



Confederate Monuments and Punitive Preemption: The Latest Assault on Local Democracy

Richard Schragger, Perre Bowen Professor, University of VA School of Law
C. Alex Retzloff, J.D. Candidate, Class of 2020, University of VA School of Law

June 2019



475 Riverside Drive, Suite 900 • New York, NY 10115 • 301-332-1137 • LSSC@supportdemocracy.org

Introduction

In recent years, local county and municipal residents have begun to pay closer attention to the monuments that dot public properties throughout their communities, and reflect on the legacies and values these monuments represent.¹ Following the horrific acts of racially motivated violence perpetrated by white supremacists in places like Charleston, South Carolina, and Charlottesville, Virginia, these reflections took on a new sense of urgency, and residents began to seriously question the place that monuments—especially those memorializing civilian and military leaders of the Confederate States of America and other individuals associated with white supremacy—enjoyed in their communities.² For many, the result of this reflection was the determination that these monuments must come down.³ But as many residents and localities were investigating how to remove these monuments, legislatures in several states were exploring how best to protect the same monuments from this rising tide of local resentment.

Employing the same tactics used to restrain local government initiatives concerning undocumented immigrants, firearms restrictions, environmental protections, and others, state legislatures have relied on preemptive statutes to block, or “preempt” local governments from removing, relocating, or altering Confederate monuments on public property, and have often imposed harsh penalties on individuals and entities that violate these statutes. While some legislatures have relied on existing statutes to preempt local action, many more have enacted,⁴ or proposed, new

¹ See, e.g., City of Charlottesville Blue Ribbon Comm’n on Race, Memorials, and Pub Spaces, Report to City Council (Dec. 19, 2016), <https://perma.cc/R82U-JPPP> [hereinafter Blue Ribbon Comm’n].

² See Jason Horowitz et al., *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), <https://perma.cc/M8PG-Q5N2>; Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://perma.cc/3DBW-V2BJ>.

³ See, e.g., Karen L. Cox, Opinion, *Why Confederate Monuments Must Fall*, N.Y. TIMES (Aug. 15, 2017), <https://perma.cc/P8VX-J93M>.

⁴ VA. CODE ANN. § 15.2-1812 (2018) (Virginia); MISS. CODE ANN. § 55-15-81 (2019) (Mississippi); S.C. CODE ANN. § 10-1-165 (2018) (South Carolina); KY. REV. STAT. ANN. § 171.780 (LexisNexis 2019) (Kentucky); TENN. CODE ANN. § 4-1-412 (2019) (Tennessee);

statutes striking at the ability of localities to manage public monuments.⁵ Broadly termed “statue statutes,”⁶ these old and new punitive and preemptive statutes have become an increasingly popular way of reining in progressive-leaning localities. The unfortunate result of this burgeoning legislative movement to adopt statue statutes and other punitive preemption measures has been the erosion of local democracy, the stifling of local political innovation, and the undermining of local faith in the democratic process. States have a great deal of authority to regulate the content of the local public square. However, some statue statutes may run afoul of state and federal constitutional and statutory protections for individuals and municipal governments, and may be vulnerable to legal challenges on First and Fourteenth Amendment grounds. These challenges face some doctrinal hurdles, and ultimately, a spirited and engaged political defense of local democracy may be more effective.

N.C. GEN. STAT. § 100-2.1 (2018) (North Carolina); ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019) (Alabama); GA. CODE ANN. § 50-3-1 (2019) (Georgia).

⁵ See, e.g., H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (Arkansas); H.B. 1349, Gen. Assemb., Reg. Sess. (Fla. 2018); H.B. 97, Gen. Assemb., Reg. Sess. (Fla. 2019); S.B. 288, Gen. Assemb., Reg. Sess. (Fla. 2019) (Florida); H.B. 54, Gen. Assemb., Reg. Sess. (Ky. 2018) (Kentucky); H.B. 71, Leg., Reg. Sess. (La. 2017); S.B. 198, Leg., Reg. Sess. (La. 2017) (Louisiana); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (Texas); S.B. 418, 84th Leg., 1st Reg. Sess. (W. Va. 2018) (West Virginia); S.B. 2320, Leg., Reg. Sess. (Miss. 2017) (Mississippi).

⁶ Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 63 (2018).

Confederate Monuments: History and Current State of Affairs

Although the Civil War ended over 150 years ago, its legacy lives on in the public monuments and memorials to the Confederacy, its leaders, and its veterans that are fixtures in public spaces throughout the United States, and are ubiquitous in Southern counties and municipalities. In the wake of violent incidents recently perpetrated by white supremacists, over 110 Confederate monuments and symbols have come down, but there are still over 1,700 Confederate monuments, place names, and other symbols displayed in public spaces.⁷ That includes 780 monuments honoring some aspect of the Confederacy, 103 public schools and 3 colleges named after Confederates, and 80 localities and 10 U.S. military bases named for Confederate leaders.⁸ Although some of these Confederate memorials were dedicated shortly after the Civil War ended in 1865, the majority came into being during one of two periods: the first ran from the early 1900s through the 1920s, and the second ran from the 1950s through the 1960s.⁹ It is telling that these two spikes in Confederate memorialization coincide with the rise of Jim Crow laws and re-segregation efforts following the end of Reconstruction in the early 20th century, and with the massive-resistance campaign waged by opponents of the civil rights and desegregation movements of the 1950s and 1960s. These were not random acts of memorialization during a period of historical and patriotic fervor, but were instead part of a concerted effort to reinforce a white supremacist worldview in mainstream society.¹⁰

Despite the fact that those who erected these monuments to the Confederacy often made clear their racist intentions for doing so,¹¹ there is still considerable public

⁷ *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://perma.cc/GFE4-LGN7> [hereinafter *Whose Heritage?*].

⁸ *Id.*

⁹ *Id.*

¹⁰ See AM. HISTORICAL ASS'N, STATEMENT ON CONFEDERATE MONUMENTS (2017), <https://perma.cc/8Q6E-HKBH> (arguing that Confederate monuments erected in the early and mid-20th century were “part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South . . . [and] were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African Americans politically and isolate them from the mainstream of public life”).

¹¹ See, e.g., Julian S. Carr, Unveiling of Confederate Monument at University. June 2, 1913 (June 2, 1913) (transcript available in the Julian Shakespeare Carr Papers, Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill). In his speech dedicating the “Silent Sam” statute—a memorial to the Confederate veterans of the

debate over the legacies and values these monuments represent today.¹² Though some see the monuments as hateful, others subscribe to the “Lost Cause” narrative promulgated by groups like the Sons of Confederate Veterans and the United Daughters of the Confederacy, and assert that the monuments simply recognize the sacrifice of their forefathers in a bloody war that had more to do with states’ rights, honor, and duty, less to do with slavery, and nothing to do with promoting white supremacy.¹³ And indeed, many still adhere to this revisionist history of the Civil War and Confederate monuments, “cling[ing] to the myth of the Lost Cause”¹⁴ and advocating for additional statue statutes to protect their revered memorials and encourage the construction of additional monuments.¹⁵ This ideological and cultural divide between those who see Confederate monuments as symbols of hate and those who see them as memorials to heroic individuals fighting for a noble cause divorced of racial animus is only part of a broader culture war between urban, often progressive cities, and rural, often conservative communities. But acknowledging this cultural and ideological divide helps to explain the rise in local efforts to remove these monuments and the concurrent growth in legislative measures to preempt these removal efforts through statue statutes.¹⁶

The Rise of Statue Statutes

The movement to protect Confederate monuments through the use of preemptive and punitive statue statutes has grown concurrently with the opposing movement to remove these monuments, especially in the wake of white supremacist violence. As of this writing, eight states have enacted some form of statue statute,¹⁷ two states have

University of North Carolina—Carr repeatedly made reference to “the Sacred Cause” for which the men fought, and celebrated “the Anglo Saxon race . . . the purest strain of [which] is to be found in the 13 Southern States.” Carr also boasted of the time he “horse-whipped a negro wench . . . in the immediate presence of [a federal] garrison.”; *see also* Blue Ribbon Comm’n, *supra* note 1.

¹² Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes”*, 91 TEMP. L. REV. 1, 13-16 (2018).

¹³ *See* Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPP. 15, 17-18 (2018).

¹⁴ *Whose Heritage?*, *supra* note 7.

¹⁵ Sabrina Tavernise, *A Boom in Confederate Monuments, on Private Land*, N.Y. TIMES (Aug. 30 2017), <https://perma.cc/5FSR-TPTJ>.

¹⁶ Bray, *supra* note 12, at 5-6.

¹⁷ *See* VA. CODE ANN. § 15.2-1812 (2018); MISS. CODE ANN. § 55-15-81 (2019); S.C. CODE ANN. § 10-1-165 (2018); KY. REV. STAT. ANN. § 171.780 (LexisNexis 2019); TENN. CODE

proposed expansions to their existing statue statutes,¹⁸ and five states currently without statue statutes have proposed adopting some form of protection for their public monuments.¹⁹ Virginia was the first state to enact a statue statute in 1904.²⁰ The 1904 act was significantly limited in scope and only applied to counties that erected Confederate monuments and memorials.²¹ But as the act was subsequently amended and recodified over the next century, the legislature significantly expanded its scope and the protections it afforded not only to Confederate monuments, but to war monuments and memorials generally.²² In its current form, Virginia’s statue statute empowers all localities to erect monuments for any war or conflict, and provides broad protections for all such monuments.²³

Following Virginia’s example in spirit, if not entirely in form, seven other states have enacted statue statutes to protect Confederate monuments. These statutes generally prohibit private parties and public entities from removing, relocating, disturbing, or altering any monument—often including monuments to the “War Between the States” or the Confederate States of America²⁴—with only minor exceptions to allow for removal in the event of repair or restoration, or for relocation to accommodate public works projects.²⁵ Other states, however, go much further in preempting local monument management through statue statutes, and have either expanded the scope

ANN. § 4-1-412 (2019); N.C. GEN. STAT. § 100-2.1 (2018); ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019); GA. CODE ANN. § 50-3-1 (2019).

¹⁸ See S.B. 2320, Leg., Reg. Sess. (Miss. 2017); H.B. 54, Gen. Assemb., Reg. Sess. (Ky. 2018).

¹⁹ See H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); H.B. 1349, Gen. Assemb., Reg. Sess. (Fla. 2018); H.B. 97, Gen. Assemb., Reg. Sess. (Fla. 2019); S.B. 288, Gen. Assemb., Reg. Sess. (Fla. 2019); H.B. 71, Leg., Reg. Sess. (La. 2017); S.B. 198, Leg., Reg. Sess. (La. 2017); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019); S.B. 418, 84th Leg., 1st Reg. Sess. (W. Va. 2018).

²⁰ See 1904 Va. Acts ch. 29.

²¹ See Amanda Lineberry, *Payne v. City of Charlottesville and the Dillon’s Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45, 49.

²² See Bray, *supra* note 12, at 24-25.

²³ See Lineberry, *supra* note 21, at 51; *but cf.* Va. Attorney General, Opinion Letter No. 17-032 (Aug. 25, 2017), 2017 WL 3901711, at *3. Virginia’s attorney general has endorsed the view of the Commonwealth’s statue statute taken in *Heritage Preservation Association v. City of Danville* (No. CL5000500-00 (Va. Cir. Ct., Dec. 7, 2015)) that the recent broad expansions all apply retroactively, meaning that the protections the statute currently affords to monuments may not apply to nearly as many as currently stand.

²⁴ Four current statutes, two proposed statutes, and one amendment to a current statute specifically protect monuments dedicated to the “War Between the States” (a dog-whistle for Lost Cause sympathizers), and two current statutes specifically protect monuments dedicated to the “Confederate State of America.”

²⁵ See, e.g., MISS. CODE ANN. § 55-15-81 (2019).

of protected monuments under the statutes²⁶ or the scope of the protections they confer on those monuments.²⁷ Significantly, these new measures only go in one direction—increasing the degree to which legislatures preempt or punish local action—and have neither been limited through amendment nor repealed.²⁸ While some states have, admittedly, included limited opportunities for local entities to appeal for individual exceptions or waivers, the efficacy of these appeal provisions is dubious and generally does not appear to provide localities a reliably viable workaround.²⁹ As if the preemptive limits these statute statutes impose on localities were not onerous enough, several of the statutes also currently or may soon include punitive provisions designed to severely punish localities—and sometimes even individual local officials—that violate monument protections, thereby ensuring stricter compliance.

The use of state preemptive statutes to regulate localities and nullify local measures deemed inconsistent with state policy is a time-honored tradition in American

²⁶ *See, e.g.*, N.C. GEN. STAT. § 100-2.1 (2018) (protecting all “objects of remembrance” including monuments, memorials, plaques, statues, markers, and “displays of a permanent character” that commemorate an event, person, or military service “that is part of North Carolina’s history”); GA. CODE ANN. § 50-3-1 (2019) (extending additional protections to privately owned monuments on private property and providing private owners a civil right of action against violators).

²⁷ *See, e.g.*, ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019) (adding renaming to the list actions localities are prohibited from doing as concern protected monuments).

²⁸ *See, e.g.*, H.B. 2377, Gen. Assemb., Reg. Sess. (Va. 2019) (seeking to amend Virginia’s statue statute to permit localities to manage monuments and memorials as they see fit; died in committee); S.B. 51, Gen. Assemb., Reg. Sess. (Ga. 2019) (seeking to repeal Georgia’s statue statute; died in committee); H.B. 10, Gen. Assemb., Reg. Sess. (N.C. 2019) (seeking to repeal North Carolina’s statue statute; died in committee).

²⁹ *See id.* (requiring localities to submit a petition for review by a monument protection committee); S.C. CODE ANN. § 10-1-165 (2018) (requiring a two-thirds vote of the general assembly after a third reading to approve a waiver); TENN. CODE ANN. § 4-1-412 (2019) (requiring clear and convincing evidence and a two-thirds vote of a largely gubernatorially-appointed commission); KY. REV. STAT. ANN. § 171.780 (LexisNexis 2019) (requiring a state commission to approve a waiver or rescind the protected status assigned to a particular monument); N.C. GEN. STAT. § 100-2.1 (2018) (allowing localities to make changes, but only with the approval of a state commission); *but see* Merritt Kennedy, *3 North Carolina Confederate Monuments Will Stay in Place, Commission Decides*, Nat’l Pub. Radio (Aug. 22, 2018), <https://www.npr.org/2018/08/22/640923318/3-north-carolina-confederate-monuments-will-stay-in-place-commission-decides> (reporting that the North Carolina Historical Commission believes it can only approve an exemption in order to better preserve a monument, and not for any other reason, effectively barring any permanent removal).

governance.³⁰ But in the last several years, legislatures have gone further in drafting statutes that are not only preemptive, but punitive in nature, and impose significant penalties on both localities and local officials who dare to violate the statutes.³¹

Statue statutes are just the latest example of states adopting this new, pernicious form of preemption. Dissatisfied with simply blocking localities from using their discretion in managing Confederate monuments, at least two statue statutes also include punitive provisions. The Alabama statue statute imposes a punitive fine of \$25,000 for each violation on any locality that is found to have disturbed a protected monument in violation of the statute.³² In Tennessee, the legislature went a step further than its Alabama counterpart and, rather than impose a set punitive fine for violations, violations of the Tennessee statue statute result in the loss of state grants for economic and community development for a period of five years.³³ Not to be outdone, both Kentucky and Texas have proposed similar legislation empowering the state legislature to impose oppressive fines on localities for violations of the state statue statutes.³⁴ Legislatures have not, however, constrained themselves merely to imposing punitive fines and funding cuts on violators. In 2017, Mississippi considered a bill that would not only have imposed fines of up to \$10,000 and prison sentences of up to one year on violators, but provided that in instances where the violation was the result of a local commission or board decision, each member of the commission or board would be held individually liable to prosecution.³⁵ Although the Mississippi bill died in committee, it represents a dangerous escalation in the attempted use of punitive preemption statutes to protect Confederate monuments, punish local officials, and stifle local democracy, and may serve as an unfortunate precedent for similar measures in other states.³⁶

Confederate Monuments and Statue Statutes Litigation

³⁰ See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2002 (2018).

³¹ *Id.* at 2002-07.

³² ALA. CODE §§ 41-9-230 – 41-9-237 (LexisNexis 2019).

³³ TENN. CODE ANN. § 4-1-412 (2019);

³⁴ See H.B. 54, Gen. Assemb., Reg. Sess. (Ky. 2018) (imposing a \$25,000 fine per violation); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (imposing a \$1,000 to \$1,500 fine for the first violation, a \$25,000 to \$25,500 fine for each additional violation, and counting each subsequent day a monument is left altered as an additional violation).

³⁵ S.B. 2320, Leg., Reg. Sess. (Miss. 2017).

³⁶ See, e.g., S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (waiving official immunity and opening up local officials to personal liability for violations of the statue statute).

While Confederate monuments have stood in local communities for generations, the national controversy surrounding them and the statutes protecting them are relatively recent phenomena. As such, there has been comparatively little litigation concerning statue statutes. What little litigation there has been over statue statutes cases has generally relied on state-specific technical challenges, not substantive challenges to the statutes;³⁷ only two recent cases in Virginia and Alabama—neither of which has been fully litigated—have concerned substantive challenges to statue statutes and the protections they afford Confederate monuments.

In Virginia, a group of local citizens and pro-Confederate activists filed suit against the city of Charlottesville, *Payne v. City of Charlottesville*, challenging the Charlottesville city council's decision to remove imposing statues of Confederate Generals Robert E. Lee and Thomas J. Jackson from two local city parks as a violation of Virginia's statue statute.³⁸ The city answered by arguing that Virginia's statue statute does not apply to the two monuments in question because they are not war memorials and because of the restriction on the retroactive application of the statute.³⁹ Importantly, the city also argued that if the court determined that Virginia's statue statute did apply to these monuments, then it would run afoul of state and federal constitutional guarantees of equal protection by condoning the preservation of public symbols that constitute government racially discriminatory speech.⁴⁰ The trial court has thus far has been inclined to agree with the plaintiffs and read Virginia's statue statute broadly to protect the Lee and Jackson monuments as war memorials.⁴¹ Whether or not the court will accept the city's equal protection argument is as yet unclear, but if the court

³⁷ See, e.g., *Heritage Pres. Ass'n v. City of Danville*, No. CL15000500-00 (Va. Cir. Ct., Dec. 7, 2015) (finding that Virginia's statue statute does not apply retroactively); *Sons of Confederate Veterans Nathan Bedford Forrest Camp 215 v. City of Memphis*, No. 18-29-III (Tenn. Ch. May 16, 2018), *appeal filed*, No. M2018-01096-COA-R3-CV (Tenn. Ct. App. June 13, 2018) (concluding that the city did not violate the statue statute when it sold a park with a Confederate monument to a private party who took it down because the statute only protected monuments on public property).

³⁸ Complaint at 9-12, *Payne v. City of Charlottesville*, No. CL 17-145 (Va. Cir. Ct. Mar. 20, 2017).

³⁹ Defendant's Brief in Opposition to Plaintiff's Motions for Partial Summary Judgment and to Strike Equal Protection Affirmative Action Defense at 4-10, *Payne v. City of Charlottesville*, No. CL 17-145 (Va. Cir. Ct. Jan. 11, 2019).

⁴⁰ *Id.* at 25-39; Lineberry, *supra* note 21, at 51-56.

⁴¹ Letter Ruling on Motion for Partial Summary Judgment Regarding the Statues Being Monuments or Memorials at 5-9, *Payne v. City of Charlottesville*, No. CL 17-145 (Va. Cir. Ct. Apr. 25, 2019).

accepts the argument, it could serve as a model for how to resist similar statue statutes in other jurisdictions.

Alabama's statue statute is similarly being litigated in state court. In the Alabama case, *State v. City of Birmingham*, the state has sued Birmingham for allegedly violating the state's statue statute when it erected a twelve-foot high wooden screen around a local Confederate monument to block it from public view.⁴² Unlike in the Virginia case, the Alabama case demonstrates a different potential line of attack against the use of a punitive preemption statute to protect Confederate monuments: the statue statute may violate the city's right to free speech under the First Amendment and constitute a denial of due process under the Fourteenth Amendment. Invoking the conclusion reached in *Pleasant Grove City v. Summum* that "[p]ermanent monuments displayed in public property typically represent government speech,"⁴³ the Alabama court agreed with the city that the monument represents government speech and that, in abridging the city's right to decide how it wants to articulate that speech—in this case, hiding the monument—the state's statue statute violated the city's right to free speech.⁴⁴ The court similarly found that the state's statue statute violated the city's Fourteenth Amendment Due Process protections. The court reasoned that by both taking \$25,000 worth of city property as a fine for allegedly violating the statute, and restricting the city's right to manage its own land as it saw fit, the statute effectuated a deprivation of city property. That the statute permitted this deprivation without giving the city or its residents any opportunity to be heard at all, "much less at a meaningful time and in a meaningful manner," meant the deprivation was violative of the Fourteenth Amendment's Due Process Clause guarantee.⁴⁵ Given that the Alabama statue statute did not contain a severability clause, the court invalidated the entire statute.⁴⁶

A win for the city and proponents of local democracy, the court's decision suggests that judges may be receptive to arguments against statue statutes and punitive preemption on First and Fourteenth Amendment grounds. Just how receptive they

⁴² Order on Cross Motions for Summary Judgment at 2, *State v. City of Birmingham*, CV 17-903426-MGG (Ala. Cir. Ct. Jan. 2019).

⁴³ 555 U.S. 460, 470 (2009).

⁴⁴ Order on Cross Motions for Summary Judgment, *supra* note 42, at 4-6.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 8-10.

may be is about to be tested—the Alabama Supreme Court granted a stay of the lower court’s ruling as it considers an appeal from the state challenging the lower court’s determination that municipalities enjoy federally-protected rights which they can assert against the state.⁴⁷

Potential Challenges to Statue Statutes

The Virginia and Alabama cases illustrate two possible substantive challenges to statue statutes and punitive preemption of local management of Confederate monuments. Yet, it must be remembered that state power over localities is extensive, and it is made all the more so since cities *qua* cities generally do not enjoy constitutional or civil rights.⁴⁸ But state power is not without limits and states cannot “manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations.”⁴⁹ And indeed, even the notion that localities lack constitutional and civil rights is more a matter of judicial habit than black letter law.⁵⁰

First Amendment

The first, and most straightforward argument against statue statutes and punitive preemption is that statutes which force others to engage in expressive activity violate the free speech protections enjoyed by private individuals and public entities under the First Amendment.⁵¹ In the context of Confederate monuments, the erection and maintenance of a monument is an expressive activity and, by extension, a form of speech. The Supreme Court has already made clear that “[p]ermanent monuments displayed on public property typically represent government speech,” because monuments are, “by definition, [] structure[s] . . . designed as a means of expression.”⁵² Thus, if the state compels a locality to maintain and protect a

⁴⁷ Plaintiff State of Alabama’s Motion to Stay at 3-4, *State v. City of Birmingham*, CV 17-903426-MGG (Ala. Cir. Ct. Jan. 2019); Brandon Moseley, *Alabama Supreme Court Temporarily Blocks Jefferson County Court’s Confederate Monuments Ruling*, ALA. POLITICAL REPORTER (Feb. 18, 2019), <https://www.alreporter.com/2019/02/18/alabama-supreme-court-temporarily-blocks-jefferson-county-courts-confederate-monuments-ruling/>.

⁴⁸ Schragger, *supra* note 6, at 61.

⁴⁹ *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979).

⁵⁰ Schragger, *supra* note 6, at 61.

⁵¹ Bray, *supra* note 12, at 17.

⁵² *Summum*, 555 U.S. at 470.

Confederate monument in a public space, the state flouts the locality's freedom of speech by forcing the locality to engage in a certain kind of expression.⁵³ Significantly, in *Summum*, the Court rejected the notion that monuments only qualify as government speech when they are publicly financed and erected on public property; rather, the Court maintained that even privately financed monuments can become government speech when they are donated to a locality and displayed on public property.⁵⁴ This more liberal interpretation of government speech could provide cities the means to challenge statue statutes and punitive preemption in an even greater variety of circumstances.

Although the First Amendment approach to challenging statue statutes and punitive preemption is straightforward, it is not without obstacles. Namely, the notion that localities do not enjoy constitutional or civil rights protections still holds considerable sway in many state judiciaries.⁵⁵ Acknowledging this hurdle, others have proposed more nuanced arguments to challenge statue statutes and punitive preemption on First Amendment grounds. Some argue that the removal of monuments by localities is an especially important, albeit controversial, form of political protest, analogous to flag burning.⁵⁶ Statue statutes, in stifling this political protest, infringe, not on the freedom of speech protections localities contingently enjoy, but on the freedom of political expression local residents absolutely enjoy.⁵⁷ When these statutes inhibit the expression of local residents' political sentiment by preventing the removal of monuments that a majority of residents find hateful, they inappropriately "put the state's coercive weight on the expressive scales."⁵⁸

Localities may also be able to attack statue statutes and punitive preemption by using the doctrine of non-endorsement borrowed from Establishment Clause

⁵³ See Aneil Kovvali, *Confederate Statute Removal*, 70 STAN. L. REV. ONLINE 82, 83 (2017) ("The free speech objection is simply stated. When a city government erects or maintains a monument, it is speaking. A statute forcing a city to retain a Confederate monument thus compels the city to engage in speech it finds offensive.").

⁵⁴ *Summum*, 555 U.S. at 464-65, 481.

⁵⁵ See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. (forthcoming 2019) (manuscript at 46-52); see also Moseley, *supra* note 47.

⁵⁶ Ira C. Lupu & Robert W. Tuttle, *The Debate Over Confederate Monuments*, TAKE CARE (Aug. 25, 2017), <https://perma.cc/F2Y3-T35E>.

⁵⁷ *Id.*

⁵⁸ *Id.*

jurisprudence.⁵⁹ Following this approach, a locality could argue that by forcing it to maintain Confederate statues in its public spaces, statue statutes implicitly compel the locality to broadcast a discriminatory message—support for the Lost Cause and white supremacy—which it is constitutionally prohibited from doing.⁶⁰ Just as a locality may not endorse Christianity by erecting a large cross in a public park, it may also not endorse white supremacy by erecting a sign that explicitly announces that whites are superior to blacks, or broadcast through its other representations a similar message of exclusion and second-class citizenship.⁶¹ State statutes cannot require that localities—or anyone for that matter—violate the state or federal constitutions; statutes requiring such action must be invalidated if they force others to engage in unconstitutional action under the First Amendment.⁶²

Fourteenth Amendment

State statue statutes and other forms of punitive preemption may also be vulnerable to constitutional challenges on Equal Protection and Due Process Clause grounds under the Fourteenth Amendment. As with the First Amendment challenge, the Equal Protection Clause argument relies on the understanding that a locality's decision to erect or maintain a monument in a public space is an expressive activity and a form of government speech.⁶³

It is well-established that while both private citizens and corporations may enjoy some limited right to engage in hateful speech, governments enjoy no such right and are patently barred from engaging in racially discriminatory speech because of the behavioral and expressive harms the speech can have on marginalized or subordinate groups.⁶⁴ The implication is that when communities are required by statue statutes and other forms of punitive preemption to display Confederate monuments—widely accepted symbols of white supremacy designed to intimidate and subordinate racial

⁵⁹ See *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

⁶⁰ See Micah Schwartzman & Nelson Tebbe, *Charlottesville's Monuments are Unconstitutional*, SLATE (Aug. 25, 2017), <https://perma.cc/9QQQ-LYE6>; see also Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 649-51, 658-65 (2013).

⁶¹ Tebbe, *supra* note 60, at 658-65.

⁶² Schwartzman & Tebbe, *supra* note 60.

⁶³ Bray, *supra* note 12, at 18.

⁶⁴ Tebbe, *supra* note 60, at 658-65; see also Helen Norton, *The Equal Protection Implication of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 174-183 (2012).

minorities—they are engaging in government racially discriminatory speech in violation of the Equal Protection Clause and state constitutional analogues.⁶⁵ Just as is the case with the free speech approach, state statutes cannot compel actors to engage in activity that violates the state or federal constitutions. If such statutes do, in fact, require actors to engage in constitutional violations, those actors have an obligation to defy the statutes and, in the case of Confederate monuments, remove them from public spaces.

As for the Due Process Clause challenge, there is considerably less judicial or scholarly commentary assessing the efficacy of this approach. Like the Free Speech Clause challenge, the Due Process challenge assumes that localities, as governmental corporations or as representatives of local residents, enjoy federal constitutional and civil rights and are entitled to their protections, including protections against the deprivation of property without due process. Thus, if a state statute includes punitive preemption language either imposing some sort of fine on a locality when it allegedly violates a provision of the statute, or dictates how the locality may use the public property on which a protected monument sits without some process or procedure for the locality to seek relief, then the statute violates the Due Process Clause. Although this challenge has not been widely tested,⁶⁶ localities contesting state statute statutes may also consider this potential claim.

Common Law and Statutory Immunity

Apart from federal constitutional challenges to the use of statue statutes and punitive preemption to block local control over Confederate monuments, localities may also consider making state law challenges to these statutes, arguing that they impermissibly infringe upon common law or statutory immunity protections of local legislators. Many states have state constitutional or statutory analogues to the federal Speech or Debate Clause that grant immunity to state legislators from suit for their votes, public statements, or other legislative action taken while performing their official duties.⁶⁷ Although local legislators are not explicitly extended the same immunities under these analogues, state courts have been inclined to extend these protections to local

⁶⁵ Schwartzman & Tebbe, *supra* note 60.

⁶⁶ *See, e.g.*, Order on Cross Motions for Summary Judgement, *supra* note 42, at 7.

⁶⁷ Briffault, *supra* note 30, at 2014.

legislators through broad interpretations of the state analogues, or as a matter of common law, citing the legislative immunities that gave rise to the federal Speech or Debate Clause.⁶⁸ It follows then, that when states impose harsh civil and criminal penalties on local legislators when, in their official capacity, they vote to remove or otherwise alter a Confederate monument in violation of a statue statute,⁶⁹ the states infringe on the immunity afforded local legislators and have a chilling effect on their decisions.

Conclusion

It is important for local governments to resist the rising use of statue statutes and other forms of punitive preemption. At stake is the continued erosion of local democracy as these measures stifle local political innovation, chill public discourse, and undermine local faith in the democratic process. With other states currently considering bills to enact similarly corrosive statue statutes,⁷⁰ governments need to encourage political resistance to this growing trend. Thus far, localities have enjoyed the most success in proactively resisting the enactment of new statue statutes, rather than contesting existing statutes. Once enacted, statue statutes have proven more resilient to local challenges. Legislative attempts to repeal statue statutes in part or in whole have thus far been entirely unsuccessful.⁷¹ Constitutional litigation has similarly also been of limited effectiveness. Local governments should, however, continue to resist statue statutes and punitive preemption in the state legislatures and the courts, challenging the statutes under the First Amendment's Free Speech Clause, the

⁶⁸ *Id.* at 2014-15; *see also* Moore v. Call (*In re* Recall of Call), 749 P.2d 647, 677 (Wash. 1988) (recognizing that the state speech or debate analogue must apply to local legislators because of “the necessity for free and vigorous debate in all legislative bodies”); Sanchez v. Coxon, 854 P.2d 126, 130 (Ariz. 1993) (noting that there was no persuasive reason that “city or town council members should be more inhibited in debate than state or federal legislators”).

⁶⁹ *See, e.g.*, S.B. 2320, Leg., Reg. Sess. (Miss. 2017) (imposing fines and prison terms on violators and subjecting local legislators to individual liability for violation while acting in their official capacity); S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019) (punishing violations with significant fines and expressly waiving all state and local immunity).

⁷⁰ *See, e.g.*, S.B. 1663, 86th Leg., Reg. Sess. (Tex. 2019).

⁷¹ *See, e.g.*, H.B. 2377, Gen. Assemb., Reg. Sess. (Va. 2019) (seeking to amend Virginia's statue statute to permit localities to manage monuments and memorials as they see fit; died in committee); S.B. 51, Gen. Assemb., Reg. Sess. (Ga. 2019) (seeking to repeal Georgia's statue statute; died in committee); H.B. 10, Gen. Assemb., Reg. Sess. (N.C. 2019) (seeking to repeal North Carolina's statue statute; died in committee).

Fourteenth Amendment's Equal Protection and Due Process Clauses, and on common law and state statutory immunity grounds.