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Understanding the Complicated Landscape of Civil War Monuments

JESSICA OWLEY* & JESS PHELPS**

This essay examines the controversy regarding confederate monuments and attempts to contextualize this debate within the current preservation framework. While much attention has been paid to this topic over the past year, particularly with regard to “public” monuments, such discussion has generally failed to recognize the varied and complicated property law layers involved—which can fundamentally change the legal requirements for modification or removal. We propose a spectrum or framework for assessing these resources ranging from public to private, and we explore the messy space in-between these poles where most monuments actually fall. By highlighting these categories, we provide an initial introduction of a typology for evaluating confederate monuments, serving as a foundation for an exploration into the nature of property law and monument protection.

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INTRODUCTION

The controversy over confederate monuments gained greater national prominence in the aftermath of the events in Charlottesville, Virginia in August 2017.¹ As conservationists, our work had not previously considered such sites despite our many years of investigation into both land protection and historic preservation. While perhaps less surprised than others to learn of the extent of confederate monuments, we quickly understood that the landscape of such structures was broader and more

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1. Sheryl Gay Soltberg & 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?_r=0 [https://perma.cc/2KKH-NMKY] (discussing the events that ultimately led to the death of three people).

complicated than many realize. Much energy and discussion has (appropriately) focused on confederate monuments erected with public funds, placed on public lands, and protected by state and/or federal laws.² More recently, investigators have begun to detail the growth in confederate memorials paid for with private funds and placed on private lands.³ The legal issues surrounding these two types of monuments differ for obvious reasons, making approaches to their removal or modification different. However, these two examples are but ends of a complex spectrum of public/private intersections in the erection and protection of confederate monuments across the United States. We set forth a rough typology of confederate monuments based on their quality of being public or private. An understanding of the public/private nature of these monuments reveals the public interest involved and outlines which laws may come into play with monument removal.

I. CONFEDERATE MONUMENTS: EMERGENCE, GROWTH, AND MEANINGS

Although most Americans cannot tell you the dates of the Civil War, let alone name key figures or battles on either side,⁴ many feel an emotional link to what was the bloodiest conflict ever fought on American soil. The number of American lives lost outstrips our country's losses in any other conflict by both sheer number (620,000 is the low estimate) and percentage (a staggering 2% of the total population).⁵ With the devastation that this would have meant for families, it would not be surprising if in the aftermath of the war, communities erected monuments to lost loved ones.⁶ Yet, that is not the common origin of confederate monuments as described below.

2. See, e.g., Joe Marusak, *Remove Confederate Statues from Public Government Land*, *ACLU-NC Urges*, CHARLOTTE OBSERVER (Aug. 15, 2017), <http://www.charlotteobserver.com/news/politics-government/article167417007.html> [<https://perma.cc/4CG3-6NPU>]; Chris Lane, *Removing Confederate Monuments from Public Areas Does Not "Erase History,"* HOUSTON PRESS, Aug. 21, 2017, <http://www.houstonpress.com/arts/confederate-statues-have-no-business-in-public-spaces-anymore-9719724> [<https://perma.cc/8H6E-TPUU>].

3. Sabrina Tavernise, *A Boom in Confederate Monuments, on Private Land*, NY TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/confederate-monuments.html> [<https://perma.cc/FNR8-SMCZ>]; JUSTIN CURRY DAVIS, *FUNDING SOUTH CAROLINA'S MONUMENTS: THE GROWTH OF THE CORPORATE PERSON IN MONUMENT FINANCING* (Master's Thesis in Public History, University of South Carolina 2017), <https://search.proquest.com/openview/5c56a7010eb7ba0e51ae13aca2010beb/1?pqorigsite=gscholar&cb1=18750&diss=y> [<https://perma.cc/HDK6-H3WN>].

4. American Council of Trustees and Alumni, Press Release, *Survey: Half of Americans Don't Know When the Civil War Took Place* (Apr. 14 2015), https://www.goacta.org/news/survey_half_of_americans_dont_know_when_the_civil_war_took_place [<https://perma.cc/8X54-WG8Y>].

5. Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html> [<https://perma.cc/XX4Q-GX9C>]; J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIVIL WAR HIST. 307 (2011).

6. DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* (2008) (discussing the various responses to this violent conflict amongst mourners and their communities).

This piece examines the establishment of confederate monuments, adopting the definition of monuments from philosopher George Schedler:

[M]arkers or statues whose purpose is to pay homage to the conduct or character—usually courage or leadership—of some person or group. Minimally, a monument is either a marker with an inscription or a statue with no inscription designed to recall with affection, or at least with approval, something or some person.⁷

We specifically exclude from this category gravestones or protection of historic sites like battlefields, but include monuments erected on or near battlefields.

Hundreds of confederate monuments are scattered across thirty-one states.⁸ Two organizations are responsible for many of these monuments: Sons of Confederate Veterans and United Daughters of the Confederacy. These organizations seek to honor the confederate dead whom they view as heroic and spread the organizations' view of the underlying conflict at the heart of the war, usually labeled the "Lost Cause" Movement.⁹ The Lost Cause theory asserts that the Civil War was not about slavery but a noble struggle to preserve states' rights and a Southern way of life.¹⁰ This view ignores the fact that the "Southern way of life" was built upon human chattel slavery.¹¹ Placement of confederate monuments worked and still works to normalize the Lost Cause view (a view almost entirely rejected or discredited by historians) and proliferate messages of black inferiority.¹²

Several confederate monuments were built during the failure of Reconstruction around 1877 to reaffirm the power of the white southerners as the messaging and content of the monuments often directly conveys.¹³ Indeed, many, if not most, confederate monuments have direct ties to white supremacy sentiments and movements and appeared long after the end of the Civil War. Monuments of this class then served as a symbol to blacks that they were not equals and to other whites that racist attitudes and behaviors would be condoned. In this light, it is unsurprising

7. George Schedler, *Are Confederate Monuments Racist?*, 15 INT'L J. APPLIED PHILOSOPHY 287 (2001).

8. Stephanie Meeks, President, Nat'l Trust for Historic Preservation, Statement on Confederate Monuments: Confronting Difficult History, June 29, 2017, <https://savingplaces.org/press-center/media-resources/national-trust-statement-on-confederate-memorials#.Wjf4C1WnGUk> [<https://perma.cc/DL8Y-24UW>].

9. Peter Galuska, Opinion, *The Women Who Erected Confederate Monuments are Stunningly Silent*, WASH. POST (Oct. 17, 2017), https://www.washingtonpost.com/opinions/the-women-who-erected-confederate-statues-are-stunningly-silent/2017/10/13/2e759dde-a920-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.100dc44c3f86 [<https://perma.cc/W3GV-MYRZ>].

10. See, e.g., Nat'l Park Ser., *Confronting Slavery and Revealing the "Lost Cause"*, <https://www.nps.gov/resources/story.htm%3Fid%3D217> [<https://perma.cc/ZF8T-S69W>].

11. See *Id.*

12. See Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1085 (1995).

13. SOUTHERN POVERTY LAW CENTER (SPLC), *WHOSE HERITAGE?* 14 (2016) (charting this over time).

that additional monuments appeared during the Jim Crow era and indeed sometimes in response to specific events, like the Supreme Court decision in *Brown v. Board of Education* and the assassination of Martin Luther King Jr.¹⁴ Unfortunately, the number of monuments is once again growing.¹⁵

II. TYPOLOGY OF CONFEDERATE MONUMENTS

The current narrative regarding the potential removal and/or relocation of confederate monuments generalizes and substantially oversimplifies the legal issues involved. Given the wide distribution of monuments, the laws that govern their removal and protection are not monolithic. The legal framework varies depending on where the monument is located (private versus public land), what types of land-use laws are at play, and who owns and/or paid for the monument's construction. Our analysis locates monuments along a spectrum ranging from purely public to purely private. There has been considerable public debate and action regarding public monuments. Conversely, private monuments have merited little attention because the legal issues associated with them are not overly complex. Completely missed has been the complicated middle ground where public and private elements mix. This section sets out six categories of confederate monuments based on the public and private interests involved. Beyond articulating the public and private ends of the spectrum, we provide context to the legal issues that the majority of these monuments encounter in the messy interstitial space between these two opposing poles.

A. *Category One: Public Space, Public Money, Public Support*

Our first category of monuments is the purely public model. These monuments tend to be the highest profile and have been the focus of many efforts at removal and modification. This category covers confederate monuments on public lands (federal, state, or municipal). Their construction was paid for with public funds, and they are often protected by law, particularly state and local historic preservation laws and laws governing the disposition of governmental property.

Many confederate monuments are in public squares, public parks, protected battlefields, courthouses, and elsewhere.¹⁶ A 2016 report from the Southern Poverty Law Center identified 718 confederate monuments (with 700 of these being on public land).¹⁷ The public display of such monuments conveys a message about a community; memorials are sacred patriotic spaces and offer conflicting views on who counts as heroes and villains. Public monuments give legitimacy to the ideals represented and one has to have sufficient political power to occupy these public spaces; the erection of such monuments indicates there is enough money and people willing to support these ideals.

14. *Id.*

15. Tavernise, *supra* note 3 (citing a North Carolina study that found twenty confederate monuments erected in that state since 2000).

16. Meeks, *supra* note 8.

17. SPLC, *supra* note 15, at 8.

One such example is the New Orleans monument to the Battle of Liberty Place. Built in 1891 by the city of New Orleans, it commemorates an 1874 uprising by members of a group called the White League challenging the legitimacy of

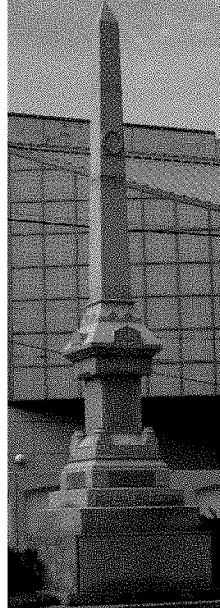


Figure 1: Battle of Liberty Place Monument
(photo by Michael Begley, in the public domain:
https://commons.wikimedia.org/wiki/File:Battle_of_Liberty_Place_Monument.jpg)

Reconstruction.¹⁸ Thus, while not a direct dedication to the Civil War, it addresses events in the aftermath of the war. During the time it was built, the city and state were working to disenfranchise blacks and confirm a policy of resistance to Reconstruction ideals.¹⁹ A plaque added to the monument in 1932 went even further explicitly referencing “white supremacy.”²⁰

In 1974, the city added a marker (but did not remove the plaque): “Although the ‘Battle of Liberty Place’ and this monument are important parts of New Orleans history, the sentiments in favor of white supremacy expressed thereon are contrary to the philosophy and beliefs of present-day New Orleans.”²¹ In 1981, the mayor of New Orleans tried to remove the monument, but the public protest was great, and he could not obtain city council approval.²² A street construction process forced its

18. Ed Kilgore, *New Orleans Pulls Down a Monument to Post-Civil War White Terrorism*, N.Y. MAG. (Apr. 25, 2017), <http://nymag.com/daily/intelligencer/2017/04/new-orleans-removes-monument-to-white-terrorism.html> [https://perma.cc/P6XB-WNDA].

19. See Gordon Chadwick, *New Orleans Historical*, The Battle of Liberty Place Monument, <http://neworleanshistorical.org/items/show/150> [https://perma.cc/CR7H-FEDE].

20. Levinson, *supra* note 12, at 1088.

21. Gordon Chadwick, *New Orleans Historical*, The Battle of Liberty Place Monument in the Late 20th Century, <http://www.neworleanshistorical.org/items/show/283> [https://perma.cc/FL6N-D989].

22. *Racism is Issue in Clash over New Orleans Monument*, N.Y. TIMES (Jan. 18, 1981),

temporary removal in 1989.²³ The mayor had agreed to replace the monument upon completion of the project.²⁴ When he took no action to remove it from storage, supporters of the White League sued.²⁵ They argued that because federal money was used for the street construction project, federal historic preservation laws required restoration of the monument.²⁶ In 1993, the parties agreed to put the monument on a less conspicuous but more historically accurate site and to remove the 1932 plaque referring to white supremacy.²⁷ At the base of the monument, the city added the names of the fallen Metropolitan Police (previously only the members of the White League had been listed).²⁸ The marker noted that the inscription did not express the current understanding of the war or attitudes of the community, yet it still claimed to be commemorating both sides of the battle, suggesting an equivalency between the violent racist acts and the police officers defending the city.²⁹

In 2015, Mayor Mitch Landrieu proposed complete removal of the monument, and the City Council agreed on the grounds that the monument was a public nuisance.³⁰ Again, supporters of the monument sued. They argued that removal of the monument would violate the 1993 agreement and federal historic preservation laws.³¹ The Eastern District of Louisiana held that while the settlement agreement required the monument to once again be displayed, it did not prohibit later removal where no federal funds were used or federal licenses of approvals required.³² The Fifth Circuit upheld the lower court, carving the way for its removal in March 2017.³³

<http://www.nytimes.com/1981/01/18/us/racism-is-issue-in-clash-over-new-orleans-monument.html> [https://perma.cc/VZ9V-VGGG].

23. Gordon Chadwick, *New Orleans Historical, The Battle of Liberty Place Monument in the Late 20th Century*, <http://www.neworleanshistorical.org/items/show/283> [https://perma.cc/2KZS-QWKY].

24. *Id.*

25. *Id.*

26. Frances Frank Marcus, *A New Orleans Monument to Strife Stirs Up More*, N.Y. TIMES (Mar. 31, 1993), <http://www.nytimes.com/1993/03/31/us/a-new-orleans-monument-to-strife-stirs-up-more.html> [https://perma.cc/RQV4-6LKC].

27. John E. DeSantis, *Confederate Insurgency Monument Stirs Controversy Over Race, History*, CHI. TRIB. (Apr. 2, 1993), http://articles.chicagotribune.com/1993-04-02/news/9304020396_1_liberty-monument-reconstruction-government-white-supremacy [https://perma.cc/SX58-78PL].

28. Gordon Chadwick, *New Orleans Historical, The Battle of Liberty Place Monument in the Late 20th Century*, <http://www.neworleanshistorical.org/items/show/283> [https://perma.cc/8T8Z-7T89].

29. Kilgore, *supra* note 18.

30. Merrit Kennedy, *Under Cover of Night, New Orleans Begins Dismantling Confederate Monuments*, NAT'L PUBLIC RADIO (Apr. 24, 2017), <http://www.npr.org/sections/thetwo-way/2017/04/24/525413502/under-cover-of-night-new-orleans-begins-dismantling-confederate-monuments> [https://perma.cc/U6G5-9RRM].

31. Kevin Litten, *New Orleans Confederate Monuments Can Come Down, Court Rules*, Mar. 6, 2017, TIMES-PICAYUNE, http://www.nola.com/politics/index.ssf/2017/03/confederate_monuments_appeals_1.html [https://perma.cc/58BE-8R5W].

32. *Monumental Task Force, Inc. v. Foux*, 240 F. Supp.3d 487 (E.D. La. 2017). The 2015 lawsuit also included some constitutional claims, but the court did not find them persuasive.

33. *Monumental Task Force, Inc. v. Chao*, 678 Fed. Appx. 250 (5th Cir. 2017).

Lawmakers in Baton Rouge unsuccessfully tried to pass legislation that would have prevented the monument's removal.³⁴ The monument was finally removed in the middle of the night on April 24, 2017, under heavy police guard and with workers covering their face to hide their identity because of fear of reprisals.³⁵

Where monuments are on public land, political lobbying and pressures on politicians may enable their eventual removal as events have demonstrated over the last year. While the publicness of these monuments is what likely most upsets people, it may also be the most vulnerable point for these monuments.³⁶ Public sentiment has been shifting away from support of these structures, recognizing them as potential symbols of injustice and as potential public nuisances because they can serve as rallying points for both white supremacists and those fighting against them.³⁷ Private organizations and landowners do not feel the same political pressure, and trespassing laws can serve to deter demonstrations on private property. In this light, it makes sense that public sites are under the greatest scrutiny, but they are not the only sites deserving of scrutiny.

B. Category Six: Private Land, Private Money

We jump ahead to category six to illustrate the two ends of our spectrum before describing the muddier middle ground. Thus, we go from fully public to fully private monuments. Some confederate monuments appear on exclusively private land. Building a confederate memorial on private land is certainly within a landowner's rights and generally protected by the First Amendment as long as the landowner complies with other laws, like nuisance and zoning ordinances. While local laws can control the time and manner of speech (through things like height restrictions, setback rules, etc.), they cannot prevent all or even many confederate memorials as this would result in potentially having to limit all monuments regardless of topic.³⁸

It is not clear how many private monuments exist. The Southern Poverty Law Center's 2016 Report identified eighteen, while a more recent *New York Times* article suggested more are being erected all the time.³⁹ Those known of are those most visible and therefore arguably the ones of most concern. The placement of these monuments on private land may show that the confederate monuments are not as

34. Katherine Sayre, *Monument Removal Bill Might be Dead in Louisiana Legislature*, TIMES-PICAYUNE (May 27, 2017), http://www.nola.com/politics/index.ssf/2017/05/confederate_monuments_bill_mig.html [<https://perma.cc/DU5T-LTGY>].

35. The initial contractor quit the job after receiving death threats and having someone set fire to the owner's car. Kennedy, *supra* note 30.

36. Although this differs by state as some state laws specifically protect public monuments. While a private landowner can decide to remove a monument unilaterally, public processes may be harder to navigate.

37. Public nuisance is the argument used by the City of Baltimore to remove several Civil War monuments. See Colin Campbell & Luke Broadwater, *Citing 'Safety and Security', Pugh Has Confederate Monuments Taken Down*, BALTIMORE SUN (Aug. 16, 2017), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-monuments-removed-20170816-story.html> [<https://perma.cc/49HV-7NZK>].

38. SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 409 (2012).

39. SPLC, *supra* note 15; Tavernise, *supra* note 3.

accepted now as they were before or may represent an attempt to avoid the legal and public process issues that have led to the removal of many monuments.

The siting of these monuments varies. Some landowners choose placements of their memorials for visibility. Others are located near historic sites or already established monuments. A particularly visual example can be found outside of Nashville, Tennessee. The twenty-five-foot fiberglass statue honors Nathan Bedford Forrest, a confederate soldier and the first Grand Wizard of the Ku Klux Klan.⁴⁰ Viewed easily from the highway, it was installed in 1998 by an individual citizen and is on private property.⁴¹ The only public action associated with the statue was an initial clearing of vegetation to make it more visible from the highway.⁴² A decade later in 2015, politicians and citizens seemed to change their view about the visibility of this monument when they petitioned the state Department of Transportation to plant vegetation to block the view of the statue.⁴³ The state agency denied the request asserting that it does not plant vegetation simply to block views of private land that people do not like.⁴⁴ While this policy makes sense, it is hard to reconcile with the fact that the agency originally cleared vegetation to increase its visibility.⁴⁵

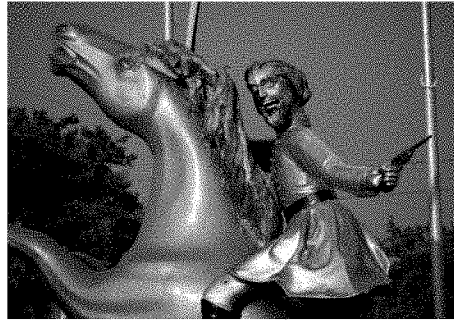


Figure 2: Nathan Bedford Forrest
(http://images.gawker.com/1310553686853971558/c_scale,fl_progressive,q_80,w_800.jpg;
photo by Brent Moore, available [here](#))

40. Peter Holley, *The 'Terrifying' Confederate Statue Some Tennesseans Want to Hide*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/25/is-this-the-weirdest-confederate-statue-in-dixie/?utm_term=.417d819c6e5f [<https://perma.cc/S4G3-LGTP>].

41. *Id.*

42. Joey Garrison, *State Denies Nashville's Request to Block I-65 Forrest Statue*, TENNESSEAN (July 20, 2015), <http://www.tennessean.com/story/news/politics/2015/07/20/state-denies-nashvilles-request-block-forrest-statue/30412745/> [<https://perma.cc/B2ER-FCLR>].

43. *See, e.g.*, Heidi Campbell, Opinion, *Conceal Nathan Bedford Forrest Statue from I-65*, TENNESSEAN (Aug. 15, 2017), <http://www.tennessean.com/story/opinion/2017/08/15/conceal-nathan-bedford-forrest-statue-65/570514001/> [<https://perma.cc/YQ6G-K9ZT>] (local mayor renewing call to visually block the statue); *TDOT denies request to block Nathan Bedford Forrest statue*, WKRN.COM (July 20, 2015), <http://wkrn.com/2015/07/20/tdot-denies-request-to-block-nathan-bedford-forrest-statue/> [<https://perma.cc/LF2P-4R4X>] (also providing an image of the statue as viewed from the highway).

44. Garrison, *supra* note 42.

45. While this is not a large public involvement or investment, it is notable that even in our most private category, we see public support for confederate monuments.

In December 2017, vandals coated the statue with pink paint. While not the first time the piece has been vandalized, this time the owner has declared that he will not remove the paint because he believes that it brings more attention to the work.⁴⁶

C. Category Two: Public Land, Private Money

In the realm between all public and all private, there are several variations. One common arrangement is confederate monuments located on public lands but paid for by a private organization that received permission to place it there. We find such monuments on federal, state, and municipal lands. For example, the federal government owns several former battlefields and forts managed by the National Park Service. Privately funded memorials have been frequently sited on such lands.⁴⁷

One example in this category of public land and private money is the confederate memorial in Boston Harbor.⁴⁸ In 1963, the Daughters of the Confederacy placed a marker on Georges Island to commemorate the confederate dead who died while imprisoned at Fort Warren, which is located on the island.⁴⁹ Georges Island is owned and managed by the state of Massachusetts through the Department of Conservation and Recreation and is a part of the Boston Harbor Islands National Recreation Area.⁵⁰ Fort Warren is a designated National Historic Landmark.⁵¹ In 2017, the state of Massachusetts covered this monument to conceal it from view as outright removal would have required approval from the Massachusetts Historical Commission, by virtue of the overall site's historic designation and state ownership.⁵²

46. Natalie Neysa Alund & Natalie Allison, *Nathan Bedford Forrest Statue off I-65 Painted Pink, Owner Bill Dorris Won't Repair*, TENNESSEAN (Dec. 27, 2017, 12:31 p.m.), <http://www.tennessean.com/story/news/2017/12/27/nathan-bedford-forrest-statue-nashville-vandalized-pink/984740001/> [<https://perma.cc/Z5Z2-9B2Q>]. Alongside a written article, the website includes a video interview with the landowner who declares his display of the work to be within his first amendment rights. Additionally, without any apparent sense of irony, landowner Bill Dorris declares the vandals to be cowards, “anybody ride around with a sheet over his head must be a coward.”

47. See, e.g., David Snyder, *Honoring the South, Stirring up Old Battles*, WASH. POST (June 22, 2003), https://www.washingtonpost.com/archive/local/2003/06/22/honoring-the-south-stirring-up-old-battles/43404fb3-7e81-4ef8-9f90-3792adc6bd49/?utm_term=.8088b1840148 [<https://perma.cc/C3VA-4QNZ>].

48. Kevin Levin, CIVIL WAR MEMORY BLOG, *United Daughters of the Confederacy in Boston?*, (July 21, 2013), <http://cwmemory.com/2013/07/21/united-daughters-of-the-confederacy-in-boston/> [<https://perma.cc/32FP-28WK>].

49. Adam Reilly, *Does A Confederate Memorial Belong in Boston Harbor?* WGBH NEWS (June 8, 2017), <http://news.wgbh.org/2017/06/08/politics-government/does-confederate-memorial-belong-boston-harbor> [<https://perma.cc/47DA-XFX2>].

50. Nat'l Park Serv., *Boston Harbor Islands National Recreation Area*, <https://www.nps.gov/boha/learn/historyculture/facts-geor.htm> [<https://perma.cc/LS8K-YLXJ>].

51. The Cultural Landscape Found., *Fort Warren*, <https://tclf.org/georges-island-fort-warren>.

52. Louise Kennedy, *Why Boston Has a Confederate Monument—And Why You Can't See it Right Now*, WBUR, (Aug. 16, 2017), <http://www.wbur.org/artery/2017/08/16/boston-confederate-monument> [<https://perma.cc/MD38-X7HJ>].

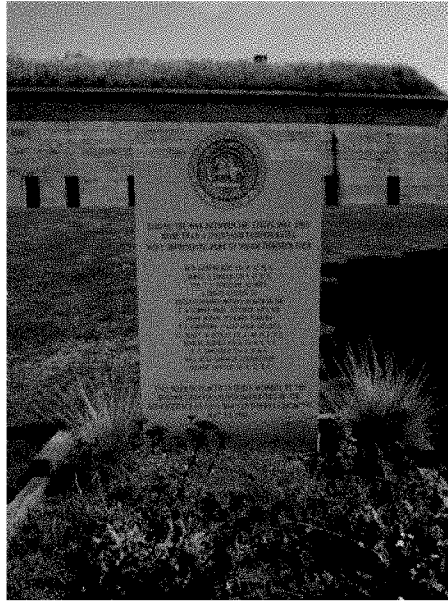


Figure 3: Memorial to Confederate POWs on George's Island in Boston Harbor
(Photo by Bryan Simmons, in the public domain at <https://www.hmdb.org/marker.asp?marker=59205>.)

The mixture of public and private here presents some interesting conundrums. First, where monuments are not on fully private land—like the Nathan Bedford Forrest example—local politicians might be able to remove, modify, or, as in Boston, conceal them.⁵³ They can also add interpretive information or situate other statues nearby to respond to the subject matter. When political attitudes change, community members can pressure politicians to take action with respect to these monuments.

Additionally, the private organizations discussed here are not purely private actors or private individuals expending their own funds, but rather these are nonprofit organizations advancing their respective missions. Private nonprofit organizations receive many public benefits.⁵⁴ We have a well-established national policy of supporting the work of charitable organizations by both giving the organizations certain tax advantages and allowing income tax deductions to charitable organizations.⁵⁵ This added public lens into the situation does not appear to widen the political options available for securing removal or other remedies for confederate

53. Louise Kennedy, *Boston's Only Confederate Monument Will Move out of Public View*, WBUR (Oct. 3, 2017), <http://www.wbur.org/artery/2017/10/03/bostons-confederate-memorial-will-move> [<https://perma.cc/B572-BAM6>] (explaining that this monument was first boxed up and would be permanently moved out of public view).

54. See Michael Lipsky & Steven Rathgeb Smith, *Nonprofit Organizations, Government, and the Welfare State*, 104 *POLITICAL SCI. Q.* 625, 625-26 (1989), <http://www.jstor.org/stable/2151102>.

55. See generally Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *YALE L.J.* 299 (1976); Henry Hansmann, *The Effect of Tax Exemption and Other Factors on the Market Share of Nonprofit Versus For-Profit Firms*, *XL(1) NAT'L TAX J.* 71 (1987).

monuments. Yet, the argument that these monuments should be less controversial because they are less public rings hollow when one understands that the public has forgone tax revenue in exchange for them. One (admittedly politically unlikely) way to combat new creation of confederate monuments is to target the federal subsidies bestowed upon the nonprofits with an interpretation of public policy that excludes supporting such structures. The First Amendment implications of such actions, however, would be problematic. Moreover, this would not impact any monuments erected by private individuals, organizations, or corporations.

D. Category Three: Private Land, Public-ish Money

As noted above, there can be public economic support of confederate monuments even without the public consciously realizing it is subsidizing monuments through tax policy. Category three comes thus with the most variations. First, in our description of the location of the land as private, we mean not owned in fee simple by any layer or entity of government. The ownership patterns differ, however, with some land owned by private individuals, some owned by businesses or corporations, and some owned by nonprofit organizations. Second, in our labeling the money as “public-ish”, we note that the money to construct the monuments comes from a variety and mixture of sources, including private individuals, corporations, nonprofit organizations, and even public funds. The key feature of the organizations funding the project is that they receive public support.

One example in this category is the confederate monument behind the Georgetown Historical Society building in Delaware. The building houses the Marvel Carriage Museum. The Sons of Confederate Veterans erected the monument, with Robert Eldreth spearheading the project.⁵⁶ While located on private property, it is still property associated with public benefits, including favored tax status. In addition, the historical society has received state grants for support of its museum and mission.⁵⁷ This state money is the reason that the NAACP has called on the state of Delaware to stop the issuance of an \$11,500 Grant-in-Aid to the Historical Society.⁵⁸ Lawmakers have objected to the NAACP position because of the monument’s location on private land.⁵⁹ Further, the society raised special funds to support the Delaware Confederate monument.⁶⁰ No state funds go directly to the

56. Tavernise, *supra* note 1.

57. DJ McAneny, *NAACP Calls for Halt of State Grant Money to Georgetown Historical Society until Delaware Confederate Monument is Removed*, WDEL, (Aug, 16, 2017), http://www.wdel.com/news/naacp-calls-for-halt-of-state-grant-money-to-georgetown/article_db51f054-82c2-11e7-964c-8b3d4a3b1a18.html [https://perma.cc/8MYR-WX2E].

58. *Id.*

59. Glenn Rolfe, *Confederate Monument at Marvel Museum: Lawmakers Won’t Act on NAACP’s Request*, SUSSEX POST, Aug. 17, 2017, <http://sussexpost.com/news/confederate-monument-marvel-museum-lawmakers-wont-act-naacps-request/> [https://perma.cc/3LUR-QZSC].

60. Facebook page of the Georgetown Historical Society (post of Aug. 22, 2017), <https://www.facebook.com/Georgetown-Historical-Society-841715709225277/> [https://perma.cc/XY8V-NVCB].

payment for the monument nor its upkeep.⁶¹ Yet, public funds generally support the organization.



Figure 4: Georgetown Delaware Confederate Memorial
(Photo by Don Morfe, in the public domain, <https://www.hmdb.org/marker.asp?marker=105569>)

E. Category Four: Preservation Easements

Category four builds upon the same messy public-private mix of the previous two categories to examine the special case of land protected by conservation easements. Conservation easements generally involve a landowner agreeing to refrain from engaging in certain activities on her land with the goal of yielding an express conservation benefit. State law recognizes historic preservation as a valid conservation purpose, either through conservation easement enabling acts or separate historic preservation easement laws. Where the conservation benefit is historic preservation, we refer to these arrangements collectively as preservation easements. State law dictates the exact contours of the agreements, but they generally follow the same rules: A property owner conveys the ability to modify or demolish a structure.⁶² A non-governmental organization or governmental body holds the preservation easement, giving them the ability to enforce the restriction.

Landowner motivation for burdening land with a preservation easement may be largely altruistic, seeking to protect important architectural structures or other historic aspects of a property.⁶³ However, often landowners donate preservation easements to obtain tax benefits or to obtain development approvals.⁶⁴ While multiple tax advantages may come into play, the most significant is the ability to deduct the donation on federal income tax returns.⁶⁵ To qualify for the federal tax

61. Chris Flood, *NAACP: Remove Georgetown's Confederate Monument*, *CAPE GAZETTE*, (Aug. 18, 2017), 857.

62. Jessica Owley, *The Future of the Past: Historic Preservation Easements*, 35 *ZONING & PLANNING L. REP.* 1, 3-4 (Nov. 2012).

63. Dianna A. Stroman & Urs P. Kreuter, *Perpetual Conservation Easements and Landowners: Evaluating Easement Knowledge, Satisfaction and Partner Organization Relationships*, 146 *J. ENV'T'L MGMT.* 284, 285 (2014).

64. Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 *NEB. L. REV.* 1043 (2005).

65. There are also significant federal estate tax benefits and the possibility of reduced

deduction, a preservation easement must protect “an historically important land area or a certified historic structure.”⁶⁶ A certified historic structure could include confederate monuments if listed on the National Register.⁶⁷ There are many on the National Register.⁶⁸

The income tax benefits are based on the value that the landowner “lost” by agreeing to restrict her property.⁶⁹ A preservation easement that sought solely to protect a confederate monument might meet state property law requirements but would, for a variety of reasons, either not qualify for the National Register or not result in a loss in property value.⁷⁰ The value of the tax deduction would be difficult to calculate. If only protecting a monument, the value would be minimal. If the monument is protected as a part of a larger historic site or building, or even appears in a private park with open space and environmental interest, there might be value unrelated to the monument itself, so it is unlikely that a memorial alone would result in tax deductions.

As confederate monuments exist on private lands, or could be placed on private lands with historic significance, preservation easements could be utilized to protect either these monuments or associated resources in a blurring of private/public tools and status. The public interest involved in confederate monuments protected by preservation easements is a complicated discussion and comes with almost as many permutations as we have categories in this essay. All preservation easements represent a change to longstanding property law rules that prevented perpetual land restrictions where the benefit of the restriction is not held and enforced by an adjoining landowner. States passed laws allowing limited exceptions to this longstanding rule because of legislators’ beliefs that such arrangements would

local property taxes. JESSICA E. JAY, CONSERVATION EASEMENTS AND TAX BENEFITS 6, 8–9 (2019), <http://conservationlaw.org/publications/01-ConservationEasementsandBenefits.pdf> [<https://perma.cc/4L5P-ZXNZ>]; Land Trust Alliance, *Estate Tax Incentives for Land Conservation: Keeping Land in the Family*, <https://www.landtrustalliance.org/topics/taxes/estate-tax-incentives-land-conservation> [<https://perma.cc/XZ59-DVVQ>]. Recent changes in the tax code may lessen the allure of estate tax benefits. Phil Tabas, Presentation, Developing Tax Incentives and Financial Tools for Conservation, International Land Conservation Network 2018 Global Congress, Santiago, Chile January 25, 2018.

66. 26 U.S.C. § 170(h)(4)(A)(iv) (2011).

67. *Id.* § 170(h)(4)(C)(i).

68. According to the National Register of Historic Places NPGallery Database as of February 9, 2018, twenty-one entries contain “confederate” in the name of the resource. *National Register of Historic Places*, NATIONAL PARK SERVICE, <https://npgallery.nps.gov/NRHP/SearchResults/> [<https://perma.cc/M8X5-BUNR>]. These mostly appear to be objects or statues, as opposed to buildings or battlefields (although there are a few of those). *Id.* Eleven states (including Virginia and North Carolina) are not included in the database. *Id.*

69. Such value would be questionable when it comes to agreeing not to remove a confederate monument, but as explained in the text, any preservation easements over confederate monuments could cover larger parcels with historic or conservation benefit.

70. This assumes the monument would qualify under the National Register criteria. See National Parks Service, *How to Apply the National Register Criteria for Evaluation*, NATIONAL REGISTER BULLETIN (1999), https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_3.htm [<https://perma.cc/CXZ2-34XB>] (discussing the application of the National Register criteria with regard to these types of properties).

benefit the public through the protection of land with historical, cultural, recreational, or environmental value. Thus, use of this tool in a way that does not produce a public benefit goes against the purposes of the law and creates unwarranted encumbrances and limitations on land in violation of public policy.

The holders of preservation easements are either public entities or nonprofit conservation organizations, but the underlying landowner could be either a public or private entity. Where a public entity holds the preservation easement, there is actually a public property right involved. If the underlying land is owned by one public entity and the preservation easement is held by a different public entity, we can have complicated legal questions. At first glance, this may appear to fit into our first category of purely public, but where the public entities are not identical, their actions are more like those of private entities than public ones.

If the underlying land is private but the preservation easement is held by a public entity, we end up with a mixture of public and private land. It is unclear what would happen here. We have seen from our other categories that sometimes the nature of something as public can inspire vocal criticism and removal. But in other examples, we also see express limitations on public actors removing or altering confederate monuments.

Monuments encumbered with preservation easements tend to present complicated and unique structures, and our example in this section is no exception. In 2015, Baltimore Mayor Stephanie Rawlings-Blake tasked a commission with reviewing the fate of four confederate monuments in the city.⁷¹ The commission explored the legal requirements surrounding the monuments and determined that the Maryland Historical Trust (“MHT”), a state agency, held preservation easements on three of the four monuments.⁷² These preservation easements arose from inclusion of the statues in the state’s cyclical outdoor bronze sculpture maintenance program in 1984. All of the statues protected under that program are covered by preservation easements that require MHT approval for any changes or modifications.

In August 2017, Mayor Catherine Pugh ordered the removal of these monuments, which occurred on the evening/morning of August 16–17.⁷³ Press reports indicate that the mayor did this without the approval of the MHT to “protect her city” and to prevent future protest and vandalism to the monuments.⁷⁴ Despite lacking the legal authority to remove these monuments, it does not appear that the State of Maryland

71. SPECIAL COMMISSION TO REVIEW BALTIMORE’S PUBLIC CONFEDERATE MONUMENTS, REPORT ON BALTIMORE’S PUBLIC CONFEDERATE MONUMENTS (Aug. 16, 2016), https://mayor.baltimorecity.gov/sites/default/files/Confederate%20Monuments%20report_1.pdf [<https://perma.cc/4M3E-C6RP>].

72. *Id.*

73. Merrit Kennedy, *Baltimore Took Down Confederate Monuments. Now It Has to Decide What to Do with Them*, NAT’L PUBLIC RADIO, (Aug. 28, 2017, 3:47 p.m.), <http://www.npr.org/sections/thetwo-way/2017/08/28/546131805/baltimore-took-down-confederate-monuments-now-it-has-to-decide-what-to-do-with-t> [<https://perma.cc/Q2LR-D856>].

74. Michelle Harris & Meredith Herzing, *Confederate Monuments in Baltimore “Quickly and Quietly” Removed*, BALTIMORE MAG. (Aug. 16, 2017, 3:25 p.m.), <http://www.baltimoremagazine.com/2017/8/16/confederate-monuments-in-baltimore-quickly-and-quietly-removed> [<https://perma.cc/389T-ZA5X>].

or the MHT is planning to respond to this violation⁷⁵—perhaps demonstrating the political limits protecting such a resource through preservation easements held by a governmental agency.⁷⁶ A private nonprofit organization that held a preservation easement may be less likely to turn a blind eye to violations due to concerns about the precedent it might set or how such a decision might threaten the integrity of the organization, either through public perception or as a qualified easement-holder.⁷⁷



Figure 5: Jackson and Lee Monument
(Photo in the public domain, https://commons.wikimedia.org/wiki/File:Jackson_and_Lee_Monument,_Front.JPG#filelinks)

F. Category Five: Public Support through Preservation Laws

In some cases, the obstacle to removing controversial monuments turns not on whether the land or money involved is public or private, but on the laws that seemingly add a layer of public-condoned protection regardless of the underlying circumstances involving the site.

One thing that muddies the divide between public and private in the context of monuments is the protection of these resources under historic preservation laws. Four

75. It is possible, but far from clear, that others may be able to bring suit against the city or the state for violation of the preservation easement. In some cases, aggrieved parties may be able to bring an enforcement suit based on third-party beneficiary theories or other approaches. See generally Jessica Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT L. REV. 757 (2004).

76. See Ian Duncan, *Baltimore Lacked Authority to Take Down Confederate Statues, and State Says it Could — but won't — Order them Restored*, BALTIMORE SUN (Oct. 26, 2017, 2:45 pm), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-confederate-monuments-letter-20171026-story.html> [https://perma.cc/LUW3-RATL].

77. While perhaps no one is interested in the fight, a land trust that does not enforce its conservation easements could draw attention from the state attorney general, the Internal Revenue Service, and in some cases, the Land Trust Accreditation Commission.

levels of historic preservation can come into play. At the federal level, confederate monuments may receive protection under the National Historic Preservation Act (“NHPA”).⁷⁸ Part of this statute creates the National Register of Historic Places, mentioned above with reference to the federal tax code.⁷⁹ The National Register is the nation’s list of those places with historic significance and integrity.⁸⁰ The National Register criteria are broad but may, in some ways, have limited the number of monuments designated or eligible for designation. For example, the criteria considerations exclude historic resources constructed purely for commemorative purposes.⁸¹ The majority of monuments covered by the National Register are likely contributing elements to resources listed on the National Register, have been listed for their artistic value or design, or for significance acquired over time.⁸²

Beyond the National Register, the NHPA established section 106, which is triggered when projects have some sort of federal hook—that is something carried out, funded by, or permitted by the federal government.⁸³ In the monument context, this condition would be met for monuments located on federal lands or when using federal funds for removal or alteration. Once section 106 is triggered, the project proponents have to determine whether their projects will impact properties listed, or eligible for listing, in the National Register of Historic Places.⁸⁴ Where these conditions are met, section 106 requires the federal action agency to meaningfully consult with regard to the project and receive public input on how to carry out the project through the consultation process.⁸⁵

78. 54 U.S.C. § 300101 (1966). Passed in 1966, the NHPA is the first comprehensive federal preservation law and is still considered the “heart of federal historic preservation law.” BRONIN & BYRNE, *supra* note 38, at 106, 106-08 (providing overview of the impacts of the NHPA).

79. 54 U.S.C. § 302101 (2014); 36 C.F.R. § 60 (2012).

80. BRONIN & BYRNE, *supra* note 38, at 60-62 (2012) (providing overview of National Register criteria).

81. 36 C.F.R. § 60.4 (2012). This does not mean that monuments cannot of themselves be designated, but will have to qualify on some other basis.

82. National Parks Service, *supra* note 70 (discussing the application of the National Register Criteria with regard to these types of properties).

83. 54 U.S.C. § 306108 (2014). The National Environmental Policy Act also can apply as it requires consideration of major federal actions significantly impacting the human environment, which includes “aesthetic, historic, [and] cultural effects.” 40 C.F.R. § 1508.8(b) (2011).

84. 54 U.S.C. § 306108. If a property is a National Historic Landmark, the requirements under NHPA go further and require (1) planning, to the maximum extent possible, to minimize harm to the site, and (2) consultation with the Advisory Council on Historic Preservation and the National Park Service. 54 U.S.C. § 306107 (2014). Given the rarity of such landmarks, however, it is unlikely that many monuments are covered under this subcategory, unless as with the Boston Harbor example, the monuments are placed at an underlying site.

85. ADVISORY COUNCIL ON HISTORIC PRESERVATION, PROTECTING HISTORIC PROPERTIES: A CITIZEN’S GUIDE TO SECTION 106 REVIEW, <http://www.achp.gov/docs/CitizenGuide.pdf> [<https://perma.cc/X6ZG-X7W5>] 36 C.F.R. Part 800 provides the consultation process and relies heavily on the State Historic Preservation Officers as the backbone of the consultation process.

Beyond section 106, the NHPA also provides the standards that govern or shape, directly or indirectly, the application of other preservation laws, including state and local laws that tier off this status. It is generally these state and local laws that make removal of designated sites difficult.⁸⁶ Some states have state-equivalents to section 106 or to the National Environmental Policy Act (“NEPA”), which require projects with a state nexus to consult or to avoid impacts to listed sites.⁸⁷

More significantly, there are also state laws specifically protecting confederate war monuments. For example, Alabama recently passed the Alabama Memorial Preservation Act, which prohibits local governments from removing historic structures, including Civil War monuments that are over forty years old.⁸⁸ In 2015, North Carolina passed a similar law, which limits local governments’ ability to remove monuments.⁸⁹ A Tennessee law to this effect tied the City of Memphis’ hands when it tried to remove a monument to Nathan Bedford Forest. The city took the unusual step of conveying the land to a private nonprofit organization that stated its intent to remove the statute once it became the landowner.⁹⁰

Last, many local governments have historic preservation laws that potentially apply to monuments. The most common is local historic district regulations where local governments designate areas with collective historic significance. Property owners in historic districts must receive approval to modify or demolish structures. Some communities rely on landmarks laws. In contrast to the district model, landmarks laws designate individual historic sites as worthy of protection and, in many instances, require the owners of listed properties to seek approval to modify or demolish designated landmarks. Where local preservation laws protect monuments, anyone seeking to destroy, remove, or alter the monument must apply to the local historic district or landmarks commission for permission to do so.

Although we have not found many examples of requests for removal, one such request was made in Rockville, Maryland. In 2015, Montgomery County applied to the Rockville Historic District Commission to remove a statue located on the grounds of the county’s circuit courthouse.⁹¹ The statue was erected in 1913 on a traffic island

86. BRONIN & BYRNE, *supra* note 38, at 73.

87. *Id.* at 197–98. As noted, any effort to remove a monument may also require NEPA analysis, again, if it involves a major federal action affecting the quality of the human environment. *Id.* at 190–92 (discussing the application of NEPA and the interactions between the NHPA and NEPA).

88. Joshua Barajas, *Alabama Attorney General Sues Birmingham for Partially Covering Confederate Monument*, PBS NEWSHOUR (Aug. 17, 2017, 9:10 a.m.), <http://www.pbs.org/newshour/rundown/alabama-attorney-general-sues-birmingham-partially-covering-confederate-monument/> [<https://perma.cc/3LXS-5RJG>].

89. The Cultural History Artifact Management and Patriotism Act, N.C. GEN. STAT. § 100-2.

90. Theoretically, the organization could then reconvey the land to the city but it does not appear to be in the plans. This technique would not be available everywhere as some states (e.g., New York) prohibit the conveyance of public park or recreation lands to private parties, but this demonstrates some of the challenges presented by local and state preservation laws.

91. Andrew Metcalf, *Rockville Historic District Commission Grants County’s Request to Move Confederate Statue*, BETHESDA MAG. (Sept. 18, 2015, 11:22 AM), <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Rockville-Historic-District-Commission-Grants-Countys-Request-to-Move-Confederate-Statue/>

and was moved to the courthouse's grounds in 1971.⁹² Wording on its pedestal includes the phrase: "That we through life may not forget to love the thin gray line."⁹³

The statue came under the commission's authority because the historic courthouse is listed as a single resource historic district.⁹⁴ The commission allowed removal based upon its determination that the statue was not a contributing element to the courthouse itself and removal would not violate the applicable design review standards.⁹⁵ If Civil War monuments themselves are listed, historic district commissions will have to consider requests for removal under the standards provided under their ordinances, which may prove problematic.



Figure 6: Civil War Memorial, Rockville, Maryland courthouse
(Photo available at: https://www.flickr.com/photos/mr_t_in_dc/)

[<https://perma.cc/6P5T-9GXG>].

92. Seth Denbo, *All History Is Local: Debating the Fate of a Confederate Soldier Statue in Maryland*, AMERICAN HISTORICAL ASSOCIATION: AHA TODAY, (July 27, 2015), <http://blog.historians.org/2015/07/debating-the-fate-of-a-confederate-soldier-statue/> [<https://perma.cc/Z2FK-WXUR>].

93. *Id.* The "thin gray line" refers to the relatively small number of confederate soldiers (gray) in comparison to union soldiers (blue), and the use of the phrase is generally considering part of the Lost Cause mythology. James W. Loewen, *Why Do People Believe Myths About the Confederacy? Because Our Textbooks and Monuments Are Wrong*. WASH. POST (July 1, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/01/why-do-people-believe-myths-about-the-confederacy-because-our-textbooks-and-monuments-are-wrong/?noredirect=on&utm_term=.c7ca0d555b25 [<https://perma.cc/D66T-5TSC>]

94. City of Rockville, Historic District Commission Staff Report: Certificate of Approval HDC2016-00756, 29 Courthouse Square (Sept. 10, 2015), <http://rockvillemd.gov/DocumentCenter/View/12674> [<https://perma.cc/2ASA-5QGN>]. National Register status, of itself, does not result in protection of a resource or application of the local preservation law unless the community has incorporated this status by reference.

95. *Id.*

CONCLUSION

The presence and public support of confederate monuments is controversial because the monuments often represent a narrative of the past that is unsupported by evidence, while serving as a focal point for present discrimination and injustices. In the context of efforts to modify and remove the structures, this essay serves as an initial foray into articulating how property law arrangements and public investment can complicate the debate. Our typology highlights the complex nature of the interests involved in such structures, which helps to understand the laws regarding the modification and removal of these monuments. The examples above illuminate a tangled story of public and private. It is a story present throughout much of our society. We are often fixated on whether something is public or private, and draw lines between the two in an effort to help us navigate the legal and social world. But public and private is often a blurry line. Here we see how fuzzy this line can be even in the context of something that seems as set in stone or permanent as a monument. This fuzzy line may introduce both impediments to modification as well as produce opportunities.