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## Grey State, Blue City: Defending Local Control Against Confederate “Historical Preservation”

Sage Snider

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# Grey State, Blue City: Defending Local Control Against Confederate “Historical Preservation”

## ABSTRACT

*Confederate monuments have become lightning rods across the American landscape. While these ubiquitous symbols have spread Lost Cause propaganda for over one hundred years, they have also instigated unprecedented protest and violence since the 2015 Charleston massacre, 2017 Charlottesville rally, and 2020 George Floyd murder. In response, southern state legislatures have passed preemptory “statue statutes,” laws that obstruct left-leaning cities from removing Confederate monuments. This Note compares the political and legal strategies cities and citizens have used to overcome these legal barriers, both in opposition to individual monuments and statue statutes themselves. Using Tennessee’s Historical Commission waiver process as a case study, this Note reveals how commission-based statue statutes act as objective façades disguising partisan bans on Confederate monument removal. Therefore, this Note urges that cities shift their energy from seeking waivers against individual monuments to publicly challenging historical commissions and statue statutes so that citizens can regain legal pathways to peacefully and safely remove Confederate monuments.*

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The most politically conservative states in the United States are at war with their left-leaning cities.<sup>1</sup> Urban residents and municipal governments routinely battle with governors and state legislators over mask mandates, voting rules, police budgets, worker protections, discrimination policies, and more.<sup>2</sup> Some of these conflicts have manifested in protest—even violence—over a ubiquitous feature of the built environment: the hundreds of Confederate monuments that stand at courthouses, state capitols, schools, parks, and squares.<sup>3</sup> These monuments have always done more than make claims over history; most were intended to sanction racial segregation, intimidation, and disenfranchisement.<sup>4</sup> Nowadays, many are located in diverse communities that condemn what the monuments express.<sup>5</sup> However,

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1. Ronald Brownstein, *‘Breaking Point’: Why the Red State/Blue City Conflict Is Peaking over Masks*, ATLANTA VOICE (Aug. 17, 2021), <https://theatlantavoice.com/breaking-point-why-the-red-state-blue-city-conflict-is-peaking-over-masks/> [https://perma.cc/WXE3-GL85].

2. *Id.*

3. See S. POVERTY L. CTR., WHOSE HERITAGE? (2022), [https://docs.google.com/spreadsheets/d/1W4H2qa2THM1ni53QYZftGob\\_k\\_Bf9HreFAtCERfjCIU/edit?pli=1#gid=1205021846](https://docs.google.com/spreadsheets/d/1W4H2qa2THM1ni53QYZftGob_k_Bf9HreFAtCERfjCIU/edit?pli=1#gid=1205021846) [https://perma.cc/BQ9L-UUR2] (select “Symbol Type Count By State - Live” tab) [hereinafter SPLC DATA]. If you include the names of buildings and towns, the number of Confederate tributes ranges in the thousands. *Id.*; see also *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [https://perma.cc/XA63-EKEQ] (click “Map and findings”); Josh Bergeron, *Confederate Group Contests Public Safety Exception After Protests, Riots Involving Monuments*, SALISBURY POST (June 29, 2020, 12:00 AM), <https://www.salisburypost.com/2020/06/29/confederate-group-contests-public-safety-exception-after-protests-riots-involving-monuments/> [https://perma.cc/S6X9-A5LF].

4. Zachary Bray, *From ‘Wonderful Grandeur’ to ‘Awful Things’: What the Antiquities Act and National Monuments Reveal About the Statue Statutes and Confederate Monuments*, 108 KY. L.J. 585, 589 (2020).

5. See, e.g., Antonio Olivo, *After Charlottesville, Va. Democrats See Opening to Change 114-Year-Old Monuments Law*, WASH. POST (Aug. 25, 2017), [https://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?tid=ss\\_tw](https://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?tid=ss_tw)

state legal restrictions still force cities to protect and maintain them by obstructing local removal or alteration efforts.<sup>6</sup>

Heritage groups erected many of these monuments as backlash against assertions of civil rights to spread the historically unfounded “Lost Cause” narrative that the Civil War “was not about slavery,” but rather preserving states’ rights and a “Southern way of life.”<sup>7</sup> Many were created in the 1880s and 1890s as “[r]econstruction was being crushed,” though monument erection peaked between 1900 and 1920 as segregation, disenfranchisement, and lynching resurged with the Ku Klux Klan (KKK).<sup>8</sup> Construction also peaked during the Civil Rights era from the mid-1950s to the late 1960s and has subsequently continued, rising slightly in the 2000s.<sup>9</sup> Even today, the monuments

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[<https://perma.cc/E89W-975X>] (quoting history Professor Brian Daugherty who explained that “most of the localities [trying to remove monuments] are Democratic and in many cases have an African American majority . . . [w]hereas, the state government is still rather conservative”). For example, in the predominately “blue” Nashville, a formerly whites-only, but now racially mixed park, still maintains a “Lost Cause” statue. See Sage Snider, *The Elephant in the Park: Nashville’s Least-Talked-About Monument*, SAGESNIDER.COM (Aug. 23, 2017), <http://www.sag-esnider.com/confederatemonument/> [<https://perma.cc/4JEK-GHRR>].

6. See, e.g., Kyle Gassiott, *State of Alabama Fights Local Community over Confederate Statue*, MARKETPLACE (Mar. 14, 2018), <https://www.marketplace.org/2018/03/14/life/lawsuit-over-protest-confederate-statue-alabama-heads-court/> [<https://perma.cc/WZE3-W3ZU>] (quoting state Democratic representative Juandalynn Givan that “the law places an undue burden on communities because it forces them to keep a monument but doesn’t set aside any money for upkeep”). See generally Brian Palmer & Seth Freed Wessler, *The Costs of the Confederacy*, SMITHSONIAN MAG. (Dec. 2018), <https://www.smithsonianmag.com/history/costs-confederacy-special-report-180970731/> [<https://perma.cc/LWG9-NM8U>] (“[O]ver the past ten years, taxpayers have directed at least \$40 million to Confederate monuments . . . and to Confederate heritage organizations . . . . ‘The state is giving the stamp of approval to these Lost Cause ideas.’”). Cities also pay for “around-the-clock” police presence. David A. Graham, *Local Officials Want to Remove Confederate Monuments—but States Won’t Let Them*, ATLANTIC (Aug. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351/> [<https://perma.cc/3P5R-JDHK>] (quoting Birmingham’s mayor who argued that he does not believe monuments “should have a place of prominence on public space that African Americans, the Jewish community, the Hispanic community, and all minorities [use] [given] that it’s an affront to [support] by their tax dollars”).

7. Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPPLEMENT 15, 17–18 (2018) (“[C]onfederate monuments worked and still work[] to normalize the Lost Cause view (a view almost entirely . . . discredited by historians) and proliferate messages of Black inferiority.”); see David Lohr, *This Is Why Another Confederate Statue Won’t Come Down in Tennessee*, HUFFPOST (May 31, 2018, 9:01 AM), [https://www.huffpost.com/entry/tennessee-confederate-statues\\_n\\_5b0f1b77e4b05ef4c22a7796](https://www.huffpost.com/entry/tennessee-confederate-statues_n_5b0f1b77e4b05ef4c22a7796) [<https://perma.cc/9BTS-KHEP>] (“They were an in-your-face white supremacist reaction to [periods advancing civil rights for Black people].”). See generally KAREN L. COX, NO COMMON GROUND: CONFEDERATE MONUMENTS AND THE ONGOING FIGHT FOR RACIAL JUSTICE (2021).

8. Palmer & Wessler, *supra* note 6; see *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 3; SPLC DATA, *supra* note 3 (select “Whose Heritage Master” tab).

9. *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 3; SPLC DATA, *supra* note 3 (select “Whose Heritage Master” tab); see also Palmer & Wessler, *supra* note 6.

instigate conflict over values and power as culture war icons and rallying points for white supremacists like the alt-right, KKK, and Charleston shooter Dylann Roof.<sup>10</sup>

Recently, cities and citizens have begun to aggressively oppose these statues. The 2015 Charleston massacre, the 2017 “Unite the Right” rally, and the 2020 George Floyd murder especially reinvigorated removal efforts.<sup>11</sup> For many, the Charleston massacre was the tipping point to finally confront public Confederate symbols in ways not seen in this generation.<sup>12</sup> Charlottesville similarly turned these statues into “lightning rods,” creating a newfound desire as well as opportunities for local and state politicians to effectuate removal.<sup>13</sup> After Floyd’s murder, many citizens expressed frustration with “government inaction—or continued government reinforcement of racist ideals”—by toppling or defacing statues, at risk to their own freedom and lives.<sup>14</sup> These government actions and public protests have

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10. Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1397 (2020) [hereinafter *Life and Death*]; see Helen Lewis, *History Was Never Subject to Democratic Control*, ATLANTIC, <https://www.theatlantic.com/ideas/archive/2021/08/bristol-colston-statue-culture-war-history/619671/> [https://perma.cc/85UC-WDWH] (Aug. 10, 2021, 3:02 PM).

11. See *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 3. In 2017, the Charlottesville city council’s attempt to remove a Confederate statue led to a neo-Nazi rally resulting in mass injury and one fatality among counter protesters. See, e.g., Graham, *supra* note 6. In May 2020, unarmed Black man George Floyd died after an officer knelt on his neck for nine minutes. Jason Lemon, *Majority of Americans Now Support Removing Confederate Statues, Up 16 Points from 2018: Poll*, NEWSWEEK (July 21, 2020, 11:53 AM), <https://www.newsweek.com/majority-americans-now-support-removing-confederate-statues-16-points-2018-poll-1519408> [https://perma.cc/7JUF-WPLZ].

12. See Naomi Shavin, *States Are Using Preservation Laws to Block the Removal of Confederate Monuments*, ARTSY (Apr. 24, 2018, 5:20 PM), <https://www.artsy.net/article/artsy-editorial-states-preservation-laws-block-removal-confederate-monuments> [https://perma.cc/K8KY-W35N]; see also, e.g., Kristi W. Arth, *The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law*, 56 GONZ. L. REV. 1, 14 (2020) (explaining that the Charleston shooting was “a tipping point” after which a university president removed two monuments).

13. See Erik Ortiz, *Charlottesville Mayor Changes Position, Agrees with Confederate Statue Removal*, NBC NEWS (Aug. 18, 2017, 3:37 PM), <https://www.nbcnews.com/news/us-news/charlottesville-mayor-changes-position-agrees-confederate-statue-removal-n793931> [https://perma.cc/SM26-HPJQ] (discussing Charlottesville’s Mayor Mike Signor’s change from believing in preservation as a “reminder” of slavery, to calling for the removal of a “twisted token” of Nazis, the KKK, and the alt-right); see also Olivo, *supra* note 5.

14. *Life and Death*, *supra* note 10, at 1398–1400; see also Andrew Lawler, *The Black, Millennial Mayor Who Tore Down His City’s White Monuments*, POLITICO (Aug. 9, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/08/09/richmond-mayor-monuments-392706> [https://perma.cc/XT3K-8XZL] (describing an incident in which a protester was almost killed in an attempt to pull down a Confederate monument).

successfully removed monuments, changed flags, and renamed schools and roads.<sup>15</sup>

However, removal efforts have triggered backlash.<sup>16</sup> In response to opposition, many southern states have issued so-called “statue statutes,” which obstruct local efforts to remove or challenge Confederate monuments.<sup>17</sup> Many southern cities therefore face an escalating crisis: strong, mass, local efforts to challenge monuments blocked by state laws, judges, and politicians. Faced with ever-decreasing legal options to challenge narratives propagated by these statues, local, liberal communities are left with few solutions beyond vandalism.<sup>18</sup>

This Note, therefore, reviews and proposes alternative paths to removal. It describes and contextualizes statue statutes and then weighs strategies for challenging individual monuments and the laws blocking their removal. Finally, it examines Tennessee’s removal process and argues that cities should challenge commission-based statue statutes by exposing how they act as objective façades for partisan bans on removing Confederate monuments.

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15. *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 3 (reporting that 114 Confederate symbols and forty-eight monuments were removed within three years of the Charleston massacre); see Joel Shannon, *Report Counts How Many Confederate Statues Have Been Removed Since George Floyd’s Death. It’s a Lot*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/08/12/george-floyd-confederate-monuments-splc/3356819001/> [<https://perma.cc/F48E-633M>] (Aug. 15, 2020, 4:15 PM) (discussing removal of thirty-eight Confederate monuments within three months of George Floyd’s death).

16. See Arth, *supra* note 12, at 5.

17. See, e.g., *id.* at 5, 15 n.89, 15–16.

18. See, e.g., Jonathan M. Katz, *Protester Arrested in Toppling of Confederate Statue in Durham*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/protester-arrested-in-toppling-of-confederate-statue-in-durham.html> [<https://perma.cc/NW53-XSWB>] (“Sheriff’s deputies in this predominantly liberal city . . . began arresting protesters they said tore down a statue honoring pro-slavery secessionists, while the state’s Democratic governor pledged to repeal a state law that had prevented such monuments from being removed through legal means.”).

## I. CONTEXT OF HISTORIC-COMMISSION STATUTE STATUTES

A. *Statue Statutes*

Statue statutes obstruct local efforts to remove Confederate monuments.<sup>19</sup> While not the only legal barriers to removal, these statutes are arguably the strongest.<sup>20</sup> Currently, eight states—all in the South—have monument-protection laws: Alabama, Georgia, Mississippi, North Carolina, South Carolina, Virginia, and Tennessee.<sup>21</sup> Even when facially neutral, legislators have passed these laws with the goal of protecting Confederate monuments—as their timing often makes clear.<sup>22</sup> For example, North Carolina passed a law requiring that a “Historical Commission” approve monument relocation three months after the Charleston shooting.<sup>23</sup> Past use of these laws has also primarily been to protect Confederate monuments from hostile local governments.<sup>24</sup> Many of these laws directly forbid alteration or removal,

19. See Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 659 (2019) [hereinafter *Etched in Stone*].

20. See generally *id.* (explaining how federal and local historical preservation, environmental laws protecting cultural monuments, visual artists rights acts, preservation easements, and demolition delay ordinances can create procedural barriers to removing public monuments). For a recent case showing how removal might work without a “statue statute,” see *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494 (E.D. La. 2017).

21. *Life and Death*, *supra* note 10, at 1443. Alabama, North Carolina, Tennessee, and Georgia have enhanced monument protection since 2015. See *id.*; Hearst Television, *As Confederate Monuments Come Down, Some States Have Laws that Prevent Their Removal*, TELEGRAPH (July 10, 2020), <https://www.thetelegraph.com/news/article/As-Confederate-monuments-come-down-some-states-15382654.php> [<https://perma.cc/6SHL-9UYX>]. Texas, Florida, Kentucky, Louisiana, and Arkansas are considering enacting similar statutes. Hearst Television, *supra*.

22. See *Etched in Stone*, *supra* note 19, at 660, 667 (arguing there is “no question” North Carolina’s facially neutral statute—passed while debating removal of a Confederate statue—seeks to prevent Confederate monument removal); see also, e.g., Dakin Andone, *NAACP Slams Alabama Governor’s Campaign Ad About Law Protecting Confederate Monuments*, CNN (Apr. 21, 2018, 3:15 PM), <https://www.cnn.com/2018/04/21/us/alabama-confederate-monuments-kay-ivey-campaign/index.html> [<https://perma.cc/9T8T-5MVQ>] (describing how the NAACP challenged the governor’s claim that Alabama’s Memorial Preservation Act is “inclusive to all monuments, not just Confederate ones”). However, Virginia’s 1904 statute specifically targets *Confederate* monuments. Act of Feb. 19, 1904, 1904 Va. Acts 62 (current version at VA. CODE ANN. § 15.2-1812 (West 2020)); see Zachary A. Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes”*, 91 TEMP. L. REV. 1, 23–27 (2018). South Carolina’s 2000 Heritage Act also specifies certain monuments. S.C. CODE ANN. § 10-1-165(A) (2022).

23. See Kasi E. Wahlers, *North Carolina’s Heritage Protection Act: Cementing Confederate Monuments in North Carolina’s Landscape*, 94 N.C. L. REV. 2176, 2184 (2016).

24. See *Life and Death*, *supra* note 10, at 1443; see also Bray, *supra* note 22, at 10 n.53 (“[A] close examination of the statue statutes’ histories . . . shows that they were designed with a



while others create indirect procedural barriers.<sup>25</sup> Some are more creative: Georgia recently banned moving monuments to museums and allowed local governments to sue vandals for three times the value of damages.<sup>26</sup> At least three states—North Carolina, Alabama, and Tennessee—require that appointed committees approve changes.<sup>27</sup>

### B. Political and Historical Context

These historical commission-based statue statutes are a recent reaction to popular resistance, but they fit within a larger context. States have long used historical preservation, state commissions, and preemption to undermine local control and, often, defend racist policies.

#### 1. Historical Preservation Law

Americans have a long tradition of using historical preservation to whitewash US history and contemporary politics. From its beginnings, US “historic[al] preservation” has been tied to defending Confederate mythology.<sup>28</sup> For example, the United States’ first statewide historic preservation organization used sites’ symbolism to counter post-Civil War social and political change and “legitimate Virginia’s traditions of white supremacy.”<sup>29</sup> Similarly, the nation’s first government-supported planning and zoning ordinance created a

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near-exclusive focus on public monuments to the Confederacy and a desire to strip control from local governments.”).

25. See Hearst Television, *supra* note 21. Compare GA. CODE ANN. § 50-3-1 (2021) (forbidding any removal or alteration of public monuments to the “Confederate States of America”), with S.C. CODE ANN. § 10-1-165(B) (2022) (prohibiting changes without two-thirds of the state general assembly approving), held unconstitutional by Pinckney v. Peeler, 862 S.E.2d 906 (2021).

26. Hearst Television, *supra* note 21.

27. ALA. CODE §§ 41-9-230 to -237 (2022); TENN. CODE ANN. § 4-1-412 (2022); N.C. GEN. STAT. § 100-2.1 (2021). In 2002, Kentucky’s governor—surrounded by Sons of Confederate Veterans members—signed a law creating a similar “Kentucky Military Heritage Commission.” See W. Davis Riddle, *How Devolved Is Too Devolved?: A Comparative Analysis Examining the Allocation of Power Between State and Local Government Through the Lens of the Confederate Monument Controversy*, 53 GA. L. REV. 367, 385–86 (2018). England’s conservatives have also recently implemented procedural barriers. See Lewis, *supra* note 10.

28. See, e.g., James M. Lindgren, *Association for the Preservation of Virginia Antiquities*, ENCYC. VA. (Jan. 31, 2021), <https://encyclopediavirginia.org/entries/association-for-the-preservation-of-virginia-antiquities/> [https://perma.cc/A8YG-2X4Q].

29. *Id.* Led by “Old South traditionalists” and “Lost Cause writers,” the group initially formed to acquire a weapons storehouse previously used to deter slave rebellions and assist Confederates. *Id.* It is probably not a coincidence that the myth-making efforts of the Association for the Preservation of Virginia Antiquities (APVA) started around the same time as these monuments—which similarly “preserve” a politically motivated view of Confederate history. See *id.*

“historic district” in Charleston, South Carolina, which sought to actualize an imagined appearance of a pre-1860, slave society “golden age,” while excluding African Americans from contemporary urban spaces.<sup>30</sup> Like the statue statutes that soon followed, these mythmaking efforts used historical preservation to perpetuate “Lost Cause” ideology in the service of contemporary white supremacy.<sup>31</sup>

Today, a wide variety of historical preservation laws at the federal and state level create procedural barriers to monument removal.<sup>32</sup> While these barriers do not bar removal, they discourage local efforts by ensuring any effort is “costly, controversial, and time-consuming.”<sup>33</sup> For example, monuments can receive procedural protection through the National Register of Historic Places, which requires federal agency approval for removal.<sup>34</sup> Currently, the Register gives this enhanced protection to many Confederate monuments (listed prior to the recent statue statute revival) and underrepresents monuments that honor minorities.<sup>35</sup> At the state level, governments can also incentivize preservation through conservation easements or “restrictive covenants,” which similarly impose burdensome removal

30. Stephanie E. Yuhl, *Charleston Is Largely a Matter of Feeling*, in GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 199, 214 (Randall Mason & Max Page eds., 2d ed. 2020). Many early land use regulations enforced segregation explicitly, and later indirectly, by restricting certain changes. See Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 754–58 (2020). Today, historic preservation zoning laws can restrict development, raise prices, exclude lower-income people, and undermine the vitality of cities to serve elite interests. J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 666–69 (2012).

31. Conventional accounts of historical preservation often begin with Mount Vernon in 1853 and New York’s Pennsylvania Station in 1963. Max Page & Randall Mason, *Rethinking the Roots of the Historic Preservation Movement*, in GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES, *supra* note 30, at 3, 6–7.

32. See generally *Etched in Stone*, *supra* note 19. Local historic preservation laws can also function similarly through mechanisms like landmark commissions but have rarely prevented Confederate monument removal. *Id.* at 669.

33. *Id.* at 650, 659 (using Monumental Task Comm., Inc v. Foxx, 259 F. Supp. 3d 494 (E.D. La. 2017), to show how preservation organizations can discourage Confederate monument removal using the National Historic Preservation Act by listing monuments to make removal difficult or by claiming removal processes were inadequate).

34. See *Etched in Stone*, *supra* note 19, at 645.

35. See *id.* at 643–44 (finding 101 listings with the word “Confederate” in the title, most of which were built between 1890 and 1950 and were listed between 1975 and 1997); Sara Bronin, Opinion, *How to Fix a National Register of Historic Places that Reflects Mostly White History*, L.A. TIMES (Dec. 15, 2020, 3:30 AM), <https://www.latimes.com/opinion/story/2020-12-15/historic-preservation-chicano-moratorium-national-register> [<https://perma.cc/HKW5-L2D4>] (“Less than 8% of sites on the National Register are associated with women, Latinos, African Americans or other minorities.”). Likewise, many antebellum plantation homes have been restored while slave quarters have “almost entirely disappeared.” Byrne, *supra* note 30, at 682.

procedures that enhance state control.<sup>36</sup> For example, Maryland held conservation easements over three Confederate monuments in Baltimore which forced the city to get approval for any changes from the Maryland Historical Trust.<sup>37</sup> However, statue statutes can differ from these procedural barriers by targeting Confederate monuments, granting full protection regardless of historic significance, and by banning removal outright.<sup>38</sup>

## 2. State Commissions

Some statue statutes coopt historical commissions, thereby obstructing removal—a strategy that states have used to undermine local control since the mid-nineteenth century.<sup>39</sup> For example, in the 1870s, many states transferred city functions to unelected commissions.<sup>40</sup> Some states reacted to this actual or feared “tyranny of the legislature” by adding clauses to their constitutions that prohibited special, appointed commissions from interfering with municipal affairs.<sup>41</sup> These amendments show that cities have long feared state-appointed commissions.<sup>42</sup>

36. See *Etched in Stone*, *supra* note 19, at 684–85; Associated Press, *Virginia Supreme Court Rules the State Can Remove Statue of Robert E. Lee*, NPR, <https://www.npr.org/2021/09/02/1033595859/virginia-supreme-court-remove-statue-robert-e-lee-confederate-richmond> [<https://perma.cc/WFU8-Q8WD>] (Sept. 2, 2021, 10:57 AM) (explaining how in 1887 and 1890, “restrictive covenants” gave states control over local monuments).

37. See *infra* Section II.A.3. However, unlike commission-based statutes (which require approval unconditionally for all monuments), this approval requirement was imposed as a condition of the state funding maintenance on these statues. *Etched in Stone*, *supra* note 19, at 684.

38. See, e.g., GA. CODE ANN. § 50-3-1 (2021) (specifically forbidding any removal or alteration of publicly owned monuments in honor of the “Confederate States of America”).

39. See Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 9–10 (1990). “Commission” structures operate under many names and for many purposes, but this Note refers to non-elected officials granted temporary or permanent advisory or regulatory power by executive or legislative officials. See Colton C. Campbell, *Creating an Angel: Congressional Delegation to Ad Hoc Commissions*, 25 CONG. & PRESIDENCY 161, 161 (1998).

40. For example, in Michigan, a state law gave control over Detroit’s water to an appointed board controlled by the state legislature. See *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44 (1871); see also, e.g., *People ex rel. Wood v. Draper*, 15 N.Y. 532 (1857) (transferring control over New York City police forces to governor-appointed commissioners).

41. See HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 45–48 (1916). States include Pennsylvania, New Jersey, Colorado, California, Montana, Wyoming, and Utah. *Id.*

42. See Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1380–81 (2014) (“Antipathy toward state degradation of local autonomy has been embodied in constitutional prohibitions on special state commissions that

More recently, legislators have used commissions to defer and scapegoat controversial decisions during social crises.<sup>43</sup> By delegating, legislators can forestall action or mask their contributions to avoid individual accountability.<sup>44</sup> Critics also claim commissions are (a) undemocratic because they are unrepresentative, biased, unelected, and secretive; and (b) financially inefficient—especially when legislative bodies ignore their recommendations.<sup>45</sup>

### 3. Preemption

The new wave of statue statues also fits within a trend of red states controlling blue cities via preemption—the legal principle that a higher authority of law trumps a lower authority, like state law superseding local regulation.<sup>46</sup> While state preemption is not new, this particular preemption trend likely started in the early 1990s with lobbying efforts by the tobacco industry and National Rifle Association supported by conservative model-legislation supplier, the American Legislative Exchange Council (ALEC).<sup>47</sup> These conservative efforts are possible because local governments are creatures of state law, and states, therefore, exercise plenary authority over them.<sup>48</sup> Between Reconstruction and the mid-twentieth century, courts determined the

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assume municipal functions . . . [and] broad interpretations of municipal affairs within which localities may exercise independence and . . . trump conflicting state statutes.”).

43. See Campbell, *supra* note 39, at 162–68, 177. For example, Congress has distanced itself from politically risky decisions using social security, military base closure, and Medicare commissions—although that delegation made it possible to vote against, rather than for, their constituents’ interests. See *id.* at 177.

44. *Id.* at 162–68 (discussing “blame avoidance” and “obfuscation”).

45. JACOB R. STRAUS, CONG. RSCH. SERV., R40076, CONGRESSIONAL COMMISSIONS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 7 (2022). The South has also used voter registration boards “dominated by ‘party hacks’” to set up rules to prevent the poor, working class, and minorities from voting. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 47–49 (1974) (discussing local voting registrars appointed by Jim Crow state governments).

46. See *Etched in Stone*, *supra* note 19 (“It could be argued that these state laws are not even really historic preservation laws, but preemptive laws designed to remove decision-making authority from local governments.”); see also David A. Graham, *Red State, Blue City*, ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/> [<https://perma.cc/5T42-F4RR>].

47. Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 9, 2016, 5:53 AM), <https://slate.com/business/2016/09/how-alec-acce-and-pre-emptions-laws-are-gutting-the-powers-of-american-cities.html> [<https://perma.cc/5C9K-3YA3>]. State control over cities has long sustained Jim Crow governance. See, e.g., *Baker v. Carr*, 206 F. Supp. 341, 345–48 (M.D. Tenn. 1962) (describing how city residents were underrepresented in the state legislature).

48. See Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1371–72 (2020). Because the US Constitution does not give local governments rights, states must specifically grant municipalities legislative powers via state constitution or statute. *Id.*

scope of granted powers using “Dillon’s Rule,” a rule of construction that limits local powers only to those states explicitly grant.<sup>49</sup> More recently, most states have adopted “Home Rule,” meaning cities can presumptively act unless preempted by the state.<sup>50</sup> While state constitutional grants are stronger than statutory grants, states generally have broad authority to redefine and restrict local powers.<sup>51</sup>

Recently, southern states have exploited cities’ lack of intrinsic rights and authority to undermine local governing powers, particularly in predominantly African-American cities.<sup>52</sup> In 2016, at least thirty-six states introduced preemptive laws, mostly to enforce culturally conservative policy preferences.<sup>53</sup> Some state laws forbid local regulation of fracking, e-cigarettes, pet breeders, firearms, inclusionary zoning ordinances, and even discrimination.<sup>54</sup> Some prevented local bans on plastic grocery bags, Happy Meal gifts, sugary drinks, and the destruction of confiscated guns.<sup>55</sup> Others banned local minimum wage laws and sick-leave ordinances.<sup>56</sup>

These state laws can also cost cities more than the price of statue preservation.<sup>57</sup> For example, North Carolina’s HB2—which overturned an ordinance banning discrimination against LGBT people—cost Charlotte more than \$285 million and 1,300 jobs.<sup>58</sup> These preemption battles can also result in other types of costs: states can withdraw local government funding or subject local officials to removal, fines, or criminal and civil sanctions.<sup>59</sup> In response to these state incursions, local governments, officials, and citizens “caught in the partisan

49. Simon Davis-Cohen, *Progressive Wins in Virginia Are Limited as Long as “Dillon’s Rule” Is on the Books*, SCALAWAG (Nov. 13, 2019), <https://scalawagmagazine.org/2019/11/virginia-property-discrimination/> [<https://perma.cc/4D49-LDUE>]. The Supreme Court had applied Dillon’s rule to all American communities by the early 20th century. *Id.*

50. *Id.*

51. See Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 60–62, 72–73 (2018) [hereinafter *White Supremacists Invade*].

52. See Davis-Cohen, *supra* note 49; see also HUNTER BLAIR, DAVID COOPER, JULIA WOLFE & JAIMIE WORKER, ECON. POLY INST., PREEMPTING PROGRESS 3–4, 31–32 (2020), <https://files.epi.org/pdf/206974.pdf> [<https://perma.cc/BD74-GMLW>] (showing that current state interference with local decision-making is most prevalent in the South).

53. See Graham, *supra* note 46.

54. *Id.*; see also Davis-Cohen, *supra* note 49.

55. See Graham, *supra* note 46.

56. *Id.*

57. *Id.*

58. *Id.*

59. See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L. J. 954, 958, 969–70 (2019).

crossfire” have used increasingly creative litigation to defend themselves, despite limited formal power.<sup>60</sup>

Today’s red state “clampdowns” on blue cities echo nineteenth-century anxieties about urban progressivism and demographics, even though the economics behind that distrust have changed.<sup>61</sup> However, these clampdowns also reflect the newer “Big Sort” phenomenon, that Americans increasingly congregate among those with similar socioeconomic and political profiles, which makes rural areas more conservative and cities more liberal.<sup>62</sup> Redistricting exacerbates this effect by locking in partisan advantages and distancing state legislatures from progressive cities.<sup>63</sup> Ironically, this electoral polarization spurs Republicans to dictate local policy while Democrats champion decentralized power.<sup>64</sup>

Despite this context, historical preservation law, commission structures, and state preemption can be socially useful, non-partisan tools. For example, while historical preservation and preemptory laws can serve conservative culture-war agendas, historical preservation law can also protect civil rights monuments, and blue states can preempt red cities.<sup>65</sup> Commissions, like for redistricting, can make less partisan and more expert decisions that better serve the public interest, reduce legislator workload, and increase efficient problem-solving.<sup>66</sup> Likewise, while increasing local power can enhance representation, community, and policy innovation, it can also reflect and reinforce economic, social, and racial inequalities, primarily benefit affluent places to the detriment of a larger, interdependent political community, and paradoxically undermine public life by focusing local politics on parochial matters.<sup>67</sup> Conversely, state commissions and preemptive laws can regulate localities’ interactions and address problems that cross localities’ boundaries.<sup>68</sup> However, while historical preservation,

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60. *Id.* at 971–74.

61. *See* Graham, *supra* note 46 (arguing that agricultural economies—driving rural resistance to industrial and immigrant-filled cities—were historically dominant and stable but are now struggling and resentful).

62. *Id.*

63. *See* Davidson, *supra* note 59, at 963–64.

64. *See* Graham, *supra* note 46; *see also* Grabar, *supra* note 47 (quoting Wisconsin’s Governor Scott Walker, a Republican who signed a bill preempting local paid sick leave laws, as saying: “When you send power back to the local level, the level closest to the people is generally best.”).

65. *See* Davidson, *supra* note 59, at 973–74.

66. *See generally* Campbell, *supra* note 39.

67. *See* Davidson, *supra* note 59, at 958 (“The legal arguments . . . invoke[d] in these conflicts [to advance equity and inclusion] could . . . be turned against the very values they are defending.”); *see also* Briffault, *supra* note 39, at 1–6.

68. *See* Briffault, *supra* note 39, at 13.

commissions, and preemption can be useful tools to worthy ends, the precedents and contexts underlying this application help reveal the wider motivations and stakes involved in upholding statue statutes.

## II. CHALLENGING STATUES AND STATUTES

### A. Removing Individual Statues

Given these statutory barriers, what are the legal options for communities that want to remove or modify their Confederate monuments? First, communities can challenge individual monuments under the existing legal framework.

#### 1. Legislative Reform

Surprisingly, some state politicians have helped remove monuments, especially during waves of anti-Confederate sentiment after high-profile hate crimes.<sup>69</sup> For example, Bill Lee, the Republican governor of Tennessee, reversed his opposition to removing the bust of Confederate general, war criminal, and KKK leader Nathan Bedford Forrest from the state capital just after George Floyd protests were held outside the building.<sup>70</sup> Similarly, in Richmond, amid renewed protests ten days after Floyd's death, Democratic governor Ralph Northam removed the prominent Monument Avenue statue of Robert E. Lee; the city has since removed dozens more.<sup>71</sup>

However, relying on state politicians to remove individual monuments is an insufficient solution. First, Confederate monuments are so ubiquitous that removing only the most prominent after high-profile hate crimes cannot address the enormity of the problem.<sup>72</sup> Second, removing controversial statues in Republican-dominated southern states is difficult, slow, and often against state popular opinion.<sup>73</sup> In Tennessee, it took over forty years of protest to remove the

69. See, e.g., Natalie Allison, *Gov. Lee Prepares Commission for Forrest Bust Removal Vote; Legislature Asks for AG Involvement*, TENNESSEAN (Feb. 16, 2021, 6:01 AM), <https://www.tennessean.com/restricted/?return=https%3A%2F%2Fwww.tennessean.com%2Fstory%2Fnews%2Fpolitics%2F2021%2F02%2F16%2Ftn-capitol-remove-forrest-bust-bill-lee-prepares-commission-vote%2F6736838002%2F> [<https://perma.cc/E2VQ-3T3H>].

70. *Id.*; Kyle Davis, *A Look at the History of the Nathan Bedford Forrest Bust at the Capitol*, NEWSCHANNEL5 NASHVILLE, <https://www.newschannel5.com/news/the-history-of-the-nathan-bedford-forrest-busts-move-from-the-capitol-to-the-state-museum> [<https://perma.cc/3TZU-3K74>] (July 23, 2021, 10:41 AM).

71. See Associated Press, *supra* note 36.

72. See, e.g., *id.*; SPLC DATA, *supra* note 3.

73. See, e.g., Olivo, *supra* note 5 (noting that rural and exurban populations and the state government are more conservative and sympathetic towards the state's Confederate past).

Forrest bust.<sup>74</sup> And while Virginia's Democratic governor supported removal, southern states tend to have Republican leadership whose base strongly supports these statues.<sup>75</sup> In fact, polls show that most southern, statewide constituents, and, until recently, a majority of Americans, supported keeping these statues.<sup>76</sup> While popular opinion might be changing, monument decisions continue to be made by politicians accountable to polarized, statewide constituencies.<sup>77</sup> Therefore, substantial progress towards widespread removal remains unlikely.

## 2. Exploiting Loopholes

Rather than appealing to state politicians, some cities have removed individual monuments by exploiting loopholes in poorly constructed statue statutes.<sup>78</sup> These opportunities can arise from statutes that lack enforcement mechanisms or are limited by monument age, location, or ownership.<sup>79</sup> For example, Memphis exploited a location-based loophole by selling parkland under a Forrest statue to a nonprofit.<sup>80</sup> Charlottesville also recently argued its

74. Davis, *supra* note 70 (noting that protests began at installation).

75. See Sean Trende, *Misunderstanding the Southern Realignment*, REALCLEARPOLITICS (Sept. 9, 2010), [https://www.realclearpolitics.com/articles/2010/09/09/misunderstanding\\_the\\_southern\\_realignment\\_107084.html](https://www.realclearpolitics.com/articles/2010/09/09/misunderstanding_the_southern_realignment_107084.html) [<https://perma.cc/TL96-MTQX>]; see also Ariel Edwards-Levy, *Public Opinion on Taking Down Confederate Monuments Hasn't Budged in the Last Three Years*, HUFFPOST (June 10, 2020, 6:05 PM), [https://www.huffpost.com/entry/poll-confederate-flag-statues\\_n\\_5ee143b9c5b6ee376f836778](https://www.huffpost.com/entry/poll-confederate-flag-statues_n_5ee143b9c5b6ee376f836778) [<https://perma.cc/43UH-V5UX>] (showing that post-Floyd, only seventeen percent of Republicans favor removal).

76. Alex Seitz-Wald, *NBC News Poll: The South, Once a Conservative Bastion, Is Changing*, NBC NEWS, <https://www.nbcnews.com/politics/elections/nbc-news-poll-south-once-conservative-bastion-changing-n864441> [<https://perma.cc/2BCF-DJJA>] (Apr. 12, 2018, 8:04 AM) (“[A] strong majority of Southerners—61 percent—oppose removing Confederate monuments . . . while just 36 percent support their removal.”); see Lemon, *supra* note 11 (citing a post-Floyd 2020 poll by NBC News and the *Wall Street Journal* in which 51 percent of respondents favored removal, marking a “significant shift from 2018,” when a majority opposed it). *But cf.* Edwards-Levy, *supra* note 75 (citing its own poll showing that while a majority of Americans opposed Confederate flag displays post-Floyd, only a minority favored monument removal). This support can stem from misunderstanding. See Snider, *supra* note 5.

77. See Davidson, *supra* note 59.

78. See generally Bray, *supra* note 22, at 20–44 (arguing statue statutes offer “thin” protections which cities can evade).

79. *Id.* at 20.

80. See Melissa Alonso & Amanda Jackson, *Remains of Confederate General Nathan Bedford Forrest and His Wife Will Be Removed from a Memphis Park*, CNN, <https://www.cnn.com/2020/05/13/us/nathan-bedford-forrest-body-to-be-moved-trnd/index.html> [<https://perma.cc/VV2E-KNJG>] (May 13, 2020, 8:46 PM). This legal strategy is not intrinsically partisan. *Cf.* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 901–03 (2011) (describing how governments have evaded



monuments were not “war memorials” under Virginia’s statute, but lost at summary judgment.<sup>81</sup>

However, if a loophole is successfully exploited, state legislatures will likely close it.<sup>82</sup> For instance, Memphis’ successful strategy spurred the Tennessee legislature to strengthen its law via amendment.<sup>83</sup> In addition to closing the loophole, the new statute added a “citizen suit” provision, imposed new penalties, and specifically punished Democratic and majority-Black Memphis by removing \$250,000 earmarked for the city’s bicentennial.<sup>84</sup> Thus, because states can impose such drastic consequences, local, law-specific, creative workarounds only offer risky, short-term, small-scale solutions that may cause more problems than they solve.

Moreover, whether a city’s legal strategy works depends on the statute at issue.<sup>85</sup> In states with extremely restrictive historic commission statutes—such as Tennessee after Memphis’ maneuverings—there are few, if any, loopholes.<sup>86</sup> Therefore, exploiting statute loopholes to remove individual monuments can only be a temporary, partial solution.

### 3. Defying Laws

Because removal is so difficult, yet urgent, some cities have tried ignoring their statutes. For example, the Mayor of Richmond, Virginia, Levar Stoney, invoked emergency powers to take down statues in the name of public safety, despite the dangers and unclear legality of his actions.<sup>87</sup> His effort was largely successful: many statues were removed,

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Establishment Clause and First Amendment constraints by conveying land under public memorials).

81. See, e.g., *Payne v. City of Charlottesville*, 102 Va. Cir. 431 (2019).

82. See Lohr, *supra* note 7.

83. *Id.*

84. *Id.*; see also *Etched in Stone*, *supra* note 19, at 666–67. New punishments include lost eligibility for community grants. See *Etched in Stone*, *supra* note 19, at 666–67. One representative expressed regret the impact was “not . . . millions of dollars.” *Id.* at 666.

85. See generally Bray, *supra* note 22 (discussing alteration and removal opportunities in each state with a statue statute).

86. *Cf. id.* at 24 (arguing that after Tennessee closed the Memphis loophole, removal efforts are likely foreclosed, although property could be sold near monuments to evade restrictions on nearby displays).

87. Lawler, *supra* note 14. Specifically, the mayor struggled to find a contractor who would do the removal despite potential “death threats and car bombs.” *Id.* The sheriff refused to protect the contractors until a law firm promised pro bono representation. *Id.* Stoney’s chief of staff resigned. *Id.* Meanwhile, the mayor hid to avoid being served. *Id.*

and Stoney kept his job in the next election.<sup>88</sup> In Baltimore, Mayor Catherine Pugh similarly used a public nuisance theory to remove her city's monuments without approval from the Maryland Historical Trust.<sup>89</sup> While the Trust held that this removal lacked legal authority, it did not enforce the terms of its easement or require restoration.<sup>90</sup>

However, the special circumstances under which these removals took place are likely not replicable in most southern states. Both mayors made quick decisions during escalating protests and used special public-safety powers.<sup>91</sup> Both also lacked strong Republican state leadership, and neither's monuments had strong legislative protection.<sup>92</sup> Nevertheless, during extreme unrest, this strategy might work in states where statue statutes have a public safety exception.<sup>93</sup> For example, North Carolina's Democratic governor justified removing two Raleigh monuments following Floyd's death by citing likely violence and "dangerous" removal efforts.<sup>94</sup>

By contrast, under a more conventional statue statute and hostile state government, defying removal laws can come at great financial and political risk.<sup>95</sup> For example, in 2017, Birmingham's

88. See *2020 November General Official Results: Mayor (Richmond City)*, VA. DEPT OF ELECTIONS (Jan. 21, 2021, 3:04 PM), [https://results.elections.virginia.gov/vaelections/2020%20November%20General/Site/Local-ity/RICHMOND\\_CITY/Mayor\\_\(RICHMOND\\_CITY\).html](https://results.elections.virginia.gov/vaelections/2020%20November%20General/Site/Local-ity/RICHMOND_CITY/Mayor_(RICHMOND_CITY).html) [<https://perma.cc/XA5N-4FT3>].

89. See *Etched in Stone*, *supra* note 19, at 684–85. Baltimore is restricted by conservation easements, not a "statue statute," which similarly require a state historical trust's approval to make changes. *Id.* Reacting to violent protests in Charlottesville which threatened to demonstrate in Baltimore next, Pugh claimed she needed to "protect her city" and prevent future protest and vandalism. *Id.* at 684; see also Shavin, *supra* note 12.

90. See *Etched in Stone*, *supra* note 19, at 684.

91. See Ian Duncan, *Baltimore Lacked Authority to Take Down Confederate Statues, and State Says It Could—but Won't—Order Them Restored*, BALT. SUN (Oct. 26, 2017, 2:45 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-confederate-monuments-letter-20171026-story.html> [<https://perma.cc/9EX9-UP4Z>] ("Pugh's staff concluded that she had broad authority to order the monuments taken down under her powers to safeguard the public and under the city parks department director's responsibility to protect the monuments."). Moreover, the local preservation law had a public safety clause. Shavin, *supra* note 12.

92. When Stoney removed Richmond's statue, Democrats had control of the state legislature and governorship and had passed a bill allowing counties to remove statues—though it had not gone into effect at Stoney's removal. See Lawler, *supra* note 14.

93. See Bergeron, *supra* note 3.

94. See *Gov. Cooper Orders Removal of Confederate Monuments on Capitol Grounds; Citing Public Safety*, WCNC CHARLOTTE, <https://www.wncn.com/article/news/local/gov-cooper-orders-removal-of-confederate-monuments-on-capitol-grounds-citing-public-safety/275-7442d152-6123-40aa-ba3c-2cfa9fd18cd7> [<https://perma.cc/7LQ6-GZFM>] (June 20, 2020, 3:58 PM).

95. See, e.g., Sam Prickett, *Birmingham Council Agrees to Fine for Covering Confederate Monument Base*, BIRMINGHAMWATCH (June 30, 2020), <https://birmingham-watch.org/birmingham-council-agrees-fine-covering-confederate-monument-base/> [<https://perma.cc/P38P-6NM8>].

Mayor William Bell reacted to violent Charlottesville protests by covering a park monument with plywood and a tarp while arguing that this “protective barrier” was not an “alteration” under the Alabama Memorial Preservation Act.<sup>96</sup> Nevertheless, the Alabama Attorney General responded with a lawsuit that sought \$25,000 per day that the statue was covered, which would have totaled \$20.85 million.<sup>97</sup> Additionally, Alabama governor candidate Stacy “Lee” George also filed an ethics complaint against Bell for the removal a week before an election, which Bell lost to Randall Woodfin.<sup>98</sup> On the other hand, in May 2020, Mayor Woodfin convinced violent post-Floyd protesters to give the city twenty-four hours to remove that same monument peacefully.<sup>99</sup> Treating the statute as a fine, Woodfin stated that a \$25,000 penalty “is a lower cost than civil unrest in our city.”<sup>100</sup> Overall, these examples show that addressing the Confederate monument problem one statue at a time can be a viable solution in certain cities depending on political leaders, legal restrictions, and public pressures.<sup>101</sup> However, this approach is slow, risky, unscalable, and depends on ever-changing politics.

### B. Defeating Statue Statutes

Given the barriers to removing individual monuments within the current political and legal context, challenging statue statutes themselves could be a more effective approach. While undermining these laws will not remove particular statues, it would make the monument removal process easier and give cities more local control.

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96. See Erin Edgemon, *AG Files Lawsuit Against Birmingham over Confederate Monument*, AL.COM (Aug. 16, 2017, 7:02 PM), [https://www.al.com/news/birmingham/2017/08/ag\\_files\\_lawsuit\\_against\\_birmi.html](https://www.al.com/news/birmingham/2017/08/ag_files_lawsuit_against_birmi.html) [https://perma.cc/S92A-WXB4].

97. *Id.* The city ultimately lost at the Alabama Supreme Court but was only fined a single \$25,000 penalty. *State v. City of Birmingham*, 299 So. 3d 220, 237–38 (Ala. 2019).

98. See Mike Cason, *Stacy George Files Ethics Complaint Against Mayor Bell over Monument Cover*, AL.COM, [https://www.al.com/news/2017/08/stacy\\_george\\_files\\_ethics\\_comp.html](https://www.al.com/news/2017/08/stacy_george_files_ethics_comp.html) [https://perma.cc/RE3K-43YJ] (Mar. 7, 2019, 2:41 PM).

99. See Greg Garrison, *Mayor Recalls Confederate Monument Removal, Turmoil in Linn Park*, AL.COM, <https://www.al.com/news/2021/05/mayor-recalls-confederate-monument-removal-turmoil-in-linn-park.html> [https://perma.cc/J294-GD3R] (May 31, 2021, 8:51 AM).

100. Prickett, *supra* note 95. Other Alabama counties followed suit and paid \$25,000 fines. See, e.g., *State Accepts County’s Payment for Removing Rebel Monument*, AP NEWS (Oct. 1, 2021), <https://apnews.com/article/alabama-lawsuits-huntsville-73aed9bfe4d39e505e6924f6e25fee7b> [https://perma.cc/V3NP-SZHK].

101. See, e.g., *State Accepts County’s Payment for Removing Rebel Monument*, *supra* note 100.

## 1. Legislative Reform

Given the current movement against these statues, political solutions are possible. For example, in April 2020, Virginia responded to the resurgence of the Black Lives Matter movement by effectively overturning its prohibition.<sup>102</sup> Virginia now allows counties and cities to “remove, relocate, contextualize, cover or alter” monuments through a formal process.<sup>103</sup>

However, political strategies are unlikely to work against most statutes for the same reasons they are unlikely to work against statues. Virginia only amended its statute under a Democratic governor and after Democrats regained the legislature for the first time in over two decades.<sup>104</sup> Largely because of the Republican leaders and popular support discussed above, state leaders and academics in states with these statutes do not expect revision in the near future.<sup>105</sup>

## 2. Lawsuits

Because of the limitations of political solutions, many scholars have proposed, and some cities have tried, bringing lawsuits that claim these statutes are unconstitutional.<sup>106</sup> As discussed above, citizens do not have a right to local self-determination, so challenging the preemptive relationships underlying statue statutes would not be an effective legal approach.<sup>107</sup> However, cities and individuals could try claiming that these statutes violate First Amendment, Equal Protection, Due Process, or other constitutional rights.<sup>108</sup>

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102. Jillian Fitzpatrick, *Reframing the Monuments: How to Address Confederate Statues in the United States*, 34 J. CIV. RTS. & ECON. DEV. 283, 284 (2021); see also SPLC DATA, *supra* note 3.

103. Lawler, *supra* note 14.

104. *Id.*

105. Bray, *supra* note 22, at 11; see, e.g., Riddle, *supra* note 27, at 384–85 (explaining Georgia’s failed 2018 amendment).

106. See, e.g., Fitzpatrick, *supra* note 102, at 302–03.

107. Briffault, *supra* note 39, at 7 (“[R]esidents of local governments [lack] any inherent right to local self-government.”).

108. See Davidson, *supra* note 59, at 958 (explaining that recent local government cases involving federal constitutional claims have “surprisingly, given their nominal lack of formal authority . . . prevailed in a not-insignificant number of cases”). For more on why a notable number of recent local government cases involving federal constitutional claims have prevailed, see Sellers & Sharff, *supra* note 48, at 1372.

*a. Cities: First Amendment, Equal Protection, Due Process, and Other Claims*

Some cities have challenged statue statutes by arguing that monuments constitute speech, and therefore, statutes that force cities to display and maintain Confederate monuments force speech and violate the First Amendment.<sup>109</sup> In *Pleasant Grove City v. Summum*, the Supreme Court confirmed that even donated and privately-financed monuments on public land “speak for the government.”<sup>110</sup> Additionally, a government entity has the right to “speak for itself:” to say what it wishes and select views to express.<sup>111</sup> Using this reasoning, a city could argue that its statue statute violates its right to define itself via monument selection and maintenance.<sup>112</sup>

Cities could also argue that monuments subject to statue statutes should not be considered government speech, and therefore they and the statutes controlling them should be subject to First Amendment review.<sup>113</sup> *Summum* reasoned that First Amendment restrictions need not apply to monuments because observers would associate them with governmental property owners and therefore could hold political decision-makers accountable.<sup>114</sup> However, statue statutes obscure and expand the speakers behind statues, and thereby prevent observers from identifying or voting out those actually dictating such speech.<sup>115</sup> Consequently, such statues should not receive the First Amendment immunity of other forms of government speech, and courts

109. Anel Kovvali, *Confederate Statue Removal*, 70 STAN. L. REV. ONLINE 82, 83 (2017).

110. *Pleasant Grove City v. Summum*, 555 U.S. 460, 461–62, 470 (2009) (explaining that monuments project a city’s identity because “government decisionmakers” select and maintain them “based on local . . . culture”); cf. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 202, 219 (2015) (using *Summum* to argue license plates are government speech because they are used to convey state messages, identified with government by the public, and controlled by the state).

111. *Summum*, 555 U.S. at 467–68, 470–71.

112. See Richard C. Schragger, *What Is Government “Speech”? The Case of Confederate Monuments*, 108 KY. L.J. 665, 685 (2020) [hereinafter *What Is Government “Speech”?*] (“If . . . the city is understood as an individual or a corporation, then forcing the city *qua* city to maintain a Confederate monument looks the same as forcing any other private actor to recite a certain dogma.”).

113. *But see Summum*, 555 U.S. at 472–73 (finding that city control makes monuments government speech).

114. *Id.* at 468–69, 471–72 (discussing how the public associates park statues with the city that owns the land); see also *id.* at 481–82 (Stevens, J., concurring).

115. See *What Is Government “Speech”?*, *supra* note 112, at 682–84.

should subject statutes that restrict monument speech to greater First Amendment scrutiny.<sup>116</sup>

However, even if these statutes coerce municipalities' speech, they do so in favor of state government speech.<sup>117</sup> While *Summun*'s assumptions about association and accountability are less true for states than cities, statute statutes give states the expressive control that *Summun* assumed belonged to cities.<sup>118</sup> Given that courts generally reduce cities to "jurisdictional entities," courts are unlikely to grant them speech rights over long-recognized states' rights.<sup>119</sup> Finding otherwise would require a radical change in how courts recognize municipal powers.<sup>120</sup>

Nevertheless, despite formal barriers, cities have successfully claimed these rights.<sup>121</sup> For example, when Birmingham argued that Alabama's statute violated its free speech rights, the trial judge agreed: following *Summun*,<sup>122</sup> the judge held that Birmingham had the "right to speak for itself, to say what it wishes, and to select the views it wants to express."<sup>123</sup> However, the Alabama Supreme Court overturned that decision on the grounds that municipalities do not possess free speech rights against their state.<sup>124</sup>

The Virginia Supreme Court in *Taylor v. Northam* recently used a First Amendment argument to justify the removal of an individual Confederate statue.<sup>125</sup> However, the reasoning behind that decision

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116. See *id.* Specifically, statute statutes restrict cities' speech in traditional public fora by discriminating against viewpoints or limiting content without a compelling government interest. See *Summun*, 555 U.S. 460.

117. See *White Supremacists Invade*, *supra* note 51, at 62, 68.

118. See *id.* ("[C]ities, being subordinate governments, cannot readily argue that the city's free-speech rights are being violated when the state refuses to let them decide what to say.")

119. See *id.* at 73; *What Is Government "Speech"?*, *supra* note 112, at 682 ("The city is merely a convenient administrative unit through which the state exercises its decision to speak or not to speak and in what form.")

120. *What Is Government "Speech"?*, *supra* note 112, at 682–84. For example, cities could be treated like other corporations which have First Amendment rights. See *id.* Since "[t]he Supreme Court has never definitively held that cities do not enjoy speech rights and some courts have treated cities as potential First Amendment rights holders," courts could overturn current constitutional doctrine and recognize municipal constitutional rights. *Id.* For an explanation of how and why such rights could and should be recognized, see Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 367–69 (2019). However, the Supreme Court currently rejects extending free speech rights to city "corporations." See *State v. City of Birmingham*, 299 So. 3d 220, 231–32 (Ala. 2019).

121. See *Davidson*, *supra* note 59, at 958.

122. See generally *Pleasant Grove City v. Summun*, 555 U.S. 460 (2009).

123. Order on Cross Motions for Summary Judgment at 1, 4–6, *City of Birmingham*, 299 So. 3d 220 (No. CV-17-903426-MGG).

124. *City of Birmingham*, 299 So. 3d at 220, 228–29.

125. See *Taylor v. Northam*, 862 S.E.2d 458 (Va. 2021).

would probably not apply to cities challenging statue statutes. First, in *Taylor*, a restrictive covenant prevented removal.<sup>126</sup> Unlike statutes, courts do not favor covenants and can find them unenforceable for violating public policy.<sup>127</sup> Second, the *Taylor* court deduced public policy violations because prior state actions implicitly rejected Confederate memorialization.<sup>128</sup> By contrast, a statue statute expresses current policy.<sup>129</sup> Finally, this covenant restricted state—not city—speech, thus making it easier for the court to recognize First Amendment protection.<sup>130</sup> Therefore, unless courts reconsider the broader legal relationship between cities and states, cities will have a hard time using a First Amendment argument to overturn statue statutes.<sup>131</sup>

While cities cannot currently claim First Amendment protection, they could appeal to other government speech restrictions.<sup>132</sup> For example, cities could claim that Confederate monuments are government hate speech, and thus monuments and any statute that compels cities to speak through them violate the Equal Protection (EP) Clause.<sup>133</sup> While most Supreme Court doctrine restricting government speech has focused on the Establishment Clause,<sup>134</sup> the concurring Justices in *Summum* asserted that the EP Clause also restricts racist expression.<sup>135</sup> To impel strict scrutiny, litigants must prove that government speech is either facially discriminatory or discriminatory in both impact and intent.<sup>136</sup> Proving facial discrimination would not be possible for most statues, let alone statue statutes, because Confederate

126. *Id.* at 461 n.1, 461–62.

127. *Id.* at 468.

128. *See id.* at 463–64 (recognizing Juneteenth, ending “Robert E. Lee” day, removing Confederate monuments, and so forth).

129. *See id.* at 463–65.

130. *See id.* at 466, 472.

131. *See generally* Blank, *supra* note 120.

132. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 648–50 (2013).

133. *See* Aaron D. Sanders, *If Confederate Statues Could Talk: Durham’s Monuments and Government Speech*, 45 SETON HALL LEGIS. J. 109, 115 (2021).

134. *See id.* at 117.

135. *Id.* at 115 (“The [Supreme] Court has not yet taken a case to resolve how the Fourteenth Amendment might relate to government speech.”); *see* *Pleasant Grove City v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring) (“For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including . . . the Establishment and Equal Protection Clauses.”).

136. *See* Off. City of Durham NC, *City County Committee on Confederate Monuments & Memorials*, YOUTUBE, at 42:40–45:50, 49:45–50:20 (Oct. 11, 2018), <https://youtu.be/LOBGTm-txBc> [<https://perma.cc/P72R-SN8W>] (encouraging claims against racist government speech for violating state constitutions). For a successful EP claim against a statute, *see* *Hunter v. Underwood*, 471 U.S. 222 (1985), which found the disenfranchisement of Black people sufficient but-for discriminatory intent and impact to invalidate a facially neutral statute despite secondary motivation to disenfranchise poor white people.

monuments are not racially explicit, even if they historically enforced segregation.<sup>137</sup> Proving impact requires analyzing present harm.<sup>138</sup> For example, one could show that government speech suggests second-class status, creates or affirms social hierarchies, incites discriminatory and violent activity, or causes psychological harm.<sup>139</sup> Intent is about historical motive, and the government must have taken action “because of, rather than in spite of” discriminatory impact.<sup>140</sup>

However, these prongs can be difficult to prove. First, a court must consider the impact of communicative acts significant, even if the harm is purely psychological or stigmatic.<sup>141</sup> Intent can be unclear for monuments or statutes because of multiple or ambiguous meanings.<sup>142</sup> Moreover, the fact-specific nature of these claims would make them difficult to win against particular monuments or broad, facially neutral, statue statutes. For example, Charlottesville’s City Council recently brought an EP claim to remove the two Confederate statues that sparked the city’s protest.<sup>143</sup> Ultimately, the Virginia Circuit Court disputed the racist intent that defendants and historical experts attributed to the monuments and statute, and the claim failed.<sup>144</sup>

137. See Sanders, *supra* note 133, at 115 n.32 (“Confederate monuments do not fit . . . standard categories of [facially discriminatory] government acts.”).

138. See generally L. Darnell Weeden, *A Growing Consensus: State Sponsorship of Confederate Symbols Is an Injury-in-Fact as a Result of Dylann Roof’s Killing Blacks in Church at a Bible Study*, 32 *BYU J. PUB. L.* 117 (2017) (discussing the legal implications of the “injury” caused by states displaying Confederate flags).

139. See *What Is Government “Speech”?*, *supra* note 112, at 677; see also *Off. City of Durham NC*, *supra* note 136, at 51:00 (discussing the contemporary psychological and physical harm these monuments cause).

140. Sanders, *supra* note 133, at 116, 141; *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

141. See Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 *ARIZ. L. REV.* 45, 49–57 (2021) [hereinafter *Crosses and Confederate Monuments*]. In Confederate flag cases, lower courts have found the injury insufficient. See *id.* at 48 n.13.

142. See *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 476 (2009) (“[I]t frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure, and consequently, the thoughts . . . expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.”); see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). But any racially discriminatory motive might heighten scrutiny. See *Arlington Heights*, 429 U.S. at 265–66; see also *Crosses and Confederate Monuments*, *supra* note 141, at 63–65 (discussing how intent defined as “objective social meaning” for EP Clause claims might be easier to identify).

143. Defendants’ Brief in Opposition to Plaintiffs’ Motions for Partial Summary Judgment and to Strike Equal Protection Affirmative Defense at 1–2, *Payne v. City of Charlottesville*, 104 Va. Cir. 145 (2020) (No. CL 17-145).

144. See *City Loses 14th Amendment Argument in Attempt to Remove Confederate Statues*, WINA, <https://wina.com/news/064460-city-loses-14th-amendment-argument-in-attempt-to-remove-confederate-statues> [<https://perma.cc/6GQC-JZ5U>] (last visited Apr. 12, 2022); *Payne v. City of Charlottesville*, 102 Va. Cir. 431 (2019).



The Supreme Court's recent approach to restricting religious speech in *American Legion v. American Humanist Association* also bodes poorly for EP claims against Confederate monuments.<sup>145</sup> Specifically, the Court held that the Establishment Clause did not restrict the government from maintaining a large cross as a World War I (WWI) memorial.<sup>146</sup> It reached this conclusion by (1) selectively draining historical religious and racist meanings while discrediting the knowability and relevance of historical motivations and meanings generally, and (2) discrediting religious minorities' contemporary understanding of the memorial's meaning while emphasizing the harmful messages of government removal to memorial supporters.<sup>147</sup> Applied to an EP claim for Confederate monuments, these tactics could make it difficult to prove discriminatory intent or impact.<sup>148</sup> Overall, given these theoretical challenges and the ideology of the current Supreme Court, a successful EP claim against a statue statute, or even statue, seems unlikely.<sup>149</sup>

A city could also argue that a statue statute threatens to deprive it of property without Due Process.<sup>150</sup> For example, a statute could violate Due Process by forcing a city to use public property a certain way—like a public park for a statue or public funds to maintain that statue—without providing some procedure for relief.<sup>151</sup> The Constitution (the Fifth and Fourteenth Amendment) requires that the state provide notice and an adequate hearing before depriving someone of property.<sup>152</sup> When Birmingham used this rationale to argue that Alabama's statue statute was unconstitutional, the trial court agreed—reasoning that the statute lacked a procedure whereby cities could petition to change monuments, and that deprivation was not severable.<sup>153</sup> However, as with the First Amendment rationale, the

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145. See generally *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Crosses and Confederate Monuments*, *supra* note 141.

146. *Am. Legion*, 139 S. Ct. at 2089–90; *Crosses and Confederate Monuments*, *supra* note 141, at 76 (finding that the memorial insufficiently endorsed Christianity to fall under constitutional constraints).

147. See *Am. Legion*, 139 S. Ct. 2067; *Crosses and Confederate Monuments*, *supra* note 141, at 77–80, 86–89 (arguing that under *American Legion's* reasoning, Confederate monuments can make a stronger case for violating restrictions on government speech than the Bladensburg cross).

148. See *Crosses and Confederate Monuments*, *supra* note 141, at 77–80, 86–89.

149. See, e.g., *Am. Legion*, 139 S. Ct. 2067.

150. See RICHARD C. SCHRAGGER & C. ALEX RETZLOFF, LOC. SOLS. SUPPORT CTR., *CONFEDERATE MONUMENTS AND PUNITIVE PREEMPTION: THE LATEST ASSAULT ON LOCAL DEMOCRACY* 16 (2019).

151. See *id.*

152. See *id.*

153. *State v. City of Birmingham*, 299 So. 3d 220, 225 (Ala. 2019).

Alabama Supreme Court overturned that ruling on the grounds that municipalities do not possess Due Process rights against their states.<sup>154</sup>

Cities could also bring claims specific to their statute. For example, the South Carolina Supreme Court recently struck a statue statute provision requiring that a two-thirds legislative supermajority approve changes.<sup>155</sup> While that court rejected the plaintiffs' other claims that the statute violated home rule and other state constitution provisions, other cities could bring claims based on the specific home rule powers granted in their state constitutions.<sup>156</sup> In another recent case, a county counterclaimed that Alabama's statue statute was unconstitutionally vague and that a mandatory \$25,000 fine was unconstitutionally excessive.<sup>157</sup>

Ultimately, most lawsuits by cities will likely fail at standing. Current precedent largely precludes cities from suing their creator states for constitutional violations.<sup>158</sup> Despite this precedent, change seems possible: some courts have recognized city constitutional rights,<sup>159</sup> other forms of corporations have gained constitutional rights,<sup>160</sup> and a battle for city rights could unite a broad coalition against state preemption. Nevertheless, for now, standing will likely cause cities to lose challenges on First Amendment, EP, Due Process, or other constitutional grounds.<sup>161</sup>

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154. *Id.* at 232.

155. *Pinckney v. Peeler*, 862 S.E.2d 906, 913–15 (2021).

156. *See, e.g., id.* at 916–20 (rejecting the claim that a statue statute *prohibiting* changes to place names violated a state constitutional provision preventing states from *changing* those names). Treason clauses would also likely not preclude statue statutes, although Mississippi still has an anti-secession prohibition on laws “passed in derogation of the paramount allegiance of the citizens of this state to the [federal] government.” MISS. CONST. art. III, § 7.

157. Answer of Defendants at 5, *State ex rel. Marshall v. Madison County*, No. 47-CV-2020-901595.00 (Madison Cnty. Cir. Ct. Dec. 23, 2020); Paul Gattis, *Madison County Fighting \$25,000 Fine over Removing Confederate Monument*, AL.COM, <https://www.al.com/news/2021/01/madison-county-fighting-25000-fine-over-removing-confederate-monument.html> [https://perma.cc/8Z3M-9BYY] (Jan. 15, 2021, 11:21 AM).

158. *See, e.g., Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933) (“A municipal corporation . . . has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.”).

159. *See City of Birmingham*, 299 So. 3d at 225.

160. *See Williams*, 289 U.S. at 48.

161. *See, e.g., City of Birmingham*, 299 So. 3d at 234–35.

*b. Citizens: First Amendment, Equal Protection, Due Process, Establishment, and Other Claims*

While individual citizens could avoid city standing issues by bringing their own claims, they would need to bypass their own standing issues by proving a particularized injury.<sup>162</sup> For example, a South Carolina court found sufficient injury for being unable to rename streets as head of a city's historical preservation efforts and being unable to change a monument dedicated to oneself or a close, deceased relative.<sup>163</sup> By contrast, in *Perry-Bey v. City of Norfolk*, the court found unwelcome contact during protests, altered behavior to avoid such contact, and targeted government speech that promoted segregation and incited violence to be mere "offense," indistinguishable from injury to the public at large.<sup>164</sup> Such broad definitions of offense, in addition to the Supreme Court's consistent holding that "offense" constitutes a "generalized grievance" insufficient for standing beyond Establishment Clause cases,<sup>165</sup> limit which plaintiffs can challenge monuments and statutes.<sup>166</sup> While scholars have questioned why "offended observer" standing should be allowed for religious and not racial government hate speech—especially given US history—the current Supreme Court seems more likely to limit than expand the doctrine.<sup>167</sup>

Assuming individuals can prove standing, scholars have suggested bringing similar claims on different grounds. For example, city residents could assert First Amendment rights by arguing that removal restrictions "put the state's coercive weight on the expressive scales" by preventing local communities from deciding what they want

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162. See, e.g., *Moore v. Bryant*, 853 F.3d 245, 249–53 (5th Cir. 2017) (finding insufficient injury via stigmatic harm, workplace and physical injury, and harm to plaintiff's daughter to find standing for a challenge to a Confederate battle flag); *Miss. Div. of United Sons of Confederate Veterans v. Miss. State Conf. of NAACP Branches*, 774 So. 2d 388, 388–89 (Miss. 2000) (rejecting the NAACP's claim that the state flag violated its members' EP rights because the NAACP could not prove constitutional injury). *But cf.* Amanda Lineberry, Note, *Standing to Challenge the Lost Cause*, 105 VA. L. REV. 1177, 1210 (2019) (arguing that harm from such symbols should be sufficient for standing).

163. See *Pinckney v. Peeler*, 862 S.E.2d 906 (2021) (challenging the constitutionality of South Carolina's Heritage Act). It is unclear if nearby property owners can sue. See *Taylor v. Northam*, 862 S.E.2d 458, 467 (Va. 2021).

164. *Perry-Bey v. City of Norfolk*, No. CL19-3928, 2019 Va. Cir. LEXIS 265, at \*14 (2019).

165. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2099–100 (2019).

166. See *Perry-Bey*, 2019 Va. Cir. LEXIS 265, at \*14.

167. See *Crosses and Confederate Monuments*, *supra* note 141, at 80–81 (discussing Justice Gorsuch's *American Legion* concurrence advocating to eliminate such standing); see also *What Is Government "Speech"?*, *supra* note 112, at 688–89 (asking why courts consider religious speech more harmful given the salience of racism and EP in our constitutional culture).

to communicate.<sup>168</sup> However, courts have rejected the underpinnings of this argument in cases where monument supporters challenged removal on free speech grounds.<sup>169</sup> In that context, courts have held that plaintiff citizens can still speak freely and do not have the right to speak through public monuments, which are government speech.<sup>170</sup> Moreover, the Supreme Court has often denied taxpayers a First Amendment right to challenge government speech with which they disagree.<sup>171</sup>

Citizens have also tried claiming EP Clause violations. For example, in *Perry-Bey*, plaintiffs claimed Confederate government speech constituted “segregation, religious bigotry, hate speech, anti-Semitism, and political or religious white supremacy practices,” but the court found plaintiffs failed to prove that the defendant’s conduct intentionally discriminated based on race or that the monument’s display caused an unequal protection of laws.<sup>172</sup> Scholars have also suggested minorities argue that statue statutes violate EP by restructuring the political process in discriminatory ways.<sup>173</sup> For example, in *Romer v. Evans*, the Supreme Court struck a state restriction on anti-discrimination ordinances on EP grounds that forbidding local redress made it harder for minorities to avoid discrimination.<sup>174</sup> Likewise, statue statutes restrict the removal of discriminatory statues by forcing minorities to seek redress from a larger state electorate.<sup>175</sup> Similarly, in *Hunter*, the Supreme Court struck a city charter amendment that required a referendum to pass ordinances to end housing discrimination.<sup>176</sup> Likewise, statue statutes

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168. Ira C. Lupu & Robert W. Tuttle, *The Debate over Confederate Monuments*, TAKE CARE BLOG (Aug. 25, 2017), <https://takecareblog.com/blog/the-debate-over-confederate-monuments> [<https://perma.cc/RMJ3-CCPS>]; SCHRAGGER & RETZLOFF, *supra* note 150, at 12–13.

169. *See, e.g.*, *Patterson v. Rawlings*, 287 F. Supp. 3d 632 (N.D. Tex. 2018).

170. *Id.* at 641–42 (“Plaintiffs have failed to cite any case in which a plaintiff’s agreement with . . . someone else’s speech—here, the City’s—transforms that speech into the plaintiff’s.”). *But cf.* *Tebbe*, *supra* note 132, at 666–68 (arguing that racialized government speech impedes victims’ political participation).

171. *See, e.g.*, *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (“To govern, government has to say something, and a First Amendment heckler’s veto of any forced contribution to raising the government’s voice in the ‘marketplace of ideas’ would be out of the question.”).

172. *Perry-Bey v. City of Norfolk*, No. CL19-3928, 2019 Va. Cir. LEXIS 265, at \*6–7 (2019).

173. *See* Kovvali, *supra* note 109, at 85–87.

174. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

175. Kovvali, *supra* note 109, at 85–87.

176. *Hunter v. Erickson*, 393 U.S. 385, 386–87, 392–93 (1969) (reasoning that a referendum requirement would dilute minorities’ votes). *But cf.* *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 298–300, 314–15 (2014) (plurality opinion) (refusing to strike a constitutional amendment banning affirmative action).

impose political barriers on removing Confederate statues to end racist practices.<sup>177</sup>

In *Perry-Bey*, the plaintiffs also tried to bring Due Process and Establishment Clause claims.<sup>178</sup> The court rejected the plaintiffs' argument that altering behavior to avoid contact violated Due Process rights because no "life, liberty, or property" interest was thereby impaired by the Defendants' actions.<sup>179</sup> Similarly, the court rejected the plaintiffs' argument that government advocacy of "white supremacy" violated the Establishment Clause because white supremacy is not—as the plaintiffs claimed—a religion.<sup>180</sup> Furthermore, the court reasoned that even if the broad and disputed definition of "religion" included "white supremacy," the monument would still be allowed because under *American Legion*, (1) "longstanding" monuments and symbols are presumptively constitutional, and (2) any "religious connotations" from Confederate iconography are insufficient to offend the Establishment Clause.<sup>181</sup>

Overall, the greatest barrier to challenging these statutes is that courts generally deny that cities have constitutional rights that states can violate.<sup>182</sup> Nevertheless, when citizens claim that states violate their constitutional rights, courts find the injury too generalized for standing.<sup>183</sup> Therefore, even if these statutes violate First Amendment, EP, Due Process, or other federal or state constitutional rights, most courts have left remedies to the political process.<sup>184</sup>

### III. HISTORICAL COMMISSION STATUTES

#### A. How "Historical Commissions" Actually Work

As discussed above, at least three statue statutes—in North Carolina, Alabama, and Tennessee—claim to leave localities an outlet for alterations: waivers from appointed "historical commissions."<sup>185</sup> This Section examines Tennessee's waiver process to show how these facially neutral procedural barriers—with names suggesting objective

177. See Kovvali, *supra* note 109, at 85–87.

178. *Perry-Bey v. City of Norfolk*, No. CL19-3928, 2019 Va. Cir. LEXIS 265, at \*6–8 (2019).

179. *Id.* at \*7.

180. *Id.* at \*9.

181. *Id.* at \*9–11; *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2071 (2019).

182. See Arth, *supra* note 12, at 18 (explaining that "most courts decide Confederate monument removal cases on . . . standing," rather than substantive policy); see also, e.g., *State v. City of Birmingham*, 299 So. 3d 220, 235 (Ala. 2019).

183. See, e.g., *Perry-Bey*, 2019 Va. Cir. LEXIS 265, at \*14.

184. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

185. See *supra* Section II.A.

arbiters of academic disputes—function like overtly partisan statutes that explicitly ban Confederate monument removal.<sup>186</sup> It argues that reforming these committees or undermining them via lawsuit is improbable, so the only realistic legal path for challenging individual monuments—even in states with these ostensible removal procedures—remains challenging statute statutes themselves.

Tennessee's general assembly created the Tennessee Historical Commission (THC) in 1919 to collect information on WWI, but quickly expanded its duties and included all wars in which Tennessee had engaged.<sup>187</sup> In 1994, the Tennessee General Assembly also created the Tennessee Wars Commission (TWC), which dedicated special THC efforts to certain wars, including “the War Between the States.”<sup>188</sup> According to the TWC, Tennessee had approximately seventy public Confederate monuments in 2013.<sup>189</sup> That same year, Memphis' attempt to change Confederate park names spurred a Republican legislator to introduce two laws to protect Confederate tributes.<sup>190</sup> One of these, the Tennessee Heritage Protection Act (THPA), prevented public memorial changes without a state waiver, and thus placed the THC in a larger

186. See *supra* Section II.A; Wahlers, *supra* note 23, at 2186–89; N.C. GEN. STAT. § 100-2.1 (2021) (supporting the notion that the North Carolina Historical Commission is more transparently powerless, since it can only remove or relocate to preserve monuments); see also, e.g., Merrit Kennedy, *3 North Carolina Confederate Monuments Will Stay in Place, Commission Decides*, NPR (Aug. 22, 2018, 11:35 PM), <https://www.npr.org/2018/08/22/640923318/3-north-carolina-confederate-monuments-will-stay-in-place-commission-decides> [https://perma.cc/7SYB-W4BJ]. But see, e.g., GA. CODE ANN. § 50-3-1 (2021) (forbidding any removal or alteration).

187. Herbert L. Harper, *Tennessee Historical Commission*, TENN. ENCYC., <http://tnency.utk.tennessee.edu/entries/tennessee-historical-commission/> [https://perma.cc/T34A-R39L] (Mar. 1, 2018).

188. *Id.* By contrast, Tennessee's statute statute recognizes the “War Between the States,” not the Civil War. TENN. CODE ANN. § 4-1-412(a)(2) (2022).

189. *The Confederate Statues and Monuments in Tennessee: Where They Are and When They Were Built*, TENNESSEAN, <https://www.tennessean.com/story/news/2019/01/03/confederate-statues-monuments-tennessee-removed/2474530002/> [https://perma.cc/66BR-L2WC] (Oct. 17, 2019, 8:27 AM) (noting that the largest peaks for building Tennessee monuments were between 1900–1909 and 2000–2009).

190. Cari Wade Gervin, *The Tennessee Heritage Protection Act Shields Confederate Monuments*, NASHVILLE SCENE (Sept. 28, 2017), [https://www.nashvillescene.com/news/cover-story/the-tennessee-heritage-protection-act-shields-confederate-monuments/article\\_78d6b94a-f4cd-5c01-b077-61d75cfcf23a.html](https://www.nashvillescene.com/news/cover-story/the-tennessee-heritage-protection-act-shields-confederate-monuments/article_78d6b94a-f4cd-5c01-b077-61d75cfcf23a.html) [https://perma.cc/Z6TA-BQXB]; see Bray, *supra* note 22, at 27–28, 28 n.172 (explaining that the Tennessee Sons of Confederate Veterans wrote and introduced the bill); *Two Preservation Bills Making Their Way Through the TN General Assembly*, TENN. PRES. TR. (Mar. 8, 2013), <http://www.tennesseepreservationtrust.org/news/two-preservation-bills-making-their-way-through-the-tn-general-assembly> [https://perma.cc/LCE3-DPHV]; H.R. 301, 108th Gen. Assemb. (Tenn. 2013) (creating a special account from which the THC could grant nonprofits funds); H.R. 553, 108th Gen. Assemb. (Tenn. 2013) (prohibiting changes to public memorials without petitioning the THC for a waiver).

battle preempting local minimum wage, paid leave, local hire, and anti-discrimination laws.<sup>191</sup>

While ostensibly designed for “heritage protection,” Tennessee’s statue statute structures the THC waiver process to block Confederate monument removal.<sup>192</sup> To receive a waiver, a public entity with control over a covered memorial must petition the THC, prove “material or substantial need” for the waiver at a hearing by clear and convincing evidence, and win approval by a two-thirds vote.<sup>193</sup> The THPA thus requires a high burden of proof to, and supermajority support from, a commission where twenty-four of twenty-nine members are governor-appointed, four members are Black, and members can miss votes.<sup>194</sup> Bias can also sway members who represent pro-Confederate organizations, which may have donated the monuments being contested.<sup>195</sup>

191. See § 4-1-412; BLAIR ET AL., *supra* note 52, at 6, 13. The Republican state of Tennessee has recently made its war against Democratic Nashville, and particularly its Black community, even more explicit. Michael Wines, *In Nashville, a Gerrymander Goes Beyond Politics to the City’s Core*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/nashville-gerrymandering-republican-democrat.html> [<https://perma.cc/2ZZM-MF57>] (removing Nashville’s political representation through gerrymandering).

192. See § 4-1-412.

193. *Id.* § 4-1-412(c) (including other burdensome provisions, such as: any interested party can demand access to hearing recordings at cost to the waiver-seeker; the waiver-seeker must provide extensive notice to the public and interested parties; and the process allows for many potential delays and appeals).

194. See, e.g., *id.* § 4-11-102(a) (listing the five, ex-officio members include the governor); *Former Governors – Tennessee*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/former-governors/tennessee/> [<https://perma.cc/HHZ3-VLU3>] (showing that Tennessee has had a Republican governor since THPA’s enactment); E-mail from Butch Eley, Chair, Capitol Comm’n, Tenn. Dep’t of Fin. Admin., to E. Patrick McIntyre Jr., Exec. Dir. & State Historic Pres. Officer, Tenn. Hist. Comm’n (Aug. 14, 2020), <https://www.tn.gov/content/dam/tn/statearctect/scc/20200814%20SCC%20Petition%20for%20Waiver%20and%20Supporting%20Documentation.pdf> [<https://perma.cc/QGA5-JY62>] (listing extensive petitioner requirements in an attached Petition for Waiver filed by the State Capitol Commission); TENN. COMPTROLLER OF THE TREASURY, TENNESSEE HISTORICAL COMMISSION AND TENNESSEE WARS COMMISSION PERFORMANCE AUDIT REPORT 13–17 (2018), <https://capitol.tn.gov/Archives/Joint/committees/govopps/com/TN%20Historical%20and%20TN%20Wars%20Commission%20PA.pdf> [<https://perma.cc/GWU6-HVDW>] (finding that commissioners lacked training to conduct hearings and one member missed meetings for eight months); see also Jason Moon Wilkins, *Governor Names 2 Appointees to Tennessee Historical Commission Ahead of Vote on Monument Removal*, WPLN (July 10, 2020), <https://wpln.org/post/governor-names-2-appointees-to-tennessee-historical-commission-ahead-of-vote-on-monument-removal/> [<https://perma.cc/GY4J-SCBU>].

195. See Lohr, *supra* note 7 (quoting Memphis pastor Keith Norman who stated that “[r]epresentatives and senators often recommend appointments, and they . . . stack[] the deck with [Confederate monument] empathizers.”); SPLC DATA, *supra* note 3 (select “Whose Heritage Master” tab); see also, e.g., E-mail from Butch Eley, *supra* note 194.

For example, in a final vote that seven members missed, the THC denied a petition from Middle Tennessee State University (MTSU) to remove Forrest's name from its ROTC building.<sup>196</sup> Ignoring extensive evidence that the name served as a tool of white supremacy, the THC held that Petitioners failed to demonstrate that the name was chosen to defy desegregation or express racial animosity or had caused students to leave or not attend MTSU.<sup>197</sup> Moreover, dismissing that the majority of the task force and MTSU community desired change, the THC highlighted that a "significant minority" of the task force and alumni opposed it.<sup>198</sup>

While petitioners can appeal denials to the Chancery Court, appeals would likely lose (assuming the process is legal) and can be prohibitively expensive.<sup>199</sup> For example, MTSU declined to appeal because the state Attorney General said the school would need outside counsel to avoid having two state entities on opposing sides.<sup>200</sup> Moreover, even if the THC grants a waiver, the THC can condition it on preservation and continued accessibility.<sup>201</sup> Furthermore, any entity with an "interest" in the monument can seek an injunction pending appeal.<sup>202</sup> Unlike city standing, which courts define narrowly, the legislature broadly defined this standing to include even "aesthetic" injury.<sup>203</sup> By contrast, the general assembly has encouraged the THC to limit which "public entities" can petition for removal.<sup>204</sup>

196. See Updates from the Forest Hall Task Force, MIDDLE TENN. STATE UNIV., <https://mtsu.edu/forresthall/updates.php> [<https://perma.cc/56G2-MR7C>] (last visited Feb. 28, 2022) (explaining that seven members missed the final vote).

197. Final Order at 7, Middle Tenn. State Univ., No. 04.47-150473A (Tenn. Hist. Comm'n Mar. 19, 2018); see also Josh Howard, *A Confederate on Campus: Nathan Bedford Forrest as MTSU's Mascot*, SPORT IN AM. HIST. (Aug. 24, 2015), <https://ussporthistory.com/2015/08/24/nathan-bedford-forrest-and-mtsu/> [<https://perma.cc/A6SY-HWCD>] (highlighting that the MTSU Department of History helped lead the call for change, explaining that Forrest's image "is bad for business and that it projects an image of white supremacy"); Elizabeth Catte, *A Confederate on Campus: The Case of MTSU's Forrest Hall*, NAT'L COUNCIL ON PUB. HIST. (Oct. 27, 2015), <https://ncph.org/history-at-work/a-confederate-on-campus/> [<https://perma.cc/BF5F-ZE2C>].

198. Final Order, *supra* note 197.

199. See Updates from the Forest Hall Task Force, *supra* note 196.

200. *Id.*

201. See TENN. CODE ANN. § 4-1-412(c)(8)(B) (2022).

202. See *id.* § 4-1-412(d).

203. See *id.*; *supra* Section II.B.2 (discussing city and citizen standing).

204. Tenn. Att'y Gen., Opinion Letter on State Capitol Commission's Petition for Waiver Under Tennessee Heritage Protection Act (May 12, 2021), <https://www.tn.gov/content/dam/tn/at-lawyergeneral/documents/ops/2021/op21-07.pdf> [<https://perma.cc/PGP8-WCHX>].



Overall, this design has ensured that, in THPA's seven years, the THC has only received seven waiver petitions.<sup>205</sup> While the committee granted the three unrelated to removing Confederate tributes, of the other four, the commission has granted only one.<sup>206</sup>

### *B. Reform from Within or Without*

If the THC ever supports Confederate monument removal, not only does the THPA facilitate appeals, but the legislature can retaliate. In recent years, the THPA has been changed and challenged multiple times when Confederate monument removal seemed possible.<sup>207</sup> In 2016, in response to post-Charlottesville threats of removing the state capitol's Forrest bust and renaming MTSU's "Forrest Hall," the legislature raised the THC voting requirement from a majority of those present to two-thirds of the commission.<sup>208</sup> In 2018, after the THC upheld the decision that the THPA no longer applied after Memphis' land sale, the legislature restricted such sales and made THPA violators ineligible for certain grants.<sup>209</sup> Finally, in 2021—after a Republican governor appointed pro-removal commissioners during Floyd protests and the THC granted its only waiver to remove a Confederate monument—Republican senators proposed SB0600 to eliminate the THC.<sup>210</sup> The replacement commission would cut

205. See *Tennessee Heritage Protection Act*, TENN. HIST. COMM'N, <https://www.tn.gov/historicalcommission/tennessee-heritage-protection-act.html> [<https://perma.cc/LV3Q-LFQJ>] (last visited Feb. 27, 2022).

206. *Id.* The governor heavily influenced the one waiver. See Davis, *supra* note 70. One of these waivers has not been decided. See *Tennessee Heritage Protection Act*, *supra* note 205.

207. See *Hearing on S. 600 Before the S. Gov't Operations Comm.*, 112th Gen. Assemb. (Tenn. 2021) (statement of Sen. Mike Bell, Rep. District 9) [hereinafter *Hearing on S. 600*] ("[S]ome decisions have been made that I may not agree with, but in 2013, again in '16 and '18, if you want to look up the definition of arduous . . . that's the process we created for removing a monument. Every time we get a decision . . . that we don't like, we want to come back and change it again. You know, if we want to just put it in our hands, let's just do a bill to do away with [the commission] completely and let the legislature vote on it.").

208. Gervin, *supra* note 190; see also Sam Stockard, *Heritage Protection Act Passes*, MURFREESBORO POST, [https://www.murfreesboropost.com/news/heritage-protection-act-passes/article\\_7f01f80a-2246-561f-901c-4671110b6604.html](https://www.murfreesboropost.com/news/heritage-protection-act-passes/article_7f01f80a-2246-561f-901c-4671110b6604.html) [<https://perma.cc/F9RC-U9CY>] (Oct. 26, 2017).

209. See *supra* Section II.A.2; Lohr, *supra* note 7; see also *Tennessee Heritage Protection Act*, *supra* note 205.

210. See *supra* Section II.A.2; Tenn. Att'y Gen., *supra* note 204; S. 600, 112th Gen. Assemb. (Tenn. 2021). Governor Bill Lee made the removal possible by appointing THC members who would vote to remove the Forrest Bust at the State Capital. See Sam Stockard, *Senate Committee Bucks Governor to Remake Historical Commission for Forrest Vote*, TENN. LOOKOUT (Mar. 17, 2021, 4:05 PM), <https://tennesseelookout.com/2021/03/17/senate-committee-bucks-governor-to-remake-historical-commission-for-forrest-vote/> [<https://perma.cc/CP7V-7Z5B>]; Kyle Horan, *Bill Would Remove All Members of the Historical Commission*, NEWSCHANNEL5 NASHVILLE,

membership in half, give the general assembly more appointment power than the governor, and remove academic requirements as well as racial and age diversity recommendations.<sup>211</sup> While this bill was deferred to “summer study,” the fate of this entire process remains unknown and current decisions must be made against the imminent threat of disbandment.<sup>212</sup> Moreover, another bill proposed the day after SB0600 explicitly required general assembly approval for any THC waiver and banned future removals comparable to the one just granted.<sup>213</sup> Thus, if the THC ever became a genuine path to removal, the legislature would likely just ban removal outright.<sup>214</sup>

Admittedly, requiring approval from a state historical commission is not intrinsically a facade. There is some truth to THPA supporters’ claim that changing historical markers should be “arduous.”<sup>215</sup> One could also argue that political communities larger than cities should control historical recognition.<sup>216</sup> A recent waiver granting Knoxville permission to remove and replace a misleading plaque with a more inclusive, accurate, and updated state marker shows how this larger oversight process can lend credibility and protection to historical preservation efforts.<sup>217</sup>

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<https://www.newschannel5.com/news/bill-would-remove-all-members-of-the-historical-commission> [<https://perma.cc/5WNH-YFVK>] (Mar. 18, 2021, 9:04 AM).

211. Tenn. S. 600.

212. *SB 0600 Bill History*, TENN. GEN. ASSEMB., <https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0600&GA=112> [<https://perma.cc/GS3Q-QLCT>] (last visited Feb. 28, 2022). Alabama’s committee membership is already similar: its eleven members are appointed by the Governor, Senate Pro Tem, and House Speaker, and must all be approved by the Alabama Legislature. Sherri Jackson, *Alabama Monument Protection Committee Named by State Officials*, CBS 42 (Aug. 18, 2017, 2:47 AM), <https://www.cbs42.com/news/alabama-monument-protection-committee-named-by-state-officials/> [<https://perma.cc/N9C5-7FVS>].

213. This bill would: forbid removing any statue from the state capitol’s second floor and create new crimes for altering monuments (including making it an impeachable offense for which elected officials are personally liable); extend the statute of limitations for filing a THC complaint to two years; and create a cause of action allowing individuals to sue Confederate monument vandals. H.R. 1432, 112th Gen. Assemb. (Tenn. 2021).

214. See *Hearing on S. 600*, *supra* note 207.

215. See *id.* However, Confederate memorials do not fit standard historical preservation justifications. See *Etched in Stone*, *supra* note 19, at 639.

216. Cf. *supra* Section II.B.1; Bray, *supra* note 22, at 52 (arguing statue removal is a local, land use issue).

217. Final Order, City of Knoxville, No. 04.48-210840A (Tenn. Hist. Comm’n June 18, 2021). Although, requiring an over seven-month process to reduce historical confusion and enhance historical recognition might harm the public’s historical understanding. See *id.* Moreover, enforcing the THPA can harm the THC’s ability to do more important preservation. See *id.*; Telephone Interview with Sam Davis Elliott, Tenn. Hist. Comm’n (Jan. 10, 2022) (claiming that the THPA requires approximately half the THC’s time, that its legal expenses drain the commission’s budget, and that the two-thirds voting requirement can make basic preservation

Furthermore, past revisions suggest that THC's form could also be made more fair and democratic. For example, legislators could (1) grant the THC public interest or safety valve exceptions, (2) require waiver procedures to consider historical and contemporary significance, (3) place special emphasis on protecting monuments to subjugated peoples, (4) give localities more waiver influence, (5) impose tighter decision time frames, or (6) require membership to balance political parties and local representation, be relevantly educated, and lack conflicts of interest with heritage organizations.<sup>218</sup> In fact, urged by legal counsel after Memphis challenged its waiver process, the THC improved transparency by promulgating waiver standards via formal rulemaking.<sup>219</sup> However, given the THPA's motivations, southern state legislatures are unlikely to initiate substantive reforms to further local control or block false and discriminatory representations of US history.<sup>220</sup> Moreover, the mere existence of a statewide procedural barrier likely deters efforts at change, and thus any state commission approval requirement will favor the "heritage" choices of the past over the preferences of the present.<sup>221</sup>

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decisions difficult—like approving a land sale waiver at a hearing that only eighteen members attended).

218. Byrne, *supra* note 30, at 672, 683; *see, e.g.*, Col. Stephen R. Schwalbe, *An Exposé on Base Realignment and Closure Commissions*, CHRONOS. ONLINE J., June 12, 2003, at 1, 2–3, 5; *see also Etched in Stone*, *supra* note 19, at 669–70, 687.

219. *See* TENN. HIST. COMM'N, RULEMAKING HEARING RULE(S) FILING FORM 2 (2015), [https://www.tn.gov/content/dam/tn/environment/historic-commission/thc\\_heritage\\_act\\_rules.pdf](https://www.tn.gov/content/dam/tn/environment/historic-commission/thc_heritage_act_rules.pdf) [<https://perma.cc/6HXV-KHYT>]. Standards include considering the support of *local*, not *Tennessee*, residents—which likely favors removal—but not statues' "modern interpretation"—which could go either way. *See id.*; TENN. COMPTROLLER OF THE TREASURY, *supra* note 194, at 13.

220. *See supra* Part II.

221. *See, e.g.*, Adam Friedman, *Tennessee Laws Slow Push to Remove Madison County Confederate Statue*, JACKSON SUN, <https://www.jacksonsun.com/story/news/local/government/2020/07/23/tennessee-laws-slow-push-remove-madison-county-confederate-statue/5491814002/> [<https://perma.cc/T5YH-5NGY>] (July 24, 2020, 10:20 AM); *cf.* Taylor v. Northam, 862 S.E.2d 458, 471–72 (Va. 2021); Telephone Interview with Macy Amos, Att'y, Nashville Dep't of L. (Jan. 13, 2022). *Compare* Catte, *supra* note 197 (explaining that MTSU's president removed a plaque dedicated to Forrest over 1989's winter break without discussion), *with* Updates from the Forest Hall Task Force, *supra* note 196 (describing a three-year community effort to rename "Forrest" Hall that resulted in THC rejection). However, citywide commissions might prove more democratic. *See* Lewis, *supra* note 10 (describing Bristol's History Commission).

### C. Undermine via Loopholes & Lawsuits

While political reform is unlikely, reactionary sloppiness may create opportunities for loopholes and lawsuits.<sup>222</sup> For example, an Alabama county argued that (1) its committee took so long to respond to its waiver that it was implicitly granted, and (2) that it qualified for a separate “construction waiver” because of a planned courthouse expansion.<sup>223</sup> The county alternatively argued that the statute unconstitutionally violated the state’s Open Meetings Act and separation of powers via membership requirements.<sup>224</sup> However, these arguments are specific to state laws and practice, which can be changed to prevent future exploitation.<sup>225</sup> Therefore, the strongest arguments to defeat commission-based statutes will probably be the same used against statue statutes generally.<sup>226</sup>

For example, cities could argue that committee waiver processes obfuscate and remove democratic control over speakers behind monuments, so statues and statue statutes should not get First Amendment immunity due to political accountability.<sup>227</sup> Specifically, waiver processes suggest localities can influence the ultimate speaker, “history” or historical arbiters, when, in fact, elected state leaders have total control.<sup>228</sup> Cities could also argue the EP claim that historical commissions restructure the political process in discriminatory ways.<sup>229</sup> Finally, cities could further procedural Due Process claims by arguing that the slow and rigged THC process denies them the opportunity to be heard “at a meaningful time and in a meaningful manner” while being deprived of resources to maintain unwanted statues.<sup>230</sup> However,

222. See *supra* Sections II.A.2, II.B.2; Bray, *supra* note 22, at 52–53 (“[S]tatue statutes hide their practical flaws and constitutional vulnerabilities behind their structural complexity [and] their sweeping references to . . . military history.”).

223. See Answer of Defendants, *supra* note 157.

224. *Id.* These claims were not resolved because the case was dismissed. See *State Accepts County’s Payment for Removing Rebel Monument*, *supra* note 100.

225. See, e.g., TENN. COMPTROLLER OF THE TREASURY, *supra* note 194, at 13 (showing the THC fixed its waiver standards after Memphis’ legal challenge).

226. See *supra* Section II.B.2.

227. Cf. *supra* Section II.B.2. Unlike in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), historical commissions remove local control over monument selection, blur government versus private speakers, and prevent electoral redress for unrepresentative speech. See *supra* Section III.A.

228. Cf. Byrne, *supra* note 30, at 679–80 (explaining that many viewers experience historical sites as representing “authentic expressions” from the past independent of government planners).

229. See *supra* Section II.B.2 (discussing political process claims).

230. See *Monumental Task Comm., Inc v. Foxx*, 259 F. Supp. 3d 494, 508 (E.D. La. 2017); see also Alexander Willis, *Hearing on Williamson County Seal Alteration Delayed to Next Year Due*

so long as courts hold that cities lack constitutional rights against states, these claims will be dismissed for standing.<sup>231</sup>

Given that historical commissions nearly always result in the same removal bans as more direct statue statutes, why do state legislatures work so hard to maintain them?<sup>232</sup> First, seemingly independent arbiters can give credibility to subsequent denials and shield legislators from accountability for preserving racist statues.<sup>233</sup> Second, persuading localities to engage in never-ending, bureaucratic processes can diffuse community discontent.<sup>234</sup> For example, in June 2020, Governor Bill Lee told Williamson County commissioners to address post-Floyd opposition to the county seal's Confederate flag by "engag[ing] in dialogue" with community members—ignoring that the THC had ultimate authority to approve alteration while claiming he "wasn't familiar with the [THC] process" (in which he would vote).<sup>235</sup> At his urging, those county commissioners created a task force, the task force unanimously recommended removal, and the commissioners voted for removal in September 2020, only to await a THC hearing which an appeal by the Sons of Confederate Veterans delayed until February 2022.<sup>236</sup> This difficult petition process discourages filing and the temporal lag undermines community activism.<sup>237</sup> Moreover, even if a

to *Sons of Confederate Veterans*, WILLIAMSON HOME PAGE (Aug. 30, 2021), [https://www.williamsonhomepage.com/news/hearing-on-williamson-county-seal-alteration-delayed-to-next-year-due-to-sons-of-confederate/article\\_3cd902e0-09dd-11ec-8dfc-cb2d75b139a4.html](https://www.williamsonhomepage.com/news/hearing-on-williamson-county-seal-alteration-delayed-to-next-year-due-to-sons-of-confederate/article_3cd902e0-09dd-11ec-8dfc-cb2d75b139a4.html)

[<https://perma.cc/6ZJG-RYMX>] (describing how the waiver process postpones denial until long after instigating resistance); *supra* Section II.B.2.

231. See *supra* Section II.B.2.

232. See *supra* Sections III.A–B.

233. Wahlers, *supra* note 23, at 2186–87; see also JACOB R. STRAUS, CONG. RSCH. SERV., R40076, CONGRESSIONAL COMMISSIONS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 5–7 (2022); Telephone Interview with Sam Davis Elliott, *supra* note 217 (claiming that the THC generates a lot of controversy but not necessarily a lot of action).

234. Cf. Campbell, *supra* note 39, at 168 (arguing delegation facilitates "doing something" while averting decisions).

235. Alexander Willis, *Gov. Lee Recommends Community Dialogue in Call to Remove Confederate Flag from Williamson County Seal*, WILLIAMSON HOME PAGE, [https://www.williamsonhomepage.com/news/gov-lee-recommends-community-dialogue-in-call-to-remove-confederate-flag-from-williamson-county-seal/article\\_59ed5474-ab85-11ea-b133-37aa778c694a.html](https://www.williamsonhomepage.com/news/gov-lee-recommends-community-dialogue-in-call-to-remove-confederate-flag-from-williamson-county-seal/article_59ed5474-ab85-11ea-b133-37aa778c694a.html) [<https://perma.cc/7VF8-YMEE>] (May 7, 2021).

236. See Willis, *supra* note 230. The February hearing was delayed again until April as the parties negotiate a settlement. Coleman Bomar, *County Seal Alteration Vote Delayed Again*, WILLIAMSON HERALD, [https://www.williamsonherald.com/news/local\\_news/county-seal-alteration-vote-delayed-again/article\\_05f34f52-8443-11ec-99a9-b3f24ecd3c82.html](https://www.williamsonherald.com/news/local_news/county-seal-alteration-vote-delayed-again/article_05f34f52-8443-11ec-99a9-b3f24ecd3c82.html) [<https://perma.cc/Z52B-ZNXE>] (Feb. 16, 2022). The delay between community consensus and filing a petition can also be long. See, e.g., *infra* note 237 and accompanying text.

237. See, e.g., METRO. BD. OF PARKS & RECREATION, MINUTES OF BOARD MEETING: JANUARY 5, 2021, at 3–4 (2021), <https://www.nashville.gov/sites/default/files/2021-07/Parks-Minutes-2021-01-05.pdf> [<https://perma.cc/S54N-VQ8A>] (reacting to outrage against recent

community successfully navigates these processes, the THC will likely reject its recommendation in short, futile hearings.<sup>238</sup> The THC thus offers angry citizens neutral-sounding, deliberative, democratic solutions (e.g., “task forces” and public hearings) while the state maintains removal power for itself. Finally, the façade of a fair waiver process can be used to criticize those who resort to illegal alteration and removal.<sup>239</sup> For example, Governor Lee advocated removing the Capitol’s Forrest bust using the State Capitol Commission process (and implicitly the THC)—designed “with representative citizen appointees [to] use a framework to determine the historical figures whom we revere”—rather than “mob rule . . . the worst way to address questions of history.”<sup>240</sup> However, until state legislatures give cities a better “framework” to challenge monuments than historical commissions, citizens will reasonably conclude that their leaders cannot “act on the frustration and pain” that monuments inflict and will resort to vandalism and violence.<sup>241</sup>

#### IV. CONCLUSION

Blue cities face an uphill battle against the statues and statue statutes foisted upon them by red states. Not only does structural polarization make political solutions unlikely, but the monuments and statutes themselves act as self-justifying propaganda. The statues

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murders by voting to petition the THC to remove a Confederate monument). A year later, the Board’s lawyer is still compiling information and notifying interested parties so she can submit the petition. Telephone Interview with Macy Amos, *supra* note 221. The petition process can also confuse the media, which can mislead the public into thinking its concerns are being addressed. *See, e.g.*, Corinne Murdock, *Metro Parks Board Petitions State Historical Commission to Remove Sam Davis Statue*, TENN. STAR (Feb. 5, 2021), <https://tennesseestar.com/2021/02/05/metro-parks-board-petitions-state-historical-commission-to-remove-sam-davis-statue/> [<https://perma.cc/W4UG-CJAY>] (falsely reporting that the Board had submitted its petition).

238. *See, e.g.*, Updates from the Forest Hall Task Force, *supra* note 196 (describing MTSU’s extensive efforts collecting community input to recommend renaming that were ultimately defeated in a five-hour THC hearing which seven commission members missed). MTSU’s petition was rejected in 2018, though students had been protesting since 2015. Catte, *supra* note 197.

239. *Cf. Governor Bill Lee Addresses the Nathan Bedford Forrest Bust*, TN OFF. OF THE GOVERNOR (July 8, 2020, 3:11 PM), <https://www.tn.gov/governor/news/2020/7/8/governor-bill-lee-addresses-the-nathan-bedford-forrest-bust.html> [<https://perma.cc/9EA4-9PLJ>] (“I [Governor Bill Lee] have great respect for this process.”).

240. *Id.*

241. *Cf. Kennedy*, *supra* note 186 (noting that after losing his own historical commission petition, North Carolina’s Democratic Governor Roy Cooper stated that the General Assembly needed to give citizens a “better path” to safely challenge monuments and that protestors who had knocked down monuments had concluded that their leaders “would not – could not – act on the frustration and pain it caused”).

promote a false narrative that the Confederacy nobly defended “home rule” against Northern invaders, while historical commission statutes suggest communities choose to maintain these monuments as accurate representations of revered “history.” In fact, these ubiquitous statues and the laws that protect them are powerful tools of oppression and misinformation that undermine home rule.

However, even if challenging statues and statutes is difficult, bringing creative lawsuits against them still matters.<sup>242</sup> First, as some lower courts have shown, judicial victories are possible.<sup>243</sup> Second, lawsuits could expose what these monuments truly mean and how these statutes undermine self-determination.<sup>244</sup> If the public understood the difficulty and futility of pursuing waivers, angry citizens and cities could stop organizing endless task forces, petitions, and hearings to remove individual monuments, and instead find other ways to challenge these narratives, organize against statue statutes generally, or even take action beyond the law.<sup>245</sup> Citizens would also know who to hold accountable for this government hate speech: not cities or even commissioners, but the state leaders who control them. Overall, if lawsuits and education can help change the narrative—and citizens transfer their energy to organizing for legislative change—maybe someday political leaders will remove these statue statutes so that cities have a path to remove Confederate statues themselves.<sup>246</sup>

*Sage Snider\**

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242. Cf. BRENNAN CTR. FOR JUST., *LEGAL CHANGE: LESSONS FROM AMERICA’S SOCIAL MOVEMENTS* 107 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015), [https://www.brennan-center.org/sites/default/files/publications/Legal\\_Change\\_Lessons\\_from\\_America%27s\\_Social\\_Movements.pdf](https://www.brennan-center.org/sites/default/files/publications/Legal_Change_Lessons_from_America%27s_Social_Movements.pdf) [<https://perma.cc/X4PM-UK93>] (discussing the effectiveness of using litigation to support social movements).

243. See *supra* Section II.B.2.

244. Bray, *supra* note 22, at 20.

245. See, e.g., David Plazas, *People of the Year 2021: The Founders of the Fuller Story in Franklin, Tennessee*, TENNESSEAN (Dec. 26, 2021, 10:43 AM), <https://www.tennessean.com/story/opinion/editorials/2021/12/26/people-year-2021-fuller-story-founders-franklin-tennessee/6416457001/> [<https://perma.cc/X23H-J9SG>]. But see Lewis, *supra* note 10 (criticizing “retain and explain”).

246. Cf. Lawler, *supra* note 14 (describing how Virginia changed its statute so localities could change monuments).

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