

Belmont University

Belmont Digital Repository

Law Faculty Scholarship

College of Law

3-23-2021

The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law

Kristi Arth

Belmont University College of Law

Follow this and additional works at: <https://repository.belmont.edu/lawfaculty>



Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Arth, Kristi, "The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law" (2021). *Law Faculty Scholarship*. 148.

<https://repository.belmont.edu/lawfaculty/148>

This Article is brought to you for free and open access by the College of Law at Belmont Digital Repository. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of Belmont Digital Repository. For more information, please contact repository@belmont.edu.

THE ART OF THE MATTER:
A LINGUISTIC ANALYSIS OF PUBLIC ART POLICY IN
CONFEDERATE MONUMENT REMOVAL CASE LAW

Kristi W. Arth*

TABLE OF CONTENTS

INTRODUCTION..... 3

I. RESEARCH METHODOLOGY 9

II. AN OVERVIEW OF CONFEDERATE MONUMENT REMOVAL CASE
LAW 12

A. *The Typical Monuments* 13

B. *The Typical Parties* 14

C. *The Typical Claims* 15

D. *State Statue Statutes* 15

E. *The Injunctive Relief Posture* 16

* Kristi W. Arth is an Assistant Professor of Law at Belmont University College of Law. She earned her Master’s in Arts Policy & Administration and her Juris Doctorate from The Ohio State University, where she was Order of the Coif. Prior to entering academia, she was a partner at Bradley Arant Boult Cummings LLP, an Am Law 200 law firm. She extends her thanks to her research assistants, Hannah Piantek and Madison Biggs, for their monumental help on this project. And, as ever, thanks to Bill, Liam, and Charlie for their superhero-level support (and costume wear). It should be noted that this article was largely written before George Floyd’s death and the renewed demands for removal of Confederate statues that his tragic death has inspired in cities across the nation. Joel Shannon, *Report Counts How Many Confederate Statues Have Been Removed Since George Floyd’s Death. It’s A Lot.*, USA TODAY (Aug. 12, 2020), <https://www.usatoday.com/story/news/nation/2020/08/12/george-floyd-confederate-monuments-splc/3356819001/> (discussing removal of thirty-eight Confederate monuments in the three months following George Floyd’s death—“nearly as many removals as reported in the three years following the Charleston, South Carolina, church shooting”). Of course, those thirty-eight pieces of public art that have been removed so far represent only a small fraction of the total number of Confederate monuments sited in the United States, and the work of removal activists is far from over. Hopefully, this article provides both activists and communities at large with a new lens for considering the removal demand, a framework for advocacy, and a register for discussing why these particular public artworks may not be providing the value that public art is so capable of delivering.

III.	FRAMEWORKS OF PUBLIC ART POLICY.....	18
	A. <i>Public Art in the United States</i>	19
	B. <i>Public Policy Goals of Public Art</i>	22
	1. The Historic Value Proposition: Art as Monument	22
	2. The Functional Value Proposition: Art as Amenity.....	24
	3. The Democratic Value Proposition: Art as the Agora	25
	C. <i>The Disposition of Confederate Monuments</i>	26
	1. Historicizing Monuments: The Move to Museums	27
	2. Privatizing Public Space	28
	3. Art on Art: Using Art to Reinterpret Existing Art in Situ.....	29
IV.	THE LINGUISTIC TRENDS EMERGENT IN CONFEDERATE MONUMENT REMOVAL CASE LAW	31
	A. <i>Artistic Content/Context</i>	32
	B. <i>Patronage</i>	33
	C. <i>Art as Speech</i>	36
	D. <i>Ownership Interests</i>	40
	E. <i>Physical Integrity of the Artistic Piece</i>	44
	F. <i>Public Utility</i>	46
V.	A LINGUISTIC ANALYSIS OF CONFEDERATE MONUMENT REMOVAL CASE LAW & ITS APPLICATION TO THE PUBLIC ART THEORY FRAMEWORK.....	47
	A. <i>Overall Trends</i>	47
	B. <i>Trends by Proponent</i>	49
	C. <i>Trends by Location</i>	55
	D. <i>Trends by Code</i>	57
VI.	THE OPPORTUNITY FOR PRACTITIONERS AND JURISTS	60
VII.	CONCLUSION.....	62

INTRODUCTION

In New Orleans, Louisiana, there is a traffic roundabout formerly named Tivoli Circle but now known almost universally (and controversially) to locals and tourists alike as “Lee Circle.”¹ In the middle of the land officially renamed “Lee Place,” a sixty-foot marble column thrusts into the sky.² Right now, that sixty-foot pillar holds up nothing.³ But prior to May 19, 2017, and the extended litigation leading up to that day,⁴ the marble column held up a sixteen-foot bronze statue of General Robert E. Lee.⁵ The larger-than-life statute depicted the Confederate general, weapon slung at his side, gloved arms folded across his chest, standing sternly with his left foot slightly out in front of him.⁶ Upon approaching the traffic circle from any number of directions, it was hard to miss General Lee towering approximately 90 feet in the air—hence, Lee Circle.⁷

But in that litigation, as in so many similar pieces of Confederate monument removal litigation, one name remains largely omitted from the discussion: Alexander Doyle, the artist who sculpted the Lee monument.⁸ Doyle, a prominent sculptor in his day, was the creator of twenty-four works cataloged in the Smithsonian American Art Museum’s Art Inventories Catalog.⁹ That body of work includes monuments to President James Garfield; Margret Gaffney Haughery, a female philanthropist (at a time when women were not typically memorialized in monuments); Francis Scott Key, the composer of the national

1. See John Ferguson, *National Register of Historic Places Registration Form*, NAT’L PARK SERV. §§ 1–2, 4, 7–8 (Mar. 19, 1991), <https://npgallery.nps.gov/NRHP/GetAsset/bf67e975-a67f-4922-ac26-ade34cc11aa0/> (Registration Form for the Lee, Robert E., Monument).

2. *Id.* § 1, 4, 8.

3. See Janell Ross, “*They Were Not Patriots*”: *New Orleans Removes Monument to Confederate Gen. Robert E. Lee*, WASH. POST (May 19, 2017), https://www.washingtonpost.com/national/new-orleans-begins-removing-monument-to-confederate-gen-robert-e-lee/2017/05/19/c4ed94f6-364d-11e7-99b0-dd6e94e786e5_story.html.

4. *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494 (E.D. La. 2017).

5. Ferguson, *supra* note 1, § 7.

6. See Ross, *supra* note 3.

7. See Ferguson, *supra* note 1, § 7.

8. *Id.* § 8; see also Michael Panhorst, *Devotion, Deception, and the Ladies Memorial Association, 1865–1898: The Mystery of the Alabama Confederate Monument*, 65 ALA. REV. 163, 171–73 (2012); Errata, 66 ALA. REV. 251, 251 (2013), <https://muse.jhu.edu/article/524409> (“Alexander Doyle was a leading sculptor and monument maker in late nineteenth-century America” and “was born into the monument business.”).

9. See *Arts Inventories Catalog*, SMITHSONIAN AM. ART MUSEUM, <https://siris-artinventories.si.edu/ipac20/ipac.jsp?> (last visited Sept. 17, 2020).

anthem “The Star-Spangled Banner”; two Civil War-period Union monuments;¹⁰ and at least seven Confederate monuments.¹¹ Three of those seven Confederate monuments were at issue in the *Monumental Task Committee* litigation.¹² Doyle studied in Italy at the national academies at Carrara, Rome, and Florence.¹³ He typically worked in bronze and marble.¹⁴

The fate of Doyle’s public artworks—tangled in litigation about whether they should remain on public display—is not unique.¹⁵ The multiculturalism endemic to the United States probably also engendered its litigious history with respect to public art projects.¹⁶ Art policy scholars Harriet Senie and Sally Webster note that “public art and controversy seem to have been joined at birth.”¹⁷ And public works depicting Confederate war heroes are especially vulnerable to such controversy.¹⁸ Litigation over the removal of Confederate monuments can be traced back as early as 1874.¹⁹

Confederate monuments proliferated during the Jim Crow Era²⁰ with a second peak during the Civil Rights Movement.²¹ A study conducted by the Southern Poverty Law Center identified 780 monuments located on public

10. *Id.* (The Union monuments were the General James Steedman monument and the Soldiers and Sailors Monument in New Haven, CT).

11. *Id.* (The Confederate monuments were the John E. Kenna monument, Louisiana Confederate Soldier monument, Benjamin Harvey Hill monument, Army of Tennessee—Louisiana Division monument, The Confederate Monument, General G.T. Beauregard monument, and Robert E. Lee monument).

12. *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 497 (E.D. La. 2017).

13. Errata, *supra* note 8, at 251–52.

14. *Alexander Doyle Papers, 1852–1937*, SMITHSONIAN INST., <https://www.aaa.si.edu/collections/alexander-doyle-papers-7594> (last visited Sept. 17, 2020) (“Sculptor . . . made marble and bronze statues, many relating to Civil War heroes.”).

15. See discussion *infra* Part II and cases cited *infra* note 56.

16. Harriet F. Senie & Sally Webster, *Public Art and Public Response*, in *CRITICAL ISSUES IN PUBLIC ART* 171, 171–73 (Harriet F. Senie & Sally Webster eds., 1992) (“The very concept of public art, defined in any meaningful way, presupposed a fairly homogenous public and a language of art that speaks to all. These two prerequisites were never present in the United States.”).

17. *Id.* at 171.

18. See discussion *infra* Part II and cases cited *infra* note 56; see also Aline Cain & Marguerite Ward, *10 Confederate Leaders Who Still Have Monuments and Places Named After Them All Over the US*, *BUS. INSIDER* (June 10, 2020, 12:12 PM), <https://www.businessinsider.com/confederate-monuments-spark-controversy-2017-8>.

19. *McCullom ex rel. Walton Cnty. Mem’l Ass’n v. Morrison*, 14 Fla. 414, 414–17 (1874).

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

21. Juanita Solis, *A Monumental Undertaking – Tackling Vestiges of the Confederacy in the Florida Landscape*, 8 *U. MIA. RACE & SOC. JUST. L. REV.* 109, 115–16 (2018).

property.²² However, the propagation of Confederate monuments is not over.²³ The Southern Poverty Law Center study found at least 45 Confederate monuments were dedicated during the Civil Rights movement,²⁴ and 34 were dedicated in 2000 or later.²⁵ Some of these monuments have received protections as cultural heritage sites.²⁶ Some Confederate monuments have been included on the National Register of Historic Places.²⁷

The removals of such Confederate monuments were catalyzed by the Charleston, South Carolina, mass shooting at the African Methodist Episcopal Church Bible study.²⁸ According to Southern Poverty Law Center data, “114 Confederate symbols [were] removed [after] the Charleston massacre, including 48 monuments.”²⁹

This spate of monument removals, in turn, kicked off a backlash in the form of both legislation and litigation.³⁰ The removal or threatened removal of some monuments sparked a series of heritage protection bills being introduced in state legislatures, primarily across the South.³¹ These heritage protection bills limited the right of local governments to place and remove public artworks as part of the local government’s own speech rights.³² Additionally, the push to remove certain monuments initiated litigation, often with a request for injunctive relief, in an effort to prevent the removals.³³

This article asks what responsibility the judiciary and the parties have to acknowledge that Confederate monuments—for better or for worse—are creations of public art.³⁴ As one modern sculpture artist observed, “People took

22. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>.

23. *See id.*

24. Solis, *supra* note 21, at 112.

25. S. POVERTY L. CTR., *supra* note 22.

26. Lucas Lixinski, *Confederate Monuments and International Law*, 35 WIS. INT’L L. J. 549, 554–58, 570 (2018).

27. *See, e.g.*, McGraw v. City of New Orleans, 16-0446, p. 9–10 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 325 (noting the Robert E. Lee monument, formerly located in the center of Tivoli Place, was listed on the National Register of Historic Places in 1991).

28. *See* Solis, *supra* note 21, at 110, 113 (noting that after the deadly Charlottesville rally, the prominent statue “Old Joe” located in front of the Alachua County Administration building in Gainesville, Florida was relocated); S. POVERTY L. CTR., *supra* note 22.

29. S. POVERTY L. CTR., *supra* note 22.

30. *See* discussion *infra* Part II and cases cited *infra* note 56.

31. Solis, *supra* note 21, at 121–22.

32. *See* discussion *infra* Section II.D and note 89.

33. *See* cases cited *infra* note 56.

34. This article assumes that even simple monuments on public property should be considered public art by virtue of their craftsmanship and public siting. But to be sure, there

a lot of time to make something powerful, beautiful, elegant. And menacing.”³⁵ And it is clear that these works of public art are inherently public things, subject to the control of public processes and taken out of the realm of private ownership and claims.³⁶

Public artwork can shape the built environment that the public encounters on a daily basis.³⁷ Stephen Clowney argues that the “landscape, put simply, ‘is not innocent.’ It inscribes selective and misleading versions of the past in solid, material forms.”³⁸ Public art asserts itself onto the public landscape, where all citizens in that locale will be required to encounter it.³⁹ Because the majority of the populace is not visiting art museums, public art is the location where most citizens encounter and interact with art.⁴⁰ And given that “[s]eeing comes before words[,]” the importance of the visual landscape becomes paramount, especially

has been much debate in the academy about whether monument art is truly “art.” See, e.g., Paul Clements, *Public Art: Radical, Functional or Democratic Methodologies?*, 7 J. OF VISUAL ARTS PRAC. 19, 19 (2008) (“Alongside film, photography, musical theatre, jazz and rock music, public art has often been regarded as simple monument and too functional to be considered as a worthwhile art form. But art, when it is displayed in public as opposed to hermetically sealed white cube gallery spaces, can become the central focus for a range of competing discourses.”); Danielle Rice, *The “Rocky” Dilemma: Museums, Monuments, and Popular Culture in the Postmodern Era*, in CRITICAL ISSUES IN PUBLIC ART, *supra* note 16, at 228, 228–29 (summarizing the debate around the Rocky statue in Philadelphia and noting the shifting perspectives on whether a movie prop with a specific function could be considered “art” even though created by Colorado-based artist, Thomas Schomberg, “who was called by *Sports Illustrated* . . . ‘perhaps the best known sports sculptor working today’”).

35. Kriston Capps, *Kehinde Wiley’s Anti-Confederate Memorial*, NEW YORKER (Dec. 24, 2019), <https://www.newyorker.com/culture/culture-desk/kehinde-wileys-anti-confederate-memorial>.

36. See, e.g., *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 597 (E.D. La. 2016) (noting it is “well established that public things cannot be alienated or appropriated to private use”).

37. See Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 3, 9 (2013).

38. *Id.* at 3.

39. Some theorists posit that “[w]e only see what we look at. To look is an act of choice.” JOHN BERGER, *WAYS OF SEEING* 8 (1972). However, with public art, particularly art that predominates a public space such as a well-used traffic circle, public square, or highly-trafficked public building, such choice may be removed for the individual viewer—raising the stakes surrounding the question of public art’s installation or its removal.

40. See Seph Rodney, *Is Art Museum Attendance Declining Across the US?*, HYPERALLERGIC (Jan. 18, 2018), <https://hyperallergic.com/421968/is-art-museum-attendance-declining-across-the-us/>; see also BERGER, *supra* note 39, at 24 (showing that art museum visitation corresponds positively to increased education but even at the highest levels of education only 11.5-17.3% of people visit art museums in Europe).

when the contents of that visual language are sanctioned implicitly or explicitly by the courts.⁴¹

Furthermore, it has not been completely lost on litigants that these monuments also serve as public art pieces. By way of illustration, in *Callan v. Fischer*, the *pro se* plaintiff, Brennan James Callan, an alleged descendant of certain Civil War figures, sued a host of defendants to fight the removal of a Confederate monument from South Third Street in Louisville, Kentucky.⁴² Among those defendants, Callan sued the Louisville Public Arts Commission.⁴³

Thus, it is recognized that public monuments are “put to rhetorical use.”⁴⁴ The term “monument” itself derives from the Latin “*monere*” meaning “‘to remind’ but also ‘to admonish,’ ‘warn,’ ‘advise,’ [and] ‘instruct.’”⁴⁵ If monuments serve a rhetorical function, then it is imperative that we also examine the rhetoric used to discuss the monuments themselves—especially when that rhetoric has the force of law in the form of judicial opinions. This dialectic—what the monuments say and what is being said about them—if unexamined, has the potential to sanction messages that are not truly supported by a democratic majority.

Instead of dodging the thorny issue of discussing Confederate monuments as art, courts and parties alike could examine some of the policy goals behind public art and address those public policy implications as part of their judicial opinions or advocacy. However, up to this point, courts generally have been reticent to take up questions on the public art value of Confederate monuments—or to even address the monuments as public art at all.⁴⁶ For example, the Eastern

41. BERGER, *supra* note 39, at 7; *see also* Clowney, *supra* note 37, at 30. Any stigmatizing effect attributable to public art does not constitute an injury in fact under the law. *See, e.g.*, Douglas v. Daviess Co. Fiscal Court, No. 4:17CV-108-JHM, 2018 LEXIS 64942, at *9 (W.D. Ky. Apr. 17, 2018) (noting that a “stigmatic injury does not transform into injury in fact just because the source of the stigmatic injury is frequently confronted or the stigmatic harm is strongly, sincerely, and severely felt,” in response to “Plaintiff’s allegation of having to pass the [racist] statue when he has to go to the courthouse”). However, the stigmatizing power of public art should concern courts which find themselves having to examine the public implications of a Confederate statue removal case.

42. Callan v. Fischer, No. 3:16-CV-734-TBR, 2017 WL 4273106, at *1–3 (W.D. Ky. Sept. 26, 2017).

43. *Id.* at 2.

44. Charles L. Griswold, *The Vietnam Veterans Memorial and the Washington Mall*, in CRITICAL ISSUES IN PUBLIC ART, *supra* note at 16, at 71, 74.

45. *Id.*

46. *See, e.g.*, Bray v. Fenves, No. 06-15-00075-CV, 2016 Tex. App. LEXIS 2984, at *1 (Tex. Ct. App. Mar. 24, 2016) (“In this appeal, we do not reach the merits of their arguments, and we express no opinion on the justness of their cause.”). Natural language and Boolean searches for the term “art” in Confederate removal case law generally yield few to no results.

District of Louisiana expressed this desire to wash one's hands of the policy implications involved in lawsuits about public art when it stated, "[t]his Court . . . 'has nothing to do with the question of the wisdom or good policy of municipal ordinances [regarding public monuments]. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.'"⁴⁷ The court closed by noting that "[t]he Court is well aware of the emotion and passions that are involved in this case; however, this is a court, not a political body The Court does not judge the wisdom, or lack thereof, of the actions taken by the Mayor or the City Council."⁴⁸

This article examines how courts and litigants are currently using language related to Confederate artwork in order to understand where the gaps and, thus, the opportunities lie in terms of using public art policy to address sensitive issues related to removing Confederate monuments. This issue of Confederate monuments' value as public art is not an esoteric one. Critical theorists argue that art does not exist as it once did—in a cloistered, private realm for only the rich and influential—and that instead we live in a "language of images."⁴⁹ Given that social shift, "[w]hat matters now is who uses that language for what purpose."⁵⁰

Furthermore, judicial opinions legitimate the outcomes they produce. Whether the monuments stay or go at the end of a given lawsuit, the outcome affects the public art policy of the subject community. The courts and the parties need the language of the discipline of arts policy to appropriately contextualize those decisions. Without an understanding of how public art functions in a community, the courts and litigants are creating law without a good understanding of how that law affects public policy. This article seeks to provide courts and litigants with such an understanding and the language necessary to engage those policy ideas.

To that end, Part I of this article provides an overview of the research methodology used to organize and analyze the linguistic content of the judicial opinions. Part II of this article provides an overview of Confederate monument

47. *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 603 (E.D. La. 2016) (quoting *Palermo Land Co. v. Planning Comm'n of Calcasieu Par.*, 561 So. 2d 482, 491 (La. 1990)).

48. *Id.* at 605; *see also Monumental Task Comm., Inc. v. Chao*, 678 Fed. Appx. 250, 251 (5th Cir. 2017) ("We do not pass on the wisdom of this local legislature's policy determination, nor do we suggest how states and their respective political subdivisions should or should not memorialize, preserve, and acknowledge their distinct histories. Wise or unwise, the ultimate determination made here, by all accounts, followed a robust democratic process."); *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 511 (E.D. La. 2017) ("This Court's role has never been, and will never be, to pass judgment, in approval or protest, on the wisdom of the government's actions.").

49. BERGER, *supra* note 39, at 33.

50. *Id.*

removal case law, including the typical types of monuments at issue, the typical litigants involved, and the typical claims and procedural postures presented. Part III provides a framework of public art policy, identifying three typical policy goals for public artwork. Part IV details the linguistic trends emerging in the case law and identifies six rhetorical categories for understanding how courts and litigants typically address the public art implications of Confederate monuments. Part V provides an empirical linguistic analysis from the coded data and analyzes how those trends relate to or diverge from the public art policy framework described in Part III. Part VI discusses the opportunity presented to jurists and practitioners alike to better understand (and use) the rhetoric around Confederate monuments to inform their judicial opinions or their advocacy. Particularly, it argues for more local control over monument removal decisions because local governments are best positioned to determine if a Confederate monument is serving the values typically performed by public art in a given community. Finally, Part VII provides a brief conclusion on the importance of recognizing the public art principles at play in Confederate monument removals.

I. RESEARCH METHODOLOGY

Guiding Question. All research should begin with a guiding research question.⁵¹ Here, that question was: *How do courts address (or not) the fact that Confederate monuments are public works of art?* To answer that question, this research studied judicial opinions related to Confederate monument removal litigation in all fifty states, as available on the two primary electronic reporters of case law in the United States, Westlaw and LexisNexis.⁵²

Sample. This qualitative design⁵³ begins with an aggregated sample of all publicly-accessible decisions available on the two main electronic reporters that

51. See Valerie Janesick, *The Choreography of Qualitative Research Design*, in STRATEGIES OF QUALITATIVE INQUIRY 46, 53 (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2003) (“As a researcher, I always start any given research project with a question.”).

52. Westlaw and LexisNexis make available federal trial and appellate court decisions, as well as state-level appellate court decisions. One limitation of the study design is that some, indeed a lot, of Confederate monument removal case law takes place in state trial courts, which are not typically published on Westlaw or LexisNexis. Thus, those opinions are not searchable and would require individual public records requests to individual courts in order to obtain those opinions. An example of such limitation is that the court orders and opinions in the litigation surrounding the fight to remove the Robert E. Lee monument in Charlottesville, Virginia, are unavailable on the Westlaw and LexisNexis platforms.

53. Janesick, *supra* note 51, at 57 (“Qualitative design . . . begins with a search for understanding the whole. Qualitative research is not constructed to prove something or control people.”). Qualitative research is also necessary when the research goal is to “develop new theory.” SHARAN B. MERRIAM, CASE STUDY RESEARCH IN EDUCATION: A QUALITATIVE APPROACH 57–58 (1988). It is also useful for further developing “the existing explanatory

dealt with the removal of any Confederate monument.⁵⁴ Robert Stake notes that “researchers reach new meanings about cases . . . through direct interpretation of the individual instance and through aggregation of instances until something can be said about them as a class.”⁵⁵

This research employs both methodologies. It examines the discourses surrounding the Confederate monuments in specific, individual cases, and it analyzes the emergent linguistic patterns across the full data set.⁵⁶ George notes

framework.” Alexander L. George, *Case Studies and Theory Development: The Method of Structured, Focused Comparison*, in *DIPLOMACY: NEW APPROACHES IN HISTORY, THEORY AND POLICY* 43, 51–52 (Paul G. Lauren ed., 1979).

54. The research employed various natural language and Boolean searches to ensure that substantially all major cases were located. Given that the electronic reporters constantly update judicial data, it is impossible to say that all cases were located. However, at the time of writing, the research team is confident that substantially all of the relevant cases were located and included in the linguistic analysis. The cases analyzed were cases where the gravamen of the action was related to the removal of a Confederate monument. There are tangential cases related to the fallout from protests concerning the Confederate monuments. *See, e.g.*, *Lincoln v. Mendler*, No. CV 18-4542, 2018 WL 4205421 (E.D. La. Sept. 4, 2018) (granting motion to dismiss against plaintiff who sued the owner of a local café where plaintiff was a regular after the owner saw plaintiff publicly opposing efforts to remove the Jefferson Davis Monument and owner subsequently asked plaintiff to quit patronizing the café). However, this study did not include such tangential cases as part of the corpus of textual data. The study also does not include case law related to other public symbols of the Confederacy—such as the use of Confederate flags over state capitols or the naming of public schools in honor of Confederate figures. *See, e.g.*, *NAACP v. Hunt*, 891 F.2d 1555, 1558–59 (11th Cir. 1990) (plaintiffs sued over the flying of a Confederate flag atop the capitol dome in Montgomery, Alabama).

55. ROBERT STAKE, *THE ART OF CASE STUDY RESEARCH* 74 (1995).

56. The following cases comprise the data set: *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, 756 Fed. Appx. 460 (5th Cir. 2019); *Monumental Task Comm., Inc. v. Chao*, 678 Fed. Appx. 250 (5th Cir. 2017); *Albert Sidney Johnston Chapter v. City of San Antonio*, No. SA-17-CV-1072-DAE, 2019 U.S. Dist. LEXIS 175234 (W.D. Tex. Oct. 9, 2019); *Gardner v. Mutz*, 360 F. Supp. 3d 1269 (M.D. Fla. 2019); *Albert Sidney Johnston Chapter v. City of San Antonio*, No. SA-17-CV-1072-DAE, 2018 U.S. Dist. LEXIS 179561 (W.D. Tex. Oct. 18, 2018); *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, 331 F. Supp. 3d 605 (W.D. La. 2018); *McMahon v. Fenves*, 323 F. Supp. 3d 874 (W.D. Tex. 2018); *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, No. 17-1346, 2018 U.S. Dist. LEXIS 70680 (W.D. La. Apr. 26, 2018); *Douglas v. Daviess Cty. Fiscal Court*, No. 4:17CV-108-JHM, 2018 U.S. Dist. LEXIS 64942 (W.D. Ky. Apr. 17, 2018); *Patterson v. Rawlings*, 287 F. Supp. 3d 632 (N.D. Tex. 2018); *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, No. 17-1346, 2018 U.S. Dist. LEXIS 13205 (W.D. La. Jan. 26, 2018); *Callan v. Fischer*, No. 3:16-CV-734-TBR, 2017 U.S. Dist. LEXIS 157531 (W.D. Ky. Sept. 26, 2017); *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494 (E.D. La. 2017); *Monumental Task Comm., Inc. v. Foxx*, 240 F. Supp. 3d 487 (E.D. La. 2017); *Callan v. Fischer*, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580 (W.D. Ky. Nov. 19, 2016); *Monumental Task Comm., Inc. v. Foxx*, No. 15-6905, 2016 U.S. Dist.

that such “a series of heuristic case studies or a simultaneous comparison . . . if each comprises an instance of the same class of events, can be an excellent research strategy for the cumulative development of theory.”⁵⁷ He also notes the importance of defining “the ‘class’ of events/phenomena for which [the researcher] is attempting to develop explanatory theory.”⁵⁸

Here, that class is published judicial opinions about Confederate monument removals. This article only studied judicial opinions. However, future research could apply this same linguistic analytical framework to other filings, such as the parties’ briefs, to analyze whether and how litigants are addressing the public art implication of Confederate monuments and their removal. Given the relatively small number of published cases related to this topic, the linguistic analytical framework was applied to the whole data set instead of a selected sample because “the evidence from multiple cases is often considered more compelling.”⁵⁹

Literature Review. The research design also includes a literature review of law review articles on Confederate monument removals, as well as a review of literature related to public art’s development and function in the United States.⁶⁰

Content Analysis. This research employs content analysis to analyze the judicial opinions.⁶¹ This research uses a grounded theory approach, where the

LEXIS 137347 (E.D. La. Oct. 4, 2016); Monumental Task Comm., Inc. v. Foxx, 157 F. Supp. 3d 573 (E.D. La. 2016); Sons of Confederate Veterans v. City of Memphis, No. M2018-01096-COA-R3-CV, 2019 WL 2355332 (Tenn. Ct. App. June 4, 2019); McGraw v. City of New Orleans, 16-0446 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319; Bray v. Fenves, No. 06-15-00075-CV, 2016 Tex. App. LEXIS 2984 (Tex. Ct. App. Mar. 24, 2016); Strybos v. Perry, No. 03-07-00073-CV, 2010 LEXIS 2200 (Tex. Ct. App. Mar. 26, 2010); Grady v. City of Greenville, 123 S.E. 494 (S.C. 1924); McCullom v. Morrison, 14 Fla. 414 (1874). Monumental Task Comm., Inc. v. Foxx, 240 F. Supp. 3d 487 (E.D. La. 2017) is included in the data set because it represented spin-off litigation from Monumental Task Comm., Inc. v. Foxx, 259 F. Supp. 3d 494 (E.D. La. 2017), which considered the removal of four monuments as a group: three Confederate monuments and the Liberty Place Monument, a white supremacist monument that commemorated a Confederate-era, but post-Civil War, 1874 battle between the Democratic White League paramilitary group and the sitting Republican/integrated police force. Monumental Task Committee v. Foxx, 240 F. Supp. 3d 487, focuses solely on the Liberty Place monument but involves many of the same procedural and substantive claims echoed in the Confederate monument removal case law comprising the remainder of the data set.

57. George, *supra* note 53, at 52 (emphasis omitted).

58. *Id.* at 50.

59. ROBERT K. YIN, CASE STUDY RESEARCH AND APPLICATIONS: DESIGN AND METHODS 54 (6th ed. 2018).

60. See MERRIAM, *supra* note 53, at 62 (“The thrust of an independent literature review is to present the state of the art with regard to a certain topic.”).

61. “Essentially content analysis is a systematic procedure for describing the content of communications.” *Id.* at 116. “The goal of data analysis . . . is ‘to come up with reasonable conclusions and generalizations based on a preponderance of the data.’” *Id.* at 130 (quoting

patterns used to construct the proposed theoretical model were emergent in the data. Grounded theory uses “inductive analysis, which means that categories, themes, and patterns come from the data.”⁶² The linguistic categories noted below were “not imposed prior to data collection.”⁶³ After initial coding, grounded theory usually involves the emergent categories being organized into conceptual themes.⁶⁴ Different texts will “often use[] the same or similar words and phrases to express the same idea,” which are commonly referred to as “repeating ideas.”⁶⁵ These conceptual themes are then grouped into “more abstract concepts consistent with your theoretical framework.”⁶⁶ Finally, grounded theory asks the researcher to “create a theoretical narrative,” which is the summation of what we have “learned about our research concerns.”⁶⁷

The content analysis resulted in an empirical data⁶⁸ set that enabled the researcher to identify trends in the way parties and courts used language around Confederate monuments, identify trends related to which proponent is most likely to use which type of language, and identify trends in where that language is most likely to appear in a judicial opinion.

Research Goal. The goal of this research is to create “good explanatory theory,” which is a “precondition for the development of prescriptive theory.”⁶⁹ By explaining and understanding how courts and parties are using language to address Confederate monuments now, this research provides a basis for developing more prescriptive theories later.

II. AN OVERVIEW OF CONFEDERATE MONUMENT REMOVAL CASE LAW

To understand the linguistic content of Confederate monument removal case law, it is important to first understand the broad contours of Confederate monument removal litigation. To that end, this section provides an overview of:

STEVEN J. TAYLOR & ROBERT BOGDAN, INTRODUCTION TO QUALITATIVE RESEARCH METHODS 139 (1984)).

62. Janesick, *supra* note 51, at 63; *see also* Phil Johnson, *Inductive Analysis*, in THE SAGE DICTIONARY OF QUALITATIVE MANAGEMENT RESEARCH 112, 113 (Richard Thorpe & Robin Holt eds., 2008).

63. Janesick, *supra* note 51, at 63.

64. CARL F. AUERBACH & LOUISE B. SILVERSTEIN, QUALITATIVE DATA: AN INTRODUCTION TO CODING AND ANALYSIS 35, 38–39 (2003).

65. *Id.* at 37.

66. *Id.* at 43.

67. *Id.* at 40, 43.

68. While empirical, this research does not purport to engage in a statistical analysis of Confederate monument removal, and the data should not be read as a statistical quantitative analysis.

69. George, *supra* note 53, at 48 (emphasis omitted).

(A) the typical monuments at issue; (B) the typical parties to such litigation; (C) the typical claims made by the litigants; (D) the statutes that can affect such litigation; and (E) the injunctive relief posture often found in such cases.

A. *The Typical Monuments*

To fully understand Confederate monuments as public art, it is important to understand the historical context in which they were commissioned and sited. As John Berger notes, “[t]he art of any period tends to serve the ideological interests of the ruling class.”⁷⁰ However, “[t]he past is never there waiting to be discovered, to be recognized for exactly what it is. History always constitutes the relation between a present and its past.”⁷¹

The typical Confederate monument was sited during the Jim Crow Era or the Civil Rights Movement.⁷² Confederate monuments are generally wide-ranging works with a commemorative function—remembering (typically as heroes) Confederate figures from the Civil War.⁷³ They are typically sited on public property or otherwise benefit from public funding or preservation laws.⁷⁴

70. BERGER, *supra* note 39, at 86. Similarly, Donald Horne observes that European monuments have a symbolic language and that “as tourists move[] among Europe’s sights, we are moving among symbols that explain the world in ways that justify the authority of the few over the many.” Rice, *supra* note 34, at 228, 231 (citing DONALD HORNE, *THE GREAT MUSEUM* (1987)). Rice notes that “[t]his symbolic discourse of monuments can probably also be applied to the United States.” *Id.*

71. BERGER, *supra* note 39, at 11.

72. Solis, *supra* note 21, at 115–16; *see also* McMahan v. Fenves, 323 F. Supp. 3d 874, 877 (W.D. Tex. 2018) (noting that the Confederate monuments at issue had been commissioned “during a period of resurgent white Southern nostalgia for the social order of the old South embodied by the Confederacy”).

73. Ellen Hunt, *What is a Confederate Monument?: An Examination of Confederate Monuments in the Context of the Compelled Speech and Government Speech Doctrines*, 37 L. & INEQ.: J. THEORY & PRAC. 423, 425 (2019). Importantly, Confederate monuments are not graves. *See, e.g.,* Callan v. Fischer, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580, at *6 (W.D. Ky. Nov. 19, 2016) (holding that Kentucky’s cemetery laws aimed at protecting burial sites “simply do not apply in the context of the Confederate monument at issue” in that case).

74. *See* McGraw v. City of New Orleans, 16-0446, p. 16–17 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 328 (Ct. App. La. 2017) (holding that “the monuments at issue are public things held by the City in its public capacity”); Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPPLEMENT 15, 18–33 (2018) (creating a typology of the public nature(s) of Confederate monuments with a six-category framework, including public space, public money and public support; private land, private money; public land, private money; private land, public-ish money (typically tax subsidies); preservation easements; and public support through preservation laws).

The Confederate monument artworks take a variety of forms, including, without limitations: statuary; plaques; cenotaphs; etc.⁷⁵

As certain incidents of racial violence occupied headlines, local governmental entities began to question the wisdom of divisive symbols like Confederate monuments.⁷⁶ For instance, a tipping point for University of Texas at Austin president, Gregory Fenves, came when a mass shooter opened fire on a Charleston, South Carolina, church killing nine people.⁷⁷ After that incident, he accepted the recommendations of a taskforce he had set up to study certain Confederate monuments on campus and ordered the removal of two of them to a museum.⁷⁸ Similarly, after a neo-Nazi killed Heather Heyer, who was counter-protesting the “Unite the Right” rally, a white-supremacist demonstration in Charlottesville, Virginia, Fenves ordered the removal of the remaining monuments.⁷⁹ Thus, the case law situates an importance on the process of removal.

B. *The Typical Parties*

Supporters of the monuments (those opposed to removal) are typically historical preservation affinity groups, descendants of Confederate veterans, or people who ascribe to the “secular, history-based ‘civil religion’ of the South, to which some refer as ‘the Cult of the Lost Cause.’”⁸⁰ On the other side, the typical

75. See Hunt, *supra* note 73, at 423, 428; Gardner v. Mutz, 360 F. Supp. 3d 1269, 1273 (M.D. Fla. 2019) (cenotaph dedicated to Confederate soldiers who died during the Civil War located in Lakeland, Florida’s Munn Park). A “cenotaph” is a “tomb or a monument erected in honor of a person or group of persons whose remains are elsewhere.” *Cenotaph*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cenotaph> (last visited Sept. 12, 2020). It “derives from the Greek *kenos taphos*, meaning ‘empty tomb.’” *Id.* The term is commonly applied to national war memorials. *Id.*

76. See Maha Hilal, *Confederate Statues Aren’t About History*, U.S. NEWS (Aug. 21, 2017), <https://www.usnews.com/opinion/civil-wars/articles/2017-08-21/confederate-statues-honor-americas-racist-past-and-present>.

77. *McMahon*, 323 F. Supp. 3d at 877.

78. *Id.*

79. *Id.*

80. *Lincoln v. Mendler*, No. CV 18-4542, 2018 WL 4205421, at *3 (E.D. La. Sept. 4, 2018); accord *Gardner*, 360 F. Supp. 3d at 1272 (plaintiffs included individual citizens Wade Steven Gardner and Mary Joyce Stevens, citizens in their individual and official capacities, including Randy Whittaker (Southern War Cry), Phil Walters (1st Lt. Commander of the Judah P. Benjamin Cap #2210, Sons of Confederate Veterans), Ken Daniel (Director of Save Southern Heritage, Inc. Florida), and the preservation association, Veterans’ Monuments of America, Inc.).

defendants in Confederate monument removal case law are local governmental entities, such as cities or public universities.⁸¹

C. *The Typical Claims*

Monument removal plaintiffs have asserted a colorful variety of claims when attempting to block removal of Confederate monuments.⁸² Such claims include, without limitation, First Amendment free speech claims;⁸³ Fourteenth Amendment equal protection claims;⁸⁴ Fourteenth Amendment procedural due process claims;⁸⁵ claims under the National Historic Preservation Act (NHPA);⁸⁶ and claims under state constitutions.⁸⁷

D. *State Statue Statutes*

Despite some art theorists' notions that "matters of taste cannot, and ought not, be legislated,"⁸⁸ many states have successfully done just that: passed legislation aimed at preventing the removal of Confederate monuments.⁸⁹ One

81. See *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 496 n.4 (E.D. La. 2017) (defendants included the City of New Orleans); *McMahon*, 323 F. Supp. 3d at 877 (defendants included the public university, University of Texas at Austin).

82. This article does not necessarily focus on the merits of such claims and instead concerns itself with how the litigants and the court are utilizing language about the monuments at issue and whether that language invokes principles related to public art policy, regardless of the type of claim being alleged.

83. See, e.g., *Patterson v. Rawlings*, 287 F. Supp. 3d 632, 636, 641–42 (N.D. Tex. 2018) (Plaintiffs brought "claim under 42 U.S.C. § 1983 for alleged violations of their First Amendment free speech rights" after City's removal of the Robert E. Lee Statue at Lee Park.).

84. See, e.g., *Gardner*, 360 F. Supp. 3d at 1273 (Plaintiffs argued that "deciding to remove the Cenotaph which communicated minority political speech in a public forum" violated their due process rights.).

85. See, e.g., *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm'n*, 331 F. Supp. 3d 605, 619 (W.D. La. 2018) ("Plaintiff argues its rights under the Fourteenth Amendment were violated because 'no procedural safeguards were in place to allow the Plaintiff to contest the removal of the Confederate Monument.'").

86. See, e.g., *Monumental Task Comm., Inc.*, 259 F. Supp. 3d at 502 ("Plaintiffs also allege that 'the Federal Defendants violated NHPA by failing to conduct a Section 106 review'").

87. See, e.g., *id.* at 510 ("Plaintiffs argue that removing the Monuments violates their rights under Article XII, § 4 of the Louisiana Constitution.")

88. CHER KRAUSE KNIGHT, *PUBLIC ART THEORY, PRACTICE AND POPULISM* 14 (2008).

89. States with such "statue statutes" aimed at limiting a local government's right to remove Confederate monument artworks include: Tennessee, Alabama, Georgia, North Carolina, Mississippi, Kentucky, and South Carolina. See *Bray*, *supra* note 20, at 20–44; see also TENN. CODE ANN. § 4-1-412(b)(1) (2018); ALA. CODE § 41-9-232(a)-(b) (2017); GA.

such statute, in effect at the time, prevented the removal of one of the most controversial Confederate monuments: the Robert E. Lee monument in Charlottesville, Virginia.⁹⁰ Thus, even when a city wishes to “speak” by removing a Confederate monument, state statutes may prohibit such local-level decisions,⁹¹ potentially undermining the values of localism, federalism, and free speech.⁹²

E. *The Injunctive Relief Posture*

In federal court, a party “seeking preliminary injunctive relief must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that their substantial injury outweighs the threatened harm to the party whom they seek to enjoin; and (4) that granting the preliminary injunction will not disserve the public interest.”⁹³ Courts often use a “sliding scale” approach where “[n]one of the four requirements has a fixed quantitative value,” taking into account “the intensity of each.”⁹⁴ Courts “balanc[e] . . . the probabilities of ultimate success at final

CODE ANN. § 50-3-1(c) (2019); N.C. GEN. STAT. ANN. § 100-2.1(B)(2015); MISS. CODE ANN. § 55-15-81(1) (2018); KY. REV. STATE ANN. § 171.788 (LexisNexis 2018); S.C. CODE ANN. § 10-1-165(A) (2018).

90. See VA. CODE ANN. § 15.2-1812 (2010) (amended 2020). However, the Virginia legislature then introduced legislation that would provide local governments with the authority to remove Confederate statues. Brad Kutner, *Virginia Lawmakers Grapple with Removal of Civil War Statues*, COURTHOUSE NEWS (Feb. 3, 2020), <https://www.courthousenews.com/virginia-lawmakers-grapple-with-removal-of-civil-war-statues/>. That legislation has since passed and, as of July 1, 2020, Virginia law now provides local governments the opportunity to “remove, relocate, contextualize, or cover any such monument or memorial on the locality’s public property.” VA. CODE ANN. § 15.2-1812 (2020).

91. See, e.g., Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 62, 68 (2018) (“[M]uch of the power and authority to act is lodged not in city officials but in state officials, namely in the Virginia General Assembly . . . [C]ities, being subordinate governments, cannot readily argue that the city’s free-speech rights are being violated when the state refuses to let them decide what to say.”). One commentator has argued that federal constitutional protection of government speech should be extended to cities because “[s]uch protection is necessary for the values of city speech to withstand state-led threats” and otherwise cities are “defenseless against their censoring state.” Yishai Blank, *City Speech*, 54 HARV. CIV. RTS.—CIV. LIB. L. REV. 365, 365, 381 (2019).

92. Blank, *supra* note 91, at 370, 386.

93. Monumental Task Comm., Inc. v. Foxx, 157 F. Supp. 3d 573, 582 (E.D. La. 2016) (citing Planned Parenthood Ass’n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 348 (5th Cir. 2012)).

94. *Id.* (citing Texas v. Seatrain Int’l, S.A., 518 F.2d 175, 180 (5th Cir. 1975)).

hearing with the consequences of immediate irreparable injury that possibly could flow from the denial of preliminary relief.”⁹⁵

Courts frequently decide the injunctive relief question on one of the first two factors.⁹⁶ While no one factor is dispositive, “the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.”⁹⁷ This factor is pivotal because “even if a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may not be granted unless the plaintiff has shown a likelihood—not just a possibility—of irreparable harm.”⁹⁸ Some removal plaintiffs base their irreparable harm claim on the argument that a Confederate monument is likely to be damaged during the removal process.⁹⁹ However, most courts require that the plaintiff personally suffer the irreparable harm, rather than the monument, to obtain injunctive relief.¹⁰⁰ Furthermore, previous maintenance work on a monument may be used as evidence that a monument can be removed safely and without harm.¹⁰¹

Courts should address the public art concerns of Confederate monuments because it implicates democratic values.¹⁰² As Berger explained:

A people or a class which is cut off from its own past is far less free to choose and to act as a people or class than one that has been able to

95. *Id.* (citing Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 958 (3d Cir. 1984)).

96. *See, e.g.*, Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n, No. 17-1346, 2018 U.S. Dist. LEXIS 13205, at *18 (W.D. La. Jan. 26, 2018) (finding plaintiff failed to prove likelihood of success on the merits of its ownership claim).

97. *Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 582–83 (citing 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 2948.1 (3d ed. 2013)).

98. *Id.* at 583.

99. *See, e.g.*, Bray v. Fenves, No. 06-15-00075-CV, 2016 Tex. App. LEXIS 5366, at *15, *18 (Tex. Ct. App. May 19, 2016).

100. *See, e.g.*, McGraw v. City of New Orleans, 16-0446, p. 25 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 333 (Although plaintiff “introduced some evidence which shows that the monuments might suffer damage upon their removal, transportation, or storage, he has failed to establish that such damage to the monuments will result in damage to him.”).

101. *See Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 584 (“As evidenced by the photograph of the Lee Monument being removed from the top of its limestone column by a crane for renovations, these monuments can be relocated without being damaged.”).

102. *See BERGER, supra* note 39, at 33.

situate itself in history. This is why—and that is the only reason why—the entire art of the past has now become a political issue.¹⁰³

However, most courts decide Confederate monument removal cases on a threshold issue of standing or on one of the first two injunctive relief factors—irreparable harm or likelihood of success on the merits.¹⁰⁴ Courts have opted to keep their opinions narrow and not provide much reasoning, if any, on the public policy factor.¹⁰⁵ For example, a plaintiff attempted to argue that the monument would serve the public interest because it “is essential in comprehending the lives and deaths of his family and the countless other Union and Confederate soldiers and our nation.”¹⁰⁶ However, the United States District Court for the Western District of Kentucky disagreed, stating, “the Court is unpersuaded that this factor weighs in Plaintiff’s favor.”¹⁰⁷

III. FRAMEWORKS OF PUBLIC ART POLICY

*“Rather than dealing in absolutes, public art strives to reconcile popular will and collective aspirations with governmental oversight, private business, or the individual artist’s vision.”*¹⁰⁸

To better understand the public art principles being impacted by the courts’ or the parties’ rhetoric related to Confederate monuments, this section introduces: (A) a brief history of public art in the United States; (B) an overview of some public policy goals for public art; and (C) a snapshot of how Confederate monuments are handled after litigation.

103. *Id.*

104. *See, e.g., Monumental Task Comm.*, 157 F. Supp. at 582–83.

105. *See* Shreveport Chapter No. 237 of United Daughters of the Confederacy v. Caddo Par. Comm’n, No. 17-1346, 2018 U.S. Dist. LEXIS 13205, at *23 (W.D. La. Jan. 26, 2018) (concluding it was unnecessary to discuss other preliminary injunctive relief factors because Plaintiff failed to show substantial likelihood of success on the merits); *see also Monumental Task Comm., Inc.*, 157 F. Supp. at 605 (declining to reach the public interest factor based on Plaintiff’s failure to demonstrate irreparable harm but noting in dicta that enjoining a statute denies the State of the “public interest in the enforcement of its laws”).

106. *Callan v. Fischer*, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580, at *10 (W.D. Ky. Nov. 19, 2016) (alteration in original).

107. *Id.*

108. KNIGHT, *supra* note 88, at 6 (emphasis added).

A. *Public Art in the United States*

The history of public art in the United States cannot be divorced from the government and the legal system. In contrast to our European neighbors, the United States only began serious sustained efforts at state arts patronage in the last century, evidenced mainly by three important public art programs:¹⁰⁹ Roosevelt's New Deal art initiatives;¹¹⁰ the General Services Administration's Art-in-Architecture program;¹¹¹ and the National Endowment for the Arts' Art-in-Public-Places matching grant program.¹¹² The GSA's Art-in-Architecture program is credited with helping solidify the philosophical concepts that "truly 'public' art should be literally *owned* by the citizens" and that public art should

109. *Id.* at 1–3; *see also* Harriet F. Senie & Sally Webster, *Politics, Patronage, and Public Art*, in *CRITICAL ISSUES IN PUBLIC ART*, *supra* note 16, at 102 (noting that "[i]t was not until the 1930s that sponsorship of public art became national policy, and then only as part of the larger economic relief programs undertaken in response to the Depression of 1929").

110. KNIGHT, *supra* note 88, at 3. The New Deal employed "thousands of artists [and] produced over a hundred thousand artworks." *Id.* The Federal Art Project, the largest and best-known public art project run under the Works Progress Administration, ended in 1943 due to critiques that "state-supported art smacked of fascism." *Id.* at 4 (citation omitted).

111. *Id.* at 3. The General Services Administration (GSA) oversees federal construction projects. *Id.* at 6; *see also* Senie & Webster, *supra* note 109, at 101, 102–103 (noting that the percent-for-art building "program is based on the assumption that art is a necessary and desirable part of architecture and, by extension, of the built environment"). In 1959, Philadelphia passed the first municipal percent-for-art ordinance in the United States. KNIGHT, *supra* note 88, at 8. Hawaii was the first state to adopt a percent-for-art policy in 1967. *Id.* The GSA's program is typical of percent-for-art projects, which many states have now codified in their statutory law. *See* ALASKA STAT. § 35.35.27 (2013); COLO. CODE REGS. § 24-48.5-312 (2018); CONN. GEN. STAT. § 4b-53 (2013); D.C. CODE § 39-205 (2019); FLA. STAT. § 18.225.043 (2010); HAW. REV. STAT. § 103-8.5 (LexisNexis 2008); IOWA CODE § 304A.8 (2016); 20 ILL. COMP. STAT. 3105 / 14 (2014); LA. STAT. ANN. § 25:900.1 (2016); ME. STAT. tit. 27 § 453 (1999); MINN. STAT. § 16B.35 (2007); MONT. CODE ANN. § 22-2-401 (1983); NEB. REV. STAT. § 82-317 (2015); N.H. REV. STAT. ANN. § 19-A:8 (1977); N.J. STAT. ANN. § 52:16A-29 (1987); N.M. STAT. ANN. § 13-4A (1955); OHIO REV. CODE ANN. § 3379.10 (1992); OKLA. STAT. tit. 74, § 9030.1 (2012); OR. REV. STAT. § 266.075 (2009); R.I. GEN. LAWS § 42-75.2-4 (1987); TEX. REV. CIV. STAT. ANN. § 444.029 (1995); UTAH CODE ANN. § 63A-5b-609 (LexisNexis 2020); VT. STAT. ANN. tit. 29, § 43 (1997); WASH. REV. CODE § 43.46.090 (2009); WYO. STAT. ANN. § 16-6-8 (2005).

112. KNIGHT, *supra* note 88, at 3. President Johnson's administration established the National Endowment for the Arts (NEA) in 1965 and allocated substantial taxpayer dollars for arts spending at both the state and local levels. *Id.* at 15. The NEA Arts-in-Public-Places Program was officially aimed at "increasing awareness of contemporary art; fostering aesthetic enhancement and socially-minded redevelopment of public spaces; offering American artists, especially emerging ones, opportunities to work in public contexts; supporting artistic experimentation; and engendering direct community involvement in the commission and placement of art." *Id.*

be site-specific.¹¹³ The NEA's program created a similar "change in perspective"—instead of the federal government "imposing artworks on communities that had no option but to accept or reject them," the Art-in-Public-Places Program was responsive to local requests.¹¹⁴ The Art-in-Public-Places Program was also decidedly democratic, providing some government funding, but requiring extensive community investment and initiative, which resulted largely in higher community acceptance of the resulting art pieces.¹¹⁵

There is no universally acknowledged definition of "public art"; but when defined by "its most basic precepts . . . its roots reach far back in history."¹¹⁶ These basic precepts include that the work is "designated for larger audiences[;] . . . [it is] placed to attract their attention; it intends to provide aesthetic experiences that edify, commemorate, or entertain; and its messages are comprehensible to generalized audiences."¹¹⁷ Defined this way, Confederate monuments are and should be considered public artworks.

Public art theories have shifted away from what the New Critics called the "intentional fallacy"—the notion that the artist's intention provides the artwork with its intended meaning¹¹⁸—and towards a more community-negotiated meaning.¹¹⁹ Indeed, clashes between the artist's intention and the public's perception of a piece have dominated some of the biggest controversies over public art pieces.¹²⁰ Such a shift recognizes that a piece of public art may "elicit[]

113. *Id.* at 7 (emphasis in original). "Prompted in particular by the complaints of Chief Justice Edward D. Re, [GSA Regional Administrator William] Diamond circulated petitions and convened a *Tilted Arc* hearing, claiming to carry out the public's wishes." *Id.* at 11.

114. *Id.* at 15.

115. *Id.* at 18.

116. *Id.* at 1.

117. *Id.* at 22.

118. See Clark Zumbach, *Artistic Functions and the Intentional Fallacy*, 21 AM. PHIL. Q. 147, 147 (1984); TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 41 (The Minn. Press 2d ed. 1996) (1983) ("[T]he author's intentions . . . even if they could be recovered, were of no relevance to the interpretation of his or her text"). The "intentional fallacy" extends not only to the artist's intention but also to the patron's intention. See Senie & Webster, *supra* note 16, at 171, 173 (noting that public art is "open to a wide variety of interpretations, some of them far from the artist's or patron's intent").

119. Clements, *supra* note 34, at 19 (noting a "shift from artistic intention to context and audience").

120. See Michele H. Bogart, *The Rise and Demise of Civic Virtue*, in *CRITICAL ISSUES IN PUBLIC ART*, *supra* note 16, at 175, 175–177. Bogart provides the example of *Civic Virtue*, a piece of statuary embedded in a public fountain in City Hall Park in New York City. *Id.* at 175. While the artist hoped the statue would be read figuratively as an allegory of civic virtue trampling vice, the public read the statue literally as a man trampling/oppressing two women. *Id.* at 177.

complex responses that were not the ones that the artist himself had consciously intended to convey.”¹²¹

This tension is evident in many of the controversies, and resulting pieces of litigation, over Confederate monuments. Clements notes that “another radical move has been away from individual artistic intention to a more collective approach and methodology that considers the public, its rights, opinions and creativity.”¹²²

Confederate monument art is not the first (or likely last) type of public art to generate controversy and litigation surrounding its removal.¹²³ For example, sculptor Richard Serra was hired to install a permanent, site-specific work of public art in Federal Plaza in Manhattan.¹²⁴ The piece was an imposing piece of rusted, solid, curving steel that cut through the middle of the plaza, disrupting pedestrian pathways.¹²⁵ It remained in place for three years until the new General Services Administration administrator engaged in what some believed to be a singular campaign to get rid of the work.¹²⁶ Serra challenged the work’s relocation, claiming it was a site-specific work created for the Federal Plaza alone, and sued to prevent the work’s removal.¹²⁷

Serra brought various contractual and constitutional claims under copyright, trademark, due process, and freedom of speech laws based on the removal of his sculpture, *Tilted Arc*.¹²⁸ However, the United States District Court for the Southern District of New York issued two opinions in favor of the government.¹²⁹ In the first, the district court held that government administrators could not be sued in their individual capacities due to qualified immunity.¹³⁰ In the second opinion, the court dismissed Serra’s contract, trademark, copyright, and state law claims, holding that the General Services Administration had the appropriate authority to remove *Tilted Arc* from the plaza and that Serra had not

121. *Id.*

122. Clements, *supra* note 34, at 23–24.

123. See Rosalyn Deutsche, *Public Art and Its Uses*, in *CRITICAL ISSUES IN PUBLIC ART*, *supra* note 16, at 158, 160. Perhaps more entertaining than the *Tilted Arc* controversy, Sylvester Stallone hired a group of lawyers to keep the statue of Rocky from the film *Rocky III* positioned in front of the Philadelphia Museum of Art at the top of “The Rocky Steps.” Rice, *supra* note 34, at 228, 228–29.

124. See Deutsche, *supra* note 123, at 158, 160–61.

125. See Harriet F. Senie, *Baboons, Pet Rocks, and Bomb Threats: Public Art and Public Perception*, in *CRITICAL ISSUES IN PUBLIC ART*, *supra* note 16, at 237, 241.

126. Rice, *supra* note 34, at 228, 234–35.

127. *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1044–45, 1057 (S.D.N.Y. 1987); *Serra v. U.S. Gen. Servs. Admin.*, 664 F. Supp. 798, 800 (S.D.N.Y. 1987).

128. *Serra*, 667 F. Supp. at 1046; *Serra*, 664 F. Supp. at 800.

129. *Serra*, 667 F. Supp. at 1057; *Serra*, 664 F. Supp. at 807.

130. *Serra*, 664 F. Supp. at 807.

established any claim of ownership, or any speech or property interest in the public artwork, despite being the artist.¹³¹ The United States Court of Appeals for the Second Circuit affirmed, holding that the removal of a government-owned artwork from federal property did not violate the free expression and due process rights of the artist.¹³² Many Confederate monument removal cases come out along these same fault lines regarding freedom of expression.¹³³

B. *Public Policy Goals of Public Art*

Public art serves many different public policy goals.¹³⁴ These public purposes are not always cohesive and are sometimes in tension with each other.¹³⁵ However, generally, public art purposes can be grouped into three primary veins or value propositions: (1) the historic value proposition; (2) the functional value proposition; and (3) the democratic value proposition.¹³⁶

1. The Historic Value Proposition: Art as Monument

As late as August 31, 2017, deep inside a cornerstone supporting a Confederate soldier monument located in Travis Park in downtown San Antonio, Texas, a time capsule lay buried.¹³⁷ It contained a roster of the local United Daughters of the Confederacy chapter, “Confederate bills and coins, a Confederate flag, pressed flowers from a Confederate coffin, daily newspapers, and an Old Testament used by a Southern prisoner during the Civil War.”¹³⁸ This time capsule showcases one of the public purposes of public artwork that the monument looming above it also embraced: historical preservation. Many

131. *Serra v. U.S. Gen. Servs. Admin.*, 847 F. 2d 1045, 1048 (2d Cir. 1988).

132. *Id.* at 1046.

133. *See infra* Section IV.C.

134. Clements, *supra* note 34, at 21–22 (“A list of the contributions public art can make to a range of urban issues include: aesthetic improvement and enhancing building design; local distinctiveness; attracting companies and investment; enhancing land values; creating employment and reducing vandalism; increasing the use of open spaces; as well as helping to attract cultural tourism”).

135. *See e.g., id.* at 23 (“[T]he appropriation of culture for commerce or instrumental government policy can undermine democracy and the concept of avant-garde.”).

136. Clements outlines similar purposes: “In terms of government policy intervention . . . this can be divided up according to three criteria: art as propaganda, art as beautification and art as regeneration.” *Id.* at 21.

137. *See Albert Sidney Johnston Chapter v. City of San Antonio*, No. SA-17-CV-1072-DAE, 2019 LEXIS 175234, at *2, *5 (W.D. Tex. Oct. 9, 2019).

138. *Id.* at *3.

Confederate removal plaintiffs—those who seek to prevent the removal of Confederate monuments—invoke the historical purposes of public art.¹³⁹

One accepted purpose¹⁴⁰ of public art is that it should celebrate or commemorate a society or culture’s achievements.¹⁴¹ Indeed, the United States Supreme Court has expressly recognized that “[g]overnments have long used monuments to speak to the public.”¹⁴² Cher Krause Knight defines such monument art as “a physical manifestation to mark a military victory or depict a cultural hero . . . and its tone is most often congratulatory and triumphant.”¹⁴³ Related to, but distinguishable from, monuments, memorials express “loss from war or disease, or [the remembrance of] a tragic or profound event, a memorial provides opportunities to reflect and grieve.”¹⁴⁴ Monuments and memorials, thus, sometimes are viewed as propaganda.¹⁴⁵

Indeed, one court has even referred to a Confederate monument as a “sermon in stone.”¹⁴⁶ This title is unsurprising because “war memorials by their very nature recall struggles to the death over values.”¹⁴⁷ Typical Confederate monument removal plaintiffs acknowledge that their interests lie in a “shared concern for the preservation of history ‘from a Southern perspective.’”¹⁴⁸ However, other constituents take issue with the notion that removing Confederate monuments is somehow “rewriting history.”¹⁴⁹

139. *See, e.g.,* McMahon v. Fenves, 323 F. Supp. 3d 874, 881 (W.D. Tex. 2018) (quoting from the Sons of Confederate Veterans, Inc.’s brief, which argued against removal because the monuments were in place to “protect the memory of our beloved Confederate Veterans” and “the political viewpoint that Confederate American Heroes sacrificed for a noble cause that the victors in the war have almost uniformly whitewashed from history”).

140. There are many different theoretical perspectives defining the purpose of public art. This article does not—and cannot—provide an exhaustive list of such theories. However, it attempts to highlight those theories that best relate to war monuments.

141. *See* KNIGHT, *supra* note 88, at 23.

142. Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

143. KNIGHT, *supra* note 88, at 23.

144. *Id.*

145. *See* Clements, *supra* note 34, at 21 (“Here public art can become a tool of propaganda, representing and symbolizing the sophistication and civilization of the nation, government or mayoral office.”); *see also* Senie & Webster, *supra* note 109, at 101, 103 (“Similarly, governments sponsor art only when they perceive it to be in their best political or economic interest.”); Lixinski, *supra* note 26, at 560–64 (noting that both a monument’s erection and its removal are political acts).

146. Grady v. City of Greenville, 123 S.E. 494, 501 (S.C. 1924).

147. Griswold, *supra* note at 44, at 71, 71.

148. Gardner v. Mutz, 360 F. Supp. 3d 1269, 1272 (M.D. Fla. 2019).

149. Clowney, *supra* note 37, at 59 (rather than rewriting history, removing monuments “initiates a process of critically rethinking what values a community holds and who deserves the honor of being remembered in steel and stone”); *see also* S. POVERTY L. CTR., *supra* note

Modern memorials have moved away from depicting a “particular person or place” and instead focus on “more generalized celebrations of ‘art and life.’”¹⁵⁰ Thus, the Confederate monuments at issue in case law are decidedly traditional monuments and, in most cases, also memorials.¹⁵¹ As one court acknowledged, Confederate monuments are “erected as a perpetual memorial to the heroism of the Confederate dead.”¹⁵² Thus, the historical purposes of Confederate monuments are typically made express.

2. The Functional Value Proposition: Art as Amenity

The American character, often seen as “indigenously pragmatic,” lends itself to the theory that public art should be not only aesthetically pleasing but also functional.¹⁵³ Thus, the United States has seen a push for artists to make over utilitarian objects like park benches and bus stops.¹⁵⁴ As Rosalyn Deutsche notes, “public art needs to be seen as a function not of art, but of urbanism. It needs to be thought of in relation to, rather than insulated from the numerous other functions, activities and imperatives that condition the fabric of city life.”¹⁵⁵ The idea that public art should also be a public amenity—something you can sit on, spread out your lunch on, put your feet up on—is exemplified by many percent-for-art construction projects, which requisition a certain percentage of a building project’s budget to be applied towards public artwork in the community.¹⁵⁶

22 (noting that the effort to remove such symbols is “about starting a conversation about the values and beliefs shared by a community”).

150. KNIGHT, *supra* note 88, at 24.

151. See Monumental Task Comm., Inc. v. Foxx, 259 F. Supp. 3d 494, 497 (E.D. La. 2017) (Confederate monuments at issue in lawsuit are monuments of three persons: General Robert E. Lee, P.G.T. Beauregard, and Jefferson Davis); see also Harriet F. Senie & Sally Webster, *Introduction to CRITICAL ISSUES IN PUBLIC ART*, *supra* note 16, at xi, xiii (“Although traditional monuments and memorials continued to be built, these commissions went largely to artists who were tied to a conservative style with roots in another century.”).

152. *Grady*, 123 S.E. at 496; see *Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1273 (M.D. Fla. 2019) (describing the Confederate monument as a Cenotaph memorial with an engraving that reads “Confederate Dead,” in addition to “a poem and images of Confederate flags”).

153. KNIGHT, *supra* note 88, at 28; see also Senie & Webster, *supra* note 16, at 171, 171 (“In the context of Protestant work ethic, it is an unnecessary frill.”).

154. KNIGHT, *supra* note 88, at 28.

155. Deutsche, *supra* note 123, at 162.

156. See KNIGHT, *supra* note 88, at 8, 28; see also Douglas C. McGill, *Sculpture Goes Public*, N.Y. TIMES MAG., Apr. 27, 1986, <https://www.nytimes.com/1986/04/27/magazine/sculpture-goes-public.html> (noting that while definitions of public art differ from artist to artist, the binding thread is that public art “is art plus function, whether the function is to provide a place to sit for lunch, to provide water drainage, to mark an important historical date, or to enhance and direct a viewer’s perceptions”).

This instrumentalist approach to public art is exemplified in claims that public art can assist with “developing a sense of community, place and civic identity which help to address community needs; tackling social exclusion and promoting social change; as well as offering educational value.”¹⁵⁷ Public artist Scott Burton has stated that utility is the “principal yardstick for measuring the value of public art.”¹⁵⁸ However, requiring functional utility from public art has been critiqued because the “politicization of space is relative to local and national contexts, not universal truths.”¹⁵⁹

Some scholars note that war monuments fit under a broad definition of use.¹⁶⁰ And the public spaces hosting this type of public art are, themselves, often seen as functional spaces for the public.¹⁶¹ For example, the public courthouse square in Caddo Parish, Louisiana, which hosted a contested Confederate monument, was recognized as an oft-used public venue.¹⁶² The United States District Court for the Western District of Louisiana took note that “[i]n addition to serving as a site for a courthouse, the ‘square’ is frequently and incidentally used . . . for public meetings of various kinds—political, patriotic, and otherwise, such as sports pep rallies, art shows, concerts, et cetera.”¹⁶³

3. The Democratic Value Proposition: Art as the Agora

In contrast to the idea that public art is a tool for those in control of the culture to celebrate its power or achievement, another critical theory insists that public art is, or at least should be, a place that creates a space for democratic dialogue.¹⁶⁴ According to this principle, public art should invoke the traditional

157. Clements, *supra* note 34, at 22 (noting also that such claims are largely unproven and untested and theorizing that such instrumentalism may ask too much of public art).

158. Deutsche, *supra* note 123, at 163.

159. Clements, *supra* note 34, at 22.

160. See Deutsche, *supra* note 123, at 163 (noting that “Nineteenth-century war memorials, after all, commemorate important events”).

161. See *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1052, 1056 (S.D.N.Y. 1987). The functionality argument was the logic promoted by the government in the *Tilted Arc* litigation. *Id.* The General Services Administration director, William Diamond, was quoted in a *New York Times* article saying, “This is not an attack on the esthetics of the artist. This piece, for three-and-a-half years, has made it impossible for the public and Federal community to use the Plaza.” *Id.* at 1056 (alteration in original).

162. *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Parish Comm’n*, 331 F. Supp. 3d 605, 615 (W.D. La. 2018).

163. *Id.*

164. See Senie & Webster, *supra* note 151, at xi (“Public art with its built-in social focus would seem to be an ideal genre for a democracy. Yet, since its inception, issues surrounding its appropriate form and placement, as well as its funding, have made public art an object of controversy more often than consensus or celebration.”).

Ancient Greek agora, where citizens can gather to publicly discuss and debate issues central to self-governance.¹⁶⁵

However, Confederate monuments have created spaces marred by public violence instead of functioning as places of productive democratic debate.¹⁶⁶ For instance, the Robert E. Lee statue in Charlottesville, Virginia, created by sculptors Henry Merwin Shradly and Leo Lentelli, was the site of the “Unite the Right Rally,” a protest by white nationalists against the city’s intended removal of the monument.¹⁶⁷ At the rally, a white nationalist plowed into a crowd of counter-protestors in favor of removing the monument, killing 32-year-old Heather Heyer.¹⁶⁸

While Confederate monuments have also been the site of non-violent forms of civil discourse,¹⁶⁹ the “dialogue” taking place around, and even on, monuments is not always a healthy form of debate.¹⁷⁰ For instance, the Eastern District of Louisiana noted in its nuisance analysis that the New Orleans monuments had “been the sites of criminal activity and civil unrest,” that they had “been vandalized several times,” that “the Beauregard Monument was spray-painted with the words ‘Black Lives Matter,’” that the Lee Monument, Davis Monument, and Liberty Monument had been “defaced with graffiti,” and that the Liberty Monument “was the site of a violent protest.”¹⁷¹

C. *The Disposition of Confederate Monuments*

These public value propositions for public artworks bleed over into the way Confederate monuments are handled after litigation. Because “an image [can]

165. Clements, *supra* note 34, at 19–20 (noting that one critical question concerning public art is the “extent to which public art is either a radical cultural space that represents the minority voice and resists cultural domination, or whether it supports hegemony”).

166. See Jacey Fortin, *The Statue at the Center of Charlottesville’s Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>.

167. *Id.*

168. Mitch Smith, *James Fields Sentenced to Life in Prison for Death of Heather Heyer in Charlottesville*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/james-fields-sentencing.html>.

169. See *McGraw v. City of New Orleans*, 16-0446, p. 11 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 326 (Ct. App. La. 2017) (noting that several “commemorative events” had taken place “at the three monuments at issue”); *Bray v. Fenves*, No. 06-15-00075-CV, 2016 Tex. App. LEXIS 2984, at *22 (Tex. Ct. App. Mar. 24, 2016) (noting that the facts “signal an impetus for the democratic political participation in which the [plaintiffs], like other members of the public are free to engage through the Legislative and Executive branches”).

170. See *Monumental Task Comm. v. Foxx*, 157 F. Supp. 3d 573, 602 (E.D. La. 2016).

171. *Id.*

outlast what it represented,”¹⁷² some public art may outlive its former purposes. This section addresses three non-exclusive, ways that communities have treated Confederate monuments: (1) by moving them to museums; (2) by privatizing the public space to facilitate their removal; and (3) by siting additional pieces of public art to better contextualize the monuments *in situ*.

1. Historicizing Monuments: The Move to Museums

Undoubtedly, adding written context changes the experience of an artwork,¹⁷³ but that is exactly the point for proponents of moving Confederate monuments to museums. “When we are prevented from seeing [the art of the past], we are being deprived of the history which belongs to us.”¹⁷⁴ When the art of the past is obscured, mystified and not placed in its proper historical context, it is because “a privileged minority is striving to invent a history which can retrospectively justify the role of the ruling classes, and such a justification can no longer make sense in modern terms.”¹⁷⁵

After removal, some Confederate monuments have been relocated to museums where they can be displayed in historical context alongside other artifacts, such as the artist’s working papers.¹⁷⁶ For example, the Jefferson Davis statue at issue in *McMahon v. Fenves* was relocated to the University of Texas at Austin’s Briscoe Center for American History after its removal from the university’s central mall “to be displayed in full historical context with one of the largest collections of resources on American slavery in the country as well as in full artistic context alongside the papers of Littlefield [the patron] and the sculptor of the statues.”¹⁷⁷ Many litigants, both for and against removal, have expressed such a desire to preserve history, in line with public art’s historical preservation value proposition.¹⁷⁸ Some governmental entities even have

172. BERGER, *supra* note 39, at 10.

173. *See id.* at 28–29 (establishing that adding words to a painting “change[s] the image” and that “[t]he meaning of an image is changed according to what one sees immediately beside it or what comes immediately after it”).

174. *Id.* at 11.

175. *Id.*

176. *McMahon v. Fenves*, 323 F. Supp. 3d 874, 877 (W.D. Tex. 2018); *see also* Bray v. Fenves, No. 06-15-00075-CV, 2016 Tex. App. LEXIS 2984, at *5 (Tex. Ct. App. Mar. 24, 2016) (discussing statue task force recommendations, including “relocating the Davis statue to the Briscoe Center for American History where the statue could be put in full historical context”).

177. *McMahon*, 323 F. Supp. 3d at 877.

178. *See, e.g.*, Samuel Hardiman, *Tennessee Supreme Court Won’t Hear Appeal in Memphis Confederate Statue Removal, Paving Way for Relocation*, COM. APPEAL (Oct. 16, 2019, 3:54 PM), <https://www.commercialappeal.com/story/news/2019/10/16/tennessee->

ordinances expressly providing that removed monuments can be relocated to museum-type facilities.¹⁷⁹

However, the museum approach is not without its flaws. Given museums' limited display space, dedicating the space required for Confederate monuments, according to one commentator, may have the effect of enshrining Confederate monuments rather than just contextualizing them.¹⁸⁰ Still others believe that removing Confederate monuments from the public sphere creates a missed opportunity to provide a lesson of warning and non-repetition of darker periods of American history.¹⁸¹

2. Privatizing Public Space

At least one litigant has responded to the issues presented by controversial public art by making formerly public spaces private.¹⁸² Other than providing an end-run around the legal controversy, taking away public spaces cannot further democratic dialogues or ideals.¹⁸³ Such actions contradict the democratic value proposition posed by public art policy.

supreme-court-declines-hear-confederate-stature-appeal/4001795002/ (quoting Shelby County Commissioner Van Turner as stating, "I'm not so concerned about the price tag as I am about relocating the monuments outside of Shelby County and putting them in the hands of someone who is going to preserve them and tell the history, and hopefully both sides of the history").

179. See, e.g., *McGraw v. City of New Orleans*, 16-0446, p. 8 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 324 (Ct. App. La. 2017) (discussing New Orleans City Code section 146-611(d), providing that removed monuments "may then be displayed indoors at an appropriate facility, such as a museum or stored, donated . . . or otherwise disposed of in accordance with provisions of law").

180. See Solis, *supra* note 21, at 134.

181. *Id.*; see also Lixinski, *supra* note 26, at 601 (providing examples of monuments related to Auschwitz and Hiroshima and noting that "heritage processes can be used both to tell a difficult truth about the past and to send a strong message of non-repetition").

182. See *Shreveport Chapter No. 237 of United Daughters of the Confederacy v. Caddo Parish Comm'n*, No. M2018-01096-COA-R3-CV, 2018 U.S. Dist. LEXIS 70680, at *6-8 (Tenn. Ct. App. June 4, 2019); Hardiman, *supra* note 178 (detailing how the Confederate statues of Nathan Bedford Forrest, Jefferson Davis, and Captain J. Harvey Mathes are now in the possession of a private nonprofit Memphis Greenspace "and no longer public property . . .").

183. See Clements, *supra* note 34, at 19-20, 32 (discussing concerns of hegemony given the "wider privatization of the public realm").

3. Art on Art: Using Art to Reinterpret Existing Art in Situ

Examples of later artists recontextualizing existing public statues abound.¹⁸⁴ Such recontextualizing is necessary because, as Berger notes, “[c]ultural mystification of the past entails a double loss. Works of art are made unnecessarily remote. And the past offers us fewer conclusions to complete in action.”¹⁸⁵ Recontextualizing is sometimes done through modifying the monument itself or the strategic placement of additional pieces of public art near the existing monument.¹⁸⁶

The idea that art created to oppress can be reclaimed and reappropriated has roots in both public art history and critical literary theory.¹⁸⁷ One such example is Kehinde Wiley’s piece “Rumors of War,” which was installed in Richmond, Virginia, and mimics the typical Confederate monument erected during the Jim Crow era.¹⁸⁸ Wiley’s statue depicts a war horse, but instead of the typical Confederate general, the horse’s mount is a young black man wearing a hoodie and sneakers.¹⁸⁹ The statue is situated outside the Virginia Museum of Fine Arts, where it faces the United Daughters of the Confederacy headquarters and stands in contrast to Monument Avenue, which contains five pieces of public statuary dedicated to Confederate leaders.¹⁹⁰ Wiley is not a proponent of monument

184. *Id.* at 23 (describing a 2003 anti-Iraq demonstration in London in which a “tuft of grass was placed upon the head of the statue of Winston Churchill in Whitehall, giving him a radical Mohican punk hairdo,” which altered the understanding of Churchill “from its former heroic and hegemonic representation”); *see also* Fortin, *supra* note 166 (noting that the Charlottesville report had recommended the city “either relocate the Lee statue or transform it with the ‘inclusion of new accurate historical information’”).

185. BERGER, *supra* note 39, at 11.

186. *See, e.g.*, Emily R. West, ‘A Day of Redemption’: New Markers in Franklin’s Downtown Tell African American History, THE TENNESSEAN (Oct. 17, 2019, 6:53 PM), <https://www.tennessean.com/story/news/local/williamson/2019/10/17/fuller-story-markers-african-american-history-downtown-franklin-tn/3999474002/> (discussing a project to place four African-American markers around the downtown square in Franklin, Tennessee, near an existing Confederate monument).

187. *See, e.g.*, HENRY LOUIS GATES, JR., THE SIGNIFYING MONKEY 44 (1988) (explaining the African-American signification device of “Signifyin’” in which a word (or other symbolic “sign”) is “(re)doubled upon ever closer examination” in a form of wordplay that reappropriates traditional English signifiers in a way that only those immersed in and cognizant of Black culture can fully appreciate).

188. Capps, *supra* note 35. Wiley is no stranger to juxtaposing traditional art onto atypical backgrounds for rhetorical effect. *Id.* He is responsible for painting President Barack Obama’s official portrait, which portrays the president against a baroque wall of jasmine, lilies, and chrysanthemums. *Id.*

189. *Id.*

190. *Id.*

removal: “I say don’t tear down the house . . . even though it’s ridiculous . . . We can compose poetry of broken bones.”¹⁹¹ A week prior to the ceremonial unveiling of Wiley’s statue, a Richmond city councilmember announced another resolution seeking leave from the Virginia General Assembly for local control.¹⁹² The passage of Virginia’s new law, effective July 1, 2020, fulfilled the resolution’s goal by granting control of Confederate statuary to local governments.¹⁹³

Other communities have attempted to use community art projects to install new pieces on or around Confederate monuments.¹⁹⁴ Still other communities have rededicated other public spaces to counter-narratives on race.¹⁹⁵ Such contextualization is often necessary because the built environment containing Confederate monuments often excludes any African-American history or other histories of the Civil War.¹⁹⁶ “In 2008, the Georgia Historical Society conducted a review of the more than 900 Civil War markers in the state” and “found that ‘over 90 percent of the existing markers dealt strictly with military topics, leaving vast segments of the Civil War story untold—with almost no markers describing the war’s impact on civilians, politics, industry, the home front, African Americans, or women.’”¹⁹⁷

However, such recontextualizing is not a legally viable option in every jurisdiction due to “statue statutes.”¹⁹⁸ Some of these statutes not only prevent removal, but also prevent any defacement, understood broadly.¹⁹⁹ The Southern Poverty Law Center conducted a study of the seven states that have laws protecting Confederate monuments and found that some of these laws have been

191. *Id.*

192. *Id.*

193. See VA. CODE ANN. § 15.2-1812 (2020).

194. See, e.g., West, *supra* note 186 (describing a project to place four African-American markers around the downtown square in Franklin, Tennessee, near an existing Confederate monument).

195. Clowney, *supra* note 37, at 23–24 (discussing Kelly Ingram Park in Birmingham, Alabama, which was rededicated as a “Place of Revolution and Reconciliation” and where a series of public artworks were commissioned to “capture iconic moments of the civil rights campaign in Alabama”).

196. See, e.g., *id.* at 14 (noting that Lexington, Kentucky’s courthouse square, which contained a monument to Morgan, simultaneously “fails to enshrine a single African-American politician, thinker, or artist in the pantheon of the city’s heroes”).

197. S. POVERTY L. CTR., *supra* note 22.

198. See *id.*; see also *supra* Section II.D and note 89 (discussing legislation that prevents the removal of monuments).

199. See, e.g., S. POVERTY L. CTR., *supra* note 22 (“In 2017, for example, Alabama enacted the Alabama Memorial Preservation Act, which prohibits local governments from removing, altering or renaming monuments more than 40 years old.”).

used offensively, allowing state governments to sue local governments that take steps to cover or otherwise alter Confederate monuments.²⁰⁰ The City Council of Charlottesville, Virginia, bumped up against such a rule when it voted to shroud the Robert E. Lee monument in a black cloth after an unsuccessful bid to remove the divisive monument altogether.²⁰¹ The court eventually ordered removal of the shroud on the basis that it violated Virginia's statute preventing war memorials from being removed or altered.²⁰²

IV. THE LINGUISTIC TRENDS EMERGENT IN CONFEDERATE MONUMENT REMOVAL CASE LAW

Understanding the contours of Confederate monument removal case law broadly, as well as the history of public art in the United States and the various value propositions or policy goals that public art serves, this article next compares that theoretical framework with the actual linguistic trends emerging from the text of judicial opinions in Confederate monument removal cases. This research employed grounded theory methodology to study how practitioners and jurists address and discuss public artworks depicting subjects related to the Confederate States of America. Grounded theory starts with what is actually happening on the ground, and seeks to build explanatory models based on those observations.²⁰³

The research identified six different recurring patterns in the way the plaintiffs, the defendants, the court, or some combination thereof, consistently addressed the Confederate monuments. The ways judicial opinions address public Confederate monument artworks include: (A) addressing the artistic content or context of the artwork itself; (B) addressing the patron or patrons who commissioned the artwork; (C) addressing how the artwork may be functioning as a speech act; (D) addressing the ownership interests in a public artwork; (E) addressing the physical integrity of the artwork itself; and (F) addressing public utilization of the artwork or public space created by the artwork.

200. *Id.* ("The state's attorney general in August 2017 used [the Alabama Memorial Preservation Act] to sue the majority-black city of Birmingham for covering a Confederate monument with plywood and a tarp.").

201. Amy Held, *Shrouds Pulled from Charlottesville Confederate Statues, Following Ruling*, NPR (Feb. 28, 2018, 12:29 PM), <https://www.npr.org/sections/thetwo-way/2018/02/28/589451855/shrouds-pulled-from-charlottesville-confederate-statues-following-ruling>.

202. *Id.*

203. See JENNIFER MASON, *QUALITATIVE RESEARCHING* 180 (2d ed. 2002).

A. *Artistic Content/Context*

The artistic content/context code was applied to linguistic units addressing the type of artwork, the artist, and/or the context in which the artwork was created or should be viewed. A court's attention to this aspect of a Confederate monument is particularly important for calling attention to the fact of the monuments as public *art*, which has an intrinsic and different value²⁰⁴ than other types of public spaces.

While some courts merely recited the monument and location at issue,²⁰⁵ other courts took care to describe the artistic aspects of the monument.²⁰⁶ For example, the Court of Appeal of Louisiana richly described the Confederate monument at issue, stating, “[t]he Robert E. Lee monument is situated atop a monolith, which in turn is placed in the middle of a circular park that was formerly known as Tivoli Place. The statue depicts Lee in Confederate uniform.”²⁰⁷ The Western District of Louisiana described the Confederate monument in Caddo Parish as “made of marble and granite and . . . 30 feet tall.”²⁰⁸ The Middle District of Florida described the Confederate monument as “a massive 26’ foot [sic] 2 1/2 story, approximately 14 ton Cenotaph, with base dimensions of 9’ by 9.’ The memorial is engraved with the words ‘Confederate Dead,’ as well as a poem and images of Confederate flags.”²⁰⁹

Some courts, but certainly not all, even included the artist's name in their factual recitations. For example, the Western District of Louisiana noted that Frank Teich was commissioned “to sculpt the Confederate Monument.”²¹⁰ The Texas Court of Appeals noted that the patron of the monument, Mr. Littlefield, “had commissioned the noted Italian-American sculptor Pompeo Coppini to carry out his vision of the memorial arch and statues.”²¹¹ The United States

204. See *McCullom v. Morrison*, 14 Fla. 414, 417 (1874) (“The damages recoverable at law would be no adequate compensation in such a case, because there is attached to it a value and peculiar interest much beyond its money value.”).

205. See, e.g., *Callan v. Fischer*, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580, at *1–3 (W.D. Ky. Nov. 19, 2016) (“The subject of Plaintiff’s motion is the removal of the Confederate monument located on South Third St. in Louisville, KY . . .”).

206. *McGraw v. City of New Orleans*, 16-0446, p. 12–13 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 325.

207. *Id.*

208. *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, No. 17-1346, 2018 U.S. Dist. LEXIS 13205, at *3 (W.D. La. Jan. 26, 2018).

209. *Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1273 (M.D. Fla. 2019).

210. *Shreveport Chapter No. 237 of the United Daughters of the Confederacy*, 2018 U.S. Dist. LEXIS 13205, at *3.

211. *Bray v. Fenves*, No. 06-15-00075-CV, 2016 Tex. App. LEXIS 2984, at *3 (Tex. Ct. App. Mar. 24, 2016).

District Court for the Northern District of Texas noted that the property at issue is the “Alexander Phimster Proctor monument of Robert E. Lee.”²¹²

Still other courts found it important to mention the context in which certain monuments were sited or should be appreciated. For example, several courts note that a particular monument was listed on the National Register of Historic Places.²¹³ The Texas Court of Appeals noted the relocation of a Jefferson Davis monument from the University of Texas at Austin to the Briscoe Center for American History “where the statue could be put in full historical context,” stating “[t]he Briscoe Center is one of the premier history centers in the nation, is the repository for both the Littlefield papers and the Coppini papers, and has the third largest collection of documents related to slavery.”²¹⁴ Other courts contextualized the artwork with reference to the time period of its commission.²¹⁵

B. Patronage

In Confederate removal case law, courts tend to address two primary forms of patronage: the original patronage of the monument²¹⁶ and the patronage available to pay for a monument’s removal.²¹⁷ Finding wealthy, private individuals who can patronize the removal of public art allows governmental entities to skirt the legal issue of taxpayer standing.²¹⁸ The patronage code was applied to linguistic units dealing with either form of patronage.

Scholarship on public art notes that “[t]he significance and use of public art in a democracy cannot be understood without a careful analysis of patronage and

212. *Patterson v. Rawlings*, 287 F. Supp. 3d 632, 636 (N.D. Tex. 2018).

213. *Shreveport Chapter No. 237 of the United Daughters of the Confederacy*, 2018 U.S. Dist. LEXIS 13205, at *14, *20; *McGraw v. City of New Orleans*, 16-0446, p. 9 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 325.

214. *Bray*, 2016 Tex. App. LEXIS 2984, at *5 n.5.

215. *See, e.g., McMahon v. Fenves*, 323 F. Supp. 3d 874, 877 (W.D. Tex. 2018) (“[H]e commissioned a sculptor to create statues of Jefferson Davis, Robert E. Lee, Albert Sidney Johnston, John Reagan, James Hogg, and President Woodrow Wilson ‘during a period of resurgent white Southern nostalgia for the social order of the old South embodied by the Confederacy.’”).

216. *See, e.g., Shreveport Chapter No. 237 of the United Daughters of the Confederacy*, 2018 U.S. Dist. LEXIS 13205, at *10–11 (noting that Caddo Parish reserved the land upon which it permitted the installation of a Confederate monument).

217. *See, e.g., Monumental Task Comm. Inc. v. Foxx*, 157 F. Supp. 3d 573, 581 (E.D. La. 2016) (discussing how the New Orleans City Council had located a potential donor who “had agreed to fund the cost of removing the monuments”).

218. *See, e.g., Patterson v. Rawlings*, 287 F. Supp. 3d 636, 642–43 (N.D. Tex. 2018) (holding that plaintiffs failed to demonstrate that taxpayer money was used to remove statue and therefore lacked taxpayer standing).

the motives behind it.”²¹⁹ The importance of patronage is especially evident with regard to war memorials and monuments because “[p]atronage, however enlightened, is always an expression of self-interest.”²²⁰ Public artwork in both “overt and covert ways, embodies the ideals and aspirations of its patron, be it a national government, a local community, an individual, or a corporation.”²²¹ Senie and Webster note that “[s]culptures relating to the Civil War presented a special problem” because “the personal politics of the patrons could not help but be incorporated in the works they either commissioned or supervised.”²²²

In the public art landscape, private donors and public sponsors often come together to effectuate a work. For example, in *Grady v. Greenville*, the court recognized that “the devoted women of the Ladies’ Memorial Association erected this monument upon one of the city’s streets, by express permission of the city council.”²²³ It is clear that once the initial donation of the monument is made, local governments often become a “de facto” patron in terms of paying for the ongoing maintenance, repair, and security of the monument.²²⁴ The government’s permission to erect and maintain a piece of public artwork on its property is required because it is the government’s land and the government’s speech.²²⁵

The donative intent and requests of a benefactor often influence the outcome of the artwork, as acknowledged by the Texas Court of Appeals when it recounted the specifications that the donor, Littlefield, made, even as to the relationship in space that his monuments should have to one another:

In his will, Littlefield made the following bequest . . . I give . . . \$200,000 . . . said committee to use said sum . . . [a]s may be necessary to erect a massive bronze arch over the south entrance to the campus of

219. Senie & Webster, *supra* note 109, at 101, 101.

220. *Id.* (“The connection between patronage, politics, and public art is most evident in the traditional genre of monuments and memorials.”).

221. *Id.*

222. *Id.*

223. *Grady v. City of Greenville*, 129 S.E. 494, 500 (S.C. 1924); *see also McGraw v. City of New Orleans*, 16-0446, p. 9–10 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 325 (“The monument was commissioned and constructed by the Robert E. Lee Monumental Association of New Orleans, which was founded in 1870. The monument itself was authorized in 1877 by City Ordinance . . . which granted the use of Tivoli Circle to the Monumental Association for the purpose of erecting the monument.”).

224. *See Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 603 (E.D. La. 2016) (“Plaintiffs have not shown that the City Council was arbitrary and capricious in concluding that the costs of maintaining the monuments outweigh the benefits of keeping them. . . . [T]here is no guarantee that MTC will continue to gratuitously bear the costs of maintaining the monuments in the future.”).

225. *See Patterson v. Rawlings*, 287 F. Supp. 3d 632, 641–42 (N.D. Tex. 2018).

the University of Texas, in Austin, Texas. On the top of the arch I wish them to place a life size statue of Jefferson Davis, the President of the Southern Confederacy, to his right and below him I wish them to place a life size statue of General Robert E. Lee, Commander of the Army of Virginia [and describing three other figures]. . . . The arrangement given here is suggested to the committee as being the best; However, they are authorized to change it or the design suggested if they wish, giving prominence however to the statue of the men named above.²²⁶

Defendants have also used speech in this category offensively to point out the problematic patronage issues with such public works.²²⁷

In addition to acknowledging the patronage of those who built the monuments, courts also discuss the patrons who would tear them down. Thus, this code was also applied to linguistic units addressing the patron or sponsor who agreed to pay to remove the artwork. For the most part, private donors fund removals.²²⁸ For example, a private, non-profit organization funded the controversial removal of the four Confederate monuments in New Orleans, including the one adorning Lee Circle.²²⁹

Even though patronage may influence a variety of factors, including the design and meaning²³⁰ of a monument or its strategic placement in a public space, plaintiffs have generally been unsuccessful in asserting that patronage confers standing to bring a claim against the government for removing the statue.²³¹

226. *Bray v. Fenves*, No. 06-15-00075-CV, 2016 Tex. App. LEXIS 2984, at *24–28 (Tex. Ct. App. Mar. 24, 2016).

227. *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 498 (E.D. La. 2017) (“[P]laintiffs argue that . . . the city ‘sought to politicize [removal of the Monuments] by frequent reference to the reasons the monuments were built and the motives of the individuals who erected them.’”) (alteration in original).

228. *See, e.g., Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1273 (M.D. Fla. 2019) (“[T]he Lakeland City Commission voted to relocate the Cenotaph from Historic Munn Park to another site out of the historic district, provided private donations paid for the full costs.”).

229. *Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 601 (“The City has explained that funds for the removal are being donated by Foundation for Louisiana, a non-profit corporation. The donation is documented . . . to provide up to \$175,000 to cover costs associated with removal of the four monuments.”).

230. For instance, in *Douglas v. Daviess County Fiscal Court*, the plaintiff complained that, because the patrons (the Daughters of the Confederacy) were a “racist group,” the government had discriminated against him by siting their donated artwork in front of the courthouse, indicating that the Fiscal Court was “in agreement with the confederate’s [sic] views and the statue statement.” *Douglas v. Daviess Cty. Fiscal Court*, No. 4:17CV-108-JHM, 2018 U.S. Dist. LEXIS 64942, at *2–3 (W.D. Ky. Apr. 17, 2018).

231. *See, e.g., McGraw v. City of New Orleans*, 16-0446, p. 10–11, 15–17 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 325–26, 328 (Ct. App. La. 2017) (rejecting the plaintiff’s argument that he had ownership in the monuments because he had invested his “own time,

C. *Art as Speech*

Two themes can be seen in the data coded as “art as speech.” The first is that courts are recognizing that public art conveys a message. The second is that courts are recognizing that the *government* may be conveying a message through the public art that it selects and sites.

The first theme focuses on the message and not the messenger; but deciding what the message is, exactly, is often fraught with controversy. As the Supreme Court has noted, “[t]he meaning conveyed by a monument is generally not a simple one like ‘Beef. It’s What’s for Dinner.’”²³² And the meaning of Confederate monuments cannot be discovered merely by looking at either the artistic intent or the public reaction in isolation.²³³ In fact, there are many “publics” that may encounter and interpret a Confederate monument, and often those interpretations vary widely.²³⁴ “[M]onument[s] may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.”²³⁵ This principle of public art has been re-echoed by the courts.²³⁶

In text coded for art as speech, the public art principle of functionality arises frequently. For instance, some plaintiffs asserted that the monument served an essential linguistic function in terms of “comprehending the lives and deaths of his family and the countless other Union and Confederate soldiers and our

money, and labor in the upkeep of the City’s monuments . . . spen[ding] thousands of his own dollars”); *Callan v. Fischer*, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580, at *8–10 (W.D. Ky. Nov. 19, 2016) (“[T]he only stake Plaintiff alleges to have in this action is the fact that he is ‘a distant cousin of the original President of the Woman’s Confederate Monument Association . . . which invested about seven years to raise the money, recruit a designer, and obtain the real estate property and have the Confederate Monument built at its current location.’”).

232. *Pleasant Grove City v. Summum*, 555 U.S. 460, 474 (2009) (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 554 (2005)).

233. See *Senie & Webster*, *supra* note 16, at 173.

234. Indeed, New Orleans commissioned a study of the Confederate monuments that it was contemplating removing and found that “the monuments reflect the beliefs and attitudes held by many Southerners during the late nineteenth and early twentieth centuries popularly characterized as ‘the Cult of the Lost Cause.’” *McGraw*, 215 So. 3d at 327.

235. *Pleasant Grove City*, 555 U.S. at 474.

236. *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 602 (E.D. La. 2016) (“The meaning conveyed by a monument is generally not a simple one Monuments may be intended to be interpreted . . . by different observers, in a variety of ways. Indeed, it frequently is not possible to identify a single ‘message’ that is conveyed by a monument. The monuments at issue in this case illustrate this phenomenon, as evidenced by the unprecedented public debate over their removal.” (citing *Pleasant Grove City*, 555 U.S. at 474, 476)) (alteration in original).

nation.”²³⁷ In contrast, some governmental defendants were also clearly motivated by the speech effects of Confederate monuments situated on government properties, like courthouses, where the defendants perceived the monuments to be interfering with the public functionality of that space.²³⁸

The idea that art functions as a form of speech has been invoked by both plaintiffs and defendants alike—even in the same case.²³⁹ For instance, the plaintiffs in *McMahon v. Fenves* claimed that removal of a group of Confederate statues located on the University of Texas Austin’s campus mall would violate their First Amendment free speech rights and their “right to hold a dissenting political viewpoint” because removal would, in effect, “abridg[e] the political speech of the monument.”²⁴⁰ Likewise, the defendant University president invoked the speech act of the art in *support* of removal, arguing, “Confederate monuments have become symbols of mod[ern] white supremacy and neo-Nazism.”²⁴¹ While courts have generally held that the message of existing public art cannot adequately be imputed to and addressed as the speech of any particular, individual citizen,²⁴² the idea that public art says something is consistent with the functionality value proposition.

Courts have generally not adopted the argument that Confederate monuments could celebrate something other than the Confederate States of America.²⁴³ And generally, courts recognize that Confederate monuments’ messages conform to the typical purpose of public art categorized as a monument

237. *Callan v. Fischer*, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580, at *10 (W.D. Ky. Nov. 19, 2016) (alteration in original).

238. *See, e.g.*, *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, No. 17-1346, 2018 U.S. Dist. LEXIS 70680, at *11 (W.D. La. Apr. 26, 2018) (relaying public official’s statement that the Confederate monument should be removed “from in front of our local institution of justice”).

239. *See, e.g.*, *McMahon v. Fenves*, 323 F. Supp. 3d 874, 877, 878 (W.D. Tex. 2018).

240. *Id.* at 878.

241. *Id.* at 877.

242. *See, e.g., id.* at 879–80 (acknowledging in dicta that a direct First Amendment claim would have to be a particularized injury such as being denied a license or grant funding or being denied “the opportunity to erect a new statue”).

243. *See, e.g.*, *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 592 n.4 (E.D. La. 2016) (“While it is undisputed that Robert E. Lee, P.G.T. Beauregard, and Jefferson Davis were members of the United States Army and served in the Mexican War, the monuments do not appear to commemorate that service. For example, the inscription on the base of the Lee Monument reads: Robert E. Lee . . . COMMANDER IN CHIEF / CONFEDERATE STATES OF AMERICA The Beauregard Monument depicts Beauregard astride his horse in full Confederate uniform. The inscription . . . reads . . . General C.S.A. [T]he pedestal of the Davis Monument reads: . . . PRESIDENT / CONFEDERATE STATES OF AMERICA . . . None of the monuments reference service in the United States Army.”).

or memorial—that is, they commemorate.²⁴⁴ Prior to the Civil Rights movement, one court even took the liberty to express the intended message of a Confederate monument, saying that one object was to “serve as a record of the tender reverence in which the memory of the gallant dead was held by the builders.”²⁴⁵

How this memorialization is received by the viewing public, of course, greatly differs in the modern era. Some parties contend that the monuments are “symbol[s] of hate and insurrection.”²⁴⁶ One litigant favoring removal alleged that the Confederate “[s]tatue on open display claim[s] my heros [sic] are those who say I’m not human”²⁴⁷ Parties opposing removal contend that the monuments simply represent the message that “the men who fought for the Confederacy in the Civil War deserve our respect” and do not reference racist messages.²⁴⁸

The second theme in this rhetorical category focuses on the messenger, which is often still a gray area when it comes to public art. Not all public artists view their work as speaking for the government that commissioned or allowed the piece.²⁴⁹ Nonetheless, one of the recurring themes in the case law is the idea that government speaks through Confederate monuments.

Governmental entities, where not prohibited by statutory law, may generally choose to “speak” by retaining Confederate monuments or by removing and relocating them.²⁵⁰ As the Supreme Court noted in *Pleasant Grove City v.*

244. *Grady v. City of Greenville*, 123 S.E. 494, 500 (S.C. 1924) (acknowledging the monument was dedicated to the “memory of the Confederate dead”).

245. *Id.* at 501.

246. *See, e.g.*, *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, No. 17-1346, 2018 U.S. Dist. LEXIS 70680, at *11 (W.D. La. Apr. 26, 2018).

247. *Douglas v. Daviess Cty. Fiscal Court*, No. 4:17CV-108-JHM, 2018 U.S. Dist. LEXIS 64942, at *2–3 (W.D. Ky. Apr. 17, 2018).

248. *See, e.g.*, *Patterson v. Rawlings*, 287 F. Supp. 3d 632, 641 (N.D. Tex. 2018).

249. *See, e.g.*, *KNIGHT*, *supra* note 88, at 12 (noting that the artist who created *Tilted Arc* in Federal Plaza “contend[ed] that *Tilted Arc* was never intended to – nor did it – speak for the United States Government”).

250. *See Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 510 (E.D. La. 2017) (“The City has a right to ‘speak for itself’ and removal of the Monuments is a form of such government speech.”); *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 593 (E.D. La. 2016) (holding City of New Orleans could remove some offensive monuments even if it did not remove all offensive monuments because the equal protection clause “ensures the equal protection of persons, not monuments” and a State is not required to “choose between attacking every aspect of a problem or not attacking the problem at all”); *see also Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, No. 17-1346, 2018 U.S. Dist. LEXIS 13205, at *19 (W.D. La. Jan. 26, 2018) (“In its own forum, a government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.”).

Summum, the “placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”²⁵¹ A “[c]ity has the right to ‘speak for itself,’ and [p]laintiffs may not compel [a] [c]ity to promote their culture.”²⁵² The principle that Confederate monuments are government speech applies whether the government commissioned and financed the artwork itself or the government merely accepts and displays a work that was privately financed and donated.²⁵³

This freedom of governments to engage in their own speech makes sense considering the history of Confederate monument art. When governments wanted to “speak” in favor of Confederate history and aggrandizement,²⁵⁴ such monuments went up. And now that the historical tide is turning and governments want to “speak” in favor of contextualizing such history instead of vaunting it, such monuments are being taken down.²⁵⁵ Thus, plaintiffs seeking to prevent removing monuments have to find some basis other than speech rights to prove a real interest and the concomitant standing upon which to base their claims.²⁵⁶

Plaintiffs have asserted First Amendment claims over Confederate monuments by arguing that they are the messenger, alleging that a monument’s speech represents plaintiffs’ own speech.²⁵⁷ Recognizing that a majority of the public has now turned away from celebrating the ideals of the Confederacy, some

251. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

252. *Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 601; *but see* *Blank*, *supra* note 91, at 379–80 (proposing that city speech receive First Amendment protection to fight against “state-led threats”).

253. *Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1275 (M.D. Fla. 2019).

254. *See, e.g.*, *Clowney*, *supra* note 37, at 11–12 (noting that a twenty-foot memorial to John Hunt Morgan in Lexington, Kentucky, featured him “sitting calmly astride a well-muscled stallion. Yet historians agree that in life, he rode a small mare.”).

255. *See, e.g.*, *Gardner*, 360 F. Supp. 3d at 1276 (“The government’s freedom to speak for itself ‘includes “choosing not to speak” and “speaking through the removal” of speech that the government disapproves.’”) (alteration in original) (citation omitted).

256. *See, e.g.*, *Sons of Confederate Veterans v. City of Memphis*, No. M2018-01096-COA-R3-CV, 2018 U.S. Dist. LEXIS 279, at *16–18 (Tenn. Ct. App. June 4, 2019) (finding the plaintiffs only had standing to challenge the removal of one of the monuments and such standing was created by statute, which granted a right to sue to any party involved in administrative proceedings before the Tennessee Historical Commission related to a particular public artwork); *see also* *McMahon v. Fenves*, 323 F. Supp. 3d 874, 880 (W.D. Tex. 2018) (holding that plaintiffs had not articulated a particularized interest sufficient to confer standing simply because they held a viewpoint consistent with the monument’s message and in dicta reasoning that a particularized interest could arise from a direct injury such as being denied a license or grant or opportunity to erect a new statue).

257. *See, e.g.*, *Douglas v. Daviess Cty. Fiscal Court*, No. 4:17CV-108-JHM, 2018 LEXIS 64942, at *6 n.2 (W.D. Ky. Apr. 17, 2018) (plaintiff seeking removal failed “to allege that the Confederate statue chills his speech in any manner or requires him to support the cause he alleges it represents”).

plaintiffs have even argued that Confederate monuments represent *minority* political speech that should be protected.²⁵⁸ Courts have roundly rejected this theory, noting that plaintiffs are free to engage in their own speech and are not entitled to speak through public monuments.²⁵⁹ Instead, public monuments—including their erection and removal—are a form of government speech.²⁶⁰

D. Ownership Interests

The data coded for “ownership interests” showed that courts and litigants have discussed a variety of ways to “own” a Confederate monument, including through property interests in the artwork, copyright interests in the artwork, and even property interests in the land underneath the artwork. Furthermore, linguistic units that focused on due process concerns, such as the ability to have one’s views heard prior to removal, were also coded for ownership interests because due process rights are so closely tied to cognizable property interests.²⁶¹

Text related to demonstrating a legal interest in the monument itself is prevalent because many plaintiffs are unable to demonstrate the requisite standing to survive dispositive motions.²⁶² For example, courts have shot down the theory that a person’s lineage or publicly-shared values can confer a

258. See *Gardner*, 360 F. Supp. 3d at 1275 (plaintiff claiming free speech violation based on decision to remove a monument “which communicated minority political speech in a public forum”); *McMahon*, 323 F. Supp. 3d at 879 (plaintiff claiming his “dissenting viewpoint—that which celebrates the Confederate legacy” was being impinged by the defendant University); *Patterson v. Rawlings*, 287 F. Supp. 3d 632, 641 (N.D. Tex. 2018) (claiming plaintiff heritage society “and its members were uniquely injured because they have a dissenting political viewpoint that was communicated by the Lee Statue”).

259. See *Gardner*, 360 F. Supp. 3d at 1275–76; *McMahon*, 323 F. Supp. 3d at 880–81; *Patterson*, 287 F. Supp. 3d at 641–42 (N.D. Tex. 2018) (“But they do not allege that the City has ever taken any action that would prevent *Patterson* from expressing this political view. They have at most alleged that *Patterson* shares the political viewpoint communicated to the general public by the Confederate monuments. This allegation, however, does not explain how the removal of Confederate monuments from City-owned property prevents *Patterson* from expressing *his* political viewpoint.”).

260. *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 594 (E.D. La. 2016) (“Plaintiffs wisely chose not to pursue a freedom-of-speech claim ‘[W]hen 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.’ . . . Therefore, the removal of the monuments is a form of government speech and is exempt from First Amendment scrutiny.”) (citation omitted).

261. Furthermore, there were not enough data units dealing with due process concerns to justify another code category. See *infra* Section V.B.

262. See, e.g., *Patterson*, 287 F. Supp. 3d at 639 (granting defendants’ motion to dismiss based on plaintiffs’ lack of standing because the plaintiffs had not pled or introduced evidence of a legal interest in the park at issue).

particularized injury or interest in the monuments.²⁶³ Even participation in “Civil War reenactments, living history projects, and commemorative events . . . at the . . . monuments” cannot confer an actual ownership interest in the monument.²⁶⁴ Courts have likewise rejected a “sweat equity” theory in which plaintiffs attempt to establish an interest in the monument based on their maintenance and care of it over a period of time.²⁶⁵ Standing otherwise may be conveyed through a statutory or some other more direct right.²⁶⁶

Copyright claims were not frequently raised in the case law.²⁶⁷ This trend is consistent with public art custom and practice, in which public artists generally work on a work-for-hire basis or otherwise assign their rights to the government commissioning the piece of public art.²⁶⁸

The data coded for ownership interests demonstrates an overlap with two other categories. First, the data coded for ownership interests reveals a high correlation with the text coded for “art as speech” because many plaintiffs claim that the “legally protected interest” they seek to protect “is the right to hold a politically unpopular viewpoint.”²⁶⁹ Second, data coded for ownership interests

263. See *Bray*, 2016 Tex. App. LEXIS 2984, at *16–22; *Callan v. Fischer*, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580, at *8–9 (W.D. Ky. Nov. 19, 2016) (plaintiff alleging relationship to Jefferson Davis and numerous other Confederate States of America leaders); *Gardner*, 360 F. Supp. 3d at 1276 (“Plaintiffs insist that they have sufficiently particularized interests in the Cenotaph, including ‘genealogical relationships and membership in associations for particular historical and cultural foci.’ The Court agrees with Defendants that Plaintiffs . . . cannot base their standing on their preferences for the preservation of Confederate memorials or the Southern Perspective.”) (citation omitted).

264. *McGraw v. City of New Orleans*, 16-0446, p. 11, 25 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 326, 332.

265. *Sons of Confederate Veterans v. City of Memphis*, No. M2018-01096-COA-R3-CV, 2019 Tenn. App. LEXIS 279, at *18 (Tenn. Ct. App. June 4, 2019); see also *Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 594–95 (“Plaintiffs also assert that [they] have [a] constitutionally-protected property interest in the monuments. . . . [Plaintiffs further] argue that [they] ha[ve] a property interest in the monuments because it has been the only organization preserving the monuments in New Orleans for years . . . [and] donated volunteer services worth thousands.”).

266. See, e.g., *Sons of Confederate Veterans*, 201 Tenn. App. LEXIS 279, at *11 (noting the Sons of Confederate Veterans could only demonstrate a real interest in one statue because it had been involved in a waiver process that had been defined as a basis for standing by a statute).

267. But see *Patterson*, 287 F. Supp. 3d at 638 (plaintiffs attempted to make a copyright claim based on the claim of a potential assignment from the foundation managing the artist’s estate).

268. See, e.g., *Serra v. U.S. Gen. Servs. Admin.*, 847 F. 2d 1045, 1052 (2d Cir. 1988) (holding that artist had no protected interest in *Tilted Arc* because he contractually relinquished his rights to GSA).

269. *McMahon v. Fenves*, 323 F. Supp. 3d 874, 879 (W.D. Tex. 2018).

reveals an overlap with the text in the patronage category because some plaintiffs attempt to claim an ownership interest in the work by virtue of funding the public artwork.²⁷⁰ However, courts have held that the donation of money cannot result in private ownership interests.²⁷¹

Where claims of a direct interest in the monument itself have failed, plaintiffs also raised a claim for ownership of the land on which a Confederate monument sits.²⁷² For example, in *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm'n*, the plaintiff asserted it owned the property through adverse possession and claimed that the local government could not remove a monument sited on private property.²⁷³

Because the government usually holds the property interest in a Confederate monument, text coded for “ownership interests” sometimes sees a confluence (or tension) with traditional public art policy, which views public art as *the public’s* property.²⁷⁴ For example, in *Shreveport Chapter No. 327 United Daughters of the Confederacy*, the defendant government commission argued that the commission “holds the property upon which the Confederate Monument sits in trust for the public, and therefore Plaintiff’s Constitutional claims fail.”²⁷⁵ Plaintiffs pull on this value for public ownership, too. In *Monumental Task Committee v. Foxx*, the plaintiffs alleged they had “a recognizable interest in the aesthetic and cultural well-being of the City of New Orleans.”²⁷⁶

270. See, e.g., *Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 596 (“Plaintiffs claim . . . that [their] predecessor acquired a property interest in the monuments because it raised and donated funds to erect the Beauregard Equestrian Monument and was active in the creation of the Jefferson Davis Monument.”).

271. *Id.* (“Plaintiffs admit that [their] alleged predecessor raised and donated funds to erect the Beauregard Monument. A donation, by definition, presently and irrevocably divests the donor of the thing given.”) (citation omitted).

272. See, e.g., *Albert Sidney Johnston Chapter v. City of San Antonio*, No. SA-17-CV-1072-DAE, 2019 LEXIS 175234, at *5 (W.D. Tex. Oct. 9, 2019) (moving for summary judgment because there was no evidence of an ownership interest in the land upon which the monument sat).

273. *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm’n*, 331 F. Supp. 3d 605, 612 (W.D. La. 2018).

274. See *McGraw v. City of New Orleans*, 16-0446, p. 24 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 332. (“The monuments at suit, therefore, are public things owned by the City in its capacity as a public person.”). As public things, public works of art are typically incapable of being privately owned. *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 506 (E.D. La. 2017) (granting summary judgment because “no amount of discovery” would be sufficient when “plaintiff cannot acquire rights in the monuments”).

275. *Shreveport Chapter No. 237 of the United Daughters of the Confederacy*, 331 F. Supp. 3d at 618.

276. *Monumental Task Comm., Inc. v. Foxx*, 240 F. Supp. 3d 487, 499 (E.D. La. 2017).

Text in this data set also contained a thread of speech focused on due process concerns.²⁷⁷ Procedural safeguards in relation to the build-out of public spaces is not a new concept. Public art commissions frequently employ a public bidding and comment process prior to accepting and siting a new piece of public artwork.²⁷⁸ Governmental entities have also used the weight of public comment to justify removing public art before.²⁷⁹ To decrease the racial impact of public development decisions, one commentator suggested requiring a “Landscape Impact Assessment,” including sunset provisions that would schedule Confederate monuments for destruction “unless the relevant local government deliberated over the meaning of the space and voted to reaffirm its value to the landscape.”²⁸⁰

In conformance with such trends, the emergent data from the case law also contained some text involving process-related concerns.²⁸¹ For example, the Fifth Circuit, affirming the removal decision of the lower courts, highlighted the many hearings and public comment opportunities relating to the statue’s removal, by stating, “[w]ise or unwise, the ultimate determination made here, by all accounts, followed a robust democratic process.”²⁸²

277. See *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 598–99 (“Plaintiffs also argue that removing the monuments pursuant to City Code . . . denies Plaintiffs due process . . . because [the code section] is unconstitutionally vague.”); *McGraw*, 215 So. 3d at 321 (“The enactment capped a six-month process of intense public debate and contentious governmental hearings concerning the fate of the three monuments.”).

278. See, e.g., METRO ARTS NASHVILLE OFFICE OF ARTS + CULTURE, *Public Art Guidelines* (2015), https://98d9df32-e9e5-49fb-b3f5-811942ccac16.filesusr.com/ugd/cc4e3f_94eeba7fc830492a91413df6260dbcd8.pdf (discussing selection panels, conflicts of interest, criterion, placement processes, procedures for deaccessioning a piece, etc.).

279. See, e.g., *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1052–53 (S.D.N.Y. 1987) (noting that there were “654 pages of testimony, 7,412 petitions [signatures], and 1,779 letters either for or against the relocation of the sculpture”); *CHER KRAUSE KNIGHT, PUBLIC ART THEORY, PRACTICE AND POPULISM* 12 (2008) (“Regardless, the [*Tilted Arc*] controversy made two things clear: . . . the subsequent removal of public art calls for as much careful consideration as its initial placement.”).

280. *Clowney*, *supra* note 37, at 58 (noting the “LIA scheme would do much to prevent the construction of projects that threaten to carve racial fault lines into the built environment”).

281. See, e.g., *Strybos v. Perry*, No. 03-07-00073-CV, 2010 Tex. App. LEXIS 2200, at *12–13 (Tex. Ct. App. Mar. 26, 2010) (appellants contended that the government had not followed the proper procedure for installing a new monument or memorial because it had not obtained the approval of the Texas Facilities Commission or the Texas Historical Commission).

282. *Monumental Task Comm., Inc. v. Chao*, 678 Fed. Appx. 250, 252 (5th Cir. 2017).

E. *Physical Integrity of the Artistic Piece*

Courts discuss the physical integrity of the Confederate statuary in at least two distinct ways: the physical integrity of the monuments during and after removal, as well as the physical integrity of the monuments while they remain on public display—for example, the realities and costs of cleaning graffiti off the works.²⁸³ While often unsuccessful, some plaintiffs have used the anticipated harm to the physical integrity of the monument as the basis for a legal claim in and of itself.²⁸⁴

Many courts express the common value of maintaining the physical integrity of the Confederate monument,²⁸⁵ even upon removal.²⁸⁶ Some courts have even written in dicta that destroying a Confederate monument, rather than simply removing and relocating it, would result in a different legal outcome.²⁸⁷ In keeping with this ethic of preservation,²⁸⁸ many defendants have taken steps to

283. See, e.g., *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 581 (E.D. La. 2016). This type of concern overlaps with and relates to the government's ongoing patronage of a piece.

284. See *Callan v. Fischer*, No. 3:16-CV-734, 2016 U.S. Dist. LEXIS 160580, at *4–5 (W.D. Ky. Nov. 19, 2016) (alleging violation of state law protecting the “destruction and desecration of venerated objects”); *Strybos*, 2010 Tex. App. LEXIS 2200, at *10 (alleging violation of the antiquities code prohibiting the disfigurement, removal, or destruction of a historical monument without lawful authority); see also *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm'n*, 331 F. Supp. 3d 605, 618–19 (W.D. La. 2018) (alleging an unconstitutional taking related to the removal and lack of compensation for damages to the monument or for its proper storage).

285. See, e.g., *McCullom v. Morrison*, 14 Fla. 414, 417 (1874) (“In such a case, the interference of a court of equity is necessary to protect the property from destruction and defacement while the suit is pending, and upon the final hearing, if the case is made out, to grant a perpetual injunction prohibiting any interference with it by the defendants.”).

286. See, e.g., *Grady v. City of Greenville*, 123 S.E. 494, 500 (S.C. 1924) (“[W]e are satisfied that this monument is now held in trust by the city—certainly, in so far as any right to remove and dispose of it is concerned—subject to the duty of faithfully preserving and employing the property in accordance with the purpose for which the monument was erected.”).

287. See, e.g., *id.* at 500–01 (“If the contemplated action of council involved the demolition of this monument, and the consignment of its memorial stones to a junk heap or the city rock pile, the validity of plaintiffs' claim of injury would, we apprehend, be conceded by all right-thinking persons.”).

288. The ethic of preservation for public art is not unique to removal of Confederate statues. See, e.g., *Serra v. U.S. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1054 (S.D.N.Y. 1987) (relating decision of GSA administrator, who said, “I reject the option of physically destroying the *Tilted Arc* as violating our sense of values which tell us that deliberate destruction of art, which has limited acceptance, is not compatible with a free society which prides itself on encouraging free expression of art”).

ensure the physical integrity of Confederate monuments upon removing and disposing of them.²⁸⁹

The costs of maintaining the physical integrity of the monuments have been used by some defendants as evidence of the city's sound judgment in voting to remove such public works of art.²⁹⁰ This maintenance cost is especially exacerbated with Confederate monuments because these works of public art are particularly susceptible to vandalism and protest.²⁹¹

On the other hand, plaintiffs have appealed to the value of protecting the physical integrity of the monuments—and their fragility during the removal process—as one reason for the court to enjoin such a removal.²⁹² Some defendants have even conceded the monument's fragility.²⁹³ The public controversy surrounding such public artworks may actually add to the difficulty of maintaining the physical integrity of the pieces during removal. As one court noted, at least one contractor engaged to remove the monuments in New Orleans, Louisiana, backed out of the bid process “after its staff, its owner, and the owner's family had received death threats in connection with the contractor's involvement with the project.”²⁹⁴

289. See *Albert Sidney Johnston Chapter v. City of San Antonio*, No. SA-17-CV-1072-DAE, 2019 LEXIS 175234, at *5 (W.D. Tex. Oct. 9, 2019) (“The City moved the cornerstone containing the time capsule to a climate-controlled facility in August 2018 to prevent its degradation. The Court subsequently ordered the City to protect the contents of the time capsule and appointed a special master to oversee their conservation.”) (citation omitted); *Sons of Confederate Veterans v. City of Memphis*, No. M2018-01096-COA-R3-CV, 2019 U.S. Dist. LEXIS 279, at *7 (Tenn. Ct. App. June 4, 2019) (“All three statues were stored by the City for one week before being moved to a secure, undisclosed location.”); *Patterson v. Rawlings*, 287 F. Supp. 3d 632, 636 (N.D. Tex. 2018) (“A few days after the court dissolved the [temporary restraining order], the City removed the Lee Statue and placed it in storage.”); *Monumental Task Comm., Inc. v. Chao*, 678 Fed. Appx. 250, 252 (5th Cir. 2017) (“[W]e accept the City's assurances that it will hire only qualified and highly skilled crane operators and riggers to relocate the monuments from their current positions and, further, that the monuments are merely to be relocated, not destroyed.”).

290. See, e.g., *McGraw v. City of New Orleans*, 16-0446, p. 1–2, 10 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 321, 325 (“Evidence in the record indicates that at least \$200,000 in private and public funds have been spent on repairs and maintenance of the monument.”).

291. See *Monumental Task Comm., Inc. v. Foxx* 157 F. Supp. 3d 573, 602 (E.D. La. 2016).

292. See, e.g., *id.* at 584 (noting plaintiff's expert witnesses testified that the monuments may suffer physical harm during removal if removed by untrained or unskilled operators and that repairing the structures would be impossible given the antique iron infrastructures).

293. See, e.g., *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm'n*, No. 17-1346, 2018 U.S. Dist. LEXIS 13205, at *23 (W.D. La. Jan. 26, 2018) (“Nor does the Commission dispute that a marble and granite statue is fragile, as argued by UDC.”).

294. *McGraw*, 215 So. 3d at 328.

F. *Public Utility*

Linguistic units tagged for the public utility code indicated that the functionality of the public space cannot be divorced from the considerations of where Confederate monuments are sited.²⁹⁵ For example, the court in *Grady v. Greenville* noted that the Confederate monument's "high object" could not be served because the public space where it was currently sited was "surrounded by the din and clamour of raucous automobile traffic, where neither kinsman nor stranger could pause to read the inscription without incurring jeopardy of life or limb"²⁹⁶ Similarly, as part of its process in deciding which monuments to remove or leave in place, the court in *Monumental Task Committee v. Foxx* noted that the Andrew Jackson statue "occupies the center frame of New Orleans' most famous, historic, and heavily photograph [sic] public square," a function that could properly influence the decision not to remove the Jackson statue.²⁹⁷

Some defendants have gathered evidence about the Confederate monument's usage in the public sphere to support a removal action. For example, in *McGraw v. City of New Orleans*, the City gathered evidence from the superintendent of police, who advised "that the monuments had been the location of protests, some violent, over the years and likewise recommended their removal."²⁹⁸

But plaintiffs, too, have invoked the value of public utility to support their claims. For example, the plaintiffs in *Monumental Task Committee* argued that the use of the monuments as part of New Orleans' streetcar line provided a claim under the Department of Transportation Act.²⁹⁹ Similarly, in *Callan v. Fischer*, the plaintiff contended that removal of the Confederate monument would impede the usage by "unlawfully restricting mourners from visiting the venerated . . . monument."³⁰⁰

295. See, e.g., *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm'n*, 331 F. Supp. 3d 605, 615 (W.D. La. 2018).

296. *Grady v. City of Greenville*, 123 S.E. 494, 501 (S.C. 1924).

297. *Monumental Task Comm., Inc. v. Foxx*, No. 15-6905, 2016 U.S. Dist. LEXIS 137347, at *21 (E.D. La. Oct. 4, 2016).

298. *McGraw*, 215 So. 3d at 327.

299. *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 586 (E.D. La. 2016).

300. *Callan v. Fischer*, No. 3:16-CV-734, 2016 WL 6886870, at *1 (W.D. Ky. Nov. 19, 2019).

V. A LINGUISTIC ANALYSIS OF CONFEDERATE MONUMENT REMOVAL CASE LAW & ITS APPLICATION TO THE PUBLIC ART THEORY FRAMEWORK

This research analyzed twenty-two cases and compiled 321 pieces of unique linguistic units³⁰¹ from those cases.³⁰² The linguistic units were coded with a speech code for one of the six emergent, rhetorical categories: artistic content/context; patronage; art as speech; ownership interests; physical integrity; or public utility. The linguistic units were further coded with a proponent code indicating which speaker was invoking or utilizing the public art principle. The proponent codes included the plaintiff, defendant, or court. The linguistic units were further coded with a location code indicating where in the judicial opinion that speech unit was appearing. The location codes included the background, analysis, or holding. This section discusses the emergent trends arising from that coded data, including (A) the overall trends; (B) trends broken out by proponent; (C) trends broken out by location; and (D) trends broken out by the rhetorical code.

A. Overall Trends

Overall Trends. The average number of times a party or court addressed a monument in a single case was 13.9. The median was 11. The number of times a party or court addressed the monument ranged from 1 time to 42 times in a single case, for a range of 41 times.

Overall Code Trends. The coded language with the most frequency related to the more symbolic and ethereal aspects of the Confederate monuments—who “owns” them and what they “mean.” This trend is evident in the fact that the ownership interests and patronage codes (ownership), along with the speech code (symbolic meaning) are the three most frequently used ways of addressing the Confederate monuments emergent in the case law, all together accounting for over 63% of the uses. On the contrary, the codes related to the physical, material nature of the artworks themselves show up with the least frequency—the physical integrity of the art, the description of the art, and public utilization concerns of the spaces containing the art.

301. The research did not prescribe the length of any linguistic unit. A linguistic unit tended to be formed from a contiguous section of text that correlated to one of the emergent speech codes. Linguistic units ranged from sentence fragments to sets of paragraphs.

302. The complete data set with each individual linguistic unit and its respective coding is on file with the author. The results are summarized in Table 15. See *infra* Table 15.

Table 1: Growing Order of Code Frequency

Physical Integrity	Public Utility	Artistic Content/ Context	Patronage	Art as Speech	Ownership Interests
11.84%	12.15%	12.46%	16.80%	21.5%	25.23%

Overall Proponent Trends. The proponent codes for each linguistic unit showed that all parties addressed the public art implications of the monuments in some way. However, the court and the plaintiffs were much more likely to do so than defendants. The courts, in their own right, discussed the Confederate monument(s) directly in over half of the speech acts. The plaintiffs invoked public art considerations related to the monuments over a third of the time. In sharp contrast, the defendants utilized public art principles less than one-fifth of the time.

Table 2: Proponent Frequency

Plaintiff	Defendant	Court
33.96%	15.58%	50.47%

Overall Location Trends. The study next analyzed where in the judicial opinion these public art principles were being utilized: the background recitation of facts, the legal analysis, or the holding(s). Overall, public art principles were most often invoked in the analytical sections of judicial opinions. They showed up in the data in the analysis section just under half the time. Unsurprisingly, the next-most prevalent location was the background recitation of facts, where these linguistic units were found in just under one-third of the data. Lastly, public art principles were only invoked by a court as part of its holding about one-fifth of the time.

Table 3: Location Frequency

Background	Analysis	Holding(s)
31.46%	48.90%	19.63%

B. Trends by Proponent

The research also analyzed how the six categories were being used by specific proponents: plaintiffs, defendants, or the court itself. Those results are summarized in the Proponent by Code Table.

Table 4: Proponent by Code

	Artistic Content/ Context	Patronage	Art as Speech	Ownership Interests	Physical Integrity	Public Utility
Plaintiff	2.50%	31.48%	42.03%	41.78%	42.11%	33.33%
Defendant	15.00%	14.81%	14.49%	11.11%	7.89%	33.33%
Court	77.50%	53.70%	43.48%	46.91%	42.11%	33.33%
# of Total Linguistic Units	40	54	69	81	38	39

The public utility category produced the most parity—with plaintiffs, defendants, and courts each using language about the usage of public space to support their respective points approximately one-third of the time. This result is encouraging. It shows that all parties to Confederate monument removal litigation equally value the function that public spaces can play in our democracy. Given this shared value, practitioners and jurists alike can use the public utility concept as a starting point for finding common ground and resolving litigation.

Courts are more likely than litigants to use language related to the art itself—what the monument looked like, what materials were used, who the artist was, et cetera, and by a wide margin. Practitioners, thus, are leaving behind an advocacy opportunity to invoke the artistry of a particular monument for persuasive effect.

Courts are also the most likely to use language related to patronage and ownership issues. This result is attributable to the fact that courts often rely on property rights to decide the issues presented in monument removal cases. However, this trend leaves room for advocates to invoke broader principles of public art ownership. If public art “belongs” to the public in a policy sense,³⁰³ if not a legal one, advocates miss an opportunity to discuss the implications to the public imposed in removal litigation.

However, language around due process concerns, while emergent in the ownership interest data, were not prevalent enough to justify their own rhetorical

303. See *Monumental Task Comm., Inc.*, 157 F. Supp. 3d at 597.

speech category. Given that due process is also a shared value underpinning our legal system, this result presents an opportunity for jurists and practitioners alike. Governmental entities are well-advised to consider the importance of due process on the front-end, prior to the institution of litigation. Accessible and frequent opportunities for public comment and consideration may insulate governmental entities from backlash related to any decision to remove a Confederate monument.³⁰⁴ Because the facts a court chooses to emphasize can shape public policy, courts should emphasize the procedural steps taken by the litigants to promote public participation in decisions surrounding removing Confederate monument. Doing so would also coincide with trends in public art in America, which are seeing a move toward more community-based art projects.³⁰⁵

Plaintiffs and courts almost evenly split airtime on the issues of free speech and the physical integrity of the art piece. As courts and plaintiffs vie for defining what a particular Confederate monument is “saying,” defendants miss the opportunity to argue that these monuments are creating a message inimical to the majority of citizens that the government defendants represent. Furthermore, by failing to state that they care about the physical integrity of the artwork, defendants are missing an opportunity for reconciliation with those citizens who do not want to see the monuments removed. Defendants could invoke such language to prove that they have been thoughtful about what happens to the monuments once they have been removed from public property and relocated or sold.

What these trends further reveal is that removal defendants—often governmental entities—never command the most airtime in any category. Thus, governmental entities for some reason shy away from addressing any public art principles implicated by Confederate monuments. They are not “owning” the public art issue. Therefore, government advocates, who often promote removal, are missing a significant opportunity to address why the removal of Confederate monuments would be important to the publics they represent.

The research also looked at the corollary relationship—how plaintiffs, defendants, and courts split their own respective airtime between the six categories.

304. *See, e.g., id.* at 598.

305. Clements, *supra* note 34, at 23–24 (“So another radical move has been away from individual artistic intention to a more collective approach and methodology that considers the public, its rights, opinions and creativity.”).

Table 5: Code by Proponent

	Plaintiff	Defendant	Court
Artistic Content/ Context	0.90%	12.24%	19.08%
Patronage	15.45%	16.33%	16.76%
Art as Speech	26.36%	20.41%	17.34%
Ownership Interests	30.91%	18.37%	21.97%
Physical Integrity	14.55%	6.12%	10.98%
Public Utility	11.82%	26.53%	13.87%
Total # Linguistic Units	110	49	173

Organized in ascending order by proponent, the data shows the following trends:

Table 6: Growing Order of Frequency by Plaintiffs

Artistic Content/ Context	Public Utility	Physical Integrity	Patronage	Art as Speech	Ownership Interests
0.90%	11.82%	14.55%	15.45%	26.36%	30.91%

Table 7: Growing Order of Frequency by Defendants

Physical Integrity	Artistic Content/ Context	Patronage	Ownership Interests	Art as Speech	Public Utility
6.12%	12.24%	16.33%	18.37%	20.41%	26.53%

Table 8: Growing Order of Frequency by Courts

Physical Integrity	Public Utility	Patronage	Art as Speech	Artistic Content/ Context	Ownership Interests
10.98%	13.87%	16.76%	17.34%	19.08%	21.97%

Broken out in this way, the data shows how each type of proponent—plaintiffs, defendants, and courts—tends to split its linguistic currency among the six different ways of addressing the public art implications of Confederate monuments.

Plaintiffs. Plaintiffs, perhaps unsurprisingly, spend the most time using language related to property rights and ownership—in the copyright of the monuments, in the monuments themselves, in the land underneath the monuments, etc. The argument is that the ownership interest, whatever it may be, gives the plaintiffs power to block a removal action.³⁰⁶ This notion of blocking a public removal action by virtue of a private ownership right runs contrary to public art principles.³⁰⁷ The logic relies on a claim that public art is not truly public, that it can be privately owned by individual constituents. Defendants would do well to point out such contradictions in their advocacy.

Plaintiffs spend the second highest amount of airtime devoted to the idea that art can function as speech. Plaintiffs were quick to merge their own individual rights to freedom of speech with the message they ascribed to the monuments.³⁰⁸ However, courts have been equally quick to assert that this argument is not legally sound.³⁰⁹ This result is consistent with public art principles in which art is open to multiple (and changing) interpretations.³¹⁰ While plaintiffs may rightfully ascribe one meaning to the monuments, there are other publics that may take very different meanings away from the monuments. Thus, the idea that meaning in public art is community-mediated necessitates the legal result that a Confederate monument cannot be synonymous with any one plaintiff's speech. Instead of wasting page space dedicated to such arguments, plaintiffs should look at the other ways public art functions.

Plaintiffs spent very little airtime on the artistic content/context or on public utility principles. Even when fighting a losing removal battle, plaintiffs could focus on the artistic content/context of monument works to advocate for their disposition upon removing them from the public sphere. Plaintiffs may be more successful in seeing the monuments preserved in a museum, for example, instead of auctioned off to a private bidder if they invoked such public art principles. Similarly, by highlighting the value of using public spaces as places for democratic dialogues,³¹¹ defendants could undermine plaintiffs' arguments by showing how those arguments limit the Confederate monument's function to the

306. See *supra* Section IV.D.

307. See, e.g., *McGraw v. City of New Orleans*, 16-0446, p. 24–25 (La. App. 4 Cir. 3/29/17); 215 So. 3d 319, 332.

308. See, e.g., *Patterson v. Rawlings*, 287 F. Supp. 3d 632, 640–41 (N.D. Tex. 2018).

309. See, e.g., *id.* at 641–42; see also *supra* Section IV.C.

310. See *Senie & Webster*, *supra* note 16, at 172–73.

311. See *supra* Section III.B.3 and notes 164–65.

individual—as a way to preserve plaintiffs’ personal heritage and beliefs—instead of more properly focusing on the monument’s public function.

Defendants. Defendants spent the most time invoking public utility principles when addressing Confederate monuments—often to show that the Confederate monument was negatively impacting the usage of public space by causing a nuisance, for example.³¹² This rhetoric is both consistent and inconsistent with principles related to public art. On the one hand, public art is meant to create dialogue and the democratic exchange of differing viewpoints.³¹³ So just because a Confederate monument may spark controversy in a public space does not mean that the public artwork no longer fulfills its function. On the other hand, if exchanging viewpoints functions more like the battlefield than the democratic agora, then the public art is perhaps no longer mediating a democratic space. Defendants should make more of a direct connection between these public utility concerns and public art theories to show how the Confederate monuments are not creating truly public spaces.

The next-most utilized categories for defendants were art as speech and ownership interests. Defendants mainly claimed that the Confederate monuments, as public works, represented government speech, and that the government was entitled to speak (or not) as it pleased.³¹⁴ In essence, the government owned the works, and the government, therefore, had the right to dispose of the works as the government wished. While true, defendants may be missing an important opportunity for advocacy. By acknowledging the public art principles of community-mediated meaning,³¹⁵ defendants could bolster their reasoning and arguments for removal. Rather than an initiative coming from the government, governmental defendants should recast their removal initiatives as a representative action by the people and for the people.

On the other hand, defendants spent the least amount of time discussing the physical integrity of the artwork or the artistic content/context itself. Instead of running from the fact that a monument is a work of marble or bronze created by a skilled artist, for example, defendants should address (and draw the sting from) the fact that Confederate monuments actually required great artistic skill to create. Giving credence to the work’s artistry instead of its variant messaging may be one way for defendants to find a point of common ground with citizens opposed to removal to build a better, less contentious environment for the removal.

312. See, e.g., *McGraw*, 215 So. 3d at 327–28.

313. See *supra* Section III.B.3.

314. See *supra* Section IV.C.

315. See *Clements*, *supra* note 34, at 19.

Courts. Courts focused most of their speech on ownership interest issues, which is unsurprising given that ownership and control were central issues to the holdings in the case law. Courts focused next on the artistic content/context of the pieces, but largely did so in a neutral way since neither plaintiffs nor defendants made persuasive use of the artistic content/context of the works. Given that this category of speech showed up as the second-most frequent for courts, advocates should understand the value that courts place on the artistic content and context of Confederate monuments in their judicial opinions.

While courts spent a majority of their speech on ownership issues, courts focused little of that speech on due process concerns related to the monuments. By highlighting the *process* that governmental defendants have gone through before removal, even if only in their factual recitations, courts may be able to emphasize the importance of this practice to future litigants. This practice would be consistent with public art principles where Americans commonly see a very deliberate process built up around the installation of public art.³¹⁶ If courts use their opinions to highlight the importance of a similar process in the *deinstallation* of public art, communities may start to see local and state-level governments organizing removal decisions in much the same way that local and state-level arts organizations currently organize the bidding and vetting process for handling the selection and installation of public art. This dialogue may even spur collaborations in which current artists recontextualize or situate existing Confederate monuments so effectively that removal becomes unnecessary.³¹⁷

Courts also spent very little airtime on public utility concerns. Courts could bolster their decisions related to Confederate monument cases by invoking this value proposition in public art policy. By acknowledging that public artworks function in citizens' daily lives by shaping the public spaces where citizens live and work, courts could add another policy rationale to their holdings.

Lastly, the research evaluated where the proponents were utilizing the various types of public art principles in judicial opinions, as represented below:

Table 9: Proponent by Location

Units	Proponent	Background	Analysis	Holding
110	Plaintiff	32.73%	66.36%	0.90%
49	Defendant	44.90%	55.10%	0.00%
162	Court	26.54%	35.19%	38.27%

316. See, e.g., METRO ARTS NASHVILLE OFFICE OF ARTS + CULTURE, *supra* note 278, at 1-2.

317. See, e.g., West, *supra* note 186.

Unsurprisingly, this data shows that plaintiffs and defendants do not frequently invoke public art principles in the holdings of cases because a court is usually speaking by and for itself at that part of the judicial opinion.

Plaintiffs and defendants alike have the bulk of their speech related to public art principles in analysis sections of judicial opinions, which are usually longer than background sections. Courts, however, almost evenly split their time discussing public art principles between the analysis and the holdings.

C. Trends by Location

The research also analyzed the locations where each of the six speech codes were typically used to better understand how they functioned in judicial decision-making. The first table identifies how the linguistic units coded for the background, analysis, and holding sections, respectively, were spread across the six speech categories.

Table 10: Location by Code

	Background	Analysis	Holding
Artistic Content/Context	27.72%	7.00%	1.59%
Patronage	20.79%	17.20%	9.52%
Art as Speech	14.85%	22.93%	28.57%
Ownership Interests	13.86%	24.84%	44.44%
Physical Integrity	10.89%	14.01%	7.94%
Public Utility	11.88%	14.01%	7.94%
# of Units Coded for Background/Analysis/Holding	101	157	63

Broken out by opinion section, the frequency of a particular code in each location is:

Table 11: Growing Order of Code Frequency in Background

Physical Integrity	Public Utility	Ownership Interests	Art as Speech	Patronage	Artistic Content/Context
10.89%	11.88%	13.86%	14.85%	20.79%	27.72%

Table 12: Growing Order of Code Frequency in Analysis

Artistic Content/Context	Physical Integrity	Public Utility	Patronage	Art as Speech	Ownership Interests
7.00%	14.01%	14.01%	17.20%	22.93%	24.84%

Table 13: Growing Order of Code Frequency in Holding

Artistic Content/Context	Physical Integrity	Public Utility	Patronage	Art as Speech	Ownership Interests
1.59%	7.94%	7.94%	9.52%	28.57%	44.44%

Background. The artistic content/context code dominates the background section of the judicial opinions along with the patronage code, which, together, make up almost half of the linguistic units in the background sections. This result is logical given that a court typically needs to identify what monument is at issue before proceeding with an analysis of the legal issues affecting that monument. Similarly, patronage is often part of this initial “story” of the monument, so it shows up frequently in the background section. What shows up less is language related to the ownership interests in a work or the symbolic messages that work may have in a given community. If the ownership interests are disputed and the symbolic message of the public artworks is similarly being litigated, it makes sense that these categories would not appear in a typical recitation of the undisputed facts underlying a piece of litigation.

What shows up least in the background sections is language related to the public utility and the physical integrity of the artwork. If courts want to use their platform to encourage more democratic processes and consensus building around public art’s utilization and function in a public space, then fronting and highlighting those facts in the background sections could be an important way to raise the profile of this issue moving forward.

Analysis. In a slight reversal from the background section, the ownership interests code leads the analysis section. While this result makes sense because courts often decide legal outcomes based on property rights, courts should also be cognizant of the delicate nature of “ownership” in relation to public works of art.³¹⁸ The governmental entity may technically own the work, but the citizenry who encounters the art in the public landscape daily and who elects governmental

318. See, e.g., *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 506 (E.D. La. 2017).

officials are the ones who mediate the meanings of public art. Ultimately, it is the will of the people that influences whether government officials vote to remove artworks from the public landscape.³¹⁹ Courts acknowledging this principle of public art would bolster their opinions when ruling for the governmental entities who act on behalf of the citizen-owners.

The ownership code, together with the art as speech code, accounts for almost half of the coded speech in analytical sections. Communities not only receive messages from public art, but they also create messages that they put *onto* the public artwork, and those messages depend on demographics and cultural movements.³²⁰ Therefore, courts should recognize that a Confederate monument's "speech" is derivative of the community where it is sited. And, in a democratic society, that community should ideally be reflected in the work of its elected officials. Courts acknowledging this principle of public art could further bolster their opinions that Confederate monument "speech" is simply government speech. Indeed, government speech is, ideally, the people's speech. If the citizenry is ready to remove the Confederate monuments due to messages being projected onto or received from them, then courts could give credence to this interplay between the people's speech and government speech.

Holding. Logically, the frequency of coded speech appearing in the holdings mirrors the order of code frequencies in the analysis section. However, in the holding sections of judicial opinions, the ownership interests code predominates in an even more pronounced fashion. Together, language coded as dealing with an ownership interest or speech make up almost three-quarters of the coded units in holdings. Simultaneously, speech coded for artistic content/context falls almost entirely out of the equation.

D. *Trends by Code*

Looking at the data from the angle of the codes first, similar patterns emerge. The following table looks at the linguistic units coded for each of the six speech codes and then summarizes how each type was spread between the three locations.

319. See, e.g., *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 603–04 (E.D. La. 2016).

320. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 474–75 (2009).

Table 14: Code by Location

	Artistic Content/Context	Patronage	Art as Speech	Ownership Interests	Physical Integrity	Public Utility
Background	70.00%	38.89%	21.74%	17.28%	28.95%	30.77%
Analysis	27.50%	50.00%	52.17%	48.15%	57.89%	56.41%
Holding	2.50%	11.11%	26.09%	34.57%	13.16%	12.82%
# of Units Coded	40	54	69	81	38	39

Language dealing with the artistic composition of a public monument and the context in which it should be viewed appears overwhelmingly in the background sections of judicial opinions, makes some appearance in the legal analysis, and then is negligible and rarely found in holdings. This result makes sense. Courts would have to describe and discuss the monument in the background section to introduce the reader to the property at issue. But if the background section is the only place courts discuss the materiality of the artwork, then the reality of the monument's physicality in the built environment may be diminished. No matter the outcome of a case, a court could discuss the importance of context when writing about the parties' intended disposition of a monument.

Each of the other speech codes appears most frequently in the analytical segments of judicial opinions. After the analysis section, language related to the physical integrity of a Confederate monument, the public's use of the public space containing a Confederate monument, and the patronage behind such a monument is more likely to show up in the background facts section than in the holding. The reverse is true for the categories dealing with art as speech and ownership interests.

Code by Location by Proponent. Considered all together, the following table identifies where and by whom the most frequently used types of speech in this study occurred:

Table 15: Frequency of Appearance Overall³²¹

	40 Units	Background	Analysis	Holding
1 Artistic Content/ Context	Courts	22 (6.85%)	10 (3.12%)	1 (0.31%)
	Defendants	5 (1.56%)	1 (0.31%)	0
	Plaintiffs	1 (0.31%)	0	0
2 Patronage	54 Units	Background	Analysis	Holding
	Courts	9 (2.80%)	14 (4.36%)	6 (1.87%)
	Defendants	4 (1.25%)	4 (1.25%)	0
	Plaintiffs	8 (2.49%)	9 (2.80%)	0
3 Art as Speech	69 Units	Background	Analysis	Holding
	Courts	3 (0.93%)	9 (2.80%)	18 (5.61%)
	Defendants	3 (0.93%)	7 (2.18%)	0
	Plaintiffs	9 (2.80%)	20 (6.23%)	0
4 Ownership Interests	81 Units	Background	Analysis	Holding
	Courts	3 (0.93%)	8 (2.49%)	27 (8.41%)
	Defendants	3 (0.93%)	6 (1.87%)	0
	Plaintiffs	8 (2.49%)	25 (7.79%)	1 (0.31%) ³²²
5 Physical Integrity	38 Units	Background	Analysis	Holding
	Courts	5 (1.56%)	9 (2.80%)	5 (1.56%)
	Defendants	0	3 (0.93%)	0
	Plaintiffs	6 (1.87%)	10 (3.12%)	0
6 Public Utility	39 Units	Background	Analysis	Holding
	Courts	1 (0.31%)	7 (2.18%)	5 (1.56%)
	Defendants	7 (2.18%)	6 (1.87%)	0
	Plaintiffs	4 (1.25%)	9 (2.80%)	0

Courts discussing ownership interests as part of the holding made up the most frequent type of coded data, followed closely by plaintiffs invoking ownership interest arguments as part of the legal analysis. The next two most

321. The number of overall linguistic units was 321 and served as the denominator to create the percentages in this table. The number of units for each location in the matrix is represented by the first number, and the percentage out of 321 is in parentheses.

322. This unit is an anomaly created by the way the court in that case phrased its holding in which it incorporated (and refuted) the contention of the plaintiff. *See* Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm'n, No. 17-1346, 2018 U.S. Dist. LEXIS 13205, at *18 (W.D. La. Jan. 26, 2018). The court stated, "UDC has failed to demonstrate a substantial likelihood of success on the merits of its contention that it owns the plot of land where the Confederate Monument sits, it has no substantial likelihood of success on the constitutional claims its [sic] asserts based on this alleged property interest." *Id.*

common ways language about the Confederate monuments was used were that courts discussed the artistic content/context in the background sections of judicial opinions and plaintiffs invoked art-as-speech principles in the legal analysis.

VI. THE OPPORTUNITY FOR PRACTITIONERS AND JURISTS

The bottom line is that language matters. The way jurists and practitioners use language about Confederate monuments influences public art policy, and public art policy, in turn, influences the language that participants in the legal system use to think about and address the monuments. This reciprocal process influences public, democratic spaces, so it should not be ignored.

The analytical rubric proposed here (speech type/proponent/location) offers a way to understand how public art principles function in both advocacy and judicial decision-making—especially where courts and litigants do not expressly address the Confederate monuments *as public art*. The rubric could be applied to future federal court decisions, appellate state court decisions, and state trial court decisions, where available. It could also be applied to the parties' briefs where available. As more textual data become available, the coding could be further refined and tested by future researchers.

By understanding the content of the language used to address Confederate monuments, who is typically using that content, and where it is likely to influence a judicial opinion, jurists and practitioners alike can better understand (and influence) the discourse between art policy and Confederate monument removal case law. Courts do not have to pick a side of the removal debate to highlight the public art principles that might be in play in a Confederate monument removal case.³²³ And by making the implicit art policy discourses *explicit*, practitioners and jurists should arrive at better outcomes for the public, who must live in and interact with these public spaces.

This section identifies some rhetorical opportunities based on the trends in the linguistic data, and it organizes those opportunities in light of the three value propositions inherent in public policy related to public art.

The Historic Value Proposition: Art as Monument. First, advocates should engage with the fact that Confederate monuments require artistry. Because courts are more likely to discuss the artistic content and context of the works, the parties could appeal to the court's interest for more persuasive effect. For example, plaintiffs may draw upon the monument's artistic value and properties to argue for better dispositions of the pieces after removal—such as

323. See Clowney, *supra* note 37, at 37–38 (noting that one of the difficulties of a legal “ban on racialized spaces” is the lack of “institutional competence” courts have “to make judgments about the meaning and implications of the built environment”).

moving the monument to a museum. Because courts tend to discuss the artistic content of the piece in the background section anyway, courts could add a discussion of the artistic context no matter which way the case turns out to promote the value for preserving art while simultaneously acknowledging the context in which it was created. Second, defendants could address the physical integrity of the monuments as a point of common ground with plaintiffs, and plaintiffs could emphasize the physical integrity of the pieces in terms of advocating for their care upon removal.

The Functional Value Proposition: Art as Amenity. First, plaintiffs, defendants, and courts split the airtime on the public utility question evenly, showing an equally-shared value for the way the public uses the artwork and the spaces the artwork creates. Practitioners and jurists, thus, should use the public utility concept as a point of common ground in resolving Confederate monument removal litigation. Second, the public utility concept was the most utilized concept by defendants. Thus, governmental entities could bolster this line of argument by drawing more explicit connections to the way the art functions in the community. They could do this by highlighting how the monument is not creating spaces for democratic dialogues and by highlighting how the speech being ascribed to the monuments does not reflect the values of the local community for whom the government is supposed to speak.

The Democratic Value Proposition: Art as the Agora. First, courts could begin drafting their opinions with the importance of procedural due process in mind. In the context of the American landscape regarding public art, the trend in public art lies in a movement toward community art projects.³²⁴ While Confederate monuments are not “participatory” art in the modern sense, courts could honor the value for community engagement by highlighting the need for participatory decision-making processes relating to public art, especially controversial public art like Confederate monuments.

For example, the Eastern District of Louisiana was careful to highlight the importance of the community processes surrounding the removal of the New Orleans monuments. In its decision, the court reasoned:

Plaintiffs had an opportunity to be heard at a meaningful time and in a meaningful manner. In addition to soliciting reports and recommendations from various agencies and public officials, the City considered the removal of the monuments in two separate meetings

324. See, e.g., *Shreveport Chapter No. 237 of the United Daughters of the Confederacy v. Caddo Par. Comm'n*, No. 17-1346, 2018 U.S. Dist. LEXIS 70680, at *8–9 (W.D. La. Apr. 26, 2018) (recounting the defendant Commissioners’ call for public input, published in the local paper, “the *Shreveport Sun*, which read . . . The Confederate Monument Must Go. Please join me and the Caddo Parish Commissioners as we discuss the future of the Confederate Monument at the Caddo Parish Courthouse . . . We need your voices to be heard.”).

including over six hours of public comment on the subject. Further, it appears the Plaintiffs participated and spoke at the public meetings discussing the ordinance to remove the monuments. Thus, Plaintiffs were given a meaningful opportunity to be heard.³²⁵

Because the data did not show that speech related to due process concerns was sufficient to justify its own category, there is an opportunity there for courts to highlight procedural facts in a way that encourages such public processes. Second, government defendants should emphasize that governmental entities are a proxy for the public. In a representative democracy, governmental entities are merely a stand-in for the will of the people. Governmental defendants should draw a more direct connection between themselves and the people they represent to emphasize that the government's speech or the government's ownership is really that of the people. By emphasizing the public by proxy nature of their position in the litigation, governmental defendants could appeal to and make better use of the principle that public art should create spaces for democratic interchange.

Such advocacy strategies could be utilized in any of the typical Confederate monument claims. Additionally, they may be especially suited for argument and analysis of the public policy factor when injunctive relief is requested. Public art policy is at the center of the policy concerns in Confederate removal cases.

In addition to the recommendations related to Confederate monument removal litigation, legislators and community organizers should use these three value propositions, as well as the linguistic trends shown here, to advocate for the amendment of the "statue statutes" to allow more local governmental control over monument removal processes. Because local governments are the ones closest to the will of the people in a given community, local governments are best positioned to decide when the historic, functional, and/or democratic value of a particular Confederate monument/public artwork no longer serves those roles in a given community.

VII. CONCLUSION

We ignore the fact that Confederate monuments function as public art to our disadvantage. Public artworks shape the public landscape and the public consciousness. Therefore, practitioners and jurists alike should be aware of the ways in which public art acts—historically, functionally, and democratically. And they should be conversant about how public art functions generally, so that they are prepared to speak about the way a particular Confederate monument functions specifically in a given case. This research provides insight into the way

325. *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 598 (E.D. La. 2016).

that public art policy is being currently addressed in relation to Confederate monuments and the ways in which it is not. It also provides a framework for thinking and talking about public art's value, so that both advocates and jurists can consciously frame these public art issues as they come up in cases and legislative proposals.

