>69</sup> Defenders of the continued existence of Confederate monuments in public civic spaces offer many justifications for the monuments’ preservation. Some contemporary defenders of Confederate monuments simply resort to the racially charged threats of violence that have been associated with these monuments since their creation.<sup>70</sup> Others base their arguments on family, personal, or cultural connections with the dead Confederates to whom the monuments are dedicated.<sup>71</sup>

The most thoughtful defenders of retaining at least some Confederate monuments in public spaces tend to deplore what many Confederate monuments represent but argue that monument removal or destruction might lead to historical amnesia about the history of racial discrimination that they represent.<sup>72</sup>

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65. *Id.*

66. *Id.*

67. *E.g.*, *Monuments of Folly*, *supra* note 52.

68. W. E. B. Du Bois, *Postscript*, 40 *CRISIS* 278, 279 (1931).

69. *See supra* notes 27–32, 55–56 and accompanying text.

70. *See, e.g.*, Kate Royals, *Rep. Karl Oliver: Those Removing Confederate Monuments ‘Should Be Lynched’*, *MISS. TODAY* (May 21, 2017), <http://mississippitoday.org/2017/05/21/rep-karl-oliver-those-removing-confederate-monuments-should-be-lynched/> [<http://perma.cc/FS2D-L7LZ>] (quoting a Mississippi state representative who wrote that those involved in the “heinous and horrific” removal and destruction of Confederate monuments, “erected in the loving memory of our family and fellow Southern Americans, . . . should be LYNCHED!”).

71. *See, e.g.*, Justin Fedich, *Sons of Confederate Veterans Work To Preserve History of the South*, *FAYETTE COUNTY NEWS* (Ga.) (July 1, 2017), <http://fayette-news.net/sons-of-confederate-veterans-work-to-preserve-confederate-history/> [<http://perma.cc/MQ7Y-PTVT>] (quoting a camp commander in the Sons of Confederate Veterans who argues that he and his associates should not “have to give up the recognition of [their] heroes, of [their] leaders,” and that honoring their dead Confederate ancestors “binds [them] together”); R. Kevin Stone, *Opinion, Confederate Monuments Honor Sacrifice*, *ROANOKE-CHOWAN NEWS-HERALD* (Nov. 29, 2017), <http://www.dailyadvance.com/Chowan/2017/11/29/Confederate-monuments-honor-sacrifice.html> [<http://perma.cc/9UA7-E5WS>] (expressing dismay “that the legacy of [Confederate] ancestors is now being . . . tarnished”).

72. *See, e.g.*, Alfred L. Brophy, *Opinion, Why We Shouldn’t Pull Down All Those Confederate Memorials*, *NEWSWEEK* (July 10, 2015), <http://www.newsweek.com/why-we-shouldnt-pull-down-all-those-confederate-memorials-352222> [<http://perma.cc/968D-WU2R>] (arguing that in eliminating

Frequently, those who wish monuments to remain in public places for these reasons also want to modify them to provide a balanced historical record, thereby transforming the monuments from a source of intimidation into an opportunity for education.<sup>73</sup> But, as Section II shows, this sort of monument modification is ostensibly forbidden under most statue statutes to precisely the same degree as monument removal.<sup>74</sup> Because the statutes forbid both modification and removal of Confederate monuments, this Article takes no position on whether outright removal or monument modification is the best approach, either generally or in any specific situation.<sup>75</sup>

In sum, despite the enduring popularity of Confederate monuments with the general public, experts from a variety of disciplines have concluded that most Confederate monuments prominently displayed in public civic spaces should not remain—at least not in anything like their current places of honor.<sup>76</sup> Indeed, in a

Confederate monuments, “there’s a danger that we’ll forget the connections of past racial crimes to current racial inequality”); Felipe Fernández-Armesto, Opinion, *Trump Is Right: Confederate Memorials Should Stay*, TIMES HIGHER EDUC., (Sept. 14, 2017), <http://www.timeshighereducation.com/opinion/trump-right-confederate-memorials-should-stay> [<http://perma.cc/T4LC-96QD>] (arguing that Confederate monuments “cannot hurt us, but can remind us of the lessons and legacies of the past”); Lawrence A. Kuznar, Opinion, *I Detest Our Confederate Monuments. But They Should Remain.*, WASH. POST (Aug. 18, 2017), [http://www.washingtonpost.com/opinions/i-detest-our-confederate-monuments-but-they-should-remain/2017/08/18/13d25fe8-843c-11e7-902a-2a9f2d808496\\_story.html](http://www.washingtonpost.com/opinions/i-detest-our-confederate-monuments-but-they-should-remain/2017/08/18/13d25fe8-843c-11e7-902a-2a9f2d808496_story.html) [<http://perma.cc/KG89-95BB>] (arguing that preserving Confederate monuments is important because of their “constant testimony” to the devastating impact of racial discrimination).

73. See, e.g., Alfred Brophy, *How Taking Down Confederate Monuments Just Covers Up a Larger Problem*, FORTUNE (Aug. 18, 2017), <http://fortune.com/2017/08/18/confederate-monument-removal-charlottesville> [<http://perma.cc/K3LX-K4RA>] (insisting that the “monuments should not be left alone, but must be contextualized, so that they can serve as a daily lesson of what . . . the community once thought, and also how we think differently now”).

74. See *infra* Section II for a discussion of each statue statute’s restrictions on removal, modification, alteration, and other actions that local governments might take with respect to Confederate monuments.

75. Accordingly, references to either monument removal or monument modification in this Article are generally intended to be interchangeable.

76. Examples of academic criticism of the placement of Confederate monuments in public civic spaces without educational context could fill dozens of pages of footnote text. For some representative examples of academics from various disciplines who argue against the continued placement of such monuments in public civic spaces, see, for example, Gonzalo Casals et al., *Tear Down the Confederate Monuments—But What Next? Twelve Art Historians and Scholars on the Way Forward*, ARTNET NEWS (Aug. 23, 2017), <http://news.artnet.com/art-world/confederate-monuments-experts-1058411> [<http://perma.cc/L7YR-NZQS>] (gathering a range of expert opinions about the best way to remove or modify various Confederate monuments in public spaces); Julian Chambliss, Opinion, *Don’t Call Them Memorials*, FRIEZE (Aug. 23, 2017), <http://frieze.com/article/dont-call-them-memorials> [<http://perma.cc/L5WA-9UEZ>] (arguing that Confederate monuments in public civic spaces should neither be called nor treated as monuments, but rather as “political markers . . . [created] to celebrate the re-establishment of white rule after Reconstruction” that should be disposed of); Jane Dailey, Opinion, *Baltimore’s Confederate Monument Was Never About ‘History and Culture’*, HUFFINGTON POST (Aug. 17, 2017, 11:11 AM), [http://www.huffingtonpost.com/entry/confederate-monuments-history-trump-baltimore\\_us\\_5995a3a6e4b0d0d2cc84c952](http://www.huffingtonpost.com/entry/confederate-monuments-history-trump-baltimore_us_5995a3a6e4b0d0d2cc84c952) [<http://perma.cc/L5WA-9UEZ>] (defending Baltimore’s removal of its Confederate monument, which “was designed to intimidate African Americans and to reassure white Americans in a moment of rising black power”); Kristine Phillips, *Historians: No, Mr. President, Washington and Jefferson Are Not the Same as Confederate Generals*,

recent statement, the American Historical Association recommended reconsidering the placement of Confederate monuments in public civic spaces because they were “part and parcel of the initiation of legally mandated segregation,” designed “to intimidate African Americans politically and isolate them from the mainstream of public life.”<sup>77</sup> The Association concluded that altering or removing Confederate monuments from places of pride in public civic spaces neither changes nor erases history but merely alters what local communities “decide is worthy of civic honor.”<sup>78</sup>

The statue statutes analyzed at length in this Article are even harder to defend than the continued existence of the underlying monuments themselves. Recall that many of the most thoughtful defenders of preserving Confederate monuments in public spaces wish to modify their presentation or to exclude them from certain particularly sensitive public spaces, in order to provide a balanced and more accurate record that honestly reckons with the history of violence and intimidation that these monuments have reinforced.<sup>79</sup> But as Alfred Brophy has pointed out, the restrictions that statue statutes impose on local governments’ abilities to modify or remove monuments undercut the very arguments for the existence of such monuments in the first place.<sup>80</sup>

Building upon this criticism of both the monuments themselves and the statue statutes that purport to protect them, some scholars have argued that

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WASH. POST (Aug. 16, 2017), <http://www.washingtonpost.com/news/retropolis/wp/2017/08/16/historians-no-mr-president-washington-and-jefferson-are-not-the-same-as-confederate-generals> [http://perma.cc/LSE9-RVG2] (quoting numerous historians who argue that Confederate monuments in public civic spaces should be moved or “delegitimized” in some way); Nova Safo, *Are Confederate Monuments Important Works of Art?*, DAILY MAIL (London) (Aug. 18, 2017, 4:49 PM), <http://www.dailymail.co.uk/wires/afp/article-4803916/Are-Confederate-monuments-important-works-art.html> [http://perma.cc/8Z46-TYYD] (gathering opinions of historians of art and concluding that most Confederate monuments are of “mediocre” aesthetic quality at best); Dell Upton, *Confederate Monuments and Civic Values in the Wake of Charlottesville*, SOC’Y ARCHITECTURAL HISTORIANS BLOG (Sept. 13, 2017), <http://www.sah.org/publications-and-research/sah-blog/sah-blog/2017/09/13/confederate-monuments-and-civic-values-in-the-wake-of-charlottesville> [http://perma.cc/RL4N-833A] (concluding that “[w]hatever the [ultimate] disposition of the Confederate monuments, it seems clear that for reasons of justice, equity, and civic values, they must first of all be removed from civic space” because their “white-supremacist character is more important” than any aesthetic or historical attribute that can be offered in their defense).

77. AM. HISTORICAL ASS’N, STATEMENT ON CONFEDERATE MONUMENTS (2017), <http://www.historians.org/news-and-advocacy/statements-and-resolutions-of-support-and-protest/aha-statement-on-confederate-monuments> [http://perma.cc/J5Q3-STHD].

78. *Id.*

79. *See supra* notes 72–75 and accompanying text; *see also* Alfred L. Brophy, *Reframing a Historic Narrative*, LEX, Fall 2018, at 25, 27 (suggesting that while there are some “good reasons” for keeping some modified Confederate monuments in some public spaces, “they should not be in front of courthouses, where they tell members of the community that they are not welcome”).

80. *See, e.g.*, Alfred L. Brophy, Opinion, *Legislating Confederate Monuments*, WINSTON-SALEM J. (July 23, 2015), [http://www.journalnow.com/opinion/columnists/alfred-l-brophy-legislating-confederate-monuments/article\\_1db4acd4-309f-11e5-870c-73bbd75fa258.html](http://www.journalnow.com/opinion/columnists/alfred-l-brophy-legislating-confederate-monuments/article_1db4acd4-309f-11e5-870c-73bbd75fa258.html) [http://perma.cc/H64T-RFUS] (concluding that, although “[t]here are good reasons not to remove Confederate [statues],” if, through state statue statutes, “we are going to get local governments out of the business of monument removal, maybe we should also get them out of the business of monument placement”).

these statutes are unconstitutional.<sup>81</sup> These arguments are briefly reviewed in the following Part.

*B. The Constitutional Flaws of Statue Statutes*

The constitutional arguments against the statue statutes have taken many forms, but perhaps the most straightforward argument proceeds on free speech grounds. The free speech argument against statue statutes can be boiled down to something like the following: Forcing anyone—an individual, a local government—into expressive activity violates the First Amendment. Erecting and maintaining a statue in a public place is expressive activity. Accordingly, forcing local governments to erect or maintain statues in public places violates the First Amendment.<sup>82</sup>

One of the necessary premises for this argument—the idea that local governments engage in expressive activity when they erect and maintain public monuments—was recognized by the Supreme Court in *Pleasant Grove City v. Summum*.<sup>83</sup> In *Summum*, a religious organization founded in 1975 sought to erect a religious stone monument containing the “Seven Aphorisms of SUMMUM” in a public park that contained other monuments donated by private groups or individuals, including a wishing well, a monument to September 11, and a similarly sized stone monument of the Ten Commandments.<sup>84</sup> The Court held that “[p]ermanent monuments displayed on public property typically represent government speech,” rather than the creation of a forum for private speech, because monuments, “by definition, [are] structure[s] . . . designed as a means of expression.”<sup>85</sup> Indeed, noting the long history of monuments as government expression, the Court also held that even “privately financed and donated monuments” also “speak for the government” that accepts them and displays them on public land.<sup>86</sup> Accordingly, the Court in *Summum* concluded that the city could reject a religious organization’s request to display and maintain a stone monument with religious texts in a public park, because the city’s choice about what monuments to accept and display on public property “is best viewed as a form of government speech.”<sup>87</sup> As applied to Confederate monuments, then, some have argued that the reasoning of *Summum* should control for state statue statutes, which—like the losing religious organization in *Summum* itself—seek to compel an identical kind of local government expression, often against that local government’s wishes.<sup>88</sup>

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81. See *infra* notes 88–91 and accompanying text.

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

83. 555 U.S. 460 (2009).

84. *Summum*, 555 U.S. at 464–65.

85. *Id.* at 470.

86. *Id.* at 470–71.

87. *Id.* at 464–65, 481.

88. Kovvali, *supra* note 82, at 83–84.

A related constitutional argument against statue statutes is grounded in the Fourteenth Amendment's Equal Protection Clause. This argument stems from the same premise outlined in the free speech context—the idea that a city's decision to erect or maintain a monument is constitutionally significant expression. The key additional insight upon which this argument depends is that government entities, unlike private citizens, cannot engage in expression that denigrates racial or religious minorities without violating the Equal Protection Clause.<sup>89</sup> In other words, a town could not erect a sign that read “This town is for whites only,” and local officials should recognize that Confederate monuments in public spaces represent something akin to such a sign.<sup>90</sup> According to this argument, even if a state statute forbids it, local officials should rely on the supremacy of the Federal Constitution and conclude that removal of Confederate monuments is not only permissible but indeed required by the Equal Protection Clause.<sup>91</sup>

Two additional constitutional arguments against statue statutes depart from the shared premise discussed above and focus instead on the individuals affected by Confederate monuments rather than the local governments forced to maintain monuments by these statutes. For example, some have argued that state statue statutes are unconstitutional because they violate the free speech acts of individual protesters against those monuments.<sup>92</sup> They analogize the statue statutes to the prohibitions on flag burning deemed unconstitutional by the Supreme Court in *Texas v. Johnson*<sup>93</sup> and *United States v. Eichman*.<sup>94</sup> Like burning a flag, urging a local government to remove a protected monument qualifies as protected speech, and because this speech does not materially harm others, there is no legitimate state interest in suppressing it.<sup>95</sup>

To be clear, the argument outlined here does not imply that anyone, acting on their own, has the right to remove or destroy an existing monument that belongs to their local government.<sup>96</sup> Rather, this argument against the statue

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89. See, e.g., Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 648–49, 658–65 (2013) (arguing that “[r]acialized government expression” can be an unconstitutional violation of both anticlassification and antisubordination interpretations of the Fourteenth Amendment’s Equal Protection Clause, just as religious government expression can violate the First Amendment’s Establishment Clause); see also Schwartzman & Tebbe, *supra* note 49 (applying these arguments to the case of Confederate monuments and state statue statutes).

90. Schwartzman & Tebbe, *supra* note 49.

91. *Id.*

92. E.g., Ira C. Lupu & Robert W. Tuttle, *The Debate over Confederate Monuments*, TAKE CARE (Aug. 25, 2017), <http://takecareblog.com/blog/the-debate-over-confederate-monuments> [<http://perma.cc/9SUN-RQUE>].

93. 491 U.S. 397, 420 (1989) (overturning a conviction for flag desecration as inconsistent with the First Amendment).

94. 496 U.S. 310, 318–19 (1990) (applying *Texas v. Johnson* and concluding that a flag protection statute could not constitutionally be applied).

95. See Lupu & Tuttle, *supra* note 92 (arguing that “[j]ust as in the case of flag desecration laws,” the goal of “avoiding offense is not a sufficient reason to stifle [the] expressive conduct” of those who wish to protest against or advocate for the removal of Confederate monuments).

96. See *id.* (“The constitutional right to be free of restrictions on flag burning . . . does not extend to burning a particular flag that belongs to someone else . . .”).

statutes concludes that it is an unconstitutional restriction of expression for states to block the full expression of that sentiment with a statute. In other words, by “barring the removal of [a] monument” the state has also restricted expressive protest against the monuments, and in so doing the state has unconstitutionally placed its own “coercive weight on the expressive scales.”<sup>97</sup>

A fourth and final argument for the unconstitutionality of statue statutes relies on the Equal Protection Clause. According to this argument, statue statutes distort the political process by making it more difficult for victims of discrimination to seek protection.<sup>98</sup> This argument draws on analogies between statue statutes and local or state controls on antidiscrimination laws, like those at issue in *Hunter v. Erickson*<sup>99</sup> and *Romer v. Evans*.<sup>100</sup>

In *Hunter*, a city fair housing ordinance with robust antidiscrimination provisions led to widespread backlash.<sup>101</sup> In turn, this backlash led to an amendment to the city charter, passed by a direct vote of the city’s voting electors during a general election, which provided that any future fair housing ordinances had to be approved by a majority of the electors during a general election before becoming operative.<sup>102</sup> The Court in *Hunter* struck down this restrictive amendment to the city charter, holding that the amendment impermissibly discriminated against minorities in violation of the Equal Protection Clause by imposing a system of restraints that made it more difficult to enact legislation on their behalf, which the Court concluded was the practical equivalent of diluting minorities’ votes or giving one group smaller representation than another of comparable size.<sup>103</sup>

Similarly, in *Romer*, Colorado adopted an amendment to its state constitution prohibit local ordinances that limited discrimination based on sexual orientation.<sup>104</sup> The Court in *Romer* struck down this state constitutional amendment on grounds similar to those invoked in *Hunter*, holding that it impermissibly limited the rights of a minority group by preventing them from obtaining redress from discrimination through targeted legislation.<sup>105</sup> Accordingly, some opponents of statue statutes have argued that they are analogously unconstitutional because, like the amendment to the city charter struck down in *Hunter* and the state constitutional amendment struck down in *Romer*, the statue statutes force those seeking remedies for discriminatory actions with a local or sublocal impact to convince larger groups for redress,

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97. *Id.*

98. Kovvali, *supra* note 82, at 85.

99. 393 U.S. 385 (1969).

100. 517 U.S. 620 (1996).

101. *See Hunter*, 393 U.S. at 386–87.

102. *See id.* at 387.

103. *Id.* at 392–93.

104. *Romer*, 517 U.S. at 623–25.

105. *See id.* at 631 (noting that the targeted minority, under the state constitutional amendment, “can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps . . . by trying to pass helpful laws of general applicability”).

thereby diluting their voting power.<sup>106</sup>

For several reasons, many local governments will want to adopt some or all of the arguments outlined above even when they seek to act or litigate using the arguments discussed in Section II of this Article. First and most obviously, unlike the arguments outlined in Section II, the arguments discussed above do not seek opportunities for local action within the existing statutes; rather, they seek to sweep away the statue statutes altogether. And, if these arguments succeed, they will provide local governments that wish to remove or alter Confederate monuments with near-total freedom.

In addition, even if the sweeping arguments outlined in this Part fail to persuade courts, they may nevertheless prove effective in swaying public opinion,<sup>107</sup> which, as noted at the outset, still favors retaining Confederate monuments in many places.<sup>108</sup> To take just one example, local governments may fail to convince courts that statue statutes violate the First Amendment.<sup>109</sup> But merely articulating this argument may help make the public more aware of the problematic history and expressive content of the monuments themselves, as well as the injustice of compelling local governments to keep Confederate monuments in place when the local population wants them changed or removed. Perhaps more importantly, the strategies and arguments outlined below in Section II, which provide local governments with opportunities for action if the statue statutes survive, may have a useful role to play in advancing the arguments outlined here in Part I.B, which are designed to strike down the statue statutes altogether. More specifically, if local governments carefully challenge existing statue statutes along the lines discussed in Section II, then they should be able to frame the issues to enhance the constitutional arguments analyzed above.

## II. “FLAWED” IN PRACTICE: A CLOSE EXAMINATION OF STATE STATUE STATUTES REVEALS MANY OPPORTUNITIES FOR LOCAL GOVERNMENTS TO ALTER OR REMOVE CONFEDERATE MONUMENTS

Section II examines the various opportunities for local governments to alter or remove Confederate monuments under the various individual statue statutes. These opportunities include: protections that may be limited based on the age of the monuments, protections that may be limited based on the location of the monuments, protections that may be limited based on the ownership of the monuments, and enforcement provisions that are limited or entirely absent under some statutes. This Article uses the term “opportunities” for local government action to refer to gaps in the near-universal protection for

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106. Kovvali, *supra* note 82, at 85–87.

107. *Cf. id.* at 84 (noting that “[m]uch commentary has sought to defend the speech of protestors seeking to preserve” Confederate monuments, so it is surely “worth defending the speech of Charlottesville itself, a city that had rejected the monument and what it stands for”).

108. *See supra* notes 27–31 and accompanying text.

109. Kovvali, *supra* note 82, at 83 (noting that the free speech arguments against statue statutes “may or may not make for a winning legal challenge”).

Confederate monuments that these statutes are popularly presumed to provide—specific avenues left open under the statutes that local governments might exploit to modify or remove at least some Confederate monuments. Section II shows that many such opportunities exist and that statutes do not constitute impossible barriers to the modification or removal of Confederate monuments.<sup>110</sup>

Of course, what this Article refers to as “opportunities” for local government action might seem like “flaws” in the statute from another perspective, one concerned with using the statute statutes to preserve Confederate monuments in places of public honor and respect. But, as discussed in Section I, this Article has already concluded that the primary flaw of the statutes is their existence in the first place. Thus, it would be most accurate to think of these as opportunities for local government action—a set of second-best solutions to the underlying problem that the statute statutes represent. More specifically, these opportunities represent solutions that interested local governments and sympathetic state officials may wish to consider pursuing so long as the statutes exist in something like their present condition.

While many of the individual statute statutes provide similar opportunities for local government action, no two statutes share the exact same set of gaps. These discrepancies are due to differences in the construction and drafting of the statutes themselves, which were created at different times and, in some cases, amended many times as well.<sup>111</sup> In addition, differences in the structures and drafting styles of the various statute statutes mean that some of the individual statutes have their own idiosyncratic gaps in coverage, which are not replicated in many or any other state’s statutes.<sup>112</sup> As a result, the statute statutes defy easy categorization. Accordingly, the bulk of Section II provides a close critical review of each individual statute, picking out the opportunities for local government action unique to each. Section II also identifies opportunities for local government action that recur across multiple states’ statutes.

One of the most promising opportunities for local government action relates to the time periods of some statutes’ coverage. More specifically, several of the statutes explicitly or implicitly break down the Confederate monuments into categories based on when the monuments were created,<sup>113</sup> and some of these temporal categories of monuments may be mostly or even entirely unprotected. For example, Alabama’s statute statute provides different forms of protection to monuments that have been in place for less than twenty years, to those that have been in place for between twenty and forty years, and to those

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110. See *supra* note 46 and accompanying text.

111. For example, Virginia’s statute was originally passed in 1904, and it has since been amended or recodified ten times, see *infra* notes 126–139 and accompanying text, whereas Alabama’s statute was not enacted until 2017, see *infra* note 191 and accompanying text.

112. For example, Kentucky’s statute requires a state commission to approve potentially eligible monuments for protection under the statute; in other words, unlike other states’ statute statutes, monuments do not automatically qualify for protection based on their age or subject matter. See *infra* note 260 and accompanying text.

113. See, e.g., ALA. CODE § 41-9-232 (West 2018).

that have been in place for over forty years.<sup>114</sup> Local governments have already seized upon different versions of this opportunity in Charlottesville, Virginia,<sup>115</sup> and Birmingham, Alabama,<sup>116</sup> where they are now being tested in litigation.

A second opportunity for local government action presented by many but not all state statute statutes relates to the location of protected monuments. More specifically, some statute statutes refer to monuments that are currently located on or are themselves public property.<sup>117</sup> This suggests that some local governments may be able to evade the restrictions by conveying either the monument itself or the civic space where the monument stands to a sympathetic private actor. This private actor could then remove or alter the Confederate monument free from penalty because the monument would no longer be or be located on public property.<sup>118</sup> The City of Memphis recently attempted to take advantage of this opportunity, with efforts that were tested in litigation and then addressed by the Tennessee state legislature.<sup>119</sup> Care must be taken by local governments when attempting to exploit this opportunity, for the mere substitution of private for public authority may not be enough for monuments, or the land on which they rest, to be treated as private property.<sup>120</sup> In order to exploit this opportunity, local governments may need to separate themselves entirely from the management or control of the land where the monuments once

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114. *Id.*

115. See Schragger, *Robert E. Lee*, *supra* note 47 (“Since the monuments statute did not apply to cities until 1997, [Charlottesville] is free to do whatever it wants with the monuments constructed prior to that year.”). *But see* Eric Hartley & Ana Ley, *Judge Rules in Favor of Groups Trying To Keep Charlottesville’s Robert E. Lee Statue Where It Is*, VIRGINIAN-PILOT (Oct. 4, 2017), [http://pilotonline.com/news/government/virginia/article\\_bb1af08e-f426-53ee-ad72-c73239f99b45.html](http://pilotonline.com/news/government/virginia/article_bb1af08e-f426-53ee-ad72-c73239f99b45.html) [<http://perma.cc/7NLW-JURR>] (noting that the initial ruling in the Charlottesville dispute was that the statute could apply retroactively to certain monuments). This ruling is contrary to that reached by other Virginia lower courts in other monuments disputes. See *infra* notes 156–157 and accompanying text. As a result, the Charlottesville dispute is expected to reach the Supreme Court of Virginia. Hartley & Ley, *supra*. Other Virginia cities wishing to remove or alter their own Confederate monuments will want to keep a close eye on Charlottesville’s case. *Id.*

116. Kayla Gladney, *Mayor Bell Files Motion To Dismiss Lawsuit over Confederate Monument*, CBS42 (Birmingham, Ala.) (Sept. 20, 2017, 12:36 PM), <http://wlat.com/2017/09/20/mayor-bell-files-motion-to-dismiss-lawsuit-over-confederate-monument/> [<http://perma.cc/T733-EWPD>].

117. *E.g.*, TENN. CODE ANN. § 4-1-412(a)–(b) (West 2018).

118. This gap in coverage may be less significant for those statute statutes that define protected monuments as those that were “erected” on public property, as such a formulation might protect such monuments even if their location has been ceded to a private group. *Compare, e.g.*, S.C. CODE ANN. § 10-1-165(A) (West 2018) (covering all monuments “erected on public property of the State or any of its political subdivisions”), *with, e.g.*, TENN. CODE ANN. § 4-1-412(b)(1) (covering any monument that presently “is, or is located on, public property”). See also *infra* notes 280–283 and accompanying text.

119. Ryan Poe, *Forrest Family, Sons of Confederate Veterans Sue over Takedown of Memphis Statues*, COM. APPEAL (Memphis, Tenn.) (Jan. 12, 2018, 9:58 AM), <http://www.commercialappeal.com/story/news/government/city/2018/01/12/forrest-family-sons-confederate-veterans-sues-over-takedown-memphis-statues/1027918001/> [<http://perma.cc/8T4Q-7XVC>] [hereinafter Poe, *Forrest Family*]. See also *infra* notes 178–186 and accompanying text for a discussion of the removal of the Memphis monuments and the state legislature’s response.

120. See, *e.g.*, *Evans v. Newton*, 382 U.S. 296, 300–02 (1966) (holding that a segregated park remained subject to the Fourteenth Amendment when a local government transferred it to private trustees).

stood,<sup>121</sup> which may not be appropriate in every situation. In addition, local governments may face restrictions on how they can dispose of public property, which may frustrate buyers who are primarily or solely interested in purchasing the relevant property to help remove or alter a prominent Confederate monument.<sup>122</sup>

A third opportunity for local government action presented by a few state statutes relates to the penalties, or lack thereof, for violations of the statutes. More specifically, although many of the statutes provide for steep fines and jail time for anyone who moves or modifies a covered monument,<sup>123</sup> others are silent about the penalties for such actions.<sup>124</sup> This absence of any real penalty for ostensibly forbidden actions, or “penalty gap,” creates obvious opportunities for action by local governments that wish to remove or modify Confederate monuments. Indeed, one such penalty gap in the Alabama statute is already part of litigation that has recently emerged over a Confederate monument in Birmingham.<sup>125</sup>

These three main opportunities for local government action under the statue statutes—the temporal discrepancies, the exclusive focus on monuments that are or are located on public property, and the penalty gap—recur frequently across different jurisdictions. But because each statue statute was drafted with its own structure and language, each provides a unique set of challenges and opportunities for local governments that wish to alter or modify Confederate monuments. The remainder of Section II is given over to a detailed critical examination of each state’s statue statute.

#### A. *Virginia’s Statue Statute*

The history of Virginia’s general statue statute, the oldest and in many ways

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121. *See id.* at 302 (noting that ongoing local control caused the “predominant character and purpose of [the] park [to remain] municipal” rather than private). The idea of privatizing parks will concern some readers, due in part to the history of this technique as a device to buttress segregation in situations like that reviewed in *Evans v. Newton*. *Id.* These concerns are entirely appropriate: privatizing the most public spaces in a community is strong medicine, which should not be lightly taken. Against these concerns must be set the desire of some local governments to address the presence of Confederate monuments in the communities’ public spaces.

122. For example, in North Carolina, with relatively few exceptions local governments are required to dispose of real property through one of a few specified competitive bidding procedures. *See* Tyler Mulligan, *Sale of Historic Structures by NC Local Governments for Redevelopment*, COATES’ CANONS: N.C. LOC. GOV’T L., UNC SCH. OF GOV’T (Dec. 16, 2014), <http://canons.sog.unc.edu/sale-of-historic-structures-by-nc-local-governments-for-redevelopment/> [<http://perma.cc/52NS-L4YZ>] (citing, *inter alia*, N.C. GEN. STAT. ANN. §§ 160A-268 to -270 (West 2018)).

123. *E.g.*, VA. CODE ANN. § 18.2-137 (West 2018) (providing that violations of Virginia’s statue statute shall be treated as various degrees of misdemeanors or felonies, depending on the degree of intent behind the act and the value of the damage done to the monument).

124. *See*, for example, *infra* note 252 and accompanying text for a description of the absence of penalties from the Mississippi statue statute, and the pending and failed past attempts to amend the statute to incorporate penalties for its violation.

125. Gladney, *supra* note 116.

one of the most restrictive, dates back to 1904,<sup>126</sup> although some Confederate monuments in Virginia were specifically authorized by earlier legislative action.<sup>127</sup> The 1904 version of the general Virginia statute provided that the circuit court of a county, acting with the concurrence of that county's board of supervisors, could "authorize and permit" anyone to erect "a Confederate monument upon the public square of such county at the county seat thereof."<sup>128</sup> Once the monument was in place, neither the relevant local government agencies nor "any other person or persons whatever" could "disturb or interfere" with the monument.<sup>129</sup> Finally, the statute also provided that neither the local government nor any other person could "prevent the citizens of said county from taking all proper measures and exercising all proper means for the protection, preservation, and care of" such a monument.<sup>130</sup> The statute was then further amended or recodified in 1910,<sup>131</sup> 1930,<sup>132</sup> 1945,<sup>133</sup> 1962,<sup>134</sup> 1982,<sup>135</sup> 1988,<sup>136</sup> 1997,<sup>137</sup> 1998,<sup>138</sup> 2005,<sup>139</sup> and 2010.<sup>140</sup> In addition to this general statute, as noted above, several Confederate monuments in Virginia were created by monument-specific state statutes, some of which contain specific restrictions on whether the monument at issue can be disturbed.<sup>141</sup> As a result, some local governments may face additional restrictions on modifying or

126. Act of Feb. 19, 1904, Ch. 29, 1904 Va. Acts 62. The current version of Virginia's statute statute, which reflects all subsequent amendments, is codified at VA. CODE ANN. § 15.2-1812 (West 2018).

127. See Va. Attorney General, Opinion Letter No. 17-032 (Aug. 25, 2017), 2017 WL 3901711, at \*3 (noting that some of these state statutes specifically authorizing the erection of Confederate monuments predate the first version of Virginia's general monument statute, and that some of the statute-specific statutes "contain restrictions on the disturbance of the monument" while "others are silent" on this issue).

128. Act of Feb. 19, 1904, Ch. 29, 1904 Va. Acts 62.

129. *Id.*

130. *Id.*

131. Act of Feb. 9, 1910, Ch. 17, § 1, 1910 Va. Acts 21, 22.

132. Act of Feb. 28, 1930, Ch. 76, 1930 Va. Acts 86.

133. Act of Apr. 5, 1945, Ch. 55, 1945 Va. Acts Extra Sess. 47.

134. Act of Apr. 3, 1962, Ch. 623, 1962 Va. Acts 960, 1027 (recodifying "the general laws of Virginia relating to counties, cities and towns," including the statute at VA. CODE ANN. § 15.1-270).

135. Act of Mar. 9, 1982, Ch. 19, 1982 Va. Acts 21.

136. Act of Mar. 24, 1988, Ch. 284, 1988 Va. Acts 344.

137. Act of Mar. 20, 1997, Ch. 587, 1997 Va. Acts 976, 1114 (recodifying portions of the code, including the statute at VA. CODE ANN. § 15.2-1812).

138. Act of Apr. 16, 1998, Ch. 752, 1998 Va. Acts 1814.

139. Act of Mar. 21, 2005, Ch. 390, 2005 Va. Acts 523.

140. Act of Apr. 21, 2010, Ch. 860, 2010 Va. Acts 1821 (codified as amended at VA. CODE ANN. § 15.2-1812). Many of these changes were made to include monuments to subsequent conflicts within the ambit of the statute, such as including the "World War" after World War I, see Act of Feb. 28, 1930, Ch. 76, 1930 Va. Acts 86, while other changes had a more substantive impact on the kinds of monuments that might be covered, as is seen below. For the sake of brevity, a substantive discussion of the majority of the intervening changes is omitted, except where they have relevance to the current version of the statute or a particular monument conflict.

141. Va. Attorney General, Opinion Letter No. 17-032 (Aug. 25, 2017), 2017 WL 3901711, at \*3.

removing monuments.<sup>142</sup>

In its current form, the general Virginia statue statute covers “Confederate or Union monuments or memorials of the War Between the States” as well as monuments or memorials to over fourteen additional “war[s] or conflict[s]” ranging from colonial conflicts in the seventeenth century to Operation Iraqi Freedom.<sup>143</sup> Exactly what counts as a “monument” or “memorial” to one of the covered conflicts is unclear, but a nonmilitary memorial to the Confederacy might not be protected. For example, Virginia’s attorney general has suggested that this language should be read to exclude markers about the historical significance of buildings, while including only monuments to the conflicts themselves or veterans of those conflicts.<sup>144</sup>

As under the original statute, once a covered monument is in place, the statute prohibits anyone from “disturb[ing] or interfer[ing]” with it; the statute also prohibits the local government, “or any other person[s],” from “prevent[ing] its citizens from taking proper measures and exercising proper means for the protection, preservation and care of” such a monument.<sup>145</sup> The present version of the statute defines “disturb or interfere with” to include removing monuments as well as acts of physical damage or vandalism.<sup>146</sup> The statutory language “disturb or interfere with” is also specifically defined to cover, in the case of Civil War monuments, “the placement of Union markings or monuments on previously designated Confederate memorials” or the reverse in the case of monuments to the Union.<sup>147</sup> Violation of the statute by anyone who “destroys, defaces, damages,” “removes,” or “breaks down” a covered monument is a criminal offense punishable as either a misdemeanor or felony depending on the degree of lost value to the monument in question.<sup>148</sup> In addition, anyone who violates the statute or otherwise “encroache[s] upon” a protected monument may face a civil action for damages, including attorney’s fees and the potential for punitive damages.<sup>149</sup>

Like the original version of Virginia’s statue statute, there are no restrictions regarding who may erect the covered monument—all monuments that otherwise meet the descriptive characteristics of the statute will be covered, so long as they were originally authorized by the local government.<sup>150</sup> Unlike the

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142. *See id.* at \*3 & nn.35–36 (noting the existence of monument-specific statutes related to Confederate monuments in the public squares of Amelia, Bedford, Botetourt, Campbell, Greensville, King and Queen, King William, Mecklenburg, New Kent, Orange, and Rappahannock Counties).

143. VA. CODE ANN. § 15.2-1812 (West 2018).

144. Va. Attorney General, Opinion Letter No. 15-050 (Aug. 6, 2015), 2015 WL 4850422, at \*1–2.

145. VA. CODE ANN. § 15.2-1812.

146. *Id.*

147. *Id.*

148. *See id.* § 18.2-137 (determining misdemeanor or felony punishment depending on whether the value of or damage to the property is less than \$1,000).

149. *Id.* § 15.2-1812.1. Punitive damages are available for reckless, willful, or wanton violations of the underlying statue statute, including the willful “unlawful removal” of protected monuments. *Id.*

150. *Id.* § 15.2-1812.

original version of the statute, the current version does not include any restrictions on the local government agencies that may authorize the creation of a covered monument or memorial.<sup>151</sup> Similarly, and also unlike the original version of the statute, there are no restrictions on the location of the covered monument or memorial. Thus, the current statutory language might appear to protect monuments created with local government approval even if they are not on public property.<sup>152</sup> As Richard Schragger has pointed out, however, the original version of the statute applied only to monuments erected by county governments, not city governments,<sup>153</sup> and, more particularly, only to monuments erected in the public square of the county seat.<sup>154</sup> In other words, Virginia's statue statute does not appear to apply to Confederate monuments built in cities or by city governments before 1997 and thus does not prevent their alteration or removal.<sup>155</sup>

These issues are currently being litigated, and they may well reach Virginia's highest court, but to date lower courts in Virginia as well as the state's attorney general have adopted the interpretation of the relevant statutory language that would provide at least some local governments in Virginia with freedom to move or alter at least some monuments. In *Heritage Preservation Ass'n v. City of Danville*,<sup>156</sup> a Virginia court held that the expansive changes to Virginia's statue statute did not apply retroactively.<sup>157</sup> Yet another attempt to amend the statute—this time in order to make its expanded provisions apply retroactively—failed in 2016,<sup>158</sup> and Virginia's attorney general recently endorsed the view of the statute adopted in *Heritage Preservation*.<sup>159</sup>

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151. Compare *id.* (providing that “[a] locality may, within the geographical limits of the locality, authorize and permit the erection of” covered monuments), with Act of Feb. 19, 1904, Ch. 29, 1904 Va. Acts 62 (referring only to monuments created with the approval of a county's circuit court and board of supervisors). This change, expanding the statute to cover any “locality” rather than specific county-level government actors, was made in the 1997 revisions to the statute. Act of Mar. 20, 1997, Ch. 587, 1997 Va. Acts 976, 1114.

152. Compare VA. CODE ANN. § 15.2-1812 (providing that “[a] locality may, within the geographical limits of the locality, authorize and permit the erection of” covered monuments), with Act of Feb. 19, 1904 (referring only to monuments erected in the public squares of county seats). See also Va. Attorney General, Opinion Letter No. 17-032 (Aug. 25, 2017), 2017 WL 3901711, at \*3 (discussing the implications of this change). This change—expanding the statute to cover monuments anywhere within a “locality[s]” geographic ambit, rather than the locality's own property—was made in the 1998 revisions to the statute. Act of Apr. 16, 1998, Ch. 752, 1998 Va. Acts 1814.

153. Schragger, *Robert E. Lee*, *supra* note 47.

154. Act of Feb. 19, 1904.

155. Amanda Lineberry, Essay, *Payne v. City of Charlottesville and the Dillon's Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45, 57 (2018).

156. No. CL15000500-00 (Va. Cir. Ct., Dec. 7, 2015) (final order and ruling from the bench). An appeal of this decision was dismissed in 2016. Elizabeth Tyree, *Virginia Supreme Court Again Rejects Confederate Flag Appeal in Danville*, WSET (Oct. 7, 2016), <http://wset.com/news/local/virginia-supreme-court-again-rejects-confederate-flag-appeal-in-danville> [<http://perma.cc/29F5-KPK4>].

157. *Heritage Pres. Ass'n*, slip op. at 2.

158. See 2016 Session: *HB 587 Memorials and Monuments; Protection of All Memorials, Etc.*, VA.'S LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+HB587> [<http://perma.cc/8MEF-UJCO>] (last visited Nov. 1, 2018) (providing text, summary, and history of this legislation).

159. Va. Attorney General, Opinion Letter No. 17-032 (Aug. 25, 2017), 2017 WL 3901711, at \*3.

All of this means that the current version of the statute should not apply to any monuments constructed prior to 1904, the year in which the original version of the statute was passed. Nor should it apply to monuments that were erected anywhere other than the “public square” of a county seat prior to the substantive revisions in the late 1990s.<sup>160</sup> Neither the current version of the statute nor any of the previous versions of the statute define “public square,” but otherwise unrelated Virginia legislation that predates the 1904 enactment suggests that it may refer to public land where official county buildings such as a courthouse or clerk’s office are located.<sup>161</sup> Put another way, the current version of the Virginia statute should be interpreted as protecting only monuments created after 1904, and for all monuments created between 1904 and 1997 it should protect only those that were created in the “public square” of a county seat.

### B. *Tennessee’s Statue Statute*

The Tennessee Heritage Protection Act is an example of the recent crop of statute statutes that are either titled or frequently referred to as “Heritage Protection Acts.”<sup>162</sup> Unlike Virginia’s statue statute, the original version of Tennessee’s statue statute only dates back to 2013.<sup>163</sup> While the Tennessee statute does not single out the Confederacy or Confederate monuments, there can be little doubt that it was motivated primarily by a concern for Confederate monuments. For example, when the original 2013 version of the statute was enacted, the Tennessee Division of the Sons of Confederate Veterans hailed it as “one of the greatest documents in modern history,” in part because it would “clearly hereafter protect” a number of Confederate monuments, including some targeted for removal or renaming by local government officials in Memphis.<sup>164</sup> The Tennessee Division of the Sons of Confederate Veterans also pointed out that its own chief of protocol and lieutenant commander wrote and introduced the bill to the Tennessee House, and its division commander introduced the bill to the Tennessee Senate.<sup>165</sup>

In its current form, the Tennessee statute provides that “no memorial regarding a historic conflict, historic entity, historic event, historic figure, or

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160. *See id.*; Act of Apr. 16, 1998, Ch. 752, 1998 Va. Acts 1814.

161. *E.g.*, Act of Mar. 6, 1890, Ch. 632, 1889–1890 Va. Private Acts 1016; *see also* Opinion Letter No. 17-032, 2017 WL 3901711, at \*3 n.25 (discussing the possible meaning of “public square” in the statue statutes).

162. *See supra* note 42 and accompanying text.

163. Tennessee Heritage Protection Act of 2013, Pub. Ch. No. 75, 2013 Tenn. Pub. Acts (current version at TENN. CODE ANN. § 4-1-412).

164. Chuck Demastus, *Tennessee Passes Heritage Protection Act* (Mailing from the N.B. Forrest Camp 215 of Memphis and the Tennessee Division, Sons of Confederate Veterans), S. HERITAGE NEWS & VIEWS (May 11, 2013, 11:09 AM), <http://shnv.blogspot.com/2013/05/tennessee-passes-heritage-protection-act.html> [<http://perma.cc/FP6D-AUY7>].

165. *Id.*; *see also* Liliana Segura, *Forrest the Butcher: Memphis Wants To Remove a Statue Honoring First Grand Wizard of the KKK*, INTERCEPT (Sept. 2, 2017, 8:00 AM), <http://theintercept.com/2017/09/02/memphis-wants-to-remove-statue-honoring-kkk-grand-wizard-nathan-bedford-forrest/> [<http://perma.cc/49TZ-66QY>] (quoting Division Chief of Protocol and Lieutenant Commander Lee Millar, who acknowledged that he was at least “one of the authors” of the statute).

historic organization that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered” without a waiver from the Tennessee Historical Commission (Tennessee Commission or Commission).<sup>166</sup> Anyone “who can demonstrate . . . aesthetic, architectural, cultural, economic, environmental, or historic injury” related to the monument can bring an action for injunctive relief to enforce the statute and protect covered monuments.<sup>167</sup>

The Tennessee Commission is a twenty-nine-member board; twenty-four of its members are gubernatorial appointees, and five are state officials, including the governor.<sup>168</sup> A public entity exercising control of a covered memorial may petition the Tennessee Commission in writing for a waiver of the statute’s protections, specifying a “material or substantial need . . . based on historical or other compelling public interest” and providing publication notice with identification of potentially interested parties.<sup>169</sup> The requisite “material or substantial need” for a waiver must be demonstrated at the conclusion of a hearing process before the Commission “by clear and convincing evidence.”<sup>170</sup> Under the current version of Tennessee’s statute, a waiver must receive a two-thirds vote of the entire board by a roll call vote.<sup>171</sup> This is a change from the original version of the statute, which allowed a majority of the members of the Tennessee Commission’s board present at the waiver hearing to grant waivers.<sup>172</sup> The current version of the statute also contains an amendment to the original 2013 version that allows virtually anyone aggrieved by the final decision of the waiver process to seek review of the Commission’s decision in court.<sup>173</sup>

In addition to the waiver process, the Tennessee statute covers an extremely broad range of monuments. As defined and protected by the Tennessee statute, “[h]istoric conflict[s]” include the “War Between the States,” as well as sixteen other conflicts from colonial times to the present, including

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166. TENN. CODE ANN. § 4-1-412(b)(1), (c) (West 2018).

167. *Id.* § 4-1-412(d).

168. *See id.* § 4-11-102(a). The five voting ex officio members contemplated by the statute are “the governor or the governor’s designee, the state historian, the state archaeologist, the commissioner of environment and conservation or the commissioner’s designee, and the state librarian and archivist.” *Id.*

169. *Id.* § 4-1-412(c)(2)–(3).

170. *Id.* § 4-1-412(c)(8)(A).

171. *Id.* § 4-1-412(c)(8)(B).

172. *See Tennessee Heritage Protection Act of 2013, Pub. Ch. No. 75, 2013 Tenn. Pub. Acts* (providing, in the since-amended section 4-1-412(d) of the Tennessee Code, that the “commission may grant a petition for waiver by a majority vote of those present and voting”). At the time that the statute was amended, opposed state legislators argued that the purpose of the amendment was “to gum up the works and make it virtually certain that a small minority of people can make it impossible to [get rid of] a bust of Nathan Bedford Forrest.” *See Andy Sher, TN House Passes Bill Making It Harder To Remove Monuments to Controversial Figures*, TIMES FREE PRESS (Chattanooga, Tenn.) (Feb. 18, 2016), <http://www.timesfreepress.com/news/politics/state/story/2016/feb/18/tn-house-passes-bill-making-it-harder-remove-monuments-controversial-figures/350800/> [<http://perma.cc/DX22-N5DR>] (quoting former Tennessee House Democratic Caucus Chair Mike Stewart).

173. TENN. CODE ANN. § 4-1-412(d).

“Operation Urgent Fury (Grenada).”<sup>174</sup> The statute defines protected “[h]istoric entit[ies],” “event[s],” “figure[s],” and “organization[s]” broadly, referring to any token of these categories “recognized as having state, national, military, or historical significance.”<sup>175</sup> Covered “[m]emorial[s]” are defined as any public property, or almost anything located on public property, which has been erected for, named for, or dedicated in honor of a covered historic entity, event, figure, or organization.<sup>176</sup>

The protection afforded to Confederate memorials by Tennessee’s statue statute is, in some respects, broader than that provided by some other states. For example, there are no temporal coverage gaps in Tennessee’s statute, as there are in other states’ statutes reviewed in this Section.<sup>177</sup> But despite the statute’s apparent breadth, there has been one significant gap in its coverage. Beyond the waiver process and the broad definitions of covered memorials, the monument protections in the Tennessee statute are limited to memorials that either themselves are public property or that are located on public property.<sup>178</sup> By “[p]ublic property,” the statute refers to “all property owned, leased, rented, managed, or maintained by” any level of state or local government, or by any other entity created by an act of the state legislature “to perform any public function.”<sup>179</sup>

Despite the apparent breadth of this definition of public property, the statute’s focus on protecting only those monuments that are or are on public property created an obvious hole in the statute’s coverage. If an otherwise-covered monument ever ceased to be on public property, then it would no longer be protected by the statute. In other words, a local government that wanted to get rid of an ostensibly protected monument could do so, so long as it first conveyed the property on which the monument stands to a sympathetic private actor, which then could alter or move the monument unburdened by the statute.

In late December 2017 this is exactly what Memphis did for two of its Confederate monuments. Local groups with an interest in preserving the monuments swiftly filed suit.<sup>180</sup> On May 16, 2018, the Tennessee Chancery Court issued an order dissolving the plaintiff’s temporary restraining order, dismissing the plaintiff’s suit for injunctive relief, and staying any further sale or transfer of

174. *Id.* § 4-1-412(a)(2).

175. *Id.* § 4-1-412(a)(3)–(6).

176. *See id.* § 4-1-412(a)(7) (defining “Memorial” as “[a]ny public real property or park, preserve, or reserve,” or “[a]ny statue, monument, memorial, bust, nameplate, historical marker, plaque, artwork, flag, historic display, school, street, bridge, or building”).

177. *See, for example, supra* and *infra* notes 160–161, 205, 214–217 and accompanying text for a discussion of the temporal gaps in the Virginia and Alabama statue statutes.

178. *See* TENN. CODE ANN. § 4-1-412(b)(1) (“[N]o memorial . . . that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.”).

179. *Id.* § 4-1-412(a)(8).

180. *See* Sons of Confederate Veterans Nathan Bedford Forrest Camp 215 v. City of Memphis, No. 18-29-III (Tenn. Ch. May 16, 2018), *appeal filed*, No. M2018-01096-COA-R3-CV (Tenn. Ct. App. filed June 13, 2018); *see also* Poe, *Forrest Family*, *supra* note 119.

the statues pending the plaintiff's potential appeal.<sup>181</sup> In its order, the court noted that the governing language from the 2016 version of Tennessee's statue statute "does not apply to private property" and "the Statues were located on and were removed from private property" following the city's donation of the land around the monuments to a private entity.<sup>182</sup> In response to the city's efforts, the Tennessee state legislature voted to strip \$250,000 from the state's 2019 budget that had been earmarked for the Memphis bicentennial.<sup>183</sup> Several state legislators who supported the budgetary cut justified their votes by calling the city's careful attempts to comply with the statute "sneaky" and the work product of "smart lawyers."<sup>184</sup>

Perhaps more importantly, in addition to punishing Memphis for its careful compliance with a poorly drafted statute, the state legislature also revised the statute, in an attempt to prevent other Tennessee cities from using the same technique.<sup>185</sup> Tennessee's statue statute now provides that "[n]o memorial or public property that contains a memorial may be sold, transferred, or otherwise disposed of by a county, metropolitan government, municipality, or other political subdivision of this state."<sup>186</sup> This revision to the statute has not faced a significant test at the time of this writing, but it does appear to restrict future local governments in Tennessee from exploiting the statute's "public property" language in exactly the same way as Memphis. There may, however, still be opportunities for local governments to use the "public property" language in the statute to make modifications to how such monuments are displayed. While the revised statutory language may well prohibit the future sale or transfer of monuments themselves or of public property that contains a memorial,<sup>187</sup> it may not prohibit, for example, local governments from transferring public property around or near the memorial to a third party, which could then erect displays or other materials to change the memorial's presentation. Such displays might count as prohibited alterations or disturbances of a memorial that is or is located on public property without such a transfer.<sup>188</sup> But such displays might not count as prohibited alterations or disturbances if they occur on private property—even

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181. *Sons of Confederate Veterans Nathan Bedford Forrest Camp 215*, slip op. at 3–4; see also Ryan Poe, *Chancellor: Memphis Confederate Statues Takedown Was Legal*, COM. APPEAL (Memphis, Tenn.) (May 16, 2018, 5:37 PM), <http://www.commercialappeal.com/story/news/government/city/2018/05/16/chancellor-memphis-confederate-statues-takedown-legal/617518002/> [<http://perma.cc/6CS2-3QQ7>] (quoting advocates of statue removal who argued that the statue and statue defenders "lost the Civil War, and . . . just lost this one, too").

182. *Sons of Confederate Veterans Nathan Bedford Forrest Camp 215*, slip op. at 14.

183. Chas Sisk, *Tennessee Strips \$250,000 from Memphis as Payback for Removing Confederate Statues*, NPR (Apr. 18, 2018, 11:02 AM), <http://www.npr.org/2018/04/18/603525897/tennessee-strips-250-000-from-memphis-as-payback-for-removing-confederate-statue> [<http://perma.cc/YB6F-TPGF>].

184. *Id.*

185. Act of May 21, 2018, Pub. Ch. 1033, 2018 Tenn. Pub. Acts (codified as amended at TENN. CODE ANN. § 4-1-412).

186. TENN. CODE ANN. § 4-1-412(b)(2) (West 2018).

187. *Id.*

188. See *id.* § 4-1-412(b)(1) ("[N]o memorial . . . that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.").

newly private property—adjacent to the memorial, because the 2018 revisions merely added additional statutory language regarding the sale or transfer of property containing monuments,<sup>189</sup> rather than addressing the inherent limitations of the public property provision itself.<sup>190</sup>

### C. *Alabama’s Statue Statute*

Alabama’s statue statute, enacted in 2017, is the latest example of the recent crop of Heritage Protection Acts.<sup>191</sup> The Alabama statute purports to protect “monument[s] which [are] located on public property” as well as “architecturally significant building[s], memorial building[s], [and] memorial street[s].”<sup>192</sup> The statute defines a “monument” as a “statue, portrait, or marker intended at the time of dedication to be a permanent memorial to” some “event,” “person,” “group,” “movement, or military service that is part of the history of the people or geography now comprising the State of Alabama.”<sup>193</sup>

Similarly, the statute defines “memorial building,” “memorial school,” and “memorial street” as anything else that is located on public property and “erected for, or named or dedicated in honor of,” some “event,” “person,” “group,” “movement, or military service.”<sup>194</sup> It defines “architecturally significant building[s]” as buildings “located on public property” that meet the statute’s definition of monument by their “nature, inherent design, or structure.”<sup>195</sup> Last, “public property” is defined broadly as all property owned by the state, any local government in the state, or “any other entity created by act of the Legislature to perform any public function.”<sup>196</sup> While the Alabama statue statute does not single out the Confederacy or Confederate monuments (and there is no historic predecessor statute that does), the timing of the statute’s passage suggests that it was motivated in large part by a concern for Confederate monuments. To take just two examples, the bill that became the Alabama statute was introduced shortly after Confederate flags were ordered removed from Alabama’s capitol,<sup>197</sup> and the statute itself was enacted shortly after New

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189. *Id.* § 4-1-412(b)(2). Other sections of the Tennessee statute prohibit the concealment of protected memorials for more than forty-five days. *Id.* § 4-1-412(b)(3)(B). Accordingly, the Tennessee statute might be read as prohibiting transfers to private actors that result in concealment of the monuments for longer than this time period, although other efforts to put the monuments in context on newly private property might be permissible.

190. *See id.* § 4-1-412(b)(1) (“[N]o memorial . . . that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.”).

191. Alabama Memorial Preservation Act of 2017, Act No. 2017-354, 2017 Ala. Laws (codified as amended at ALA. CODE §§ 41-9-230 to -237).

192. ALA. CODE § 41-9-232(a)–(b) (West 2018).

193. *Id.* § 41-9-231(6).

194. *Id.* § 41-9-231(3)–(5).

195. *Id.* § 41-9-231(1).

196. *Id.* § 41-9-231(7).

197. Rhonda Brownstein, *SPLC: Alabama’s Memorial Preservation Act Is About Protecting Confederate Monuments*, S. POVERTY L. CTR. (May 25, 2017), <http://www.splcenter.org/news/2017/05/25/splc-alabamas-memorial-preservation-act-about-protecting-confederate-monuments> [http://perma.cc/G3BU-RRKM].

Orleans removed several of its own Confederate monuments.<sup>198</sup>

Protected monuments, buildings, and memorials fall into different classifications under the Alabama statute. Those that are “located on public property” and have been “so situated for 40 or more years” may not be “relocated, removed, altered, renamed, or otherwise disturbed,” full stop.<sup>199</sup> Those that are located on public property and have been “so situated for at least 20 years, and less than 40 years” may be relocated or altered, but only after the local government in question wins approval from the Committee on Alabama Monument Protection (Alabama Committee or Committee).<sup>200</sup>

The Alabama Committee is made up of four members of the Alabama state legislature, three local government officials appointed by the governor, and four additional at-large appointees.<sup>201</sup> If a local government wishes to relocate or otherwise disturb a protected monument, building, or memorial that has been in place for more than twenty but less than forty years, it must petition the Alabama Committee for a waiver of the statute’s restrictions, which the Committee can then either grant or deny.<sup>202</sup> If any “entity exercising control of public property” protected by the statute has “disturbed” the monument at issue without first obtaining a waiver from the Alabama Committee, then the statute directs the Alabama attorney general to collect a fine of \$25,000 for each such violation.<sup>203</sup>

Despite the onerous nature of the Committee’s review process and the stiff financial penalties provided for those who disturb ostensibly protected monuments, the protections provided by Alabama’s statute are among the

198. Derek Cosson, *Alabama Gov. Signs Law Protecting Confederate Monuments*, PULSE (May 25, 2017), <http://pulsegulfc coast.com/2017/05/alabama-gov-signs-law-protecting-confederate-monuments> [<http://perma.cc/FJ99-CFHA>]. National and local coverage of the statute’s passage focused almost exclusively on the statute’s impact on Confederate monuments. *See, e.g.*, Brandon Moseley, *Legislature Passes Confederate Monuments Preservation Bill*, ALA. POL. REP. (May 20, 2017), <http://www.alreporter.com/2017/05/20/legislature-passes-confederate-monuments-preservation-bill/> [<http://perma.cc/8EPM-EDJE>]; Joe Sterling, *A New Alabama Law Makes Sure Confederate Monuments Are Here To Stay*, CNN (May 26, 2017, 5:19 PM), <http://www.cnn.com/2017/05/26/us/alabama-confederate-monuments-bill-trnd/index.html> [<http://perma.cc/T2MG-Y7BY>].

199. ALA. CODE § 41-9-232(a).

200. *Id.* §§ 41-9-232(b), -235. Similarly, memorial schools located on public property for more than twenty years, as those terms are defined by the statute, may only be renamed pursuant to the approval of the Alabama Committee. *Id.* §§ 41-9-232(c), -235.

201. *Id.* § 41-9-234(a)–(b). The four committee members from the Alabama legislature are to be split between the state House of Representatives and Senate, and between the majority and minority parties. *Id.* § 41-9-234(b)(1)–(2). Two of the additional at-large appointments are made by the governor, one by the speaker of the Alabama House of Representatives, and one by the president pro tempore of the Alabama Senate. *Id.* § 41-9-234(b)(3)–(5). Unlike similar commissions for other state statute statutes, the Alabama statute contemplates that a list of potential nominees be submitted for these at-large appointees by a number of state historical groups, including the Black Heritage Council. *Id.* § 41-9-234(c).

202. *Id.* § 41-9-235(a)(1). If the Alabama Committee fails to address the waiver petition within ninety days, it is deemed granted. *Id.* § 41-9-235(a)(2)(c).

203. *Id.* § 41-9-235(a)(2)(d). The same penalty applies to any local government entity exercising control over a protected monument that fails to comply with any conditions and instructions issued by the Alabama Committee after granting a waiver. *Id.*

most threadbare of all of the statutes reviewed here. First, the statute is entirely silent with respect to monuments, buildings, or memorials that have been in place on public property for less than twenty years.<sup>204</sup> This is the most obvious of the many gaps in the Alabama statute's protections, but it is also the least significant: only six Confederate monuments in Alabama have been in place on public property for less than twenty years prior to the statute's passage.<sup>205</sup>

More importantly, like the statute statutes in Tennessee and other states,<sup>206</sup> the Alabama statute is silent with respect to otherwise covered monuments, buildings, or memorials that are not located on "public property."<sup>207</sup> Indeed, another provision in the Alabama statute makes this public property coverage gap potentially even more significant than in states like Tennessee, because Alabama's statute also contains a specific exception for otherwise-protected "[a]rt and artifacts in the collections of museums, archives, and libraries."<sup>208</sup> This suggests that if a local government entity donates the public property on which an otherwise-protected monument sits to a private entity, and that private entity then conveys the monument to a museum, archive, or library—undefined in the statute—then the once-protected monument would be doubly removed from the statute's ostensible protections.<sup>209</sup>

As significant as this public property gap may be for local governments in Alabama that wish to remove or modify ostensibly protected Confederate monuments, an additional opportunity for local action under the statute may prove equally or even more significant. It is easiest to see this opportunity as the product of three related classifications and procedural decisions made in the statute. First, the statute does not provide for any penalties for anyone who disturbs statues that have been protected for more than forty years.<sup>210</sup> Second, there is no referral and waiver process to the Alabama Committee for such monuments—the referral and waiver process only applies to monuments that have been in place for twenty to forty years.<sup>211</sup> Third, the penalties in the statute all relate to violations of decisions by or failures to obtain waivers from the Committee.<sup>212</sup> More specifically, the penalties contemplated by the statute are to be imposed upon any local government entity that disturbs a protected monument "without first obtaining a waiver from the committee as required by

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204. *See id.* § 41-9-232.

205. GUNTER ET AL., *supra* note 64, at 17–18.

206. *E.g.*, TENN. CODE ANN. § 4-1-412(b)(1) (West 2018).

207. ALA. CODE § 41-9-232(a).

208. *Id.* § 41-9-236(1).

209. In addition to this exception for art and artifacts in museums, archives, and libraries, section 41-9-236 also contains a number of additional exceptions. *Id.* § 41-9-236. But these additional exceptions have not been discussed at greater length here because they deal with otherwise-covered monuments that might interfere with public transportation, utility service, or port services. *Id.* Local governments might argue that almost any otherwise-covered monument interferes with public transportation or utility services, but not all such arguments would be of equal merit or could be made in good faith.

210. *Id.*

211. *See id.* § 41-9-235(a)(1) (referring to *id.* § 41-9-232(b)–(c)).

212. *Id.* § 41-9-235(a)(2)(d).

this article” or which “fail[s] to comply with the conditions and instructions issued” along with a waiver.<sup>213</sup>

But because the statute only contemplates waiver applications for otherwise-covered monuments, buildings, and memorials that have been in place for twenty to forty years, local governments that modify monuments that have been in place for more than forty years face no penalty—at least, there is no penalty provided by the statute. This is because, under the statute, there is no procedure established for them to engage with the Alabama Committee. Thus, for monuments of this age, there is no way for local governments to trigger the statute’s penalties by violating either the waiver process or a decision of the Committee about a waiver application.<sup>214</sup> To sum up, in the words of one associate city attorney and Alabama state legislator who voted against the statue statute, this gap in coverage renders the statute “essentially unenforceable,” at least when it comes to monuments that are more than forty years old.<sup>215</sup> As noted earlier, this coverage gap is the subject of a challenge by the City of Birmingham that is ongoing as of the time of this writing,<sup>216</sup> and private groups and other local governments in Alabama are considering making similar challenges.<sup>217</sup>

#### D. Georgia’s Statue Statute

Georgia’s statue statute is one small piece of a larger series of code sections, which primarily focus on Georgia’s state flag and date back over a century.<sup>218</sup> The monument protection language was added in 2001,<sup>219</sup> as part of an attempted compromise to resolve a long-simmering conflict over Georgia’s state flag, which had long incorporated Confederate designs and symbols.<sup>220</sup> But the

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213. *Id.*

214. *Id.* § 41-9-235.

215. Paul Gattis, *Alabama Monuments Law Flawed, \$25K Fine Doesn’t Apply, Lawmaker Says*, AL.COM (Aug. 19, 2017), [http://www.al.com/news/birmingham/index.ssf/2017/08/alabama\\_monuments\\_law\\_flawed\\_2.html](http://www.al.com/news/birmingham/index.ssf/2017/08/alabama_monuments_law_flawed_2.html) [<http://perma.cc/U53V-2AH5>] (quoting Alabama State Representative and Tuscaloosa Associate City Attorney Chris England). Representative England also opined that the statue statute is a “bad law” not only because the “spirit of the [statue statute] is horrible” and because it is “impractical” but also because “it was poorly drafted” and that successful legal challenges to the statute will likely show “just how bad the law is.” *Id.*

216. *See infra* note 317 and accompanying text; *see also* Gladney, *supra* note 116.

217. *E.g.*, Kyle Gassiot, *State of Alabama Fights Local Community over Confederate Statue*, MARKETPLACE (Mar. 14, 2018, 6:58 AM), <http://www.marketplace.org/2018/03/14/life/lawsuit-over-protest-confederate-statue-alabama-heads-court> [<http://perma.cc/RH5X-UEQX>].

218. Act of Aug. 21, 1916, No. 565, § 3(61), 1916 Ga. Laws 158, 178. The current version of Georgia’s statue statute, which reflects all subsequent amendments, is codified at GA. CODE ANN. § 50-3-1. The portion of the current statute dealing with the state flag is section 50-3-1(a), whereas the monument protection language begins at section 50-3-1(b). For a thoughtful analysis of the history of the state statutory treatment of Georgia’s flag and how the monument protection language came to be added to this section of the Georgia Code, see generally Darren Summerville, *New State Flag*, 18 GA. ST. U. L. REV. 305 (2001).

219. Act of Jan. 31, 2001, No. 1, § 1, 2001 Ga. Laws 1, 1–2.

220. *See, e.g.*, Dan Collins, *Georgia Finally Unfurls New Flag*, CBS NEWS (Apr. 4, 2003, 3:57 PM), <http://www.cbsnews.com/news/georgia-finally-unfurls-new-flag/> [<http://perma.cc/2AWQ-GW7D>]

compromise that gave rise to the monument protection language in this statute was short-lived.<sup>221</sup> Two years after the 2001 amendments that both added monument protection language and reworked the state flag to minimize Confederate design aspects, a 2003 bill changed the state flag design back to a design based on the Confederate national flag.<sup>222</sup>

In addition, the 2001 legislation that created Georgia's general statue statute also included a section that specifically singled out Stone Mountain,<sup>223</sup> a massive state-owned Confederate memorial and Ku Klux Klan rally site often referred to as the Confederate Mount Rushmore.<sup>224</sup> The Stone Mountain protection statute provides, notwithstanding any provision of law to the contrary, that "the memorial to the heroes of the Confederate States of America graven upon the face" of the mountain "shall be preserved and protected for all time as a tribute to the bravery and heroism of the citizens of this state who suffered and died in their cause."<sup>225</sup>

In its current form, the general Georgia statue statute protects all "publicly owned monument[s], plaque[s], marker[s], or memorial[s]" that are associated with the military service of anyone associated with the United States of America, the Confederate States of America, Georgia, or any other state, whether part of the Confederacy or the Union.<sup>226</sup> Such protected monuments may not be "relocated, removed, concealed, obscured, or altered in any fashion," save for "appropriate measures" connected with "preservation, protection, and interpretation."<sup>227</sup> The statute also provides that any person or entity who "mutilate[s], deface[s], defile[s], or abuse[s] contemptuously any publicly owned monument, plaque, marker, or memorial" has committed a misdemeanor.<sup>228</sup>

Similarly, the statute prohibits any state or local government agency, or any state or local government official, from "remov[ing] or conceal[ing]" any such monument "for the purpose of preventing the visible display of the same," again subject to prosecution for a misdemeanor.<sup>229</sup> In addition, the statute protects privately owned and protected monuments against any person or entity acting without authority who takes any of the long list of prohibited actions listed

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(noting that the state flag created in 2001 "was a compromise intended to shrink the Confederate emblem but incorporate the symbol in a mini-montage of old Georgia flags").

221. *See id.*

222. Act of May 8, 2003, No. 4, 2003 Ga. Laws 26 (codified as amended at GA. CODE ANN. § 50-3-1).

223. GA. CODE ANN. § 50-3-1(c) (West 2018).

224. *See, e.g., Planned MLK Tribute on "Confederate Mount Rushmore" Stirs Controversy*, CBS NEWS (Oct. 23, 2015, 7:09 AM), <http://www.cbsnews.com/news/martin-luther-king-jr-tribute-georgia-stone-mountain-controversy-confederate-memorial/> [<http://perma.cc/3VXB-FBGA>].

225. GA. CODE ANN. § 50-3-1(c). In the following discussion I refer to the "general" Georgia statue statute, by which I intend to exclude the provisions of the statute that are specific to Stone Mountain.

226. *Id.* § 50-3-1(b)(1).

227. *Id.* § 50-3-1(b)(2).

228. *Id.* § 50-3-1(b)(1).

229. *Id.*

elsewhere in the statute.<sup>230</sup> Furthermore, the statute provides that any person or entity aggrieved by any unauthorized damage, denigration, or relocation of a protected privately owned monument may bring damages against the person or entity, acting without authorization, who tampered with that monument.<sup>231</sup>

As with the Tennessee and Alabama statute statutes, the Georgia statute's protections are limited to those monuments that are "publicly owned."<sup>232</sup> This means that local governments in Georgia that wish to remove or alter Confederate monuments in public civic places may be able to do so if they first convey the property on which the monument stands to a sympathetic private actor. Beyond the public property carve-out, the provisions of Georgia's statute that allow local governments to take "appropriate measures" connected with the "interpretation" of a protected monument<sup>233</sup> should allow some local governments to minimize some of the longstanding negative impacts of Confederate monuments in public civic spaces. More specifically, this "interpretation" carve-out should allow local governments to erect plaques and other monuments or provide interpretative tools to demonstrate that communities now reject the messages that accompanied the monuments when they were first erected.

#### E. North Carolina's Statue Statute

North Carolina's statue statute, enacted in 2015, is another example from the recent crop of statutes often referred to as Heritage Protection Acts.<sup>234</sup> The North Carolina statute applies to "object[s] of remembrance located on public property," and it broadly defines "object[s] of remembrance" as any "monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history."<sup>235</sup> While the North Carolina statute does not single out the Confederacy or Confederate monuments, and there is no predecessor statute that does so, the timing of the statute's passage suggests that it was motivated primarily by a concern for Confederate monuments, as other scholars have previously noted.<sup>236</sup>

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230. *Id.* § 50-3-1(b)(4).

231. *Id.*

232. *Id.* § 50-3-1(b)(2).

233. *Id.*

234. Cultural History Artifact Management and Patriotism Act of 2015, Sess. Law 2015-170, 2015 N.C. Sess. Laws 435 (codified as amended in scattered sections of N.C. GEN. STAT. ANN.).

235. N.C. GEN. STAT. ANN. § 100-2.1(b) (West 2018).

236. See, e.g., Alfred Brophy, *North Carolina Heritage Protection Act*, FAC. LOUNGE (July 16, 2015, 12:14 AM), <http://www.thefacultyounge.org/2015/07/north-carolina-heritage-protection-act.html> [<http://perma.cc/WR48-ATJF>] ("[O]bviously [the bill] is about Confederate Monuments—no one's taking down Vietnam or WWII monuments."). For a more concrete example of the statute's connection with Confederate monuments, a thoughtful student comment points out that the North Carolina statue statute was enacted just two weeks after South Carolina removed the Confederate battle flag from its state capitol. Kasi E. Wahlers, Comment, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2180 (2016).

Under North Carolina's statute, protected "object[s] of remembrance" may not be permanently removed.<sup>237</sup> Protected monuments may be "relocated" on a temporary or permanent basis, but such a relocation is subject to a number of restrictions.<sup>238</sup> First, temporarily relocated objects of remembrance must be returned to their original site within ninety days.<sup>239</sup> Second, permanently relocated objects of remembrance must be relocated to sites of "similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which [they were] relocated."<sup>240</sup> More specifically, objects of remembrance may not be permanently relocated to museums, cemeteries, or mausoleums unless they were originally located at such a site.<sup>241</sup>

Despite the apparent breadth of the North Carolina statute and the specificity of the restrictions it imposes on relocating protected monuments, substantial opportunities exist for local governments in North Carolina that wish to alter or remove Confederate monuments. North Carolina's statute, much like the statutes in Tennessee and some other states, only protects monuments on public property.<sup>242</sup> As a result, if an otherwise-covered monument ever ceases to be on public property, it would presumably no longer be protected by the statute. In other words, in North Carolina, as in other states, a local government that wants to get rid of a Confederate monument might be able to do so, provided that it first conveys the property on which the monument stands to a friendly private actor.

#### F. Mississippi's Statue Statute

Mississippi's statute dates to 2004.<sup>243</sup> It purports to protect "statues, monuments, memorials[,] or nameplates" that "have been erected on public property of the state or any of its political subdivisions" and that relate to historic military figures, events, organizations, or units from a number of past conflicts.<sup>244</sup> In addition to statues, monuments, memorials, nameplates, and plaques, the statute covers almost any object that could be named after military

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237. N.C. GEN. STAT. ANN. § 100-2.1(b).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Compare N.C. GEN. STAT. ANN. § 100-2.1(b) (noting that "[a]n object of remembrance located on public property may not be permanently removed and may only be relocated . . . under the circumstances listed in this subsection" (emphasis added)), with TENN. CODE ANN. § 4-1-412(b)(1) (West 2018) (referring to "memorial[s] . . . that [are], or [are] located on, public property"). Unlike the Tennessee statute, the North Carolina statute does not define "public property." See N.C. GEN. STAT. ANN. § 100-2.1(b).

243. Mississippi Military Memorial Protection Act, Ch. 463, 2004 Miss. Laws 496 (codified as amended at MISS. CODE ANN. § 55-15-81).

244. MISS. CODE ANN. § 55-15-81(1) (West 2018). The full list of military conflicts covered by the statute includes the "Revolutionary War, War of 1812, Mexican-American War, War Between the States, Spanish-American War, World War I, World War II, Korean War, Vietnam War, Persian Gulf War, War in Iraq [and] Native American War[]." *Id.*

figures, events, or organizations from the covered conflicts—everything from schools, streets, parks, bridges, and buildings would fall within the statute’s ambit if so named.<sup>245</sup>

Under Mississippi’s statue statute, all protected monuments, public property, or public areas may not be “relocated, removed, disturbed, altered, renamed[,] or rededicated,” period.<sup>246</sup> Moreover, “[n]o person may prevent the public body responsible for maintaining” a protected monument “from taking proper measures and exercising proper means” to preserve, protect, care, repair, or restore the monument.<sup>247</sup> Unlike the statue statutes in some other states, there is no state commission for waiver of either of these restrictions nor is there a particular provision for revisiting the protection of the statute by the state legislature for specific monuments. Instead, the Mississippi statute expressly provides that the “governing body” responsible for the monument—which conceivably could be either the state or local government agency that directly maintains the monument, or the state or local government agency that maintains the property on which the monument is located if the monument is owned by a group like the United Daughters of the Confederacy—may determine that an alternative “location is more appropriate to displaying the monument” and “may move the memorial” to that alternative and “more suitable location.”<sup>248</sup> In other words, the facial language of the Mississippi statute is more flexible than that of other statue statutes.

This immediately apparent gap in the protections ostensibly afforded to qualifying monuments makes the Mississippi statue statute potentially one of the weakest, despite the apparent breadth of the statute’s protections. If local governments may simply choose to move protected monuments to a location that they deem “more suitable,”<sup>249</sup> then although the statute may save such monuments from destruction, it does nothing to prevent local governments from moving such monuments to less prominent locations, or to locations where they can be placed in historical context and used as tools for education or reconciliation rather than as monuments to discrimination and intimidation. Underscoring the relative freedom that Mississippi local governments enjoy to move protected monuments, Mississippi’s attorney general recently weighed in on this specific statutory provision, writing that monuments can be moved within a county or municipality<sup>250</sup> and that such a decision is a discretionary one that can only be made by the relevant local government.<sup>251</sup>

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245. *Id.*

246. *Id.*

247. *Id.* § 55-15-81(2).

248. *Id.*

249. *Id.*

250. Miss. Attorney General, Opinion Letter No. 2017-00275 (Oct. 2, 2017), 2017 WL 5558441, at \*2 (confirming that, under section 55-15-81(2), a protected monument may be “moved” within the county jurisdictional limits to some other more suitable location on county property” once the county’s board of commissioners makes a finding that the alternative “location is more appropriate for displaying the monument”).

251. Miss. Attorney General, Opinion Letter No. 2017-00288 (Oct. 13, 2017), 2017 WL 5558444,

In addition to this gap in the statute's ostensible protection, there are no penalties for violating any of its provisions. Although the state legislature has attempted to amend the statute and include penalties on multiple occasions, none of these attempts has succeeded to date.<sup>252</sup>

### G. *Kentucky's Statue Statute*

Kentucky's statue statute,<sup>253</sup> which was invoked during litigation over the Louisville-Brandenburg monument discussed in the introduction,<sup>254</sup> dates to 2002.<sup>255</sup> Like the Mississippi statute, the text of the Kentucky statute imposes relatively weak restrictions on local governments, especially given the interpretation of the Kentucky statute by the relevant state regulations. Moreover, the Kentucky statute has proved relatively weak in practice, as local governments in both Louisville and Lexington have been able to move prominent and controversial Confederate monuments more easily than local governments in other states.<sup>256</sup>

Kentucky's statue statute forbids the alteration, destruction, removal, or transfer "of a site designated as a military heritage site" without either the written approval of the Kentucky Military Heritage Commission (Kentucky Commission or Commission)<sup>257</sup> or the Commission's rescission of the designation of the monument as a covered site.<sup>258</sup> Military activities "engaged in by the Confederate States of America" are expressly included in the statute's long list of what qualifies as "[m]ilitary heritage" under the statute.<sup>259</sup> However, military heritage sites that meet the statute's qualifications must be approved by the Kentucky Commission. In other words, without the Commission's approval,

at \*2 (confirming that any decision as to the "suitability" of a new or alternative location for an otherwise-protected monument under the statute "is a factual determination which can only be made by the municipal governing authority," provided that the statue "remain[s] on public property for display" within the county or municipality where it was originally located).

252. *E.g.*, H.B. 969, 2018 Leg., Reg. Sess. (Miss. 2018) (attempting to impose a fine of \$10,000 plus all costs associated with restoring or relocating the protected monument, as well as a six-month jail term, in a bill that died in committee); H.B. 1268, 2017 Leg., Reg. Sess. (Miss. 2017) (attempting to impose the same fines and potential jail terms in a bill that would have taken effect July 2017).

253. KY. REV. STAT. ANN. §§ 171.780–.788 (West 2018).

254. *Sons of Confederate Veterans, Ky. Div. v. Louisville Jefferson Cty. Metro Gov't*, No. 16-CI-2009, slip op. at 5 (Ky. Cir. Ct. June 16, 2016).

255. Kentucky Military Heritage Act, Ch. 40, § 1, 2002 Ky. Acts 299, 299 (codified as amended at KY. REV. STAT. ANN. §§ 171.780–.788).

256. *See Sons of Confederate Veterans, Ky. Div.*, slip op. at 7 (denying motion to enjoin the county government from relocating a Confederate monument and granting motions to dissolve a previously granted restraining order and to dismiss the complaint with prejudice); Morgan Eads et al., *In a Surprise Move, Lexington Removes Controversial Confederate Statues*, HERALD-LEADER (Lexington, Ky.) (October 17, 2017, 6:46 PM), <http://www.kentucky.com/news/local/counties/fayette-county/article179392076.html> [<http://perma.cc/85JA-BKT2>] (noting that an opinion provided by Kentucky's attorney general "opened the door for the city to begin the removal of the statues").

257. The Kentucky Military Heritage Commission was also established by the statue statute. Kentucky Military Heritage Act, § 2 (current version at KY. REV. STAT. ANN. § 171.782).

258. KY. REV. STAT. ANN. § 171.788(2).

259. *Id.*

even if a monument might be eligible for protection under the statute, it is not protected by the statute. Violation of the statute is punishable as a misdemeanor for the first offense and a felony for each subsequent offense.<sup>260</sup>

One key opportunity for local action under Kentucky's statute relates to its unique registration process. More specifically, the statute only protects monuments approved as significant military heritage sites and designated as protected monuments by the Kentucky Commission.<sup>261</sup> But very few of the monuments in the state that might qualify as protected military heritage sites have been through this application and registration process. Fewer than thirty of the more than two hundred sites or objects that might qualify, including many of the state's most prominently displayed Confederate monuments, have ever been submitted to the Commission for consideration.<sup>262</sup> Indeed, it was just such a failure to designate the Louisville monument considered in this Article's Introduction that undercut the Kentucky Sons of Confederate Veterans' attempt to prevent its removal.<sup>263</sup> As Kentucky's attorney general recently suggested, the Kentucky Commission has designated few monuments for protection because the application process for monument designation is quite complicated.<sup>264</sup>

#### H. *South Carolina's Statue Statute*

Like many other statue statutes, the monument protection portions of the South Carolina Code do not single out the Confederacy.<sup>265</sup> Unlike many other state statue statutes, the South Carolina statute has been invoked by those who wish to preserve memorials to conflicts besides the Civil War,<sup>266</sup> but only to protect the alteration of *racially segregated* memorials to other conflicts besides the Civil War.<sup>267</sup> This tends to underscore rather than undermine the links between South Carolina's statue statute, the monuments it protects, and the state's history of institutionalized discrimination.

Moreover, as in other states, the centrality of Confederate monuments to

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260. *Id.* § 171.788(1)–(2).

261. *Id.* § 171.782(3).

262. Peter Brackney, *Two Statues, a Military Heritage Commission, and the Telling of History*, KAINTUCKEEAN (Aug. 19, 2017), <http://www.kaintuckeean.com/2017/08/relocating-breckinridge-and-morgan-statues.html> [<http://perma.cc/Z2DR-726C>].

263. *Sons of Confederate Veterans, Ky. Div. v. Louisville Jefferson Cty. Metro Gov't*, No. 16-CI-2009, slip op. at 7–8 (Ky. Cir. Ct. June 16, 2016).

264. *See* Ky. Attorney General, Opinion Letter No. 17-023 (Oct. 17, 2017), 2017 WL 4843705 (citing 202 KY. ADMIN. REGS. 8:030).

265. *See* S.C. CODE ANN. § 10-1-165(A) (West 2018) (protecting “monuments or memorials” commemorating the “Revolutionary War, War of 1812, Mexican War, War Between the States, Spanish-American War, World War I, World War II, Korean War, Vietnam War,” and “Persian Gulf War,” as well as “Native American[] or African-American History”).

266. *See, e.g.*, Alan Blinder, *Change to a Segregated Monument Is Stymied by a Law Protecting It*, N.Y. TIMES (Apr. 30, 2015), <http://nyti.ms/1GLaFGm> [<http://perma.cc/7PCB-BYSQ>] (noting that South Carolina's statue statute has been invoked to prevent the town of Greenwood from modifying a monument to World War I and World War II that lists fallen soldiers in separate categories for “white” and “colored”).

267. *Id.*

the statute is revealed by its history. More specifically, South Carolina's statue statute was passed in 2000<sup>268</sup> as part of a legislative compromise that removed the Confederate battle flag from atop the state capitol building while providing for its retention elsewhere on the capitol grounds.<sup>269</sup> Accordingly, like the other statue statutes that were passed as parts of bills related to the display of the Confederate flag or the incorporation of Confederate imagery in state flag designs, the legislative history of the South Carolina statute strongly suggests that the bill was passed with the protection of Confederate monuments particularly in mind.<sup>270</sup> Moreover, as in the other states examined here, the overwhelming majority of conflicts over protected monuments in South Carolina have been over Confederate monuments.<sup>271</sup>

As noted above, the South Carolina statute covers "monuments or memorials," terms not otherwise defined, and it covers many conflicts and periods of history in addition to the Civil War and the Confederacy.<sup>272</sup> Under the statute, monuments or memorials related to covered conflicts or periods in history "erected on public property of the State or any of its political subdivisions" may not be "relocated, removed, disturbed, or altered."<sup>273</sup> Similarly, no one may interfere with any "public body responsible for the monument or memorial" by preventing it "from taking proper measures and exercising proper means" (also undefined) for the "protection, preservation, and care" of protected monuments.<sup>274</sup>

South Carolina's attorney general has interpreted the term "public body" in the statute to include nonprofit groups such as the United Daughters of Confederacy and the Sons of Confederate Veterans.<sup>275</sup> If this interpretation is adopted by South Carolina courts, then it might mean that private groups' maintenance of protected monuments would be immune from interference from both local governments and potentially state agencies, which might wish to alter or remove the monuments. Such an interpretation would make South Carolina's

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268. Act of May 23, 2000, No. 292, § 3, 2000 S.C. Acts 2069, 2071 (codified as amended at S.C. CODE ANN. § 10-1-165).

269. *See id.* §§ 1-2 (codified as amended in scattered sections of S.C. CODE ANN.) (addressing issues related to flags at the South Carolina capitol).

270. For example, in an unusual provision highlighting the centrality of South Carolina's Confederate heritage to the 2000 legislation that created the statue statute, the provisions of the bill related to the display of the Confederate flag on and around the state capitol expressly preserved the rights of individuals "on the capitol complex grounds" to "wear[] as a part of [their] clothing or carry[] or display[] any type of flag including a Confederate Flag." *Id.* § 1.

271. *See, e.g.,* Nathaniel Cary, *S.C. Confederate Monuments in Spotlight as Some Call for Change*, GREENVILLE NEWS (Aug. 16, 2017, 7:57 PM), <http://www.greenvilleonline.com/story/news/2017/08/16/s-c-confederate-monuments-spotlight-some-call-change/574806001/> [<http://perma.cc/F64X-M97G>] (quoting legislators of both parties regarding the centrality of Confederate monuments to South Carolina's state statue statute).

272. S.C. CODE ANN. § 10-1-165(A) (West 2018).

273. *Id.*

274. *Id.*

275. S.C. Attorney General, Opinion Letter to Rep. Charles R. Sharpe (July 18, 2001), 2001 WL 957759, at \*3.

statute more restrictive than other states for local governments that wish to alter or remove Confederate monuments.

Unlike some other statutes, the South Carolina statute does not create or contemplate a state commission to hear petitions for waivers. Rather, the only possibility for waiver or modification of the monument protections is by a subsequent two-thirds vote of the state legislature.<sup>276</sup> This makes South Carolina's statute substantially more restrictive than other states, especially when one considers the pronounced rural-urban split in support for Confederate monuments.<sup>277</sup> Convincing two-thirds of the state legislators in South Carolina to agree to modify a monument that is not in their district, and which therefore faces no relevant local opposition, would likely prove far more difficult than convincing a majority or even two-thirds of a bipartisan historical commission to grant a waiver.<sup>278</sup> Again, this aspect of South Carolina's statute makes it more restrictive than other states for local governments that wish to alter or remove Confederate monuments.

Although the waiver process set forth by South Carolina's statute is even more onerous than the waiver process in other states, there is some language in South Carolina's statute that could be construed as protecting only those monuments that either themselves are "public property" or are located on "public property."<sup>279</sup> As with several other statutes, this language might be interpreted to mean that local governments in South Carolina that wish to move or alter Confederate monuments in public civic places might be able to do so, as s's Novel Strategy for Tearing Down Confederate Statues, Atlantic (Dec a actor.

On the other hand, the relevant language from the South Carolina statute refers to all monuments "*erected* on public property."<sup>280</sup> In contrast to the language in other states' statutes, this language could be interpreted as providing more protection to Confederate monuments than analogous language from other statute statutes that only protect monuments that are *publicly owned* or *located* on public property.<sup>281</sup> More specifically, unlike the language of many other statute statutes, the relevant language from the South Carolina statute might be interpreted as protecting all monuments that were originally erected on public property, even if they subsequently became private property or were moved to

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276. S.C. CODE ANN. § 10-1-165(B).

277. See *supra* notes 27–32 and accompanying text.

278. See, e.g., *supra* notes 168–173, 200–203 and accompanying text (discussing Tennessee's and Alabama's historical commissions).

279. See S.C. CODE ANN. § 10-1-165(A) (protecting "memorials erected on public property of the State or any of its political subdivisions").

280. *Id.* (emphasis added).

281. See *supra* note 118 and accompanying text for a description of this issue, comparing section 10-1-165(A) of the South Carolina Code with the relevant language from Tennessee's statute, which refers to monuments "located" on public property. See also ALA. CODE § 41-9-231(6) (West 2018) (protecting monuments "*located*" on public property or "*publicly owned*" rather than all those that may have been "*erected*" on public property (emphases added)); N.C. GEN. STAT. ANN. § 100-2.1(b) (West 2018); GA. CODE ANN § 50-3-1(b)(2) (West 2018).

private property.<sup>282</sup> Such an interpretation of South Carolina’s statute would, of course, minimize the “public property” opportunity to alter or remove Confederate monuments that is or has been available to local governments under the Alabama, Georgia, North Carolina, and Tennessee statutes.<sup>283</sup>

South Carolina’s statute also provides fewer opportunities than other statutes for local governments to modify or remove at least some Confederate monuments based on their age. For example, unlike Virginia’s statute, South Carolina’s statute has not been modified since it was passed in 2000, which means that the sort of temporal gap in protection created by Virginia’s oft-modified statute does not exist in South Carolina. Nor was South Carolina’s statute drafted with the sorts of temporal categories seen in other states, which provide local governments with the opportunity to alter or remove some monuments based on the monuments’ ages.<sup>284</sup>

In other words, South Carolina’s statute may be one of the most restrictive and least vulnerable examples of its kind—at least to the sorts of arguments discussed in Section II of this Article. Least vulnerable does not, however, mean invulnerable. Recall that South Carolina’s statute was passed as part of a response to controversies over the Confederate battle flag and Confederate monuments at and around the state capitol grounds.<sup>285</sup> Indeed, most of the provisions of this 2000 legislation apply to specific Confederate monuments or Confederate flags in or around the South Carolina state capitol, unlike South Carolina’s general-purpose statute. For example, section 1 of the 2000 legislation refers to the flags authorized to be flown or hung atop the dome of the state capitol and in the state legislature’s chambers, while sections 5 and 6 deal with the permanent display in the South Carolina State Museum of the Confederate flags that previously flew or hung in these locations.<sup>286</sup> As a result, the legislation as enacted created new statutory sections across different chapters and even different titles of the South Carolina Code.<sup>287</sup>

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282. Unlike the Alabama, Georgia, North Carolina, and Tennessee statute statutes, but like South Carolina’s statute, Virginia’s statute may be subject to a similarly restrictive interpretation, because the relevant statutory language does not refer to public property, but rather forbids any disturbance or interference “with any monuments or memorials . . . erected” within a “locality.” VA. CODE ANN. § 15.2-1812 (West 2018) (emphasis added). Similarly, Mississippi’s statute protects monuments that “have been erected on public property of the state or any of its political subdivisions.” MISS. CODE ANN. § 55-15-81(1) (West 2018) (emphasis added).

However, as discussed above and below, local governments in Mississippi and Virginia have multiple additional opportunities to alter or remove Confederate monuments that are not present under the South Carolina statute. See *supra* Parts II.A and II.F.

283. See S.C. CODE ANN. § 10-1-165(A).

284. *Id.* § 10-1-165. See also *supra* notes 205, 210–213 and accompanying text for a discussion of these opportunities for local governments under Alabama’s statute.

285. See *supra* notes 268–270 and accompanying text for a discussion of the events leading to the passage of this legislation.

286. Act of May 23, 2000, No. 292, §§ 1, 5–6, 2000 S.C. Acts 2069, 2070, 2072 (codified as amended in scattered sections of S.C. CODE ANN.).

287. Most of the statute was codified in title 10, which deals with public buildings and property. South Carolina’s statute, created by section 3 of the 2000 legislation, can be found in chapter 1 of title 10 of the South Carolina Code. S.C. CODE ANN. § 10-1-165. But the 2000 Act placed some of

Some of the pieces of the 2000 legislation do refer expressly to penalties. For example, the legislation provides that anyone who “wilfully and maliciously” defaces, vandalizes, damages, destroys, or attempts the same to any monument or flag “located on the capitol grounds” shall be guilty of a misdemeanor.<sup>288</sup> But this provision of the 2000 legislation does not reach monuments located elsewhere throughout the state. Moreover, as noted above, it is codified in a different chapter of the South Carolina Code than the statue statute.

By contrast, the statue statute provisions that apply generally across the state contain no reference to any penalty.<sup>289</sup> Nor is there any general provision for penalties in title 10, chapter 1 of the South Carolina Code—the title and chapter in which the statue statute is located—although other provisions of chapter 1 *do* contain specific penalties for their violation, including those sections that deal with recovering the costs of removal and storage for unauthorized parking in state-owned facilities.<sup>290</sup> In other words, like the Mississippi statute and part of the Alabama statute, it is unclear what penalty attaches to a violation of South Carolina’s statute, and the most appropriate answer, given the statute’s structure, might well be no penalty at all. In sum, there are at least some opportunities to challenge the South Carolina statute in its current form, and the absence of clearly defined penalties should give those local governments inclined to do something about public Confederate monuments some encouragement to do so.

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Contrary to the prevailing wisdom, statue statutes are not impossible barriers for local governments to overcome. Rather, each statute provides at least some opportunity for local governments to address the monumental legacy of institutionalized racism and violence in their public spaces, although some statutes provide more opportunities to local governments than others. Exploiting these opportunities is not the optimal solution—it would be better for legislatures or courts to get rid of these statutes altogether—but so long as the statutes remain in something like their current forms, local governments that wish to challenge them should not be discouraged from doing so by the statutes’ unearned reputation.

### III. BEYOND REPAIR: WHY COURTS AND LEGISLATURES SHOULD REJECT ATTEMPTS TO REVISE STATUE STATUTES THAT WOULD TAKE AWAY OPPORTUNITIES FOR LOCAL GOVERNMENT ACTION

Reviewing the history and terms of the statue statutes reveals that they are

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the provisions dealing with flags and monuments on or around the state capitol grounds in chapter 11 of title 10 of the South Carolina Code, while others are located in title 1 of the South Carolina Code, which deals with the administration of the state government. Act of May 23, 2000.

288. Act of May 23, 2000, § 8 (emphasis added) (citing penalties provided in S.C. CODE ANN. § 10-11-360).

289. S.C. CODE ANN. § 10-1-165.

290. *E.g., id.* § 10-1-200(3).

deeply flawed—primarily in terms of their purpose in attempting to protect monuments that enshrine entrenched patterns of discrimination, but also in terms of their practical effect. Many local governments subject to these statutes should have opportunities to alter or remove existing Confederate monuments. But it would be optimistic to assume that merely identifying opportunities for local government action under the statutes in their current form will signify the end of protected monuments without further conflict.

For example, although some state attorneys general have acted to limit the interpretation or application of existing statue statutes,<sup>291</sup> others have provided and will continue to provide guidance urging the broadest possible interpretation of the statutes.<sup>292</sup> If adopted by courts, these broad interpretations of the statutes will minimize the opportunities for monument modification or removal available to local governments. Moreover, some officials or private individuals with standing under the relevant statutes who wish to protect the continued existence or present location of monuments covered by statue statutes can be expected to file administrative appeals or to litigate.<sup>293</sup> They also may argue that some of the coverage gaps identified above should be minimized or read out of the statute altogether.<sup>294</sup> Indeed, this has already begun to occur.<sup>295</sup>

In other states, defenders of statue statutes may use legislation, rather than litigation, to patch the coverage gaps identified in this Article and provide more effective protection for Confederate monuments on public property. Such legislative fixes can be expected to take one of two forms.

First, some state legislators who wish to preserve Confederate monuments and rehabilitate existing statue statutes may try to close off some of the opportunities for local action that exist in the current statutes while preserving much of the current statutes' form and structure. As the Tennessee legislature's response to the removal of Confederate monuments shows, this also has already begun to occur<sup>296</sup>—after all, a history of frequent legislative patchwork is one of

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291. See, e.g., Va. Attorney General, Opinion Letter No. 17-032 (Aug. 25, 2017), 2017 WL 3901711, at \*3 (noting some of the time and location limitations on Virginia's statue statute outlined in this Article); see also Eads et al., *supra* note 256 (noting that the Kentucky attorney general's opinion relevant to the Lexington monuments, Opinion Letter No. 17-023, 2017 WL 4843705 (Oct. 17, 2017), "opened the door for the city to begin removal of the statues").

292. See, e.g., Miss. Attorney General, Opinion Letter No. 2017-00275 (Oct. 2, 2017), 2017 WL 5558441, at \*2-3 (concluding that the ambiguity between the Mississippi statute's monument removal and monument protection provisions should be resolved by allowing local governments to remove or relocate monuments only within their own jurisdiction).

293. See, e.g., Hartley & Ley, *supra* note 115 (noting that the Charlottesville monument dispute is likely to wind up in the Virginia Supreme Court).

294. See, e.g., Poe, *Forrest Family*, *supra* note 119 (noting that multiple chapters of the Sons of Confederate Veterans and other groups have already filed a lawsuit as well as a petition with the Tennessee Historical Commission challenging Memphis's December 2017 sale of public property with Confederate monuments and the subsequent removal of those monuments).

295. See, e.g., Gladney, *supra* note 116 (discussing details of the suit filed by the State of Alabama against the City of Birmingham after Birmingham's decision to cover Confederate monuments, which are more than forty years old, with plywood barriers).

296. See *supra* notes 185-186 and accompanying text.

the common characteristics in the history of many of the older statue statutes<sup>297</sup>—and these efforts will likely accelerate if local governments take greater advantage of the opportunities identified in this Article.<sup>298</sup>

Second, some state legislators who wish to preserve Confederate monuments by statute might radically revise the existing statue statutes, seeking new justifications or new criteria for protecting monuments even if local governments wish to alter or be rid of them. Given the many opportunities for local action under several of the current statutes, such wide-ranging revisions might well strengthen the protections available to Confederate monuments in public spaces, even if the revisions involve apparent concessions to local control or sentiment against monuments.

Third, state legislatures may take additional punitive action against cities that successfully remove or alter Confederate monuments. Here too, the recent experience of the Memphis monuments is instructive—recall that in addition to modifying the Tennessee statue statute, the state legislature also cut funding for the city’s upcoming bicentennial after the city removed Confederate monuments while complying with the existing statute.<sup>299</sup> Such legislative retaliation against local government action is, of course, a much broader trend that is not confined to disputes over Confederate monuments.<sup>300</sup>

Revisions of the statue statutes’ current flaws may pose substantial future challenges for local governments that wish to alter or remove Confederate monuments, and the specter of subsequent retaliation may deter local governments from acting to remove monuments under the letter of existing statue statutes. But the most significant potential problem facing local governments that wish to exploit the opportunities for action identified in Section II does not depend on any alteration to the existing statutes. Instead, it arises from the nature of the relationship between state and local governments. This relationship is one of profound inequality: Cities are constitutionally and legislatively subordinate to their states, making them vulnerable to action by state governments.<sup>301</sup> Traditionally, local governments have been understood as mere “agent[s],” “creature[s],” and “delegate[s]” of the state,<sup>302</sup> and in times of conflict between local and state governments, the supremacy of state over local authority often has been defined in particularly extravagant terms.<sup>303</sup> This means

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297. For example, as noted in Section II, Virginia’s statue statute has been amended at least ten times in its century-plus existence. *See supra* notes 132–140.

298. *See, for example, supra* notes 158–159 and accompanying text for a discussion of the unsuccessful attempts by Virginia legislators to fix the temporal gap in Virginia’s statue statute’s coverage.

299. *See supra* notes 183–184 and accompanying text.

300. *See, e.g.,* Richard C. Schragger, *The Attack on American Cities*, ACSBLOG (June 14, 2018), <http://www.acslaw.org/acsblog/the-attack-on-american-cities> [<http://perma.cc/S8K7-63JZ>] (noting that Tennessee’s retaliation against Memphis is just one example of a larger trend of “[l]egislative retaliation against progressive cities”).

301. *See* Schragger, *When White Supremacists Invade*, *supra* note 41, at 60–61.

302. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

303. *E.g.,* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062 n.9 (1980)

that intrastate preemption—the notion that a city’s authority in a particular area has been supplanted by state law—looms large in the background of any litigation about what local governments might do in the face of state law limitations.

As Section II shows, the statute statutes are badly drafted, even if one accepts their underlying purpose as legitimate: if put to the test in their current form, many may fail to provide the protections they purport to provide. Indeed, some of the statutes have already failed this test.<sup>304</sup> Setting aside the troubling intent behind the statute statutes, one might hope that their sloppy execution would deter courts from the sort of aggressive judicial intervention that will probably be required to patch some of the gaps in coverage identified in Section II of this Article.

Unfortunately, courts in recent years have been increasingly willing to entertain sweeping preemption arguments related to many other types of badly drafted state legislation that has little in common with the statute statutes besides a high degree of hostility to local control and often to specific local governments.<sup>305</sup> This phenomenon is twofold: state legislatures increasingly pass legislation that strips away or dramatically limits local government control, and state courts increasingly indulge these legislatures through an expansive approach to intrastate preemption.<sup>306</sup>

The specter of intrastate preemption is not unique to Confederate monuments or statute statutes.<sup>307</sup> Indeed, litigation involving intrastate preemption has grown increasingly common in recent years, especially in states with a sharp political divide between liberal urban centers and conservative rural expanses. In recent years, many states have seen their legislative and executive branches pass under the same party’s control,<sup>308</sup> even as local governments have sought out new ways to regulate personal and economic conduct, including smoking bans, antidiscrimination ordinances,<sup>309</sup> public broadband services, and minimum wage codes.<sup>310</sup> More generally, the nation’s growing rural-urban divide

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(discussing “the leading case” concerning “state control over city powers and city property,” *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)).

304. See, for example, *supra* note 256 and accompanying text for examples of situations where the Kentucky statute statute failed to protect prominent monuments in Louisville and Lexington.

305. See, e.g., Schragger, *American Cities*, *supra* note 33, at 1165–66 (noting several recent hostile legislative actions taken by states toward cities and local governments).

306. See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) (noting that “intrastate preemption” has become “the primary threat” to “cities’ ability to innovate”).

307. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2366 (2003) (suggesting that intrastate preemption will remain a “problematic shadow” until states amend their statutes or constitutions to “instruct courts to construe narrowly the scope of state preemption of local actions”); Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 268–70 (2000) (concluding that both express and implied preemption are invoked to foreclose and invalidate local environmental controls).

308. NICOLE DUPUIS ET AL., NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 1–5 (2017).

309. Diller, *supra* note 306, at 1114–15.

310. DUPUIS ET AL., *supra* note 308, at 6–7, 17–19.

continually raises the question of when local governments should be able to make their own decisions while creating clashes in which local governments are barred from taking actions important to local residents.<sup>311</sup>

In particular, intrastate preemption conflicts have grown particularly heated in many of the southern states with statute statutes examined in this Article.<sup>312</sup> In some of these states, local governments are particularly weak because they are among a relatively small number of jurisdictions that continue to adhere to *Dillon's Rule*,<sup>313</sup> an approach to local government distinct from the increased autonomy of the *home rule* approach.<sup>314</sup> Under Dillon's Rule, any exercise of local government power must "trace[] back to a specific legislative grant."<sup>315</sup> But the longstanding affinity of many courts in southern states, including those with statute statutes, for interpreting local authority narrowly and applying intrastate preemption broadly is noteworthy in both Dillon's Rule and home rule jurisdictions.<sup>316</sup>

All of this means that the threat of intrastate preemption in the context of state statute statutes is not merely a theoretical or hypothetical concern for local governments. Although there has been little litigation related to the opportunities for local action identified in Section II of this Article, preemption has already emerged as a central issue in conflicts over local attempts to exploit these opportunities. For example, in the litigation between the City of Birmingham and the State of Alabama over the city's Confederate monuments, Alabama has suggested that the state statute statute's preemption of local control over Confederate monuments is akin to the state's licensure of barbers and mortgage brokers, or the taxation of aviation fuel.<sup>317</sup>

As noted above, intrastate preemption doctrine is far from uniform. When state courts have construed and attempted to formalize the role and authority that local governments enjoy, they have done so in a variety of ways. Among other factors, different state legal cultures and idiosyncratic relationships between individual cities and their larger states mean that each state has its own

311. Graham, *supra* note 45; *see also* Schragger, *American Cities*, *supra* note 33, at 1164–65, 1184–1216 (arguing that the recent “explosion of preemptive legislation challenging and overriding” local controls is attributable, in part, to a deep-seated anti-urbanism inherent in American federalism).

312. *See, e.g.*, Graham, *supra* note 45 (“Like many recent [intrastate] preemption laws passed in states across the country, but especially in Southern states . . . , [the state statute statutes] pit conservative state legislatures against cities that tend to be more liberal and more diverse.”).

313. *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868) (Dillon, J.).

314. Diller, *supra* note 306, at 1124–27 (discussing the emergence of the home rule approach).

315. Schragger, *When White Supremacists Invade*, *supra* note 41, at 62–63 (citing *City of Clinton*, 24 Iowa at 475).

316. *E.g.*, Frayda Bluestein, *Is North Carolina a Dillon's Rule State?*, COATES' CANONS: N.C. LOC. GOV'T L., UNC SCH. OF GOV'T (Oct. 24, 2012), <http://canons.sog.unc.edu/is-north-carolina-a-dillons-rule-state> [<http://perma.cc/SFZ7-276F>]. For example, North Carolina courts no longer apply Dillon's Rule consistently, but neither is North Carolina a home rule state. *Id.* Nevertheless, North Carolina courts today frequently apply preemption rules that are at least “as strict, or perhaps even more strict” with respect to local governments' authority than under Dillon's Rule. *Id.*

317. Complaint at 2, *State v. City of Birmingham*, No. 01-CV-2017-903426.00 (Ala. Cir. Ct. filed Aug. 16, 2017) (motion to dismiss denied Oct. 16, 2017).

legal framework for preemption.<sup>318</sup> Moreover, even within individual jurisdictions, courts have often applied state-specific preemption doctrines inconsistently.<sup>319</sup> And thus, the chief issue, if and when states argue that statue statutes should preclude local governments from making the kinds of arguments outlined in Section II of this Article, will likely be how broadly to construe the withdrawals and limitations found in these statutes.<sup>320</sup> If the express language of the statute is ambiguous or shoddily drafted—and the latter, at least, is true of many statue statutes—then courts may turn to the following question: Should the restrictions on local action in the state statutes be interpreted so broadly as to preempt even those local government actions that the statute’s structure or text clearly seems to permit?

At first glance, this might not seem to be much of a problem for local governments, provided that whatever actions they take to modify or remove Confederate monuments are consistent with the relevant statue statute’s express terms or structure. But preemption arguments have been and may continue to be deployed by some state governments and private litigants seeking to protect Confederate monuments even when local governments take great pains to remove or modify monuments in ways that fit within the statue statutes’ express language and scope along the lines identified in Section II of this Article.<sup>321</sup> More specifically, some state governments can be expected to push back in litigation

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318. *E.g.*, Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 942–47 (2015).

319. Diller, *supra* note 306, at 1115–16 (noting that in preemption inquiries, “courts too often rely on unhelpful judicial tests” that are applied inconsistently, creating a confusing shadow over local authority).

Bearing in mind these caveats, the relevant framework for preemption arguments in the context of statue statutes is *express preemption*—the sort of preemption that occurs when a federal statute explicitly withdraws or limits specified powers from states, or when a state statute explicitly withdraws or limits powers from local governments. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–28 (2000) (defining express preemption). Preemption in the context of statue statutes is likely to be express rather than implied because the statue statutes expressly withdraw and limit local authority over protected monuments. This has been true for over a century, dating back to the early formulations of Virginia’s statue statute, which prohibited local governments (and all other persons) from interfering with or disturbing protected monuments. *See supra* notes 126–130 and accompanying text.

320. *See* Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. 293, 299 (2016) (noting that express preemption “requires courts to consider the scope of such preemption”); *see also* Nelson, *supra* note 319, at 226–27 (noting that in express preemption cases, judges must first “decide what the [preempting] clause means”).

321. The actions taken by Birmingham, and the pains that the city took to remain within the express language of Alabama’s statue statute, offer an instructive example. *See* Erin Edgemon, *AG Files Lawsuit Against Birmingham over Confederate Monument*, AL.COM (Aug. 17, 2017), [http://www.al.com/news/birmingham/index.ssf/2017/08/ag\\_files\\_lawsuit\\_against\\_birmi.html](http://www.al.com/news/birmingham/index.ssf/2017/08/ag_files_lawsuit_against_birmi.html) [http://perma.cc/ST5J-73JU] (noting Birmingham’s efforts to comply with the express language and structure of Alabama’s statue statute). Indeed, shortly before the lawsuit, even Alabama’s governor noted that it was at best “unclear if the statute” applied to the monuments in dispute. Erin Edgemon, *Group Threatens To Sue Birmingham Again over Possible Confederate Monument Removal*, AL.COM (Aug. 16, 2017), [http://www.al.com/news/birmingham/index.ssf/2017/08/group\\_threatens\\_to\\_sue\\_birming.html](http://www.al.com/news/birmingham/index.ssf/2017/08/group_threatens_to_sue_birming.html) [http://perma.cc/EW4V-FNU7]. Yet Alabama sued Birmingham the very next day, invoking intrastate preemption. *See* Complaint, *supra* note 317.

against local actions taken along the lines advanced in Section II, arguing for the broadest possible interpretation of statue statutes to prohibit local actions that are arguably inconsistent with the statutes' muddled spirits even if they comply with the statutes' actual terms.<sup>322</sup>

The central idea behind this argument, which has been and will be aimed at local governments that seek to exploit opportunities to alter or remove monuments under the statue statutes as currently drafted, is straightforward enough. However poorly drafted an individual statue statute might be, it was clearly intended to curtail local authority over Confederate monuments. Accordingly, if local officials seek to exert authority over Confederate monuments contrary to the will of some state officials, then those actions should be preempted as contrary to the statute's intent, even if the text of the statute clearly seems to permit the local government's actions.<sup>323</sup> On this view, almost any attempt by a local government to comply with the terms of statue statutes while modifying or removing monuments within their jurisdiction can be characterized as a scheme or a sham, which violates the spirit of the statute and should be overturned.<sup>324</sup> Whatever one's views may be on the merits of Confederate monuments in public places or the statue statutes that purport to protect them, there are good reasons to reject the expansive view of preemption outlined above—which is already emerging in the early litigation against local governments that have attempted to modify or move Confederate monuments.

In other contexts involving express preemption claims, courts often find that the relevant state or federal statute indicates a clear intent to preempt local or state action only in a portion of the potentially covered regulatory area. As noted above, the scope of the alleged preemption is the key inquiry in such express preemption cases.<sup>325</sup> But the preemption arguments emerging against local governments acting under the letter of the statue statutes preclude any inquiry into the scope of the alleged express preemption. Instead, they threaten a preemption unlimited in scope because it is untethered to the text of the statutes at issue. An example of intrastate preemption in another context may illustrate

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322. *E.g.*, Complaint, *supra* note 317, at 4 (arguing that Birmingham's actions were inconsistent with both the "letter and spirit" of the Alabama state statute); *see also* David A. Graham, *Memphis's Novel Strategy for Tearing Down Confederate Statues*, ATLANTIC (Dec. 21, 2017), <http://www.theatlantic.com/politics/archive/2017/12/memphis-confederate-statues/548990/> [http://perma.cc/5WZK-SDK8] (arguing that Memphis's strategy for removing monuments, along the same lines suggested in Section II of this Article, "raise[d] . . . uncomfortable questions" because it was "designed to follow the letter of the [statue statute] while brazenly flouting its spirit").

323. *See, e.g.*, Complaint, *supra* note 317, at 2–3 (arguing that plywood coverings violate the law prohibiting monuments from being "relocated, removed, altered, renamed, or otherwise disturbed").

324. *See, e.g.*, Poe, *Forrest Family*, *supra* note 119 (quoting from the Sons of Confederate Veterans' petition to the Tennessee Historical Commission after Memphis's removal of certain statues); *see also* City of Memphis v. Walter Law, APD No. 04.47-148176J (Tenn. Historical Comm'n Jan. 8, 2018) (reviewing arguments but denying the petition as moot). A request for review of the *Walter Law* decision was denied. *Tennessee Heritage Protection Act*, TENN. DEPT' ENV'T & CONSERVATION, <http://www.tn.gov/environment/about-tdec/tennessee-historical-commission/redirect--tennessee-historical-commission/tennessee-heritage-protection-act.html> [http://perma.cc/4NV5-7XT5] (last visited Nov. 1, 2018).

325. Wiseman, *supra* note 320, at 299.

this point. Recent conflicts over local controls on hydraulic fracturing for oil and gas illustrate the problems with using preemption to paper over coverage gaps in statutes. The conflict over the extent of intrastate preemption over local fracking controls is a useful example because both fracking and statute statutes involve local governments' attempts to exercise control over land use and the built environment—an area where local governments have traditionally enjoyed broad discretion.<sup>326</sup>

Combined with advances in directional drilling, fracking has enabled tremendous growth in the production of U.S. natural gas, even as concerns about the side effects of fracking on the natural and human environments have led hundreds of local governments to try to limit fracking activity or even ban fracking outright.<sup>327</sup> This, in turn, has led to litigation regarding the alleged preemption of these local limitations by state law, with varying outcomes across different jurisdictions.<sup>328</sup> For example, many courts have been hesitant to conclude that statutes preempting local control in a particular regulatory area have preempted all relevant local controls without express language indicating such a broad scope.<sup>329</sup> Accordingly, courts have frequently allowed substantial local restrictions on fracking activity to remain in place, including some outright bans.<sup>330</sup>

Perhaps more importantly, some continued local control over fracking activity has been tolerated even in states that have relatively restrictive approaches to local government authority, where courts have struck down local fracking bans on preemption grounds.<sup>331</sup> Even in such jurisdictions, when courts conclude that local control over fracking has been preempted, they often do so in limited terms, thereby preserving the possibility for limited future local action.<sup>332</sup> For example, local governments in these jurisdictions can amend their zoning

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326. See ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS* 45 (4th ed. 2013) (“Public land use regulation in the United States traditionally has been mainly the province of local governments.”).

327. Outka, *supra* note 318, at 928–35.

328. *Id.* at 975 (“[L]ocal governments’ legal authority over fracking remains in flux, remains a source of uncertainty and controversy, and will likely continue to vary meaningfully state by state.”).

329. *E.g.*, Wiseman, *supra* note 320, at 309. A clear example of this is seen in *Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014), in which New York courts had to confront the extent of preemption present in the state’s Oil, Gas and Solution Mining Law, N.Y. ENVTL. CONSERV. LAW § 23-0303 (McKinney 2018), with respect to a town’s decision to ban fracking activity. *Wallach*, 16 N.E.3d at 1188. The relevant statute provided that it “shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries,” N.Y. ENVTL. CONSERV. LAW § 23-0303.2, which the court held was “most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, [and] not zoning ordinances that [might] restrict or [altogether] prohibit certain land uses,” *Wallach*, 16 N.E.3d at 1195–97. Accordingly, the court concluded that it could not hold that the relevant clause “evinces a clear expression of preemptive intent” over local zoning laws. *Id.* at 1203.

330. *E.g.*, *Wallach*, 16 N.E.3d at 1203.

331. See, *e.g.*, *Ne. Nat. Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011).

332. See, *e.g.*, *id.* (holding that the city’s “complete ban on fracking” was preempted by the state’s expressly preemptive statutory scheme, while noting that the “legal issue in [the] case is very narrow”).

ordinances to prohibit *some* drilling and other fracking activity near schools, hospitals, houses of worship, and residential neighborhoods.<sup>333</sup> Such room for local control over land use and the built environment remains even in the face of statutory language that is far clearer, more comprehensive in its scope, and thus a better platform for preemption arguments than the statute statutes examined in this Article.

The space that remains for local governments to regulate fracking activity, even when local bans have been preempted, suggests that at least some local actions taken under the opportunities outlined in Section II of this Article will survive the preemption gauntlet. Stripping away a local government's authority to regulate the use of land and the built environment is a far different thing than taking away its ability to set a minimum wage or expand medical leave. The latter strikes at local governments' ability to innovate,<sup>334</sup> but the former strikes at the heart of what local governments traditionally do.<sup>335</sup> At the most basic level, the statute statutes are fundamentally about the control of land, which has traditionally been at the heart of local governments' control. Indeed, many of the monuments in question either are the property of local governments or are built on property that belongs to local governments. In such cases, what the statute statutes seek to control is not merely local governments' ability to control private property but also local governments' ability to control *their own property*.<sup>336</sup>

Nevertheless, the boundaries of intrastate preemption doctrine have expanded in unpredictable ways in recent years, which means that courts in some—perhaps many—jurisdictions may conclude that the relevant statute statutes preempt opportunities for local action against Confederate monuments. Moreover, even if preemption does not rear its unpredictable head against the opportunities for local action contemplated in Section II, it is possible that state legislatures in some jurisdictions will revise the statute statutes to try to close off some of these opportunities. But neither possibility should deter local governments from challenging the statute statutes and making use of the opportunities discussed in this Article. In fact, challenging the statute statutes along the lines suggested in Section II might be the best way to enhance the constitutional arguments against the statutes reviewed in Part I.B, which would clear out the statute statutes root and branch altogether.

At this point, it is worth remembering how the statute statutes hide their practical flaws and constitutional vulnerabilities behind their structural

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333. See, e.g., John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995, 1026–30 (2013) (discussing Morgantown's response after its ban on fracking was struck down in *Northeast Natural Energy*).

334. See, e.g., Diller, *supra* note 309, at 1114–18.

335. See ELLICKSON ET AL., *supra* note 326, at 45.

336. See, e.g., TENN. CODE ANN. § 4-1-412(b)(1) (West 2018) (limiting protection to those monuments that are either themselves public property or located on public property). The relationship between public property and the statute statutes provides what may be a significant and recurring coverage gap across several of the statute statutes discussed above. For an example related to the Tennessee statute statute, see *supra* notes 178–179 and accompanying text.

complexity,<sup>337</sup> their sweeping references to the military history of the United States, and their frequent discussion of monuments to veterans of other conflicts.<sup>338</sup> It takes a substantial amount of time and energy to scrub away the veneer, revealing the gaps in the statue statutes' coverage, their special solicitude for monuments to the Confederacy, and the fraught history of Confederate monuments in public spaces. A series of coordinated and thoughtful challenges to the statue statutes using the opportunities outlined in Section II of this Article, whether or not the challenges are ultimately successful, has the potential to inform the public of these flaws in a more direct way, thereby changing perceptions and attitudes toward Confederate monuments in public places.<sup>339</sup>

In addition, a coordinated series of challenges making use of the opportunities identified in this Article may throw the constitutional infirmities of the statue statutes into stark relief. Recall that even some of the authors of the constitutional arguments against statue statutes have expressed uncertainty about the likely success of those arguments against the statutes as currently drafted,<sup>340</sup> in part because Confederate monuments still enjoy widespread public support.<sup>341</sup> But if state legislatures revise or state courts construe the existing statue statutes in ways that foreclose any opportunity for local control over Confederate monuments in public spaces, then this support may shift.

When statue statutes and the monuments they protect are justified primarily by gauzy references to a selectively remembered past, it may be difficult to appreciate the harms they have imposed on those who have long faced institutionalized discrimination. But forcing a defense of statue statutes on preemption grounds, even if the underlying challenge is unsuccessful, may help reframe the debate. An expansive approach to preemption in this context reveals that a fight over statue statutes and the monuments they protect is not really about how we remember some distant Lost Cause, but instead about how we exercise power and control over our built environment in the present. Accordingly, local governments in states with statue statutes that wish to alter or remove Confederate monuments have much to gain by exploiting the weaknesses of the statue statutes identified in this Article. If such local governments succeed in the short term—and there are many reasons to think they might—then they will expose the many flaws of the statue statutes while altering or removing at least some Confederate monuments. But even if their efforts are thwarted on preemption grounds, local governments that challenge statue statutes may help us all to understand what is really at stake when we

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337. Schwartzman & Tebbe, *supra* note 49; *see also supra* notes 49–50, 105–116 and accompanying text (discussing the complexities associated with local governments capitalizing on perceived flaws of state statue statutes to ignite change).

338. *See supra* notes 128, 141, 143, 164–165, 197–198, 219–222, 235–236, 244, 257–259, 265–270 and accompanying text (gathering references to U.S. military monuments in statue statutes while noting the centrality of protecting Confederate monuments to these statutes).

339. *See supra* notes 107–109 (arguing that even unsuccessful constitutional challenges to statue statutes may change public perception of statue statutes).

340. *E.g.*, Kovvali, *supra* note 82, at 83.

341. *See supra* notes 27–32 and accompanying text.

consider Confederate monuments in public spaces.

#### CONCLUSION

Memory, especially the shared memory that public monuments help to build, is a tricky thing. We may hope that our individual memories were given to us “for some wise purpose,” and we may wish to build our shared memory wisely as well—to use it, perhaps, as a “mirror in which we may discern the dim outlines of the future,” so that we may make that future more tolerant and just.<sup>342</sup> But the shared memory that we construct together can also distort what came before, obscuring what was truly brave and virtuous and casting a false light on the errors and evils of the past.<sup>343</sup> By seeking to preserve Confederate monuments in places of public honor, the statue statutes represent just such a misuse of shared memory. These statutes reinforce a one-sided monumental vision of history that has supported recurring patterns of institutionalized racism and violence, and they restrict the ability of local governments to redress these historical wrongs and present the past in a more honest and accurate light.

To date, the statue statutes have escaped widespread challenges, in part because the statutes have been described as nearly invulnerable fortresses that local governments cannot hope to penetrate. This conventional wisdom about statue statutes is incorrect. Local governments have more freedom to alter or remove Confederate monuments in public places under existing statue statutes than many have thought and reported. They should be encouraged to challenge the statue statutes by pursuing opportunities that recur across different versions of the statutes as well as avenues for local action that are unique to individual statutes. When asked to resolve these challenges, courts should not bar these opportunities for local action by adopting overly aggressive interpretations of intrastate preemption doctrine. Nor should state legislatures seek to close off these opportunities for local action by attempting to repair the fundamentally flawed statue statutes. Finally, when local governments seek to act against the statue statutes, they should do so in coordinated fashion, framing their challenges to highlight the statutes’ constitutional vulnerability and working to hasten the day when these statutes can be swept away altogether.

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342. Frederick Douglass, Speech at the Thirty-Third Anniversary of the Jerry Rescue 2, 17 (1884) (transcript available in the Library of Congress and on file with author).

343. *See id.* (worrying that “we are far more likely to forget too soon, than to remember too long, the history of the great American conflict with slavery,” thereby losing a record of “the errors and evils of the past” as well as “the courage and the moral heroism” with which these evils were met).