

PRIVATE CONFEDERATE MONUMENTS

by

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As public Confederate monuments finally begin to come down across the nation, we are seeing an emergence of Confederate monuments on private lands. The number of private Confederate monuments is increasing both with the construction of new monuments and, more significantly, the relocation of monuments from public land. This Article explains why private Confederate monuments are likely to be the next battleground over these controversial and troubling statues. Through ten detailed examples, we show how private Confederate monuments emerge and how communities are responding to them. The challenges related to monuments on private land are different than those on public lands, and previous activism and research on Confederate monuments is only of limited use in grappling with this category. As relocated monuments are the largest source of new private monuments, this Article serves as a cautionary note to communities looking to dispose of their monuments by donating or returning these resources to private groups and encourages communities to fully evaluate the impacts of their removal and relocation plans to ensure they do not lead to unintended consequences or create issues for another community.

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I. INTRODUCTION

With notable exceptions,¹ U.S. citizens increasingly agree that it is time for the removal of Confederate monuments.² For too long Confederate monuments have

¹ See, e.g., OFFICE OF THE PRESIDENT, EXECUTIVE ORDER ON PROTECTING AMERICAN MONUMENTS, MEMORIALS, STATUES, AND COMBATING RECENT CRIMINAL VIOLENCE (2020) (asserting that those seeking removal of Confederate monuments are trying “to advance a fringe ideology that paints the United States of America as fundamentally unjust,” and calling for aggressive prosecution of anyone defacing or damaging a monument while also threatening to limit federal funding for states that fail to prevent vandalism of Confederate monuments).

² While polling numbers differ, the trend shows increasing support for removal. See, e.g., Cameron Easley, *Taking Down Confederate Statues is Still Relatively Unpopular, but Opinion Is Shifting*, MORNING CONSULT (June 10, 2020, 12:01 AM), <https://morningconsult.com/2020/06/10/confederate-statue-flag-polling/> (describing a Morning Consult/Politico poll of 1,900 registered voters where 32% said the statues should be removed, up from 26% in a 2017 poll); Rebecca Klar, *Poll: Majority Supports Removing Confederate Statues from Public Places*, HILL (June 17, 2020, 3:21 PM), <https://thehill.com/homenews/news/503226-poll-majority-supports-removing-confederate-statues-from-public-places> (citing a Quinnipiac study with 52% of voters supporting removal). There is even less support for the Confederate flag than there is for Confederate monuments. Ariel Edwards-Levy, *Public Opinion on Taking Down Confederate Monuments Hasn't Budged in the Last Three Years*, HUFFINGTON POST (June 10, 2020, 6:05 PM), https://www.huffpost.com/entry/poll-confederate-flag-statues_n_5ee143b9c5b6ee376f836778 (also showing that Black Americans strongly favor removal of Confederate monuments while only 19% of white respondents answered the same). All three polls found Republicans far more likely to support maintaining Confederate monuments. See also Gerald F. Seib, *Poll Shows Middle Ground in Confederate Statue Debate*, WALL STREET J. (July 23, 2020, 9:00 AM), <https://www.wsj.com/articles/after-confederate-monuments-fall-where-do-they-go-11595509200?st=q2qp2zzkrb0b5so> (video associated with the article reporting the results of a WSJ/NBC poll finding that only 16% of Americans support keeping the monuments in place as they are, 10% support removing and disposing, 31% support removal and relocation in museums or on private

stood in our parks and town squares.³ They have taken center stage in our government buildings, including state capitols and courthouses.⁴ Instead of serving as memorials to fallen soldiers, the majority of Confederate monuments were erected during the Jim Crow era and have stood for and become (sometimes quite explicitly) symbols of white supremacy and rallying places for hate groups.⁵ The month following the murder of George Floyd in the summer of 2020 was the most successful period for Confederate monument removal to date, and reignited and built upon earlier calls to grapple with these troubled structures.⁶

Efforts at monument removal (and, relatedly, resistance to those efforts) have largely focused on Confederate monuments in public spaces. Such a focus makes sense given the particularly pernicious messaging related to monuments on publicly

property, and 41% support leaving in place but contextualizing).

³ See, e.g., *Confederate Monuments*, VA. CTR. FOR CIV. WAR STUDS., <https://civilwar.vt.edu/confederate-monuments/> (last visited Feb. 3, 2021) (profiling these monuments in southwestern Virginia, including the location and context of Confederate monuments located in urban settings); see also John J. Winberry, “Lest We Forget”: *The Confederate Monument and the Southern Townscape*, 23 S.E. GEOGRAPHER 107, 108–11 (1983).

⁴ See, e.g., Merrit Kennedy, *Virginia Removes Its Robert E. Lee Statue from U.S. Capitol*, NPR (Dec. 21, 2020, 9:39 AM) <https://www.npr.org/2020/12/21/948736896/virginia-removes-its-robert-e-lee-statue-from-u-s-capitol> (profiling the removal of a statue of Robert E. Lee that had been one of Virginia’s two statues in the U.S. capitol from 1909–2020).

⁵ Gary Shapiro, Opinion, *The Meaning of our Confederate ‘Monuments’*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/opinion/the-meaning-of-our-confederate-monuments.html>; Katharine P. Zakos, *Truth is Marching On: The Lasershow Spectacular at the Stone Mountain Park Confederate Memorial and the Changing Narratives of History*, 10 J. HERITAGE TOURISM 280, 286 (2015).

⁶ Alisha Ebrahimji, Artemis Moshtaghian, & Lauren M. Johnson, *Confederate Statues Are Coming Down Following George Floyd’s Death, Here’s What We Know*, CNN (July 1, 2020, 3:45 PM), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> (describing flurry of removals but without providing numbers). Wikipedia contributors have been maintaining a list that had reached over sixty removals or planned removals as of June 25, 2020 (one month from the death of George Floyd). *List of Monuments and Memorials Removed During the George Floyd Protests*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_monuments_and_memorials_removed_during_the_George_Floyd_protests/ (last visited Feb. 3, 2021). We acknowledge the unreliability of Wikipedia as a source but have not found any other comprehensive list of removed monuments. We anticipate the Southern Poverty Law Center will keep updating such information as it has been a consistent tracker of locations and removals of such sites. See *SPLC Whose Heritage? Dataset Updates as of September 15, 2020*, SOUTHERN POVERTY L. CTR. (Sept. 15, 2020), <https://www.splcenter.org/presscenter/splc-whose-heritage-dataset-updates-september-15-2020>. Another source of information is Professor Hilary Green’s Google map of monument removals (both actual and promised). *UA Professor Creates Interactive Map of Confederate Monument Removals*, UNIV. ALA. C. ARTS & SCI. (July 21, 2020), <https://as.ua.edu/2020/07/21/ua-professor-creates-interactive-map-of-confederate-monument-removals/>.

owned lands.⁷ This focus, however, misses an important strand of Confederate monuments—those located on private property.

Confederate monuments appear on private property for a few reasons. Some, historically, were erected on private property by nonprofit organizations or individuals to commemorate a specific event or location.⁸ Some were previously public monuments now relocated to private lands.⁹ The establishment of entirely new Confederate monuments on private property is not only continuing but increasing.¹⁰ Both supporters and opponents of Confederate monuments see the appeal of private monuments. As public sentiment continues to coalesce in favor of public monument removal, supporters eye private lands as safer locations—comparatively immune from political pressure where advocates’ tools for removal are far less clear. At the same time, local governments looking to remove Confederate monuments generally view private ownership as a more palatable alternative to displays on public lands.¹¹ Local governments have begun conveying or returning monuments removed from public spaces to private organizations and individuals, removing these commemorative structures from the public domain but perhaps not the public eye.¹²

⁷ For example, a particularly common monument location is on the grounds of a local courthouse. This does not send a particularly subtle message. *See, e.g.*, Paul Pape, *Opinion: Now Is the Time to Relocate Confederate Monuments in Bastrop County*, LUBBOCK AVALANCHE J. (July 23, 2020, 12:01 AM), <https://www.lubbockonline.com/opinion/20200723/opinion-time-is-now-to-relocate-confederate-monuments-in-bastrop-county> (discussing a Confederate monument in front of the Bastrop County courthouse).

⁸ Cheril Vernon, *Confederate Veterans Memorial Plaza Dedicated in Palestine*, PALESTINE HERALD-PRESS (Apr. 13, 2013), https://www.palestineherald.com/archives/confederate-veterans-memorial-plaza-dedicated-in-palestine/article_0ce22066-47ad-51e2-8e2a-9b0234b8271b.html.

⁹ The Confederate monument at Black Jack’s Crossing Golf Course in Lajitas, Texas previously stood in a public park in Dallas, Texas. Demond Fernandez, *Controversial Robert E. Lee Statue Removed from Dallas Has New Home in Lajitas, TX*, WFAA (Sept. 20, 2019, 10:37 PM), <https://www.wfaa.com/article/news/local/controversial-robert-e-lee-statue-removed-from-dallas-has-new-home-in-lajitas-tx/287-a857b24c-937f-4a42-84b6-7fc34e0917d6>.

¹⁰ Kathleen Tipler, Tyler Johnson, Tyler Camarillo, Andrea Benjamin, Ray Block, Jr., Jared Clemons, Chryl Laird, & Julian Wamble, *93 Percent of Confederate Monuments are Still Standing. Here’s Why*, WASH. POST (Dec. 16, 2019, 4:00 AM), <https://www.washingtonpost.com/politics/2019/12/16/percent-confederate-monuments-are-still-standing-heres-why/>.

¹¹ US/ICOMOS, *Confederate Monuments: Past, Present, and Future - Webinar - August 13th, 2020*, YOUTUBE (Aug. 14, 2020), <https://www.youtube.com/watch?v=1ZsvGy9yyyQ> (comments of Destry Jarvis, former Park Service employee).

¹² Sabrina Tavernise, *A Boom in Confederate Monuments, on Private Land*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/confederate-monuments.html>. There are a few common strategies for dealing with the “after life” of a Confederate monument. Sometimes monuments are relocated to other public locations (parks, cemeteries, battlefields, or more receptive towns). Other times, communities seek to move them to museums where they can be interpreted and contextualized. Often, the monuments remain in storage as local governments

We predict the next battleground in the continued conflict over Confederate monuments will center on private monuments.¹³ This Article documents examples of private Confederate monuments (without attempting to provide an exhaustive list) to demonstrate this trend. Our other work supporting the removal of Confederate monuments in public spaces is only marginally helpful when considering private monuments.¹⁴ Substantially different issues arise with private monuments. While monuments on public land have a host of laws potentially protecting them, they are also subject to political pressures that can affect the removal and modification processes. For monuments on private lands, the legal issues center instead on property rights, land use, and free speech, and there are generally fewer tools for advocates and communities to use to facilitate removal.

This Article begins with background on public Confederate monuments to illustrate the contrast with private monuments. However, to suggest that any monument is either completely public or completely private is an oversimplification, and this Article does not make this suggestion.¹⁵ Indeed, we previously documented this false dichotomy in the private/public nature of Confederate monuments, illustrating how these interwoven interests can complicate removal discussions given the complex layers of ownership involved.¹⁶ The public/private nature of real property is generally fluid, and an examination of these monuments showcases this larger truth.

From public monuments, we move to private Confederate monuments to discuss examples of the types of private monuments that are now most commonly encountered or emerging. The examples below highlight why new and formerly public Confederate monuments are moving to private land despite previous preferences for locating these statues on public land.

After detailing the broad contours of the emerging private Confederate monu-

cannot decide what to do with them. Many end up in private hands though, returning to the heritage groups that organized their initial payment and placement or to wealthy individuals who display them on their land. Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1430 (2020) [hereinafter Owley & Phelps, *Life and Death*].

¹³ Marc Fisher, *As Confederate Monuments Tumble, Die-Hards are Erecting Replacements*, WASH. POST (July 25, 2020, 10:30 AM), https://www.washingtonpost.com/national/as-confederate-monuments-tumble-die-hards-are-erecting-replacements/2020/07/25/44f537ee-cd04-11ea-b0e3-d55bda07d66a_story.html (profiling the beginning of the shift to private monuments).

¹⁴ Jess Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 671–73 (2019) [hereinafter Phelps & Owley, *Etched in Stone*]; Owley & Phelps, *Life and Death*, *supra* note 12, at 1398.

¹⁵ Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 INDIANA L.J. SUPPLEMENT 15, 18 (2018) [hereinafter Owley & Phelps, *Complicated Landscape*].

¹⁶ *See generally id.*

ment movement, we discuss how communities can (and cannot) take action in response to these private monuments. While private Confederate monuments are appropriately protected by the First Amendment, we urge local governments to distance themselves from these monuments by ensuring they are not supported by public funds and to avoid, to the extent possible, public confusion about the true nature of these private monuments. We provide some examples where signs, additional monuments or markers, or even vegetation could lessen the public impacts of private Confederate monuments.

Last, at the end of the public life of Confederate monuments (when a community elects to remove a monument from the public domain), public entities may lose control over their placement and messaging. Relocation to private land may make rational sense, but close attention must be paid to these plans to avoid unintended consequences.¹⁷

II. PUBLIC CONFEDERATE MONUMENTS

There were three primary historic waves of Confederate monument installation. The earliest Confederate monuments tended to be in cemeteries and have a strong funeral aspect, but were comparatively few in number.¹⁸ The majority of Confederate monuments appeared post-Reconstruction and into the Jim Crow era (roughly 1890–1930), with a third wave emerging during the Civil Rights Era (roughly 1950–1970).¹⁹ Historians have noted that communities often erected Confederate monuments to reinforce the subjugation of nonwhites at times when white citizens saw their traditional way of life threatened.²⁰ With such a pattern, it would unfortunately not be surprising to see more Confederate monuments appear today in a fourth wave as backlash against contemporary removal efforts and the Black Lives Matter movement.

¹⁷ See Owley & Phelps, *Life and Death*, *supra* note 12, at 1399–1400 (discussing the afterlife of public Confederate monuments and what communities do with them post-removal); see also Jordan Brashers & Derek H. Alderman, *A Confederate Statue Graveyard Could Help Bury the Old South*, CONVERSATION (July 26, 2019, 9:00 AM), <https://theconversation.com/a-confederate-statue-graveyard-could-help-bury-the-old-south-118034> (proposing a potential solution to the afterlife of these monuments); Anna Marcum, *Mass Produced, Mass Removal, Op-Ed: A Confederate Monument Graveyard Is Within Our Grasp*, ARCHITECT'S NEWSPAPER (Aug. 4, 2020), <https://www.archpaper.com/2020/08/op-ed-a-confederate-monument-graveyard-is-within-our-grasp/> (same).

¹⁸ Winberry, *supra* note 3, at 111.

¹⁹ Ryan Best, *Confederate Statues Were Never Really About Preserving History*, FIVETHIRTYEIGHT (July 8, 2020, 7:00 AM), <https://projects.fivethirtyeight.com/confederate-statues/> (showing a timeline of monuments on public lands).

²⁰ See, e.g., *Confederate Monuments Interpretation Guide*, ATLANTA HIST. CTR, <https://www.atlantahistorycenter.com/research/confederate-monuments> (last visited Feb. 3, 2021) (profiling this history).

Understanding the timeline of Confederate monument placement gets at the truth of these statues. Few were built to support veterans or to honor lost family members.²¹ The majority were built as symbols of white dominance,²² and to remind Black residents that they did not hold the reins of power.²³

Confederate monuments have played a central role in the establishment and perpetuation of the Lost Cause myth.²⁴ The Lost Cause recasts the “nature of antebellum Southern society and the institution of slavery, the constitutionality of succession, the causes of the Civil War, the characteristics of their wartime society, and the reasons for [the South’s] defeat.”²⁵ As one National Register nomination for a property in Louisiana stated:

The Cult of the Lost Cause had its roots in the Southern search for justification and the need to find a substitute for victory in the Civil War. In attempting to deal with defeat, Southerners created an image of the war as a great heroic epic. A major theme of the Cult of the Lost Cause was the clash of two civilizations, one inferior to the other. The North, “invigorated by constant struggle with nature, had become materialistic, grasping for wealth and power.” The South had a “more generous climate” which had led to a finer society based upon “veracity and honor in man, chastity and fidelity in women.” Like tragic heroes, Southerners had waged a noble but doomed struggle to preserve their superior civilization. There was an element of chivalry in the way the South had fought, achieving noteworthy victories against staggering odds. This was the “Lost Cause” as the late nineteenth century saw it, and a whole generation of Southerners set about glorifying and celebrating it.²⁶

²¹ Best, *supra* note 19.

²² *Statement on Confederate Monuments*, NAT’L TRUST HIST. PRESERVATION (June 18, 2020), <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials> (explaining that while some Confederate monuments “were erected—like other monuments to war dead—for reasons of memorialization, most Confederate monuments were intended to serve as a celebration of Lost Cause mythology and to advance ideas of white supremacy”).

²³ See Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 KENTUCKY L.J. 695, 708 (2020).

²⁴ Dane Kennedy, *What Should We Do With Confederate Monuments?*, AM. HIST. ASS’N (Oct. 30, 2017), <https://www.historians.org/publications-and-directories/perspectives-on-history/october-2017/what-should-we-do-with-confederate-monuments> (profiling the role that these monuments played in promulgating the Lost Cause ideology); see also Henry Louis Gates, Jr., *The ‘Lost Cause’ that Built Jim Crow*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/2019/11/08/opinion/sunday/jim-crow-laws.html> (discussing the role that Lost Cause played in supporting Jim Crow laws in the period after Reconstruction).

²⁵ Gary W. Gallagher, *Introduction*, in *THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 1*, 1 (Gary W. Gallagher & Alan T. Nolan eds., 2000).

²⁶ Mitch Landrieu, *How I Learned About the “Cult of the Lost Cause,”* SMITHSONIAN MAG.

Two heritage groups have been principally responsible for helping to establish and maintain Confederate monuments.²⁷ The Sons of Confederate Veterans (SCV) and the United Daughters of the Confederacy (UDC).²⁸

The SCV was organized in Richmond, Virginia in 1896.²⁹ The SCV was inspired by the Lost Cause narrative and disapproved of attempts to extend equality to the Black community.³⁰ According to its website, “the SCV continues to serve as a historical, patriotic, and non-political organization dedicated to insuring that a true history of the 1861–1865 period is preserved.”³¹ Membership is open to all male descendants of any veteran who served honorably in the Confederate armed forces.³² The organization describes itself as involved in heritage-related work, such as marking Confederate soldier’s graves, facilitating historical re-enactments, promoting publications, and hosting regular meetings to discuss the military and political history of the Civil War.³³ The SCV generally opposes monument removal,³⁴

(Mar. 12, 2018), <https://www.smithsonianmag.com/history/how-i-learned-about-cult-lost-cause-180968426/> (quoting a National Register nomination with this discussion of the Lost Cause).

²⁷ These organizations also erected other monuments as part of the Lost Cause movement, including ones to confederate women and “faithful slaves.” See Paul A. Shackel, *Heyward Shepard: The Faithful Slave Memorial*, 37 HIST. ARCHAEOLOGY 138, 138, 140, 146 (2003) (profiling the joint efforts to erect such a monument). Faithful slave monuments were an attempt to recast slavery as a beneficial institution for enslaved persons. See Caroline E. Janney, *Written in Stone: Gender, Race, and the Heyward Shepherd Memorial*, 52 CIV. WAR HIST. 117, 120–22 (2006); see also Kali Holloway, *‘Loyal Slave’ Monuments Tell a Racist Lie About American History*, THE NATION, (Mar. 25, 2019), <https://www.thenation.com/article/archive/loyal-slave-confederate-monuments-civil-war-slavery/> (same); Alison M. Parker, *When White Women Wanted a Monument to Black ‘Mammies,’* N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/opinion/sunday/confederate-monuments-mammy.html> (discussing faithful slave monuments and a proposal to build a faithful mammy sculpture in Washington D.C. in 1923 and the critiques from the NAACP and others that prevented its completion).

²⁸ Allen G. Breed, *‘The Lost Cause’: The Women’s Group Fighting for Confederate Monuments*, GUARDIAN (Aug. 10, 2018, 12:17 PM), <https://www.theguardian.com/us-news/2018/aug/10/united-daughters-of-the-confederacy-statues-lawsuit>.

²⁹ *What Is the Sons of Confederate Veterans?*, SONS OF CONFEDERATE VETERANS, <https://scv.org/what-is-the-scv/> (last visited Feb. 23, 2021).

³⁰ Heidi Beirich, *The Struggle for the Sons of Confederate Veterans: A Return to White Supremacy in the Early Twenty-First Century*, in NEO CONFEDERACY: A CRITICAL INTRODUCTION 280, 283 (Euan Hague, Heidi Beirich, & Edward H. Sebesta eds., 2008).

³¹ *What is the SCV?*, *supra* note 29.

³² *Become A Member*, FLA. DIVISION SONS OF CONFEDERATE VETERANS, <https://www.flscv.org/index.php/become-a-member> (last visited Feb. 23, 2021).

³³ *What is the SCV?*, *supra* note 29.

³⁴ Mike Christen, *Confederate Reckoning: The Search for New Homes for the South’s Monuments*, COLUMBIA DAILY HERALD (July 31, 2020, 11:01 PM), <https://www.columbiadailyherald.com/story/news/state/2020/08/01/confederate-reckoning-search-for-new-home-for-souths-monuments/42130463/> (profiling the organization’s stance and noting they have ideas for locations for displaced monuments but do not want to reveal these ideas and tip off

although some representatives have recently made more nuanced statements, indicating that they are focusing their efforts on a few geographical areas and on preventing the destruction of monuments (so they presumably can be relocated).³⁵ Overall, the SCV is the most active group opposing monument removal.³⁶ It is also the group most active in the establishment of new Confederate monuments as seen from our detailed examples below.³⁷

The UDC was founded in Nashville, Tennessee in 1894.³⁸ After the Civil War, women's groups coalesced to bring home soldiers' remains and create memorial days.³⁹ The UDC grew out of several different ladies' memorial organizations.⁴⁰ Formally incorporated in 1919, the UDC is a nonprofit, tax-exempt organization.⁴¹ It is dedicated to honoring the memory of its Confederate ancestors and protecting,

their adversaries). It is not clear which level within the organization is pushing the anti-removal agenda, as the SCV is fairly decentralized. Some higher profile disputes are led by the state chapters. See Charlie McGee, *Sons of Confederate Veteran Members Oppose 2.5 Million Silent Sam Reward*, DAILY TAR HEEL (Dec. 14, 2019, 3:55 PM), <https://www.dailytarheel.com/article/2019/12/confederate-internal-conflict>. Other monument-promotion efforts appear to be driven by local chapters. See John Sharp, *Mobile Rebuffs Confederate Heirs; Opts to Place Monument in History Museum*, AL.COM (June 24, 2020), <https://www.al.com/news/2020/06/mobile-rebuffs-confederate-heirs-opts-to-place-monument-in-history-museum.html>; McGee, *supra* (profiling the leadership role of the North Carolina chapter in the Silent Sam debate and the divisions within the organization over this monument). Last, some opposition is being led by members in their individual capacities. See Martha Quillin, *NC Town Takes First Step in Relocating Confederate Monument, Removing Soldier From Top*, HERALD SUN (June 30, 2020, 9:30 AM), <https://www.heraldsun.com/news/local/article243875862.html>.

³⁵ Ryan W. Miller, Ledyard King, & Sarah Elbeshbishi, *Richmond Is Taking Down Confederate Statues: Is This the End for Other Confederate Memorials?*, USA TODAY (June 4, 2020, 5:36 PM), <https://www.usatoday.com/story/news/nation/2020/06/04/confederate-statues-richmond-virginia-robert-e-lee-removed-other-states/3144226001/>.

³⁶ James C. Kozlowski, *Standing to Challenge Removal of Confederate Park Monuments*, NAT'L RECREATION & PARK ASS'N (May 8, 2018), <https://www.nrpa.org/parks-recreation-magazine/2018/may/standing-to-challenge-removal-of-confederate-park-monuments/> (noting that the SCV has been the most active litigant against Confederate monument removal); see, e.g., Kevin Robinson, *Pensacola Attorneys Say There Are No Legal Grounds to Stop Confederate Monument Removal*, PENSACOLA NEWS J. (July 20, 2020, 1:57 PM), <https://www.pnj.com/story/news/2020/07/20/pensacola-attorneys-no-legal-grounds-stop-confederate-monument-removal/3287750001/> (city rejecting a legal challenge by local SCV chapter).

³⁷ See *infra* Section III.B; see also Emanuella Grinberg, *New Confederate Monuments Are Going Up and These Are the People Behind Them*, CNN (Aug. 24, 2017, 3:27 PM), <https://www.cnn.com/2017/08/18/us/new-confederate-monuments/index.html>.

³⁸ *History of the UDC*, UNITED DAUGHTERS OF THE CONFEDERACY, <https://hqudc.org/history-of-the-united-daughters-of-the-confederacy/> (last visited Feb. 23, 2021).

³⁹ CAROLINE E. JANNEY, BURYING THE DEAD BUT NOT THE PAST: LADIES' MEMORIAL ASSOCIATIONS AND THE LOST CAUSE 2 (Gary W. Gallagher ed., 2008).

⁴⁰ *Id.* at 12–13.

⁴¹ *History of the UDC*, *supra* note 38.

preserving, and marking “the places made historic by Confederate valor.”⁴² The UDC promoted the Lost Cause narrative even more than the SCV by teaching the Lost Cause mythology in schools and to UDC members.⁴³ The UDC also had an explicit mission to place a Confederate monument in every Southern town.⁴⁴

Today, the UDC is taking a less aggressive stance on monument removal than the SCV. As historian Karen Cox has noted:

They continued to hold sway in southern communities at least through the mid-20th century, before the organization experienced a steep decline in membership, likely in response to racial changes following the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965. Since the 1960s, the UDC has functioned mostly as a social group It’s rarely been involved in political battles over Confederate symbols, flags, or monuments.⁴⁵

Although the UDC has not been as active as the SCV in opposing monument removal, it is periodically recognized as the owner of Confederate monuments on public lands. As owner, the UDC sometimes has Confederate monuments thrust upon it as communities struggle with what to do with statues post-removal.⁴⁶ As local governments return monuments to the UDC, it now must decide where and how to display them. For example, the Confederate monument in Winston-Salem, North Carolina was returned to the UDC who now plans to place it in a cemetery.⁴⁷

⁴² *Id.*; see also Kali Holloway, *7 Things the United Daughters of the Confederacy Might Not Want You to Know About Them*, SALON (Oct. 6, 2018, 8:59 PM), https://www.salon.com/2018/10/06/7-things-the-united-daughters-of-the-confederacy-might-not-want-you-to-know-about-them_partner/.

⁴³ Beirich, *supra* note 30, at 283.

⁴⁴ See U.S. DEP’T OF INTERIOR, NAT’L PARK SERV., OMB NO. 1024-0018, NATIONAL REGISTER OF HISTORIC PLACES: CIVIL WAR COMMEMORATIVE SCULPTURE IN ARKANSAS, 1886–1934 (1996) (noting this emphasis on public locations).

⁴⁵ Karen L. Cox, *Setting the Lost Cause on Fire*, AHA PERSP. (Aug. 6, 2020), <https://www.historians.org/publications-and-directories/perspectives-on-history/summer-2020/setting-the-lost-cause-on-fire-protesters-target-the-united-daughters-of-the-confederacy-headquarters> (explaining the history of the UDC and the Lost Cause in context of protestors attempting to set the UDC’s headquarters on fire).

⁴⁶ It is not clear how centralized decision making is within the UDC as far as advocating for the return of public monuments initially funded by the organization. Some have been returned to local chapters. See, e.g., Daniella Cheslow, *Loudoun Daughters of the Confederacy: We’ll Take Our Statue Back*, DCIST (June 30, 2020, 5:40 PM), <https://dcist.com/story/20/06/29/loudoun-daughters-of-confederacy-well-take-our-statue-back/48> (profiling return of a Confederate monument to a local UDC chapter in Loudoun County, Virginia). Others have been returned to state chapters. See, e.g., Andrew Oxford, Helen Wieffering, & Grace Oldham, *Confederate Monuments Removed from Arizona Capitol at Request of United Daughters of Confederacy*, ARIZ. REPUBLIC (July 23, 2020, 12:07 PM), <https://www.azcentral.com/story/news/politics/arizona/2020/07/23/confederate-monuments-removed-overnight-arizona-capitol/5494682002/>.

⁴⁷ Erika Williams, *Confederate Statue Removed From NC Courthouse Grounds*, COURTHOUSE

In some cases, the UDC asks governments to regift them monuments being removed from public display.⁴⁸ This recently occurred in Arizona. The UDC had previously donated to the state both a Jefferson Davis highway marker and a memorial to the Arizona Confederate Troops that sat in downtown Phoenix.⁴⁹ The UDC asked the state to [r]egift the monuments to them explaining, “[t]hese monuments were gifted to the state and are now in need of repair, but due to the current political climate, we believe it unwise to repair them where they are located.”⁵⁰

Over the years, the UDC and the SCV worked with local governments at all levels to erect and maintain Confederate monuments.⁵¹ Many local and state governments also erected monuments *sua sponte*, or they were paid for by other funding sources and groups.⁵² By 2000, there were more than 780 monuments located across the United States, largely in the South.⁵³ While the erection of monuments slowed after the 1960s, continued calls for removal went largely unanswered until recently.

Even when communities understood the origin (and the acquired and continued symbolism of these monuments), the monuments were slow to come down.⁵⁴

NEWS SERV. (Mar. 12, 2019), <https://www.courthousenews.com/confederate-statue-removed-from-nc-courthouse-grounds/>; see also Autumn Owens, *No Action Taken on Confederate Statue, Questions Arise Over the Monument's Owner*, WEATHERFORD DEMOCRAT (June 22, 2020), https://www.weatherforddemocrat.com/covid-19/no-action-taken-on-confederate-statue-questions-arise-over-monuments-owner/article_bedba016-b4bd-11ea-b628-8f0ddb7a3af0.html (describing a dispute over the UDC's ownership of a Confederate monument in Parker County, Texas).

⁴⁸ FOX10 Staff & Johnathan J. Cooper, *2 Arizona Confederate Monuments on State Land Relocated to Private Property*, FOX 10 PHX. (July 23, 2020), <https://www.fox10phoenix.com/news/2-arizona-confederate-monuments-on-state-land-relocated-to-private-property>.

⁴⁹ *Id.*

⁵⁰ Oxford et al., *supra* note 46 (quoting a letter from the UDC to the Arizona Department of Administration).

⁵¹ See, e.g., Thomas Brown, *Civil War Monuments*, COMMEMORATIVE LANDSCAPES N.C. (2012) <https://docsouth.unc.edu/commland/features/essays/brown/> (profiling the roles of these two organizations in erecting monuments and noting that, in recent years, “the Sons of Confederate Veterans firmly supplanted the United Daughters of the Confederacy as the dominant organizational force in white Civil War commemoration”).

⁵² See, e.g., *Confederate Monument, State Capitol, Raleigh*, NCPEDIA, <https://www.ncpedia.org/monument/confederate-monument-state> (last visited Feb. 3, 2021) (summarizing efforts to erect this monument).

⁵³ *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>.

⁵⁴ See, e.g., Joan Marie Johnson, *“Ye Gave Them a Stone”: African American Women's Clubs, the Frederick Douglas Home, and Black Mammy Monument*, 17 J. WOMEN'S HIST. 62, 62–63 (2005) (profiling Black resistance to a 1920s UDC proposal to erect a national monument “in memory of the faithful colored mammies of the South”).

Not surprisingly, Black citizens have long been opposed to these controversial monuments and what they represent.⁵⁵ Despite a history of opposition, it was not until the 2015 shooting by Dylann Roof in a Black church in Charleston, South Carolina that the monument removal movement began to take hold more generally.⁵⁶ Roof made visits to several Confederate monuments and posted pictures of himself with a Confederate flag before his brutal race-motivated attack in Charleston.⁵⁷ Yet even after the shooting, removal efforts were slow—delayed by public processes, litigation, and new state laws specifically aimed at hindering removal.⁵⁸

Efforts to remove Confederate monuments in Charlottesville, Virginia in the summer of 2017 became a rallying point for the alt-right who flocked to the town for a “Unite the Right” rally.⁵⁹ The Robert E. Lee monument served (as such monuments have historically) as the meeting place for white supremacists.⁶⁰ The threatened removal of the monument was so disruptive to their narrative that the events led to violence, including the death of Heather Heyer, a nonviolent counterprotestor.⁶¹

⁵⁵ US/ICOMOS, *supra* note 11 (comments of Kali Holloway, summarizing this long resistance—specifically related to a statute of John C. Calhoun, one of the intellectual leaders of the antebellum South). In June 2020, Charleston’s city council voted unanimously to remove this long-controversial monument. See Ryan W. Miller, *Crews Work to Remove Charleston’s Statue of John C. Calhoun, A Staunch Defender of Slavery*, USA TODAY (June 24, 2020, 12:36 PM), <https://www.usatoday.com/story/news/nation/2020/06/24/john-c-calhoun-statue-charleston-south-carolina-being-removed/3249924001/>.

⁵⁶ Caroline Goldstein, *For Every Confederate Statue That Has Come Down in the United States, Ten Remain in Place*, ARTNET (July 3, 2020), <https://news.artnet.com/art-world/confederate-monument-data-1891878>.

⁵⁷ Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>.

⁵⁸ Nicole Lewis, *Analysis, Violence Again Spurs Cities to Remove Confederate Monuments, But Many Find Hurdles to Doing So*, WASH. POST (Aug. 17, 2017, 11:47 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/08/17/violence-again-spurs-cities-to-remove-confederate-monuments-but-many-find-hurdles-to-doing-so/>; see also *Interview: Kali Holloway, Senior Director Make It Right Project (Independent Media Institute)*, H-NET: H-SLAVERY, <https://networks.h-net.org/node/11465/pages/5361243/interview-kali-holloway-senior-director-make-it-right-project> (last visited Feb. 3, 2021) (profiling the role of these groups in trying to block monument removal).

⁵⁹ Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 59 (2018); Colin Dwyer, *Charlottesville Rally Aimed to Defend a Confederate Statue; It May Have Doomed Others*, NPR (Aug. 14, 2017, 7:53 PM), <https://www.npr.org/sections/thetwo-way/2017/08/14/543471538/charlottesville-rally-aimed-to-defend-a-confederate-statue-it-may-have-doomed-ot>.

⁶⁰ Jacey Fortin, *The Statue at the Center of Charlottesville’s Storm*, N.Y. TIMES, (Aug. 13, 2017), <https://nyti.ms/2vudaMV>.

⁶¹ See Tthesis, *supra* note 23 (“As with other Confederate symbols, the Lee statue is an icon

Recently, monument removal efforts were reinvigorated when a nation sequestered at home during a global pandemic watched a video of a police officer in Minneapolis, Minnesota murder George Floyd by kneeling on his neck for over eight minutes.⁶² This video was soon accompanied by others, documenting anew the continual pattern of brutality against Black Americans, often at the hands of the police.⁶³ The widespread worldwide protests that followed often involved calls for the removal of racist names, flags, monuments, and other iconography in the United States and elsewhere.⁶⁴

To date, most of the discussion related to the complex issue of Confederate monuments has centered on those located in public spaces.⁶⁵ This focus makes

of racism. Participants of the Unite the Right rally demonstrated that the Confederacy remains a symbol of slavery and segregation.”); Benjamin Wallace-Wells, *The Fight Over Virginia’s Confederate Monuments: How the State’s Past Spurred a Racial Reckoning*, NEW YORKER (Nov. 27, 2017), <https://www.newyorker.com/magazine/2017/12/04/the-fight-over-virginias-confederate-monuments>.

⁶² Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://nyti.ms/2XMtUMa>; see also Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful this Time*, BBC (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905> (discussing why these protests felt different than past protests around police brutality).

⁶³ Shawn Huber & Julie Bosman, *A Crisis That Began with an Image of Police Violence Keeps Producing More*, N.Y. TIMES (June 5, 2020), <https://nyti.ms/2MsEaDY>.

⁶⁴ Robin Wright, *Fury at America and Its Values Spreads Globally*, NEW YORKER (June 1, 2020), <https://www.newyorker.com/news/our-columnists/after-the-killing-of-george-floyd-fury-at-america-and-its-values-spreads-globally> (profiling the worldwide reaction to this horrific event); see also Alex Hanson, *Panel to Study Renaming Windsor Street that References Slaveholder*, VALLEY NEWS (July 30, 2020, 9:59 PM), <https://www.vnews.com/Windsor-Selectboard-creates-committee-to-study-renaming-of-Jacob-Street-35480583>. For a summary of the monuments and Confederate symbols that have been removed since Charlottesville and George Floyd’s murder, see *SPLC Whose Heritage?*, SOUTHERN POVERTY L. CTR. (Aug. 11, 2020), <https://www.splcenter.org/presscenter/splc-whose-heritage-dataset-updates-august-11-2020>.

⁶⁵ See, e.g., Zachary Bray, *We Are All Growing Old Together: Making Sense of America’s Monument-Protection Laws*, 61 WM. & MARY L. REV. 1259, 1301 (2020); Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes”*, 91 TEMP. L. REV. 1, 5 (2018) [hereinafter Bray, *Monuments of Folly*]; Peter Byrne, *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws*, GEO. L. FAC. PUBLICATIONS & OTHER WORKS 6 (2020); Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 4, 24 (2013); Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1081 (1995); Owley & Phelps, *Life and Death*, *supra* note 12, at 8; Phelps & Owley, *Etched in Stone*, *supra* note 14, at 636, 639–40; Schragger, *supra* note 59, at 61; Richard Schragger & C. Alex Retzliff, *Confederate Monuments and the Punitive Preemption: The Latest Assault on Local Democracy* 4 (Univ. Va. Sch. L., Pub. L. and Legal Theory Res. Paper Ser. 2019-54, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462746; Tsesis, *supra* note 23, at 702.

sense. Public monuments are the most problematic as they give voice to the ideals that a community wishes to hold up.⁶⁶ Political power and agency are illuminated by which groups have been able to navigate the informal and formal political processes necessary to erect such monuments and ultimately occupy these public spaces.⁶⁷ The ability of public monuments to essentially speak and convey a message or historical viewpoint is precisely what has made public monuments so controversial.⁶⁸

In efforts to remove Confederate monuments, the public location of these statues can be a double-edged sword.⁶⁹ At times, the public nature of the monument can add obstacles to its removal, triggering various laws protecting public property or symbols, such as state statue statutes (which were enacted to block local municipalities from removing a monument without state approval).⁷⁰ However, at other times the public aspect of the monument makes the resource vulnerable to removal as removal can be facilitated by public initiative using the local or state processes.⁷¹ Where public investment goes to supporting controversial symbols, such as paying for ongoing maintenance, political pressure can play a large role in convincing government officials to make a change.⁷² Removal efforts have often been led by local

⁶⁶ See, e.g., SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 31–32 (2d ed. 2018) (discussing these issues generally).

⁶⁷ Dell Upton, *Confederate Monuments and Civic Values in the Wake of Charlottesville*, SOC'Y ARCHITECTURAL HISTORIANS BLOG (Sept. 13, 2017), <https://www.sah.org/publications-and-research/sah-blog/sah-blog/2017/09/13/confederate-monuments-and-civic-values-in-the-wake-of-charlottesville> (“Although statues in civic spaces are read as expressing common sentiments, this was not the case for Confederate statues (and some others, of course). Confederate monument builders overrode public sentiment that ranged from indifference to hostility.”).

⁶⁸ Nuala Johnson, *Cast in Stone: Monuments, Geography, and Nationalism*, 13 ENV'T & PLAN. D: SOC'Y & SPACE 51, 55–56 (1995).

⁶⁹ Owley & Phelps, *Life and Death*, *supra* note 12, at 1408.

⁷⁰ Bray, *Monuments of Folly*, *supra* note 65, at 9–10.

⁷¹ See, e.g., Shane Dwyer, *Stay or Go? Franklin County Leaders to Put Confederate Monument Removal on Election Day Referendum*, WSLs (July 21, 2020, 9:48 PM), <https://www.wsls.com/news/local/2020/07/22/stay-or-go-franklin-county-leaders-to-put-confederate-monument-removal-on-election-day-referendum/> (discussing the Franklin County Board of Supervisors seeking a nonbinding referendum, before removing Confederate monuments in Tennessee). Most laws that protect public monuments do not apply to privately owned monuments located on private land. See Adam Lovelady, *Statues and Statutes: Limits on Removing Monuments from Public Property*, UNC SCH. GOV'T: COATES' CANONS BLOG (Aug. 22, 2017), <https://canons.sog.unc.edu/statues-statutes-limits-removing-monuments-public-property/> (noting this limit under North Carolina's monument protection law).

⁷² See, e.g., David Boraks & Ann Doss Helms, *Gaston County Commission to Push for Referendum on Monument*, WFAE NEWS (July 28, 2020, 10:26 PM), <https://www.wfae.org/post/gaston-county-commission-push-referendum-monument#stream/0> (discussing a North Carolina county commission seeking voter approval via a referendum before proceeding with monument removal).

governments deciding to remove in response to community groups' and advocates' pressure to do so.⁷³ Sometimes local officials go through a formal process,⁷⁴ and sometimes they take down monuments quickly to prevent vandalism and violence.⁷⁵

Recently, we also have seen removal by overtly illegal action—by public officials and by private citizens.⁷⁶ For example, a drawn-out removal battle over whether the Silent Sam statue at the University of North Carolina would remain in place ended in the middle of the night when those frustrated by inaction stepped in to remove it illegally.⁷⁷ Sometimes local governments appear to condone the action. For example, when protestors toppled the Jefferson Davis statue in Richmond, Virginia, police officers and a tow truck waited nearby and hauled away the monument's remnants.⁷⁸ Sometimes local governments remove monuments without complying with monument protection laws.⁷⁹ Local officials decide it is better to

⁷³ See, e.g., Alexa Doiron, *Williamsburg City Council Votes to Remove Confederate Memorial*, WYDAILY (July 14, 2020), <https://wydaily.com/local-news/2020/07/14/williamsburg-city-council-votes-to-remove-confederate-memorial/>.

⁷⁴ In Charles City, Virginia, for example, the county is following the process outlined by the state Confederate monument removal law and scheduled a voter referendum on whether to remove the Confederate monument in front of the courthouse. Michael Martz, *Charles City to Let Voters Decide Fate of Confederate Monument*, RICHMOND TIMES-DISPATCH (July 30, 2020), https://richmond.com/news/local/charles-city-to-let-voters-decide-fate-of-confederate-monument/article_2c5084de-370c-51f3-b068-fd5827533ece.html. The removal referendum failed as more than 55% voted not to remove and about 45% of the county's voters voted in favor. The ballot question asked voters: "Should the Board of Supervisors of Charles City County remove both the Civil War monument in front of the Old Courthouse and the Civil War memorial inside the Old Courthouse?" Andrew Cain, *UPDATE: Charles City Votes No in Advisory Referendum on Moving Confederate Statue*, RICHMOND TIMES-DISPATCH (Nov. 3, 2020), https://richmond.com/news/state-and-regional/govt-and-politics/update-charles-city-votes-no-in-advisory-referendum-on-moving-confederate-statue/article_fe12b0c7-9077-5c4a-aeec-ad3028121430.html.

⁷⁵ Owley & Phelps, *Life and Death*, *supra* note 12, at 1473.

⁷⁶ See, e.g., Debbie Elliot, *Mississippi Governor Signs Law Removing Confederate Design from State Flag*, NPR (June 30, 2020, 6:25 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/30/885779855/mississippi-governor-signs-law-removing-confederate-design-from-state-flag> (explaining the City of Mobile's decision to pay a \$25,000 fine to remove a Confederate monument).

⁷⁷ In Richmond, Virginia, protestors pulled down the statue of Jefferson Davis a week after Mayor Levar Stoney said he was pushing for legislation to remove all the city-owned Confederate monuments. Long delayed by a state law protecting such monuments, removal had not happened at a pace that protestors felt was appropriate. Peter Beaumont, *Protesters Topple Statue of Confederate President in Virginia*, GUARDIAN (June 11, 2020, 6:28 AM), <https://www.theguardian.com/us-news/2020/jun/11/protesters-topple-statue-of-confederate-president-in-virginia>.

⁷⁸ See Michael Levenson, *Protesters Topple Statue of Jefferson Davis on Richmond's Monument Avenue*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/us/jefferson-davis-statue-richmond.html?action=click&module=RelatedLinks&pgtype=Article>.

⁷⁹ After the Jefferson Davis statue came down, Mayor Stoney announced he would remove

pay fines and have a monument removed than have it stand in a place of honor in their town.⁸⁰ Sometimes the removals are based on public safety—removing rallying points, protecting protestors from potential injury in their efforts to remove these often sizable statues, and preventing gatherings of people where social distancing is not observed.⁸¹

When public Confederate monuments are removed, they sometimes move from public to public (e.g., a removing town finds another community willing to take the monument).⁸² Monuments have been gifted or sold to the SCV and the UDC (sometimes based on these organizations having funded their erection and in some instances having reversionary interests).⁸³ Monuments have been sold to private parties via auction.⁸⁴ They have even been relocated to private lands at taxpayer

the remaining monuments on city property. He proceeded to do so even though he had not complied with the process outlined by the state monument removal law, citing public safety concerns and nuisance principles. See Hannah Smith, *Lawsuit Filed to Stop Mayor Stoney from Removing Confederate Statues*, NBC (July 8, 2020, 3:57 PM), <https://www.nbc12.com/2020/07/08/lawsuit-filed-stop-mayor-stoney-removing-confederate-statues>.

⁸⁰ Gigi Douban, *Crews Remove 115-Year Old Birmingham Confederate Monument*, WBHM (June 2, 2020), <https://wbhm.org/feature/2020/crews-remove-115-year-old-birmingham-confederate-monument/> (noting that the Supreme Court of Alabama had previously held that removal of the monument would violate the state's monument removal statute but would only result in a one-time fine of \$25,000, which the city agreed to pay); see *State v. Birmingham*, 229 So. 3d 220 (Ala. 2019). Paying this fine has become a strategy for many communities to remove problematic monuments in the face of this law, and some advocacy groups have raised funds to pay on the communities' behalf. See, e.g., Lee Roop, *More Voices Say Take Down Madison County Confederate Monument; Group Offers to Pay Fine*, AL.COM (June 8, 2020), <https://www.al.com/news/huntsville/2020/06/more-voices-say-take-down-madison-county-confederate-monument-group-offers-to-pay-fine.html> (profiling efforts to remove a Confederate monument in Huntsville, Alabama). This campaign builds upon the efforts of local groups to cover the costs of removing monuments. See Jack Jacobs, *Nonprofit Aims to Cover Cost to Remove City-Owned Confederate Monuments*, RICHMOND BIZSENSE (July 2, 2020), <https://richmondbizsense.com/2020/07/02/nonprofit-aims-to-cover-cost-to-remove-city-owned-confederate-monuments/> (examining a Richmond-based community land trust's effort to fundraise to cover these costs).

⁸¹ See, e.g., Colin Campbell & Luke Broadwater, *Citing 'Safety and Security,' Pugh Has Baltimore Confederate Monuments Taken Down*, BALT. SUN (Aug. 16, 2017), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-monuments-removed-20170816-story.html>.

⁸² Bray, *Monuments of Folly*, *supra* note 65, at 3–4 (profiling the transfer of Louisville's Confederate monument to Brandenburg, also in Kentucky).

⁸³ See, e.g., Sarah Vogel song, *They May Sit on Public Land, But Not All Confederate Monuments Are Publicly Owned*, VA. MERCURY (July 2, 2020), <https://www.virginiamercury.com/2020/07/02/they-may-sit-on-public-land-and-be-governed-by-state-laws-but-not-all-confederate-monuments-are-publicly-owned/> (profiling the removal of monuments where these organizations retain some ongoing interest).

⁸⁴ Sarah Mervosh, *What Should Happen to Confederate Statues? A City Auctions One for \$1.4 Million*, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/us/confederate->

expense to simply move the monuments out of the public space.⁸⁵ These removals from public spaces often lead to private Confederate monuments as detailed in the next Section.

III. PRIVATE CONFEDERATE MONUMENTS

As we laid out above, we are beginning to see a material shift in the landscape of Confederate monuments from public to private. By private Confederate monuments, we refer to privately owned Confederate monuments located on private lands. Our analysis centers on the landownership status, not the ownership interests of the statues and obelisks. We are generally not concerned with private monuments unless there is some degree of continuing public access to these statues (physical or visual).⁸⁶ Confederate monuments housed in storage units and basements do not concern us. Monuments located out of the public view are not as problematic or of pressing concern.

The private monuments we examine herein have either always been private or have recently become private. Many private monuments, but not all,⁸⁷ are new,⁸⁸

statues-dallas-nashville.html.

⁸⁵ See, e.g., Andrew Metcalf, *Rockville Confederate Statue Removed*, BETHESDA MAG. (July 24, 2017, 9:56 AM), <https://bethesdamagazine.com/Bethesda-Beat/2017/Rockville-Confederate-Statue-Removed/> [hereinafter Metcalf, 2017] (describing Montgomery County, Maryland's decision to pay for relocation of a Confederate monument to private land).

⁸⁶ Interestingly, in at least one relocation effort, continuing public access at a new site was cited as a positive factor by the local government removing the statue. See Jessica Clark, *St. Johns County Park Owner Offers Land to Relieve St. Augustine of Beleaguered Confederate Monument*, FIRST COAST NEWS (Aug. 6, 2020, 11:39 PM), <https://www.firstcoastnews.com/article/news/local/park-owner-site-proposed-for-st-augustine-confederate-monument/77-27521589-d50b-405e-89f8-66172d316169>.

⁸⁷ See, e.g., Cassidy Kendall, *Hot Springs Given 2 Options to Remove Rebel Statue*, N.W. ARK. DEMOCRAT-GAZETTE (June 13, 2020, 7:52 AM), <https://www.arkansasonline.com/news/2020/jun/13/city-given-2-options-to-move-rebel-statue/>; see also Stephen Simpson, *Arkansas Statues Fall, Raising Fresh Debate*, N.W. ARK. DEMOCRAT-GAZETTE (June 21, 2020, 12:30 PM), <https://www.arkansasonline.com/news/2020/jun/21/statues-fall-raising-fresh-debate> (profiling debate over Hot Springs' Confederate Memorial Park, where a monument is located on property owned by the UDC who has no interest in removing it).

⁸⁸ Jenny Jarvie, *As Monuments to the Confederacy Are Removed from Public Squares, New Ones Are Quietly Being Erected*, L.A. TIMES (Oct. 22, 2017, 5:00 AM), <https://www.latimes.com/nation/la-na-new-confederate-memorials-20171020-story.html> (summarizing this trend with a focus on a monument in Orange, Texas).

or newly conveyed.⁸⁹ As demonstrated in our examples below, new monuments occur largely (but not exclusively) on private property.⁹⁰ In such cases, the monuments may be re-erected on private lands.⁹¹ Newly private (or previously public) monuments are those transferred from local governments. Sometimes these monuments were owned by private entities to whom they are returning. Privately owned public monuments have recently been the subject of removal efforts, with the UDC often agreeing (either enthusiastically or begrudgingly) to remove (sometimes moving them to cemeteries or privately owned parks and sometimes with no clear destination set).⁹² In other cases, local governments convey the monuments to private organizations or individuals who do not assert a previous ownership interest.⁹³

There are no comprehensive statistics regarding private Confederate monuments. Studies by the Southern Poverty Law Center and others generally do not encompass private sites as comprehensively as they do public monuments (likely given the comparative significance of public monuments and the challenge of getting statistics on private monuments). However, recent reports suggest the number of private Confederate monuments is growing.⁹⁴ A historian at the University of North Carolina noted twenty in his state alone.⁹⁵

The placement of new monuments on private land may show that Confederate monuments are not as accepted as they were before or may represent an attempt to

⁸⁹ Mike Jones, *State Board Discusses Confederate Monument*, N.W. ARK. DEMOCRAT-GAZETTE (Aug. 5, 2020, 4:00 AM), <https://www.nwaonline.com/news/2020/aug/05/state-board-discusses-confederate-monument/> (examining the relocation of Bentonville's Confederate monument from public square to a private park owned by the UDC).

⁹⁰ See *infra* Section III.

⁹¹ See, e.g., Clark, *supra* note 86 (profiling the city's decision-making process and other locations considered, including a federal cemetery, a request the Veteran's Association denied, and a museum, which would have involved additional costs).

⁹² See, e.g., Janet McConaughy, *Louisiana Parish Can Remove Confederate Statue from Courthouse*, 4WWL (July 22, 2020, 8:01 PM), <https://www.wvltv.com/article/news/state/louisiana-parish-can-move-confederate-statue-from-courthouse/289-10e46897-d9f8-49ae-b1fe-76a8eede56dd> (discussing deal struck between the UDC and local parish to relocate a courthouse monument to private land, albeit at considerable public expense).

⁹³ See, e.g., Alissa Skelton, *Virginia Beach Will Remove Confederate Monument from City Grounds*, VIRGINIAN-PILOT (July 23, 2020, 8:51 PM), <https://www.pilotonline.com/government/local/vp-nw-virginia-beach-confederate-monument-0724-20200724-572xkpcxdvd6pdxfgn5v6r4ujm-story.html> (discussing removal and the city's plan, if no historical society or museum expresses interest, to convey it to either the UDC or the SCV).

⁹⁴ Steve Byas, *More Confederate Monuments Going Up – On Private Land*, NEW AMERICAN (Sept. 6, 2017), <https://www.thenewamerican.com/culture/history/item/26865-more-confederate-monuments-going-up-on-private-land>; Jarvie, *supra* note 88; Tom Porter, *New Confederate Monuments Are Quietly Appearing Across the U.S.*, NEWSWEEK (Oct. 23, 2017, 12:39 PM), <https://www.newsweek.com/new-confederate-monuments-are-quietly-going-across-us-690798>; Tavernise, *supra* note 12.

⁹⁵ Jarvie, *supra* note 88.

avoid the legal and public process issues that have led to the removal of many existing monuments. Often, private lands are the only option for these monuments as the popular political support that initially led to their erection has eroded—leaving fewer communities with interest in having a new Confederate monument installed in a public arena.⁹⁶

The siting of these private monuments varies. Some landowners have chosen placements of their memorials for public visibility.⁹⁷ Others are located near historic sites,⁹⁸ or cemeteries,⁹⁹ or already-established monuments.¹⁰⁰ With notable exceptions mentioned below, new monuments tend to be more modest. Perhaps monument supporters are seeking a lower profile or perhaps the change represents a shift from celebrating to memorializing; it is likely also a question of cost.¹⁰¹ Landowners often grant or facilitate public access.¹⁰² Some even try to imply that the monuments are on public land by strategic placement and naming.¹⁰³

The best way to understand the shape and impact of these new private Confederate monuments is through examples that present the most common issues. Through descriptions of ten statues—a sort of field guide to private Confederate monuments—we illustrate what these monuments look like, where they are found,

⁹⁶ See *Gaston County Commissioners Vote to Remove and Relocate Confederate Monuments*, WBTV (July 31, 2020, 7:12 AM), <https://www.wbvtv.com/2020/07/31/gaston-county-commissioners-vote-remove-relocate-confederate-monument/>.

⁹⁷ See, e.g., Peter Holley, *The ‘Terrifying’ Confederate Statue Some Tennesseans Want to Hide*, WASH. POST (June 25, 2015, 5:00 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/25/is-this-the-weirdest-confederate-statue-in-dixie/>; John Nova Lomax, *Coming Soon: A Large Confederate Memorial on I-10, Just Inside the Texas State Line*, TEX. MONTHLY (Apr. 7, 2015), <https://www.texasmonthly.com/the-daily-post/coming-soon-a-large-confederate-memorial-on-i-10-just-inside-the-texas-state-line/>.

⁹⁸ Austin Wright, *Lawmakers Urge Removal of Robert E. Lee Statue at Antietam*, POLITICO (Aug. 19, 2017, 7:46 AM), <https://www.politico.com/story/2017/08/19/lawmakers-urge-removal-robert-e-lee-antietam-241788> (profiling the complex history of the Lee monument located on the Antietam battlefield involving a private buyer outbidding the National Park Service for the land, erecting the monument, and then selling the land for inclusion in the park).

⁹⁹ Geremia Di Maro, *U.Va. Restricts Access to Confederate Cemetery, Monument Amidst Nationwide Removal of Statues and Monuments*, CAVALIER DAILY (July 5, 2020), <https://www.cavalierdaily.com/article/2020/07/u-va-restricts-access-to-confederate-cemetery-monument-amidst-nationwide-removal-of-statues-and-monuments>.

¹⁰⁰ Margie Fishman, *Delaware Leaders Make No Moves to Oust Confederate Monument*, DEL. ONLINE (Aug. 15, 2017, 6:46 PM), <https://www.delawareonline.com/story/news/2017/08/15/delaware-leaders-make-no-moves-oust-confederate-monument/570039001/>.

¹⁰¹ Jarvie, *supra* note 88.

¹⁰² See, e.g., WBTV, *supra* note 96 (profiling vote to remove North Carolina monument but conditioning grant of the monument to the SCV on being placed in a location that allows continuing public access).

¹⁰³ *Turner Ashby Monument*, VIRGINIA.ORG (Feb. 26, 2018), <https://www.virginia.org/listings/HistoricSites/TurnerAshbyMonument/>.

and the complex mixture of public and private interests involved. We begin with monuments that were initially erected on private land with private money. These monuments were never found on public land and therefore are the most clearly private. From there, we detail some more nuanced examples—those that began as public monuments and then shifted to private lands because of growing public sentiment. Last, we detail some examples of private Confederate monuments where significant tax benefits or other public investments or entitlements suggest possible reasons for greater public scrutiny.

Placement and context matter for each of these monuments. We ask readers to consider the differing implications of monuments in parks, cemeteries, private yards, and even golf courses. While private Confederate monuments may seem like a narrow category, our examples highlight that this is a growing typology with complex variations. We demonstrate the need to look at each site on a case-by-case basis and the potential challenges that the shift from public to private monuments may implicate. Removing a monument from a public forum may mean that the battle over these pernicious statues will be not be over, but simply shifted to a different battlefield where monument removal advocates' tools may be even less effective.

A. *Individual Landowners*

Our first category is Confederate monuments on private land owned by individuals.

1. *Nathan Bedford Forrest Statue in Nashville, Tennessee*

One of the best known (and perhaps most ridiculed) private Confederate monuments is a 25-foot fiberglass statue of Nathan Bedford Forrest in Nashville, Tennessee.¹⁰⁴ A native of Tennessee, Nathan Bedford Forrest was a prominent Confederate cavalry commander and the first Grand Wizard of the Ku Klux Klan.¹⁰⁵ There are several statues and memorials to him in the state that still regularly celebrates a “day of special observance”¹⁰⁶ in his honor.¹⁰⁷

¹⁰⁴ See, e.g., *Last Week Tonight with John Oliver: Confederacy*, HBO (Oct. 28, 2017), <https://www.hbo.com/last-week-tonight-with-john-oliver/2017/56-episode-115-confederacy-monuments>.

¹⁰⁵ Holley, *supra* note 97. Forrest's troops were also involved in one of the worst issues of racial violence during the war—the execution of surrendering Black troops at Fort Pillow in early 1864. *Nathan Bedford Forrest*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/biographies/nathan-bedford-forrest> (last visited Feb. 23, 2021).

¹⁰⁶ Nora Eckert, *Tennessee Governor Faces Backlash for Honoring Confederate General and KKK Leader*, NPR (July 14, 2019, 7:24 PM), <https://www.npr.org/2019/07/14/741629271/272ennessee-governor-faces-backlash-for-honoring-confederate-general-and-kkk-leade>.

¹⁰⁷ Andy Sher, *Tennessee Lawmakers Vote to Keep Nathan Bedford Forrest Day*, CHATTANOOGA TIMES FREE PRESS (June 10, 2020), <https://www.timesfreepress.com/>

The garish statue was commissioned by Bill Dorris in 1998, who strategically placed it on his land to be easily viewed from the I-65 highway.¹⁰⁸ Dorris was even able to get the state transit authority to clear vegetation on the adjacent public land to make the statue more visible.¹⁰⁹ In 2015, politicians and citizens petitioned the state Department of Transportation to plant vegetation to block the statue.¹¹⁰ The state agency denied the request asserting that it does not plant vegetation simply to block views that people do not like,¹¹¹ a policy hard to reconcile with the original land clearing to make the monument more visible. Over the years, the statue has been repeatedly vandalized.¹¹² In December 2017, vandals coated the statue with pink paint. Dorris declared he will not remove the paint as it brings more attention to the work.¹¹³ During the 2020 state legislative session, Tennessee State Representative Jason Powell proposed an amendment to fund the planting of trees to

news/local/story/2020/jun/10/tennessee-lawmakers-vote-keep-nabedford-forre/525012/. According to state law, the governor of Tennessee must issue proclamations for six separate days of special observance, including Nathan Bedford Forrest Day. Before 1969, these days were official state holidays. Eckert, *supra* note 106. In June 2020, Tennessee legislators filed a bill to eliminate Nathan Bedford Forrest Day completely in Tennessee, but the bill was amended so that the governor was not required to proclaim it as a special day. Some Tennessee legislators fought to return the bill to its previous state, but the amendment failed. Ultimately, the Tennessee Senate removed the governors' proclamation of Nathan Bedford Forrest Day, but voted to keep the day itself on state books. See also Natalie Allison, *Tennessee Gov. Bill Lee Will No Longer Proclaim Nathan Bedford Forrest Day After Legislature Passes Bill*, TENNESSEAN (June 10, 2020, 3:34 PM) <https://www.tennessean.com/story/news/politics/2020/06/10/bill-lee-no-longer-proclaim-nathan-bedford-forrest-day-tennessee/5336437002/>. This means that future governors of Tennessee can proclaim Nathan Bedford Forrest Day if they wish, but the governors will no longer be required to make this proclamation.

¹⁰⁸ Holley, *supra* note 97.

¹⁰⁹ Joey Garrison, *State Denies Nashville's Request to Block I-65 Forrest Statue*, TENNESSEAN (July 20, 2015, 10:18 AM), <http://www.tennessean.com/story/news/politics/2015/07/20/state-denies-nashvilles-request-block-forrest-statue/30412745/>.

¹¹⁰ See, e.g., Heidi Campbell, *Conceal Nathan Bedford Forrest Statue from I-65*, TENNESSEAN (Aug. 15, 2017), <http://www.tennessean.com/story/opinion/2017/08/15/conceal-nathan-bedford-forrest-statue-65/570514001/> (local mayor renewing call to visually block the statue); Sarah Denson, *TDOT Denies Request to Block Nathan Bedford Forrest Statue*, WKRN (July 20, 2015, 4:29 PM), <http://wkrn.com/2015/07/20/tdot-denies-request-to-block-nathan-bedford-forrest-statue/> (also providing an image of the statue as viewed from the highway); see also Garrison, *supra* note 109.

¹¹¹ Garrison, *supra* note 109.

¹¹² Natalie Neysa Alund & Natalie Allison, *Nathan Bedford Forrest Statue off I-65 Painted Pink, Owner Bill Dorris Will Not Repair*, TENNESSEAN (Dec. 27, 2017, 12:31 PM), <http://www.tennessean.com/story/news/2017/12/27/nathan-bedford-forrest-statue-nashville-vandalized-pink/984740001/>.

¹¹³ *Id.* Alongside a written article, the website includes a video interview with the landowner who declares his display of the work to be within his First Amendment rights. Additionally, without any apparent sense of irony, Dorris declares the vandals to be cowards, saying "anybody

shield the statue.¹¹⁴ The Tennessee House voted to table the amendment 66-29.¹¹⁵ And there it remains.

2. *Johnny Reb Statue in Montgomery County, Maryland*

Until 2015, a 1913 statue of a solitary Confederate soldier, called Johnny Reb, sat in front of the Montgomery County Courthouse.¹¹⁶ A verse on the base of the pedestal read: "That we through life may not forget to love the thin gray line," a reference to the uniforms worn by the Confederate army.¹¹⁷

After the Charleston murders in June 2015, citizens and elected officials in Montgomery County, Maryland called for removal of the monument.¹¹⁸ County Executive Ike Leggett immediately agreed to its removal.¹¹⁹ The county applied to the Rockville Historic District Commission for removal because the courthouse itself is a designated historic resource subject to a local historic district ordinance.¹²⁰ The request was granted because, while the monument was located upon the grounds of a designated historic resource, it did not contribute to the courthouse's significance as it had been relocated to the grounds much later.¹²¹

[who] ride[s] around with a sheet over his head must be a coward." *Id.*

¹¹⁴ Sebastian Posey, *Amendment to Block Nathan Bedford Forrest Statue From I-65 View with Trees Tabled by TN House*, WKRN (June 16, 2020, 4:29 PM), <https://www.wkrn.com/news/local-news/tn-state-rep-files-amendment-to-block-nathan-bedford-forrest-statue-from-i-65-view-with-newly-planted-trees/>.

¹¹⁵ Erika Glover & Adrian Mojica, *Some Tennessee Lawmakers Stop Amendment to Hide Statue of Former KKK Leader*, FOX 17 NASHVILLE (June 17, 2020), <https://fox17.com/news/local/some-tennessee-lawmakers-stop-amendment-to-block-statue-of-former-kkk-leader>.

¹¹⁶ The statue itself dates to 1913, but it had been moved to the courthouse grounds in 1971. Seth Denbo, *All History Is Local: Debating the Fate of a Confederate Soldier Statue in Maryland*, PERSP. ON HIST.: AHA TODAY (July 27, 2015), <http://blog.historians.org/2015/07/debating-the-fate-of-a-confederate-soldier-statue/>.

¹¹⁷ SHEILA BASHIRI, CITY OF ROCKVILLE HISTORIC DISTRICT COMMISSION STAFF REPORT: CERTIFICATE OF APPROVAL HDC2016-00756, 29 COURTHOUSE SQUARE 11 (2015). The Maryland Historical Trust also held a preservation easement on the courthouse, but the city concluded that the statue was not a protected feature under the terms of its easement. *Id.* at 16.

¹¹⁸ See, e.g., Marissa Horn, *Across State, Marylanders Weigh Removing Confederate Memorials*, MD. REP. (Sept. 16, 2015), <https://marylandreporter.com/2015/09/16/across-state-marylanders-weigh-removing-confederate-memorials/>.

¹¹⁹ Andrew Metcalf, *Leggett Says Work Underway to Remove Confederate Statue in Rockville*, BETHESDA MAG. (July 21, 2015, 1:15 PM), <https://bethesdamagazine.com/bethesda-beat/politics/leggett-says-work-underway-to-remove-confederate-statue-in-rockville/>.

¹²⁰ See Aaron Kraut, *County Must Apply to Get Rockville Confederate Statue Moved*, BETHESDA MAG. (July 31, 2015, 9:37 AM), <https://bethesdamagazine.com/Bethesda-Beat/2015/County-Must-Apply-to-Get-Rockville-Confederate-Statue-Moved/>; see also Andrew Metcalf, *Rockville Historic District Commission Grants County's Request to Move Confederate Statue*, BETHESDA MAG. (Sept. 18, 2015, 11:22 AM), <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Rockville-Historic-District-Commission-Grants-Countys-Request-to-Move-Confederate-Statue/>.

¹²¹ Metcalf, *supra* note 120.

Yet, it took a while for the county to determine what to do with the monument after getting this approval. In response to vandalism in July 2016, the county placed a large wooden box around it.¹²² The county was worried about having to pay to clean or repair the monument and pedestal.¹²³ The box obscured most of the statue and all of the pedestal and inscription, but Johnny Reb's face remained visible.¹²⁴ Leggett saw three potential ways to deal with the monument: destroy it, move it to a museum, or leave in place and try to recontextualize it.¹²⁵ Meetings with community members, politicians, and historic preservation experts led him to conclude that the monument should be relocated but stay within Montgomery County.¹²⁶

Once the county decided to remove the monument, it had trouble finding a home for the 18-foot tall 11,000-pound statue originally erected by the UDC and the United Confederate Veterans in Montgomery County.¹²⁷ Initial efforts included proposals for several public parks.¹²⁸ County councilmembers objected to the idea that it should be displayed on any public property.¹²⁹ Efforts to move it to

¹²² Bill Turque, *New Spot for Confederate Statue: Site of Historic Ferry*, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/local/montgomery-finds-spot-for-confederate-statue-site-of-historic-ferry/2017/02/28/1de4fc08-fdf4-11e6-8f41-ea6ed597e4ca_story.html.

¹²³ Aaron Kraut, *City of Rockville Rejects County's Request to Take Controversial Confederate Statue*, BETHESDA MAG. (Feb. 10, 2016, 10:26 AM), <https://bethesdamagazine.com/bethesda-beat/news/city-of-rockville-rejects-countys-request-to-take-controversial-confederate-statue/>.

¹²⁴ Turque, *supra* note 122.

¹²⁵ David S. Rotenstein, *No Country for Johnny Reb or Bobby Lee*, ACTIVIST HIST. REV. (Aug. 21, 2017), https://activisthistory.com/2017/08/21/no-country-for-johnny-reb-or-bobby-lee/#_ednref14.

¹²⁶ *Id.* The basis for the conclusion that the monument needed to stay in the county is unclear, but Leggett explains that it was based on "consultation with community members and local historic preservation advocates" *Id.*; see also Metcalf, 2017, *supra* note 85 (quoting Leggett as saying "[b]ecause it has significance locally, I want it to remain in Montgomery County—but not on county-owned land.").

¹²⁷ Byrne, *supra* note 65, at 1. Estimates for the weight of the monument vary from 11,000 to 25,000 pounds. Unquestionably it was big and heavy, making it expensive to relocate. See Cameron Luttrell, *Controversial Confederate Soldier Statue Moves to White's Ferry*, PATCH (July 25, 2017, 5:20 PM), <https://patch.com/maryland/rockville/controversial-confederate-soldier-statue-moves-whites-ferry>.

¹²⁸ Aaron Kraut, *Montgomery County Presents Five Options for Relocation of Confederate Statue*, BETHESDA MAG. (Aug. 28, 2015, 9:37 AM), <https://bethesdamagazine.com/bethesda-beat/news/montgomery-county-presents-five-options-for-relocation-of-confederate-statue>; see also Horn, *supra* note 118.

¹²⁹ See also Aaron Kraut, *Public Response Shows Strong Objections to Moving Confederate Statue to Silver Spring Park*, BETHESDA MAG. (Sept. 17, 2017, 9:20 AM), <https://bethesdamagazine.com/bethesda-beat/news/public-response-shows-strong-objections-to-moving-confederate-statue-to-silver-spring-park/> (providing summary of public comments on initially proposed sites for relocation of this statue).

a nearby historic house museum collapsed.¹³⁰ Frustration led one councilmember to post the monument for sale on Craigslist.¹³¹

In March 2017, Leggett announced that the county had reached an agreement to relocate the monument to a nearby privately run ferry crossing.¹³² White's Ferry conveys travelers across the Potomac from Virginia.¹³³ During the Civil War, Confederate troops frequently crossed into Maryland from this point.¹³⁴ The ferry crossing was purchased by a Confederate veteran Elijah V. White in 1871; the ferry boat was long named after White's former commander, Confederate General Jubal Early.¹³⁵

The county relocated the monument on July 22, 2017.¹³⁶ The nearly \$100,000 relocation was paid for by the county.¹³⁷ The actual terms of the transfer are a bit hard to discover. It is also not clear whether the monument was simply conveyed to a citizen who volunteered to place the monument on his land or whether there were other organizations like the SCV involved, or what restrictions (if any) the county imposed on the gift.¹³⁸

¹³⁰ Turque, *supra* note 122.

¹³¹ Councilmember Tom Hucker acknowledged in the listing that he did not have permission to sell the statue and recommended that interested parties contact the county. Rotenstein, *supra* note 125. He said he put up the listing to see if there was a market for the statue, asserting that private parties who cared about the monument should be the ones to foot the bill for removal and upkeep. Cameron Luttrell, *Controversial Confederate Soldier Statue Listed On Craigslist*, PATCH (Feb. 24, 2017, 5:12 PM), <https://patch.com/maryland/rockville/controversial-confederate-soldier-statue-listed-craigslist> (quoting the craigslist ad as saying: "This posting is to assess market interest in purchasing this historical item for private display. I am not the owner but I am in contact with the owners. Serious inquiries only. Buyer is responsible for relocating statue.").

¹³² Luttrell, *supra* note 127.

¹³³ Patrick Szabo, *Whites Ferry Still A Vital Virginia-Maryland Connector After 2 Centuries*, LOUDOUN NOW (Mar. 24, 2020), <https://loudounnow.com/2020/03/24/whites-ferry-still-a-vital-virginia-maryland-connector-after-2-centuries/>.

¹³⁴ *White's Ferry — The Last Working Ferry on the Potomac*, LOUDOUN HIST., <https://www.loudounhistory.org/history/whites-ferry/> (last visited Feb. 3, 2021) (noting this history on the state historical marker associated with the site).

¹³⁵ Rotenstein, *supra* note 125.

¹³⁶ *Id.*

¹³⁷ Luttrell, *supra* note 127; Metcalf, 2017, *supra* note 85.

¹³⁸ A short video clip interviewing landowner R. Edwin Brown (father of the current landowner) on the day of the monument's arrival in White's Ferry is a bit hard to decipher. Brown clearly states that he volunteered his land when someone was looking for a volunteer to host the monument, but he also seems to be referencing an organization other than the county as having asked him ("Kentuckyians"?). Video: *Confederate Statue at New Home in White's Ferry* (Montgomery County 2017), <https://www.mymcmedia.org/confederate-statue-at-new-home-in-whites-ferry/>.

The relocation of the monument elicited criticism. On Facebook and elsewhere, community members expressed dismay that people would now be greeted by the monument when crossing the river in Montgomery County.¹³⁹ Although not on public land, the land by the ferry crossing is very much a public space. In conveying the monument to the ferry operator, the county effectively lost control of the monument and its messaging. That is, unless somehow addressed in a transfer agreement, the county no longer had power to decide where the monument was placed, how it was displayed, and whether there would be any contextualization.¹⁴⁰ To those opposed to this new site, the statue went from a place where few people noticed it to being “one of the first things passengers see as they leave the ferry and enter Maryland from Virginia.”¹⁴¹ As historian David Rotenstein remarked, “[b]efore the transaction with White’s Ferry, Leggett didn’t consider the implications of transferring an artifact freighted with such powerful symbolism to an entity that would control not only where it was placed but the narratives attached to it—its very message.”¹⁴²

On June 16, 2020, the statue was vandalized and toppled.¹⁴³ The Brown family, current owners of the ferry, moved the statue into private storage but the base with the language honoring the thin grey line remains.¹⁴⁴ The family has also removed the sign on the actual ferry that read “Gen. Jubal A. Early,” which, as noted, had been the name of the ferry boat for decades.¹⁴⁵ The Brown family replaced it with a sign that simply reads: “Historic White’s Ferry.”¹⁴⁶ One member of the Brown family stated that he wants nothing more to do with the attention it has

¹³⁹ Joseph Hawkins to Tom Hucker, FACEBOOK (Aug. 16, 2017), https://www.facebook.com/tom.hucker.3/posts/10155622153279731?comment_id=10155623085149731&comment_tracking=%7B%22tn%22%3A%22R6%22%7D (“And here is the really sad (maybe even stupid) move. It sounds like when coming from Virginia to MoCo via White’s Ferry, visitors will be able to see our statue. So, I’m crossing the Potomac and MoCo welcomes me with a confederate statue. How crazy is that? And I could care less about the private property argument. I simply do not understand why we couldn’t just melt the statue down.”).

¹⁴⁰ Rotenstein, *supra* note 125 (stating “[t]he symbolic connotations attached to White’s Ferry weren’t lost on Montgomery County residents with a better grasp of history than some of the county’s leaders”).

¹⁴¹ David Rotenstein, *The Hidden Costs of Relocating Confederate Statues*, HIST. SIDEBAR (Aug. 21, 2017), <https://blog.historian4hire.net/2017/08/21/hidden-costs-of-relocating-confederate-statues/>.

¹⁴² Rotenstein, *supra* note 125.

¹⁴³ Rebecca Tan, *A Confederate Statue is Toppled in Rural Maryland, Then Quietly Stored Away*, WASH. POST (July 4, 2020, 1:40 PM), https://www.washingtonpost.com/local/whites-ferry-confederate-statue/2020/07/04/e717b18e-bb3c-11ea-bdaf-a129f921026f_story.html.

¹⁴⁴ *Id.*

¹⁴⁵ Isabel Cleary, *White’s Ferry Confederate Statue Now in Storage*, MY MC MEDIA (July 6, 2020), <https://www.mymcmedia.org/whites-ferry-confederate-statue-now-in-storage/>.

¹⁴⁶ *Id.*

brought to their ferry business.¹⁴⁷ Montgomery County councilmember Will Jawando says White's Ferry did the right thing by taking the statue down.¹⁴⁸ As of this writing, the future of the monument is unclear, but for now it remains in private storage and removed from public view.

Montgomery County's example demonstrates that local governments need to consider whether a removal that they cannot control is better than contextualization, or simply storing the monument until they have had a chance to fully weigh options and consider the impacts of the relocation. Frankly, even the boxed statue may have been a better option (in terms of ongoing messaging to the community that white supremacist attitudes will not be tolerated) than relocation in a prominent gateway to the county with only tangential relationship with the Civil War.¹⁴⁹ This example also shows the pace and change of public opinion related to the relocation of public monuments and how to address these controversial monumental legacies.

3. *Robert E. Lee Statue in Dallas, Texas*

In Lee Park in Dallas, a fourteen-foot statue depicted Confederate General Robert E. Lee on horseback riding with an unnamed soldier.¹⁵⁰ The Dallas Southern Memorial Association commissioned the statue in 1932.¹⁵¹ Alexander Phimister Proctor, a New York sculptor, designed the statue.¹⁵² The ceremony unveiling the monument took place in 1936.¹⁵³

In a September 2017 emergency meeting, the Dallas City Council voted 13-1 in favor of the monument's removal in response to the events in Charlottesville,

¹⁴⁷ Tan, *supra* note 143.

¹⁴⁸ Tom Fitzgerald, *White's Ferry in Montgomery County Removes Confederate Statue*, FOX 5 DC (July 7, 2020), <https://www.fox5dc.com/news/whites-ferry-in-montgomery-county-removes-confederate-statue>.

¹⁴⁹ Some local historians noted that they used the presence of the statue to give talks on race, slavery, Jim Crow, and the Civil Rights Era. See Denbo, *supra* note 116 ("Two local historians who lead tours of historic Rockville spoke of how the statue provided an opportunity to discuss the history of race in America.").

¹⁵⁰ Rex Curry, *Dallas Removes Robert E. Lee's Statue from City Park*, REUTERS (Sept. 14, 2017, 7:38 PM), <https://www.reuters.com/article/us-dallas-statue/dallas-removes-robert-e-lees-statue-from-city-park-idUSKCN1BQ07Z>.

¹⁵¹ *General Robert E. Lee and Confederate Soldier, (sculpture)*, SMITHSONIAN INST., <https://siris-artinventories.si.edu/ipac20/ipac.jsp?&profile=ariall&source=-!siartinventories&uri=full=3100001-!23912-!0#focus> (last visited Feb. 3, 2021); Anita E. Kelly, *Robert E. Lee and Young Soldier*, HUMANRIGHTS DALLAS, <https://humanrightsdallasmaps.com/items/show/7> (last visited Feb. 3, 2021).

¹⁵² Liam Stack, *Robert E. Lee Statue's Removal in Dallas Delayed by Federal Court*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/us/robert-e-lee-confederate-dallas.html>.

¹⁵³ Curry, *supra* note 150.

Virginia.¹⁵⁴ The resolution authorized the city manager to use public funds to remove all Confederate monuments located on public land.¹⁵⁵ The resolution detailed that the city council in conjunction with a city task force on Confederate monuments, created in August 2017 by Dallas Mayor Michael Rawlings, was tasked with figuring out what to do with the statue.¹⁵⁶

Shortly after the city council's resolution passed, Judge Sidney Fitzwater of the United States District Court for the Northern District of Texas granted a temporary restraining order halting the statue's removal.¹⁵⁷ A Dallas resident and the SCV brought the lawsuit claiming that the city council violated their First Amendment rights by voting to remove the monument.¹⁵⁸ The complaint called the vote "a totalitarian move to determine authorized forms of political communication and to punish unauthorized political speech."¹⁵⁹ Judge Fitzwater dismissed the lawsuit at a hearing the next day.¹⁶⁰ This allowed for the statue to be removed,¹⁶¹ which city workers did that same month.¹⁶²

In April 2018, a group called Return to Lee Park, founded by former Dallas City Council candidate Warren Johnson, filed a lawsuit in state court to try to force the city to return the statue to the city park.¹⁶³ The group alleged that the city council violated the Texas Open Meetings Act, which states that governmental bodies must hold open meetings unless there is an authorized reason for a closed session.¹⁶⁴ The city council asserted the claim was moot because there was proper notice for

¹⁵⁴ Stack, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Bridget Katz, *Dallas Gets Go-Ahead to Remove Robert E. Lee Statue*, SMITHSONIAN MAG. (Sept. 8, 2017), <https://www.smithsonianmag.com/smart-news/dallas-gets-go-ahead-remove-robert-e-lee-statue-180964825/>.

¹⁵⁸ Matthew Haag, *Dallas Can Remove Robert E. Lee Statue, Judge Rules*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/lee-monument-dallas.html>.

¹⁵⁹ Christopher Connelly, *Robert E. Lee Statue in Dallas to Be Removed After Judge Tosses Restraining Order*, KERA NEWS (Sept. 17, 2017, 6:59 PM), <https://www.keranews.org/post/robert-e-lee-statue-dallas-be-removed-after-judge-tosses-restraining-order>.

¹⁶⁰ Haag, *supra* note 158.

¹⁶¹ *Confederate Monuments: Robert E. Lee Statue Removed from Dallas Park*, USA TODAY (Sept. 15, 2017, 8:39 AM), <https://www.usatoday.com/story/news/nation-now/2017/09/15/confederate-monument-robert-e-lee-statue-comes-down-dallas/669275001/>.

¹⁶² Curry, *supra* note 150.

¹⁶³ Robert Wilonsky, *Appeals Court Rules Dallas Cannot Remove Confederate War Memorial 'Until Further Notice'*, DALLAS MORNING NEWS (July 2, 2019, 6:20 PM), <https://www.dallasnews.com/news/politics/2019/07/02/appeals-court-rules-dallas-can-t-remove-confederate-war-memorial-until-further-notice/>.

¹⁶⁴ Appellant's Brief on the Merits at 21, *Return Lee to Lee Park v. Mike Rawlings*, No. 05-19-00456-CV (Tex. App. Aug. 12, 2019).

the meeting.¹⁶⁵ Additionally by the time of the lawsuit, the Lee statue had already been relocated, there had been a subsequent publicly noticed meeting where the mootness of the Texas Open Meetings Act claim was debated, and there had been another publicly noticed meeting where payment for the relocation work was authorized.¹⁶⁶ As a result, the state court dismissed the case with prejudice in April 2019.¹⁶⁷ That same month, the group appealed to the Fifth Circuit who issued a temporary restraining order, but the statue had already been sold as surplus property, and the court dismissed the case as moot.¹⁶⁸

The task force originally recommended that the statue be donated to a museum or educational site where it could be displayed in full context, but no local options proved appropriate or available.¹⁶⁹ The city then posted it to an online auction in June 2019.¹⁷⁰ The Dallas City Council approved the sale of the statue with two restrictions: that it be sold for more than the cost to remove it from City Park (previously known as Lee Park), which was estimated at roughly \$450,000, and that it was not to be publicly displayed in the Dallas-Fort Worth metropolitan area.¹⁷¹ The statue ended up selling for \$1.435 million (which exceeded the city's nearly million dollar valuation pre-auction).¹⁷² The purchaser of record was Ron Holmes, "a local real estate lawyer bidding on behalf of his firm."¹⁷³ If the statue is sold again, any

¹⁶⁵ Appellees' Brief at 12, *Return Lee to Lee Park v. Mike Rawlings*, No. 05-19-00456-CV (Tex. App. Sept. 11, 2019).

¹⁶⁶ *Id.* at 7.

¹⁶⁷ Appellant's Brief, *supra* note 164, at 1.

¹⁶⁸ *In re Return Lee to Lee Park*, No. 05-19-00774-CV (Tex. App. Oct. 10, 2019).

¹⁶⁹ Mervosh, *supra* note 84.

¹⁷⁰ *Id.*

¹⁷¹ Frank Heinz, Ken Kalthoff, & Kendall Jarboe, *Dallas' Removed Robert E. Lee Sculpture Transferred to New Owner*, NBC DRW (June 27, 2019, 11:58 AM), <https://www.nbcdfw.com/news/local/dallas-removed-robert-e-lee-sculpture-transferred-to-new-owner/214562/>. While Montgomery County felt it important that Johnny Reb remain within the county, Dallas specifically did not want the Lee sculpture anywhere nearby.

¹⁷² Stephen Young, *Dallas Sells Its Robert E. Lee Statue, Enraging at Least 1 Virginia Confederate Apologist*, DALLAS OBSERVER (June 6, 2019, 4:00 AM), <https://www.dallasobserver.com/news/dallas-sells-lee-statue-for-14-million-11680860>; Stephen Young, *Here's Who Paid \$1.45 Million for Dallas' Ode to Robert E. Lee*, DALLAS OBSERVER, (June 13, 2019, 4:00 AM), <https://www.dallasobserver.com/news/dallas-robert-e-lee-buyer-identity-11686172> (profiling owner and some of the other bidders—including a cattle company and an automotive dealer); Stephen Young, *Dallas City Council Agrees to Sell Robert E. Lee Statue*, DALLAS OBSERVER (May 23, 2019, 4:00 AM), <https://www.dallasobserver.com/news/dallas-finally-ready-to-sell-robert-e-lee-statue-11670716>.

¹⁷³ Sarah Mervosh, *Robert E Lee Statue Removed from Dallas Park Sells for More than \$1.4m*, INDEPENDENT (June 23, 2019, 6:02 PM), <https://www.independent.co.uk/news/world/americas/robert-e-lee-statue-sold-auction-dallas-confederate-texas-a8971206.html>.

subsequent purchaser must apparently comply with the location restrictions.¹⁷⁴

In September 2019, Black Jack's Crossing Golf Course in Lajitas, Texas placed the statue on display.¹⁷⁵ The resort is owned by oil and gas billionaire Kelcy Warren.¹⁷⁶ W. Scott Beasley, the president of WSB Resorts and Clubs, said that "it was donated to the resort and we could not be a more proud recipient."¹⁷⁷

4. *Turner Ashby Monument in Harrisonburg, Virginia*

The Turner Ashby Monument in Harrisonburg, Virginia sits on 1.7 acres of private land—the spot where Ashby was killed in 1862.¹⁷⁸ Ashby commanded cavalry under Stonewall Jackson and was integral to Jackson's success in the Valley Campaign.¹⁷⁹ The stone monument is around eight feet tall and composed of a rough-hewn limestone base with a granite shaft that tapers into a pyramidal cap.¹⁸⁰ Located on the marker's east side, the polished inscription to Turner Ashby states that he was killed "on this spot."¹⁸¹ The monument was placed on the Virginia Landmarks Register and the National Register of Historic Places in 2017.¹⁸² The listing describes the monument as commemorating the 1862 death in battle of Con-

¹⁷⁴ Heinz et al. *supra* note 171; *see also* Mervosh, *supra* note 173. It is not clear how binding this obligation is. Some news reports indicate that the successful bidder simply cannot convey the statue to someone who intends to display it in the DFW metropolitan area, and it is also unclear how this requirement is to be legally enforced. *See id.*

¹⁷⁵ Fernandez, *supra* note 9.

¹⁷⁶ Shawn Shinneman, *Dallas's Robert E. Lee Statue Has Landed at Black Jack's Crossing Near Terlingua*, D MAG. (Sept. 20, 2019, 11:21 AM), <https://www.dmagazine.com/frontburner/2019/09/dallas-robert-e-lee-statue-has-landed-at-black-jacks-crossing-in-terlingua/>.

¹⁷⁷ Fernandez, *supra* note 9.

¹⁷⁸ Nolan Stout, *Foundation Seeks Ashby Easement*, DAILY NEWS-REC. (Oct. 22, 2017), https://www.dnronline.com/news/harrisonburg/foundation-seeks-ashby-easement/article_a903093c-b79f-11e7-a8a3-ef33783e142f.html; Draft Minutes from Virginia State Review Board and Board of Historic Resources, Virginia Department of Historic Resources (June 15, 2017), https://townhall.virginia.gov/L/GetFile.cfm?File=meeting%5C60%5C26112%5CMinutes_DH_R_26112_v1.pdf [hereinafter Virginia Department of Historic Resources].

¹⁷⁹ *See, e.g., Turner Ashby*, SHENANDOAH AT WAR, <https://www.shenandoahatwar.org/history/turner-ashby/> (last visited Feb. 3, 2021).

¹⁸⁰ *See generally General Turner Ashby Monument*, STONE SENTINELS, <https://stonesentinels.com/less-known/harrisonburg/turner-ashby-monument/> (last visited Feb. 3, 2021).

¹⁸¹ U.S. DEP'T OF THE INTERIOR: NAT'L PARK SERV., NATIONAL REGISTER OF HISTORIC PLACES REGISTRATION FORM TURNER ASHBY MONUMENT REGISTRATION FORM, TURNER ASHBY MONUMENT (2017), https://www.dhr.virginia.gov/wp-content/uploads/2018/04/115-5063_Turner_-Ashby_-Monument_2017_NRHP_FINAL.pdf.

¹⁸² Ian Munro, *City Cannot Remove Turner Ashby Monument*, DAILY NEWS-RECORD (June 12, 2020), https://www.dnronline.com/news/local/city-cannot-remove-turner-ashby-monument/article_bb01c276-849e-5c79-9aed-d6b0f8d28f2f.html.

federate General Turner Ashby and notes that it is locally significant for its association with the Lost Cause movement.¹⁸³ This small acreage and memorial are surrounded on three sides by James Madison University, a public university.¹⁸⁴ The site and memorial are owned and maintained by the Turner Ashby Chapter of the UDC in Harrisonburg, Virginia.¹⁸⁵ Although the monument sits on private property, the property is open to the public and its proximity to the university masks the private status of the land.¹⁸⁶

In the mid-2010s, the UDC offered to convey a conservation easement to the state to protect this resource. The state easement acceptance committee recommended acceptance in light of its historic designation, but the state review board declined to accept with a three-to-three deadlocked vote (majority approval was required)¹⁸⁷—presumably based on concerns relating to the state’s involvement with a Confederate monument, although there is not much discussion in the record.¹⁸⁸ The UDC had strategically sought to have the Virginia Department of Historic Resources hold the conservation easement to provide another layer of protection (and in the view of those seeking to obtain this protection, to make it more difficult for eminent domain to be exercised against the site).¹⁸⁹ The agency’s board, however, declined the request based on its concerns relating to the structure’s legacy and noted that this was the first conservation-easement-holding request that was primarily driven by the desire to protect a Confederate monument, rather than other site-related reasons (such as open space or as contributing to larger sites).¹⁹⁰

The state then recommended that the UDC contact the Shenandoah Valley Battlefields Foundation, a nonprofit organization who had been planning to co-hold this conservation easement. The Shenandoah Valley Battlefields Foundation accepted the donation of conservation easement in October 2017.¹⁹¹ The Foundation and the Turner Ashby Chapter of the UDC commemorated creating the conservation easement by holding a rededication ceremony for the monument.¹⁹²

As the Ashby monument showcases, conservation easements are another layer of property interest that can complicate removal. A conservation easement is a legal

¹⁸³ U.S. DEP’T OF THE INTERIOR, *supra* note 181.

¹⁸⁴ Virginia Department of Historic Resources, *supra* note 178.

¹⁸⁵ U.S. DEP’T OF THE INTERIOR, *supra* note 181.

¹⁸⁶ *Id.*

¹⁸⁷ Virginia Department of Historic Resources, *supra* note 178.

¹⁸⁸ *Id.*

¹⁸⁹ Stout, *supra* note 178.

¹⁹⁰ Virginia Department of Historic Resources, *supra* note 178.

¹⁹¹ *A Rededication of the Turner Ashby Monument*, SHENANDOAH VALLEY BATTLEFIELDS FOUND., <https://myemail.constantcontact.com/Rededication-of-Turner-Ashby-Monument.html?soid=1102348702549&caid=H9fE8xkFIwY> (last visited Feb. 3, 2021).

¹⁹² *Id.*

agreement between a property owner and an easement holder (a nonprofit organization or a governmental entity), whereby the property owner gives up certain rights to modify or alter protected resources (here, a monument) and the easement holder agrees to enforce the terms of this restriction against the grantor and future owners of the protected property.¹⁹³ The holders of the conservation easements must be either nonprofit organizations or government entities.¹⁹⁴

Conservation easements insert an additional role for government or at least blur the divide between public and private in a few material ways. First, conservation easements are generally acquired with some degree of public funding or public-ish funding.¹⁹⁵ A property owner is unlikely, in most instances, to divest this degree of oversight without some corresponding benefit.¹⁹⁶ To facilitate these transactions, governmental agencies (federal, state, and local) allocate substantial resources to acquire conservation easements through acquisition programs or as conditions of grant financing to achieve other program-related objectives (for example, if a state historical agency is providing funds to restore a historic house, they may require a conservation easement to protect the house against demolition for a specified period to protect their investment).¹⁹⁷ The federal tax code also subsidizes some conservation easement donations—allowing a property owner to claim, for a qualified donation, the value of the property interest they have gifted.¹⁹⁸

Second, in many instances, governmental entities serve as the actual holder of these conservation easements.¹⁹⁹ The property interest held by government, at what-

¹⁹³ Jessica Owley, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENV'T'L L. & LITIG. 293, 298 (2004).

¹⁹⁴ Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 138 (2015).

¹⁹⁵ Jess R. Phelps, *Reevaluating the Role of Acquisition-Based Strategies in the Greater Historic Preservation Movement*, 34 VA. ENV'T'L L.J. 399, 441 (2016).

¹⁹⁶ James R. Farmer, Doug Knapp, Vicky J. Meretsky, Charles Chancellor, & Burnell C. Fisher, *Motivations Influencing the Adoption of Conservation Easements*, 25 CONSERVATION BIOLOGY 827, 833 (2011) (profiling the results of a study indicating the motivations for conservation easement conveyances (with financial motivations scoring lowest) but still play a facilitating role).

¹⁹⁷ See, e.g., Paul R. Armsworth & James N. Sanchirico, *The Effectiveness of Buying Easements as a Conservation Strategy*, 1 CONSERVATION LETTERS 182, 182 (2008) (noting the levels of expenditure on these efforts).

¹⁹⁸ See, e.g., Daniel J. Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 L. & CONTEMP. PROBS. 29 (2011).

¹⁹⁹ Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 L. & CONTEMP. PROBS. 1, 2 (2011) (discussing government agencies as holders and noting that easement acquisitions have displaced public land acquisition and land-use regulation as a preferred land conservation technique).

ever level, requires the public entity to fulfill its obligations to monitor the conservation easement and to enforce its provisions in the event of a violation.²⁰⁰ This enforcement role requires the agency, if it has accepted this obligation, to essentially prevent the property owner from taking steps to modify or remove protected features of the landscape—which can include Confederate monuments.²⁰¹ This role can also place varying levels of government, most likely a state historic preservation agency, in conflict with a local municipality seeking to remove a monument from a public space.²⁰²

Our research did not locate many examples of Confederate monuments protected by preservation or conservation easements, and even fewer examples of easement holders grappling with a complicated determination of whether to permit removal or enforce the terms of the easement against a property owner seeking to remove the monument. This may, however, be a function of one of the primary critiques of conservation easements as a public investment—that the private attributes of these conveyances often make finding data and, in turn, public oversight over the administration of the protected properties difficult.²⁰³ The Ashby monument, with its layered ownership and underlying conservation easement protecting a property that essentially looks to be part of a public university's grounds, showcases this complexity.

In June 2019, the Ashby monument had eggs, raw meat, and other substances thrown at it.²⁰⁴ The vandals also left several notes written on posters on the monument quoting Ulysses S. Grant and Jefferson Davis.²⁰⁵ Unknown persons vandalized the monument again in February 2020 by dousing it in red paint.²⁰⁶ Philip Way, a

²⁰⁰ Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 L. & CONTEMP. PROBS. 279, 280 (2011) (discussing the role/responsibilities of holders).

²⁰¹ See A.M. Merenlender, L. Huntsinger, G. Guthey, & S.K. Fairfax, *Land Trusts and Conservation Easements: Who is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 67 (2004).

²⁰² See, e.g., Ian Duncan, *Baltimore Lacked Authority to Take Down Confederate Statues, and State Says It Could—But Will Not—Order Them Restored*, BALT. SUN (Oct. 26, 2017), <https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-confederate-monuments-letter-20171026-story.html> (profiling the conflict between the Maryland Historical Trust and the City of Baltimore over the future of confederate monuments that the city removed in contravention of a preservation easement held by the MHT).

²⁰³ Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WISC. L. REV. 1237, 1239 (2009) (profiling the issues regarding transparency over protected lands).

²⁰⁴ Autumn Childress, *Confederate Monument in Harrisonburg Vandalized*, WHSV (June 6, 2019, 6:32 PM), <https://www.wHSV.com/content/news/Confederate-monument-in-Harrisonburg-vandalized—510945221>.

²⁰⁵ *Id.*

²⁰⁶ Pete Delea, *Turner Ashby Monument Targeted Again*, DAILY NEWS-REC. (Feb. 3, 2020), https://www.dnronline.com/dnronline/turner-ashby-monument-targeted-again/article_2df006

leader in the local SCV chapter, stated, “While the incidents are frustrating . . . there has been one positive: more members.”²⁰⁷ By virtue of its private ownership, the local community also lacks the clear legal ability to remove the monument, which has frustrated many in the area.²⁰⁸

B. Heritage Groups as Landowners

During the Jim Crow era, the UDC funded and placed the majority of Confederate monuments in public spaces.²⁰⁹ But today, it is the SCV who has been more aggressive by pushing for more monuments, erecting private monuments, and fighting against public monument removal.²¹⁰

In recent years, SCV chapters have actively sought to increase the number and prominence of Confederate monuments. While they have previously, and comparatively recently, facilitated some placements on public lands, the organization has begun to focus more attention on private lands. As the following examples demonstrate, sometimes the SCV owns the land itself. Sometimes the land is owned by members who allow the SCV to erect a monument. There are a number of other permutations. While our focus here is on the SCV as the most prominent owner of private monuments, we acknowledge that other heritage groups and private individuals have also been involved.

1. Confederate Memorial of the Wind in Orange, Texas

The Texas SCV Chapter recently built a new Confederate monument on private land in Orange, Texas called the Confederate Memorial of the Wind; it is on Martin Luther King, Jr. Boulevard and was strategically designed and located to be easily visible from the highway.²¹¹ The plans for the memorial were first announced

ab-d496-5e50-82f1-c8683194bcff.html (discussing this vandalism incident).

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Ian Munro, *City Cannot Remove Turner Ashby Monument*, DAILY NEWS-REC. (June 12, 2020), https://www.dnronline.com/news/local/city-cannot-remove-turner-ashby-monument/article_bb01c276-849e-5c79-9aed-d6b0f8d28f2f.html.

²⁰⁹ See, e.g., Max Kutner, *As Confederate Statues Fall, The Group Behind Most of Them Stays Quiet*, NEWSWEEK (Aug. 25, 2017, 3:06 PM), <https://www.newsweek.com/united-daughters-confederacy-statues-monuments-udc-653103> (quoting scholar Karen Cox as stating that “[i]n a typical Southern town with a statue to the Confederacy . . . ‘I could almost guarantee you that the UDC would be on the monument somewhere, that they had done the job’”).

²¹⁰ A literal example of this transfer of primary leadership, although the groups still work together in some monument-related advocacy, among other issues, is the UDC’s conveyance of the Silent Sam monument and UNC-Chapel Hill to the SCV in the middle of that controversy. See Lindsay Marchello & Rick Henderson, *Silent Sam Settlement Could Be Only the Beginning*, CAROLINA J. (Dec. 4, 2019, 8:13 PM), <https://www.carolinajournal.com/news-article/silent-sam-settlement-could-be-only-the-beginning>.

²¹¹ Dylan Baddour, *150 Years After Fall, Confederate Memories Linger in Texas*, CHRON (Apr. 9, 2015, 1:21 PM), <https://www.chron.com/news/article/150-years-after-fall-Confederate->

in 2013.²¹² The \$50,000 project was funded by donations, largely from East Texans who trace their ancestry to Confederate veterans.²¹³ It consists of 13 columns representing the 13 states of the Confederacy and includes the Confederate flag and flags of the Texas regiments belonging to the Confederate Army.²¹⁴ SCV argues that the monument is important for educating people about the Civil War and explaining that slavery was only a small part of the war and not its cause.²¹⁵

Many Orange residents protested construction of the memorial because of its close proximity to Martin Luther King, Jr. Blvd. and the racist legacy of the Confederacy.²¹⁶ In a poll of its readers conducted by a local newspaper in February 2013, 77% of respondents supported the memorial.²¹⁷ No residents, however, spoke in favor of the monument during an Orange City Council meeting about the monument in February 2013, while many residents turned up to oppose it.²¹⁸ According to the *Beaumont Enterprise*, the Beaumont chapter of the National Association for the Advancement of Colored People (NAACP) also opposed the memorial, as did some residents of Beaumont and Orange.²¹⁹

SCV needed a permit from the city to construct the monument.²²⁰ Again, the NAACP and other groups opposed the permit application, but the city saw no legal justification for denial.²²¹ According to the *L.A. Times*, Orange city officials sought to limit the memorial's impact by regulating the size of the flags and placing restrictions on parking after deciding they could not legally withhold a permit.²²² Orange City Council also passed an ordinance to "limit flagpoles to thirty-five-foot

memories-linger-6187647.php.

²¹² Gwendolyn Knapp, *Do We Need Another Confederate Monument in Texas?*, HOUSTONIA (Feb. 28, 2018, 12:00 AM), <https://www.houstoniamag.com/news-and-city-life/2018/02/confederate-monument-orange-texas>.

²¹³ Baddour, *supra* note 211.

²¹⁴ Kriston Capps, *Texas Built a Confederate Memorial on a Street Named for Martin Luther King Jr.*, BLOOMBERG (June 19, 2015, 2:04 PM), <https://www.bloomberg.com/news/articles/2015-06-19/texas-built-a-confederate-memorial-on-a-street-named-for-martin-luther-king-jr>. Note that residents felt comfortable supporting the memorial in an anonymous poll but not comfortable enough (or perhaps simply not invested enough) to speak in favor of the memorial openly at a public hearing.

²¹⁵ Jarvie, *supra* note 88.

²¹⁶ See Parris Kane, *Protesters Take a Stand Against Confederate Memorial in Orange in Honor of Martin Luther King Jr. Day*, 12 NEWS NOW (Jan. 21, 2019, 5:41 PM), <https://www.12newsnow.com/article/news/protesters-take-a-stand-against-confederate-memorial-in-orange-in-honor-of-martin-luther-king-jr-day/502-85890743-5c1f-44b2-974d-4e434aac08fb>.

²¹⁷ Baddour, *supra* note 211.

²¹⁸ Capps, *supra* note 214.

²¹⁹ *Id.*

²²⁰ Jarvie, *supra* note 88.

²²¹ *Id.*

²²² *Id.*

tall and to ban any flags larger than four by six feet” in the community.²²³ This ordinance “prevent[ed] the erection of huge flags and tall flagpoles on the property,” which would have been seen from Interstate 10.²²⁴ Furthermore, the city’s regulations on the property required a concrete parking lot with a certain number of parking places including parking for the disabled.²²⁵ It was that requirement that has slowed the completion of the site.²²⁶ As of summer 2020, there was still no parking lot because the SCV does not own sufficient land around the monument to meet its parking requirements.²²⁷ The city will not allow the SCV to have public gatherings there until they have a parking lot.²²⁸ While SCV members suggest the site is open to the public, “no trespassing” signs have also been posted.²²⁹

There have been ongoing protests against the memorial. About 30% of the population in Orange, Texas is African-American.²³⁰ Despite efforts and appeals by local politicians, businesses, and religious leaders (along with the city’s offer to purchase the land), the SCV has refused to consider any alternatives to erecting the monument.²³¹ In 2017, a Texas couple founded the Repurpose Movement to advocate for the repurposing of the Confederate Memorial.²³² Repurpose raised enough money in January 2020 to purchase two months of advertising space on a billboard that appears over the monument.²³³ The billboard detailed a picture of Martin Luther King, Jr. with a quote that states, “A time comes when silence is betrayal.”²³⁴ The billboard appeared a few days before MLK Day in January 2020 and remained through the entirety of Black History Month (February 2020).²³⁵ In June 2020, the couple started another campaign to secure space on the billboard for

²²³ *Id.*

²²⁴ John Cash Smith, *Letter to the Editor Re: Confederate Memorial*, ORANGE LEADER (June 17, 2020, 12:01 AM), <https://orangeleader.com/2020/06/17/letter-to-the-editor-re-confederate-memorial/>.

²²⁵ *Id.*

²²⁶ *About*, REPURPOSE MEMORIAL, <https://repurposememorial.com/about/> (last visited Feb. 3, 2021).

²²⁷ *Id.*

²²⁸ See Knapp, *supra* note 212.

²²⁹ Email from Jeremy Parzen, Founder, Repurpose, to Sean Hughes, Research Assistant, Univ. of Miami School of Law (July 6, 2020) (on file with authors).

²³⁰ Knapp, *supra* note 212.

²³¹ REPURPOSE MEMORIAL, *supra* note 226.

²³² *Id.*

²³³ Do Bianchi, *MLK Billboard Appears Over Confederate Memorial Throughout Black History Month. Thanks to Everyone Who Made it Possible*, REPURPOSE MEMORIAL (Feb. 28, 2020), <https://repurposememorial.com/2020/02/28/southern-poverty-law/>.

²³⁴ *Id.*

²³⁵ *Id.*

the next year, including MLK Day 2021 and Black History Month 2021.²³⁶ The campaign raised \$6,227 and secured the billboard space for 6 months starting in August 2020.²³⁷ On June 13, 2020 about 40 people protested at the memorial.²³⁸ As of this writing, the Confederate Monument of the Wind remains in place and continues to be owned by the SCV.

2. *Monument to the Immortal Spirit of the Confederate Cause in Aiken, South Carolina*

In Aiken, South Carolina, there is a new granite monument dedicated to the “immortal spirit of the Confederate cause.”²³⁹ The seven-foot-tall granite memorial honors the Confederate soldiers that fought in the Battle of Aiken in February 1865.²⁴⁰ The Barnard E. Bee Camp of the SCV erected the monument in 2017,²⁴¹ at the Battle of Aiken reenactment site.²⁴² The SCV owns the land,²⁴³ and hosts an annual three-day reenactment of the Battle of Aiken where reenactors eat, sleep, live, and fight in a recreated version of the world in 1865.²⁴⁴ “In addition to battle reen-

²³⁶ Jeremy Parzen, *MLK Billboard to Overlook Confederate Memorial*, GOFUNDME (June 8, 2020), <https://www.gofundme.com/fl/e57cw-mlk-billboard-to-overlook-confederate-memorial>.

²³⁷ *Id.*

²³⁸ Jacob Dick, *Protests of Confederate Monument in Orange Renew in Wake of George Floyd’s Murder*, BEAUMONT ENTER. (June 16, 2020, 9:29 AM), <https://www.beaumontenterprise.com/news/article/Protests-of-confederate-monument-in-Orange-renew-15338643.php>.

²³⁹ Jarvie, *supra* note 88. There also appears to be a similar marker on the actual battlefield, rather than the reenactment site. See *Battle of Aiken*, HIST. MARKER DATABASE, <https://www.hmdb.org/m.asp?m=10061> (last visited Feb. 3, 2021).

²⁴⁰ Renetta DeBose, *Long Awaited Confederate Monument Goes Up at Battle of Aiken Reenactment Site*, WJBF (Sept. 27, 2017, 9:59 PM), <https://www.wjbf.com/news/long-awaited-confederate-monument-goes-up-at-battle-of-aiken-re-enactment-site/>.

²⁴¹ Dede Biles, *New Confederate Monument Unveiled, Dedicated on Private Land Near Aiken*, AIKEN STANDARD (Sept. 30, 2017), https://www.aikenstandard.com/news/new-confederate-monument-unveiled-dedicated-on-private-land-near-aiken/article_857c150a-a5fa-11e7-b74c-3f543d7d4eae.html.

²⁴² Amanda King, *Confederate Monument Erected at Battle of Aiken Site*, AUGUSTA CHRON. (Sept. 30, 2017, 8:07 PM), <https://www.augustachronicle.com/news/2017-09-30/confederate-monument-erected-battle-aiken-site>.

²⁴³ See Biles, *supra* note 241 (indicating that in light of the events of Charlottesville “[i]f anyone in attendance [at the dedication] was opposed to what the Barnard E. Bee Camp was doing, they didn’t express their feelings out loud during the ceremony”).

²⁴⁴ *The Battle of Aiken*, AIKEN S.C.: TOURISM DIVISION, https://www.visitaikensc.com/calendar/event/the_battle_of_aiken (last visited Feb. 23, 2021). This is a reenactment of considerable size. See Shiann Sivell, *Battle of Aiken Visitors Speak on Confederate Monuments*, *Heritage*, AIKEN STANDARD (Feb. 26, 2020), https://www.aikenstandard.com/news/battle-of-aiken-visitors-speak-on-confederate-monuments-heritage/article_213fd78c-55e0-11ea-afe6-67286818d9bf.html (noting that this twenty-sixth annual reenactment drew an estimated 15,000 visitors in 2020).

actments, there are authentic nineteenth-century military encampments, living history presentations, reproductions of medical facilities, an engineer and signal service, and civilian portrayals.”²⁴⁵ The reenactment is open to the public and tickets are available to purchase every year.²⁴⁶ Proceeds from the reenactment funded the monument.²⁴⁷

In the fall of 2017, the SCV indicated that it was not erecting this monument as a form of backlash against monument removal across the South, but noted its long-term intentional planning to erect this monument at this specific site over the course of many years.²⁴⁸ The local NAACP chapter indicated that while it would prefer monuments to more unifying figures, it would not oppose this monument based upon its siting on privately owned property.²⁴⁹

3. *Confederate Monument in Crenshaw County, Alabama*

A member of the SCV in Alabama, David Coggins, dedicated a grey stone memorial in Crenshaw County just weeks after the 2017 Charlottesville protests.²⁵⁰ Located in an area around the towns of Brantley and Luverne,²⁵¹ the simple obelisk is dedicated to the unknown Alabama soldier.²⁵² The monument is in a privately owned “park” called Confederate Veterans Memorial Park, also owned and developed by Coggins.²⁵³ “It stands alongside other Confederate memorials, flags, and replica cannons . . .”²⁵⁴ Coggins asserts that the monument is important for hon-

²⁴⁵ *The Battle of Aiken*, *supra* note 244.

²⁴⁶ *Battle of Aiken February 20 and 21, 2020*, BATTLE OF AIKEN, <https://www.battleofaiken.org/> (last visited Feb. 23, 2021).

²⁴⁷ Colin Demarest, *Confederate, Civil War Monuments Dot Aiken County*, AIKEN STANDARD (June 27, 2020), https://www.aikenstandard.com/news/confederate-civil-war-monuments-dot-aiken-county/article_b59fa1e4-b564-11ea-bb0b-a3cda293360e.html.

²⁴⁸ Dede Biles, *New Confederate Monument in Aiken Not a Protest Says Leader of Local Group*, AIKEN STANDARD (Sept. 27, 2017), https://www.postandcourier.com/aikenstandard/news/new-confederate-monument-in-aiken-not-a-protest-says-leader-of-local-group/article_2536cf5d-ca7f-5b1d-a976-051d31acd7b3.html.

²⁴⁹ *Id.*

²⁵⁰ The landowner claimed that the event had been planned long before, but the Alabama Chapter of the NAACP did not believe him. Alex Johnson, *A New Confederate Monument Goes Up in Alabama*, NBC NEWS (Aug. 28, 2017, 9:09 PM), <https://www.nbcnews.com/news/us-news/new-confederate-monument-goes-alabama-n796531>.

²⁵¹ Randi Hildreth, *New Confederate Monument to be Unveiled in Crenshaw County*, WSAF12 (Aug. 22, 2017, 10:50 PM), <https://www.wsa.com/story/36194304/new-confederate-monument-to-be-unveiled-in-crenshaw-county/>.

²⁵² *Id.*

²⁵³ Connor Sheets, *New Confederate Monument Set to be Unveiled in Alabama*, AL.COM, (Aug. 18, 2017), https://www.al.com/news/2017/08/new_confederate_monument_to_be.html.

²⁵⁴ Robin Eberhardt, *New Confederate Monument Goes Up in Alabama*, HILL (Aug. 28, 2017, 10:20 AM), <https://thehill.com/blogs/blog-briefing-room/348244-alabama-community-unveils>.

oring ancestors, explaining “[w]e should all be proud of our Confederate ancestors.”²⁵⁵ Another SCV member stated that the monument was important because they needed to “let people know that what our ancestors did was not in vain.”²⁵⁶

More than 500 people showed up for the unveiling of the monument.²⁵⁷ At the event, the SCV asked for donations to support erecting another monument—this one to the Confederate Navy.²⁵⁸ The Alabama Division of SCV anticipates installing more Confederate monuments in response to recent removal efforts but think it is likely that most will be on private land.²⁵⁹ This monument also shows a trend, demonstrating that some of these monuments are being installed by private individuals rather than the organizations to which they belong.

4. *Joseph Johnston Monument in Bentonville, North Carolina*

On March 20, 2010, the Smithfield Light Infantry Camp, a local chapter of the SCV in North Carolina, unveiled a new Confederate monument near the Bentonville Battlefield.²⁶⁰ This monument depicts Joseph Johnston, a senior general officer in the Confederate Army, who served in the Mexican-American War and Seminole Wars.²⁶¹ The monument is a bronze statue of him atop a stone and brick base with the inscription “Defender of the Southland to the End.”²⁶² The monument cost \$100,000.²⁶³

To avoid controversy, the Smithfield Light Infantry placed the statue on donated private land located adjacent to the battlefield.²⁶⁴ Although the statue is pri-

new-confederate-monument.

²⁵⁵ *Id.*

²⁵⁶ Connor Sheets, *New Confederate Memorial Unveiled in Alabama*, AL.COM, (Aug. 27, 2017), https://www.al.com/news/2017/08/more_than_200_people_attend_un.html [hereinafter Sheets, *Monument Unveiled*].

²⁵⁷ Johnson, *supra* note 250.

²⁵⁸ Sheets, *Monument Unveiled*, *supra* note 256.

²⁵⁹ Samantha Day, *New Confederate Monument Unveiled in Crenshaw County*, WSFA (Aug. 28, 2017, 1:53 AM), <https://www.wsfa.com/story/36228411/new-confederate-monument-unveiled-in-crenshaw-county/>.

²⁶⁰ *Joseph Johnston Monument, Bentonville Battlefield, Four Oaks*, COMMEMORATIVE LANDSCAPES N.C., <https://docsouth.unc.edu/commland/monument/28/> (last visited Feb. 23, 2021).

²⁶¹ *Id.*

²⁶² *General Joseph Eggleston Johnston*, HIST. MARKER DATABASE, <https://www.hmdb.org/m.asp?m=34181> (last visited Feb. 3, 2021).

²⁶³ *Joseph Johnston Monument*, *supra* note 260 (“The statue was built on private land based on the belief that approval to place it on state-owned land would be incredibly time-consuming and likely impossible.”).

²⁶⁴ *Joseph Johnston Monument*, NCPEDIA, <https://www.ncpedia.org/monument/joseph-johnston-monument> (last visited Feb. 3, 2021); *see also* Martha Quillin, *On Bentonville Battlefield, General’s Fans Find Him a Home*, NEWS & OBSERVER, (Aug. 16, 2017, 3:43 PM),

vate property, the public has direct visual and physical access to it.²⁶⁵ The close proximity to the battlefield makes the monument seem like it is part of the public site.²⁶⁶ It is only 100 feet from a stop on the battlefield's driving tour.²⁶⁷ The SCV decided to build the statue on private land based on the belief that "approval to place it on state-owned land would be incredibly time-consuming and likely impossible."²⁶⁸ This approach may also become a trend: using inholdings or lands adjacent to significant or public sites for these monuments, particularly for the relocation of formerly public monuments.

5. *Confederate Veterans Memorial Plaza in Palestine, Texas*

The John H. Reagan Camp No. 2156 of the SCV opened its Confederate Veterans Memorial Plaza on April 13, 2013, following a parade and dedication ceremony.²⁶⁹ The memorial is located on private property in downtown Palestine, Texas, across the street from the current veterans memorial park.²⁷⁰ The plaza honors Confederate veterans from Anderson County, the State of Texas, and across the South.²⁷¹ It consists of a plaza with a central flag display, two granite monuments, benches, and other displays.²⁷² The plaza is also part of the SCV's program "Flags Across Dixie," that aims to honor Confederate veterans throughout the South.²⁷³ For a donation, people can memorialize their ancestors and others with engraved brick pavers.²⁷⁴ The five displayed flags include the Texas state flag surrounded by the first, second, and third national flags of the Confederacy, along with the Con-

<https://www.newsobserver.com/news/local/article167553747.html>; David Zucchini, *Confederate General Returns to Battlefield*, L.A. TIMES (Mar. 21, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-mar-21-la-na-statue21-2010mar21-story.html>.

²⁶⁵ *Joseph Johnston Monument*, *supra* note 260.

²⁶⁶ For example, commenters on Trip Advisor include pictures of the monument on their reviews of the state historic park, suggesting that they are not distinguishing between the public and private land. See, e.g., Review, *Bentonville Battlefield State Historic Site*, TRIP ADVISOR, https://www.tripadvisor.com/Attraction_Review-g49144-d104891-Reviews-Bentonville_Battlefield_State_Historic_Site-Four_Oaks_Johnston_County_North_Carolin.html (last visited Feb. 3, 2021).

²⁶⁷ *Joseph Johnston Monument*, *supra* note 260.

²⁶⁸ *Id.*

²⁶⁹ *Confederate Veterans Memorial Plaza—Palestine, Honor Your Ancestor with a Memorial Brick Paver!!!*, JOHN H. REGAN CAMP 2156 SONS OF CONFEDERATE VETERANS, http://www.reagansvcamp.org/Flyers/CVMP-Palestine_Paver_Flyer_4-2013.pdf (last visited Feb. 3, 2021).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Home*, JOHN H. REGAN CAMP 2156 SONS OF CONFEDERATE VETERANS, <http://www.reagansvcamp.org/> (last visited Feb. 3, 2021).

federate battle flag.²⁷⁵

Kenneth Davidson, the President of Palestine's NAACP chapter, organized a rally to be held on the same day as the opening ceremony of the plaza.²⁷⁶ Citizens of Palestine and others from all over Texas came to show their disdain for the new plaza by attending the rally.²⁷⁷ Davidson stated that the display of the flag within the plaza symbolizes "hatred, depression, oppression, slavery, and it's nothing but division."²⁷⁸ After the opening ceremony, members of the SCV and NAACP met behind closed doors to discuss their contentions regarding the plaza.²⁷⁹ It is not clear what they discussed during the meeting nor whether the two groups came to a conclusion on how to handle their disagreements. As shown above, and by the degree of counter-protests, many members of the Palestine community seem to dislike what the SCV and the memorial plaza represent. Since its opening in 2013, the plaza remains in place. Because the Confederate plaza is located across the street from the current veteran's memorial park, many people might mistakenly believe that the memorial plaza is owned and operated by the city of Palestine. And although community members may not agree with the plaza and its messaging, the SCV likely feels no pressure to remove the plaza as it sits on private property.

6. *Confederate Monuments at the Historical Society in Georgetown, Delaware*

Sometimes we see Confederate monuments on private land, but do not realize that they were funded in part by the public. This could happen both with outright grants for the monuments or in connection with public grants and other benefits supporting the organization displaying the monument. This could also take the form of giving tax breaks for the land on which the monument is placed.

²⁷⁵ Dylan Baddour, *Confederate Monuments in Texas*, MY SAN ANTONIO (Oct. 25, 2017, 4:21 PM), <https://www.mysanantonio.com/news/houston-texas/slideshow/Confederate-monuments-in-Texas-106212.php>.

²⁷⁶ *Confederate Flag Flies High Over Palestine, Controversy Heats Up*, KLTV7 (Apr. 13, 2013, 10:19 PM), <https://www.kltv.com/story/21971210/confederate-flag-flies-high-over-palestine-controversy-heats-up>.

²⁷⁷ *Id.*

²⁷⁸ *Id.* The group had been met with community opposition from previous flag displays on public land. In 2011, the group obtained approval from the Anderson County Commissioners' Court to fly the Confederate flag over the Anderson County Courthouse. Vernon, *supra* note 8. This led to protests from community members who pushed the SCV to take down the flag. *ETX Sons of Confederate Veterans Group Says They Are Misunderstood*, KLTV (Mar. 11, 2013, 11:49 PM), <https://www.kltv.com/story/21578735/etx-sons-of-confederate-veterans-group-says-they-are-misunderstood/>. This inspired the SCV to search for private property, leading to the construction of the plaza. Vernon, *supra* note 8. Right before the opening of the plaza, the group was denied participation in a town festival in March 2013. The Palestine Area Chamber of Commerce released a statement that said "[i]t is not in the community's best interest to allow politically divisive groups to participate" *SCV Misunderstood*, *supra*. This shows that many members of the Palestine community did not support the SCV as an organization.

²⁷⁹ *Flag Over Palestine*, *supra* note 276.

One example of a Confederate monument on private land is the monument behind the Georgetown Historical Society building in Delaware.²⁸⁰ The organization's building houses the Marvel Carriage Museum.²⁸¹ The SCV erected the monument in May 2007.²⁸² SCV raised money specifically for the monument and no public funds were involved.²⁸³ While state funds do not directly pay for the monument nor its upkeep, public funds generally support the non-profit organization.²⁸⁴ The historical society has received state grants for support of its museum and mission.²⁸⁵ This state money is the reason that the NAACP called on the state of Delaware to stop the issuance of an \$11,500 Grant-in-Aid to the historical society.²⁸⁶ The Governor said that he would support withdrawing the funding if the Confederate flag is not removed from the site.²⁸⁷

In July 2019, Senator Trey Paradee, a member of the General Assembly's Joint Finance Committee, recommended that the historical society be removed from the State's Grant-in-Aid list due to its open display of Confederate symbols. The bill was unanimously approved. Senator Paradee asserted that he did not "discuss the change in funding with the historical society in advance, though he would consider restoring the grant if they got rid of the Confederate symbols."²⁸⁸ Although the loss of grant funds appears to have a significant impact on the non-profit, it does not look to have persuaded the organization to look towards removing it from the non-

²⁸⁰ Cris Barrish, *Delaware Museum Group Loses Taxpayer Funding Over Confederate Monument*, WHYHY (July 23, 2019), <https://whyhy.org/articles/delaware-museum-group-loses-taxpayer-funding-over-confederate-monument/>.

²⁸¹ *Plan a Visit to Marvel Museum*, MARVEL CARRIAGE MUSEUM, <http://www.marvelmuseum.com/index.cfm> (last visited Feb. 3, 2021).

²⁸² James Fisher & Taylor Potter, *Confederate Flag to Stay Over Delaware Museum*, DEL. ONLINE (June 24, 2015, 5:48 PM), <https://www.delawareonline.com/story/news/local/2015/06/24/confederate-flag-stay-delaware-museum/29238451/>.

²⁸³ *Id.* (noting that this monument was erected in recognition of Delaware citizens joining the Confederacy).

²⁸⁴ Taylor Goebel, *Confederate Flag, Monument Hurt Delaware Nonprofit's State Funding*, DELMARVA NOW (July 23, 2019, 9:44 AM), <https://www.delmarvanow.com/story/news/2019/07/23/confederate-symbols-hurt-georgetown-historical-society/1754677001/>.

²⁸⁵ See Glenn Rolfe, *Petition Launched to Remove Confederate Statute, Flag in Georgetown*, DEL. ST. NEWS (June 22, 2020), <https://delawarestatenews.net/news/petition-launched-to-remove-confederate-statue-flag-in-georgetown/>.

²⁸⁶ Chris Flood, *NAACP: Remove Georgetown's Confederate Monument*, CAPE GAZETTE (Aug. 18, 2017), <https://www.capegazette.com/article/naacp-remove-georgetown-s-confederate-monument/140006>.

²⁸⁷ Steve Byas, *More Confederate Monuments Going Up — On Private Land*, NEW AMERICAN (Sept. 6, 2017), <https://www.thenewamerican.com/culture/history/item/26865-more-confederate-monuments-going-up-on-private-land>.

²⁸⁸ Goebel, *supra* note 284.

profit's grounds.²⁸⁹

C. *Private Cemeteries*

As we discussed in the introduction, Confederate monuments are also found in private cemeteries.²⁹⁰ Public spaces and public and private cemeteries serve as a compromise location for many removed monuments.²⁹¹ In this way, monuments are shifting back to cemeteries where the first Confederate monuments were initially erected. Indeed, historians have asserted that cemeteries, museums, and battlefields are the best places for Confederate monuments.²⁹² In museums and on battlefields, they can often be contextualized. In cemeteries, the monuments play a different, more funereal, role. With the removal to a cemetery, much of the problematic messaging around the statue is eliminated. These resources perhaps can move back toward memorializing the dead and honoring lost family members instead of serving as symbols of the Lost Cause mythology.

In some towns, cemeteries appear to be a location agreed upon by both local governments and heritage groups. In Winston-Salem, North Carolina, the UDC was found to have never conveyed a statue of a lone Confederate soldier that long stood in front of the county courthouse to the city (so the UDC retained ownership).²⁹³ The UDC was ordered to remove the statue, although in the end the city paid for the removal.²⁹⁴ Both the UDC and local government officials agreed to relocate the monument to a nearby private cemetery, Salem Cemetery, with the

²⁸⁹ Rolfe, *supra* note 285 (proving response of museum director to this loss of funding).

²⁹⁰ See, e.g., jseattle, *Confederate Memorial in Capitol Hill's Lake View Cemetery*, CAPITOL HILL SEATTLE BLOG (July 4, 2020, 5:00 PM), <https://www.capitolhillseattle.com/2020/07/confederate-memorial-in-capitol-hills-lake-view-cemetery-topped/> (discussing controversial UDC-owned monument located in privately-owned cemetery in Seattle).

²⁹¹ See, e.g., John Bacon, "*Johnny Reb*" No Longer Welcome in Norfolk: Virginia City Gets OK to Move Confederate Statue, USA TODAY (Oct. 23, 2019, 9:01 AM), <https://www.usatoday.com/story/news/nation/2019/10/23/norfolk-virginia-ok-move-confederate-monument-cemetery/2452814001/> (discussing the relocation of this monument); Elizabeth Tyree, *Norfolk Votes to Move Confederate Statue to Cemetery Where Soldiers Are Buried*, ABC13NEWS (July 8, 2020), <https://wset.com/news/local/norfolk-votes-to-move-confederate-statue-to-cemetery-where-soldiers-are-buried> (profiling this vote and the debate between Elmwood Cemetery and relocating this monument to a battlefield in the Shenandoah Valley). Elmwood Cemetery, which was ultimately chosen, is a public cemetery owned and operated by the City of Norfolk. See *Elmwood Cemetery*, CITY NORFOLK, <https://www.norfolk.gov/facilities/facility/details/Elmwood-Cemetery-47> (last visited Feb. 23, 2021).

²⁹² Emanuella Grinberg, *Where Confederate Monuments End Up*, CNN (Aug. 16, 2017, 3:56 PM), <https://www.cnn.com/2017/08/16/us/where-confederate-statues-end-up/index.html>.

²⁹³ Erika Williams, *Confederate Statue Removed from NC Courthouse Grounds*, COURTHOUSE NEWS SERV. (Mar. 12, 2019), <https://www.courthousenews.com/confederate-statue-removed-from-nc-courthouse-grounds/>.

²⁹⁴ *Id.*

mayor describing it as “a very dignified location.”²⁹⁵ The UDC has also agreed to remove monuments in Salisbury²⁹⁶ and Louisburg, North Carolina.²⁹⁷ Both will go to cemeteries. The Salisbury monument, called the “Fame Confederate Monument,” is a UDC monument built in 1905.²⁹⁸ It is a bronze statue of the muse Fame supporting a dying soldier.²⁹⁹ In 1908, the county gave the land to the UDC, making this a private monument.³⁰⁰ Fame appeared to be a public monument because of its prominent location in the center of the town.³⁰¹ It is being relocated to a city-owned cemetery.³⁰²

Other monuments across the South are also headed to private cemeteries. The John Castleman monument in Louisville, Kentucky was removed by the city on June 8, 2020.³⁰³ It is supposed to go to his burial site at Cave Hill Cemetery,³⁰⁴ but is currently in storage pending relocation.³⁰⁵ A Confederate statue known as Old

²⁹⁵ *Id.*; see also Tanya Marsh, *Cemetery Tourist: Salem Cemetery in Winston-Salem, NC*, FUNERAL L. BLOG (Nov. 22, 2016), <https://funerallaw.typepad.com/blog/2016/11/cemetery-tourist-salem-cemetery-in-winston-salem-nc.html> (providing overview of this historic cemetery).

²⁹⁶ *Confederate Statue ‘Fame’ Removed from Downtown Salisbury*, WSOCTV (July 7, 2020, 6:07 PM), <https://www.wsoctv.com/news/local/confederate-statue-salisbury-be-moved-overnight-city-says/X6T4RMHQ75ADDA2OKFGZNMUHM/>.

²⁹⁷ Carey Johnson, *Monument Case Headed for a Hearing*, FRANKLIN TIMES (July 2020), <https://www.thefranklintimes.com/news.php?viewStory=44767> (describing a law suit that argues (1) that the town didn’t have the right to remove the monument because it wasn’t the property owner, (2) that the town failed to follow North Carolina’s statue statute, and (3) the town violated open meeting laws when deciding to remove); see also Jack Kessler, *Lawsuit Claims Removal of Louisburg Confederate Statue Illegal*, WAKE WEEKLY (July 2, 2020), <https://wakeweekly.com/stories/lawsuit-claims-removal-of-louisburg-confederate-statue-illegal,211522?> (noting that the Louisburg relocation process may be delayed by pending litigation).

²⁹⁸ *Fame Confederate Monument, Salisbury*, NCPEDIA, <https://www.ncpedia.org/monument/confederate-monument-state> (last visited Feb. 3, 2021).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *United Daughters of the Confederacy Sign Agreement to Move ‘Fame’ Monument in Salisbury*, WBTB (June 22, 2020, 2:23 PM), <https://www.wbtv.com/2020/06/22/united-daughters-confederacy-sign-agreement-move-fame-monument-salisbury/>.

³⁰² See *About Old Lutheran Cemetery*, CITY SALISBURY, <https://salisburync.gov/Government/Public-Works/Cemeteries/Old-Lutheran> (last visited Feb. 23, 2021) (providing overview of cemetery history; the cemetery was deeded to the City in 1980 so it is a public cemetery, although one closed to new burials).

³⁰³ Ben Tobin, *Statue of Former Confederate Soldier Turned Lincoln Sympathizer Quietly Sent to Storage*, LOUISVILLE COURIER J. (June 8, 2020, 6:34 AM), <https://www.courier-journal.com/story/news/local/2020/06/08/john-b-castleman-statue-louisville-taken-down-cherokee-triangle/3173739001/>.

³⁰⁴ *Cemetery Map*, CAVE HILL CEMETERY, <https://www.cavehillcemetery.com/about/map/> (last visited Feb. 3, 2021).

³⁰⁵ Tobin, *supra* note 303.

Joe, in Gainesville, Florida, was recently returned to the UDC, who placed it in the private Oak Ridge Cemetery south of the city.³⁰⁶

Not only are relocations of old monuments occurring, but also some new monuments are occasionally appearing in cemeteries. For example, in 1999, a local chapter of the SCV dedicated the Arizona Confederate Veterans Monument in Greenwood Memory Lawn Cemetery, a private cemetery.³⁰⁷

However, not all cemeteries are willing to accept relocated Confederate monuments even if the memorialized soldiers are already buried there.³⁰⁸ A private cemetery in Baltimore, where Confederate soldiers are buried, rejected the city's proposal to relocate Confederate monuments there, with the cemetery's president "unequivocally" opposing any Confederate monuments on their grounds.³⁰⁹ Publicly-owned cemeteries, including federally owned and administered cemeteries, are also rejecting requests that they serve as the custodians of these statues.³¹⁰

IV. WHAT CAN WE DO ABOUT THEM? WHAT SHOULD WE DO ABOUT THEM?

In other work, we detailed how to conceptually approach removal efforts for Confederate monuments on public lands.³¹¹ As the tide of public opinion regarding Confederate monuments shifts, many local governments are supportive of removal, but can be stymied by the need to deal with multiple legal issues or barriers. We have also specifically noted struggles where Confederate monuments are encumbered with conservation easements, or are designated as historic sites or resources

³⁰⁶ Andrew Caplan, *Confederate Statue Removed from Downtown Gainesville*, GAINESVILLE SUN (Aug. 14, 2017, 9:54 AM), <https://www.gainesville.com/news/20170814/confederate-statue-removed-from-downtown-gainesville>.

³⁰⁷ Antonia Noori Farzan, *Here's the Real History Behind Arizona's Confederate Monuments*, PHX. NEW TIMES (June 7, 2017, 6:00 AM), <https://www.phoenixnewtimes.com/news/arizona-confederate-monuments-state-capitol-greenwood-cemetery-southern-arizona-veterans-cemetery-9392610>; Cydney Henderson, *Confederate Monuments in Arizona: Should They Come Down?*, USA TODAY (Aug. 16, 2017, 8:00 PM), <https://www.usatoday.com/story/news/local/arizona/2017/08/16/z-arizona-confederate-monuments/570467001>.

³⁰⁸ The Veteran's Association, as a blanket rule, does not allow relocation of Confederate monuments into federal veterans' cemeteries.

³⁰⁹ Scott Calvert & Valerie Bauerlein, *After Confederate Monuments Fall, Where Do They Go?*, WALL STREET J. (July 23, 2020, 9:00 AM), <https://www.wsj.com/articles/after-confederate-monuments-fall-where-do-they-go-11595509200>.

³¹⁰ See, e.g., *City Manager Touts Trout Creek Fish Camp for Confederate Memorial*, HISTORIC CITY NEWS (Aug. 6, 2020), <https://historiccity.com/2020/staugustine/news/city-manager-touts-trout-creek-fish-camp-for-confederate-memorial-117832> (noting that the VA had rejected St. Augustine's relocation request).

³¹¹ Owley & Phelps, *Life and Death*, *supra* note 15, at 8.

under state or federal law.³¹² While some of that guidance is helpful, those articles are written for communities where the public landowner seeks removal through a political and legal process. This is simply not the situation that private Confederate monuments present.

Displaying a Confederate memorial on private land is within a landowner's rights and is generally protected by the First Amendment as long as the landowner complies with other laws, like nuisance and zoning ordinances. While local laws can control the time and manner of speech (through regulations governing height restrictions, setback rules, etc.), they cannot categorically prevent the placement of Confederate memorials because a blanket ban would result in potentially limiting all monuments regardless of topic.³¹³ Yet, these tools can be deployed in the same manner as restrictions on sizes of flags or requirements for parking. Communities should also evaluate whether the monuments will likely lead to increased security costs from public officials or have potential to become a public nuisance.

The truth is that there are few tools for removing Confederate monuments on private land. And frankly, even if constitutionally permissible, it may be unwise to try to limit landowners having the freedom to build monuments (regardless of the subject matter) on their land. However, this Article urges local governments to consider ways to minimize the impacts of such monuments. In particular, local governments should attempt to make it clear that such monuments are neither public nor publicly supported. Communities should also ensure that, by their disposal of formerly public monuments to private landowners, they are not contributing to this problem by essentially outsourcing the issue, removing it from the public domain, and potentially creating other problems beyond their ability to reach or control.

This Section details a few of the available tools that can be used to limit or contextualize monuments. First and foremost, local governments should be cautious when transferring ownership—ensuring that public money is not supporting the monuments and, where possible, clearly demonstrating that the Confederate monuments are not public. Where available, governments can add signs and contextualization to explain the monument's meaning and counteract its messaging.

³¹² Phelps & Owley, *Etched in Stone*, *supra* note 14, at 682.

³¹³ SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 409 (2012). There is also the difficult question of line drawing—or determining the appropriate scope of governmental authority under the First Amendment to obscure or discourage Confederate monuments on private land. We argue that communities should look for ways to signal that these private monuments are not on public land and are not public speech, but where does this potentially go too far and actually impinge on protected First Amendment speech? This line/balancing is outside of the property lens through which this Article is focused and is an issue that we hope to take up in future work.

A. Careful Transfers with Meaningful Restrictions

State and local governments (along with universities and other owners of Confederate monuments) may want to rush to get monuments off their lands and out of their hands, and they cannot be blamed for this. Yet the Montgomery County, Maryland, and Dallas, Texas, examples show us that transfers to private parties can mean a loss of control over the display of the monument.³¹⁴

Montgomery County's conveyance of the Johnny Reb statue offers a valuable lesson. It appears that the local government was so glad to find a willing party to accept the monument that it did not think too deeply about the monument's new home. In less than two years, its new home, which was in some ways more publicly visible, also proved unworkable. In trying to craft a solution, local governments often seek museums or individuals willing to display the monuments. County Executive Leggett emphasized the need to find a location that local residents would be able to easily visit.³¹⁵ The county's choice of location was a misstep. Displayed in a public place at a ferry crossing, the statue of Johnny Reb greeted people upon entering the state through this crossing.³¹⁶ It is likely that many people would have perceived the location as public land and assumed that it was supported by the town or county. The county did not require any special contextualization and as it agreed to (and paid for) the relocation, it could not easily argue that it did not know where or how it would be displayed.

The concerns seen with Johnny Reb show why some governments have taken the further step of adding restrictions in agreements related to conveyance or transfer of Confederate monuments. The types of restrictions involved differ, but as seen above, they tend to geographically limit where the monument can be displayed. For example, the City of Dallas imposed restrictions preventing the monument from being displayed in the Dallas-Fort Worth metropolitan area. This is a sensible policy but must be carefully considered to avoid unintended consequences. Many local governments are requiring relocation outside their area but leave open the option for public displays elsewhere.³¹⁷ No observations have been made concerning requirements of contextualization, signage, or other similar restrictions that might limit the messaging related to the monument once it has left public ownership.

We urge governments considering the removal of Confederate monuments to limit transferees to museums, battlefields, or other places where contextualization

³¹⁴ See, e.g., Charlotte Rene Woods, *Albemarle County Votes to Remove Its Confederate Monuments from Court Square*, CHARLOTTESVILLE TOMORROW (Aug. 6, 2020, 8:53 PM), <https://www.cvilletomorrow.org/articles/albemarle-county-votes-to-remove-its-confederate-monuments-from-court-square/> (noting that vote to remove these monuments and community concern that transferring these monuments to private ownership may create similar issues).

³¹⁵ Metcalf, *supra* note 120.

³¹⁶ Turque, *supra* note 122.

³¹⁷ Mervosh, *supra* note 173.

can occur and in a setting that is suited to having these statues present. Periodic reevaluations and reinterpretations of the past challenge oversimplified and unnuanced historical understandings and assumptions, and generally provide a more unvarnished or complex picture of past events.³¹⁸ This reevaluation has not only impacted Confederate monuments, but has also extended to other monuments and the renaming of buildings and structures honoring Christopher Columbus,³¹⁹ Cecil Rhodes,³²⁰ and John Henry Boalt,³²¹ to name a few recent examples for this trend to rethink what values society recognizes or holds up as exemplars.³²² As noted above, monuments to the Lost Cause were not solely focused on memorializing the Confederacy, but also focused on other aspects of Antebellum southern life and culture. Within the museum context, this has required many historic sites to shift their interpretation of these places to tell a more complete and accurate story of the past. One prominent example of this reinterpretation is the relatively recent effort to install recreations of slave dwellings at Monticello.³²³ The National Trust for Historic Preservation, the national preservation umbrella advocacy group, now supports the relocation of formerly public monuments to “museums or other places where they may be preserved so that their history as elements of Jim Crow and racial injustice can be recognized and interpreted.”³²⁴

Without receiving assurances that the monuments will be appropriately displayed, local governments may be better off simply placing these resources in storage until they can craft an appropriate solution to address these pressing concerns.

³¹⁸ Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 3 (2013).

³¹⁹ Pamela Avila, *Downtown L.A.’s Christopher Columbus Statue Is Being Removed for Good*, L.A. MAG. (Nov. 9, 2018), <https://www.lamag.com/citythinkblog/los-angeles-columbus-statue/> (discussing the removal of this bronze statue as well as arguments over its long-term ownership by the City).

³²⁰ Stephen Castle, *Debate Over Cecil Rhodes Statue at Oxford Gains Steam*, N.Y. TIMES (Dec. 24, 2015), <https://www.nytimes.com/2015/12/25/world/europe/cecil-rhodes-statue-oxford.html> (profiling the debate at the University of Cape Town (South Africa) and at Oxford (United Kingdom) over monuments commemorating the complicated legacy of Cecil Rhodes).

³²¹ Gretchen Kell, *UC Berkeley Removes Racist John Boalt’s Name from Law School*, BERKELEY NEWS (Jan. 30, 2020), <https://news.berkeley.edu/2020/01/30/boalt-hall-denamed/> (discussing the former name of the law school building, Boalt Hall, and its relatively recent renaming in light of John Henry Boalt’s racial views).

³²² KIRK SAVAGE, *STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR AND MONUMENT IN NINETEENTH-CENTURY AMERICA* x–xiii (2018).

³²³ See Farah Stockman, *Monticello Is Done Avoiding Jefferson’s Relationship with Sally Hemmings*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/sally-hemmings-exhibit-monticello.html> (profiling recent exhibitions at the site focused on Jefferson, Sally Hemmings, and slavery generally).

³²⁴ *Statement on Confederate Monuments*, *supra* note 22.

B. Public Distancing from Private Monuments

Where confusion is possible, public entities should add signs, or other monuments and elements that clarify that private monuments are private. For example, local governments could erect billboards or signage near private monuments like the Confederate Memorial of the Wind or near the Nathan Bedford Forrest statue outside of Nashville to provide this context and to clearly dissociate the public interest from the private monumentation. State and local governments could also require all private parks (which would cover those run by the SCV and others) to clearly label themselves as private parks through local zoning and land-use regulation.

At times, as profiled above, Confederate monuments were strategically placed to make them appear to be part of public land, thus sending a public message. This is the case with the Turner Ashby monument on James Madison's campus.³²⁵ Owners of the adjacent public land could also add fencing, landscaping, signs, or other elements to affirm that the community does not support the message and intention of the monument.

C. Stop Facilitating Private Confederate Monuments

Lastly, all levels of government should end support of these private monuments where possible, both directly and indirectly.

Public support for Confederate monuments happens at different levels and in myriad ways. For example, on a small scale, moves like the initial removal of landscaping near the Nathan Bedford Forrest monument in Nashville make it more visible to the public.³²⁶ While this may seem like a passive activity with little cost and effect, the act of having public employees clear away vegetation to increase the reach of a Confederate monument sends a clear signal that the government supports the monument and its message. The government thereby amplifies the impact of a private monument. These efforts are hopefully now being reversed.

Some support comes in terms of public funds supporting those organizations that display the monuments. For example, the Georgetown Historical Society in Delaware receives public funds to support some of the activities and upkeep of their land through a state grant-in-kind program.³²⁷ While the money does not go directly to the monument, which was erected solely with private funds, the continued awarding of grants to the Georgetown Historical Society has been offensive to many given its role in prominently displaying this message on its grounds.³²⁸ Eliminating the funding for organizations displaying these monuments in a fashion similar as the State of Delaware has done with grants to the Georgetown Historical Society

³²⁵ U.S. DEP'T OF THE INTERIOR, *supra* note 181.

³²⁶ Garrison, *supra* note 109.

³²⁷ Barrish, *supra* note 280.

³²⁸ Tavernise, *supra* note 12.

may not result in removal or contextualization but avoids indirectly supporting the continued display of this monument.³²⁹

In the end, local, state, and federal governments should take a close look at their practices to ensure that they are not taking steps towards supporting the magnification of the messaging that is conveyed by private monuments. This involves community steps towards disposing of formerly public monuments in a responsible and considered manner that does not result in simply relocating the issue, and thereby avoiding signaling public support for these private monuments (particularly those adjacent to public lands) through state funding. The line between public and private interests in these moments is blurred, as is the case with most property interests, but any steps that communities can take to clarify or eliminate monumental blurriness will help to rectify how the public understands private monuments and the message that they represent.

V. CONCLUSION

Despite years of resistance and inaction, public support for the removal of public Confederate monuments has seemingly changed overnight in favor of removal of public monuments in response to the death of George Floyd in Minneapolis and other similar tragedies across the country.³³⁰ We have been tracking monument removal issues since 2017. While after Charlottesville and the Unite the Right Rally, and Dylann Roof's murder of congregants in Charleston, South Carolina, there was some initial movement towards removal, this feels qualitatively different and the initial results on the ground as far as the number of monuments that have been removed and relocated seems to bear this out.

There seems to be a much stronger public reaction against the use of Confederate iconography than in the past. To cite but a few non-monument examples, the state of Mississippi seems poised to remove the Confederate battle flag from its official state flag,³³¹ and NASCAR has banned the display of Confederate flags at its

³²⁹ Even more subtle are tax implications. Where the private monument owners are nonprofit organizations, such as the SCV and UDC, they may receive significant tax benefits. In many states they will also be exempt from state property taxes including for the lands where they display their confederate statues (as well as from other state and local taxation). Their federal 501(c)(3) status also suggests that the government believes that they support the public interest. Perhaps even more hidden is the public support associated with funding the acquisition of conservation easements that potentially burden some private monuments. It is not clear that much can be done to limit support of these organizations through the tax code but awareness of this support is important to note.

³³⁰ See generally Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/us/confederate-statues-george-floyd.html>.

³³¹ Debbie Elliot, *Mississippi Governor Signs Law Removing Confederate Design from State Flag*, NPR (June 30, 2020, 6:25 PM), <https://www.npr.org/sections/live-updates-protests-for>

races³³²—demonstrating a public and corporate shift away from these controversial symbols. This seems to signal a move to a new front in the ongoing conflict: a shift to private monumentation. We believe this will have a positive and meaningful effect on the commemorative landscape. But how positive and how meaningful will depend on how well communities grapple with these monumental legacies by minimizing their association and support of landowners and organizations displaying private monuments, and by making responsible decisions about how to dispose of and relocate these statues.

racial-justice/2020/06/30/885779855/mississippi-governor-signs-law-removing-confederate-design-from-state-flag.

³³² Doha Madani, *NASCAR Bans Confederate Flags at its Events*, NBC NEWS (June 20, 2020, 2:21 PM), <https://www.nbcnews.com/news/us-news/nascar-bans-confederate-flags-its-events-n1229506>.