

SHOULD THEY STAY, OR SHOULD THEY GO?
 STATUE POLITICS IN SHIFTING SOCIETIES: THE
 PERMISSIBILITY OF PEACETIME REMOVAL, ALTERATION
 AND DESTRUCTION OF PROBLEMATIC POLITICAL
 MONUMENTS IN THE UNITED STATES

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I. INTRODUCTION

Much has changed politically and socially in the United States since August 2017, when violent protests poured into the streets of Charlottesville, Virginia where organizers of the Unite the Right rally gathered to defend a statue of Confederate General Robert E. Lee.¹ In 2017 the city planned on removing the statue. While supporters contended that the statues were simply memorials to the Confederacy's war veterans, the city argued that the monuments "were intended to, and did, send messages of intimidation, exclusion, and hostility to African Americans."²

The debate over which parts of a nation's collective history should be publicly preserved and monumentalized has gained traction since 2017, peaking during the international Black Lives Matter movement of 2020, when across the nation, and world, statues and monuments of colonial rulers and Confederate leaders came tumbling down. It cannot be denied that there exists a clear divide among people who believe the Confederate statues in the United States should remain where they are, and those who advocate for their removal. The simple solution would be for governments and elected officials to relocate certain political relics to museums, changing the statue's narrative from public permanence, to historical remembrance. The problem with this seemingly simple solution, however, lies in the fact that

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¹ Paul Duggan, *Charlottesville's Confederate statues still stand – and still symbolize a racist legacy*, THE WASH. POST, (Aug. 10, 2019) <https://www.washingtonpost.com/history/2019/08/10/charlottesvilles-confederate-statues-still-stand-still-symbolize-racist-past/>.

² *Id.*

Confederate monuments are protected by law in several states.³ The laws protecting cultural heritage in the United States takes a preservationist approach without granting elected leaders the ability to act on behalf of their constituents' desires and address problematic monuments from a modern lens.

Virginia's laws, for example, are particularly antiquated and lack forward-thinking provisions in that its state law prohibits local authorities from removing a monument to a war veteran once erected.⁴ Going further, they cannot "interfere" with it; nor "prevent...citizens from taking proper measures and exercising proper means for the protection, preservation, and care of the same."⁵ The statute is found at Va. Code §15.2-1812, which effectively goes as far as prohibiting any disturbance to these monuments to war veterans.⁶ An enforcement provision was added in 2000, allowing any interested person to sue to recover damages for encroachments, in addition to any other legal remedies.⁷ Laws like the ones found in Virginia protecting Confederate monuments arguably stifles a communities' political progress. While there is a dramatic focus on preserving the past, few legal options are provided for the future.

Domestic legislation has been implemented throughout the southern States to protect and preserve Confederate statues. Many see these draconian laws preventing the removal and alteration of statues and monuments as commemorating hatred and bigotry. The question is not necessarily whether the laws should change to permit the removal or alteration of these statues, but rather *how* the law should permit communities to navigate what options are available. The consensus that some of the statutes preventing removal now "need[] to go" is easier established than the consensus on what, specifically, "should go."⁸

³ See *Confederate Monuments Are Protected by Law in Several States*, WXII 12 (Jul. 10, 2020), <https://www.wxii12.com/article/confederate-monuments-law-protection/33078480#>.

⁴ THE MONUMENT FUND, <https://www.themonumentfund.org/the-law-suit> (last visited Feb. 6, 2020).

⁵ *Id.*

⁶ VA. CODE ANN. § 15.2-1812 (West 2019).

⁷ *Id.* There is also a criminal vandalism statute protecting monuments at VA. CODE ANN. §18.2-137 (prohibiting defacing, damaging, or removing monuments). See VA. CODE ANN. §18.2-137 (West 2019).

⁸ Sarah Fenton, *AHA Plenary: "The Confederacy, Its Symbols, and the Politics of Public Culture," January 7, 2016*, AHA TODAY (Jan 9, 2016) <https://www.historians.org/publications-and-directories/perspectives-on-history/january-2016/aha-plenary-the-confederacy-its-symbols-and-the-politics-of-public-culture-january-7-2016>.

UNC-Chapel Hill's Fitzhugh Brundage put it this way: there are statues "we should remove . . . and then there are those that we would perhaps want to reinterpret. And then there are those that we will probably end up deciding that we have to tolerate."⁹ Stone Mountain, for example, is the world's largest piece of exposed granite, into which massive carvings of Stonewall Jackson, Robert E. Lee, and Jefferson Davis on horseback were completed in 1972.¹⁰ Brundage calls it an "elaborate shrine to white supremacy" but couldn't see a viable way to either demolish or transform it.¹¹ In light of certain immovable monuments, Brundage claims that we should embark on an "effort to revise the commemorative landscape of the south as part of a much larger project to create a more pluralist south."¹² To do this, the United States must first and foremost revise legislation with a modern constitutional lens and look to the international stage for guidance on how to best remove, revise or alter politically problematic sculptures present in our public spaces.

II. BACKGROUND

History is ultimately preserved in the culture we protect. Memorials are a part of the collective discussion and the individuals and events portrayed are not simply preserved, they are represented through "contingent and purposeful lenses."¹³ Cultural heritage is perceived as part of the "common heritage of mankind."¹⁴ The host state, acting as a keeper of the culture, bears the responsibility of protecting these historical treasures because of their location, but often humanity has a collective interest in the overall preservation.¹⁵ John Schofield, a leading scholar on the ethics of cultural heritage, writes that it "[i]s the inevitability and universality of valued places filling our world that gives heritage strong social relevance and purpose."¹⁶ For example, in April of 2019, a fire ravaged the Notre-Dame Cathedral in Paris,

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Scott R. Stroud & Jonathan A. Henson, *Memory, Reconstruction, and Ethics in Memorialization*, 33 J. OF SPECULATIVE PHIL. 282, 283 (2019).

¹⁴ See SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* (Oceana Publications, 1978).

¹⁵ Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. REV. 183, 186 (2003).

¹⁶ TRACY IRELAND, *THE ETHICS OF CULTURAL HERITAGE* 1 (Tracy Ireland & John Schofield eds., 2015).

France—arguably the most visited monument in France¹⁷—and in just 10 days after the fire, close to \$1 billion was raised, from donors around the world, to repair the site.¹⁸ Events such as these evidence the fact that cultural heritage is, to an extent, central to civilization’s collective experience of the world, prone to eliciting deep and sentimental feelings from individuals with differing backgrounds.

The question then becomes, what do we do with our “dark heritage.”¹⁹ What if the memorials standing in our public squares and parks boast a history of inequality and oppression targeting specific groups of the population? Monuments and statues are typically symbols of triumphalism with a focus on the victors. However, should the historically oppressed have a say in whether these monuments have a home in modern society? When you approach heritage as an inherently ethico-political problem—where the effects of the past are transferred into the present, inevitably setting the stage for the future—it becomes evident that the culture society chooses to preserve often allows for the “possibility of an ethical rapprochement with the wounds of history.”²⁰

Statues and monuments inherently have a duty to preserve the archives of the past, which are meant to survive the destruction of time. In the United States, we are faced with the issue of what to do when those archives preserve or glorify the memory of an oppressive regime. Aristotle’s ontological category of destruction encompasses the tendency of time to destroy what humans construct—a tendency which, he argues, must be acted against if humans are to ‘grow.’²¹ Memorials serve as a physical manifestation of remembrance, therein embodying a key aspect of growth.²² It is with this that we accept the roots of conservation as being necessary for societal progress, and consequently turn to the law.

Over the years a complicated legal system of statutes and regulations have been developed and aimed at conservation. Public works

¹⁷ Christine Hauser, *A Guide to Our Notre-Dame Fire Coverage*, N.Y. TIMES (April 19, 2019), <https://www.nytimes.com/2019/04/19/world/europe/notre-dame-cathedral-fire.html>.

¹⁸ Ciara Nugent, *Pledges Reach Almost \$1 Billion To Rebuild Paris’ Notre Dame Cathedral*, TIME (April 17, 2019), <https://time.com/5571518/notre-dame-donations/>.

¹⁹ Torgrim Sneve Guttormsen, *Is it right to destroy monuments over our dark past?*, SCIENCE NORWAY (May 13, 2018), <https://sciencenorway.no/forskningno-norway-opinion/is-it-right-to-destroy-monuments-over-our-dark-past/1455939>.

²⁰ Ireland, *supra* note 16, at 2.

²¹ *Id.*

²² *Id.*

memorializing individuals and historical events, which society believes worthy of recollection, are erected and integrated into our daily lives, and then protected by the local and state legislature. These laws protect against the possibility of erasing history. As the evolution of human consciousness is a continuous process, every historical site has an important story to tell, which arguably is meant to encourage patriotism, reinforce common social mores, and preserve a collective identity.²³ It is with this that we see the roots of conservation as being necessary for societal progress, as it is hard to imagine a future without the foundation of the past.

Roman monuments, for example, provide tangible evidence of the intentions of emperors and their administrations through erecting imperial propaganda and monumentalizing their achievements, which has become a key part of western culture.²⁴ The “we” involved in the act of remembering is complex and multifaceted, and therefore the choices and trade-offs involved in deciding whose values and memories are preserved should perhaps be re-evaluated.²⁵ Ultimately, the questions at the forefront of the discussion are which monuments should be preserved for future generations? And what parts of history are worth memorializing?

The riots in the United States both for and against the removal of historical monuments shows that there is a need for knowledge on what to do with what we currently have.²⁶ Lawmakers have put a great deal of effort into ensuring the preservation and protection of the past, however very few options have been codified as to what elected officials may do when the presence of certain monuments are not conducive to a politically inclusive future. Even if preservation is key to progress, the international cases have proven that there comes a point where the presence of divisive statues do more harm than good for society as a whole, and it is at this point when it becomes necessary for a country to take legal steps to permit the removal and alteration of problematic public monuments.

²³ *5 Reasons Why We Should Preserve Heritage Sites*, GoUNESCO (July 5, 2014), <https://www.gounesco.com/why-preserve-heritage-sites/>.

²⁴ Steven L. Tuck, *The Expansion of Triumphal Imagery Beyond Rome: Imperial Monuments at the Harbors of Stia and Lepcis Magna*, 6 MARITIME WORLD OF ANCIENT ROME, 325 (2008).

²⁵ Scott R. Stroud & Jonathan A. Henson, *supra* note 13 at 283.

²⁶ Torggrim Sneve Guttormsen, *Is it right to destroy monuments over our dark past?* SCIENCE NORWAY (May 13, 2018), <https://sciencenorway.no/forskningno-norway-opinion/is-it-right-to-destroy-monuments-over-our-dark-past/1455939>

A. *Proven Debilitating Effects of the Presence of Confederate Statues in Southern States*

On February 6, 2017, the Charlottesville City Council voted to remove the statue of Robert E. Lee, a decision which elicited numerous riots and lawsuits.²⁷ These riots ultimately peaked violently in August 2017, when several counter-protestors were severely injured. The protestors—organizers of “Unite the Right”—predominantly identify as white supremacists and neo-Nazis.²⁸ The imagery associated with these events have become all too familiar to the American public. White supremacists who target minority communities are, more often than not, discovered to be in possession of, and empowered by, propaganda from past oppressive regimes—much like the statue of Robert E. Lee.²⁹

Members of a neo-Confederate hate group, Identity Dixie, aided in the planning of the attack on the rally in Virginia,³⁰ which elicited both a criminal investigation and a civil lawsuit against former Identity Dixie member Jason Kessler.³¹ Kessler also belonged to the “Proud Boys,” a hate group comprising of self-described “Western

²⁷ Amanda Lineberry, *Payne v. City of Charlottesville and the Dillon's Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45 (2018).

²⁸ Steve Hendrix, ‘It’s still hard to look at,’ THE WASH. POST, (Aug. 10, 2019) <https://www.washingtonpost.com/graphics/2018/local/charlottesville-photographer-pulitzer-prize-photo/> (the protest soon took a bloody turn when a gray Dodge Challenger plowed into the crowd of counter-protestors injuring several, and killing Heather Heyer, a 32-year-old committed activist for racial equality).

²⁹ Hannan Adely, ‘Nothing is Going to Stop Us Being Jewish’: New York Community Rallies After Anti-Semitic ‘Terrorism’ Attack, USA TODAY (Dec. 29, 2019), <https://www.usatoday.com/story/news/nation/2019/12/29/monsey-stabbing-new-yorkers-solidarity-hanukkah-attack/2771116001/> (the attacker was found in possession of anti-Semitic propaganda and symbols); Matt Zaposky, *Charleston church shooter: ‘I would like to make it crystal clear, I do not regret what I did,’* THE WASH. POST (Jan. 4, 2017), https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd_story.html; Feliks Garcia, *Dylann Roof: The vile white supremacist that killed 9 black churchgoers*, INDEPENDENT (Jan. 11, 2017), <https://www.independent.co.uk/news/world/americas/dylann-roof-death-sentence-had-to-do-it-white-supremacist-manifesto-who-is-he-a7520656.html> (Dylann Roof was found with hoards of confederate propaganda, including memorabilia from the KKK).

³⁰ Hatewatch Staff, *Identity Dixie Leaders Helped Plan Deadly Rally*, SOUTHERN POVERTY LAW CENTER, (July 26, 2019), <https://www.splcenter.org/hate-watch/2019/07/26/identity-dixie-leaders-helped-plan-deadly-rally>.

³¹ *Sines v. Kessler*, No. 3:17-cv-00072, (W.D. Va. Aug. 9, 2019).

chauvinists,” and aided in securing the permits to hold the “Unite the Right” rally.³²

As Kristin Layng Szakos,³³ a member of Charlottesville, Virginia’s City Council, and ex-vice mayor, wrote:

Dozens of communities around the country, including New Orleans, Louisville, Dallas, and Baltimore, have removed Confederate statues in their public spaces and changed the names of countless schools and highways named for heroes of the Confederacy’s Lost Cause. After the racist murders of nine worshipers at Emanuel African Methodist Church in Charleston, South Carolina, in 2015, and the violence at the Charlottesville Unite the Right Rally, they have determined that monuments to white supremacy have no place in their public spaces. But in Southern states with outmoded Confederate monument laws like Virginia’s, localities have been prevented from acting. . . . Before the bloodshed in Charlottesville, many people didn’t understand that memorials to the Confederacy were a threat to public safety.³⁴

It is not a secret that these radical racist groups build their image using propaganda left behind by past organizations such as the KKK. Several perpetrators have online blogs and social media accounts flaunting images of oppressive and racist symbols.³⁵ The existing Confederate statues only fuel their hateful fires.³⁶ It is in these facts and circumstances that we see how powerful symbolism and imagery can be. Even if there is not a direct causation, a correlation can likely almost always be drawn. Plenary chair and Yale historian David Blight

³² Hatewatch Staff, *supra* note 30.

³³ Kristin Layng Szakos served eight years on the Charlottesville, Virginia, City Council from 2010 to 2017 (serving as vice mayor from 2014 to 2016). She chaired Virginia First Cities, co-chaired the national Youth, Education and Families Council, and served on the National League of Cities Council on Race, Equity and Leadership.

³⁴ Kristin Layng Szakos, *Why Virginians Deserve to Have Local Control over Confederate Monuments*, SALON (Jan. 17, 2020), <https://www.salon.com/2020/01/17/why-virginians-deserve-to-have-local-control-over-confederate-monuments-partner/>.

³⁵ See Frances Robles, *Dylan Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>.

³⁶ Sarah Fenton, *AHA Plenary: “The Confederacy, its symbols, and the politics of Public Culture,”* HISTORIANS, (Jan 9, 2016) <https://www.historians.org/publications-and-directories/perspectives-on-history/january-2016/aha-plenary-the-confederacy-its-symbols-and-the-politics-of-public-culture-january-7-2016>.

noted that “in memorialization, a loss is always more interesting than victory.”³⁷ With that said, one hopes that our days of memorial building will one day be behind us.³⁸

B. The Role of International Law and Foreign Actors in Arriving at the Appropriate Solution for Domestic Courts and Legislatures

It is difficult to argue against the notion that the growing domestic unrest coupled with the involvement of these statues and monuments in domestic terror schemes,³⁹ proves the need for statutory reform to allow the uniform alteration or removal of Confederate monuments in the United States. The particular shortcomings of the legal channels currently available to citizens negatively affected by the presence of these monuments—i.e., in public parks, and throughout communities—affirms that domestic laws fall short of adequate remedies for the citizens of the United States. To begin, domestic laws should be re-interpreted in light of contemporary applications of the Constitution while also drawing insight from international legal norms. Customary international law, coupled with a contemporary application of domestic constitutional law, will provide the best forum within which states plagued by the presence of oppressive symbols can achieve restorative justice.

When we look to the global stage for guidance, it appears that generally nations have been amenable to efforts behind removing statues and monuments commemorating discrimination, hatred, and violence. With that said, it seems as if international cultural heritage management has been as much about what should not be preserved and displayed in public spaces, as about what should be. Destruction, whether by conscious demolition or natural decline, should therefore be a permissible part of cultural heritage management.⁴⁰ This can be permitted under the notion that the presence of monuments from totalitarian and oppressive past regimes impede a nation’s growth.

³⁷ *Id.*

³⁸ *Id.* See also Kristin Layng Szakos, *supra* note 34.

³⁹ See generally, Harry Blain, *Should We Fight a War on White Terrorism?*, FOREIGN POLICY IN FOCUS (Aug. 21, 2019), <https://fpif.org/should-we-fight-a-war-on-white-terrorism/>.

⁴⁰ Torgrim Sneve Guttormsen, *Is it right to destroy monuments over our dark past?*, SCIENCE NORWAY (May 13, 2018), <https://sciencenorway.no/forskningno-norway-opinion/is-it-right-to-destroy-monuments-over-our-dark-past/1455939>.

It is for this reason that a joint analysis with international actors dealing with similar frustrations is effective in arriving at a comprehensive proposal for domestic US legislatures dealing with politically problematic statues, and there is certainly a domestic demand for change. Dallas Mayor, Mike Rawlings, stated in an interview in August 2017 that he doesn't like the Confederate monuments in the city's public spaces and considers them a "symbol of injustice" and divisive and "dangerous totems."⁴¹ Despite the growing consensus that the "dangerous totems" must go, there is no legal agreement about the monuments' fates in the United States.⁴²

C. Method of Analysis

This Note will look to the specific ways in which policy and decision-makers in the United States can act to mitigate the harm inflicted by statues and monuments left behind by an oppressive government, subsequently proposing a resolution that could work to uniformly resolve the tension around the presence of Confederate statues in public arenas. Acting within the intricacies of international cultural heritage law, it is important to analyze the state's actions in conjunction with both international and domestic norms. To families whose ancestors died during the Civil War, the statues are a tribute to lost loved ones; however, they are also symbols of Confederate America and therefore remain relics of repression that pay tribute to a white supremacist movement.⁴³ In light of this dichotomy, it is valuable to look and see what other nations have done with their monuments of oppression.

⁴¹ Tristan Hallman, *Dallas Mayor Mike Rawlings calls Confederate monuments 'problematic' but isn't rushing tear them down*, DALLAS NEWS (Aug. 15, 2017) <https://www.dallasnews.com/news/2017/08/15/dallas-mayor-mike-rawlings-calls-confederate-monuments-problematic-but-isn-t-rushing-to-tear-them-down/> (Mayor Rawlings additionally claimed he is hesitant to tear down the statues because of the divisive nature of the act, "It's easy to jump on the bandwagon and say 'tear it down' because it's frankly politically correct and in many ways it makes us all feel good. I feel that way," Rawlings said. "But I hesitate because I realize the city of Dallas is better, is stronger when we are united and not divided. My goal as mayor, my job as mayor, is to continue to unite our city.>").

⁴² Yuliya Komska, *From 2017: How Germany handles monuments from Nazi and communist eras*, THE PHILA. INQUIRER (June 17, 2020), <https://www.inquirer.com/philly/opinion/commentary/charlottesville-nazis-germany-communists-monuments-trump-20170817.html-2>.

⁴³ Josh Horwitz, *The way that Taiwan, India, and other countries deal with statues that symbolize ugly pasts*, QUARTZ (Aug. 18, 2017), <https://qz.com/1056877/how-taiwan-india-and-others-dealing-with-statues-that-symbolize-ugly-pasts/>.

Part II of this article will look deeper into policy, laws, norms and practices protecting cultural heritage on an international stage. Part III will then analyze individual international case studies which likely could provide an example for what United States decisionmakers can and should do about the Confederate monuments in the US, and finally Part IV will outline a proposal for United States policymakers based on the case studies discussed in Part III.

To understand how a State should go about the removal, alteration or modification of political and religious statues that convey problematic ideals, case studies of global participants—who through their own experiences have specific expectations about how to act—can be useful in revealing what the operational norms are in given situations.⁴⁴ Even though a norm may not be codified in law, global participants may still have expectations about how to act.⁴⁵ It is in analyzing the actions taken by global actors that the United States decisionmakers can better understand which circumstances excuse the destruction or alteration of cultural property. Reputationally speaking, it will give additional insight into how the world could likely react to certain decisions made regarding historic monuments in the United States, particularly with regard to what precedent the US's actions may set.

The greatest point of contention that will arise in the analysis of what United States decisionmakers should do with their Confederate monuments does not lie solely in the comparison with international actors, but rather in looking closely at the relationship between state and federal domestic laws and the Constitution. In several states, local governments face statutory restraints on removing or modifying these monuments.⁴⁶ Several states within the U.S. have local state statutes governing and protecting statues. Some local governments have sought to remove or modify Confederate monuments in public spaces, but face statutory restraints on preventing removal or modification.⁴⁷ More specifically, some local governments must reckon with statutes designed to preserve the public display of these monuments in places of honor and respect.⁴⁸ These “statue statutes” are frequently described as “impossible” barriers for local governments that wish to modify or

⁴⁴ Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. REV. 183, 192 (2003).

⁴⁵ *Id.*

⁴⁶ Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes”*, 91 TEMP. L. REV. 1 (2018).

⁴⁷ *Id.*

⁴⁸ *Id.*

remove Confederate monuments.⁴⁹ For example on February 6, 2017, the City Council in Charlottesville voted to remove the statue of Robert E. Lee.⁵⁰ In response, numerous plaintiffs filed a lawsuit to prevent any changes to either Market Street (formerly Lee and Emancipation) or Court Square (formerly Jackson and Justice) Parks on the basis that these monuments were protected under state and local law.⁵¹

D. Overview and Key Terms

UNESCO defines the term cultural heritage to encompass several main categories of heritage including tangible cultural heritage, which includes movable, immovable and underwater cultural heritage.⁵² The phrase “cultural heritage” is generally understood to describe objects inherited from past generations that relate to a society’s cultural development.⁵³ It includes monuments, groups of buildings, and sites, “which are of outstanding universal value from history, art or science.”⁵⁴ Throughout the article, the term will refer to tangible items of cultural value.

It is understandable that the view is sometimes expressed that ‘things’ are not as important as human beings, and that consideration of the fate of objects should always be secondary to that of the alleviation of human suffering.⁵⁵ Yet UNESCO is constantly confronted by the pleas of people who are physically suffering, to assist them in efforts to save their cultural heritage, for their suffering is “greatly increased” by the destruction of what is dear to them.⁵⁶ As previously discussed, cultural heritage represents a nation’s history, community, and effectively, their identity, and preservation is sought, not for the

⁴⁹ *Id.*

⁵⁰ Amanda Lineberry, *Payne v. City of Charlottesville and the Dillon’s Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45 (2018).

⁵¹ *Id.*

⁵² *What is Meant By “Cultural Heritage”?*, UNESCO (2019), <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/>.

⁵³ *See id.*

⁵⁴ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, T.I.A.S. No. 8226, 27 U.N.T.S. 37 [hereinafter World Heritage Convention] (emphasis added).

⁵⁵ Lyndel V. Prott, *Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War*, in THE SPOILS OF WAR: WORLD WAR II & ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY 225 (Elizabeth Simpson ed., 1997).

⁵⁶ *Id.*

sake of the objects, but for the sake of the people who derive meaning from their presence.⁵⁷ Legislative and government officials must understand that there is likely a weight associated with the Confederate statues for many US citizens, particularly in light of defining individual and collective identity, if the initiative to amend the laws surrounding the removal of the statues is to be taken seriously.

E. Why Does this Matter? Understanding the Associative Value and its Ties to Iconoclasm

It is important to understand why cultural heritage is valuable in light of asking whether or not it is worth preserving, especially when there is an association with suffering.⁵⁸ As noted earlier, the category at issue here, and most inclined to include monuments and statues, falls under immovable tangible cultural heritage. Triumphant arches, columns, and other monuments have been built to commemorate military victories, sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression.⁵⁹ A key aspect to understanding the value of monuments and statues is through the concept of associative value.

Associative value refers to the tangible link that cultural heritage provides to the past.⁶⁰ People feel connected to certain objects, structures and monuments because they are driven by a need for “historical continuity and social identity,” which they derive from the association with particular relics.⁶¹ Statues and monuments are essentially erected to commemorate a certain *zeitgeist*, speaking to a group’s common experience, which then forms the basis of group identity.⁶²

Monuments to the Confederacy and former Confederate figures have been prominently displayed in parks, courthouse squares, and other public spaces of many American towns and cities for many

⁵⁷ *Id.*

⁵⁸ As part of human activity, Cultural Heritage produces tangible representations of the value systems, beliefs, traditions, and lifestyles. As an essential part of the culture as a whole, Cultural Heritage contains these visible and tangible traces from antiquity to the recent past. See Culture in Development, *What is Cultural Heritage* (2019), http://www.cultureindevelopment.nl/cultural_heritage/what_is_cultural_heritage.

⁵⁹ Zachary Bray, *supra* note 46, at 14.

⁶⁰ William D. Lipe, Value and Meaning in Cultural Resources, in HENRY CLEERE ED., *APPROACHES TO THE ARCHAEOLOGICAL HERITAGE* 4 (1984).

⁶¹ *Id.* at 5.

⁶² *Id.* at 5.

years.⁶³ There is little doubt that, to an extent, their presence is inextricably linked with patterns of institutionalized racism, including but not limited to the rise of Jim Crow, in the United States.⁶⁴ In recent years, the continued display of these monuments has given rise to intense controversy and outbreaks of violence,⁶⁵ and in response, some local governments have pursued options of removal or modification, only to face statutory roadblocks.⁶⁶ Again, as stated these “statue statutes” are barriers for local governments that wish to modify or remove harmful monuments.⁶⁷ Commemorative monuments, such as statues or battlefields, are meant to unify by evoking the common experiences of a heterogeneous society.⁶⁸ The associative value of cultural property leads to its symbolic power and the emotional connection that people then feel towards it. In many instances, cultural heritage becomes an icon representing certain states, groups or beliefs.⁶⁹ Which leads the conversation to the concept of iconoclasm.

Iconoclasm is the destruction of icons due to the belief that the images are imbued with an unacceptable symbolic significance, or rather an unacceptable associative value.⁷⁰ In the mind of the iconoclast, annihilating the image is a way of destroying the associated message.⁷¹ During the French Revolution, for example, the revolutionaries tried to destroy all artwork and monuments connected with the king to delegitimize the Ancien Regime.⁷² Similarly, when the Bolsheviks took control of Russia in 1917, they ordered the demolition of all pre-revolutionary monuments.⁷³ The concept of iconoclasm, and the desired effect of eradicating a certain imagery in a shifting society, is not a novel notion.

⁶³ Zachary Bray, *supra* note 46.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Zachary Bray, *supra* note 46.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 14.

⁷⁰ KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 115-16 (1994).

⁷¹ George Fitzherbert, *Icon Smashing—the Precedents*, BBC NEWS (Mar. 10, 2001), http://news.bbc.co.uk/2/hi/world/south_asia/1211067.stm (“‘The feeling was that people were attributing to the object, to the images—and this particularly applies to sculpture, which is the most realistic art form—they were attributing to the objects a power that is only God’s,’ said Dr. Aston [historian of the English Reformation].”).

⁷² See generally, William D. Lipe, *supra* note 60.

⁷³ *Id.*

F. *Historical Context and Relevance in Light of the Current Legal Climate*

As now established, international and domestic laws are in place to protect cultural heritage, but controversies arise when governments face the prospect of removing, altering or destroying artifacts or relics, or even areas of protected land, that might fall under the cultural heritage umbrella. To give a procedural example, a federal judge rejected the Trump administration's bid to dismiss lawsuits challenging the constitutionality of a 2017 decision to downsize two sprawling national monuments in Utah.⁷⁴ On December 4, 2017, then-President Donald Trump issued a proclamation to modify Bear Ears National Monument in Utah by replacing it with two smaller monuments.⁷⁵ In Proclamation 9558 of December 28, 2016, exercising his authority under section 320301 of Title 54, United States Code (the "Antiquities Act"), President Barack Obama established the Bears Ears National Monument in the State of Utah, reserving approximately 1.35 million acres of Federal lands for the care and management of objects of historic and scientific interest identified therein.⁷⁶

On grounds that the statute allows the President to reserve parcels of land with the limits being "confined to the smallest area compatible with the proper care and management of the objects to be protected,"⁷⁷ President Trump argued that the boundaries of the monument should be modified to exclude nearly 1.2 million acres of land that he feels are unnecessary for the care and management of the objects to be protected within the monument.⁷⁸ Three separate lawsuits, filed by scientists, conservation and historic preservation organizations, and Native American tribes in December 2017, argued that only Congress, not the president, has the power to reduce the size of national monuments in the United States.⁷⁹

⁷⁴ Brady McCombs, *Trump administration loses bid to dismiss monument lawsuits*, THE WASH. POST: BUSINESS (Oct. 1, 2019), https://www.washingtonpost.com/business/trump-administration-loses-bid-to-dismiss-monument-lawsuits/2019/10/01/203ce57e-e48d-11e9-b0a6-3d03721b85ef_story.html.

⁷⁵ Donald Trump, *Presidential Proclamation Modifying the Bears Ears National Monument*, WHITEHOUSE (Dec. 4, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/>.

⁷⁶ *Id.*

⁷⁷ 54 U.S.C.A. § 320301 (West 2014).

⁷⁸ Brady McCombs, *supra* note 75.

⁷⁹ Hopi Tribe v. Donald J. Trump, No. 17-cv-2590, 2019 WL 2494161 (D.D.C. Mar. 20, 2019).

The struggle surrounding who can alter or remove monuments is not a new concept, but rather is substantiated by historical practices in the United States. In 1938, when asked by President Franklin D. Roosevelt whether he could abolish a national monument, Attorney General Homer Cummings claimed that the president had no such power.⁸⁰ That conclusion was the basis on which Congress reorganized the relevant parts of the laws relating to federal land management in the Federal Land Policy and Management Act of 1976.⁸¹ Furthermore, it has been established that the president has no power to unilaterally abolish a national monument under the 1906 Antiquities Act.⁸²

If this option is not exercisable by the President of the United States, the question then begs, who can? What legal mechanisms are in place to alter or remove controversial monuments. What can a state do with statues and monuments that “promote white supremacy and racism.”⁸³ Monuments have traditionally articulated historical and ideological concerns, directly addressing the citizen. In analyzing contemporary culture and the meaning of monuments, “monumentality has emerged as a generalized category that applies to all sorts of grandiose and emblematic structures [where] [t]he examination of this critical process becomes all the more urgent as the proliferation of monuments overwhelms the globalized, awe-driven public sphere.”⁸⁴

In the United States there are 1,747 monuments, place names and other symbols honoring the Confederacy.⁸⁵ It can hardly be denied that many Americans struggle to live among reminders of a violent and oppressive past in addition to the popular attribution of these symbols to modern oppression and the race-related violence still terrorizing

⁸⁰ Robert D. Rosenbaum, *No, President Trump can't revoke national monuments*, THE WASH. POST (March 29, 2017), https://www.washingtonpost.com/opinions/no-president-trump-cant-revoke-national-monuments/2017/03/29/35e53336-10cd-11e7-ab07-07d9f521f6b5_story.html.

⁸¹ *Id.*

⁸² *Legal Analysis of Presidential Ability to Revoke National Monuments*, NATIONAL PARKS CONSERVATION ASS'N (May 3, 2017), <https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments#sm.00001fbs81qyif8lr9fmk842ibga>.

⁸³ Debra McKinney, *Stone Mountain: A Monumental Dilemma*, S. POVERTY L. CTR. (Feb. 10, 2018), <https://www.splcenter.org/fighting-hate/intelligence-report/2018/stone-mountain-monumental-dilemma>.

⁸⁴ *Discussions in Contemporary Culture: Monuments, Monumentality, Monumentalization*, DIA <https://www.diaart.org/program/program/monuments-monumentality-monumentalization> (last visited Aug. 27, 2020).

⁸⁵ *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019) <https://www.splcenter.org/data-projects/whose-heritage>.

American.⁸⁶ Activist Richard Rose states that “[e]very monument is a celebration of something, a person’s life or some significant event. [Confederate monuments] represents a celebration of the attempt to maintain slavery as an institution in America.”⁸⁷ The largest monument is etched into Stone Mountain outside of Atlanta. Bigger than Mount Rushmore, the high-relief carving of Robert E. Lee, Jefferson Davis, and Stonewall Jackson dominates the landscape on the site of the 1915 revival of the Ku Klux Klan.⁸⁸ As Jennifer Allen stated in an interview with NPR, “[m]onuments are not static things that have a single narrative behind them . . .” but rather things that we create.⁸⁹

As mentioned before, on August of 2017 the city of Charlottesville, Virginia, was engulfed by violence as white nationalists and counter-protestors clashed in one of the bloodiest fights to date over the removal of Confederate monuments across the South.⁹⁰ After the rally at a city park was dispersed, a car bearing Ohio license plates plowed into a crowd near the city’s downtown mall, killing a 32-year-old woman.⁹¹ Some 34 others were injured, at least 19 in the car crash.⁹²

While most Confederate symbols are found in states that were part of the Confederacy, some are also found in more liberal parts of the country like California or New York, and even in Idaho, Arizona, and New Mexico, which were admitted to the Union after the end of

⁸⁶ See Brigit Katz, *At Least 110 Confederate Monuments and Symbols Have Been Removed Since 2015*, SMITHSONIAN MAGAZINE (June 8, 2018), <https://www.smithsonianmag.com/smart-news/least-110-confederate-monuments-and-symbols-have-been-removed-2015-180969254/#5ZMXQz0chUKd6Mlp.99> (“In June 2015, a self-described white supremacist named Dylann Roof shot and killed nine African-Americans at a historically black church in Charleston, South Carolina. In the aftermath of the mass murder, as photos emerged of Roof posing with the Confederate flag, a nation-wide movement began to remove public tributes to Confederate heroes.”).

⁸⁷ McKinney, *supra* note 84.

⁸⁸ Beth D. Jacob, *Confederate Monuments That Remain*, ABA (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/confederate-monuments/.

⁸⁹ Interview with Jennifer Allen, *What Our Monuments (Don't) Teach Us About Remembering The Past*, NPR (Aug. 23, 2017) <https://www.npr.org/sections/codeswitch/2017/08/23/545548965/what-our-monuments-don-t-teach-us-about-remembering-the-past>.

⁹⁰ Sharyl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N. Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html>.

⁹¹ *Id.*

⁹² *Id.*

the Civil War.⁹³ In the case of *Pleasant Grove City, Utah v. Summum* Justice Alito wrote, “There may be situations in which it is difficult to tell whether a government entity is speaking on its behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech. Governments have long used monuments to speak to the public.”⁹⁴ He continues to explain that when a government 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.”⁹⁵ If left to the majority of the citizens in the United States it would seem that there is no room for monuments celebrating the Confederacy in modern society; however, there is still significant push back from both the states and private parties on this topic. For example, Alabama sued Birmingham in 2017 after municipal officials in the majority-black city erected a wooden box obscuring the inscriptions on a 52-foot-tall (16-meter-tall) obelisk honoring Confederate veterans making it clear that even alterations to Confederate symbols lead to legal discord.⁹⁶

Alternatively, monuments to the “Lost Cause” in San Antonio and at the University of Texas at Austin can stay down after a ruling by the U.S. 5th Circuit Court of Appeals.⁹⁷ A three-judge panel ruled on Jan. 3, 2020 that the Texas Division of the Sons of Confederate Veterans and three individuals couldn’t show their rights were violated or that they were personally harmed by the removal of the monuments.⁹⁸ “Their passion, however sincere, does not place them among

⁹³ *Id.*

⁹⁴ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009).

⁹⁵ *Id.*

⁹⁶ *Birmingham Fined Over Panels Around Confederate Monument*, AP NEWS (Jan. 24, 2020), <https://apnews.com/b2c3a7f9f1cc5406a2d8a081b7ca4c6a> (“Alabama sued Birmingham in 2017 after municipal officials in the majority black city erected a wooden box obscuring the inscriptions on a 52-foot-tall (16-meter-tall) obelisk honoring Confederate veterans.”).

⁹⁷ Brett Barrouquere, *Confederate Monuments in Texas Can Stay Down*, COURT RULES, S. POVERTY L. CTR. (Jan. 8, 2020), <https://www.splcenter.org/hate-watch/2020/01/08/confederate-monuments-texas-can-stay-down-court-rules> (The decision upheld two separate rulings by federal court judges in Texas. In both, the judges found that the Sons of Confederate Veterans and the members of the organization who sued lacked the legal standing to claim the removal of the statues violated their First Amendment rights. Sons of Confederate Veterans Texas Division spokesman Shelby Little and white supremacist attorney Kirk David Lyons, who filed the initial lawsuits, did not return email messages seeking comment).

⁹⁸ *McMahon v. Fenves*, 323 F.Supp. 3d 874 (W.D. Tex. 2018), *aff’d*, 946 F.3d 266 (5th Cir. 2020).

the injured,” Judge Edith Brown Clement wrote, joined by fellow judges Jennifer Walker Elrod and Stuart Kyle Duncan.⁹⁹

The Confederate monuments still standing in the United States convey messages that are well understood. It is with that in mind that the argument over whether or not Confederate statues should exist in the public sphere was never really about the statues; “they’re a proxy war about cultural erasure and how cultural memory materializes spatially.”¹⁰⁰ A monument that is commissioned and financed by a government body for placement on public land effectively constitutes government speech.¹⁰¹ Justice Frank Murphy outlined instances where “speech” may be curtailed, including “lewd and obscene, the profane, the libelous and the insulting or ‘fighting’ words—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace.”¹⁰²

There are other, of course, other “peacetime threats” to cultural heritage, such as natural disasters, environmental degradation, tourism, and illicit trade—all constituting methods of removal without necessarily having to involve the law (an example of which will be seen in the case of Coronation Park in New Delhi, India)—but they are generally beyond the scope of this Article mainly because the state is not the one perpetrating the removal or destruction.¹⁰³

III. LOOKING BEYOND THE UNITED STATES: COMPARING DOMESTIC PRACTICES WITH THOSE OF INTERNATIONAL PLAYERS TO SHAPE U.S. POLICY

A. *International Conventions and Agreements Protecting Cultural Heritage*

Since the mid-17th century the international community has felt the need to protect cultural goods, predominantly through the creation of international laws and initially as a response to times of war.¹⁰⁴ The

⁹⁹ *Id.*

¹⁰⁰ Diana Budds, *The Fraught Future Of Monuments*, FAST COMPANY (Jan. 2, 2018), <https://www.fastcompany.com/90155197/the-fraught-future-of-historical-monuments>.

¹⁰¹ See generally, *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

¹⁰² *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72, (1942)).

¹⁰³ Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. REV. 183, 192 (2003).

¹⁰⁴ Katerina Papaioannou, *The International Law on the Protection of Cultural Heritage*, 7 IJASOS 257, 259 (2017).

first legislative regulation in a European country dates back to 1666 in Sweden with the enactment of such a law for the protection of their national monuments.¹⁰⁵ By the end of the 19th century the majority of the rest of the European countries followed with the implementation of laws protecting their archeological and historical heritage.¹⁰⁶ Similarly, in America in 1863 the “Lieber Code”¹⁰⁷ was the first attempt at implementing rules during a time of war for the protection of cultural goods; it then became the basis for the Brussels Declaration in 1874, the first international codification of this policy.¹⁰⁸

The international law governing cultural property consists of multilateral treaties and customary international law. Because these have all emerged resulting from condemned acts or waves of destruction, they tend to promote cultural preservation above all else.¹⁰⁹ Through preserving culture, and implementing laws for its protection, the goal was to minimize human suffering. However, the preservation of monuments which lead to suffering, or inherently memorialized suffering, proves to be counterintuitive, effectively defeating the original purpose of the laws themselves. At the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting in Paris on October 17, 1972, UNESCO passed a convention which noted that “the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction . . .”¹¹⁰

The Convention further goes to state that given dangers threatening the destruction of cultural heritage, “it is incumbent on the international community as a whole to participate in the protection of the

¹⁰⁵ *Id.* at 257-259.

¹⁰⁶ *Id.*

¹⁰⁷ The Lieber Code is sometimes referred to as the first modern codification of the laws of war (Humanitarian Law, International). Promulgated at the height of the American Civil War (1861–65), it proposed a set of rules to govern the conduct of hostilities by the United States armies (‘Union’ or ‘North’) against the Confederate States of America (‘Confederacy’ or ‘South’). Named after its main author, Francis Lieber, the Code regulated a variety of legal issues, in particular, the interplay between military necessity and the principle of humanity.

¹⁰⁸ Katerina Papaioannou, *supra* note 104, at 259.

¹⁰⁹ E. Perot Bissell V, *Monuments to the Confederacy and the Right to Destroy in Cultural Property Law*, 128 YALE L.J. 1130, 1136 (2019).

¹¹⁰ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO (Nov. 16, 1972), <https://whc.unesco.org/archive/convention-en.pdf>.

cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto.”¹¹¹ The international legal community places great emphasis on the preservation of cultural heritage and property. Safeguard and respect are the watchwords of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols (1954 and 1999).¹¹² “Damage to cultural property belonging to any people whatsoever” is internationally recognized as “damage to the cultural heritage of all mankind.”¹¹³

On March 24, 2017, the international community demonstrated that it was united in its determination to protect cultural heritage when the United Nations Security Council unanimously adopted Resolution 2347 which, “Condemns the unlawful destruction of cultural heritage, including the destruction of religious sites and artifacts, and the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, notably by terrorist groups.”¹¹⁴ However, understanding the underlying goals and core purpose of these laws and policies, to alleviate further suffering, a government should be permitted to destroy, remove or alter cultural heritage when it was erected in celebration of a violation of the customary international law of human rights.¹¹⁵ With that said, a government cannot hide behind international laws protecting cultural heritage, when that cultural heritage violates the integrity and intent of the laws themselves.

In 1935, the preamble of the Treaty on the Protection of Artistic and Scientific Institutions—a Pan-American initiative also known as the Roerich Pact—formulated the idea that cultural property, which “form the cultural treasure of peoples” must “be respected and protected in time of war and peace.”¹¹⁶ Another international declaration that follows this direction is the Declaration of Dresden 1982 themed

¹¹¹ *Id.*

¹¹² Catherine Fiankan-Bokonga, *A historic resolution to protect cultural heritage*, UNESCO (Mar. 24, 2017) <https://en.unesco.org/courier/2017-october-december/historic-resolution-protect-cultural-heritage>.

¹¹³ *Id.*

¹¹⁴ S.C. Res. 2347, ¶ 1 (Mar. 24, 2017).

¹¹⁵ See generally E. Perot Bissell V, *supra* note 109.

¹¹⁶ Catherine Fiankan-Bokonga, *A historic resolution to protect cultural heritage*, UNESCO (Mar. 24, 2017) <https://en.unesco.org/courier/2017-october-december/historic-resolution-protect-cultural-heritage>.

“Reconstruction of Monuments Damaged by War.”¹¹⁷ Formally described, customary international law is the body of law defined by the general practices of the states in the global community.¹¹⁸ Although customary international law does not create the same obligations as treaties, it nevertheless guides domestic states.¹¹⁹ The application of customary international law often depends on the interpretation by domestic legislatures and policymakers, and as a consequence, no two nations seem to approach the issue of what to do with problematic cultural heritage in the same way.

Interpretation...has its etymological roots in *interpatriari*, in mingling with or entering the discourse of the fathers. While the etymology is dubious, the concept is peculiarly applicable to legal interpretation, where the search for authority, for prior and precedent determinations, whether contained in code or judicial decisions, plays an inordinate role in the elaboration of meaning and the deciding of disputes.¹²⁰

A major part of deciding what to do with memorials, and political public statues, depends on how societies interpret international law, in addition to what the work itself represents. This theme is outlined with regard to the removal of Apartheid-era statues in South Africa, the arguably purposeful neglect of colonial statues in India, and Norway’s national struggle with the presence of Viking and Norse monuments. As we see *vis a vis* the international laws, treaties, and covenants established to preserve cultural property, there are in fact cases where it appears that the destruction of cultural property can serve powerful expressive, cathartic, and practical interests that are ultimately unrealizable by preservation alone.¹²¹

¹¹⁷ Katerina Papaioannou, *supra* note 104, at 260.

¹¹⁸ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (defining customary international law as “a general practice accepted as law”).

¹¹⁹ See E. Perot Bissell V, *supra* note 109, at 1138.

¹²⁰ PETER GOODRICH & MICHEL ROSENFELD, ADMINISTERING INTERPRETATION: DERRIDA, AGAMBEN, AND THE POLITICAL THEOLOGY OF LAW 1 (Fordham University Press, 1st ed. 2019).

¹²¹ See E. Perot Bissell V, *supra* note 109.

B. *South Africa and the Struggle to Safely Remove Apartheid-Era Monuments*

“Public memory” has many different definitions but is generally conceived of as the type of memory “that occurs in the open, in front of and with others.”¹²² The United States has recently seen what the fight over memory looks like, with the growing debate over Confederate monuments and their place in the public sphere.¹²³ As stated, the United States is home to 1,747 Confederate symbols spread out over the nation.¹²⁴ Many of these statues were erected as symbols of white supremacy, monumentalizing colonialism. It is difficult to dispute the fact that Confederate statues in the United States convey messages on behalf of a Confederate government. For example, historians have noted that statues erected to Jefferson Davis¹²⁵ in New Orleans serves “to monumentalize the Confederacy, glorifying slavery, racism, white supremacy and oppression, and that they should no longer occupy prominent places within the city.”¹²⁶ Their presence today arguably inflicts injury and tends to incite breach of the peace, which directly violates and contradicts the intent and purpose of the laws preserving cultural property.

During travels through Atlanta and the Carolinas in 1931, W. E. B. Du Bois wrote of the “unavoidable and mutually reinforcing connection between the sheer number of physical monuments to the Confederacy in public spaces”—“awful things” that should have been dedicated “to the memory of those who fought to Perpetuate Human Slavery”—and the similar omnipresence of both “the rules of ‘Jim-

¹²² Scott R. Stroud & Jonathan A. Henson, *supra* note 13, at 284.

¹²³ *Id.* at 284.

¹²⁴ S. Poverty L. Ctr, *supra* note 86.

¹²⁵ Jefferson Davis, the first and only president of the Confederate States of America, died in New Orleans, Louisiana on December 6, 1889. Residents hung black bunting from buildings along St. Charles Avenue, and the city itself entered a period of mourning. Almost immediately, memorial associations sprang up in cities across the South intending to create a suitable monument for Davis. After a 6-1 vote by the City Council in 2015, this statue was one of four Confederate monuments scheduled to be removed. The statue of Jefferson Davis was removed on May 11, 2017, in the middle of the night after many days of protests and counter-protests surrounding the statue. The city's current plan is for the monuments to be removed and housed in a city-owned warehouse until a more permanent location can be determined. See Amber Nicholson et al., *Jefferson Davis Monument*, NEW ORLEANS HISTORICAL, <https://neworleanshistorical.org/items/show/1278> (last visited Aug. 17, 2020).

¹²⁶ Amber Nicholson, *Jefferson Davis Monument*, NEW ORLEANS HISTORICAL, <https://neworleanshistorical.org/items/show/1278>.

Crow” and the prevailing “custom of murder.”¹²⁷ Statutes were passed by congress protecting these monuments. The presence of these monuments more accurately celebrate a society built on racial oppression rather than honor the memory of the dead.¹²⁸ It is with this in mind that the United States government could easily make concessions to the status quo of preservation, to instead take steps towards removing or altering these problematic symbols from the public sphere.

America would not be the first country to take this step to ensure peace and social progress. In March of 2015 a #RhodesMustFall protest movement began in Cape Town, South Africa directed against a statue at the University of Cape Town that commemorated Cecil Rhodes, a British imperialist who wanted to continue British rule in South Africa.¹²⁹ On March 9, 2015, Chumani Maxwele, a South African political activist, threw human excrement at a statue of Rhodes, as part of a campaign to have the monument removed from one of the top universities in the country. The act became a catalyst for heightening student activism and movements throughout universities in the country, stimulating political discourse within South Africa as well as around the world.¹³⁰ Maxwele’s protest, staged as a political performance, was in response to the lack of attention given to the symbols on campus that are physical reminders of white supremacy and Black subjugation and oppression that is rooted in South Africa.¹³¹

Zethu Matebeni, a documentary film maker and Associate Professor at the University of the Western Cape¹³² explained that in many ways the statute of Rhodes promoted “the elitism of the white race, his colonial conquests from Cape to Cairo, and how the land in the Cape should be distributed, to whom and by whom.”¹³³ These ideas were

¹²⁷ Zachary Bray *supra* note 46, at 14.

¹²⁸ Sarah E. Gardner, *What We Talk About When We Talk About Confederate Monuments*, ORIGINS (Feb. 5, 2018), <http://origins.osu.edu/article/what-we-talk-about-when-we-talk-about-confederate-monuments>.

¹²⁹ Interview with Zethu Matebeni, Senior Researcher at UCT’s HUMA- Institute for Humanities in Africa, Heinrich Böll Stiftung (Feb. 19, 2018).

¹³⁰ Chumani Maxwele, *Chumani Maxwele ignites the #RhodesMustFall Movement*, SOUTH AFRICAN HISTORY ONLINE (March 9, 2015), <https://www.sahistory.org.za/dated-event/chumani-maxwele-ignites-rhodesmustfall-movement-uct>.

¹³¹ *Id.* (By taking human excrement from Khayelitsha, a township in South Africa located on the Cape Flats in the City of Cape Town, his action sought to make a connection with the lack of human dignity given to Black people living in townships).

¹³² A Senior researcher at UCT’s HUMA-Institute for Humanities in Africa and a member of the #RhodesMustFall movement.

¹³³ See Maxwele, *supra* note 131.

still evident at the University of Cape Town (UCT) where the statue towered prominently over the campus, almost as if Rhodes was gazing on his conquest, “wondering how far and for how long into time his colonizing powers could reach in taking over the land.”¹³⁴ Across the country, students called for the “decolonization” of universities and free higher education.¹³⁵

The message instilled by the monument of Cecil Rhodes on UCT’s campus is similar to the ideologies inherent in the presence of the Robert E. Lee statue in Charlottesville, Va. This Confederate memorial, located in a public park in Virginia, not only acts as a constant reminder of a violent and oppressive past, but has become the center of several violent white supremacist protests over the past few years.¹³⁶ As was seen in South Africa, a viable solution would be to remove the monument from the public sphere.

C. India’s Abandonment of Colonial Statues and Monuments

In light of the presence of international institutions and the formation of customary international law, particularly in the field of human rights and cultural heritage, US law and policy makers can look to the international community as a guide for their domestic decision making. Under the traditional theory, a rule of customary international law is deemed to arise as a result of a pattern of actual behavior on the part of states that reflects conformity with the rule.¹³⁷ State practice in the form of actual conduct on the part of the states in their international relations is what counts fundamentally.¹³⁸ Within this traditional view, customary international law exists, or “crystallizes,” when a pattern of state behavior generates a certain threshold of understanding about the content of a rule, along with widespread manifestations of consent to be bound to the rule, this sense of obligation being the so-called *opinion juris*.¹³⁹

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Doug Stanglin, *Charlottesville statue of Robert E. Lee vandalized with anti-Trump graffiti*, USA TODAY (Jul. 24, 2019), <https://www.usatoday.com/story/news/nation/2019/07/24/charlottesville-robert-e-lee-statue-vandalized-anti-trump-graffiti/1813727001/>.

¹³⁷ S. James Anaya, *Customary International Law*, 92 ASIL PROC. 41, <https://www.jstor.org/stable/25659187>.

¹³⁸ *Id.* at 41-42.

¹³⁹ *Id.* at 42.

Official memories are produced in state-sponsored public spaces.¹⁴⁰ Official memory sites, like museums, monuments and memorials not only reflect, but shape ethnic relations.¹⁴¹ With this said, the United States can look to the case of India—a diverse state with a tumultuous history of colonialism and ethnic integration—in assessing the best course of action concerning the Confederate statues. The emerging states in the multicultural north-east of India has responded to the imagination of the politically dominant community, which is and remains persistently insensitive to marginalized “others” in the state.¹⁴² Similar to other postcolonial societies, the “historical imagination of the emerging states in the region” depends heavily on anti-colonial movements aimed at shedding a problematic past.¹⁴³ Yet, India is unique in that nationalized “public memories” are effectively invisible in state-sponsored public spaces, and so are the memories of the minority communities, both in the interest of a particular, generally politically dominant, ethnic community in the state.¹⁴⁴ It has been pointed out that the “historical imagination of the postcolonial state in the region has largely favored the memory of anti-colonial movements as common ground to organize the freed people.”¹⁴⁵ These shifts in society, and the people’s response to push past colonialism, resemble the political climate in a modern America where society is constantly moving further away from the ideals embraced by the Confederate government.

When New Delhi was being built, English architect, Sir Edwin Lutyens designed a statue of George V to stand beside India Gate at Coronation Park—at almost fifty feet tall it grotesquely exuded British power.¹⁴⁶ Britain also erected statues of more obscure governors-general and military men around the new Indian capital—memorials to functionaries whom history would hardly remember. For many American cities, towns, and campuses fighting to move away from antiquated ideals embodied by the presence of monumentalized

¹⁴⁰ See Jangkhomang Guite, *Monuments, Memory and Forgetting in Postcolonial North-East India*, 46 *ECON. & POL. WKLY.* 56 (2011).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 57.

¹⁴⁵ *Id.* at 63.

¹⁴⁶ Manimugdha Sharma, *What statue-topplers around the world can learn from India*, *THE TIMES OF INDIA* (Sept. 3, 2017), <https://timesofindia.indiatimes.com/india/what-stature-topplers-around-the-world-can-learn-from-india/articleshow/60341750.cms>.

Confederate leaders and generals, New Delhi's example is perhaps a useful one.

Until the very recent, and polarizing, rise of Hindu chauvinism, India was a generally unified society. The city of New Delhi turned Coronation Park, into a public facility managed by the Delhi Development Corporation.¹⁴⁷ The park's architects erected an obelisk commemorating the Durbars, who originally occupied the land, and collected the monstrous likeness of George V and other former British overlords from around New Delhi and scattered them about the park to rest at the mercy of time and the natural elements.¹⁴⁸ Statues and cultural heritage in India are governed and regulated by the Antiquities and Art Treasures Act of 1972 and the Antiquities and Art Treasures Rules of 1973.¹⁴⁹ These acts effectively regulate the export and trade of antiquities and art treasures to provide for the prevention of smuggling of and fraudulent dealings in antiquities, further providing for the compulsory acquisition of antiquities and art treasures but most importantly, for preservation in public places.¹⁵⁰ In addition to these rules, local governments were left to devise their own schemes of permanent inspection and conservation, in line with what may be considered of national importance.¹⁵¹

The concept of 'national importance' had been introduced by the Ancient and Historical monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951.¹⁵² Under this Act, monuments could essentially be divided into four categories, according to their ownership; first, are those which are owned by the Central Government, declared as monuments of national importance, protected, and cared for by the Archaeological Survey; second are those owned and correspondingly protected by the State Governments; third are those still in private or corporate ownership, and hence neither protected nor, in all cases, listed; and fourth, are those which

¹⁴⁷ *Id.*

¹⁴⁸ Steve Coll, *Things to Think About When Taking Down Statues*, THE NEW YORKER (Aug. 31, 2017) <https://www.newyorker.com/news/daily-comment/things-to-think-about-when-taking-down-statues>

¹⁴⁹ The Antiquities and Art Treasures Act, 1972, No.52, Acts of Parliament, 1972 (India).

¹⁵⁰ *Id.*

¹⁵¹ F.R. Allchin, *Monument Conservation and Policy in India*, 126 J. ROYAL SOC'Y OF ARTS 746, 746-765 (1978).

¹⁵² *Over 1,000 temples declared as protected monuments under ASI: Government*, THE ECONOMIC TIMES (Jul. 31, 2017) <https://economictimes.indiatimes.com/news/politics-and-nation/over-1000-temples-declared-as-protected-monuments-under-asi-government/articleshow/59847543.cms>.

although still in private or corporate ownership are the subject of an agreement between the owners and the Archaeological Survey, and which are listed and protected accordingly.¹⁵³ These are the types of comprehensive plans that the United States should incorporate in dealing with the removal of Confederate statues domestically, while preserving state sovereignty as well as respecting national ideals.

D. Norway and the Decision to Destroy Symbols From a Problematic Past

Similar to societies transitioning away from a colonial past, Norway has grappled with how to navigate the display and preservation of symbols chosen to represent the nation's history, and people, over the past several decades.¹⁵⁴ During the nineteenth century efforts to strengthen national identity by using imagery sourced from a heroic Viking heritage became predominant during periods of war and national conflicts.¹⁵⁵ However, these images do not encourage inclusivity, diversity, and often symbolize and celebrate oppression and violence. A common feature of these 'old' national monuments is that they "represent a stale utopia of an 'imagined community' based on a unified ethnic concept of national identity that is problematic as valuable heritage."¹⁵⁶ Similar to the Confederate statues, the old Nordic monuments do not correspond with a present reality that is defined by a culturally plural democratic society influenced by migration and international integration.¹⁵⁷ In fact, the Norwegian national memorial sites commemorating Vikings were used in ethnic national political programs such as German Nazi propaganda as well as by the fascist-based Norwegian National Socialism party, during the inter-war period and the Second World War.¹⁵⁸

In Norway, historical monuments representing a shadowy use of the past, such as Nazi monuments raised in honor of Norse heroes,

¹⁵³ Allchin, *supra* note 152, at 753-754.

¹⁵⁴ Torgrim Sneve Guttormsen: "National Memorial Sites as Heritage Values: Valuating Sites Paying Tribute to Heroic Vikings" in *HERITAGE, DEMOCRACY AND THE PUBLIC: NORDIC APPROACHES*, TORGRIM SNEVE GUTTORMSEN AND GRETE SWENSEN, 13-26 (Routledge, 2016).

¹⁵⁵ *Id.* at 14.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

have been destroyed to conceal or wipe out this difficult past.¹⁵⁹ For example, the Snorre Monument erected in 1941 in the Royal Garden in Oslo and the National Socialism monument erected at Stiklestad in 1944, were destroyed when the war ended despite the protection afforded to Norwegian monuments under the Cultural Heritage Act of 1978.¹⁶⁰ Norway shows us that sometimes it is appropriate to remove or alter monuments to promote societal progress, even in light of laws automatically providing protection to the contrary. In fact, the Norwegian Cultural Heritage Act provides an exception for the automatic protection of monuments by including language that allows “competent authority” the final say in how and if monuments should be preserved.¹⁶¹

This added language provides a logical solution to the predicament presently faced by United States decisionmakers, where even if government officials collectively wish to remove or alter monuments protected by law, their hands are legally tied, leaving the state with little to no discretion. It is with this said that United States law and policy makers should look to the international stage for guidance on how to adapt and improve the US legal system to promote local officials with more power to implement decisions on behalf of their constituents.

IV. DOMESTIC TENSIONS AND THE NEED TO AMEND U.S. CULTURAL HERITAGE LAWS

“Many of those people were there to protest the taking down of the statue of Robert E. Lee,” Mr. Trump said. “So this week, it is Robert E. Lee. I noticed that Stonewall Jackson is coming down.” George Washington and Thomas Jefferson, the president noted, were also slave owners. “I wonder, is it George Washington next week?” Mr. Trump said. “And is it Thomas Jefferson the week after? . . . You know, you really do have to ask yourself, where does it stop?” he added, comparing the removal of statues to “changing history.”¹⁶²

¹⁵⁹ Torgrim Sneve Guttormsen, *Is it right to destroy monuments over our dark past?*, SCIENCE NORWAY (May 13, 2018), <https://sciencenorway.no/forskningno-norway-opinion/is-it-right-to-destroy-monuments-over-our-dark-past/1455939>

¹⁶⁰ *Id.* See also generally, Lov om kulturminner [kulturminneloven] 15. feb 1979 nr. 96 §§ 3-7.

¹⁶¹ See Lov om kulturminner, *supra* note 160 at §3.

¹⁶² Jennifer Schuessler, *Historians Question Trump’s Comments on Confederate Monuments*, N.Y. TIMES (Aug. 15, 2017),

James Grossman, the executive director of the American Historical Association, said that Mr. Trump's comments "failed to recognize the difference between history and memory, which is always shifting" further explaining that "When you alter monuments, you're not changing history, you're changing how we remember history."¹⁶³ Some critics of Confederate monuments have called for them to be moved to museums, rather than destroyed, or even left in place and reinterpreted, to explain the context in which they were created.¹⁶⁴ Mr. Grossman noted that most Confederate monuments were constructed in two periods: "the 1890s, as Jim Crow, was being established, and in the 1950s, during a period of mass Southern resistance to the civil rights movement. No matter how the statues are interpreted, though, the South's history of Jim Crow apartheid is undeniable."¹⁶⁵

The South, similar to many other parts of the country, was blatantly plagued by institutionalized racism when the Jackson and Lee sculptures were dedicated, in 1921 and 1924 respectively. Many of the Confederate monuments that dot the South would qualify as honoring behavior that violated today's customary international law of human rights—in particular, slavery and systemic racial discrimination.¹⁶⁶ Surprisingly, the overwhelming majority of monuments to the Confederacy were not erected in the immediate aftermath of the war, which arguably presents a flaw in the argument that the monuments were erected to honor the lives lost during the war.¹⁶⁷ Instead, monument construction peaked in the Jim Crow era, when hundreds of statues were erected, and street names were changed, through the advocacy of private groups throughout the South.¹⁶⁸ The circumstances, and purpose for which these monuments were constructed—i.e. preserving the ideals of an Antebellum South—could provide policymakers with a justifiable reason to permit amendments to the laws protecting these monuments to provide local leaders the discretion to pursue their removal or alteration. The presence of these monuments, as

https://www.nytimes.com/2017/08/15/arts/design/trump-robert-e-lee-george-washington-thomas-jefferson.html?_r=0.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Paul Duggan, *supra* note 1.

¹⁶⁶ Bissell, *supra* note 109, at 1162.

¹⁶⁷ *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>; See S. POVERTY L. CTR., *WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY* 11 (2017).

¹⁶⁸ *Id.*

stated, directly violates the purpose and intent of the Constitution of the United States in many ways.

The United States Constitution adopted the Fourteenth Amendment on July 9, 1868.¹⁶⁹ It was intended to guarantee equal protection and was expected by its framers to be enforced primarily by Congress.¹⁷⁰ With that said, racial discrimination was the central concern of the Fourteenth Amendment.¹⁷¹ Justice Harlan dissented in the case of *Plessy v. Ferguson*¹⁷² by objecting fundamentally to an 1890 Louisiana law that required “equal but separate accommodations” for “white” and “colored” railroad passengers.¹⁷³ Harlan claimed the Louisiana statute interferes with the personal freedom of citizens and the decision in *Plessy* will “encourage the belief that it is possible, utilizing state enactments, to defeat the beneficent purposes which the people had in view when they adopted the recent amendments of the Constitution.”¹⁷⁴ Justice Harlan’s dissent insists that the white race “deems itself,” dominant “in prestige, in achievements, in education, in wealth and power” and that the “thin disguise of ‘equal’ accommodations [will] not mislead anyone, nor atone for the wrong”¹⁷⁵ This is the message conveyed by monuments still standing the United States, and the statutes passed Congress protecting the preservation of those monuments defeats the beneficent purposes of the Fourteenth Amendment. Therefore, the existing laws should be amended to allow elected leaders the opportunity to look closer into the circumstances, and purpose, behind the erection of certain monument’s, to allow for a determination to be made as to whether the monument was established in celebration of a violation of human rights or whether it contributes to the identity and history of the United States narrative. In these revisions

¹⁶⁹ *Id.*

¹⁷⁰ NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 656 (Found. Press, 20th ed. 2019).

¹⁷¹ *The Slaughter-House Cases*, 83 U.S. 36, 21 L. Ed. 394 (1873).

¹⁷² History.com Editors, *Plessy v. Ferguson*, HISTORY.COM, <https://www.history.com/topics/black-history/plessy-v-ferguson> (last updated Feb. 21, 2020) (“*Plessy v. Ferguson* was a landmark 1896 U.S. Supreme Court decision that upheld the constitutionality of racial segregation under the “separate but equal” doctrine. The case stemmed from an 1892 incident in which African American train passenger Homer Plessy refused to sit in a car for blacks. Rejecting Plessy’s argument that his constitutional rights were violated, the Supreme Court ruled that a law that “implies merely a legal distinction” between whites and blacks was not unconstitutional. As a result, restrictive Jim Crow legislation and separate public accommodations based on race became commonplace.”).

¹⁷³ *Plessy v. Ferguson*, 163 U.S. at 554 (1896).

¹⁷⁴ *Id.* at 559, 562.

¹⁷⁵ FELDMAN & SULLIVAN, *supra* note 170, at 659.

to the laws protecting statues and monuments, discretion should be given to local governments to decide whether certain cultural property should be amenable to destruction.¹⁷⁶

*A. Understanding and Navigating State and Federal Laws
Protecting Monuments*

Similar to international cultural property law, domestic laws tend to reflect preservationist tendencies.¹⁷⁷ The Supreme Court has already determined that a statue in a city park is protectable as “speech.” In *Pleasant Grove City v. Summum*, the Supreme Court held that a city government was entitled to select the monuments it displayed in a public park.¹⁷⁸ 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.”¹⁷⁹ Because of the city’s “freedom to express its views,” the Court held that Pleasant Grove was entitled to refuse to display a monument setting out the tenets of a small religious group.¹⁸⁰

First Amendment arguments, coupled with the statutes implemented by individual states and the federal government, there is often more support for the preservation of cultural property, than the removal when public monuments are threatened with removal or alteration in the United States. These protections stem from executive branch powers to local state statutes. For instance, as previously discussed, the National Monuments and the Antiquities Act, as well as the Antiquities Act of 1906 (54 U.S.C. §§320301-320303), authorizes the president to proclaim national monuments on federal lands that contain historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest.¹⁸¹ The president is to reserve “the smallest area compatible with the proper care and management of the objects to be protected.”¹⁸² Presidents have proclaimed a total of 158 monuments, and also have enlarged, diminished, and changed the

¹⁷⁶ See E. Perot Bissel V, *supra* note 109, at 1165.

¹⁷⁷ *Id.*

¹⁷⁸ *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

¹⁷⁹ Aneil Kovvali, *Confederate Statue Removal*, 70 STAN. L. REV. 82, 83-4 (2017) (internal citations omitted).

¹⁸⁰ *Id.*

¹⁸¹ National Monuments and the Antiquities Act (Nov. 30, 2018).

¹⁸² *Id.*

terms of monuments previously proclaimed by Presidents.¹⁸³ However, the power to remove or alter these established monuments then falls to Congress. Congress has modified many of these proclamations and has abolished some monuments, while going as far as creating monuments under its authority.¹⁸⁴ With that noted, it would not be unprecedented to amend cultural heritage and preservation laws in the United States to grant local elected officials the power to decide whether certain public monuments can be altered or removed from the public sphere.

Additionally, there is 18 U.S. Code § 1369 to take into consideration, which states that (a) whoever, in a circumstance described in subsection (b), willfully injures or destroys, or attempts to injure or destroy, any structure, plaque, statue, or another monument on public property commemorating the service of any person or persons in the armed forces of the United States shall be fined under this title, imprisoned not more than 10 years, or both.¹⁸⁵ States have adopted similar local laws protecting their monuments. Virginia is unusual in that its law prohibits local authorities from removing a monument to a war veteran once erected.¹⁸⁶ They cannot “disturb or interfere” with it; nor “prevent its citizens from taking proper measures and exercising proper means for the protection, preservation, and care of the same.” The statute is found at Va. Code §15.2-1812 (prohibiting local authorities from disturbing monuments to war veterans).¹⁸⁷ An enforcement provision was added in 2000, allowing any interested person to sue to recover damages for encroachments, in addition to any other legal remedies.¹⁸⁸ There is also a criminal vandalism statute protecting monuments at Va. Code §18.2-137 (prohibiting defacing, damaging, or removing monuments)¹⁸⁹ that bears a close relation to the Alabama Memorial Preservation Act of 2017, which forbids “the relocation, removal, alteration, renaming, or disturbance of any architecturally significant building, a memorial building, memorial street, or monument on public property which has been in place for 40 or more years.”¹⁹⁰

¹⁸³ See *National Monuments and the Antiquities Act*, CONGRESSIONAL RESEARCH SERVICE (updated Nov. 30, 2018), <https://fas.org/sgp/crs/misc/R41330.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ 18 U.S.C.A. § 1369 (West 2019).

¹⁸⁶ See *Confederate Monuments Are Protected by Law in Several States*, *supra* note 3.

¹⁸⁷ Va. Code §15.2-1812 (West 2019).

¹⁸⁸ *Id.*

¹⁸⁹ Va. Code §18.2-137 (West 2019).

¹⁹⁰ Ala. Code § 41-9-230 (West 2019).

Though all of these laws are in place focusing on the preservation of the past, they effectively stunt the growth of the community at large by not taking into consideration future treatment of the monuments and statues already erected. There are no notable clauses or statutes that can be referenced in cases where the people desire removal, alteration or amendment. This is arguably an easy fix on a congressional level that could ultimately prevent any future conflict or violence over what to do with Confederate monuments in the United States.

B. *The Rise of Litigation in U.S. Courts*

These state statutes have led to several recent cases in court. In *Payne v. City of Charlottesville*, in response to the City Council voting to remove the statue of Robert E. Lee, numerous plaintiffs filed a lawsuit to prevent any changes to either Market Street (formerly Lee and Emancipation) or Court Square (formerly Jackson and Justice) Parks.¹⁹¹ In January of 2020, Governor Ralph Northam proposed a bill for the General Assembly to consider that would give local governments control over Confederate monuments in Virginia.¹⁹² If passed in the General Assembly, the bill would authorize Virginia localities “to have control over monuments and remove the existing statewide prohibition against removing Confederate War memorials.”¹⁹³ Initiatives like these are what it will take to overcome the legal obstacles preventing positive change from commencing domestically in the United States. Local governments must act internally to circumvent existing laws preserving the “dark monuments” of US history.¹⁹⁴ In a nation as legally complex as the United States, these “battles” are better pursued in a courtroom. However, in order to make this a viable option, the laws protecting cultural heritage must be amended to provide opportunity for remedy.

Similarly, Texas provides a classic example of the types of litigation stemming from the question of monument removal. Descendants of Confederate veterans and organizations dedicated to protecting the memory of Confederate veterans brought an action against university president to challenge the president’s decision to remove statues of

¹⁹¹ Amanda Lineberry, *supra* note 27.

¹⁹² WHSV, *Virginia governor backs bill to let localities decide on Confederate monuments*, WHSV3 (Jan. 09, 2020), <https://www.wHSV.com/content/news/Northam-proposes-bill-to-give-localities-control-over-Confederate-monuments-566843621.html>

¹⁹³ *Id.*

¹⁹⁴ *Id.*

Confederate officers and officials and seeking injunctive relief and declaratory judgment in *McMahon v. Fenves*.¹⁹⁵ In January of 2020, the US Court of Appeals for the Fifth Circuit upheld the dismissal of this lawsuit seeking the reinstallation of Confederate statues on the University of Texas Austin campus and a Confederate monument in a San Antonio city park.¹⁹⁶

Further, the Sons of Confederate Veterans Society filed a lawsuit against the city of Memphis challenging the procedure by which the city renamed three parks that were named or dedicated in honor of those who fought for the Confederate States of America during the Civil War,¹⁹⁷ while contrastingly, the city of Norfolk, Va., filed a federal lawsuit against the state of Virginia over a law blocking the removal of a Confederate statue from its downtown business district.¹⁹⁸ According to a state law enacted in 1904, public war memorials in the state cannot be taken down or altered, leaving local officials unable to act on an approved 2017 resolution aimed at moving the city-owned memorial—which was erected in 1907 and commemorates soldiers who died fighting for the Confederacy—to a cemetery, according to the suit filed in the U.S. District Court in Norfolk.¹⁹⁹ It is clear that the litigious nature of the subject of removal, and how best to navigate existing legislation, has created a rift among the citizens of the United States. This is even more reason to encourage a democratic discussion around how best to navigate the existing laws to permit states to act on behalf of the interests of their people, without, of course, facing legal consequences or flooding the courts with frivolous litigation.

C. #BlackLivesMatter Movement

Over the summer of 2020, Confederate monuments were taken down across the United States, whether by local leaders or by demonstrators, in the wake of protests over police brutality against Black

¹⁹⁵ *McMahon v. Fenves*, 323 F. Supp. 3d 874 (W.D. Tex. 2018), *aff'd*, 946 F.3d 266 (5th Cir. 2020).

¹⁹⁶ *Id.*

¹⁹⁷ *See Sons of Confederate Veterans v. City of Memphis*, 2019 WL 2355332, (Tenn. Ct. App. June 4, 2019), *see also Hayes v. City of Memphis*, No. W201401962COAR3CV, 2015 WL 5000729, at *1 (Tenn. Ct. App. Aug. 21, 2015).

¹⁹⁸ Jessica Campisi, *Norfolk city officials sue over law blocking the removal of Confederate statue*, The Hill (Aug. 20, 2019), <https://thehill.com/homenews/state-watch/458131-norfolk-city-officials-sue-virginia-over-law-blocking-removal-of>.

¹⁹⁹ *Id.*

Americans.²⁰⁰ These efforts have further sparked dialogues across the nation about why and how these symbols have remained intact, especially in minority communities, which, in turn, has shone a spotlight on the laws currently in place preserving these monuments. For example, up until 2001, the Confederate emblem was part of Georgia's state flag.²⁰¹ Then Gov. Roy Barnes, lead a movement to replace the flag during the 2001 legislative session.²⁰² The flag was ultimately changed, but as part of a compromise—the compromise involved a statute protecting all Confederate monuments in Georgia, including Stone Mountain.²⁰³ The law states “It shall be unlawful for any person, firm, corporation, or other entity to mutilate, deface, defile, or abuse contemptuously any publicly owned monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or the several states thereof, or the Confederate States of America”²⁰⁴

In 2019, Georgia Gov. Brian Kemp signed a bill into law that further protects monuments, including those dedicated to the Confederacy, banning moving monuments from a prominent location to a museum and allowing local governments to sue those who vandalize monuments for up to three times the value of the damages.²⁰⁵ This is not a unique instance, but instead, similar laws can be found in North Carolina, Mississippi and South Carolina.²⁰⁶ On a federal level, President Donald Trump issued an executive order in June 2020 protecting monuments in response to protesters vandalizing Confederate statues such as the Albert Pike statute in Washington, DC.²⁰⁷ The executive order Trump signed directed the Justice Department to prioritize “the investigation and prosecution” of those who damage federally-owned monuments.²⁰⁸ Trump claims in his executive order that the

²⁰⁰ See *Confederate Monuments Are Protected by Law in Several States*, *supra* note 3.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Ga. Code Ann. § 50-3-1 (West 2019).

²⁰⁵ Editorial, *Gov. Kemp signs new law issuing heavy fines for anyone that messes with Georgia monuments*, WJCL22 (Apr. 29, 2019), <https://www.wjcl.com/article/gov-kemp-signs-new-law-issuing-heavy-fines-for-anyone-that-messes-with-georgia-monuments/27310745#>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Exec. Order No. 13933, 85 Fed. Reg. 40081, 40081-40084 (June 26, 2020)

destruction of the monuments is in turn a symbol for the destruction of the U.S. government.²⁰⁹ But in reality, it may be time to take a hint from the world stage, and amend the laws and governing tactics of the United States to promote inclusivity and to look to the future, rather than being bogged down by a problematic past.

V. CONCLUDING THOUGHTS

There is no argument that the international community takes a preservationist approach under international law to conserve cultural property. History is a foundational aspect of every society, and a pillar of cultural identity. Ever-increasingly, however, it has become prevalent that nations are addressing the question of what to do with the cultural property that no longer has a place in contemporary history. By coming up with creative solutions, such as altering, removing, or preserving these emblems of a problematic past in a private and educational sphere, efforts have been made in many countries to deal with how to incorporate a troubling past into modernity, without erasing history.

The issue faced by the United States regarding monuments celebrating the Confederacy is that the domestic legal system leaves states and local leaders with their hands tied. The law lacks fluidity and stifles attempts to problem solve on behalf of US citizens. Many legislatures wish to remove statues and monuments, as other nations, like South Africa, have done, but face legal obstacles preventing them from acting to protect their constituents—both on a federal and state level. In addition to the preventative obstacles, there are also consequences associated with the removal or alteration.²¹⁰ Many local statutes suppress the speech of cities and states while compelling them to make statements with which they disagree, and therein distort the political process in troubling ways.²¹¹ This policy is not conducive to a progressive and united nation and it is therefore in the best interest of the United States to look to the international stage for guidance in ways to alter the current status quo and amend legislation to permit local officials the discretion to consider circumstantial evidence and

<https://www.whitehouse.gov/presidential-actions/executive-order-protecting-american-monuments-memorials-statues-combating-recent-criminal-violence/>.

²⁰⁹ *Id.*

²¹⁰ Associated Press, *Birmingham fined over panels around Confederate monument*, NBC (Jan. 25, 2020), <https://mynbc15.com/news/local/birmingham-fined-over-panels-around-confederate-monument-01-26-2020>.

²¹¹ Kovvali, *supra* note 179, at 83, 85.

act in accordance with the wishes of the citizens they represent to effectively alter, remove or amend problematic political monuments.