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"Close the Sores of War": Why Georgia Needs New Legislation to Address Its Confederate Monuments

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“CLOSE THE SORES OF WAR”: WHY GEORGIA NEEDS NEW LEGISLATION TO ADDRESS ITS CONFEDERATE MONUMENTS

Abigail K. Coker*

“Let us put the cannons of our eyes away forever. Our one and only Civil War is done. Let us tilt, rotate, strut on. If we, the living, do not give our future the same honor as the sacred dead—of then and now—we lose everything.”¹

-Nicky Finney

ABSTRACT

Confederate monuments have been a point of contention in America for decades, but a series of events since 2015 have stoked the most recent movement calling for their removal. In 2015, Dylann Roof murdered Black churchgoers at a historically Black church in Charleston, South Carolina. Because Roof was seemingly motivated and emboldened by Confederate ideology, many focused their attention on removing the more than 700 Confederate monuments throughout the country. Then, in August 2017, a large white nationalist rally assembled in Charlottesville, Virginia, to protest the removal of

* J.D. Candidate, 2022, Georgia State University College of Law. My deepest gratitude to Professors Ryan Rowberry and Natsu Taylor Saito for their encouragement, guidance, and feedback; to my colleagues and friends on the Georgia State University Law Review for their time and attention in polishing this Note; and finally, to my family, and the friends who have become family, for their unwavering support every step of the way.

1. *A New Day Dawns*, THE STATE (July 9, 2015), <https://www.thestate.com/living/article26928424.html> [https://perma.cc/6G5C-AV6B]. On July 9, 2015, on the heels of the racially motivated murder of Black churchgoers in Charleston weeks earlier, the South Carolina legislature passed a bill to remove the Confederate flag from statehouse grounds. Elahe Izadi & Abby Phillip, *South Carolina House Votes to Remove Confederate Flag from Statehouse Grounds*, WASH. POST (July 9, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/09/south-carolina-house-votes-to-remove-confederate-flag-from-statehouse-grounds/> [https://perma.cc/Q7QG-DG2L]. In response to the flag removal, South Carolina poet Nicky Finney penned the prose poem “A New Day Dawns,” from where this excerpt comes. *A New Day Dawns*, *supra*. Finney’s father, Ernest Finney, was the South Carolina Supreme Court’s first African-American Chief Justice. *Id.*

a statue of Robert E. Lee from Charlottesville's Emancipation Park. The demonstrations turned violent when a white nationalist barreled his car into a crowd of counterprotesters, killing one and injuring nineteen more. Finally, in May 2020, the murder of George Floyd, a Black man, at the hands of a White police officer catapulted the removal movement to a peak.

In response to these events, some states swiftly removed Confederate monuments from their public spaces, but in 2019, Georgia bolstered its monument-protection laws, tightening restrictions on local control by outright barring monument removal. This leaves localities—the ones who actually own much of the public property on which these monuments sit—without recourse. Several Georgia localities have nonetheless removed Confederate monuments from their grounds, but since these actions conflict directly with Georgia state law, they are vulnerable to litigation.

Monuments maintained in public spaces are means of expression that necessarily convey political narratives. Thus, by prohibiting monument removal, Georgia has prevented its localities from speaking their own narratives. Further, preemptively precluding monument removal undermines community engagement and erases any possibility of democratic consensus building.

To remedy this problem, this Note argues that Georgia should amend its monument-protection laws to return the power to local communities by affording them myriad options—including contextualization, removal, and destruction—to address their Confederate monuments. This Note proposes that Georgia adopt a monument-protection statute similar to Virginia's monument-protection statute that provides a democratic forum for discussion and ultimately allows localities to manage their own public spaces.

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INTRODUCTION

As midnight approached on the eve of Juneteenth 2020, a crowd gathered in Georgia's Decatur Square to watch the dismantling of a 112-year-old Confederate monument.² Applause erupted as a crane plucked the thirty-foot obelisk from its pedestal outside the historic DeKalb County courthouse.³ The removal was three years in the making: in September 2017, Decatur's City Commission voted unanimously to remove the monument.⁴ Yet the Commission's vote was moot in the face of Georgia law, which then, and now, prohibits monument removal.⁵ Thus, until a 2020 court order authorized the removal for public safety, the City was powerless to do more than contextualize the monument that sat on its grounds, exposing a glaring hole in Georgia state law.⁶

What governments maintain in their public spaces bears directly on their communities.⁷ Public space is a precious and limited commodity managed by those in political power.⁸ Thus, the organization of public space necessarily conveys a political narrative.⁹ That narrative is communicated most clearly through expressive markers like

2. Tyler Estep & Amanda C. Coyne, *The Confederate Monument in Decatur Comes Down*, ATLANTA J.-CONST. (June 19, 2020), <https://www.ajc.com/news/local/breaking-confederate-monument-decatur-appears-coming-down/1SfeR7g7YZdScfGI5NVfSJ/> [<https://perma.cc/RF88-X6V9>]; Faith Karimi, *A Controversial Confederate Monument Goes Down in the Atlanta Suburb of Decatur*, CNN, <https://www.cnn.com/2020/06/19/us/decatur-square-confederate-monument-removed/index.html> [<https://perma.cc/3VJH-M7G6>] (June 19, 2020, 6:46 AM).

3. Tyler Estep (@ByTylerEstep), TWITTER (June 18, 2020, 11:43 PM), <https://twitter.com/ByTylerEstep/status/1273823641097113600> [<https://perma.cc/3MJW-XDTV>]; Karimi, *supra* note 2.

4. City Comm'n of the City of Decatur Res. R-17-26, 2017 Leg. (Ga. 2017).

5. GA. CODE ANN. § 50-3-1 (2019).

6. Order Granting Emergency Motion for Interlocutory Abatement of a Pub. Nuisance, *Downs v. DeKalb Cnty.*, No. 20CV4505-3 (Super. Ct. DeKalb Cnty. June 12, 2020).

7. Alex Zhang, Essay, *Damnatio Memoriae and Black Lives Matter*, 73 STAN. L. REV. ONLINE 77, 78 (2020) ("Monuments do not simply memorialize the past—they are vital expressions of political authority . . .").

8. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 7 (1998) (noting that a society's organization of public space teaches the public a "desired political lesson").

9. *See id.*

monuments¹⁰ but may just as well be conveyed through structural mechanisms not considered in this Note.¹¹ Because monuments are “a means of expression,” political narrative building includes deciding which monuments, particularly those placed by previous regimes, deserve to occupy public spaces.¹²

Although Confederate monuments have remained a point of contention in America for decades, a series of events since 2015 have stoked the most recent movement calling for their removal. First, in June 2015, white supremacist Dylann Roof massacred nine Black churchgoers at a historically Black church in Charleston, South Carolina, in hopes of igniting a race war.¹³ Pictures of Roof posing with the Confederate battle flag quickly surfaced, including information that he made a pilgrimage to several Confederate heritage

10. GA. CODE ANN. § 50-3-1(b)(1)(B) (2019). For purposes of this Note, the Author uses the definition of “monument” embraced by Georgia state law:

“Monument” means a monument, plaque, statue, marker, flag, banner, structure name, display, or memorial constructed and located with the intent of being permanently displayed and perpetually maintained that is:

- (i) Dedicated to a historical entity or historically significant military, religious, civil, civil rights, political, social, or cultural events or series of events; or
- (ii) Dedicated to, honors, or recounts the military service of any past or present military personnel of this state; the United States of America or the several states thereof; or the Confederate States of America or the several states thereof.

Id. Thus, the term “Confederate monument” refers to any monument erected to commemorate individuals or events associated with the Confederate States of America or the theory of the Lost Cause.

11. Although not considered in this Note, structural organization of public space is another means of communicating political narratives. Consider the Jim Crow South: restrictions on Black individuals’ use of public space promulgated the racist, segregationist attitude of those in power. See Melvin I. Urofsky, *Jim Crow Law: United States [1877-1954]*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Jim-Crow-law> [<https://perma.cc/3F3Q-4YMR>].

12. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (“When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”). Moreover, “[p]ermanent monuments displayed on public property typically represent government speech,” which necessarily has the effect of communicating “a message on the [government entity’s] behalf.” *Id.*; Brief of Appellees at 23, *State v. City of Birmingham*, 299 So. 3d 220 (Ala. 2019) (No. 1180342), 2019 WL 2710813, at *23; Sanford Levinson, *Thomas Ruffin and the Politics of Public Honor: Political Change and the Creative Destruction of Public Space*, 87 N.C. L. REV. 673, 673 (2009) (listing the following examples of reorganization after a regime change: “renaming of streets, airports, and buildings . . . construction of statues and memorials honoring those deemed ‘heroes’ by the new regime” and “effacement of old names and destruction of old statues and memorials . . .”).

13. See Polly Mosendz, *Dylann Roof Confesses: Says He Wanted to Start ‘Race War,’* NEWSWEEK (June 19, 2015, 9:38 AM), <https://www.newsweek.com/dylann-roof-confesses-church-shooting-says-he-wanted-start-race-war-344797> [<https://perma.cc/MLN6-4X2X>] (noting that, in his confession to police, Roof said he wanted to start a “race war”).

sites in preparation for the shooting.¹⁴ Because Roof revered and was seemingly emboldened and motivated by Confederate ideology, many turned their attention to removing the Confederate flag and Confederate monuments from public spaces.¹⁵

Following the Charleston shooting, South Carolina swiftly removed the Confederate battle flag from its statehouse grounds, and a number of Confederate monuments around the country were relocated, including ones in Texas, Missouri, Louisiana, and Kentucky.¹⁶ At the same time, however, some states bolstered restrictions on monument removal.¹⁷

Then, in August 2017, a large white nationalist rally titled “Unite the Right” assembled in Charlottesville, Virginia, to protest the

14. Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), <https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist> [<https://perma.cc/CB66-T559>] (cataloging the sites where Roof traveled: the Museum and Library of Confederate History in Greenville, South Carolina; a Confederate graveyard in his hometown of Columbia, South Carolina; a former plantation, Boone Hall, in Mount Pleasant, South Carolina; and Sullivan’s Island, South Carolina, which was, at one time, “the largest disembarkation point in the United States for ships carrying enslaved Africans”); Keith O’Shea, Darran Simon & Holly Yan, *Dylann Roof’s Racist Rants Read in Court*, CNN, <https://www.cnn.com/2016/12/13/us/dylann-roof-murder-trial/index.html> [<https://perma.cc/8QEJ-LEXA>] (Dec. 14, 2016, 10:28 AM) (noting that Roof maintained a website containing pictures and a racist “manifesto” that detailed how he came to believe in white supremacy); Ralph Ellis, *Photos of Unsmiling Roof on Manifesto Website Show Symbols, Gun*, CNN, <https://www.cnn.com/2015/06/20/us/charleston-shooting-website/> [<https://perma.cc/J2A4-8BAU>] (June 21, 2015, 11:45 AM). Notably, several photos on Roof’s website include him posing with the Confederate battle flag. *Id.* Roof’s reverence for the flag contributed to the removal movement sparked in 2015. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019) [hereinafter *SPLC Report*], <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [<https://perma.cc/F264-GRCY>].

15. Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 630 (2019) (concluding that past debates over Confederate symbology centered on the Confederate battle flag, but efforts renewed in the wake of the Charleston shooting and violence in Charlottesville focused more on Confederate monuments in public spaces); see also Adam K. Raymond, *A Running List of Confederate Monuments Removed Across the Country*, N.Y. MAG.: INTELLIGENCER, <https://nymag.com/intelligencer/2017/08/running-list-of-confederate-monuments-that-have-been-removed.html> [<https://perma.cc/FQK7-BUCP>] (Aug. 25, 2017) (“Before [Roof’s shooting], most Americans didn’t think much about the more than 700 Confederate monuments around the nation . . . [but after,] people began looking beyond the flag and focused their attention on statues and monuments to Confederate generals, soldiers, and battles . . .”).

16. Izadi & Phillip, *supra* note 1; see also Raymond, *supra* note 15; *SPLC Report*, *supra* note 14.

17. See, e.g., Kaeli Subberwal, *Several States Have Erected Laws to Protect Confederate Monuments*, HUFFPOST, https://www.huffpost.com/entry/states-confederate-statue-laws_n_5996312be4b0e8cc855cb2ab [<https://perma.cc/5SKY-MGTN>] (Aug. 18, 2017) (noting that Alabama passed tighter restrictions since the Charleston shooting). See generally *SPLC Report*, *supra* note 14, for more background on other states’ monument protection laws.

removal of a statue of Robert E. Lee from Charlottesville's Emancipation Park.¹⁸ The demonstrations turned violent when a white nationalist barreled his car into a crowd of counterprotesters, killing one and injuring nineteen more.¹⁹ Seeds of political dissent were sown, foreshadowing a sea change in the 2020 presidential election, when then-President Trump offered a weak rebuke of the white nationalist crowd by comparing them to their counterprotesters, implicitly recognizing their perspective as equally valid.²⁰ After the Charlottesville rallies, dozens of Confederate monuments were removed from public spaces.²¹ By contrast, Georgia reacted to the Charleston massacre by broadening the scope of its monument-protection laws.²²

Finally, in May 2020, the murder of George Floyd at the hands of police catapulted the movement to a peak.²³ The police arrested Floyd,

18. Richard Fausset & Alan Feuer, *Far-Right Groups Surge into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html> [<https://perma.cc/S265-R2Q2>] (“[D]emonstrations in Charlottesville were perhaps the most visible manifestation to date of the evolution of the American far right, a coalition of old and new white supremacist groups connected by social media and emboldened by the election of Donald J. Trump.”). Numerous far-right organizations flooded Charlottesville for the protests, including groups like Vanguard America, the League of the South, and Identity Evropa. *Id.* On Friday night before their planned rally on Saturday, hundreds from the far right marched through the University of Virginia campus bearing torches and chanting Nazi-associated phrases. *Id.*

19. Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018, 4:44 PM), <https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500> [<https://perma.cc/E7CZ-LXT4>]. In the years since the Unite the Right rally, white supremacists have committed “at least [seventy-three] murders . . . [thirty-nine] of which were clearly motivated by hateful, racist ideology.” *Two Years Ago, They Marched in Charlottesville. Where Are They Now?*, ADL.ORG (Aug. 8, 2019), <https://www.adl.org/blog/two-years-ago-they-marched-in-charlottesville-where-are-they-now> [<https://perma.cc/3LXR-NXSK>].

20. See Jordyn Phelps, *Trump Defends 2017 ‘Very Fine People’ Comments, Calls Robert E. Lee ‘A Great General,’* ABC NEWS (Apr. 26, 2019, 3:47 PM), <https://abcnews.go.com/Politics/trump-defends-2017-fine-people-comments-calls-robert/story?id=62653478> [<https://perma.cc/ZW7F-6UBS>]. When asked about the rally in the days following it, then-President Donald J. Trump said, “You [] [have] some very fine people on both sides.” *Id.* Regarding Trump’s statement, then-presidential candidate Joe Biden reflected: “With those words, the [P]resident of the United States assigned a moral equivalence between those spreading hate and those with the courage to stand against it . . . [a]nd in that moment, I knew the threat to this nation was unlike any I’d ever seen in my lifetime.” *Id.*

21. Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate over Confederate Statues*, N.Y. TIMES, <https://www.nytimes.com/2020/06/03/us/confederate-statues-george-floyd.html> [<https://perma.cc/8YCG-39WE>] (Apr. 1, 2021).

22. See *infra* Part I.D.

23. Ortiz & Diaz, *supra* note 21; Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES, <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/TBM6-737K>] (Sept. 7, 2021).

a Black man, after he allegedly used a counterfeit twenty-dollar bill at a convenience store in Minneapolis.²⁴ Floyd was handcuffed but resisted entering a squad car after telling police he was claustrophobic.²⁵ As the effort to put Floyd in the police car continued, Floyd eventually hit the ground—it is unclear whether he fell or was pushed by police—and officers immediately restrained him.²⁶ Officer Derek Chauvin, a White man, knelt on Floyd’s neck for eight minutes and forty-six seconds, ignoring Floyd’s repeated cries that he could not breathe, until Floyd lost consciousness.²⁷ Chauvin continued kneeling on Floyd’s neck even after Floyd became unresponsive, and his pulse was no longer detectable.²⁸ Floyd was declared dead shortly later at a hospital, and nationwide protests ensued in the subsequent weeks.²⁹

Protests over the killings of unarmed Black people are not new; in fact, the Black Lives Matter (BLM) movement and corresponding demonstrations started in 2013 after George Zimmerman, a White man, was acquitted for the murder of a Black teen, Trayvon Martin.³⁰ Nevertheless, the BLM protests that erupted in the wake of George Floyd’s murder reached unprecedented levels.³¹ Data suggests that

24. Elliott C. McLaughlin, *Three Videos Piece Together the Final Moments of George Floyd’s Life*, CNN, <https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html> [<https://perma.cc/24EX-RZ2A>] (June 23, 2020, 9:14 AM).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://perma.cc/8ELB-Z8T8>]. The Black Lives Matter (BLM) movement, created by three Black women, started as a hashtag on social media in response to the acquittal of George Zimmerman in 2013 and has grown into a global network of over forty chapters. *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [<https://perma.cc/6R53-QCUN>]; Aleem Maqbool, *Black Lives Matter: From Social Media Post to Global Movement*, BBC NEWS (July 10, 2020), <https://www.bbc.com/news/world-us-canada-53273381> [<https://perma.cc/VAZ6-XF48>]. Unlike the Civil Rights Movement of the 1960s, where prominent leaders like Dr. Martin Luther King, Jr. were well known, BLM has intentionally decentralized leadership and depends on member-led organization. *See* Maqbool, *supra*. Leadership in many of the BLM chapters is female, leading to a deliberately intersectional approach that affirms all Black lives, including “queer and trans folks, disabled folks, undocumented folks, folks with records, women, and all Black lives along the gender spectrum.” *About*, *supra*.

31. *See generally* Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/9R59-QDKL>].

fifteen to twenty-six million people participated in the protests.³² Some protestors directed their anger at Confederate monuments, vandalizing monuments in Virginia, Alabama, and Georgia.³³

Political movements, especially those that spawn regime changes, often usher in “the strategic reorganization” of public space; thus, it is not surprising that the Confederate removal movement’s peak came as a corollary to a national reckoning over systemic racism.³⁴ Through the rise of multiculturalism³⁵ and movements to root out systemic racism, the United States is clearly in the midst of political transformation.³⁶ As America struggles to redefine its identity, debates

32. *Id.* (“These figures would make the recent protests the largest movement in [U.S.] history.”). The geographic spread of the protests was equally impressive, signaling the depth and breadth of the movement’s support; demonstrations have occurred in about 2,500 towns and cities since Floyd’s death. *Id.* Notably, “[u]nlike with past Black Lives Matter protests, nearly 95 percent of counties that had a protest recently are majority white, and nearly three-quarters of the counties are more than 75 percent white.” *Id.*

33. See Ortiz & Diaz, *supra* note 21; see also Zhang, *supra* note 7, at 77 (“Protestors have defaced, torn down, and called for the removal of monuments that represent our country’s racist past, as well as structural racial injustice today.”).

34. LEVINSON, *supra* note 8, at 7, 9. Levinson notes typical initial practices after a regime change:
States always promote privileged narratives of the national experience and thus attempt to form a particular kind of national consciousness Those who overthrow regimes often take as one of their first tasks the physical destruction of symbols and the latent power possessed by these markers of those whom they have displaced.

Id.

35. See, e.g., Kristen Bialik, *For the Fifth Time in a Row, the New Congress Is the Most Racially and Ethnically Diverse Ever*, PEW RSCH. CTR. (Feb. 8, 2019), <https://www.pewresearch.org/fact-tank/2019/02/08/for-the-fifth-time-in-a-row-the-new-congress-is-the-most-racially-and-ethnically-diverse-ever> [<https://perma.cc/4KQV-3F3J>]. Since the 107th Congress of 2001 to 2003, the United States Congress has experienced an eighty-four percent increase in racial and ethnic diversity. *Id.* This influx of multicultural groups into the political arena has led to changes in the public narrative. *Id.*

36. Adam Serwer, *The New Reconstruction*, THE ATLANTIC (Oct. 2020), <https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475/> [<https://perma.cc/43ER-3ECS>].

Alicia Garza, cofounder of the BLM movement, reflected:
[T]his country is at a turning point and has been for a little while. We went from celebrating the election of the first Black president in history to bemoaning a white nationalist in the White House People are grappling with the fact that we’re not actually in a post-racial society.

Id. Two main factors contributed to the United States reaching this precipice in 2020: transparency of racially discriminatory police brutality and the racial wealth gap. *Id.* “[T]he proliferation of videos from cellphones and body cameras has provided a vivid picture of the casual and often fatal abuse of Black Americans by police[.]” giving rise to a new ideology about policing. *Id.* Moreover, the wealth gap between White and Black families is as wide today as it was in 1968 when the Civil Rights Act passed. *Id.* As of 2020, the median net worth of White families is over \$170,000, while the median net worth of

over how to manage its public space will only increase.³⁷ Indeed, the debate over Confederate monuments is, at its core, a debate over identity.³⁸ Thus, Georgia, a state with more Confederate monuments than any other state and the site of drastic political upheaval, must be equipped with the tools to redefine its identity.³⁹

This Note explains why Georgia should adopt a comprehensive statutory framework that provides local governments with democratic options—including removal, relocation, contextualization, and destruction—to address their Confederate monuments. Part I provides an overview of Confederate symbolism and historic preservation laws, outlines Georgia’s current monument-protection laws, and ends with an examination of Georgia’s response thus far to the call for monument removal.⁴⁰ Part II analyzes the effects of Georgia’s monument-protection laws on attempts at removal and exposes deficiencies in the current law.⁴¹ Lastly, drawing from Virginia’s standard, Part III proposes for Georgia to embrace a statutory model that is receptive to local opinion by providing myriad options and supplies justifications for each option.⁴²

Black families is a mere \$20,000. *Id.* The Great Recession of 2008 hit Black households disproportionately hard: their median net worth dropped by fifty-three percent, while White household net worth dropped only sixteen percent. *Id.* The subsequent economic trial from the COVID-19 recession likewise threatened Black businesses at a disproportionate rate: from February to April 2020, forty-one percent of Black businesses halted operations, nearly double the twenty-two percent rate of businesses overall. *Id.*

37. LEVINSON, *supra* note 8, at 20. Rising multiculturalism “raises the general question of how we are to understand our nation and its culture. What monuments are we to raise (or raze), what holidays are we to celebrate, how are we to name our schools and our streets?” *Id.* Importantly, Levinson emphasizes that true regime changes—like those that occurred in Eastern Europe after the repudiation of communism—actually resolve questions about identity more easily than countries (or states) wrestling with how to achieve “a truly multicultural identity.” *See id.* at 8, 20.

38. *Id.* at 27 (quoting historian Charles Reagan Wilson that lawsuits over Confederate symbols are really debates about “identity and world view . . .”).

39. *See SPLC Report, supra* note 14. Using the SPLC Report’s terminology, a monument is a statue or structure in a public area. *Id.* Georgia has 114 compared to 68 in Texas, and 110 in Virginia. *Id.* Electorally, Georgia transitioned from red to blue for the first time in twenty-eight years in the 2020 presidential election, capturing the national evolution on a microcosmic level. Kevin Schaul, Harry Stevens & Dan Keating, *How Georgia Became a Swing State for the First Time in Decades*, WASH. POST (Nov. 8, 2020), <https://www.washingtonpost.com/elections/2020/11/08/georgia-swing-state-democrats/?arc404=true> [https://perma.cc/53JJ-9ZVQ].

40. *See generally infra* Part I.

41. *See generally infra* Part II.

42. *See generally infra* Part III.

I. BACKGROUND

Three years after General Robert E. Lee and his Confederate Army retreated from the Battle of Gettysburg, the Gettysburg Battlefield Memorial Association invited Lee to memorialize in granite his soldiers' positions and movements on the field.⁴³ Lee rejected the invitation, conceding that he thought "it wiser . . . not to keep open the sores of war but to . . . obliterate the marks of civil strife, to commit to oblivion the feelings engendered."⁴⁴ And yet Lee's advice was neglected as over 1,700 monuments honoring the Confederacy were created, including 230 monuments honoring Lee himself.⁴⁵

Georgia's Confederate history can be seen in the over 100 Confederate monuments peppered throughout the state.⁴⁶ The vast majority of these are traditional monuments (statues or structures); in fact, Georgia has more traditional monuments than any other state.⁴⁷ Accordingly, Georgia has the power to be a model for other states, and how Georgia deals with its Confederate monuments could set an important precedent.

A. *Confederate Symbolism*

Most often, the debate over Confederate monument removal involves a debate over symbolism—the crux of the debate is whether Confederate monuments simply commemorate history or legitimize

43. Olivia B. Waxman, *Here's Why Robert E. Lee Opposed Putting Up Confederate Monuments*, TIME (Aug. 16, 2017, 5:16 PM), <https://time.com/4903671/charlottesville-robert-lee-confederate-monuments-history/> [https://perma.cc/SG2V-LLNU].

44. *Id.*

45. *SPLC Report*, *supra* note 14. Numerically, Robert E. Lee is by far the most honored Confederate figure. *Id.* Jefferson Davis, the one and only President of the Confederate States, trails Lee with 152 sole dedications. *Id.* General Thomas "Stonewall" Jackson rounds out the top three with 112 sole memorials. *Id.*

46. *Id.* Unlike Georgia law, which embraces a broad definition of monument, the SPLC Report categorizes Confederate symbols into different types—highway name, monument, marker, military base, flag, etc. *Id.* Accordingly, the following data refers to overall Confederate symbol count: Georgia has 114 Confederate symbols, Texas has 68 symbols, and Virginia has 110 symbols. *Id.* As of June 2015, Texas has removed 33 symbols, Virginia has removed 15, and Georgia has removed only 6. *Id.*

47. *Id.*

white supremacist ideology.⁴⁸ Symbolism largely depends on whether the representation takes a monument or memorial form.⁴⁹ Although the distinction between monuments and memorials may seem faint—Georgia does not even distinguish them in its monument-protection legislation—philosopher of art Arthur Danto articulated a clear and important contrast: “We erect monuments so that we shall always remember, and build memorials so that we shall never forget.”⁵⁰ Essentially, monuments confer honor on their subjects, conveying to the public that the subject has qualities that should be embodied, but memorials commemorate their subjects, honoring only the subject’s memory.

1. Memorial Representations

The Civil War remains the United States’ bloodiest conflict, with roughly two percent of the U.S. population perishing in the war.⁵¹ Accordingly, mourners desired a way to commemorate the dead, leading to the proliferation of “Phase One” Confederate monuments during the first twenty years postwar.⁵² These memorials, often placed in cemeteries, were erected to honor the Confederate dead and to create mourning spaces for families.⁵³

48. See Gary Shapiro, Opinion, *The Meaning of Our Confederate ‘Monuments,’* N.Y. TIMES: THE STONE (May 15, 2017), <https://www.nytimes.com/2017/05/15/opinion/the-meaning-of-our-confederate-monuments.html> [<https://perma.cc/29HM-Q4MV>].

49. *Id.* (“[Monuments] demonstrate a community’s symbolic honoring of events and people for qualities it finds indispensable to its identity[.]” but memorials “ensure that certain events and people will never be forgotten, even though, in many cases, we are ambivalent about some aspects of the events.”).

50. *Id.* (Danto further explained that monuments ““commemorate the memorable and embody the myths of beginnings. Memorials ritualize remembrance and mark the reality of ends.””).

51. *Civil War Casualties*, AM. BATTLEFIELD TRUST, <https://www.battlefields.org/learn/articles/civil-war-casualties> [<https://perma.cc/TF5J-TPBY>]. Although scholars disagree over the exact casualty figures, it is settled that between 620,000 and 850,000 died as a result of the Civil War. *Id.* For context, two percent of 2020’s population would be around six million. *Id.*

52. *Historical Introduction: Confederate Monuments*, ATLANTA HIST. CTR. [hereinafter *Confederate Interpretation Guide*], <https://www.atlantahistorycenter.com/learning-and-research/projects-initiatives/confederate-monument-interpretation-guide/historical-introduction-confederate-monuments/> [<https://perma.cc/PRD9-WEL6>]. Phase One monuments were erected primarily in the first twenty years following the Civil War. *Id.* These monuments were “[o]ften placed in cemeteries and [took] the form of obelisks, arches, or fountains . . .” *Id.*

53. *Id.* (noting these monuments were spaces for activities like Confederate Memorial Day).

2. Monument Representations

Between 1890 and 1930, however, “Phase Two” monuments were erected alongside Jim Crow laws.⁵⁴ These monuments were built to legitimize the white supremacist rule promulgated through Jim Crow laws and featured distinct geographic and visual characteristics to depict their subjects as exemplars.⁵⁵ By casting their subjects as exemplars, Phase Two monuments served honorific functions, which express identity and convey to the public who holds power and authority within the community.⁵⁶ Geographically, Phase Two monuments were situated in prominent public spaces, such as in front of court houses and state capitals, to signal “an official and permanent [political] affirmation of the Lost Cause of the Confederacy.”⁵⁷

54. *Id.* During this phase, “there was a shift from honoring the dead to supporting the living.” Phelps & Owley, *supra* note 15, at 634.

55. See Travis Timmerman, *A Case for Removing Confederate Monuments*, in ETHICS, LEFT AND RIGHT: THE MORAL ISSUES THAT DIVIDE US 513, 514 (Bob Fischer, ed., Oxford Univ. Press 2020) (lamenting that monuments erected in this era were created for explicitly racist reasons to help justify Jim Crow laws and intimidate Black individuals); see also Catesby Leigh, *Why We Should Keep Confederate Statues Standing*, THE FEDERALIST (July 1, 2020), <https://thefederalist.com/2020/07/01/why-we-should-keep-confederate-statues-standing/> [<https://perma.cc/5SHS-4P9J>] (quoting historian Sean Wilentz’s view that “Confederate monuments were intended ‘to celebrate . . . the re-subjugation of the formerly enslaved and their progeny into the economic peonage and racial caste system of Jim Crow.’”) (alteration in original).

56. Joanna Burch-Brown, *Is It Wrong to Topple Statues and Rename Schools?*, 1 J. POL. THEORY & PHIL. 59, 68 (2017); Benjamin Cohen Rossi, *False Exemplars*, 18 J. ETHICS & SOC. PHIL., July 2020, at 49, 50, 52 (construing “honorific representation” to mean “any representation of an individual in a public space that depicts that individual as an exemplar of a value or values, such as courage, integrity, or justice”). Rossi explains a feature unique to honorific representations:

A morally crucial feature of honorific representations is that they depict their subjects as *exemplars*, or fitting objects of admiration . . . Honorific representations depict their subjects as exemplars *relationally*: by being located in public space, by being created for certain purposes, or by being informed by certain values, they convey the message that the subjects they represent are to be admired.

Id.

57. *Confederate Interpretation Guide*, *supra* note 52. The Lost Cause mythology is a “revisionist history that gained popularity in the 1890s,” which “recast the Confederacy’s . . . defeat in a treasonous war [over] slavery as the embodiment of the Framers’ true vision for America.” Michel Paradis, *The Lost Cause’s Long Legacy*, THE ATLANTIC (June 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/the-lost-causes-long-legacy/613288/> [<https://perma.cc/54XD-4VPG>]. To preserve Southerners’ sense of honor, the lost cause “supplie[s] a heroic interpretation of the war . . .” that “insists that the South fought nobly and against all odds . . .” for “the rights of states to govern themselves . . .” David S. Williams, *Lost Cause Religion*, NEW GA. ENCYC., <https://www.georgiaencyclopedia.org/articles/arts-culture/lost-cause-religion> [<https://perma.cc/UA86-KA64>] (Oct. 2, 2017). In other words, the Lost Cause myth purports that states’

Visually, Phase Two monuments adopted celebratory imagery and other markers of exemplarity like large scales and physically idealized proportions.⁵⁸

Notably, many of Georgia's Confederate monuments fit in this category, including one that still presides over Georgia's capitol.⁵⁹ The statue of former Governor John B. Gordon, dedicated in 1907, exemplifies common characteristics of Phase Two monuments. Looming in front of a prominent public space—the capitol steps—the former Confederate general is robed in Confederate regalia and sits gallantly on horseback.⁶⁰

Finally, a third wave of Confederate monuments emerged out of the Supreme Court's 1954 *Brown v. Board of Education* decision mandating desegregation.⁶¹ “Phase Three” monuments took many forms, including flags, statues, and even the largest bas-relief carving in the world.⁶² Georgia championed all of those forms, beginning in 1956, with the incorporation of the Confederate battle flag into the

rights, not slavery, were the central cause of the Civil War. *Id.* Functionally, the Lost Cause myth “delete[s] the African[-]American perspective from the historical narrative.” *Confederate Interpretation Guide*, *supra* note 52; *see generally* Phelps & Owley, *supra* note 15; Rossi, *supra* note 56, at 53 (“[I]t can be, and often is, reasonably inferred that the mere existence of a representation of a person in a public space implies that its subject is considered an exemplar.”).

58. Rossi, *supra* note 56, at 53. Rossi provides the following examples of markers of exemplarity:

[T]he Lee monument in New Orleans featured a sixteen-and-a-half-foot bronze statue atop a sixty-foot-tall marble column. This technique exploits the metaphorical association between the relation of *being above* and the relation of *being better than*. In addition, honorific representations tend to depict their subjects in physically idealized terms, exploiting the human tendency to infer moral excellence from physical excellence—the “what is beautiful is good” bias.

Id.

59. *Confederate Interpretation Guide*, *supra* note 52 (noting the majority of Confederate monuments belong in Phase Two).

60. *See* Tia Mitchell & Greg Bluestein, *The Jolt: John B. Gordon's Descendants Plead for His State Capitol Statue's Removal*, ATLANTA J.-CONST. (June 22, 2020), <https://www.ajc.com/blog/politics/the-jolt-john-gordon-ancestors-plead-for-his-state-capitol-statue-removal/5cxJfdjN4UARzBCU7j9xpK/> [<https://perma.cc/GN4G-5G7W>]. Typically, “an equestrian statue of a Confederate general in front of a courthouse of capitol building is not about mourning or loss. It is about power and who is in charge.” *Confederate Interpretation Guide*, *supra* note 52.

61. *Confederate Interpretation Guide*, *supra* note 52. Phase Three monuments, which followed the 1954 *Brown v. Board of Education* decision, were “used as a rallying point for proponents of segregation.” *Id.*

62. *See id.*; Debra McKinney, *Stone Mountain: A Monumental Dilemma*, S. POVERTY L. CTR. (Feb. 10, 2018), <https://www.splcenter.org/fighting-hate/intelligence-report/2018/stone-mountain-monumental-dilemma> [<https://perma.cc/FCF9-U865>].

Georgia state flag.⁶³ In 1958, Georgia's then-Governor Marvin Griffin purchased Stone Mountain and its surrounding land to establish a memorial park.⁶⁴ Stone Mountain, a massive granite dome protruding out of the Georgia clay, east of Atlanta, features a carving on its north face of Robert E. Lee, Jefferson Davis, and Thomas "Stonewall" Jackson that has been dubbed the "Mount Rushmore of the Confederacy" and "the largest shrine to white supremacy in the world."⁶⁵ Although the first fundraising campaign for the carving began in 1915, it was not complete until 1972 when interest in the carving was reignited in the wake of the Civil Rights Movement.⁶⁶ The majority of Confederate monuments generally, and particularly in Georgia, belong in Phases Two and Three.⁶⁷

63. Edwin L. Jackson, *State Flags of Georgia*, NEW GA. ENCYC., <https://www.georgiaencyclopedia.org/articles/government-politics/state-flags-georgia#print> [<https://perma.cc/BNE8-JX6J>] (July 14, 2020). From 1956–2001, two-thirds of Georgia's state flag featured the Confederate battle flag. *Id.* In 2001, Democratic Governor Roy Barnes, backed by the Georgia House Black Caucus, changed the flag to mainly feature the Georgia state seal; however, the flag contained a ribbon that situated five small flags—including the 1956 Confederate battle flag—beneath the seal. *Id.* After heavy criticism from rural, White Georgians and a rating by the North American Vexillological Association as the worst-designed state or provincial flag in North America, Republican Governor Sonny Perdue changed the flag again in 2003 to its current configuration, which substantially resembles the "stars and bars" flag of the former Confederate States. Rachel Lance, *Mississippi is Replacing Its State Flag, but a Confederate Emblem Still Flies over Georgia*, TIME (July 15, 2020, 4:13 PM), <https://time.com/5867157/confederate-flag-georgia/> [<https://perma.cc/5MBU-ANPS>]; GA. CODE ANN. § 50-3-1 (2019). What most consider as the Confederate flag is actually one version of a Confederate battle flag used in combat. John M. Coski, *Embattled Banner: The True History of the Confederate Flag*, HISTORYNET, <https://www.historynet.com/embattled-banner-the-true-history-of-the-confederate-flag.htm> [<https://perma.cc/9TTE-7NLE>]. Confederate commanders used battle flags because the Confederacy's first national flag too closely resembled the United States' flag to be easily distinguished and thus threatened confusion on the battlefield. *Id.*

64. McKinney, *supra* note 62.

65. *Id.*

66. *Id.* "[T]he idea of carving a monument into Stone Mountain had floated about for years [until] Civil War widow Helen Plane[,] ['a charter member of the United Daughters of the Confederacy,'] made it her mission." *Id.* On Thanksgiving night of 1915, the Ku Klux Klan held a revival meeting on the mountain's summit, sparking Plane's mission. *Id.* After Gutzon Borglum, who later sculpted Mount Rushmore, was chosen to be the monument's sculptor, Plane suggested a design: "I feel it is due to the Klan which saved us from Negro dominations and carpetbag rule, that it be immortalized on Stone Mountain. Why not represent a small group of them in their nightly uniform approaching in the distance?" *Id.* Borglum had only completed Lee's head by the time the twelve-year lease to complete the carving was up; the project was stalled for the next thirty-six years until the "*Brown v. Board of Education* integration decision and [the] rise of the Civil Rights Movement jump-started interest in completing the carving." *Id.* After Georgia's "segregationist" Governor Griffin purchased the mountain, carving resumed in 1964. *Id.*

67. *See id.*

B. Overview of Historic Preservation Law

The National Historic Preservation Act of 1966 (NHPA) established “the primary legal framework for preserving and managing the [United States’] cultural heritage, including historic monuments.”⁶⁸ At the federal level, historic preservation law protects only those resources that have been designated or are eligible to be designated “historic.”⁶⁹ After a resource undergoes the federal process of being designated historic, it is cataloged in the National Register of Historic Places (National Register).⁷⁰

68. Ryan Rowberry & Gordon Pirie, *Laws Regarding Controversial Cultural Heritage in South Africa and the United States: Public Monuments and Street Names*, 63 *STUDIA IURIDICA* 263, 269 (2016). Phelps and Owley describe the National Register criteria:

The National Register is an official list of the buildings, structures, districts, sites, and objects that the federal government has deemed worthy of protection To be eligible for the National Register, the resource must qualify as a building, structure, object, site, or district. A monument would likely be classified as an object. For a property to merit listing on the National Register, it must meet several criteria outlined by federal law

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

Phelps & Owley, *supra* note 15, at 642–43.

69. SARA C. BRONIN & RYAN ROWBERRY, *HISTORIC PRESERVATION LAW IN A NUTSHELL* 39 (2d ed. 2018).

70. *Id.* at 40, 46, 56–57. “To be listed on the National Register, a resource must . . . undergo a formal nomination and evaluation process,” and satisfy the following criteria: it must be of the correct type, it must be relevant to a prehistoric or historic context, it must be significant, and it must have integrity. Once a resource is listed in the National Register, it may be removed from the National Register only after going through a de-listing process, which provides four grounds for removal. *Id.* The grounds for de-listing are as follows:

- (1) The property has ceased to meet the criteria for listing in the National Register because the qualities which caused it to be originally listed have been lost or destroyed, or such qualities were lost subsequent to nomination and prior to listing;
- (2) [a]dditional information shows that the property does not meet the National Register criteria for evaluation;
- (3) [e]rror in professional judgement as to whether the property meets the criteria for evaluation; or
- (4) [p]rejudicial procedural error in the nomination or listing process.

Id. at 57.

The United States has a “decentralized government structure for heritage preservation,” so state legislation, which often uses the NHPA as a model, provides the framework for local preservation.⁷¹ In Georgia, the Georgia Historic Preservation Act (GHPA) functions as the state’s central authority on historical preservation.⁷² The GHPA established a “uniform” procedure for counties and municipalities to enact ordinances “providing for the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, or aesthetic interest or value.”⁷³ Local historic preservation commissions, often organized at the city level, are the medium through which these powers are exercised.⁷⁴

The purpose of historic preservation is to conserve physical remnants that have significant historic value.⁷⁵ Some have construed this to mean that historic preservation law embraces a preservationist impulse that is not equipped to account for removal movements; however, historic preservation laws do not generally provide protection for commemorative properties.⁷⁶ Honorific representations, like monuments, are typically ineligible for listing in the National Register because “such resources are created consciously to shape cultural memory and often reflect biases that promote a fictitious or

71. Rowberry & Pirie, *supra* note 68, at 279.

72. GA. CODE ANN. § 44-10-21 (2021).

73. *Id.*

74. DECATUR, GA., CODE OF ORDINANCES pt. IV, art. 5, § 5.2 (establishing the city’s historic preservation commission and outlining the criteria and procedures for preservation).

75. Peter Byrne, *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws*, 71 FLA. L. REV. F. 169, 170 (2020) (noting that conservation of significant historic resources seeks to “give contemporary people a sense of orientation to, and meaning from, their cultures and places”); *see also* BRONIN & ROWBERRY, *supra* note 69, at 1 (stating that the “primary goal of historic preservation law is to protect significant historic resources from destruction, inappropriate alteration, and neglect” and “[t]he most enduring historic preservation laws manage to achieve this protective aim while balancing a range of other values” like individual property rights, free speech, and cultural identity, among others).

76. *Compare* Phelps & Owley, *supra* note 15, at 650 (stating that the National Historic Preservation Act (NHPA) may be a vehicle to complicate Confederate monument removal efforts), *with* Byrne, *supra* note 75, at 174, 181 (asserting that the NHPA “[does] not seriously impede” Confederate monument removal, but instead provides the mechanism by which communities can “ascertain[] facts about the erection of a particular monument, [clarify and critique] perspectives, and [] search for acceptable mitigation”).

propagandistic narrative about the subject.”⁷⁷ Thus, state statutes like Georgia’s that limit local governments from removing monuments are not preservation laws at all.⁷⁸ Instead, given that these monument removal bans lack the features of exemplary preservation laws—they do not require historical documentation, consultation with experts or citizens, or findings of historic significance—they are most accurately characterized as preemptive legislation.⁷⁹

C. Georgia’s Monument-Protection Laws

Accordingly, specific protection for monuments is not part of the GHPA and is instead housed in a distinct code section dedicated to the “state flag, seal, and other symbols.”⁸⁰ Prior to 2019, this Monument Protection Act (MPA) was limited to publicly owned military monuments, but the 2019 amendment broadened its scope, allowing the same protection for nonmilitary and privately owned monuments.⁸¹

77. Byrne, *supra* note 75, at 170–71 (“[C]ommemorative properties . . . are not directly associated with [an] event or with [a] person’s productive life, but serve as evidence of a later generation’s assessment of the past[;]” in other words, “monuments do not reliably tell us about the subject being commemorated but only about the mindset of those promoting the commemoration.” (citing U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV., HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 2 (1995))). Exclusion of commemorative monuments from the National Register can be overcome only “if design, age, tradition, or symbolic value has invested it with its own exceptional significance.” U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV., HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 2 (1995).

78. See Byrne, *supra* note 75, at 170.

79. Compare GA. CODE ANN. § 50-3-1 (2019) (prohibiting alteration or removal of monuments but providing no mechanism for evaluating a monument’s significance), with DECATUR, GA., CODE OF ORDINANCES pt. IV, art. 5, § 5.2.2 (providing criteria, which includes an evaluation of a resource’s historic significance and aesthetic value, for designating resources as historic districts or historic property); Byrne, *supra* note 75, at 170 (“[Statue] statutes are political efforts of state legislators to confirm a particular view of the past held by their base supporters . . . [I]t is misleading to list them among preservation laws.”); see also *infra* note 83 (echoing Byrne’s argument by stating that Georgia’s Monument Protection Act (MPA) was intended to “pander” to state politicians’ supporters who oppose monument removal).

80. § 50-3-1(b)(1)(B).

81. *Id.* § 50-3-1; Evelyn Graham & Timothy J. Graves, *State Government*, 36 GA. ST. U. L. REV. 219, 220 (2019) (noting that “[e]ssentially, the purpose of [the amendment] was to broaden [the] statute and create harsher punishment to deter the destruction of monuments”). For purposes of this Note, the Author will refer to this section of Georgia’s code as a Monument Protection Act. It is useful to point out that laws of this type, those focused on monuments, are often termed “statue statutes.”

1. *The Current Law: The 2019 Monument Protection Act*

Georgia Senate Bill (SB) 77, which amended the pre-2019 Monument Protection Act (MPA) to its current version, has a conflicting origin story. Sponsor of the bill, Georgia Senator Jeff Mullis (R-53rd), credits the vandalism of the Chickamauga Cemetery in his hometown as motivation for the bill.⁸² Yet that vandalism occurred in 2007, over ten years before he sponsored SB 77, leading the bill's opponents to speculate that a more modern catalyst spurred the bill.⁸³ Georgia Representative Jasmine Clark (D-108th) believes that the bill's introduction was an appeal to the conservative base and a direct "response to Stacey Abrams'[s] initiative to remove [Confederate] monuments."⁸⁴ Stacey Abrams, the Democratic nominee in Georgia's 2018 gubernatorial race, called for the removal of Confederate monuments after the Charlottesville protests, reasoning that they "belong in museums . . . not in places of honor across [Georgia]."⁸⁵

The 2019 amended MPA has two main branches: one provides protection for publicly owned monuments located on publicly owned

82. See Josh O'Bryan, *Vandalism Shakes Chickamauga History*, ROME NEWS TRIB. (Dec. 19, 2007), https://www.northwestgeorgianews.com/vandalism-shakes-chickamauga-histor-local-new/article_c46bb7a9-673d-5883-ad21-20640692be6a.html [https://perma.cc/N5DJ-BG2C]. Several gravesites, including tombstones of Confederate soldiers and Chickamauga's prominent Gordon family, were vandalized in December 2007. *Id.* Graham & Graves, *supra* note 81, at 219–20; Interview by Timothy Graves with Sen. Jeff Mullis (R-53rd), in Atlanta, Ga., (May 15, 2019) (on file with the Georgia State University Law Review) [hereinafter Mullis Interview] (Mullis noting that "with the things going on in the country and the world it was the right time" to introduce the bill); *Lawmakers Legislative Day* 33, GPB, at 6 min., 25 sec. (Mar. 18, 2019) (remarks by Sen. Jeff Mullis (R-53rd)) [hereinafter *Lawmakers*], <https://video.gpb.org/video/legislative-day-33-031819-pvqxcd/>.

83. O'Bryan, *supra* note 82; Electronic Mail Interview with Rep. Jasmine Clark (D-8th) (May 24, 2019) (on file with the Georgia State University Law Review) [hereinafter Clark Interview].

84. Clark Interview, *supra* note 83 (also noting that, in addition to a reaction to Abrams's statements, the bill was introduced to "pander to people who will keep these politicians in office . . ."); Graham & Graves, *supra* note 81, at 221.

85. Stacey Abrams (@staceyabrams), TWITTER (Aug. 15, 2017, 7:20 AM), <https://twitter.com/staceyabrams/status/897417662556504068> [https://perma.cc/7XYM-DPAY]. Abrams considers the carving of Confederates on Stone Mountain a "blight on [Georgia]" and urged that "we should do something about the fact that we have this massive monument to domestic terrorism without context and without information." Stacey Abrams (@staceyabrams), TWITTER (Aug. 15, 2017, 7:22 AM), <https://twitter.com/staceyabrams/status/897418209468481536> [https://perma.cc/T7VJ-P75M]; Russ Bynum, *Charlottesville Gave Momentum to Confederate Monument Foes*, AP NEWS (Aug. 11, 2018), <https://apnews.com/article/f98def94e57d4e579a8f4f6aa980162f> [https://perma.cc/FZ4Z-QQC5].

property and the other provides protection for privately owned monuments located on privately owned property.⁸⁶

First, the MPA outlines what constitutes a publicly owned monument: any monument owned by the State of Georgia or its agents, which includes, among others, local government entities and educational institutions such as local boards of education and institutions of the University System of Georgia.⁸⁷ For publicly owned monuments “erected, constructed, created, or maintained” on publicly owned property, it is unlawful for anyone to “mutilate, deface, defile, or abuse contemptuously” such monuments.⁸⁸ Additionally, officers or agencies, meaning the local governments or institutions that own the monuments, are prohibited from relocating, removing, concealing, obscuring, or altering their public monuments.⁸⁹

Anyone who mutilates or defaces a public monument may be charged with a misdemeanor and is liable for treble the amount of the full cost of repair or replacement, legal costs, and may be subject to further exemplary damages.⁹⁰ Likewise, anyone who loses or removes a monument may be liable for the same treble costs of replacement, legal costs, and exemplary damages.⁹¹ Harsher penalties were added in 2019 to further deter potential violators.⁹²

Regarding privately owned monuments on private property, it is illegal for anyone, other than those storing the monument, to “mutilate, deface, defile, abuse contemptuously, relocate, remove, conceal, or obscure” any monument.⁹³

In conclusion, the 2019 MPA provides a strict, general bar on monument removal, alteration, and destruction.⁹⁴ It provides only two

86. GA. CODE ANN. § 50-3-1 (2019).

87. *Id.* § 50-3-1(b)(1)(A) (“‘Agency’ means any state or local government entity, including any department, agency, bureau, authority, board, educational institution, commission, or instrumentality or subdivision thereof, and specifically including a local board of education, the Board of Regents of the University System of Georgia, and any institution of the University System of Georgia.”).

88. *Id.* § 50-3-1(b)(2).

89. *Id.* § 50-3-1(b)(3).

90. *Id.* § 50-3-1(b)(4); *see also* Graham & Graves, *supra* note 81, at 224.

91. *Id.* § 50-3-1(b)(4).

92. Mullis Interview, *supra* note 82 (“People will think twice about doing it when the consequences are harsher.”).

93. § 50-3-1(b)(6).

94. *See generally id.* § 50-3-1.

exceptions: one exception is clear and unambiguous and the other exception is more open to interpretation. First, a monument may be relocated when the relocation is necessary for construction projects, but the monument must be “relocated to a site of similar prominence, honor, visibility, and access within the same county or municipality in which the monument was originally located.”⁹⁵ Importantly, monuments may not be relocated to a museum or cemetery unless the monument was originally located in such a place.⁹⁶

Second, “appropriate measures taken for the preservation, protection, and interpretation” of public monuments are not prohibited.⁹⁷ Effectively, this qualifying clause permits contextualization but only to an “appropriate” extent and approves removal, alteration, or concealment only when it is appropriate and necessary to preserve or to protect the monument.⁹⁸

2. 2020 Proposed Amendment

In June 2020, opponents of the new MPA proposed an amendment: Georgia House Bill (HB) 1212.⁹⁹ HB 1212 retained much of the same restrictions on local control as the 2019-amended MPA, with one notable exception.¹⁰⁰ Rather than prohibiting monument removal, which the 2019 MPA did, HB 1212 reversed course and sought to prohibit the display of monuments honoring the Confederate States of America, slave owners, or persons or organizations “that encouraged, promoted, supported, or advocated for the continuation of slavery” on public property except for in museums or on Civil War battlefields.¹⁰¹ Ultimately, the bill failed to be put up for a vote in the Georgia House.¹⁰²

95. *Id.* § 50-3-1(b)(7).

96. *Id.*

97. *Id.* § 50-3-1(b)(3).

98. *See id.*

99. H.R. 1212, 155th Gen. Assemb., Reg. Sess. (Ga. 2020).

100. *Compare* H.R. 1212, 155th Gen. Assemb., Reg. Sess. (Ga. 2020), *with* § 50-3-1.

101. *Id.*

102. *Georgia's 2020 Legislative Roundup: Hate Crimes Bill, Alcohol Delivery and More*, WABE NEWS, <https://www.wabe.org/georgias-2020-legislative-roundup/> [<https://perma.cc/FT73-2M9K>] (June 26, 2020, 11:33 PM).

D. Georgia's Response to Calls for Removal: Three Case Studies

Although Georgia's MPA does not afford local governments the flexibility to remove monuments, at least three Confederate monuments have been removed since June 2020 in the wake of protests over George Floyd's death. Given the general bar on removing monuments, these removals were achieved through alternative legal means in conflict with the MPA.

First, as depicted in this Note's Introduction, a Dekalb County Superior Court Judge ordered the removal of the Confederate obelisk in Decatur Square.¹⁰³ Judge Clarence F. Seeliger found grounds for removal in nuisance law: he reasoned that the monument had "become an increasingly frequent target of graffiti and vandalism, a figurative lightning rod for friction among citizens, and a potential catastrophe that could happen at any time if individuals attempt to forcibly remove or destroy it."¹⁰⁴ Nuisance law is a frequent vehicle to skirt around oppressive monument-protection laws.¹⁰⁵

Shortly after the Decatur monument's removal, a monument of a Confederate soldier was removed from Rockdale County's City of Conyers.¹⁰⁶ The authority to remove the monument came from an

103. Order Granting Emergency Motion for Interlocutory Abatement of a Pub. Nuisance, *supra* note 6, at 2 (ordering to hold the monument in storage until further notice); Karimi, *supra* note 2. Crane crews dismantled the obelisk to a crowd of cheers as night fell on Juneteenth. *Id.*

104. Order Granting Motion for Interlocutory Abatement of a Public Nuisance, *supra* note 6, at 1–2; GA. CODE ANN. § 41-2-1 (2020). Georgia law provides:

[A]ny nuisance which tends to the immediate annoyance of the public in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the public may be abated by order of a judge of the superior court of the county in which venue is proper.

Id.

105. Robert McClendon, *Mitch Landrieu Invokes Public 'Nuisance' Ordinance for Confederate Monuments*, NEWS.COM: TIMES-PICAYUNE, https://www.nola.com/news/politics/article_7ce07b64-c1f9-501c-8909-8b8b62934023.html [<https://perma.cc/SW4X-YA4T>] (July 18, 2019, 12:43 PM). To remove Confederate monuments in New Orleans, Mayor Mitch Landrieu invoked an ordinance that granted the City Council authority to declare public monuments a nuisance if they "praise[] a subject at odds with the message of equal rights under the law[,]""[h]as been or may become the site of violent demonstrations[,]"" and [c]onstitutes an expense to maintain that outweighs its historic [value] . . ." *Id.*

106. Larry Stanford, *After 107 Years, Confederate Monument in Conyers is Taken Down*, ROCKDALE NEWTON CITIZEN, https://www.rockdalenewtoncitizen.com/multimedia/photos-after-107-years-confederate-monument-in-conyers-is-taken-down/collection_f4f9e466-bb5a-11ea-b93b-d32cc481d1b8.html [<https://perma.cc/P6F8-DMYX>] (Mar. 31, 2021). The monument honored Rockdale County's Confederate soldiers and rested at the corner of the County's courthouse since 1913. *Id.*

executive order issued by Rockdale County Commission Chairman, Oz Nesbitt, Sr.¹⁰⁷ Nesbitt was motivated to remove the monument after learning of petitions calling for its removal.¹⁰⁸ He hoped to remove the monument “legally” but resorted to removing it unilaterally after learning of threats aimed at the monument.¹⁰⁹ Rockdale County officials are contemplating whether to relocate the statue to an old cemetery in the county containing Confederate graves.¹¹⁰

Finally, a third Confederate monument was removed from McDonough, Georgia, on July 29, 2020.¹¹¹ The removal of this Confederate soldier statue was facilitated by the Henry County Commission, which voted to remove the monument from McDonough’s Square.¹¹²

All three removals conflict with the MPA, making them incredibly vulnerable to opposing litigation. In fact, opponents of the removals have already planned retaliation: the Sons of Confederate Veterans has filed suits against the Decatur and McDonough removals, alleging that the removals violate the MPA.¹¹³ In Conyers, one resident lamented, “Mr. Nesbitt believes he can break state law and not have any consequences, that he can make an executive decision without talking to the residents of Rockdale County.”¹¹⁴ Ironically, executive

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Darryn Moore, *Confederate Monument at McDonough Square Removed Overnight*, WSB-TV ATLANTA (July 29, 2020, 3:49 AM), <https://www.wsbtv.com/news/local/henry-county/mcdonough-square-confederate-monument-removed-overnight/NMZZ6GWF4NBYNC42U5DKIYNTBI> [<https://perma.cc/4FCG-ASBN>].

112. *Id.*

113. See generally *infra* Part II.A.2; Angelina Velasquez, *Demolition Crew Removes Confederate Monument in Henry County*, CBS 46 (July 28, 2020), https://www.cbs46.com/news/demolition-crew-removes-confederate-monument-in-henry-county/article_of2935ec-d142-11ea-8429-77fd03a96d19.html [<https://perma.cc/DX4S-LTHJ>] (“Sons of Confederate Veterans condemns in the strongest terms possible the vandalism, removal and defacement of any Veteran’s monuments, memorials, or grave markers and will assist law enforcement in any way possible to vigorously pursue the prosecution of these heinous violations to the fullest extent of the law.” (quoting statement of Sons of Confederate Veterans)).

114. *Rockdale County Dismantles Confederate Statue in Surprise Move*, CBS 46 (June 30, 2020), https://www.cbs46.com/news/rockdale-county-dismantles-confederate-statue-in-surprise-move/article_1509db38-bb3f-11ea-a485-dba50187ff5.html [<https://perma.cc/JXN5-HJNN>] (internal quotations omitted).

decision-making is precisely what state legislators did when they stripped away local control by passing the 2019 MPA.

III. ANALYSIS

In light of recent political and social upheaval and the actions of several Georgia cities, it is clear that local communities are interested in debating their options to address Confederate monuments.¹¹⁵ To understand why Georgia needs to provide a democratic forum to discuss Confederate monuments and thus why its current Monument Protection Act (MPA) is deficient, it is worth spending some time analyzing the arguments on both sides of the removal debate.

A. *Support for and Opposition to Monument Removal*

First, it is important to note that removal efforts are overwhelmingly aimed at monument representations, not memorials.¹¹⁶ There is little debate that Phase One monuments, which are more accurately termed memorials, are permissible. Phase One monuments do not feature the characteristics of Confederate monuments that supporters of removal find objectionable—they are not political narratives created to legitimize a racist ideology or to intimidate Black people.¹¹⁷ Accordingly, the debate over Confederate monuments is shaped by how people understand the functions of Phase Two and Phase Three monuments.¹¹⁸

115. Greg Bluestein, *Georgia Leaders Take Creative Steps to Move Confederate Statues*, ATLANTA J.-CONST. (June 23, 2020), <https://www.ajc.com/news/state—regional-govt—politics/confederate-memorials-become-battleground-for-testing-georgia-law/4zhqRliErlwSkx7BQqqbOI/> [<https://perma.cc/WRM9-U27V>]; see generally City Comm’n of the City of Decatur Res. R-17-26, 2017 Leg. (Ga. 2017).

116. See, e.g., Gabriella Angeleti, *Monuments Across the U.S. Are Toppled, Damaged as Protests over George Floyd’s Death Continue*, ART NEWSPAPER (June 2, 2020), <https://www.theartnewspaper.com/news/monuments-dismantled-in-us-protests> [<https://perma.cc/R2B9-DLR7>] (“[Removal efforts] mostly target monuments glorifying colonisation and racial inequity . . .”).

117. See *supra* notes 51–53 and accompanying text.

118. See *supra* Part II.A.1.

1. *Support for Monument Removal*

Those who advocate for the removal of Confederate monuments recognize the monuments' honorific and narrative functions and make arguments based on that understanding. Honoring involves picking out a person or group as an exemplar or a worthy subject of admiration.¹¹⁹ Importantly, distinguishing a person as an exemplar and erecting a public structure to honor that person implicitly condones the exemplar's behavior.¹²⁰ Put simply, it is not possible to honor a figure without condoning, approving, or embracing his behavior. This is, for most supporters of monument removal, the crux of the problem with Confederate monuments: they condone the racist ideology embraced by their subjects, legitimizing and perpetuating systemic discrimination.

Legal scholar and historian Annette Gordon-Reed summarized the argument succinctly: "There is no path to a peaceful and prosperous country without challenging and rejecting [white supremacy and the total disregard for the humanity of Black people] as a basis for our society."¹²¹ At minimum, rejecting white supremacy requires putting an end to honoring the Confederacy, which requires removing Confederate monuments from places of honor in public spaces.

119. *Id.*

120. Alfred Archer & Benjamin Matheson, *When Artists Fall: Honoring and Admiring the Immoral*, 5 J. AM. PHIL. ASS'N 246, 250 (2019). The authors provide this practical example of the effects of condonation:

Suppose a friend behaves in a rude and obnoxious way towards us one evening and we then condone their behavior. We are not saying the friend's behavior is good, but we are willing to "let it slide." One consequence of an expression of such an attitude to wrongdoing, however, is that it might be *legitimizing* in certain contexts. That is, it might make the wrongdoer believe that they can get away with acting in this manner. If we do not express to our friend that they have wronged us, they might think that there was nothing wrong with their behavior. This is not only prudentially worrisome (for instance, they might not worry about behaving rudely to us again in the future), but also morally problematic (they might come to think they can get away with rude behavior). Expressing some moral disapproval seems necessary then to avoid legitimating such behavior.

Id.

121. Colleen Walsh, *Must We Allow Symbols of Racism on Public Land?*, HARVARD GAZETTE (June 19, 2020), <https://news.harvard.edu/gazette/story/2020/06/historian-puts-the-push-to-remove-confederate-statues-in-context/> [<https://perma.cc/BE54-2C67>].

The rebuttal most often employed against this argument adopts a theory of selective honoring.¹²² That is, some claim that the monuments honor only the admirable qualities of their subjects and not the immoral ones, or that the admirable traits outweigh the immoral ones.¹²³ This is largely illogical on two fronts. First, the admirable qualities allegedly present in the subjects of Confederate military monuments were instrumental to or enabled by morally objectionable practices.¹²⁴ And second, it is practically impossible to evoke only some traits of a subject's personality and even more impossible to balance the commendable and immoral traits.¹²⁵ Moreover, even when a subject possesses both admirable and offensive traits—as most

122. See, e.g., Teresa Lam, *Petition to Keep the Robert E. Lee Statue in Lee Park*, CHANGE.ORG, <https://www.change.org/p/mike-signer-keep-the-robert-e-lee-statue-in-lee-park?redirect=false> [<https://perma.cc/UB47-P9KM>]; Daniel L. Nation, *Should Confederate Statues Stay or Go?*, FORT WORTH STAR-TELEGRAM (Aug. 25, 2017), <https://www.star-telegram.com/opinion/letters-to-the-editor/article169447232.html> [<https://perma.cc/34VA-WXH9>].

123. See Lam, *supra* note 122. For example, those who recognize that Robert E. Lee fought to defend racist institutions nonetheless wish to maintain monuments to honor him for his bravery, military prowess, or strong convictions. *Id.* (claiming in an online petition that a Lee monument should remain because Lee was “a great military engineer . . . a forward thinker, [and that] he tried to heal our country, to bring it back together”); Nation, *supra* note 122 (claiming that, before condemning monuments, “it [may] be useful to review the entire record of that individual”). Nation uses Jefferson Davis as an example, suggesting that his pre-Civil War accomplishments merit continued reverence:

Jefferson Davis served with distinction in the war with Mexico, helping to preserve Texas independence. As secretary of war, Davis was responsible for sending Robert E. Lee to defend against Mexican depredations near Brownsville, and helped establish the U.S. Cavalry corps to defend Texas against Comanche, Apache and Kiowa raids.

Id.

124. Rossi, *supra* note 56, at 59–60 (“[T]he implicit or public meanings of an honorific representation may be endorsements or elisions of grave historical injustices because the ‘valuable’ traits or deeds for which the representation’s subject are honored were often either *instrumental to* morally objectionable ends or *enabled by* morally objectionable practices.”). For example, “Robert E. Lee may have manifested genuine virtues in his prosecution of the war, but the aim of the Confederate war effort was primarily to preserve the institution of slavery.” *Id.*

125. *Id.*; Rob Natelson, *Why Removing Historical Monuments Is a Bad Idea*, THE HILL (Sept. 20, 2017, 7:40 AM), <https://thehill.com/opinion/civil-rights/351227-why-removing-national-monuments-is-a-bad-idea> [<https://perma.cc/J4P8-FGP6>]. Natelson suggests that there is a workable method of weighing traits:

We disregard or discount those faults common to the individual’s time and place. We do not erect monuments to people who performed extraordinary feats that were unquestionably evil, even if their characters included some virtuous traits. Thus, George Washington is memorialized in statues and place names, although he held slaves. Adolph Hitler gets none, although he was kind to dogs.

Id.

humans do—honoring them still condones the behavior reflected by both sets of traits.¹²⁶

2. *Opposition to Monument Removal*

Those who wish to preserve Confederate monuments generally present arguments premised on one or more of the following theories: historical significance and aesthetic value, erasure, and slippery slope.¹²⁷ The aesthetic value argument is the weakest. First, focusing only on a monument's aesthetic value and divorcing it from its political or cultural context is an egregious misunderstanding of the symbolism of Confederate monuments.¹²⁸ Second, few Confederate monuments actually have significant aesthetic value; in fact, they were often mass-produced.¹²⁹ Moreover, even if a monument is shown to be aesthetically valuable, its aesthetic significance is not diminished by being removed from a place of public prominence.¹³⁰ In fact, aesthetically-valuable monuments are prime candidates for museum displays.

The more often employed argument is the erasure and accompanying slippery slope argument.¹³¹ Essentially, the argument is that removing Confederate monuments erases history, and when we

126. Rossi, *supra* note 56, at 60 (“[W]hen both attitudes of admiration and of contempt are fitting, the choice to express only attitudes of admiration may, in certain contexts, convey the message that the immoral behavior is condoned.”). For example, when a monument highlights Jackson and Lee’s “‘gentlemanly’ prosecution of the war while the aims for which they fought pass without comment, this conveys the message that their personal virtue is more important than the fact that had their efforts ultimately borne fruit, slavery might have existed in America well into the twentieth century.” *Id.*

127. Timmerman, *supra* note 55, at 517–21.

128. Levinson, *supra* note 12, at 690–91 (noting that viewing monuments strictly through the lens of aesthetics requires the “basic turning away from the explicit political or cultural content attached to them at the time of their creation[,]” which is easier done “the more sheer ignorance about the specific events or persons that might be commemorated”).

129. Timmerman, *supra* note 55, at 517; Lily Rothman, *The Surprising Reason Why So Many Civil War Memorials Look Almost Exactly the Same*, TIME (July 16, 2018, 11:00 AM), <https://time.com/5337148/civil-war-memorial-statues/> [<https://perma.cc/25T6-PJ74>] (noting that many Civil War monuments were mass produced and could be ordered from a catalog, eliminating the need to find a sculptor and making it cheaper and quicker for local communities to erect the monuments).

130. Timmerman, *supra* note 55, at 518.

131. Senator Mullis advocated for this argument when discussing SB 77: “It’s time to protect our history—good, bad, or indifferent . . . we don’t need to try to erase it.” *Lawmakers*, *supra* note 82.

start erasing history, where do we stop?¹³² This argument suffers from two main flaws. First, removing monuments from prominent public spaces does not erase them—it simply severs them from their honorific function. Second, this argument fundamentally misunderstands the difference between monuments and memorials.¹³³ Phase Two and Phase Three monuments placed in public spaces were not erected to memorialize people and events in our past—they were erected for explicitly honorific purposes.¹³⁴ Some argue that the passing of time has effectively eliminated the honorific functions of the monuments, but time alone does not change a monument’s function—only if a monument is removed from its place of honor may it cease to serve an honorific function.¹³⁵

Regarding the slippery slope argument, monument defenders often point to figures like former Presidents George Washington and Thomas Jefferson.¹³⁶ It is important to recognize the crucial distinction between monuments to the Confederacy and monuments to the founders of the United States: they were erected for markedly different purposes.¹³⁷ Confederate monuments were erected in the haze of Civil Rights tension explicitly to condone white supremacy and “sentimentalize people who had actively fought to preserve the system

132. John Daniel Davidson, *Conservatives Shouldn't Accept the Left's Corrupt View of American History*, THE FEDERALIST (June 23, 2020), <https://thefederalist.com/2020/06/23/conservatives-shouldnt-accept-the-lefts-corrupt-view-of-american-history/> [https://perma.cc/R5PZ-MFHV]. Davidson adeptly provides an example of the slippery slope argument:

If [B]lack Americans have a claim against Fort Benning and Fort Bragg, both named after Confederate leaders, why don't Native Americans have a claim against, say, Fort Carson in Colorado, which bears the name of Kit Carson, an Indian fighter who took his first Indian scalp at age 19. Is that not offensive? Should we not rename the base? Why not? No one can say.

Id.

133. See Shapiro, *supra* note 48. Defenders of Confederate monuments offer a defense about preserving heritage, but this is a memorial defense for works built in a monumental spirit. *Id.*

134. See *supra* Part I.

135. Davidson, *supra* note 132 (arguing that monuments may change functions: “[w]hat was erected to give honor in an earlier generation can simply remind us today of who we are and how far we’ve come”). Davidson also suggests that monuments “could be powerful reminders that we overcame not just the Civil War but the failure of Reconstruction and the Jim Crow era that followed.” *Id.* This argument, as noted, misunderstands that monuments do not cease to exhibit honorific functions simply because cultural attitudes have changed.

136. See Walsh, *supra* note 121.

137. *Id.*

of slavery.”¹³⁸ In contrast, monuments to the Founders were not erected to promote slavery, although most were slave owners, but to celebrate the critical role the Founders played in forming the United States and shaping its early years.¹³⁹ This distinction makes monuments to the Founders prime candidates for contextualization rather than removal.¹⁴⁰ But more importantly, the fact that reasonable minds can disagree about the line between Confederate monuments and monuments to the Founders is even more reason to have MPAs that encourage and facilitate democratic discussion and decision-making. The slippery slope argument is not a defect but a virtue of allowing communities to have difficult conversations about what should be commemorated.¹⁴¹

B. *Deficiencies in the 2019 Monument Protection Act*

Georgia’s MPA has effectively eliminated a forum for discussion by barring subsequent action.¹⁴² By stripping municipalities’ power to

138. *Id.*

139. *Id.* Gordon-Reed responds to the slippery slope argument:

Both Washington and Jefferson were critical to the formation of the country and to the shaping of it in its early years . . . Confederate statues were put up when they were put up [not just after the war but largely during periods of Civil Rights tension in the 20th century], to send a message about white supremacy, and to sentimentalize people who had actively fought to preserve the system of slavery. No one puts a monument up to Washington or Jefferson to promote slavery. The monuments go up because, without Washington, there likely would not have been an American nation. They put up monuments to T.J. because of the Declaration of Independence, which every group has used to make their place in American society. Or they go up because of T.J.’s views on separation of church and state and other values that we hold dear.

Id.

140. Gillian Brockwell, *Historians: No, to Removing Jefferson, Washington Monuments. Yes, to Contextualizing Them*, WASH. POST (Sep. 2, 2020), https://www.washingtonpost.com/history/2020/09/02/removing-washington-monument-jefferson-memorial-historians/?itid=lk_inline_manual_28 [<https://perma.cc/2MMA-FLKZ>].

141. *Id.* Historian Seth Bruggeman commented: “There’s a lot of good to come of arguing over what should and should not be commemorated. It’s when that conversation stops, and a monument is left to stand in for the argument—when it begins to do the remembering for us—that we begin to lose sight of history.” *Id.* Other groups, including American Indians, object to commemorating the Founders for reasons beyond the fact that most were slave owners; although these controversies are important, they are beyond the scope of this Note.

142. GA. CODE ANN. § 50-3-1 (2020); see also Bluestein, *supra* note 115; F. Sheffield Hale, *Opinion: A Monumental Miscalculation over Confederacy’s Memorials*, ATLANTA J.-CONST.,

move their monuments, the State of Georgia has silenced the voices of its people. Therefore, municipalities have been forced to either ignore their communities' concerns or forge methods to circumvent state law.¹⁴³ The local governments in the three Georgia removals were forced to resort to executive authority or nuisance law, reactive solutions that conflict with the MPA and are vulnerable to litigation.¹⁴⁴ Thus, these case studies expose glaring deficiencies in the current statutory scheme: the MPA forecloses democratic options, forbidding communities to define their own identities. Even if removal is permitted by legal means outside of the MPA, removal efforts are vulnerable to litigation and unlikely to be permanent.¹⁴⁵

1. *Lack of Democratic Options*

Georgia's MPA is structured in a way that "does not account for when the proprietor of cultural property might wish to remove its property from public display."¹⁴⁶ Preemptively precluding local communities' options to remove monuments from their public spaces "undermines the process of community engagement" and "eliminates the possibility of democratic consensus building."¹⁴⁷ Without options, communities are left with nothing to debate—the decision to maintain monuments has been chosen for them without their input.¹⁴⁸ Ironically, eliminating their voices may very well accelerate the instances of violence and vandalism the MPA intends to limit.¹⁴⁹ When people feel that their local governments are not responsive to their desires or that

<https://www.ajc.com/news/opinion/opinion-monumental-miscalculation-over-confederacy-memorials/gEniVXuAXNXgf2TFT4MMrM/> [<https://perma.cc/UN6N-Q2FK>] (June 20, 2020).

143. See *supra* Part I; Bluestein, *supra* note 115.

144. See Bluestein, *supra* note 115; Hale, *supra* note 142.

145. Hale, *supra* note 142.

146. E. Perot Bissell V., *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, 128 YALE L.J. 1130, 1147 (2019) (noting that cultural property law's orientation toward preservation fails when "a community might decide [to] remov[e] or destr[oy] [] its cultural property . . .").

147. Bluestein, *supra* note 115; Hale, *supra* note 142.

148. Clark Interview, *supra* note 83 ("[T]he bill stripped away local control and counties and cities cannot decide what they want in public; this is extreme and incredible government overreach . . .").

149. Hale, *supra* note 142; see also Graham & Graves, *supra* note 81, at 224.

there is no legal route to achieving their goals, they are more likely to take matters into their own hands.¹⁵⁰

Further, stripping away local control has other consequences. For one, it even precludes accounting for the desires of a monument subject's descendants.¹⁵¹ Relatives of former Georgia Governor John B. Gordon recently sent a letter to current Governor Brian Kemp urging for the removal of Gordon's statue at the state capitol.¹⁵² Unless moving the statue is an appropriate measure for protection or preservation, Gordon's relatives' request will remain unfulfilled.¹⁵³ Moreover, the spirit of the MPA is to keep monuments safely in their places; thus, Governor Kemp is unlikely to relent in moving a prominent monument from the state capitol, and the law is on his side.¹⁵⁴

Additionally, preventing local control has unintended consequences. For example, it would prevent a local library from removing a plaque containing the name of a fire official convicted for sex crimes.¹⁵⁵ In Kingston, Ontario, citizens complained that a plaque

150. See, e.g., *NC Governor Orders Removal of Confederate Statues in Raleigh*, AP NEWS (June 20, 2020), <https://apnews.com/article/0b77eb86b863233f4c73a415e4f6956a> [<https://perma.cc/HF8N-FQ56>] (recounting how protestors in Raleigh, North Carolina, used rope to pull down two monuments of Confederate soldiers located at the capitol). The next day, North Carolina's Governor Roy Cooper remarked: "[i]f the legislature had repealed their 2015 law that puts up legal roadblocks to removal, we could have avoided the dangerous incidents of last night." *Id.*

151. See Mitchell & Bluestein, *supra* note 60.

152. *Id.*; John B. Gordon is widely acknowledged as "one of the leading proponents of both the New South creed and the cult of the Lost Cause" and, at one time, was "head of the Ku Klux Klan in Georgia." W. Todd Groce, *John B. Gordon (1832–1904)*, NEW GA. ENCYC., <https://www.georgiaencyclopedia.org/articles/government-politics/john-b-gordon-1832-1904> [<https://perma.cc/7LQF-8KW8>] (June 8, 2017). In the letter, forty-four of Gordon's relatives wrote:

[T]he "primary purpose of the statue was to celebrate and mythologize the white supremacists of the Confederacy . . ." The continuing presence of this statue on public property serves to negate and undermine the past and ongoing struggle of Georgians to overcome and reverse the legacy of slavery and oppression of [B]lack Americans . . ."

Mitchell & Bluestein, *supra* note 60; Jill Nolin, *Calls Grow to Remove Confederate Statue from State Capitol's Front Lawn*, NOW HABERSHAM (June 9, 2020), <https://nowhabersham.com/calls-grow-to-remove-confederate-statue-from-state-capitols-front-lawn/> [<https://perma.cc/VU5E-9E3F>].

153. See GA. CODE ANN. § 50-3-1 (2019) (prohibiting monument removal except where removal is necessary to protect or preserve the monument).

154. See *id.*

155. See, e.g., Shauna Cunningham, *Kingston Library to Remove Sign Featuring Convicted Sex Offender's Name*, GLOBAL NEWS CAN., <https://globalnews.ca/news/4411718/kingston-library-remove->

within the public library featured Robb Kidd's name.¹⁵⁶ Kidd was the City of Kingston's assistant fire chief until, after eighteen alleged victims came forward, he pled guilty to charges including voyeurism, criminal harassment, and making and possessing child pornography.¹⁵⁷ The library responded swiftly to the complaint and removed the plaque "out of respect for Mr. Kidd's victims"¹⁵⁸ In Georgia, under the 2019 MPA, this kind of action is prohibited because it does not fall under one of the two exceptions.¹⁵⁹

2. *Vulnerable to Litigation*

Because monument removals conflict directly with Georgia's MPA, unless they fit into one of the two exceptions, the counties in the case studies have exposed themselves to potential litigation from both the state and individuals.¹⁶⁰ In fact, the Sons of Confederate Veterans has already filed lawsuits against the local government officials involved in the McDonough and Decatur monument removals.¹⁶¹ The lawsuit regarding Decatur's monument has not yet been considered by the court, but the trial court and the Court of Appeals of Georgia have handed down decisions in the McDonough case.¹⁶² There, the trial court concluded that the Sons of Confederate Veterans lacked standing to bring its claims because it failed to show that its members "suffered an injury in fact because they have not alleged a concrete or particularized injury."¹⁶³

sign-sex-offender/ [https://perma.cc/HRW4-TX75] (Aug. 28, 2018, 12:56 PM); Clark Interview, *supra* note 83.

156. Cunningham, *supra* note 155 ("It's a slap in the face for the families and victims to see his name in such prominence within a city of Kingston facility.").

157. *Id.*

158. *Id.*

159. See GA. CODE ANN. § 50-3-1 (2019); Clark Interview, *supra* note 83 (noting the library's actions would be illegal in Georgia under the 2019 MPA).

160. See § 50-3-1.

161. Rob DiRienzo, *Sons of Confederate Veterans Sues to Bring Back Monument in Decatur*, FOX 5 ATLANTA (June 21, 2021), <https://www.fox5atlanta.com/news/sons-of-confederate-veterans-sues-to-bring-back-monument-in-decatur> [https://perma.cc/PK8V-QA5B]; see generally *Sons of Confederate Veterans v. Newton Cnty. Bd. of Comm'rs*, 861 S.E.2d 653 (Ga. Ct. App. 2021).

162. See generally *Sons of Confederate Veterans*, 861 S.E.2d 653.

163. *Id.* at 655. The trial court also concluded that sovereign immunity was not waived by Georgia's MPA, but the Georgia Court of Appeals did not consider that issue on appeal. *Id.*

Although Georgia's MPA appears to provide a broad grant of standing by affording anyone "a right to bring a cause of action for any conduct prohibited by [the MPA]," plaintiffs must still satisfy constitutional standing requirements.¹⁶⁴ For that reason, the Georgia Court of Appeals affirmed the trial court's ruling and held that the Sons of Confederate Veterans lacked standing to bring a lawsuit because it failed to allege a concrete and particularized injury.¹⁶⁵ Although the McDonough monument case was dismissed on standing grounds, standing is a highly fact-specific inquiry, meaning that Georgia's monument removals are still vulnerable to lawsuits despite the outcome of the McDonough case.

A recent case out of Alabama, *State v. City of Birmingham*, provides another useful example of the type of lawsuits that localities may face.¹⁶⁶ At issue was Alabama's Memorial Preservation Act, which has substantially similar provisions to Georgia's MPA, providing that no monument located on public property that "has been so situated for [forty] or more years may be relocated, removed, altered, renamed, or otherwise disturbed."¹⁶⁷ In response to the 2017 events in Charlottesville, Birmingham's then-mayor William Bell ordered a "freestanding plywood screen" to be erected around the base of a Confederate monument in Birmingham's Linn Park.¹⁶⁸ Mayor Bell was soon confronted with a lawsuit when the State of Alabama sued

164. § 50-3-1(b)(5); Rep. Josh McLaurin (D-51st), *Remarks at the House Floor Debate*, YOUTUBE (Mar. 28, 2019) [hereinafter House Floor Debate], <https://www.youtube.com/watch?v=X9PVw5FPVOM>. Representative McLaurin analyzed the text of the MPA and concluded that either everyone or no one will meet the requirement of standing to file a lawsuit for violation of the Act. *See id.* He noted that Georgia law follows federal law regarding standing, which requires a harm to be "concrete" and "particularized" to file a lawsuit. *Id.* at 1 hr., 24 min., 13 sec. Thus, he reasoned, since no one group has a greater claim to specific harm resulting from violation of the Act, everyone or no one has standing. *Id.* at 1 hr., 24 min., 45 sec. If no one has standing to file a lawsuit, the statute would be toothless.

165. *Sons of Confederate Veterans*, 861 S.E.2d at 658–59 (Although the MPA's language is broad, "the constitutional doctrine of standing still requires that a cause of action involve a concrete and particularized injury. In other words, a plaintiff must show that 'he has been directly affected apart from his special interest in the subject at issue.'").

166. *See generally* *State v. City of Birmingham*, 299 So. 3d 220 (Ala. 2019).

167. ALA. CODE § 41-9-232 (Westlaw through the end of the 2021 Reg. Sess.).

168. Brief of Appellees, *supra* note 12, at 12–13. Notably, the City of Birmingham owns the monument and the park in which it sits and maintains the monument with its own funds. *Id.* Moreover, the plywood screen "does not touch or connect to the [m]onument"—the screen was situated "inches away from the monument on all four sides." *Id.* at 13.

him and the City of Birmingham for “altering” and “disturbing” the monument in violation of the Memorial Preservation Act.¹⁶⁹

In addition to contending that it did not violate the Memorial Preservation Act by leaving the monument untouched, the City of Birmingham attacked the Memorial Preservation Act’s constitutionality.¹⁷⁰ On First Amendment grounds, the City contended that the Act violated its right to free speech by “compelling the City against its will to communicate a message supporting the Confederacy and its purported goals.”¹⁷¹ The circuit court affirmed by relying on *Gomillion v. Lightfoot*, reasoning that “the State could not force the City to speak a message that it did not wish to speak.”¹⁷² Alternatively, the City asserted that the Act “deprives the City of property without

169. See generally *Birmingham*, 299 So. 3d 220; Daniel Jackson, *Alabama Sues Birmingham for Covering Confederate Statue*, COURTHOUSE NEWS SERV. (Aug. 17, 2017), <https://www.courthousenews.com/alabama-sues-birmingham-covering-confederate-statue/> [<https://perma.cc/6AFH-38GK>].

170. Brief of Appellees, *supra* note 12, at 22–30, 52–58. The appellee’s brief noted that:
The core of dispute before this Court is whether the temporary plywood screen surrounding the Linn Park monument unlawfully “alters” or “otherwise disturbs” the monument as barred by the Memorial Preservation Act. The Attorney General asked the Circuit Court to declare that Mayor Bell and the City of Birmingham violated the “letter and spirit” of the Memorial Preservation Act, because the placement of the plywood screen makes a portion of the monument “hidden from view.” Though the Act is absent of any language suggesting that it was intended to preserve the “viewing” of such monuments, it is the State’s contention that the City “altered” or “otherwise disturbed” the monument by blocking a portion from view, although the Monument itself is left undisturbed.

Id. at 52. Appellees’ argument rests on plain meaning and maxims of construction to urge that a significant change in structure or physical change is required to violate the Act. *Id.* at 54. Moreover, erecting a plywood screen is the exact type of measure encouraged by the Act “for the protection, preservation, care, repair, or restoration of those monuments[;]” thus, the same measure cannot constitute the type of disturbance contemplated under the violating clause. *Id.* at 56; ALA. CODE § 41-9-233 (Westlaw through the end of the 2021 Reg. Sess.).

171. Brief of Appellees, *supra* note 12, at 20. See generally Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes,”* 91 TEMP. L. REV. 1 (2018).

172. *Birmingham*, 299 So. 3d at 229; The Alabama Supreme Court dismissed the Appellees reliance on *Gomillion* which stated:

“[T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”

Id. at 230 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 344–45 (1960)); see also Bray, *supra* note 171.

due process of law” by foreclosing the City’s ability “to decide how to use its . . . spaces.”¹⁷³

The case eventually reached the Alabama Supreme Court, which struck down the circuit court’s ruling.¹⁷⁴ First, siding with the State, the court held that, although the screen did not touch the monument, it “so modifie[d] and interfere[d] with the monument that it must be construed as ‘alter[ing]’ or ‘disturb[ing]’ . . . within the plain meaning of those terms as used in [the Act].”¹⁷⁵ Regarding the Constitutional arguments, the court held that “the City cannot assert any substantive Constitutional rights against its creator state[,]” relying on the “well[-]established” rule from *Williams v. Mayor & City Council of Baltimore* stating the same.¹⁷⁶

The Alabama Supreme Court’s decision in *City of Birmingham* suggests that similarly-situated courts favor strict construction in policing monument-protection statutes.¹⁷⁷ Thus, Georgia’s municipalities must tread carefully when unilaterally relocating monuments. Moreover, because Georgia’s MPA provides a cause of action for any individual or entity when an alleged violation occurs, municipalities must be aware that they are vulnerable from all fronts.¹⁷⁸

In Decatur’s monument removal, the county had authority granted from a court based on nuisance law.¹⁷⁹ Yet the removal actions of the Rockdale and Henry County Commissions likely rely on a theory of removal necessitated for protection. Although Georgia allows

173. Brief of Appellees, *supra* note 12, at 36, 37. In response to this argument, the State declared complete ownership over the City and its property. *Id.* at 37, *37. To which the appellees responded, “[A]lthough the State may have had the power to create the City, that does not give it the power to ignore the City’s due process rights. ‘While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of a such an interest, once conferred, without appropriate procedure safeguards.’” *Id.* (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)); *see also* *Bray*, *supra* note 171.

174. *See Birmingham*, 299 So. 3d at 237–38.

175. *Id.* at 227.

176. *Id.* at 235. *See Williams v. Mayor & City Council*, 289 U.S. 36, 40 (1933) (holding “a municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator”).

177. *See generally Birmingham*, 299 So. 3d 220.

178. *See* GA. CODE ANN. § 50-3-1 (2019).

179. *See generally* Order Granting Emergency Motion for Interlocutory Abatement of a Pub. Nuisance, *supra* note 6; *Karimi*, *supra* note 2.

appropriate measures to protect monuments, “appropriate” is a vague legal term; accordingly, the contours and limitations of the term are often established in courts. Without case law interpreting Georgia’s amended MPA, the question of what is appropriate remains unanswered.

C. *Deficiencies in the 2020 Proposed Amendments*

Given opposition to the 2019 MPA, state lawmakers have proposed subsequent amendments.¹⁸⁰ But the proposed legislation missed the mark in carving out a space for local communities to be heard.¹⁸¹ Although HB 1212 sought to respond to calls for Confederate monument removal, it overcorrects.¹⁸² By prohibiting all Confederate monuments on the state’s public property except for museums or Civil War battlefields, the bill eliminates the voices on the other side of the debate.¹⁸³ Instead of providing a mechanism for local municipalities to decide what to do with their public space, the bill outright bars anything reminiscent of the Confederacy—mirroring the bar on monument removal exhibited by the 2019 MPA.¹⁸⁴ Regardless of which side of the debate one may be on, this is as troubling a result as the expanded 2019 MPA. Although sensitive to the will of those who oppose displaying Confederate monuments, the bill, like the current statute, does not provide a forum for discussion.¹⁸⁵ Unsurprisingly, given the legislature’s broad support for the 2019 MPA, the bill failed in the Georgia House.

III. PROPOSAL

As Georgia redefines its identity, the needs of its communities are changing; many have focused on seizing the political moment to deconstruct oppressive institutions and forge a new, more inclusive

180. *See, e.g.*, H.R. 1212, 155th Gen. Assemb., Reg. Sess. (Ga. 2020).

181. *Id.*

182. *Id.*

183. *See id.*

184. *See generally id.*; *see also* GA. CODE ANN. § 50-3-1 (2019).

185. *See id.*

society.¹⁸⁶ Accordingly, it is necessary for Georgia now, more than ever, to adopt a new Monument Protection Act that provides viable options to achieve that end.

Although supporters of the 2019 MPA embrace a memorial justification premised on preservationism, this reasoning is inconsistent with demonstrated functions of monuments.¹⁸⁷ Moreover, transitional politics require democratic options attentive to the evolving politics. Thus, the current moment must be met with a new theory—one that recognizes the value inherent in removal, recontextualization, and even destruction. A reconstructionist theory, which allows communities to manage their public spaces as they see fit, realigns the goals of cultural preservation from protection for history's sake to narrative building—an important and necessary function of political change.¹⁸⁸ This Note proposes a new MPA, modeled after Virginia's statute addressing confederate monuments, which is built to manage the shifting views implicit in transitioning politics.¹⁸⁹

A. *A New Monument Protection Act for Georgia: Building from*

186. Schaul et al., *supra* note 39. Electorally, Georgia transitioned from red to blue for the first time in twenty-eight years in the 2020 presidential election, capturing the national evolution on a microcosmic level. *Id.* Moreover, locals have increasingly lobbied for Confederate monument removal since Floyd's death. Melissa Stern, *Locals Lobbying for the Removal of Confederate Monuments*, CBS 46 (June 8, 2020), https://www.cbs46.com/news/locals-lobbying-for-the-removal-of-confederate-monuments/article_eabd3e92-a9c3-11ea-ae71-3b5b2534fe28.html [https://perma.cc/6HP7-CNS7]. One local Georgia criminal defense lawyer and civil rights activist echoed how many feel:

As the country again reckons with whether Black Lives really Matter, symbols of hate should be gone as they do not honor history but rather are a painful acknowledgement of what this country did to a people who did not ask to come here but, nevertheless have made many strides and contributions as Americans How do we explain these monuments to children? How should we explain? That we continue to honor these people even though they were happy to use the law to suppress Black people? These monuments and symbols are inexcusable. If this society wants to move forward, this is an easy fix to show seriously that Black Lives Matter.

Id. (statement by R. Gary Spencer).

187. *See generally supra* Part II.A.2.

188. *See* LEVINSON, *supra* note 8.

189. *See generally infra* Part III.A.

Virginia's Model

Georgia should restructure its MPA to accomplish two goals. First, divest state actors from exercising authority over local public space by delegating monument protection to municipalities; and second, provide communities with enough options to ensure that they can effectively control their public spaces' narratives. Namely, to allow monuments to be removed and relocated, contextualized, altered, and destroyed, as determined by the people. Because Virginia's most recent MPA is designed to achieve those ends, Georgia can build its framework from Virginia's model.¹⁹⁰

Prior to the 2020 version, Virginia's MPA was much like the current one in Georgia: it prohibited any person, including authorities of the locality where the monument was located, from disturbing or interfering with monuments for war veterans.¹⁹¹ In that context, "disturb or interfere" encompassed removal and damage.¹⁹² The 2020 amendment, however, reversed course by allowing localities to "remove, relocate, contextualize, or cover" any monument or memorial situated on the locality's public property, except for monuments or memorials located in publicly owned cemeteries.¹⁹³

But before a locality can exercise any of those options, it must comply with a series of administrative procedures.¹⁹⁴ First, it must publish a notice of its intent to remove, relocate, contextualize, or cover the monument in a newspaper having general circulation in the locality.¹⁹⁵ Second, within thirty days of the notice, it must hold a public hearing where interested persons may present their views.¹⁹⁶ Third, after the public hearing, the governing body may vote to decide which option, if any, it will use.¹⁹⁷ And fourth, if the governing body votes to remove, relocate, contextualize, or cover a monument or memorial, it must first, for a period of thirty days, "offer the monument

190. *See generally* VA. CODE ANN. § 15.2-1812 (West, Westlaw through end of 2021 Reg. Sess.).

191. *See* VA. CODE ANN. § 15.2-1812 (2019); *see also* H.R. 1537, Gen. Assemb. Reg. Sess. (Va. 2020).

192. VA. CODE ANN. § 15.2-1812 (2019).

193. VA. CODE ANN. § 15.2-1812 (West, Westlaw through end of 2021 Reg. Sess.).

194. *See id.*

195. *Id.* § 15.2-1812(B).

196. *Id.*

197. *Id.*

or memorial for relocation and placement to any museum, historical society, government, or military battlefield.”¹⁹⁸ Importantly, the local governing body has the sole authority to determine the monument’s final disposition.¹⁹⁹ Virginia’s MPA includes important safeguards to ensure monuments are not unilaterally altered by individuals in high offices.²⁰⁰ For example, requiring localities to hold public hearings before voting on a course of action keeps lawmakers in touch with the desires of their communities.²⁰¹

Although Virginia’s amended MPA makes great strides in providing democratic options, Georgia’s MPA can, and should, go further. In addition to allowing localities to remove, relocate, and contextualize their monuments, it should likewise permit alteration and destruction. Allowing localities to alter or destroy their monuments confers a broad grant to localities to rewrite their spaces’ narratives.

Georgia should also retain the administrative safeguards built into Virginia’s MPA, with some alterations. It should maintain the procedure of publishing notice and holding a public hearing before voting on an option.²⁰² Yet, given the inclusion of alteration and destruction as an option, localities should not be required to first consider relocation. Instead, even when localities opt for removal and relocation, they should retain the sole authority to decide what to do with the monument.

B. Justifications for Each Option

The justifications for including removal, relocation, alteration, and destruction in the catalog of options available to local governments stem from the arguments and counterarguments analyzed in Part II.²⁰³

198. *Id.*

199. VA. CODE ANN. § 15.2-1812 (West, Westlaw through end of 2021 Reg. Sess.).

200. *See generally id.*

201. *Id.*

202. By allowing localities to discuss and vote on options, encourages community engagement and democratic consensus building, but the author acknowledges that a majority vote structure does not cure the possibility of an oppressive majority.

203. *See supra* Part II.

1. Contextualization

Contextualization is, generally, the mildest method of altering public space as it leaves existing property untouched. Traditionally, monument contextualization has taken the form of placing plaques near monuments to situate them within their historical context, often revealing the true motivation behind the monument's erection.²⁰⁴ With Confederate monuments, this means installing markers that acknowledge their glorification of the Lost Cause and their promotion of white supremacy.²⁰⁵ For example, before Decatur Square's monument came down in 2020, the DeKalb County Commission mandated the installation of a context marker that revealed, among other things, that "this monument. . . [was] created to intimidate African-Americans and limit their full participation in the social and political life of their communities."²⁰⁶

Another, more drastic, form of contextualization occurs when new art is situated in a way that alters the meaning of existing art.²⁰⁷ The installation of the Fearless Girl statue in front of Wall Street's famous Charging Bull provides a good example.²⁰⁸ Originally, the Charging Bull represented "the power of the American people" and the resilient spirit of New York.²⁰⁹ The bull itself symbolizes a strong, healthy stock market.²¹⁰ But when the statue of the Fearless Girl, which depicts a young, defiant girl with her hands on her hips and her chin held high, was placed to stare down the bull, the narrative of the space

204. See generally Hannah Natanson, *There's a New Way to Deal with Confederate Monuments: Signs That Explain Their Racist History*, WASH. POST (Sept. 22, 2019), <https://www.washingtonpost.com/history/2019/09/22/theres-new-way-deal-with-confederate-monuments-signs-that-explain-their-racist-history/> [https://perma.cc/66VM-A3QS].

205. Tia Mitchell, *Marker Supplies Historical Context for DeKalb's Confederate Monument*, ATLANTA J.-CONST. (Sept. 17, 2019), <https://www.ajc.com/news/local/marker-supplies-historical-context-for-dekalb-confederate-monument/3mGyZ6ITzCEGVgz785O1zJ/> [https://perma.cc/U8FB-5HJN].

206. *Id.*

207. Kristina Zucchi, *Charging Bull: The Bronze Icon of Wall Street*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/100814/charging-bullthe-brass-icon-wall-street.asp> [https://perma.cc/EB3K-SC6J] (July 10, 2020).

208. *Id.*

209. *Id.* (internal quotations omitted).

210. *Id.*

changed.²¹¹ Fearless Girl was “designed to call attention to a new initiative . . . to increase the number of women on . . . corporate boards.”²¹² What once signaled aggressive prosperity became a critique of gender disparity in an instant.²¹³

Undoubtedly, contextualization is better than inaction. Yet contextualization does little to change monument symbolism, which dictates the political narratives conveyed by monuments.²¹⁴ Thus, contextualization fails to temper the honorific functions of monuments.

2. *Removal and Relocation*

Removal and relocation, which moves a monument from a public, usually prominent, space to a museum, cemetery, or battlefield, is a more moderate solution than contextualization.²¹⁵ Relocation recognizes that, to sever a monument from its political narrative function, it must be removed from places of honor.

The downside to relocation is that it does not reliably provide for the sheer number of Confederate monuments.²¹⁶ Even if a local government can find a museum or cemetery to take their monument, Georgia has over 100 other monuments that would need to be relocated, making this an unrealistic option.²¹⁷ “A museum may ‘need’

211. Danielle Wiener-Bronner, *Why a Defiant Girl Is Staring Down the Wall Street Bull*, CNN MONEY (Mar. 9, 2017, 11:24 AM), <https://money.cnn.com/2017/03/07/news/girl-statue-wall-street-bull/> [<https://perma.cc/C4FA-PCEV>].

212. *Id.*

213. Page Benoit, *A Monumental Question: A Comparison Between the United States’ and South Africa’s Monument Debates 25* (May 2018) (B.A. thesis, Bard College) (on file with the Bard Digital Commons).

214. *Id.*

215. Relocation disrupts the current organization of public space unlike contextualization, which leaves property in its original location.

216. *See* Levinson, *supra* note 12, at 673.

217. Complaint at 8, *Downs v. DeKalb Cnty.*, No. 20CV4505-3 (Super. Ct. DeKalb Cnty. June 12, 2020) (“Over a year after the Board of Commissioners directed that the Confederate monument be relocated away from the Decatur Square, it remained in the same exact place. In short, despite their efforts, County staff could not find any takers.”). This result was not without effort—County staff published requests for proposals and contacted numerous potential relocation sites. *Id.*

or want one statue . . . but there is no conceivable need for a dozen [of the same] artifacts.”²¹⁸

3. *Destruction*

Monument destruction is the most extreme option advocated for in this Note and is likely repugnant to many who value preserving cultural property generally.²¹⁹ Nonetheless, destruction has valuable cathartic, expressive, and symbolic properties that necessitate its spot on the list of viable options.

For many, removing Confederate monuments represents the physical manifestation of taking down oppressive institutions.²²⁰ Evidence of destruction’s symbolic and cathartic value comes from history: often, one of the first actions of a new regime is to destroy the prior one’s cultural property, especially if the previous regime was oppressive.²²¹

In fact, our own American history reflects this idea. On July 9, 1776, a copy of the Declaration of Independence, hot off the press from Philadelphia, arrived in New York City.²²² General George Washington and his troops, joined by a crowd of civilians, flocked to hear it read in what is now City Hall Park.²²³ After the reading, the crowd descended upon a statue of King George III on Bowling Green and pulled it to the ground.²²⁴ The community’s first action upon

218. Levinson, *supra* note 12, at 696; Walsh, *supra* note 121 (“[P]eople I know who work in museums tear their hair out about this suggestion, that somehow, we’re going to ship all these Confederate monuments off to the lucky museum that has to find a place to put them.”).

219. This Note does not purport to encourage the destruction of cultural property generally. Instead, it seeks to be receptive to political movements aimed at dismantling oppressive regimes.

220. Karimi, *supra* note 2. In the background of the video taken of the dismantling of Decatur’s Confederate monument, a woman can be heard shouting “this is to white supremacy coming down!” *Id.*

221. Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 280 (2009).

222. Andrew Lawler, *Pulling Down Statues? It’s a Tradition that Dates back to U.S. Independence*, NAT’L GEOGRAPHIC (July 1, 2020), <https://www.nationalgeographic.com/history/2020/07/pulling-down-statues-tradition-dates-back-united-states-independence/#close> [<https://perma.cc/TY2M-4GWZ>].

223. *Id.*

224. *Id.*; Bissell, *supra* note 146, at 1150–51; ISAAC BANGS, JOURNAL OF LIEUTENANT ISAAC BANGS: APRIL 1 TO JULY 29, 1776, at 57 (Edward Bangs ed., Cambridge, J. Wilson & Son 1890) (1776), <https://archive.org/details/journaloflieuten00bang/page/56>. After its destruction, the statue was shipped to Newark to be made into bullets for the war. BANGS, *supra*. Bangs wrote: “[I]t is hoped that the Emanations of the Leaden George will make [a] deep impression in the Bodies of some of his red Coated and Torie Subjects [sic]” *Id.*

hearing the rings of revolution was to topple a symbol of their oppressor.²²⁵ Such actions are done, of course, to symbolize a changing of the guard.²²⁶ Thus, to be receptive to political movements aimed at dismantling white supremacist regimes still legitimized by Confederate monuments in public spaces, destruction must be an option.

CONCLUSION

As the rapidly shifting political landscape has made clear, people are eager to foster new, more inclusive narratives with their public spaces.²²⁷ Accordingly, Georgia must reckon with its Confederate monuments. As it stands, Georgia's Monument Protection Act does not allow localities to manage their own property and thus their own narratives, instead substituting executive control where local control is necessary.²²⁸

There is impassioned debate on both sides, but with an informed understanding of both the underlying symbolism of Confederate monuments and their harmful honorific functions, one route emerges as the more democratic one. The only comprehensive way to allow communities to build their own narratives is to provide a mechanism of democratic options. Preserving the relics of a dark past for history's sake does little to foster modern cohesiveness, and it ignores the realistic function of monuments to perpetuate systemic discrimination. Thus, equipping Georgia with a new MPA that recognizes the value inherent in removing, relocating, contextualizing, and destroying Confederate monuments provides Georgia the best chance to build a new identity rooted in its valuable multiculturalism.

225. Lawler, *supra* note 222.

226. Adler, *supra* note 221.

227. *See supra* INTRODUCTION.

228. *See* GA. CODE ANN. § 50-3-1 (2019); *see also* Clark Interview, *supra* note 83.