



## ESSAY

**Confederate Statute Removal**

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**Abstract.** Certain state governments have adopted statutes that are designed to prevent city governments from eliminating memorials to Confederate forces and leaders. Critics of these controversial statutes generally focus on the moral issue of preserving statues honoring white supremacy. This Essay highlights a different set of concerns: These statutes suppress the speech of cities while compelling them to make statements they disagree with, and they distort the political process in troubling ways. These concerns have clear echoes in constitutional doctrine, and represent a separate reason for removal of these statutes.

**Introduction**

Various city and local governments have sought to remove memorials to Confederate forces and leaders.<sup>1</sup> In response, state governments have adopted measures that are designed to prevent removal.<sup>2</sup>

These “Confederate statutes” vary in form. North Carolina’s “Cultural History Artifact Management and Patriotism Act of 2015” provides that an “object of remembrance located on public property may not be permanently removed . . . .”<sup>3</sup> South Carolina adopted a measure in 2000 that protected monuments to the “War Between the States,” among other conflicts, while revealing its focus by honoring the “South Carolina Infantry Battle Flag of the Confederate States of America.”<sup>4</sup>

Alabama’s “Memorial Preservation Act of 2017” similarly prevents the removal of any “statue . . . intended at the time of dedication to be a permanent memorial to an event, a person, a group, a movement, or military service that

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1. See, e.g., Mitch Landrieu, *We Can’t Walk Away from This Truth*, ATLANTIC (May 23, 2017), <https://perma.cc/2PDN-DBKM> (quoting a statement by the mayor of New Orleans urging removal of monuments to the Confederacy).

2. See Kaeli Subberwal, *Several States Have Erected Laws to Protect Confederate Monuments*, HUFFINGTON POST (Aug. 17, 2017, 9:09 PM ET), <https://perma.cc/UJN2-289H>.

3. Cultural History Artifact Management and Patriotism Act of 2015 § 3(c), 2015 N.C. Sess. Laws 170.

4. 2000 S.C. Acts 292 §§ 1, 3.

is part of the history of the people or geography now comprising the State of Alabama”<sup>5</sup> that has been in place for 40 years or more.<sup>6</sup> Through this statute, Alabama Attorney General Steve Marshall filed suit against the city of Birmingham and its mayor for covering a Confederate monument.<sup>7</sup>

Critics of these controversial state measures tend to focus on the moral issue of preserving monuments to white supremacy.<sup>8</sup> But the measures also raise a separate set of issues, because they run contrary to constitutional values regarding free speech and the fairness of the political process. While these issues may or may not make for a winning legal challenge to the statutes, they clearly represent an important aspect of the debate over their propriety.

## I. Free Speech

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. This runs against free speech principles.<sup>9</sup>

The Supreme Court has already determined that a statue in a city park is speech. In *Pleasant Grove City v. Summum*,<sup>10</sup> the Supreme Court held that a city government was entitled to select the monuments it displayed in a public

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5. 2017 Ala. Laws 354 § 2(6) (defining “monument”).

6. *Id.* § 3(a) (providing in part that no monument in place for 40 or more years may be removed).

7. Joshua Barajas, *Alabama Attorney General Sues Birmingham for Partially Covering Confederate Monument*, PBS NEWSHOUR (Aug. 17, 2017, 9:10 AM EDT), <https://perma.cc/2STY-HJTZ>.

8. See, e.g., Rhonda Brownstein, *SPLC: Alabama’s Memorial Preservation Act is About Protecting Confederate Monuments*, SOUTHERN POVERTY LAW CENTER (May 25, 2017), <https://perma.cc/HBL3-5LQA> (“These racist symbols have no place on government property, where they counter our nation’s core principle to ensure liberty and justice for all.”); David A. Graham, *The Stubborn Persistence of Confederate Monuments*, ATLANTIC (Apr. 26, 2016), <https://perma.cc/ZCS7-V7NU> (“Establishing monuments to Confederate war heroes, in turn, celebrates men who committed treason and sought to break the nation apart in the name of slavery.”). But see Ira C. Lupu & Robert W. Tuttle, *The Debate Over Confederate Monuments*, TAKE CARE (Aug. 25, 2017), <https://perma.cc/8VGU-TNJG> (analyzing issue from a legal instead of a moral perspective).

9. Professors Ira C. Lupu and Robert W. Tuttle have also urged that the statutes represent unconstitutional viewpoint discrimination. See Lupu & Tuttle, *supra* note 8. While Lupu and Tuttle seem to suggest that a state statute mandating removal of Confederate monuments would also be objectionable, that claim is not entirely obvious. There is a basic asymmetry at work—it would be hard for a reasonable observer to interpret an empty park as a statement by the city government about Confederate values, but a reasonable observer could easily interpret a park with a Confederate statue as a statement by the city and state governments. The state government might have a legitimate interest in preventing such a statement from being made in its name.

10. 555 U.S. 460 (2009).

park.<sup>11</sup> As explained in a majority opinion authored by Justice Alito, “A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”<sup>12</sup> Because of the city’s “freedom to express its views,”<sup>13</sup> the Court held that Pleasant Grove was entitled to refuse to display a monument setting out the tenets of a small religious group.<sup>14</sup>

Courts have been less clear as to whether cities can assert free speech protections against state governments.<sup>15</sup> After all, cities are merely creatures of state law. But recent Supreme Court precedent is instructive. In *Citizens United v. Federal Election Commission*,<sup>16</sup> the Supreme Court held that the First Amendment protects for-profit corporations, which are generally organized under state law.<sup>17</sup> Granting free speech protection to for-profit corporations while denying them to municipal corporations would amount to discrimination by type of speaker—a practice that the *Citizens United* Court generally rejected.<sup>18</sup>

Of course, even if these arguments would not prevail in federal court, they may prevail in the court of public opinion. Much commentary has sought to defend the speech of protestors seeking to preserve a Confederate monument in Charlottesville.<sup>19</sup> Surely it is worth defending the speech of Charlottesville itself, a city that had rejected the monument and what it stands for.

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11. *Id.* at 481.

12. *Id.* at 470.

13. *Id.* at 468.

14. *Id.* at 465, 468, 481.

15. For a general treatment, see Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 425-27 (2013) (arguing in favor of municipal free speech rights, and addressing conflicting Supreme Court precedent).

16. 558 U.S. 310 (2010).

17. *Id.* at 329.

18. Bendor, *supra* note 15, at 426. As Bendor observes, this conception of free speech rights would involve federal courts in sensitive disputes between different parts of state governments. *Id.* at 426-27. But the Supreme Court has proven willing to entertain suits by one state agency against another. See *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 261 (2011) (concluding that federal courts could hear a suit by a state agency against state officials alleging violation of federal law).

19. See, e.g., William McGurn, *Hurrah for the ACLU: In Charlottesville, a Principled Stand for the Speech Rights of Even Odious Speakers*, WALL ST. J. (Aug. 14, 2017), <https://perma.cc/42B6-GCSR> (praising the ACLU for its support of protestors seeking to preserve monument).

## II. Political Process

### A. Geographic

Apart from free speech concerns, the statutes are problematic in that they distort the political process. The presence or absence of a statue is a distinctly local issue—it only directly impacts people in the vicinity. Yet the state laws generally take the issue out of the hands of the local government, and place it in the hands of an entity operating at a higher level. As a result, opponents of a statue cannot prevail simply by convincing their neighbors; they have to convince some different and geographically more diffuse group.

The Supreme Court has recognized that it violates equal protection to restructure the political process in a way that places special impediments in the way of people seeking protection from discrimination. In the 1969 case of *Hunter v. Erickson*,<sup>20</sup> the Supreme Court struck down a city charter amendment that required a voter referendum before the city could adopt any ordinance dealing with racial, religious, or ancestral discrimination.<sup>21</sup> The amendment was put in place as part of the backlash to a city council ordinance on fair housing.<sup>22</sup>

This doctrine has seen some successes, and some major defeats. After some Colorado municipalities adopted ordinances limiting discrimination based on sexual orientation, Colorado voters adopted an amendment to the state constitution that precluded that type of law.<sup>23</sup> In 1996, the Supreme Court struck down the amendment, relying in part on political process concerns with its effect.<sup>24</sup>

[Under the amendment,] Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury.<sup>25</sup>

In other words, the amendment was problematic partly because it forced people seeking redress for discrimination (including discrimination at the local level) to convince a different and geographically more diffuse group at the state level.<sup>26</sup> The invidious intent behind this restructuring of the political process

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20. 393 U.S. 385 (1969).

21. *Id.* at 393.

22. *Id.* at 386-87.

23. *See Romer v. Evans*, 517 U.S. 620, 623-24 (1996).

24. *Id.* at 623.

25. *Id.* at 631.

26. *See id.*

was made clear by the fact that it applied even if the harm was “local or discrete.”<sup>27</sup>

The Supreme Court moved in the opposite direction in *Schuette v. Coalition to Defend Affirmative Action*,<sup>28</sup> by refusing to strike down a state constitutional amendment that, amongst other things, banned the use of race in the college admissions process.<sup>29</sup> To the *Schuette* plurality, the political process doctrine only seemed to apply where “the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race.”<sup>30</sup>

To the editors of the Harvard Law Review, the *Schuette* plurality “effectively interred the political-process doctrine,” because it limited the application of the doctrine to circumstances where “conventional equal protection doctrine” would apply.<sup>31</sup> But it is possible to take a less dramatic view. Unlike the amendment in *Romer*, the amendment in *Schuette* did not shift decision-making authority from the local to the state level, but rather from unelected university administrators to the voters.<sup>32</sup> And unlike the policies under attack in *Hunter* or *Romer*, which straightforwardly protected minorities from discrimination, the policy under attack in *Schuette* was affirmative action—a policy that the Court only tolerates on the ground that it confers benefits on institutions as a whole, not on racial minorities in particular.<sup>33</sup>

In many ways, the state statutes preventing removal of Confederate statues are more similar to the measures struck down in *Hunter* and *Romer* than the measure sustained in *Schuette*. In *Hunter*, the measure prevented efforts to address housing discrimination.<sup>34</sup> Here, the state measures are preventing cities from addressing Confederate statues that have similarly been used to achieve and enforce racial segregation.<sup>35</sup> In *Romer*, the state sought to take issues out of

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27. *Id.*

28. 134 S. Ct. 1623 (2014) (plurality opinion).

29. *Id.* at 1629, 1638.

30. *Id.* at 1633; *see also id.* at 1636 (distinguishing *Hunter* based on assertion that *Schuette* did not involve a “specific injury”).

31. *See Leading Cases: Constitutional Law*, 128 HARV. L. REV. 191, 286 (2014).

32. *See Schuette*, 134 S. Ct. at 1650 (Breyer, J., concurring).

33. *See Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (rejecting equal protection attack on affirmative action by citing the benefits that diversity confers on students and the legitimacy of the overall system). Of course, this approach is subject to serious challenge. *See, e.g.,* RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 199-205 (2013) (urging that the Supreme Court had erred in rejecting the justification that affirmative action remedies societal discrimination against minorities while insisting that programs be justified by reference to diversity benefits).

34. *Hunter v. Erickson*, 393 U.S. 385, 386 (1969).

35. Sophie Abramowitz et al., *Tools of Displacement*, SLATE (June 23, 2017, 3:20 PM), <https://perma.cc/7WMF-8FE3>.

the hands of local governments, much like measures considered here.<sup>36</sup> And again, even if a city would not prevail in a federal lawsuit based on these arguments, the arguments are available to advocates.

### B. Temporal

The political process issue is not just geographic. The statutes generally shift decisions from a geographically concentrated electorate that is matched to the concerns raised by a local monument to a geographically diffuse electorate. But they also shift decisions from a *modern* electorate that is matched to the current meaning of the monuments to the *past* electorates that installed and maintained the monuments. For example, the Alabama statute most strongly protects monuments that have been in place for forty years or more.<sup>37</sup> By protecting a long-lasting status quo in this way, the statute gives special weight to the views of past generations of voters.

It is not uncommon to treat a long-lasting status quo as settled and uncontroversial,<sup>38</sup> but it is problematic. Among other issues, demographic change<sup>39</sup> can change meanings. In an overwhelmingly Christian community like eighteenth century Cambridge, a social club's mandatory weekly pork dinner may only communicate a desire for good food and consistent fellowship. In a community that has come to incorporate a significant population of Jews, Muslims, Hindus, and Buddhists, stubborn insistence on that same practice means something very different.<sup>40</sup> Even on the (highly dubious) assumption

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36. *Romer v. Evans*, 517 U.S. 620, 623-24 (1996).

37. See 2017 Ala. Laws 354 § 3(a).

38. For example, in his concurrence in *Van Orden v. Perry*, Justice Breyer cited the fact that a Ten Commandments monument had been in place for forty years without being challenged as support for his conclusion that it should remain in place notwithstanding strong Establishment Clause concerns. 545 U.S. 677, 700-03 (2005) (Breyer, J., concurring).

39. Individual events can also change meanings. After a terrorist attack in Charlottesville, the city's mayor advocated for removal of the statue that had precipitated the event, remarking: "It became very clear to me that the historical meaning of this statue has been inalterably changed . . . It's changing every day in part because we're getting new threats on a daily basis from terrorists who see it as a lightning rod and want to come back here." Madeline Conway, *Charlottesville Mayor Calls for Virginia to Change Law on Removing Monuments*, POLITICO (Aug. 18, 2017, 5:21 PM EDT), <https://perma.cc/Q2VE-SRXU> (quoting Charlottesville Mayor Michael Signer).

40. See Herbert H. Denton, Jr., *Behind the Velvet Curtain: A Look At Harvard's Final Clubs*, HARVARD CRIMSON (May 25, 1965), <https://perma.cc/35SF-KDP3> (discussing the origins of the Porcellian Club at Harvard College, and referencing the "tacit ban on Jews" that had prevailed at Harvard's social clubs); cf. *Pleasant Grove City v. Summum*, 555 U.S. 460, 477 (2009) (noting that the symbolic meaning of the Statue of Liberty had changed over time from "international friendship and the widespread influence of American ideals" to "a beacon welcoming immigrants to a land of freedom").

that Confederate memorials sent an acceptable and uncontroversial message when built, they can send a very different message now.

The concern here is also unique. To some extent, all durable laws raise the question of whether past generations had the right to make decisions binding following generations.<sup>41</sup> But the Confederate statutes raise the question of whether it is appropriate to take power out of the hands of current voters and amplify the effect of decisions by past voters. Enactments like Alabama's 2017 statute are not simply holdovers from a previous era. They are a current attempt to privilege the decisions of a past voting pool over the decisions of the very different modern voting pool.

Such maneuvers are particularly questionable in light of changes to the voting pool. In the United States, the undeniable trend has been toward greater racial diversity.<sup>42</sup> While legal changes have not always moved in one direction, it is also undeniable that racial minorities have greater freedom to express their concerns now than they did a century ago. Against this backdrop, a statute that locks in the decisions of previous generations of officials amounts to an attempt to empower a different and less diverse electorate than the electorate that has to live with the monuments. In other contexts, attempts to place decisions in the hands of less diverse bodies prompt serious judicial skepticism.<sup>43</sup> The temporal effect of these statutes may merit similar skepticism—if not by the courts, then by the public.

### Conclusion

The state statutes protecting Confederate monuments are anomalous, and fit uncomfortably alongside constitutional values of free speech and fair play. While constitutional doctrine may or may not support a lawsuit toppling the statutes, the doctrine has valuable lessons for the public debate. Constitutional doctrine—and the moral deliberation it incorporates—provides an additional ground for skepticism of statutes that suppress the speech of cities and that restructure political processes to take power out of the hands of the voters who actually have to live with the monuments. The Confederate statutes should be removed.

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41. Thomas Jefferson famously suggested they didn't, declaring, "The earth belongs to the living"; the point has some salience in debates about memorials. Scott Jaschik, *Why Honor Thomas Jefferson?*, SLATE (Nov. 25, 2015, 2:00 PM), <https://perma.cc/F5HZ-HASL>.

42. See SANDRA L. COLBY & JENNIFER M. ORTMAN, CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P25-1143, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 8 (2015) ("The United States is projected to become more racially and ethnically diverse in the coming years.").

43. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (applying searching and skeptical analysis to racial gerrymander); *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986) (criticizing use of peremptory challenges to jurors on racial grounds).