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The Removal of Confederate Monuments and the Effect of Religious Symbol Jurisprudence

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INTRODUCTION

On August 12, 2017, white nationalists descended on Charlottesville, Virginia to protest the planned removal of monument honoring Robert E. Lee, a Confederate general in the Civil War.[1] As protestors clashed with counter-protestors, one young woman was killed and nineteen people were injured, five critically.[2] The incident has brought the removal of Confederate monuments into national prominence and into the courtroom.

The Southern Poverty Law Center has produced a report documenting Confederate monuments, place names and symbols in public spaces nationwide.[3] As of February 2019, they have identified 114 Confederate symbols that have been removed.[4] 1,747 remain.[5] The issue remains an immediate concern for this country. Opponents of these monuments[6] see them as symbols of oppression that further institutionalize racism. Proponents see them as teaching tools, memorials of a shared cultural history. Each side has found support.

As the Nation begins to reckon with its Civil War history, it can look to the lessons learned in the legal battlefield where the fight for the removal of religious symbols on public property continues to rage. The Supreme Court has taken a turn in favor of maintaining those symbols, pointing to the importance of history and tradition, and making the challenges for the removal of Confederate monuments clear. While seeking to avoid conflict and discrimination, the Supreme

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[1] Meghan Keneally, *What to know about the violent Charlottesville protests and anniversary rallies*, ABC News (Aug. 8, 2018). https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500.

[2] *Id.*

[3] S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* (Feb.01,2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy.

[4] *Id.*

[5] *Id.*

[6] This paper will refer to Confederate symbols interchangeably as "symbols," and "representations" as well as "monuments" and "statues" although, of course, these symbols include more than figures made of marble or bronze. The Southern Poverty Law Center identified schools and college, military bases, counties and cities, lakes, bridges and roads named for Confederate icons, state holidays, flags, and mile markers commemorating Confederate soldiers, battles, or causes, among others. Id.

Court risks eliminating a viable judicial solution by suppressing minority views and legitimizing concerns of the majority in favor of preservation. This lesson is an important one for those seeking to remove Confederate monuments.

This paper evaluates the changing religious monument jurisprudence and establishes what we can learn and apply to the removal of Confederate monuments. Section I reviews the evolution of the case law on religious monuments on public property, including the relevant tests proposed by Supreme Court Justices O'Connor, Kennedy, Breyer, and Kavanaugh, as well as the views of other justices on the topic. In Section II, this paper explores the official response to the removal of Confederate monuments, both in and out of the courtroom. Section III applies the lessons learned through religious monument case law to Confederate monuments, and in some cases, where Confederate monument case law may show an impact on religious monument jurisprudence. Finally, Section IV presents viable remedies in both religious monument and Confederate monument case law and executive action to evaluate whether such solutions can offer resolution to public officials just approaching these issues before the cases reach court and, where they have reached the court, to judges seeking an inclusive solution.

I. RELIGIOUS MONUMENTS ON PUBLIC PROPERTY AND THE CHANGING LEGAL LANDSCAPE

The courts examine religious symbols on public property under the Establishment Clause which prohibits the government from officially recognizing any single religion over another.[7] The cases evaluating religious symbols are marked by a splintered court, each with their own unique view of the Establishment Clause and many with their own legal tests. Taken together, these cases

[7] U.S. CONST. amend. I, § 1.

show a steady movement towards history and tradition, resulting in broad preservation for religious monuments on public property.

Following *Lynch v. Donnelly*,[8] in which the Court evaluated the validity of a Pawtucket, Rhode Island Christmas display which included the creche among many other secular symbols, the Court has turned from the *Lemon* test, the traditional Establishment Clause test, towards other tests created and promoted by different members of the Court. In *Lynch*, the court followed the *Lemon* test which asks (1) does the government action have a secular purpose; (2) is its primary effect one that neither "advances nor inhibits" religion; and (3) does the government action "foster excessive government entanglement with religion."[9] In accordance with the *Lemon* test, the Court upheld the display, holding that the city had a secular purpose, the display did not impermissibly advance religion, and there was no excessive entanglement between the government and religion.[10] In her concurrence in *Lynch*, Justice O'Connor introduced the endorsement test, finding that the town's purpose in including the creche was a celebration of a public holiday through traditional symbols and not an endorsement of any one religion.[11]

Justice O'Connor's endorsement test was then accepted by the majority in *Allegheny County v. American Civil Liberties Union.*[12] Here, the Court held that a creche on the Grand Staircase of the Allegheny County Courthouse was unconstitutional, but the menorah, placed with a Christmas Tree and a sign celebrating liberty, was constitutional.[13] Using the endorsement test, Justice Blackmun held that the creche was indisputably religious and thus, and endorsement of Christianity.[14] However, the menorah was held to be a cultural symbol as well as a religious symbol

[8] 465 U.S. 668 (1984).
[9] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[10] *Lynch*, 465 U.S. 668 at 685.
[11] *Id.* at 691 (O'Connor, J., concurring).
[12] 492 U.S. 573 (1989).
[13] *Id.* at 611-613, 612.
[14] *Id.* at 612-614.

and, therefore, its placement with the tree and sign reinforced only the cultural aspects of the symbol, making it secular.[15] Justice Kennedy, writing for the dissent, introduced a new test: the coercion test, which is based on principles of history and tradition.[16] Under the coercion test, Justice Kennedy held that both symbols were constitutional because neither compelled an objective observer to participate, there were no tax dollars put toward the display, and that the symbols themselves were passive, adding that a disgruntled observer was free to ignore the display.[17]

The Court declined to extend the endorsement test to expressions of private speech in *Capitol Square Review and Advisory Board v. Pinette*.[18] There, the Ohio Klu Klux Klan applied to the City of Columbus for a permit to erect a cross on the grounds of the State Capital, which the Court considered to be a traditional public forum.[19] Writing for the majority, Justice Scalia held that private religious expression does not violate the Establishment Clause when it is conducted in a public forum that has historically been open to all.[20]

While these cases addressed temporary displays, their reasoning was then applied to more permanent installations. In *McCreary County v. American Civil Liberties Union*,[21] the Court evaluated two displays depicting the Ten Commandments in the halls of two courthouses in Kentucky. The displays were posted in a high traffic area; then, after the litigation commenced, posted among many other civic documents, some of which touched on religion; then reposted with

[15] *Id.* at 613-621.
[16] *Id.* at 662 (Kennedy, J., dissenting) ("In determining whether there exists an establishment, or a tendency toward one, we refer to other types of church-state contracts that have existed unchallenged throughout our history or have been found permissible in our case law.").
[17] *Id.* at 664.
[18] 515 U.S. 753, 763-769 (1995).
[19] *Id.* at 757-759.
[20] *Id.* at 765-767.
[21] 545 U.S. 844 (2005).

an explanation about the historical and legal significance of each document.[22] Here, the Court turned back to the *Lemon* test.[23] Justice Souter struck down the display, holding that the displays were erected with a predominantly religious purpose.[24] Justice O'Connor concurred, emphasizing that the endorsement test is founded on the premise that the First Amendment protects citizens of all faiths.[25] Justices Scalia, Roberts, Thomas and Kennedy dissented, with Justice Scalia highlighting the traditional uses of religious phrases in civic ceremony.[26]

Justice Scalia's dissent in *McCreary* represented a movement towards history and tradition when evaluating the validity of religious symbols on public land that has continued to persist through today.[27] In *Van Orden v. Perry*,[28] the Court evaluated another Ten Commandments display, this a six-foot monolith which was placed between the state capitol and the supreme court building in Austin, Texas.[29] The monument was donated by the Fraternal Order of Eagles, a national non-profit civic organization and paid for, in part, by Cecil B. DeMille to promote his film "The Ten Commandments."[30] Here, the Court fractured. Chief Justice Rehnquist announced the judgment of the court and wrote an opinion in which Justices Scalia, Kennedy and Thomas joined. He dismissed the *Lemon* test and instead focused on "the strong role played by religion and religious traditions throughout [the] Nation's history."[31] In doing so, he listed all the places in the Washington, D.C. that depict religious symbols, ultimately determining that the displays "bespeak the rich American tradition of religious acknowledgements."[32] Rather than examining whether the

[22] *Id.* at 852-857.
[23] *Id.* at 859.
[24] *Id.* at 869.
[25] *Id.* at 881-885. (O'Connor, J., concurring).
[26] *Id.* at 885-895 (Scalia, J., dissenting).
[27] *See* Kermit V. Lipez, *Reflections on the Church/State Puzzle*, 72 ME. L. REV. 325 (2020).
[28] 545 U.S. 677 (2005).
[29] *Id.* at 681-682.
[30] Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2083 (2019) (noting the facts in *Van Orden*.)
[31] *Van Orden*, 545 U.S. at 683.
[32] *Id.* at 690.

symbols were appropriate, he used their proliferation to justify their existence. Moreover, he held the placement of the Ten Commandments to be "passive," just as Justice Kennedy did in his dissent in *Allegheny County*, meaning that an observer is free to ignore the display.[33]

With Justice Thomas also filing a concurrence and Justices Stevens and Ginsburg filing a dissent, Justice Breyer's concurrence became the controlling opinion. He eschewed other formal legal tests (*Lemon*, endorsement, and coercion) in favor of a test of legal judgment, examining the purpose of the religion clause, the context of the issue and the consequences of the decision.[34] In examining the last point, he held that to reach a decision in favor of removing the monument based on its religious context would be indicative of "hostility" towards religion.[35] Since, as Justice Breyer contended, the purpose of the Religion Clauses is to avoid divisiveness based on religion, such hostility would go against the Constitution by promoting conflict.[36]

In 2019, the Court renewed the application of history and tradition in *American Legion v. American Humanist Association*.[37] This time the Court examined the Bladensburg Cross, a World War I memorial maintained by the Maryland-National Capital Park and Planning Commission.[38] In the parts where the Court was able to come to a majority, the decision held that the Bladensburg Cross did not violate the Constitution because the cross has evolved to be a secular symbol.[39] Justice Alito, writing for the majority, noted that the purposes of a monument may be difficult to

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[33] *Id.* at 691.
[34] *Id.* at 698-705 (Breyer, J., concurring).
[35] *Id.* at 704.
[36] *Id.*
[37] 139 S. Ct. 2067 (2019).
[38] *Id.* at 2074.
[39] *Id.* at 2085-2087. The Court splits on the issue of the *Lemon* test. Justice Alito denounces the test, and Justice Breyer, author of the legal judgment test, joins him. *See id.* However, Justice Kagan preserves the Lemon test, finding some merit in its "focus on purposes and effects." *Id.* at 2094 (Kagan, J. concurring). Yet, federal courts have since begun to express doubt in the viability of the *Lemon* test. *See* Hunt Valley Baptist Church v. Balt. Cty., 2020 U.S. Dist. LEXIS 22054 (D. Md. 2020) (4th Circuit); Kondrat' Yev v. City of Pensacola, 2020 U.S. App. LEXIS 5088 (11th Cir. 2020) (on remand from U.S. Supreme Court for further consideration in light of *American Legion*.)

discern and could multiply with the passage of time, saying that as society embraces more religions, a community may wish to preserve religious monuments as a way to honor historical significance or "their place in a common cultural heritage."[40]

While dismissing Justice Breyer's legal judgment test with its focus on purpose, Justice Alito did give merit to his concern that the removal of religious monuments and symbols will be seen as "aggressively hostile" to religion, again relying on history and tradition to justify his concern.[41] As an example, Justice Alito recognized that the State of California contains many cities with religiously affiliated names. Yet, he said, while few would say California is promoting a religious message, to remove all the names would certainly be viewed as hostile towards religion.[42] Ultimately, the Court gives rise to a presumption of constitutionality for all old religious monuments.[43]

While not controlling, the concurring decisions touch on the same themes. Justice Gorsuch outright dismisses (with no small amount of disdain) the assertion that the establishment of one religion over another can cause actionable offense, holding that an offended observer does not have standing in these cases.[44] In doing so, he fails to recognize religious diversity[45] and does so while touting a "historically sensitive" approach, asking whether the challenged symbol fits within the tradition of this country.[46] Justice Kavanaugh, in his own concurrence, declares the death of

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[40] *Id.* at 2084. ("With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity.")
[41] *Id.* at 2085. ("Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing and divisive.")
[42] *Id.* at 2087.
[43] *Id.* at 2082 and 2085. While this seems to be a plurality in which Justice Kagan does not join, it is again repeated at the end of Section II (B). Even without Justice Kagan, a majority of the court would likely support a presumption of constitutionality for old religious monuments, with Justices Gorsuch and Thomas as supporters of non-coercive monuments, even though they did not join the majority opinion.
[44] *Id.* at 2098-2103 (Gorsuch, J., concurring).
[45] Kermit V. Lipez, *Reflections on the Church/State Puzzle*, 72 ME. L. REV. 325, 356 (2020).
[46] *American Legion*, 139 S. Ct. at 2102.

Lemon and the application of a "history and tradition test."[47] Adopting elements of Justice Kennedy's coercion test, Justice Kavanaugh holds that because the entire practice of displaying religious memorials on public land is not coercive and is rooted in history and tradition, the Bladensburg Cross did not violate the Constitution.[48] Recognizing the value of history as a guide, Justice Kagan agrees with Justice Alito's approach, but limits its application to a "case-by-case" basis.[49]

State courts have also confronted the issue of religious monuments on public land, where state constitutions offer some help for those seeking their removal. Many state constitutions include provisions for stricter church-state separation.[50] In *Prescott v. Oklahoma Capitol Preservation Commission,*[51] the Oklahoma Supreme Court examined a Ten Commandments monument placed on the grounds of the Oklahoma State Capitol.[52] The court looked at the plain language of the statute to determine the intent, holding that the framers specifically included a provision that the public money may not even indirectly benefit religion.[53] The court held that the monument violated the Oklahoma Constitution, which prohibits public money or property from being spent for the use, benefit or support of a religion.[54] While the opinion did mention *Van*

[47] *Id.* at 2092 (Kavanaugh, J., concurring).
[48] *Id.* at 2093.
[49] *Id.* at 2094.
[50] The majority of state constitutions contain what is commonly referred to as a "Blaine Amendment," which prohibit state governments from financing "religious worship, exercise or instruction" and requires that schools receiving state aid be free from religious influence or control. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns,* 26 HARV. J. L. &. PUB. POL'Y 551, 554-555 (2003). Such is the case here. *See also* Locke v. Davey, 540 U.S. 714 (2004) (holding that a state may deny scholarship funding for the pursuit of theology degree), Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017) (where churches are exempt from a program providing public funding, the Free Exercise clause is violated); Espinoza v. Mont. Dep't of Revenue, 139 S. Ct. 2777 (2019) (holding that a state law that allows funding for education but prohibits funding for religious schools is a violation of the Free Exercise Clause).
[51] 373 P.3d 1032 (2015).
[52] *Id.* at 1033.
[53] *Id.*
[54] *Id.* at 1034.

Orden, the court distinguished it, holding that the opinion rests on the Oklahoma Constitution, not the Establishment Clause.[55]

II. OFFICIAL TREATMENT OF THE REMOVAL OF CONFEDERATE MONUMENTS

Like religious symbols on public land, Confederate monuments drive a wedge between those who seek to preserve them for their history and those who see them as a symbol of oppression, designed to alienate an entire sector of the community. However, in dealing with Confederate monuments the cultural stakes are high because wounds still exist from the Civil War and its aftermath. In their examination of Confederate monument case law, Jess R. Phelps and Jessica Owley make a statement which highlights that distinction:

> "Confederate monuments are largely not statues honoring lost love ones erected in the aftermath of the war. Instead, white Southern civic groups established monuments in the wake of Reconstruction and later Jim Crow to reinforce cultural norms that treated black and other non-white people as second-class citizens."[56]

In fact, most of these monuments were built between 1890 and 1950.[57] According to the Southern Poverty Law Center, of the 114 Confederate symbols which have been removed, forty-eight are monuments, thirty-five are name changes in schools and one college, ten are roads and three are flags. Leading the states was Texas, which removed thirty-three symbols, followed by Virginia, which removed fifteen, Florida, ten, Tennessee, eight, Georgia, six, Maryland, six, and North Carolina, four. Confederate flags have been removed from the capitol grounds in South

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[55] *Id.*

[56] Jess R. Phelps and Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, FL. L. REV. 62. (2019). This has been referred to as "The Cult of the Lost Cause," which served to systematically "rewrite" the narrative surrounding the loss of the Confederacy through statues and other Confederate symbols. *See* Editorial: *New Orleans Mayor on Removing Confederate Monuments*, Time Magazine, May 23, 2017, https://time.com/4790674/mitch-landrieu-new-orleans-confederate-monuments-speech/.

[57] S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* at 14 (Apr. 21, 2016), https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf.

Carolina and Alabama, but are represented in seven public places in five former Confederate states.[58]

New Orleans Mayor Mitch Landrieu rose to national prominence in 2017 by championing the movement to remove four monuments in his own city memorializing Confederate figures. The last to be removed was a statue of Robert E. Lee who stood on a sixty-foot pedestal in the middle of a traffic circle.[59] Those who opposed the move claimed that the monuments represented a central part of Louisiana's cultural identity.[60] In his comments on the day of the removal, Mayor Landrieu pushed back on those claims, drawing a line between remembering history and revering it.[61]

In Summer 2020, both the United States Senate and the House of Representatives passed bills which included the removal of Confederate names from Army bases.[62] Ten Army bases are named for Confederate leaders.[63] Despite open opposition from President Trump, who calls the effort an attempt to rewrite history, both Democrat and Republican leaders supported the measure which would allow input from the communities.[64] On December 11, 2020, the House bill was presented to the President who has yet to act on it.[65]

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[58] S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* (Feb. 01, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy.
[59] Amber Nicholson, *Robert E. Lee Monument*, New Orleans Historical, https://neworleanshistorical.org/items/show/1279.
[60] Tegan Wendland, *With Lee Statute's Removal, Another Battle of New Orleans Comes to a Close*, NPR (May 20, 2017), https://www.npr.org/2017/05/20/529232823/with-lee-statues-removal-another-battle-of-new-orleans-comes-to-a-close.
[61] Editorial: *New Orleans Mayor on Removing Confederate Monuments*, Time Magazine (May 23, 2017), https://time.com/4790674/mitch-landrieu-new-orleans-confederate-monuments-speech/.
[62] National Defense Authorization Act, H.R. 6395, 116th Cong. (2020).
[63] Camp Beauregard, Louisiana; Fort Benning, Georgia; Fort Bragg, North Carolina; Fort Gordon, Georgia; Fort A.P. Hill, Virginia; Fort Hood, Texas; Fort Lee, Virginia; Fort Pickett, Virginia; Fort Polk, Louisiana; Fort Rucker, Alabama.
[64] Connor O'Brien, *Senate clears bill removing Confederate names from military bases, setting up clash with Trump*, Politico (July 23, 2020), https://www.politico.com/news/2020/07/23/senate-defense-bill-ndaa-bases-trump-380362.
[65] H.R. 6395 – National Defense Authorization Act for Fiscal Year 2021, Congress.gov https://www.congress.gov/bill/116th-congress/house-bill/6395.

Yet, in the face of this groundswell, seven states have enacted laws to protect their Confederate monuments.[66] In 2017, Alabama enacted the Alabama Memorial Preservation Act, prohibiting local governments from removing, altering or renaming monuments more than forty years old.[67] In 2015, North Carolina passed a law requiring General Assembly approval prior to the removal of a monument.[68] In 2013, Tennessee lawmakers required the state's historical commission to complete a lengthy process, including public notice, before making changes to any monuments.[69] In 2001, as part of a compromise to remove a Confederate symbol from the state flag, Georgia lawmakers protected all Confederate memorials.[70] In 1972, a Mississippi law was passed to protect war memorials.[71] Further measures in Florida, Texas, Kentucky and Louisiana have failed.[72]

Some of these cases have found their way to court, including one of the monuments Mayor Landrieu fought to remove: the Liberty Place Monument, which memorializes a 1874 battle between white supremacists and New Orleans' first integrated police force.[73] In *Monumental Task Commission v. Foxx*,[74] the Louisiana Eastern District Court examined the monuments under multiple federal statutes, most notably the National Historic Preservation Act ("NHPA"), which prohibits federal agencies from approving the expenditure of federal funds without accounting for the effect of the project on historic property.[75] While the memorial was protected by NHPA at the

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[66] S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* (Feb. 01, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy.
[67] Alabama Memorial Preservation Act, Ala. Code 1975 § 41-9-232 (2020).
[68] N.C. Gen. Stat. § 100-2.1(2020)
[69] Tennessee Heritage Protection Act, Tenn. Code Ann. § 401-412 (2019).
[70] Ga. Code Ann. § 50-3-1 (2020).
[71] Miss. Code Ann. § 55-15-81 (2020).
[72] S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* (Feb. 01, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy.
[73] Monumental Task Comm. v. Foxx, 240 F.Supp.3d 487 (2017).
[74] 240 F.Supp.3d 487 (2017).
[75] *Id.* at 590.

time of the federally awarded project some thirty years earlier, the Court held that a previous receipt of federal funds does not place the monument under the protection of NHPA in perpetuity.[76]

The court also dismissed the plaintiff's contention that the "abstract need or desire" to preserve the monument was a constitutionally protected right under the Fourteenth Amendment or the Equal Protection Clause of the First Amendment.[77] Plaintiffs made another claim under the Louisiana Constitution, which recognizes the "right of the people to preserve, foster, and promote their respective historic, linguistic, and cultural origins.[78] In the court's evaluation, they reference *Pleasant Grove City, Utah v. Summum*[79] in which an the Supreme Court reviewed a request to erect a stone monument containing the organization's Seven Aphorisms in a public park among other privately donated permanent displays, one included a Ten Commandments monument.[80] There, the Supreme Court held that the placement of a monument in the public park is a form of government speech and thus not subject to the Free Speech Clause.[81] The Louisiana Eastern District Court uses the case to note that the city has "a right to 'speak for itself,'"[82] holding that plaintiffs cannot force the City to promote their culture.[83]

In *Callan v. Fischer*,[84] plaintiffs sought an injunction to stop the removal of a Confederate monument. Plaintiffs claimed that by removing the monument, the University of Louisville was discriminating against Confederate veterans, implicating a state statute protecting burial sites. This

[76] *Id.* at 591.
[77] *Id.* at 593-600.
[78] *Id.* at 600; LA. CONST., art. XII, § 4.
[79] 555 U.S. 460 (2009).
[80] *Id.*
[81] *Id.* at 470 (2009).
[82] *Foxx*, 240 F.Supp.3d at 501 (quoting *Pleasant Grove*, 555 U.S. at 467).
[83] *Id.*
[84] 2016 U.S. Dist. LEXIS 160580 (2016).

was summarily dismissed by the Kentucky Western District Court as "untenable" and inapplicable.[85]

McMahon v. Fenves[86] consolidated two Texas cases in which representatives of the Sons of Confederate Veterans sued to keep Confederate monuments. In one, they opposed the relocation of several Confederate statues at the University of Texas.[87] In the other, they protested the removal of a Confederate monument and two cannons from a San Antonio park.[88] The plaintiffs contended that as descendants of Confederate soldiers, these monuments were donated for them as beneficiaries and the relocation of those statues caused them injury.[89] The United States Court of Appeals for the Fifth Circuit dismissed this theory, holding that the plaintiffs confused particular reasons for injury with particularized injury.[90] The court affirmed the lower court holdings, finding that the plaintiffs lacked standing.[91] Plaintiffs appealed to the Supreme Court where certiorari was denied.[92]

In *Moore v. Bryant*, Moore, an African-American lawyer, challenged the Mississippi flag under the 14th Amendment's Equal Protection Clause.[93] The flag incorporates the Confederate battle flag, placing the Confederate symbol on the upper-right portion of the state flag.[94] Both the District Court for the Southern District of Mississippi and the Fifth Circuit of Appeals ruled that Moore lacked standing,[95] holding that Moore has no constitutional right to be free from the

[85] *Id.* at 7.
[86] 946 F.3d 266 (2020).
[87] *Id.* at 268 (2020)
[88] *Id.*
[89] Plaintiffs also claimed that they had standing as municipal taxpayers, but, according to the court, abandoned this theory in oral argument. *Id.* at 271.
[90] *Id.* at 271.
[91] *Id.* at 272.
[92] McMahon v. Hartzell, 2020 U.S. LEXIS 4783 (Petition for writ of certiorari denied).
[93] Moore v. Bryant, 853 F.3d 245, 248 (2017).
[94] *Id.*
[95] *Id.* at 249.

psychological effects of government displays of historical racism.[96] In doing so, the Fifth Circuit distinguishes the Equal Protection Clause approach to standing from the Establishment Clause approach to standing, saying that injuries protected against under the Clauses are different; the Equal Protection Clause evaluates government treatment, whereas the Establishment Clause recognizes injuries resulting from government messaging.[97]

In all, court cases dealing with the removal of Confederate symbols are largely brought by people seeking to defend them and are largely dismissed on procedural grounds. Thus far, it seems that the requirement for particularized injury has prevented plaintiff's from asserting that the removal of Confederate monuments would injure the community.[98] There are few cases to be found where the challenger is seeking to remove the monument. It is possible that this argument fails to reach the courts because cases are primarily brought to prevent communities from removing the statues, in which case, the community has already made its determination that the statute does not represent their collective identity. Yet, where state legislatures prevent local government from removing older statues, communities are also prevented from making such decisions for themselves. This is perhaps why most of cases seeking preservation take place outside of states where legislation has been passed to protect such memorials: Alabama, North Carolina, Tennessee and Mississippi. In Louisiana, Texas and Kentucky, where many of these cases take place, attempts to pass protective legislation has failed.[99] In areas where legislation has been passed to preserve Confederate monuments, petitions for their removal may be ripe for the courts.

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[96] Juanita Solis, Note: *A Monumental Undertaking – Tackling Vestiges of the Confederacy in the Florida Landscape*, 8 U. MIAMI RAC. & SOC. JUST. L. REV. 109 (Summer 2018).
[97] *Moore*, 853 F.3d at 250.
[98] See *McMahon* at 272, noting that if plaintiffs had asserted that removal would limit other's [or the community's] free speech rights, limitations on standing would prevent their suit.
[99] S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* (Feb. 01, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy.

Because cases are largely dismissed on procedural grounds, there is an open question as to how the courts would approach the removal of such monuments where a group was able to prove standing, as well as where advocates sue for removal. For this reason, we turn to the trends in religious symbol jurisprudence to apply the lessons learned through their treatment, as some district courts have already done.[100]

III. RELIGIOUS MONUMENT LESSONS LEARNED AND APPLIED TO CONFEDERATE MONUMENTS

Two trends arising from the Court's treatment of religious monuments can be applied to the removal of Confederate monuments: (1) older monuments are promoted to elevated standing; and (2) the state has an interest in equality in the civic landscape. However, given the trends in Confederate monument case law, we first address the possibility that Confederate monument case law may have some impact on religious monument jurisprudence.

A. *Issue of Standing in Religious Monument Case Law*

The cases confronting the removal of Confederate monuments are largely decided on a lack of particularized injury, echoing Justice Gorsuch's concurrence in *American Legion*.[101] It is possible that the case law concerning the removal of Confederate statues may actually affect the Court's analysis of the removal of religious monuments. Justice Gorsuch decries what he calls "offended observer" standing for its lack of evidence of particularized injury.[102] This assessment also appealed to Justice Thomas who joins the concurrence. While one case does not make a trend, there is validity to Justice Gorsuch's point, as shown by *McMahon*, and it is possible that this idea

[100] See *Liberty Place Monument* (citing *Pleasant Grove*, 555 U.S. 460 (2009)).
[101] Am. Legion v. Am. Humanist Ass'n., 139. S. Ct. 2067, 2098-2103 (2019) (Gorsuch, J., concurring).
[102] *Id.* at 2099 (2019).

will gain traction as a way to contend with the issues of religious monuments while maintaining a position of non-discrimination which appeals to the majority of the Court.

In order to survive the issue of standing under the Establishment Clause, one must have more than psychological injury.[103] Where one has to choose between giving up their enjoyment of a public space or having to accept that their use of that space means accepting unwanted religious imagery, one has proven particularized injury sufficient for standing.[104] In *Van Orden*, the plaintiff was a lawyer who had to pass by the offensive monument each time he conducted research at the state library.[105] Yet the make-up of the Court has changed since *Van Orden* was decided in 2005. It is possible that new judges, like Justice Gorsuch and now, Justice Amy Coney Barrett, may have trouble finding standing for cases like Van Orden where it may be difficult to see an injury beyond simply a psychological one.

B. *Preservation of Older Monuments*

Justice Alito's presumption of constitutionality for older monuments paves the way for broad preservation.[106] In attempting to prove standing, proponents of Confederate monuments argue that the symbols represent their community. Following Justice Alito's reasoning in *American Legion*, proponents of those symbols could argue that while the monuments may have been erected as symbols of oppression,[107] their message has evolved to the point where those statues are now engrained into the community as part of its identity.

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[103] Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485 (1982).
[104] American Civil Liberties Union v. Rabun County Chamber of Commerce, 698 F.2d 1098, 1108 (11th Cir., 1983).
[105] Van Orden v. Perry. 545 U.S. 677, 681 (2005).
[106] However, this reasoning is not without its critique. In his concurrence, Justice Gorsuch asks how old a monument must be in order to trigger this presumption. Following Justice Alito's reasoning, it is when the evolution of a monument's message allows the monument to become secular. This seems overly subjective and difficult to enforce. Justice Gorsuch solves this problem using an analysis of tradition: "a practice consistent with our nations traditions is just as permissible whether undertaken today or 94 years ago." *American Legion* at 2102.
[107] *See* Jess R. Phelps and Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, FL. L. REV. 627 (2019).

In *American Legion*, Justice Alito expounds on the evolution of older religious monuments as they ingratiate into the local community. In this context, it is common to point to examples of religious symbols embedded in European cultures.[108] This misdirects the conversation which should be focused on cultural identity closer to home. America, famously, is a melting pot of cultures, sharply different from Europe's own cultural history in which those of different backgrounds are notoriously separate. Our diversity is written into our history, into our founding and, implicitly, into our Constitution. European countries each have their own history, which, in many cases, involves deep cultural ties to the Church. That is simply not the case here.

Preservation is always the culturally conservative, or traditionalist, choice when attempting to balance the views of two parties.[109] As Justices Kagan and Breyer show, where one is sensitive to inclusion,[110] preservation offers a safe choice.[111] However, doing so simply allows those with stronger voices to be heard.[112] In her *American Legion* dissent, Justice Ginsburg makes this point saying that the choice to preserve a monument on public property sends a "message of exclusion" saying that those not traditionally represented by the symbol "are outsiders, not full members of the political community."[113]

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[108] *See* Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2084 (pointing to the fire at the Notre Dame Cathedral in Paris). *See also* LESLIE C. GRIFFIN, LAW AND RELIGION: CASES AND MATERIALS 123 (West Academic eds., 4th ed. 2017) (noting Taliban destruction of Buddha statues in Bamiyan, Afghanistan).

[109] Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020) ("Traditionalist interpretation also emphasizes the. . . endurance of practices.")

[110] American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2091 (2019).(Breyer, J., concurring); (emphasizing that each case must be considered under the purposes of the Religion Clauses: tolerance for all parties, avoiding conflict and maintaining a separation between church and state and dismissing the idea that the majority opinion creates a "history and tradition test").

[111] Van Orden v. Perry. 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

[112] As New Orleans Mayor Mitch Landreau stated in his speech at the removal of the statute of Robert E. Lee, "We still find a way to say "Wait – not so fast," but like Dr. Martin Luther King Jr. said, "'Wait' has almost always meant 'never.'" Editorial: *New Orleans Mayor on Removing Confederate Monuments*, Time Magazine (May 23, 2017), https://time.com/4790674/mitch-landrieu-new-orleans-confederate-monuments-speech/

[113] *American Legion* at 2106 (Ginsburg, J., dissenting).

This is what is referred to as "the chilling effect."[114] Communities that are disempowered can refrain from taking action because there are unsure whether or not they can legally do so. The chilling effect is of particular concern in states that have passed legislation making it difficult to remove Confederate statues. Where the courts promote history and tradition and states codify that in historic preservation laws, communities already disempowered can find themselves silenced, with few advocates willing to take a stand to remove offensive statues from public property. These communities are already disenfranchised, making it nearly impossible to decide that they have an equal say as to what goes on public land.

C. *Court's Attempt at Non-Discrimination*

In *Van Orden* and *American Legion*, the Court makes much of the fact that to remove religious monuments would promote divisiveness. Justice Alito points to the need for "inclusivity and nondiscrimination" in his review of religious symbols in his opinion in *American Legion*.[115] Justice Kagan too, makes the point in her concurrence that there is value in tolerance and diversity.[116] This seems to be an attempt to meet the same equality in which Justice O'Connor based the endorsement test: to protect the religious rights of all citizens.[117] Religious people can belong to a majority or a minority and the Justices here are acknowledging a balance to insure religious people are not unjustly vilified. Yet by applying their evaluation through a lens of history and tradition, they will only be assisting majority religions to become stronger and more deeply engrained in our society. Those majority religions are the ones most likely to have old and

[114] Note: *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338 (Feb 2020)
[115] *American Legion* at 2089.
[116] *Id.* at 2094 (Kagan, J., concurring) (noting that there is "much to admire" in the part of the opinion that focuses on tolerance for diverse religious viewpoints.)
[117] McCreary Cty. v. American Civil Liberties Union, 545. U.S. 753, 881-885 (2005) (O'Connor, J., concurring).

established symbols on public land. Those are not always symbols of tolerance and inclusivity. Therefore, efforts to be respectful and inclusive sound hollow.

As Justice Ginsburg notes in her dissent in *American Legion*, using an argument of non-discrimination to allow them to remain also promotes divisiveness.[118] This is what separates Justice Alito's argument from that of Justice O'Connor's endorsement test, which also attempts to avoid divisiveness. While Justice O'Connor's endorsement test promotes inclusivity and equality by attempting to ensure government neutrality, Justice Alito contextualizing the removal of monuments as hostile towards religion promotes divisiveness just as much as it attempts to avoid it. Alito notes that by including Catholics and Baptists in the dedication of the cross, the community rose above division. There is no mention of a Rabbi or Imam. Simply because a group is not empowered enough to raise dissent at the time of the dedication did not mean that the symbol was not divisive in the community. In contextualizing these monuments as part of a shared secular cultural heritage, the Court actually promotes the kind of divisiveness they are trying to avoid. They invalidate the concerns of people who do not share the same culture.

Much of the promotion of a historical analysis is found in attempts to shelve more empathetic tests, such as *Lemon* and the endorsement tests. Justices Alito, Gorsuch, Kavanaugh and Kennedy have all supported the much less forgivable coercion test and seem to have pivoted to a test based more in history and tradition.[119] They are joined by Justices Kagan and Breyer, who are less eager to abandon the *Lemon* test in favor of a decision based solely on history and

[118] American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2104 (Ginsburg, J., dissenting) (maintaining the Cross elevates Christianity over other faiths, and religion over nonreligion and carries a "starkly sectarian message.").
[119] *See id.*

tradition.[120] However, they do seem to find that history is important in the analysis of these monuments.

While the traditionalist view can be easily dismissed in terms of political leanings, Justices Kagan and Breyer, typically liberal justices, have joined with the Court's conservative bloc to sway these decisions, leaning on an aversion to conflict.[121] Justice Alito is also sensitive to these ideas, relying on a theory of non-discrimination against either party.[122] Justice Breyer, who concurred only in the judgment, is careful to say that he may have decided the case differently if there had been evidence that the organizers had "deliberately disrespected" members of a minority faith or if the Cross had been recently erected.[123] This seems to deliberately speak to proponents for the preservation of Confederate monuments, warning them that here, history and tradition would not lean in their favor. Justice Kagan too emphasizes that controlling in the opinion is the evaluation on whether the monuments reflect "respect and tolerance" for diversity and "an honest endeavor to achieve inclusivity and nondiscrimination."[124] Yet, lending their vote to these circumstances on a more fact-sensitive basis creates precedent that could be used to oppress minority voices.

D. *If Challenger Seeks Removal of Confederate Monuments*

As shown, most cases involving Confederate monuments are brought by those wishing to preserve the monument. Where the challenger is seeking to remove the Confederate symbol, as in *Moore v. Bryant*, the court dismisses the case for lack of standing.[125] The court in *Moore*

[120] *See id.* at 2090 (Breyer, J., concurring) (holding that removing or altering the monument would "signal 'a hostility toward religion.'"); *See id.* at 2094 (highlighting inclusivity and tolerance for differing views in review of religious monuments).
[121] *Id.*
[122] *Id.* at 2089.
[123] Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2091 (2019) (Breyer, J. concurring). In fact, Breyer expressly rejects the idea of a "history and tradition test." *Id.*
[124] *Id.* at 2094 (Kagan, J. concurring).
[125] Moore v. Bryant, 853 F.3d 245 (2017).

distinguishes Establishment Clause standing from Equal Protection Clause standing, saying the first looks at particularized injury from government messaging and the second looks at particularized injury from government treatment.[126] But that does not foreclose the ability of the court to look to the "message" of the Confederate monument, as they do under the Establishment Clause. Moreover, by doing so, the court is consolidating a constitutional standard for standing instead of creating a "hierarchy of constitutional values."[127]

Justice O'Connor understood the Establishment Clause to ensure equality by preventing the state from factoring religion into their decisions.[128] Similarly, Civil War amendments may be understood to ensure secular equality. Applying Justice O'Connor's endorsement test, the "reasonable informed observer"[129] would likely understand that the monument was, in effect, a public endorsement of the Confederate ideals. The reasonable observer would follow Justice O'Connor's lead in her *Lynch* concurrence[130] and would take into account the context of the time in which the monument was erected and the government's purpose in doing so. Given that most monuments were erected between the Reconstruction and Civil Rights era, a reasonably informed observer would see a government's purpose as reasserting racist intent, particularly if that monument was in the South. In states that were not part of the Confederacy, the endorsement test may bear different results.

Applying *American Legion*, the Court may find that the monument has existed for such a long period of time that it has evolved beyond its oppressive intent and now stands for the shared cultural heritage of the South. This view would follow Justice Alito's treatment of the Bladensburg

[126] *Id.* at 250.
[127] *Id.*
[128] *See* McCreary Cty. v. Am. Civil Liberties Union, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring).
[129] *See* Capitol Square Review and Advisory Bd. v. Pinette 115 S. Ct. 2440, 2451 (1995) (O'Connor, J., concurring) (explaining that the endorsement tests is taken from the perspective of a "reasonable informed observer").
[130] Lynch v. Donnelly, 465 U.S. 668, 691 (1984).

Cross, recognizing the monument as a memorial engrained in the common heritage of the South. However, similar to the endorsement test, the result may differ when approaching monuments in states that were not part of the Confederacy, although it is less clear than when applying the endorsement test. When applying *American Legion* in states that were not part of the Confederacy, it is unclear what the cultural purpose would be, apart from glorifying racism. The court may find a historical purpose, using the monument as a teaching moment about the Civil War or that, like the Bladensburg Cross, the monument acts as a memorial to fallen soldiers and the monument itself, not the message, has become part of the community. However, it would be difficult to argue that a monument honoring the Confederacy represents the shared heritage of Northern states.

Justice Kagan has seemed to show willingness to limit this sort of government message. Her concurrence in *American Legion*, though deferential to history, also recognizes limitations to what the Court is willing to permit governments to do.[131] In evaluating Confederate monuments, Justice Kagan may find that preserving a Confederate monument is one step too far in protecting historical monuments. Such action would not bear out the sort of equality and non-discrimination that she found admirable in Justice Alito's decision in *American Legion*.

IV. REMEDIES

When confronted with a First Amendment issue under the Establishment Clause, governmental bodies have found creative remedies that could be applied to Confederate monuments. However, even remedies should account for the context of the monuments. The case law in religious monument cases seems to suggest that the Court is advocating the retention of those monuments. Yet, this may confuse retention with preservation. As Justice Kavanaugh points

[131] American Legion v. American Humanist Ass'n., 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

out in his *American Legion* concurrence, the opinion *allows* the State to maintain the cross on their land without *requiring* them to do so.[132]

In *Salazar v. Buono*, the Court examined the validity of a land transfer to solve the problem of a religious monument on public land.[133] In 1934, representatives from the Veterans of Foreign Wars erected a cross on federal land in the Mojave National Preserve as a monument to fallen soldiers in World War I.[134] Buono, a visitor to the Preserve filed an injunction requiring the federal government to remove the cross.[135] The District Court decided in his favor and as the Government's appeal was pending, Congress passed the Department of Defense Appropriations Act of 2004 in which the Secretary of the Interior, who oversaw the Preserve, was directed to transfer the cross and the land under it to the VFW.[136] Buono then sought an injunction against the land transfer, both the District Court and the Ninth Circuit held in Buono's favor and the Supreme Court granted certiorari.[137]

Writing for the Court, Justice Kennedy held that in designating the cross as a national memorial it is recognizing its historical meaning over its religious context.[138] He validated the land transfer as the embodiment of legislative judgment, determining that Congress had found importance in the memorial's historical purpose.[139]

In *Selling Land and Religion*, Eang L. Ngov notes that, "Privatizing religious symbols has the effect of advancing religion by securing the retention of religious objects through private land ownership."[140] For the same reason, transferring the ownership of land under Confederate

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[132] *Id.* at 2094 (Kavanaugh, J., concurring) (emphasis added).
[133] Salazar v. Buono, 1559 U.S. 700 (2010).
[134] *Id.* at 705-7.
[135] *Id.* at 707.
[136] *Id.* at 707-11.
[137] *Id.*
[138] Salazar v. Buono, 1559 U.S. 700, 716 (2010)
[139] *Id.*
[140] Eang L. Ngov, *Selling Land and Religion*, 61 U. KAN. L. REV. 1 (2012)

monuments may not satisfy the proponents of removing those monuments. In the latter case, removing the monuments is less about the government ownership of them than the promotion of the cause they represent.

Solutions to Confederate monuments seem to borrow from these suggestions for religious monuments and may offer some remedies of their own. In *McMahon*, the Fifth Circuit recounts that in the district court, the Sons of Confederate Veterans moved for a temporary restraining order to prevent San Antonio from removing a Confederate monument and two cannons. The district court denied the motion but required the City to "remove the monument 'in such a manner as to preserve [its] integrity' and further, that it 'be stored in a secure location in order to protect it from damage or from being defaced.'"[141] This disclaimer may become the norm, particularly given the Supreme Court's sympathy in cases of religious monuments to allow such solutions to stand.

Virginia's Monument Avenue, a street at one time dotted with no less than nine Confederate monuments, represents a particular problem for the state.[142] An iconic statue of Robert E. Lee, weighing twelve tons and reaching twenty-one feet tall, has been standing prominently on Monument Avenue for 130 years.[143] Protestors have turned the piece into an artwork of their own, scrawling colorful graffiti and leaving personal signs and messages over the base of the monument.[144] After the governor sought to remove the monument in June 2020, the statue has been the subject of litigation.[145] A state court temporarily blocked its removal after a Virginia

[141] McMahon v. Fenves at 269, quoting McMahon v. Fenves at 2018 U.S. Dist. LEXIS 231679.
[142] Andrew Lawler, *The origin story of Monument Avenue, America's most controversial street*, National Geographic, July 27, 2020, https://www.nationalgeographic.com/history/2020/07/origin-story-monument-avenue-america-most-controversial-street/.
[143] Sarah Rankin, *Judge issues order halting Lee statue removal for 10 days*, Associated Press, June 8, 2020, https://apnews.com/article/62da15fd455f6cd840eed707dcb32a46.
[144] Isis Davis-Marks, *Virginia Museum Will Lead Efforts to Reimagine Richmond Avenue Once Lined with Confederate Monuments*, Smithsonian Magazine, December 18, 2020, https://www.smithsonianmag.com/smart-news/virginias-governor-wants-spend-11-million-reinventing-confederate-monument-180976574/.
[145] Rankin, *supra* note 115.

resident successfully showed that the state remained party to a 1890 restrictive covenant agreeing faithfully guard" and "affectionately protect" the statue.[146] In October 2020, the Circuit Court of Richmond found that Virginia is not bound by the agreement, holding that enforcement of the restrictive covenants would be "in violation of the current public policy of the Commonwealth of Virginia." [147] In December 2020, the governor's proposed budget set aside eleven million dollars to allow the Virginia Museum of Fine Arts to reimagine Monument Avenue in a more racially and culturally inclusive manner.[148]

It is possible that such solutions could be identified by the owners of the monument prior to the case reaching court. In Florida, the Alachua County Administration building was guarded by a statue nicknamed "Old Joe," donated by the United Daughters of the Confederacy ("UDC") in 1904. In 2017, the county elected to remove it, offering the statue back to the UDC[149] who then relocated the monument to Oak Ridge Cemetery.[150] Yet, if allowed to remain in the wrong context or controlled by the wrong hands, preservation may simply be a tool of oppression.

V. CONCLUSION

The court's treatment of religious monuments sends a troubling message to those seeking to remove Confederate monuments: that history and tradition are more important than empathy

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[146] Laura Vozzella, *Northam can remove Lee statue in Richmond, judge rules*, The Washington Post, October 27, 2020, https://www.washingtonpost.com/local/virginia-politics/richmond-judge-lee-statue-removal/2020/10/27/6fe87166-1893-11eb-82db-60b15c874105_story.html.

[147] Taylor v. Northam, 2020 Va. Cir. LEXIS 443, 16 (October 27, 2020).

[148] Davis-Marks, *supra* note 116. The Virginia Museum of Fine Arts Direct Alex Nyerges notes that this may potentially be "a model for other parts of Virginia, other parts of the United States [or] other parts of the world as people struggle with monuments – when to create them, when to take them down."

[149] Marissa Sarbak, *Alachua County Commission votes 4-1 to remove 'Old Joe' Confederate Statue*, CBS 4 News, May 24, 2017. https://mycbs4.com/news/local/alachua-county-commission-votes-4-1-to-remove-old-joe-confederate-statue

[150] Andrew Caplan, Confederate statue removed from downtown Gainseville, The Gainsville Sun, August. 14, 2017. https://www.gainesville.com/news/20170814/confederate-statue-removed-from-downtown-gainesville. The Gainsville Sun interviewed City Commissioner Harvey Ward, who said he was "glad to see Old Joe go" despite that his great-great-great-grandfather was a Confederate soldier. Adding that he hopes the UDC adds a historical plaque to the monument, he noted that such statues "didn't pop up at the end of the Civil War to honor veterans."

and diversity. For this reason, advocates attempting to seek a judicial solution to the removal of Confederate monuments will have to seek creative solutions outside the courts.