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CONFEDERATE MONUMENTS AS BADGES OF SLAVERY

*Alexander Tsesis**

ABSTRACT

This Article develops a Thirteenth Amendment theory supporting the removal of Confederate symbols from government properties. It argues that such monuments to the Lost Cause are badges of slavery that should have no place in public squares.

The Article discusses how white supremacist groups, such as those who participated in the 2017 Unite the Right March in Charlottesville, effectively draw together around monuments honoring leaders and soldiers who fought for the cause of slavery. Relying on the Thirteenth Amendment's principles of freedom, States and municipalities can and should eliminate those monuments from their properties. Such policy initiatives communicate the government's disapproval of secession's racist premises and advance the nation's commitment to equal liberty untainted by the Confederacy's peculiar institution.

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INTRODUCTION

One and a half centuries after the guns of Civil War ceased to spew their deadly lead, monuments throughout the South continue to stand as badges of a rebellion undertaken to preserve the South's peculiar institution. Despite the Thirteenth Amendment's ban against the badges of slavery or involuntary servitude,² States have thrown up roadblocks against the removal of Confederate monuments in cities such as Atlanta, Georgia; Birmingham, Alabama; and Memphis, Tennessee.³ In some locations, as at Stone Mountain in Georgia, removal is complicated by the enormous size of the commemorative relief.⁴ These monuments memorialize the achievements of military prowess brandished in support of slavery. They are not solely historical markers nor burial obelisks but symbols of racist heritage.

Several States glorify Confederate soldiers' heroism by statutorily protecting statues and obelisks erected to honor them,⁵ without condemning slavery for which they fought or praising the ratification of the Thirteenth Amendment through which the nation abolished slavery. A number of cities have sought to remove Confederate monuments against States' policies. After the City of Birmingham erected a plywood barrier to disguise a monument to the memory of Confederate sailors and soldiers, the Alabama Attorney General brought a lawsuit for the barrier's removal.⁶ He brought the case under the Alabama Memorial Preservation Act, which prohibits removal of any monument that has been located in a public place for forty or more years.⁷ The trial court held that "[j]ust as the state could not force any particular citizen to post a pro-Confederacy sign in his or her front lawn, so too can the state not commandeer the city's property for the state's preferred message."⁸ The Alabama Supreme Court ruled against the city of Birmingham, however, and found that it had

² U.S. CONST. amend. XIII, § 1; Jamal Greene & Jennifer Mason McAward, *A Common Interpretation: The Thirteenth Amendment*, NAT'L CONST. CTR.: CONST. DAILY (Dec. 6, 2016), <https://constitutioncenter.org/blog/a-common-interpretation-the-thirteenth-amendment> [perma.cc/X55Y-7ZLN].

³ Nicquel Terry Ellis, *Blocked from Taking Confederate Statues Down, Atlanta, Birmingham, Memphis Try Other Ideas*, USA TODAY (Mar. 13, 2019, 5:54 PM), <https://www.usatoday.com/story/news/nation/2019/02/12/confederate-monuments-leaders-cities-removal-alternatives-civil-rights-groups/2525178002/> [perma.cc/WXX9-YH8H].

⁴ See *Carving Size*, STONE MOUNTAIN GUIDE, <https://www.stonemountainguide.com/Carving-Size.html> [perma.cc/JZW3-6JUC].

⁵ See, e.g., GA. CODE ANN. § 50-3-1 (2019); N.C. GEN. STAT. ANN. § 100-2.1 (West 2019); Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412 (West 2019); An Act Relating to Monuments and Memorials, H.B. 97, 2019 Leg. (Fla. 2019) (proposed Florida memorial law); see also Orlando Sentinel Editorial Board, *In This Bill, Confederate Soldiers are Heroes, But Not Civil Rights Leaders*, ORLANDO SENTINEL (Jan. 28, 2019, 10:25 AM), <https://www.orlandosentinel.com/opinion/editorials/os-op-confederate-statue-protection-bill-florida-20190129-story.html> [perma.cc/T359-RUNY] (discussing a Florida congressman's support of a bill that would render illegal the removal of Confederate symbols).

⁶ Brian Lyman, *AG Sues Birmingham for Hiding Confederate Monument*, MONTGOMERY ADVERTISER (Aug. 16, 2017, 6:06 PM), <https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/08/16/alabama-attorney-general-sues-birmingham-hiding-confederate-monument/573980001/> [perma.cc/KJ99-8KH1Y].

⁷ ALA. CODE § 41-9-232 (2019). The waiver for removing the statue does not apply to the older Confederate statues. *Id.*; see *id.* § 41-9-235.

⁸ Brian Lyman, *Judge Rules Alabama's Monument Protection Law Unconstitutional*, USA TODAY (Jan. 15, 2019, 2:50 PM), <https://www.usatoday.com/story/news/2019/01/15/judge-rules-alabamas-monument-protection-law-unconstitutional/2581741002/> [perma.cc/RQF7-V8QK].

no free speech right.⁹ In Memphis, to avoid complying with the State Heritage Protection Act,¹⁰ the City Council approved the sale of parks to a nonprofit organization that vowed to remove confederate symbols,¹¹ rather than abiding by a Tennessee law protecting them.¹² And, in North Carolina, protestors took vigilante action on the Chapel Hill campus to topple a Silent Sam statue.¹³ This property destruction cost the Board of Governors of the University of North Carolina system and the University of North Carolina \$2.5 million paid in a pre-trial settlement to the Sons of the Confederate Veterans.¹⁴ More organized removals occurred in Winston-Salem and Pittsboro, North Carolina.¹⁵ That state's monument law remains in force, however, preventing removal of Confederate monuments on North Carolina state grounds.¹⁶ The lack of uniformity is empowering, but it also leaves legal uncertainty of how cities should approach the problem in the future.

The free speech claims that failed in Birmingham were also not determinative in a circuit court in Charlottesville, Virginia, the location of a 2017 violent, white supremacist protest.¹⁷ Indeed, one writer has rightly said that, “[u]nder current doctrine, a city *qua* city cannot readily invoke the First Amendment to protect its decision to remove Confederate monuments, nor can it readily assert a collective constitutional or civil right to be free from fear and intimidation.”¹⁸ After the Charlottesville riots, the trial judge for the Circuit Court of the City of Charlottesville found that the state law¹⁹ did not infringe on the city's expression nor did it commandeer municipal alderman.²⁰

The Thirteenth Amendment provides an alternative legal instrument for city autonomy against the continued glorification of Confederate symbols, which are arguably the badges of slavery. In the words of the Mayor of Birmingham, a monument to the Confederacy is “a monument to segregation. It's a monument to human bondage. It's a monument to sedition and the breakup of the United States of

⁹ State v. City of Birmingham, No. 1180342, 2019 WL 6337424, at *10–11 (Ala. Nov. 27, 2019).

¹⁰ Tennessee Heritage Protection Act of 2013, TENN. CODE ANN. § 4-1-412 (West 2019).

¹¹ Ryan Poe, *Chancellor: Memphis Confederate Statues Takedown was Legal*, MEM. COM. APPEAL (May 16, 2018, 7:34 PM), <https://www.commercialappeal.com/story/news/government/city/2018/05/16/chancellor-memphis-confederate-statues-takedown-legal/617518002/> [perma.cc/EV5G-MKBR].

¹² Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412 (West 2019).

¹³ Jane Stancill, *Protesters Topple Silent Sam Confederate Statue at UNC*, NEWS & OBSERVER (Aug. 20, 2018, 8:05 PM), <https://www.newsobserver.com/news/local/education/article217035815.html>.

¹⁴ Karen L. Cox, *Opinion, With 'Silent Sam' Deal, UNC has Betrayed Its Mission*, CNN (Dec. 7, 2019, 11:08 AM), <https://www.cnn.com/2019/12/07/opinions/unc-sons-of-confederate-veterans-silent-sam-cox/index.html> [perma.cc/NCN2-2NZA]; see also Kate Murphy & Martha Quillin, *Outraged UNC Students and Faculty Slam Silent Sam Decision and Fear for Campus Safety*, CHARLOTTE OBSERVER (Dec. 5, 2019, 6:54 PM), <https://www.charlotteobserver.com/news/local/education/article238038574.html>.

¹⁵ Associated Press, *Another Confederate Statue Comes Down in North Carolina*, ATLANTA NEWS NOW (Nov. 20, 2019), <https://www.ajc.com/news/another-confederate-statue-comes-down-north-carolina/unJse7oCZLVQaJWQZM0ohO/> [perma.cc/XV4X-33SY].

¹⁶ N.C. GEN. STAT. ANN. § 100-2.1 (West 2019); see also Lynn Bonner, *Keep Confederate Monuments in Raleigh, State Commission Recommends*, NEWS & OBSERVER (Aug. 22, 2018, 11:30 AM), <https://www.newsobserver.com/news/politics-government/article217124550.html>.

¹⁷ See *infra* Parts I–II.

¹⁸ Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 61 (2018).

¹⁹ VA. CODE ANN. § 15.2-1812 (West 2019).

²⁰ See *infra* Section III.A.

America.”²¹

I do not mean to say that the Thirteenth Amendment is the only appropriate approach to the removal of Confederate monuments. In addition to the use of the First Amendment claim, Micah Schwartzman and Nelson Tebbe have rightly asserted that Confederate monuments “communicate a message of racial inferiority.”²² The Equal Protection Clause of the Fourteenth Amendment gives cities power to choose to remove them without state interference.²³ Yet, even here, whether courts would adopt such an approach to equal protection jurisprudence is doubtful. An alternative strategy, taken up by this Article, is grounded on the Thirteenth Amendment. This additional option is bound to enrich municipalities’ strategies for removing Confederate symbols from publicly owned properties.²⁴ The Thirteenth Amendment prohibition against the badges of slavery historically and normatively grounds efforts to remove Confederate symbols from government properties.

This Article examines how municipalities can undertake a neo-abolitionist defense against state encroachment into decisions to take down Confederate monuments. It evaluates an affirmative defense that municipalities can assert based on ideals of national freedom following Reconstruction. The Thirteenth Amendment, the Article argues, provides an affirmative defense against state efforts to legitimize Confederate monuments and the badges of slavery they represent. It relies on a case study from Charlottesville, Virginia to illustrate how supremacist groups continue to unite around those symbols of white supremacy.

As its case study, the Article examines the Unite the Right rally, a supremacist rally that had been organized around the issue of Confederate monuments, left one dead. After providing the background of the rally and demonstrating the symbolic effect Confederate monuments had on the 2017 events in Charlottesville, Virginia, the Article evaluates the relevance of the Thirteenth Amendment to the removal of confederate monuments. Finally, it suggests that a municipality can claim a property right to remove Confederate monuments from public places because they are badges of slavery.

I. UNITE THE RIGHT RALLY OF 2017 AND CONFEDERATE MONUMENTS

The August 11–12, 2017 Unite the Right march drew about five to six hundred participants to Charlottesville, Virginia in opposition to the removal of a statue of

²¹ Ian Stewart, *Judge Throws Out Alabama Law that Protects Confederate Monuments*, NPR (Jan. 15, 2019, 5:52 PM), <https://www.npr.org/2019/01/15/685672038/judge-throws-out-alabama-law-that-protects-confederate-monuments> [perma.cc/BL5S-8G4D].

²² Micah Schwartzman & Nelson Tebbe, *Charlottesville’s Monuments are Unconstitutional*, SLATE (Aug. 25, 2017, 9:07 AM), <https://slate.com/news-and-politics/2017/08/charlottesvilles-monuments-are-unconstitutional.html> [perma.cc/KY9F-NUH6].

²³ See *id.*

²⁴ See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 370 (2019) (“As part of the ongoing battle over Confederate monuments, many southern states have prohibited municipalities from removing their Confederate monuments, thus depriving cities of the ability to express their disdain for the message that those monuments send.”).

Confederate General Robert E. Lee.²⁵ Jason Kessler organized the rally, which was attended by high profile white supremacists, including Michael Hill and David Duke.²⁶ The rally was scheduled to follow a KKK event, which had been held one month before in the same park to protest the City's decision to remove the monument to one of the Confederacy's best known and most competent generals.²⁷ Lee added his military prowess defending the Confederate Constitution of 1861, containing clauses that provided for the perpetuation of "the institution of negro slavery."²⁸ He was a U.S. Army General, commissioned at West Point, who chose the rebellion of the States, unlike Ulysses S. Grant and others who fought on the Union side.²⁹ White supremacists rallied around an icon of their unity. The Lee statue had been erected during the Jim Crow era of segregation, at a time when glorification of the Lost Cause was popular in States of the old confederacy.³⁰ The rally gathered at the monument to express support for slavery and segregation. The Mayor of New Orleans, Mitch Landrieu, pointed out that Confederate statues are not merely aesthetic.³¹ They are, rather, "monuments [that] celebrate a fictional, sanitized Confederacy—ignoring the death, ignoring the enslavement, ignoring the terror that it actually stood for."³²

Supremacists who alighted on Charlottesville in 2017 were not naïve about the significance of the monument. For them, the Lee statue and other Confederate symbols are "potent political symbols to those who wish to maintain white supremacy."³³ The stated purpose of supremacist groups is to regain control of America, a country they believe was founded by and for white people.³⁴ The rally, just as the statue of Robert E. Lee, signaled a desire for a hegemonic country

²⁵ Spencer S. Hsu, *Charlottesville White Supremacist Rally in August Drew Attendees from 35 States, Study Finds*, WASH. POST (Oct. 8, 2017, 3:07 PM), https://www.washingtonpost.com/local/public-safety/study-charlottesville-white-supremacist-rally-in-august-drew-attendees-from-35-states/2017/10/08/fe57868e-ac45-11e7-a908-a3470754bbb9_story.html?utm_term=.df63eba2cf4f [<https://perma.cc/X98U-AWVR>]; Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html> [<https://perma.cc/C94Y-DM4S>].

²⁶ *'The Fight for the White Race': What Some of the Charlottesville Rally Participants Stand for*, N.Y. TIMES (Aug. 19, 2017) [hereinafter *The Fight for the White Race*], <https://www.nytimes.com/interactive/2017/08/19/us/charlottesville-quotes.html> [<https://perma.cc/BMW9-SHUB>].

²⁷ Hawes Spencer & Matt Stevens, *23 Arrested and Tear Gas Deployed after a K.K.K. Rally in Virginia*, N.Y. TIMES (July 8, 2017), <https://www.nytimes.com/2017/07/08/us/kkk-rally-charlottesville-robert-e-lee-statue.html> [<https://perma.cc/Q3R9-EZDM>]. Violence began when counter protestors refused to allow members of the Klan to leave after their event. *Id.*

²⁸ CONFEDERATE CONST. of 1861, art. IV, § 2, cl. 1; *id.* 1, § 9, cl. 4; *id.* at art. IV, § 2, cl. 3; *id.* at art. IV, § 3, cl. 3; see also ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 140-41 (2004).

²⁹ *Robert E. Lee*, HISTORY (Dec. 10, 2019), <https://www.history.com/topics/american-civil-war/robert-e-lee> [<https://perma.cc/38VC-7Y96>].

³⁰ SUSAN T. FALCK, *REMEMBERING DIXIE: THE BATTLE TO CONTROL HISTORICAL MEMORY IN NATCHEZ, MISSISSIPPI, 1865-1941*, at 225 (2019).

³¹ German Lopez, *New Orleans Mayor: We Can't Ignore the Death, Enslavement, and Terror the Confederacy Stood for*, VOX (May 23, 2017, 11:40 AM), <https://www.vox.com/policy-and-politics/2017/5/23/15680472/new-orleans-mayor-confederate-monuments> [<https://perma.cc/338H-SYKG>].

³² *Id.*

³³ LISA BLEE & JEAN M. O'BRIEN, *MONUMENTAL MOBILITY* 208 (2019).

³⁴ *The Fight for the White Race*, *supra* note 26.

committed to racial purity.³⁵

Members from a variety of organizations alighted on the college town, including Ku Klux Klan, neo-Nazis, Proud Boys, Vanguard America, and Identity Evropa.³⁶ Among them was former KKK Grand Wizard David Duke and alt-right leader Richard Spencer.³⁷ The chants of participants gave vent to the protestors' mindset. At the August 11 rally, the group made clear its belief that Jews are the crucial outsider to eliminate from American society.³⁸ One banner proudly asserted, "Jews are Satan's children."³⁹ Many of the participants intermixed support for the Confederacy with sympathies for Nazis and the Holocaust. They wore shirts depicting Adolf Hitler and his quotes and displaying other Nazi symbols.⁴⁰ David Duke told the crowd that Jews control the news media, the Federal Reserve, and American politics.⁴¹ Another white supremacist at the rally, James Field, Jr., who eventually plowed his vehicle into a crowd of counter protestors, idolized Hitler and identified with a group committed to fighting "the international Jew."⁴²

The vitriol of those gathered at the Unite the Right rally revealed a grander mission. They hoped to ignite a race war against Jews, blacks, immigrants, and others they believed are "anti-white vermin."⁴³ Those who gathered for the August 2017 rally joined forces around the Lee monument to voice a reverence for the Nazis, shouting slogans like, "[i]nto the ovens."⁴⁴ This slogan extolled the history of Nazis throwing Jews, in some cases living people, into crematoria and burning pits.⁴⁵ Those gathered before the Lee statue regaled symbols of slavery and anti-black discrimination. Many of the assembled groups are outspoken supporters for race wars.

The Lee monument provided a rallying point for supremacist organizations.⁴⁶

³⁵ See *id.*

³⁶ Joanna Walters, *Neo-Nazis, White Nationalists, and Internet Trolls: Who's Who in the Far Right*, GUARDIAN (Aug. 17, 2017, 2:00 PM), <https://www.theguardian.com/world/2017/aug/17/charlottesville-alt-right-neo-nazis-white-nationalists> [<https://perma.cc/HWC8-J5EE>].

³⁷ Yair Rosenberg, 'Jews Will Not Replace Us': Why White Supremacists Go after Jews, WASH. POST (Aug. 14, 2017, 10:03 AM), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/14/jews-will-not-replace-us-why-white-supremacists-go-after-jews/?utm_term=.011cef4351c7 [<https://perma.cc/J2YU-8UQY>].

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; see also *Vanguard America*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/vanguard-america> [<https://perma.cc/S7XW-WP5S>].

⁴³ Spike Anderson, *Temple Emanu-El: Rise Up to Drive Out Hate*, ATLANTA JEWISH TIMES (Sept. 13, 2017, 1:07 PM), <https://atlantajewishtimes.timesofisrael.com/temple-emanu-el-we-must-rise-up-to-drive-out-hate/> [<https://perma.cc/G5UG-4XH7>] ("Robert Ray, who runs the neo Nazi website the Daily Storm, spoke to the reporter about the reason why 1,000 people were marching with torches, guns and Nazi flag: 'We are showing this parasitic class of anti-white vermin that this is our country. . . . We will clear them from the streets, forever. We are starting to slowly unveil our power level. You ain't seen nothing yet.'").

⁴⁴ *What Charlottesville Changed*, POLITICO MAG. (Aug. 12, 2018), <https://www.politico.com/magazine/story/2018/08/12/charlottesville-anniversary-supremacists-protests-va-virginia-219353> [<https://perma.cc/WS92-JRXX>].

⁴⁵ MARY FULBROOK, RECKONINGS: LEGACIES OF NAZI PERSECUTION AND THE QUEST FOR JUSTICE 215 (2018).

⁴⁶ See FRED EVANS, PUBLIC ART AND THE FRAGILITY OF DEMOCRACY 238–39 (Lydia Goehr & Gregg M. Horowitz eds., 2019) (referring to the monument's "symbolic meaning of white supremacy").

The statue was not merely a vestige of history but a living representation for a bygone era of white dominance over politics and culture. The devotion to Southern leaders is not limited to the general. Monument Boulevard, located in Richmond, Virginia, is a public space where leaders who took up arms to dismember the Union and prevent Northern intervention into chattel slavery continue to be glorified. As with other Confederate symbols, the Lee statue is an icon of racism. Participants of the Unite the Right rally demonstrated that the Confederacy remains a symbol of slavery and segregation. It is a symbol of opposition to national civil rights principles. In Charlottesville, it served as a backdrop for participants of the Unite the Right rally to intimidate and threaten those they considered to be enemies of white European culture.

II. EFFORTS TO REMOVE THE ROBERT E. LEE MONUMENT

Supremacist groups were determined to voice opposition to the City's proposed removal or covering of the Robert E. Lee monument at the Market Street Park in Charlottesville. The atmosphere surrounding that symbol of the Confederacy had been charged even more before the planned rally on August 11–12, 2017. After reviewing the legal proceedings that led to the Unite the Right rally, Part III turns to what constitutional provision informs the topic.

During the course of the year preceding the march, Charlottesville City Council members investigated the possibility of removing the monument. On December 19, 2016, a Charlottesville committee on “race, memorials, and public spaces” issued a report to the City Council.⁴⁷ After months of factfinding, public comments, and discussions, the committee found that the Lee statue depicted a perspective on the Civil War that lamented the fate of the Confederacy while ignoring the injustice of slavery, the centrality of slavery to the *casus belli* of the Civil War, and the contemporary persistency of white supremacy.⁴⁸ In order to “promote freedom and equity,” committee members recommended removing the Lee statue and renaming the park to signal the city's inclusiveness.⁴⁹

Then, in February 2017, the Charlottesville City Council voted 3-2 that the statue would be removed and relocated.⁵⁰ Further discussions were to follow about how best to remove the monument.⁵¹ Then, in June, the Park was renamed from Lee Park to Emancipation Park and afterward, in July 2018, to its current name, simply Market Street Park.⁵² The main line of legal attack against the Defendant City focused on its

⁴⁷ See generally CITY OF CHARLOTTESVILLE BLUE RIBBON COMM'N ON RACE, MEMORIALS, AND PUB. SPACES, REPORT TO CITY COUNCIL (Dec. 19, 2016), <http://www.charlottesville.org/Home/ShowDocument?id=48999> [<https://perma.cc/6VCV-2NHA>].

⁴⁸ *Id.* at 7, 20–22.

⁴⁹ *Id.* at 7.

⁵⁰ Chris Suarez, *Charlottesville City Council Votes to Remove Statue from Lee Park*, DAILY PROGRESS (Feb. 6, 2017), https://www.dailyprogress.com/news/local/charlottesville-city-council-votes-to-remove-statue-from-lee-park/article_2c4844ca-ecc3-11e6-a7bc-b7d28027df28.html [<https://perma.cc/YL9N-CV9G>].

⁵¹ *Id.*

⁵² Max Greenwood, *Charlottesville Votes to Rename Parks a Second Time*, HILL (July 17, 2018, 9:29

effort to remove the statue.

In March 2017, the Monument Fund, an organization committed to the preservation of Confederate war monuments and memorials, filed a lawsuit with the Charlottesville Circuit Court to block the City's plan.⁵³ The civil suit arose pursuant to a Virginia state statute that prohibited removal of monuments.⁵⁴ The circuit court judge subsequently ruled that the statue is a war memorial and is therefore protected under the Virginia statute protecting Civil War monuments;⁵⁵ Charlottesville was therefore powerless to take it down or cover it with plastic bagging. The judge felt compelled to add:

“While some people obviously see Lee and Jackson as symbols of white supremacy, others see them as brilliant military tacticians or complex leaders in a difficult time . . . and do not think of white supremacy at all and certainly do not believe in, accept, or agree with such,” Moore said. “In either event, the statues to them under the undisputed facts of this case still are monuments and memorials to them, as veterans of the Civil War.”⁵⁶

In this, the judge failed to understand that a message with a dual racist and military meaning continues to be an banner of racism and, as I will argue in Part III, a badge of slavery. That is, neither the military theme nor combat strategy erases the racist past that the symbols venerate. Generals Lee and Jackson led soldiers to prolong slavery, just as Nazi officers and soldiers participation in battles perpetuated the Holocaust.⁵⁷

The white supremacist action at Charlottesville began with a tiki light vigil on Friday, August 11, 2017.⁵⁸ Around 250 white nationalists marched in a column shouting slogans that were antisemitic and xenophobic, “Jews will not replace us!” “Blood and soil!” “You will not replace us!”⁵⁹ Scuffles broke out with roughly 30

AM), <https://thehill.com/blogs/blog-briefing-room/news/397383-charlottesville-again-changes-names-of-two-parks> [<https://perma.cc/N49K-P29N>].

⁵³ *The Lawsuit*, MONUMENT FUND, <https://www.themonumentfund.org/the-law-suit> [<https://perma.cc/8GPJ-R7GW>].

⁵⁴ *Id.*; see also VA. CODE ANN. § 15.2-1812 (2019).

⁵⁵ Nina Golgowski, *Confederate Statues in Charlottesville are Legally Protected, Virginia Judge Rules*, HUFFPOST (May 1, 2019, 11:57 AM), https://www.huffpost.com/entry/virginia-judge-rules-charlottesville-confederate-statues-protected_n_5cc98befe4b0913d078b1451 [<https://perma.cc/87YV-4QGZ>].

⁵⁶ *Id.*

⁵⁷ Jürgen Habermas, in an article entitled *A Kind of Damage Control: On Apologetic Tendencies in German History Writing*, argued that the continued battle by the German Wehrmacht furthered the Nazi cause of the Holocaust. See Jürgen Habermas, *A Kind of Settlement of Damages: The Apologetic Tendencies in German History Writing*, in *FOREVER IN THE SHADOW OF HITLER?* 34, 35–37 (James Knowlton & Truett Cates trans., 1993); see also Stefan Berger, *German History Politics and the National Socialist Past*, in *THE CONVOLUTIONS OF HISTORICAL POLITICS* 21, 32 (Alexei Miller & Maria Lipman eds., 2012); Patchen Markell, *Making Affect Safe for Democracy?: On “Constitutional Patriotism,”* 28 *POL. THEORY* 38, 39–40 (2000) (discussing Habermas's and his opposing views on German nationalism and the uniquely evil nature of the Holocaust).

⁵⁸ Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST. (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/> [<https://perma.cc/A9PU-RHBK>].

⁵⁹ *Id.*

counter-protestors engaging marchers on the University of Virginia campus.⁶⁰

The supremacist groups had received a permit to gather on August 12 between noon and 5:00 p.m.⁶¹ Rallygoers and counter-protestors arrived by 8 a.m. and congregated around the Robert E. Lee monument in what was then still called Emancipation Park.⁶² There were persons on both sides carrying sticks, shields, and clubs.⁶³ Fights broke out.⁶⁴ At this point, now 11:22 a.m., the police broke the crowd up and prohibited the “unlawful assembly” from sparking into more violence.⁶⁵

After the event, ten Charlottesville residents, who had allegedly been hurt at the rally, filed a lawsuit against event organizers for violating the Civil Rights Act of 1871.⁶⁶ Plaintiffs claimed that the Defendants had “formed a conspiracy to commit the racial violence that led to the Plaintiffs’ varied injuries” in violation of 42 U.S.C. § 1985(3).⁶⁷ A federal district court, in *Sines v. Kessler*, found plausible the allegation that Defendants were motivated by specific, invidious animus.⁶⁸ Section 1985(3) is not, however, a standalone remedy for animus—the conspiracy must “deprive the plaintiff of the equal enjoyment of rights secured by the law to all.”⁶⁹ But “Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.”⁷⁰ In *Sines*, the court found that Plaintiffs had a plausible case to pursue under the Thirteenth Amendment to vindicate the “underlying right to be free from racial violence.”⁷¹ The district court relied on *Griffin v. Breckenridge* for the premise that “the Court held that Section 1985(3) reached a private conspiracy where white Mississippians allegedly stopped African-Americans on a public highway (mistaking them for civil rights workers), pulled them out of their car, and beat them.”⁷² The court in *Sines* concluded that “Plaintiffs have, for the most part, adequately alleged that Defendants formed a conspiracy to hurt black and Jewish individuals, and their supporters, because of their race at the August 11th and 12th events.”⁷³ Thus, they impaired residents’ federal right to travel freely without fear of violent reprisal.

The *Sines* district court found that the Supreme Court determined Congress has independent authority to pass legislation pursuant to the Thirteenth Amendment.⁷⁴ Its use of that authority to pass 42 U.S.C. § 1985(3) was rational and legitimate.⁷⁵ That same reasoning should be extended to mark the general national obligation to pass laws prohibiting the continued use of Confederate symbolism in public places

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Sines v. Kessler*, 324 F. Supp. 3d 765, 773–74 (W.D. Va. 2018).

⁶⁷ *Id.* at 773, 779–80.

⁶⁸ *Id.* at 780–81.

⁶⁹ *Id.* at 780.

⁷⁰ *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 372 (1979).

⁷¹ *Sines*, 324 F. Supp. 3d at 782.

⁷² *Id.* at 781 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 89–92 (1971)).

⁷³ *Id.* at 797–98.

⁷⁴ *Id.* at 782.

⁷⁵ *See id.*

such as Market Street Park. In addition, the State of Virginia's continued preservation of Confederate monuments against the Charlottesville City Council's efforts to remove the Lee monument contradict the edict of the Thirteenth Amendment.

III. CONFLICTS OVER REMOVAL AND THE THIRTEENTH AMENDMENT

The City of Charlottesville's attempt to remove Confederate symbols and challenges to that determination provide lessons about how to proceed with similar cases in the future. The City sought to undo the redemptionist policies of the late-nineteenth and early-twentieth centuries, which orchestrated a concerted effort to rehabilitate Confederate leaders and to unite under the banner of white supremacy.⁷⁶ The monuments were meant to signal a certain permanence about the custom of white supremacy. The relevance of the matter extends far outside the borders of Virginia to the hundreds of Confederate statues that remain displayed in public places in the United States, almost all of them in the South.⁷⁷

A. Procedures in Charlottesville District Court

The City of Charlottesville sought to advance its policy of removing Confederate symbols from public site by shrouding the Robert E. Lee and Thomas "Stonewall" Jackson statues. The shrouds also signaled mourning for Heather Heyer, whom one of the Unite the Right supremacists murdered with his vehicle.⁷⁸ Covering the statues fully in dark black was also done in commemoration of two police officers who died separately in a helicopter crash while they were monitoring the Unite the Right rally from the air.⁷⁹

A group of thirteen private litigants filed suit in *Payne v. City of Charlottesville* with the Circuit Court of the City of Charlottesville under Section 15.2-1812 of the

⁷⁶ See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 130, 135, 227 (2001); KIRK SAVAGE, *STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND MONUMENT IN NINETEENTH CENTURY AMERICA* 3 (1999) ("All three—race, war, and monument—were pivotal to the nation as it emerged from its long tradition of slavery.").

⁷⁷ Molly Olmstead, *New Report Finds More Than 1,000 Public Symbols of the Confederacy Remain Standing*, SLATE (June 5, 2018, 1:01 PM), <https://slate.com/news-and-politics/2018/06/spic-study-finds-more-than-1-000-confederate-symbols.html> [<https://perma.cc/C97D-D74M>]; see also Kali Holloway, *Confederate Monuments: Where are They Now?*, SALON (Aug. 18, 2019, 10:59 AM), https://www.salon.com/2019/08/18/confederate-monuments-where-are-they-now_partner/ [<https://perma.cc/Q2KU-3RGJ>]; *Whose Heritage?: Public Symbols of the Confederacy*, S. POVERTY L. CTR., <https://www.splcenter.org/data-projects/whose-heritage> [<https://perma.cc/VXA5-X4NX>] (providing a U.S. map depicting locations of Confederate symbols).

⁷⁸ *White Supremacist Gets Life in Prison for Deadly Charlottesville Car Attack*, CBS NEWS (June 28, 2019, 5:53 PM), <https://www.cbsnews.com/news/james-fields-jr-charlottesville-va-car-attack-driver-sentenced-to-life-in-prison-today-2019-06-28/> [<https://perma.cc/5HQG-SDGQ>].

⁷⁹ Chris Suarez, *Tarps Must Come Down from Confederate Statues in Charlottesville, Judge Says*, RICHMOND TIMES-DISPATCH (Feb. 27, 2018), https://www.richmond.com/news/virginia/tarps-must-come-down-from-c...ttsville-judge/article_c4181e42-1b33-5b93-8f72-8b59c362314d.html; Jason Wilson et al., *Man Charged with Murder after Driving into Anti-Far-Right Protestors in Charlottesville*, GUARDIAN (Aug. 13, 2017, 9:45 AM), <https://www.theguardian.com/us-news/2017/aug/12/virginia-unite-the-right-rally-protest-violence> [<https://perma.cc/9EG8-SU82>].

1950 Virginia Code.⁸⁰ The statute prohibits the removal of memorials to the Civil War, euphemistically called “the War Between the States.”⁸¹ Plaintiffs sought injunctive and declaratory relief for emotional harms suffered because the City passed a resolution on February 6, 2017 to remove the Robert E. Lee statue, around which the Unite the Right event was to take place.⁸² Damages were not available under the statute, but the judge awarded fees to Plaintiffs’ counsel of over \$300,000.⁸³ The City had passed the resolution in recognition that, “public spaces and histories have ignored, silenced or suppressed African American history, as well as the legacy of white supremacy and the unimaginable harms done under that cause.”⁸⁴ At the time of the filing, the City had done no alteration, repair, or even preservation of the Lee monument; therefore, no true damage had been done to it.

The court dragged out the proceedings, with the Unite the Right rally occurring while it was still pending.⁸⁵ Early in the case, the judge issued a permanent injunction prohibiting Charlottesville from removing the Lee and Jackson statues.⁸⁶ The court held that both statues were war memorials under Virginia Code § 15.2-1812, and that the state law prohibited City officials from taking them down or covering them from public view.⁸⁷ In an opinion fixated on the text of the state statute, the judge refused the relevance of Charlottesville’s explanation that the statue was a Confederate symbol the City could remove to avoid offense to its citizens.⁸⁸

The trial judge also perfunctorily ruled that no Equal Protection Clause defense

⁸⁰ Complaint at 9, *Payne v. City of Charlottesville*, No. CL17-145 (Va. Cir. Ct. Mar. 20, 2017).

⁸¹ Referring to the Civil War as the War Between the States, the statute reads as follows:

If such [monuments or memorials] are erected, it shall be unlawful for the authorities of the locality, or any other person or persons, to disturb or interfere with any monuments or memorials so erected, or to prevent its citizens from taking proper measures and exercising proper means for the protection, preservation and care of same. For purposes of this section, “disturb or interfere with” includes removal of, damaging or defacing monuments or memorials, or, in the case of the War Between the States, the placement of Union markings or monuments on previously designated Confederate memorials or the placement of Confederate markings or monuments on previously designated Union memorials.

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

⁸² Complaint, *supra* note 80, at 10, 15–16.

⁸³ Moriah Davis, *Judge to Order Charlottesville to Pay \$365K to Cover Plaintiffs’ Lawyers in Statue Case*, WHSV (Jan. 23, 2020, 6:30 PM), <https://www.wHSV.com/content/news/Judge-to-order-Charlottesville-to-pay-365K-to-cover-plaintiffs-lawyers-in-statue-case-567244191.html> [<https://perma.cc/DAB6-ZGTP>]; see also Tyler Hammel, *Judge to Award Attorneys Fees, Rules Against Damages over Confederate Statue Shrouds*, DAILY PROGRESS (Sept. 13, 2019), https://www.dailyprogress.com/news/local/judge-to-award-attorneys-fees-rules-against-damages-over-confederate/article_24de3949-37f9-5c91-bc79-bac74347386e.html [<https://perma.cc/V6NN-5RPH>].

⁸⁴ Complaint, *supra* note 80, at Exhibit H.

⁸⁵ Hammel, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ *Payne v. City of Charlottesville*, No. CL17-145, 2019 Va. Cir. LEXIS 1175, at *3–5 (Va. Cir. Ct. Sept. 11, 2019).

⁸⁸ Letter Ruling from Richard E. Moore, Judge, Sixteenth Judicial Court, Commonwealth of Virginia, to Counsel in *Payne v. City of Charlottesville* 6 n.5, 7 (Apr. 25, 2019), <https://statutes.law.virginia.edu/litigation/payne-v-charlottesville> [<https://perma.cc/EPV7-2V4P>] (scroll down to “Letter Ruling on Motion for Partial Summary Judgment Regarding the Statues Being Monuments or Memorials” under “Docket Files;” then click on the accompanying PDF hyperlink).

was available to the City.⁸⁹ Missing from the trial were considerations of whether Confederate symbols were badges of slavery and involuntary servitude. The constitutional posture of the case should be significant not only for the outcome of *Payne v. City of Charlottesville*, but also for cities around the country seeking to formulate and enforce a policy for taking down Confederate monuments against state interventions.

B. Symbolic Power of Confederate Monuments

Confederate monuments serve to honor a history indubitably linked to slavery and involuntary servitude. Language and cultural symbolism delimit people's parameters of thought and influence their attitudes, behaviors, and reactions.⁹⁰ The depiction of Confederate horsemen speaks to those who hope the Old South will rise again and regain its supremacy.⁹¹ Modern supremacists in the Ku Klux Klan continue to cling to the desire for a bygone culture of racial dominance.⁹² This comes through with the zeal shown to the heroes of Southern slavery and nullification, such as John Calhoun and Jefferson Davis, whose statues adorn cities such as Charleston, South Carolina and Richmond, Virginia.⁹³ The culture of the Confederacy, as the Rebels' Constitution makes clear, involves commitment to slavery with all its suppression for equal human freedom.⁹⁴ The monuments represent as heroic what was permeated with social and customary racism.⁹⁵

Cultural symbols provide a unifying theme to otherwise disparate political groups,⁹⁶ as was the case at the Unite the Right March of 2017. Groups choose emblems, signs, flags, and badges that are rich in historical meaning. Confederate monuments are pregnant with political meaning that governments can embrace or

⁸⁹ *Payne v. City of Charlottesville*, No. CL17-145 (Va. Cir. Ct. Oct. 15, 2019) (order denying and dismissing Defendants' Equal Protection defenses).

⁹⁰ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951–52 (1995) (discussing social meaning).

⁹¹ This hope for the slave culture of the past began to be voiced almost immediately after Appomattox. See, e.g., JOHN H. BELL, *WESTERN SKIES: A NARRATIVE OF AMERICAN TRAVEL IN 1868* 5 (1870) (“The South will rise again and . . . regain[] her lost supremacy . . .”); *Ruins of the Rebellion*, BANGOR DAILY WHIG & COURIER (Bangor, Me.), Aug. 10, 1865, at 2 (asserting that the South can rise by former slaveholders gaining elected offices).

⁹² See Megan Trimble, *KKK Groups Still Active in These States in 2017*, U.S. NEWS & WORLD REP. (Aug. 14, 2017, 5:21 PM), <https://www.usnews.com/news/best-states/articles/2017-08-14/the-kkk-is-still-based-in-22-states-in-the-us-in-2017> [<https://perma.cc/C9TC-QWUQ>].

⁹³ Gregory S. Schneider, *Richmond Monument Panel Urges Removing Jefferson Davis Statue*, WASH. POST (July 2, 2018, 2:40 PM), https://www.washingtonpost.com/local/virginia-politics/richmond-monument-panel-urges-removing-jefferson-davis-statue/2018/07/02/73636904-7e17-11e8-bb6b-c1cb691f1402_story.html [<https://perma.cc/7NV3-CTMD>]; *Calhoun Monument*, CHARLESTON MUSEUM, <https://www.charlestonmuseum.org/research/collection/calhoun-monument/10512A1E-8D4A-4DEC-9F30-163985710223> (last visited May 15, 2020) [<https://perma.cc/BGH9-H9UE>].

⁹⁴ CONFEDERATE CONST. of 1861 art. I, § 9, cl. 4.

⁹⁵ See GEORGE EATON SIMPSON & J. MILTON YINGER, *RACIAL & CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 64 (5th ed. 1985).

⁹⁶ See PIERRE BOURDIEU, *LANGUAGE & SYMBOLIC POWER* 167 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991) (explaining the unifying effect of symbols).

renounce. As other cultural symbols, they serve to rally followers to political causes with unmistakable messages of white supremacy and violent secession. Even when coupled with other meanings, Confederate monuments are calls to redeem the South of antebellum America. Those monuments have been erected to glorify the Old South. They communicate affinity to that bygone era, including its peculiar institutions, enslavements, oppressions, which the Thirteenth Amendment eradicated.⁹⁷

IV. CONFEDERATE STATUTES AND THE THIRTEENTH AMENDMENT

The Robert E. Lee statue, whose proposed removal was the focus of the Unite the Right rally, provided the white supremacists who gathered both a physical and ideological symbol. It drew groups with nationalistic, supremacist, and Confederate sympathies.⁹⁸ Confederate monuments are vestiges of the slavery. They represent a lost political and military cause, fought against the Union in an effort to retain a system of chattel property in humans.⁹⁹ Monuments to Confederate heroes sprung up in the immediate aftermath of Southern defeat. Erections of equestrian Robert E. Lee statues appeared as part of the Lost Cause movement in the 1880s and 1890s to resurrect the sectional pride that had been so deeply pierced by the Union Army's victory.¹⁰⁰ From the late nineteenth century, Confederate monuments became associated with white sectional reconciliation.¹⁰¹ The approach downplayed the suffering inflicted by the South's defense of slavery.

Southerners erected Confederate monuments as part of broader campaigns to deny blacks equal liberty and to unite whites.¹⁰² The raising of Confederate monuments went hand-in-hand with the growth of Jim Crowism, black disenfranchisement, and the political separation of Southern blacks and whites.¹⁰³ Thus, the Unite the Right rally organizers' decision to gather around the Lee statue was part of a broader historical pattern of relying on Confederate symbols to maintain racial identity, southern heritage, and historic connections with the failed effort to secede from the Union. Monument building became a means of distorting history, of glorifying heroes of those States that seceded to preserve a civil, social, and political system that commodified human beings.¹⁰⁴

⁹⁷ See David P. Tedhams, *The Reincarnation of 'Jim Crow': A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & C.R. L. REV. 133, 151 (1994).

⁹⁸ See *supra* text accompanying notes 40–46.

⁹⁹ Cf. Chris Springer, *The Troubled Resurgence of the Confederate Flag*, HIST. TODAY, June 1993, at 7, 9 (discussing the symbolic meaning of the Confederate flag).

¹⁰⁰ John J. Winberry, "Lest We Forget": *The Confederate Monument and the Southern Townscape*, 55 SE. GEOGRAPHER 19, 27 (2015).

¹⁰¹ Kirk Savage, *The Politics of Memory: Black Emancipation and the Civil War Monument*, in COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY 127, 132 (John R. Gillis ed., 1994) ("Americans perceived this kind of monument building as part of a healthy process of sectional reconciliation—a process that everyone knew but no one said was for and between whites.").

¹⁰² Jonathan Leib & Gerald R. Webster, *On Remembering John Winberry and the Study of Confederate Monuments on the Southern Landscape*, 55 SE. GEOGRAPHER 9, 14 (2015).

¹⁰³ See Winberry, *supra* note 100, at 28.

¹⁰⁴ See *Finding Jefferson Davis on the Commemorative Landscape: A Roundtable Discussion*, 107 REG. KY. HIST. SOC'Y 237, 260–61 (2009).

What the South had been unable to do on the battlefield, to erect a permanent constitutional structure of oppression, it sought to achieve by raising statues heralding the military ability of their leaders. The white granite of the monuments symbolizing the purity of the Confederate cause, washed clean of its violent subjugation of humans and imposition of militancy. The placement of Confederate symbols, such as the Lee statue in Market Street Park, carries an emotional message, whose power is heightened by its public placement on government property, especially parks.¹⁰⁵

The Confederate veterans and dead that such monuments place on a figurative and literal pedestal fought for a pro-slavery and racist ideology that plunged the nation into Civil War. The aims of the Confederacy were not obscure: the Constitution of the Confederate States of America, unlike the United States Constitution, overtly protected “negro slaves.”¹⁰⁶ The South fought for an unambiguous cause. The Confederate Constitution explicitly denied civil protections to persons of African descent.¹⁰⁷ The Confederate Vice President, Alexander Stephens, asserted that the “cornerstone” of his government rested “upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.”¹⁰⁸ Historical romanticism and denialism began almost immediately after the Civil War. By 1866, just one year after Appomattox, Edward Pollard, a celebrated American journalist and Confederate sympathizer, asserted that slavery was not the cause of the Civil War.¹⁰⁹ Instead, he attributed the *casus belli* to the overreach of the federal government that the South had fought courageously and honorably.¹¹⁰ His account of the War was part of a cultural glorification for a cause advanced to render slavery inviolable. That view struck a chord with many and continues to drive historical revisionism to this day. To the contrary, as historian David Blight explains, “race was so deeply at the root of the war’s causes and consequences, and so powerful a source of division in American social psychology,” that it was “the antithesis of a culture of reconciliation.”¹¹¹

With all these connections to the ideals of the Lost Cause, it seems that Confederate statues, no matter whether they are designated as military monuments or heroic statues, are badges of slavery. They, therefore, fall under the Thirteenth Amendment. Only Congress is authorized to pass laws pursuant to that power. No State, Virginia or otherwise, can prohibit a city, such as Charlottesville, from removing a symbol of slavery and racial oppression. Removing public emblems to oppression is consistent with the values of the abolition Amendment. Where States

¹⁰⁵ See Martha E. Kinney, “*If Vanquished I am Still Victorious*”: *Religious and Cultural Symbolism in Virginia’s Confederate Memorial Day Celebrations, 1866–1930*, 106 VA. MAG. HIST. & BIOGRAPHY 237, 239 (1998).

¹⁰⁶ CONFEDERATE CONST. of 1861 art. I, § 9, cl. 4.

¹⁰⁷ See *id.* (“No bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves shall be passed.”).

¹⁰⁸ J. E. CAIRNES, *THE SLAVE POWER: ITS CHARACTER, CAREER, AND PROBABLE DESIGNS* 89–90 (1862).

¹⁰⁹ HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 17–18 (2019).

¹¹⁰ EDWARD A. POLLARD, *THE LOST CAUSE: A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES* 750–52 (1866); see also BLIGHT, *supra* note 76, at 260; GATES, *supra* note 109, at 17–18.

¹¹¹ BLIGHT, *supra* note 76, at 4.

prohibit cities from removing a Confederate symbol, they overextend authority in contravention of the national commitment in the Thirteenth Amendment to eliminate the badges of slavery.

V. MUNICIPAL PROPERTY RIGHTS AND THE THIRTEENTH AMENDMENT

Linking the Thirteenth Amendment to Confederate monuments gives rise to the question of whether the march on Charlottesville might have been avoided. Participants asserted that the Robert E. Lee monument was a rallying point reflecting their ideology that outgroups would not replace them. The City of Charlottesville had sought to eliminate that badge of slavery by shrouding or removing them, but the State of Virginia had prohibited them from doing so. Virginia officials relied on the State War Monument Act to preempt the City's initiative. But Virginia had no power to make such a preemption. Federal law against statues is governed by Congress's plenary power over the badges of slavery. In this case the badge of slavery is the Lee statue. The state of Virginia abused its state authority to prevent the City of Charlottesville from removing a symbol of slavery and involuntary servitude.

The Thirteenth Amendment left it to Congress to decide, as the Court held in *Jones v. Alfred H. Mayer Co.*, "what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."¹¹² That alteration to the Constitution augmented federal power at the expense of States' antebellum authority over slavery and signs of its subjugation. The Amendment's framers affixed the second clause to the Amendment as a federal legislative tool for battling state prejudices and giving practical effect to abolitionist ideals.¹¹³ Additionally, the Thirteenth Amendment admits to regulating private actions,¹¹⁴ such as carrying supremacist symbols at ethnocentric demonstrations that call for public intolerance, violence, and other racial oppressions. What the Fifth Circuit found amounted to "badge[s] of slavery" were "indicators, physical or otherwise, of African-Americans' slave or subordinate status."¹¹⁵ Confederate statues fall in that category, whether or not they are war memorials. Thus, Virginia lacked the authority to prohibit a municipality from exercising its decision to take down the Lee and Jackson statues from the City of Charlottesville. That lesson applies inside and outside the State's border.

Any city sued under a state Confederate monument statute, as occurred in *Payne v. City of Charlottesville*,¹¹⁶ can assert an affirmative defense under 42 U.S.C. § 1982. That federal statute provides that, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal

¹¹² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

¹¹³ *Id.* at 429–30, 434.

¹¹⁴ See *United States v. Kozminski*, 487 U.S. 931, 942 (1988) ("[T]he Thirteenth Amendment extends beyond state action . . .").

¹¹⁵ *United States v. Cannon*, 750 F.3d 492, 501 (5th Cir. 2014).

¹¹⁶ See *supra* text accompanying notes 80–82.

property.”¹¹⁷ Cities, too, can assert a right to alienate or destroy their own property permitted on a different provision, 42 U.S.C. § 1983, the principal statute under which parties can assert an affirmative defense against state actors for violating federal law.¹¹⁸ Residents have a right to enjoy public parks unencumbered by badges of slavery, such as Confederate monuments. Cities, like Charlottesville, can therefore raise an affirmative defense, arguing that § 1983 gives residents of the City the right to enjoy public parks unadorned by badges of slavery in the form of Confederate monuments.¹¹⁹

To prove its case, a municipality will likely need to show that the state’s intent of retaining the monuments was to glorify the Lost Cause. Confederate symbols even when used as expressions of southern heritage also communicate a message of sympathy for States that rebelled against the Union to better secure human chattel against perceived northern encroachments. There is good reason to believe that “stone warriors atop these monuments had [and continue to have] an aura of dignity and endurance.”¹²⁰ This is especially the case with statues, sitting astride horses, adorned in Confederate, military regalia. States that adopt such monuments as expressions of the South’s just cause defend the Confederacy’s core institution,—slavery. The notion that the South’s rebellion was exclusively or primarily about state rights and prerogatives is a debunked myth.¹²¹ In any litigation, the question for the jury should be whether display of monuments in public places, such as statues to Generals Robert E. Lee and Stonewall Jackson, are components of state efforts to legitimate slavery and secession. If so, the Thirteenth Amendment is relevant to litigation for their removal. Cities can take down public statues whose design and purpose are to glorify the Confederacy and to create a false narrative about the principal cause of the Civil War. States are preempted by the Thirteenth Amendment from abusing authority to thwart cities’ efforts to take down monuments to the Confederacy and the slavery it embraced. A § 1983 affirmative defense is available to cities like Charlottesville who are hit with lawsuits for taking down or covering symbols of a glorious south, still committed to the institutions and customs of the Confederate government with its constitutional protection of black slavery.

CONCLUSION

The racist significance of Confederate symbols is not lost on supremacist groups. As in Charlottesville during the 2017 Unite the Right rally, monuments to the heroes

¹¹⁷ 42 U.S.C. § 1982 (2018).

¹¹⁸ *See id.* § 1983.

¹¹⁹ Section 1982, like its § 1981 cousin, were both part of the Civil Rights Act of 1866, and both should be thought to be available against a state Confederate monument law through reliance on a § 1983 action. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989) (“We think the history of the 1866 Act and the 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981.”).

¹²⁰ GAINES M. FOSTER, *GHOSTS OF THE CONFEDERACY* 129 (1987).

¹²¹ EDWARD H. BONEKEMPER III, *THE MYTH OF THE LOST CAUSE: WHY THE SOUTH FOUGHT THE CIVIL WAR AND WHY THE NORTH WON* 4–7 (2015) (detailing the “myth” of the Lost Cause ideology and how it has a deleterious effect on the American understanding of the Civil War).

of the Lost Cause continue to be rallying points for groups who seek to intimidate communities and to rally support for racist ideologies. They are not merely historical but in contemporary contexts symbolize recalcitrance against racial uplift and resonate with the nostalgia of white supremacy. Cities seeking to remove Confederate symbols can look to the Thirteenth Amendment as a source of affirmative defense against States seeking to bar their removal.

The democratic initiatives of cities like Birmingham and Charlottesville to take down symbols of the Confederacy have been thwarted by States that prohibit citizens from carrying out their popular will. States like Alabama and Virginia protect the badges of slavery and the Jim Crow culture that after the Civil War emerged in much of the South. Their removal should be the prerogative of city residents acting through their elected representatives or by popular referenda to eliminate state sanctioned symbols of oppressions and bondage.