

Fall 2018

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Recommended Citation

Maliha Ikram, *Long-Term Preservation of Public Art: From Cultural Heritage to the Confederacy*, 14 Nw. J. L. & Soc. POL'Y. 37 (2018).
<https://scholarlycommons.law.northwestern.edu/njlsj/vol14/iss1/2>

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Long-Term Preservation of Public Art: From Cultural Heritage to the Confederacy

Maliha Ikram*

ABSTRACT

*Fifty years ago, in the city of Idyllic Isle, America,¹ an artist created a sculpture for the city. The artist's focus was on remedying the sordid history of Idyllic Isle, a city that was not always so peaceful. Long ago, the city was overrun with racism, hateful propaganda advancing minority oppression, government corruption, and disregard for its coastal environment. Over the years, the city improved, but still had not reached its potential. The artist decided that he wanted to erect a sculpture on the publicly-owned land overlooking the city's coastal waters. The government agreed that he could place the statue on the land as he wished, since there were no other plans for the land and the government wanted to rehabilitate it into a park space for its citizens. The sculpture, entitled *Bliss is Ignorance*, depicted a scene of a beaten-down woman of ethnically ambiguous descent on her knees with her arm outstretched, reaching forward with hope in her eyes. She was placed under the foot of a powerful man walking over her while laughing and dropping donut crumbs onto the ground next to her with one hand, the other hand on his hip. His clothing was emblazoned with "Anti-X" slogans—phrases signifying anti-minority sentiments—and was affixed with a government badge. While her eyes were open and hopeful, his were shut as he laughed. The artist was proud of this work; it depicted his vision for society—a body of people moving toward a better future while recognizing its past of racial hatred, governmental corruption, and pollution. He cast his signature on the base—as he always did on his works—and presented the statue to the government of Idyllic Isle, which installed the statue of the scene on its coastal public land.*

At present, Idyllic Isle is a booming, progressive city. It has incredible representation of diverse persons in government; has a culture of "zero tolerance" for hate; and it is pristine. All of its citizens are proud to live there and the city boasts near-zero unemployment or poverty. Minority women are high-ranking and hold plenty of executive positions. The government is full of upright, law-abiding officials who are just and fair. The city is full of parks and encourages public art installations to beautify the land for people to enjoy. However, there is burgeoning discontent among citizens

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¹ A fictional location.

regarding the value of certain works of the city's public art, given how wonderful a place Idyllic Isle has become. One of these contested works is *Bliss is Ignorance*.

Three years ago, voters elected a mayor who had been vocal during his campaign about the need to preserve all public statues and public art—citing the “importance of history” as his reason. The mayor continues to believe this, making this view a part of his re-election campaign. However, the majority opinion in Idyllic Isle has shifted, and now the majority expresses a desire to remove public art that no longer appeals to the city's sense of identity. Criticism has started bubbling as to the social purpose the statue now serves.

Given the rise of strong, powerful minority women in the city and their celebration of having a voice, some citizens feel repulsed by the idea of walking along the coastal lands and seeing a minority woman being trampled over by a hateful male governmental official. Social justice groups find the statue's “Anti-X” slogans to be both offensive and hateful reminders of past racial tensions. Preservationist groups and environmentally focused individuals resent the depiction of littering due to fear that it may encourage young children to pollute the earth. In all, *Bliss is Ignorance* has now lost most of its social value in depicting hope for the future for a majority of Idyllic Isle's citizens, as they believe that future has now arrived and there is no need to dwell on the past. However, on the opposite side, plenty of Idyllic Isle's citizens believe—as does the mayor they elected—that history is an integral part of any city, and therefore it is imperative that all public art remains that reminds Idyllic Isle of where it came from and how advanced it is now. Suffice it to say, the majority of the public and the government are at odds.

The artist of *Bliss is Ignorance*, still alive, is in the latter years of his life and is happy to see that the city has improved as he dreamed it would nearly fifty years ago. However, he is deeply dismayed, not at the tumult of public opinion regarding his statue—as he believes all art should spark inspiration and debate—but by the amount of vigilante public art now crowding around his statue. Other local artists have started putting their own sculptures around *Bliss is Ignorance*, some of them designed to purposefully comment on its themes. One sculpture is a solid concrete wall, placed in front of the scene with the woman extending her arm, intending to suggest that minority women will always be kept out of influential positions. Another sculpture depicts a dog lifting its hind leg on the corner of *Bliss is Ignorance*, evoking a Dadaistic ethos of everything being nonsensical and meaningless, art included. The artist of *Bliss is Ignorance* believes he has no recourse to stop this proliferation of secondary works, as the current mayor is adamant about fostering the creation of public art of all kinds. In fact, the mayor has publicly stated that he intends to keep all the statues surrounding the work where they are. Due to this, the artist decides that *Bliss is Ignorance* no longer serves his artistic vision; instead, he believes it is being corrupted by other artists' sculptural commentaries that take away from his message of hope blossoming out of past strife.

What is Idyllic Isle to do about *Bliss is Ignorance*? The city's most powerful government official—the mayor—wants the work to remain. The public is at odds: the current majority faction is advocating for its removal, while the former preservationist faction that elected the mayor wants it to stay. The artist wants to remove the piece because he does not believe it is serving its purpose any longer. Which of these parties'

views should control what ultimately happens to the art? And what factors inform that outcome?

INTRODUCTION: CULTURAL HERITAGE²—WHAT IT MEANS AND FOR WHOM IT HOLDS
MEANING

Cultural heritage comprises the shared ideologies, experiences, and values communities use to build their cultural identity.³ Cultural heritage develops over time, and is comprised of the values of a people and place through cultural signifiers. This heritage can be developed through art,⁴ landmarks, community projects, parks, and so forth. But what is so unique about public art⁵ is that, as it lasts on the land, it can achieve relevant cultural status based on its “history, popularity, or fame”⁶ Neighboring individuals or passersby can derive emotional fulfillment from the work and may begin to see it as part of their identity as residents of the locality where it sits. Still, when it comes to preventing destruction of the public art—despite it having achieved “cultural heritage” status, the public is unable to lean on “moral rights” legislation like the Visual Artists Rights Act of 1990 (VARA)⁷ located in the Copyright Act of 1976⁸ to prevent adulteration of the work.⁹ Only the artist of the public art has this prerogative.¹⁰ Notwithstanding the public’s lack of legal recourse, the preservation of art that is “symbolic of a culture, community, or society” may be squarely in the public interest such that any other governmental interest for the land on which it sits may pale in comparison to the cultural heritage the work represents.¹¹ This view is of course one that places the interests of the public above those of the artist (who may want to remove or alter the work for personal reasons) and the government (who may want to use the land for another purpose or otherwise remove the art for economic or aesthetic reasons) in the name of shared cultural heritage.¹² But prioritizing the interests of the public may have complications, especially when one thinks of artists as the masters of their work or the

² Cultural heritage comprises the shared ideologies, experiences, and values that communities use to build their cultural identity. See Cathay Y. N. Smith, *Community Rights to Public Art*, 90 ST. JOHN’S L. REV. 369, 381 (2016).

³ *Id.*

⁴ See Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 179 (2001) (“[T]here is an identifiable public or community-centered interest in certain objects.”).

⁵ For the purpose of this Article, “public art” means art that is displayed in public spaces and on public lands where it is accessible to everyone.

⁶ Smith, *supra* note 2, at 369–70.

⁷ See Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2012) (providing a federal legal scheme that protects the artist and his or her “moral rights”—a colloquial term for the rights explicitly listed in the statute—in the artwork); see also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81–82 (2d Cir. 1995) (recognizing that moral rights are those of attribution and integrity).

⁸ Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012).

⁹ Smith, *supra* note 2, at 370–71.

¹⁰ See *infra* Part II-C.

¹¹ Smith, *supra* note 2, at 378–79.

¹² In her article, Cathay Y. N. Smith also includes—and emphasizes—the private property owner whose property contains public art. For purposes of this Article, the private property owner is not included in the “public art” analysis.

government as shaping a locality's heritage over time. This begs the question—whose cultural heritage interest governs?

That the public has a common right to preserve cultural heritage is a novel idea,¹³ albeit a noteworthy one in the sense of fostering community identity. Sometimes, a locality views its public art as being essential to the land; public artworks such as Chicago's *Cloud Gate* (nicknamed "The Bean" by local residents) or New York City's *Statue of Liberty* are particularly famous examples. To remove such works would be an affront to the citizens of those cities' shared identity, as these cultural works "nourish" in local residents "a sense of community, of participation in a common human enterprise."¹⁴ In examples such as these, where a community ascribes significance to public art, it follows that the citizens should have some say in that art's disposition.¹⁵ However, public art may in fact be commissioned by federal, state, or local governments, and even though the artwork has particular significance to a community, it is ultimately available to the public because of the government.

When public art is created for, purchased by, or transferred to the government, the ends of that art may not be purely for public enjoyment but rather for stimulating the economy or boosting the locality's morale.¹⁶ Government may have a very tailored end—to beautify its cities and increase aesthetic quality of life. It is well-documented that people tend to gravitate towards areas that have "special traits" such as "architectural beauty" and unique "recreational opportunities."¹⁷ This means that public art, when it has risen to the level of cultural heritage, can create a sense of "attachment" to a community, encouraging people to both come and then stay.¹⁸ In this sense, the way in which public art is placed and given cultural significance is a "local matter."¹⁹ In these cases, the government itself builds a city's cultural heritage and dictates how that heritage develops over time. As such, public art's cultural heritage is not only a product of the public's appreciation and conferring of "heritage" status onto the work, but also that of the government's orchestration of where that art sits, how visible it is and to whom, and for how long it remains.²⁰

Indeed, cultural heritage is multifaceted, and the works that achieve that status give rise to many complications in terms of competing interests. Still, the above debate discredits the role of the artist in the conversation of the artwork's place in society. For scenarios where the living artist retains an interest in his or her public artwork, the public and government's interest in its contribution to cultural identity may be insufficient to

¹³ Smith, *supra* note 2, at 380.

¹⁴ John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 349 (1989).

¹⁵ Smith, *supra* note 2, at 381.

¹⁶ *Id.*

¹⁷ Gerald A. Carlino & Albert Saiz, *City Beautiful 3* (Fed. Reserve Bank of Phila., Working Paper No. 08-22, 2008), <https://www.philadelphiafed.org/research-and-data/publications/working-papers/2008>.

¹⁸ Smith, *supra* note 2, at 381–82.

¹⁹ Clifford Geertz, *Art As a Cultural System*, 91 MLN COMP. LITERATURE 1473, 1475 (1976).

²⁰ This is not to be confused with "time, place, and manner" restrictions, a term of art stemming from First Amendment jurisprudence. When a government engages in such determinations of time, place, and manner of speech, that behavior is considered "government speech," which the Supreme Court concluded was an acceptable form of regulation in *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009).

confer these groups dominion over it under current federal law that makes protecting the interest of the artist its priority.²¹

This Article will be informed in equal parts by existing law (through a descriptive analysis) and my own suggestions (through a normative analysis). I will analyze which legal frameworks might control the resolution of this question in different circumstances, followed by an explanation of what should be made of these frameworks in practice. Of particular importance are circumstances where the law is either silent or inexplicit, in which case policy decisions must correctly balance the interests of each of the parties to achieve an outcome in accordance with the overall spirit of the law and the public's shared cultural heritage generally. The issues surrounding long-term public art preservation are multifaceted, and each parties' position poses relevant social interests. Ultimately, the challenge in resolving this debate requires balancing each party's interests in accordance with the overarching legal schemes, while still acknowledging that the result should be rooted in cultural heritage concerns. I argue that public art should be held in the public trust for the people once it has risen to the level of local "significance."²² Long-term preservation is integral for public art that informs local heritage—but the converse is also true: art may be removed or altered if the public determines the art is no longer representative of community identity.

The structure of the Article is as follows. First, I will discuss the relevant parties—the government, the public, and the artist(s)—and the different legal schemes that govern them, which are predominantly local government law and copyright law. Second, I will lay out the relevant copyright schemes that protect the artist(s)'s interest in their public artwork, namely, the Visual Artists Rights Act of 1990 (VARA). Third, I will present the fair use defense and the Derivative Works Right under copyright law as a way for the public to push back against artist(s)'s copyright claims under VARA. Fourth, I will explore the government and the public's unique relationship to each other under property law's public trust doctrine, through which the government is legally required to hold lands—and, as I argue, public art—in the public trust for the community's enjoyment. Fifth, I will address the hotly-debated issue of Confederate monument removal, arguing that such monuments' preservation, adaptation, or removal is inherently a cultural heritage issue. Finally, I suggest various approaches for resolving the unrest between governments and their electorate.

I. THE PLAYERS AND THE GAME

Long-term maintenance of public art presents a substantive conflict of interests between various players—most saliently the elected government officials, the public,²³

²¹ See 17 U.S.C. § 106A(a) (2012) (addressing the rights of the author of the work, colloquially known as "moral" rights).

²² Smith, *supra* note 2, at 381.

²³ When I say the "public," as distinct from the "government," what I mean is that there must be recognition of the shifts in controlling majority factions within the public that may come into tension with a "government" official who was elected when a certain faction was the majority but who does not remain the representative of choice for the public when the majority faction changes. Additionally, aside from the tyranny of vacillating factions, there are infrastructural problems that prevent autonomy in a community's ability to elect officials. One such example of this is politically preservationist gerrymandering. See Walter

and the artist(s). When art is created or installed on public lands, each of these groups is implicated. Conflicts arise between these groups when their viewpoints regarding the value of the art diverge, leading to clashing opinions as to how to handle the preservation, adaptation, or removal of public art. This Article will evaluate how and whether public art should be preserved in the long-term by discussing both the merits and faults of the positions held by interested parties—the government, the public, and artist(s)—and ultimately determining whose opinion might control in different scenarios.

A. *The Government*

The term “government,” for purposes of this Article, is local government,²⁴ consisting of majority-elected public officials. In theory, the platform upon which a candidate for public office runs for election reflects the values of various factions within the local electorate. In the end, whichever view the majority of citizens ascribes to wins the day, and the candidate who best represents that majority view is elected to office. With this position, the government official enjoys a term that typically lasts several years. This is a general phenomenon of representative government. During this time, the official may decide to either continue to hold the views on which he or she ran, or adapt them to cultivate a broader reach. Historically, the former happens,²⁵ whereby the official sticks to party lines and the political mood of the majority that elected him or her. Because of this, the “government” may not be in tune with shifts in support. The majority that elected the current makeup of officials can change, and with that comes ideological conflict between the government actor and the citizens.²⁶

M. Frank, *Help Wanted: The Constitutional Case Against Gerrymandering to Protect Congressional Incumbents*, 32 OHIO N.U. L. REV. 227, 227 (2006) (“Walt Whitman loved elections with their torchlight parades, unending campaign oratory and passionate divisions. For him, the most powerful scene in the western world was the still small vibrating voice—America’s choosing day. Had he been told that America’s real choosing days now occur long before the voters go to the polls, he would undoubtedly have disapproved. But, at least with respect to the House of Representatives, that is precisely the case. Today, most elections for Congress have all the suspense of a driver’s license renewal and all the excitement of a trip to the mall.”) (internal quotations omitted).

²⁴ In thinking about local governments, it is important to note that they can comprise both city or locality and state governments. For purposes of this Article, the choice of whether to remove or maintain public art rests at the local level within the state. This, of course, is further nuanced by the state’s grants of authority, which may or may not confer home rule advantage for localities via an enabling act from the state. Thus, “home rule states,” as they are called, create powers for localities, be they initiative or immunity powers. Still, local governments are often subject to preemption from state legislatures—or perhaps do not even have home rule at all—further complicating the relationship between the government and the voters. See Joseph Zelasko, *The Reverse-Commandeering System: A Better Way to Distribute State and Local Authority*, 112 NW. U. L. REV. 83, 90 (2017) (“Today, however, very few home rule provisions provide local governments with immunity from legislative interference in local affairs—generally, ordinances passed under a local government’s home rule authority can be preempted by state legislation.”).

²⁵ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 923 (1995) (Thomas, J., dissenting) (“At the same time that incumbents enjoy the electoral advantages that they have conferred upon themselves, they also enjoy astonishingly high reelection rates.”); see also Patrick T. Roath, *The Abuse of Incumbency on Trial: Limits on Legalizing Politics*, 47 COLUM. J.L. & SOC. PROBS. 285, 298 (2014) (suggesting that incumbency inherently brings advantages to government officials’ ability to engage with their constituents and secure reelection, and the line between abuse of incumbency and legitimate use of incumbency is often blurry).

²⁶ Ryan Struyk, *Even Republicans Don’t Like Congress Anymore*, CNN (Aug. 3, 2017, 5:24 PM), <http://www.cnn.com/2017/08/03/politics/republicans-congress-approval-drops/index.html>.

1. Factions

Factions, or interest groups, are created when groups of citizens ascribe to disparate goals for the locality. When a faction gains enough momentum to become the largest—majority—faction, the longstanding Madisonian impetus is to ensure that majority rule does not rise to the level of tyranny.²⁷ The concern is that the majority faction will become self-serving, striving to “subordinate the common good” to its own interests.²⁸ And indeed, the majority often does accomplish this; it is why at the most basic political level, people ascribe to a blanket “red” or “blue” political identity, even if doing so may be counter-productive to the general interests of the collective citizenry.²⁹ However, factions do win elections—at the end of the day, the candidate that corrals the majority gets to hold office for the term. This means that term duration can create a lag in the current of political change, as the majority group at the time of election may no longer be the majority group before the expiration of the official’s term. Thus, if a government official takes a stance on an issue facing the locality—such as public art preservation—his or her policy position may not align with the shift in public opinion a few years down the road as to whether to preserve or remove art.

Another potential problem posed by representative governments is when the electorate or a candidate does not give a specific issue priority in the election. In many instances, elections may come down to single-issue politics, in which the outcome of the election hinges on a single issue carrying disproportionately significant influence on the locality.³⁰ In those scenarios, subjectively less pressing issues—long-term art preservation, perhaps—fall to the wayside. Additionally, some elected officials themselves may advocate against their prioritization.³¹ In all, accountability fails because of how elected officials view certain issues, be they superficial priorities or systemic problems with deep roots. It comes down to who the majority faction elects.³²

²⁷ See THE FEDERALIST NO. 10 (James Madison) (suggesting that one majority faction continually outnumbering smaller factions is a threat to democracy, as opportunities for that majority to oppress will be more frequent.).

²⁸ Norman R. Williams II, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 963 (1994).

²⁹ See MORRIS P. FIORINA, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA, 1–8 (3d ed. 2010) (suggesting that though most of America is not in fact polarized in political ideologies, since media and socialization falsely portray this to be the case, Americans buy into the manufactured notion of “red” and “blue”).

³⁰ Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1734 (2013).

³¹ See Ned Oliver & Mark Robinson, *Richmond Councilman Proposes Measure to Advance Confederate Statue Removal; Colleagues Skeptical*, RICHMOND TIMES-DISPATCH (Sept. 25, 2017), http://www.richmond.com/news/local/city-of-richmond/richmond-coun...val-colleagues/article_6eec6c7e-7609-5c99-849b-4f1aefaf1b1.html (quoting Richmond City Council President Chris Hilbert on monument removal: “It’s just not a priority for me, and I wish all of the time and energy and resources being put into this debate would be focused on education and public safety.”).

³² There are, of course, instances where majority rule cannot stand, such as when individual constitutional rights are adversely affected. In these cases, minority interests are protected at the expense of insidious majority motivations. Thus, purely “local” majority actions become subservient to the larger governing entity. This is due to the recognition that there are social goals involving constitutionally protected rights that are bigger than the locality’s majority-made decisions. See *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390, 442 (N.J. 1983) (Where minority citizens wanted suitable housing but the

2. State Constitutions

State constitutions vary in what constitutes local power—that is, to what degree the locality has decision-making authority. Professor Gerald Frug argues that it is because local governments are viewed as inferior political entities to their states, and because home rule often does not change that, local governments do not win out over their states.³³ This is due to the design of state constitutions; without limitations in their constitutions, states can “amend, abridge or retract any power it has delegated, much as it can impose new duties or take away old privileges.”³⁴ This means that the state constitution dictates what the parameters of power are and how the electoral process—and what issues can be meaningfully addressed therein—will be affected at the local level.

Corruption is an extreme in which the electorate may not matter at all due to government officials looking out for themselves. This can range from ignoring the electorate altogether or maintaining viewpoints just to pander to the majority to ensure re-election.³⁵ State constitutions may not even play much of a role in these local elections, as they may be more “hands-off” or otherwise confer home rule advantage to the locality for the issues at play. When local government officials become so self-interested that legitimate use of incumbency becomes susceptible to abuse to advance political goals, corruption may be evident.³⁶ And in this state of corruption, it may be unlikely that the public is being represented, as the harm it causes “subverts the democratic process to provide a private good for one individual”—the officeholder—“rather than a public good for all.”³⁷

3. Present and Future Interests

Political goals change over time, and old laws may not necessarily account for an evolving society. However, successfully changing laws and amending constitutions are not easy feats. Perhaps there is political gridlock; perhaps the existing laws are designed such that the local government official’s hands are tied.³⁸ Though public opinion may

township made it nearly impossible due to its zoning laws, the Supreme Court of New Jersey said that the locality could not just look after its own interests and ignore statewide fair-housing initiatives.).

Furthermore, steps are often taken by local governments to mitigate past issues and move forward with ameliorative remedies, albeit inorganically undertaken. *See Sheff v. O’Neill*, 678 A.2d 1267, 1283 (Conn. 1996) (“We therefore hold that, textually, article eighth, § 1 [of the Connecticut Constitution], as informed by article first, § 20, requires the legislature to take affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto.”).

³³ Richard Briffault, *Our Localism: The Structure of Local Government Law* (pt. 1), 90 COLUM. L. REV. 1, 6–7 (1990).

³⁴ *Id.* at 7.

³⁵ For this circumstance, the goal is reelection for the sake of maintaining power, not necessarily to serve the electorate.

³⁶ *See Roath*, *supra* note 25, at 291 (“[T]he threat of incumbent abuse can be understand [sic] as a corollary to the harm posed by corruption generally.”) (internal quotations omitted).

³⁷ *Id.* at 293.

³⁸ An example of such a limit on an official’s power is if state law preempts local law on a given issue and there is no home rule immunity for the locality. *See, e.g.*, N.C. GEN. STAT. § 100-2.1(a) (2015) (“Except as otherwise provided in . . . this section, a monument, memorial, or work of art owned by the State may not

vacillate over time, the constraints of elections prevent the public from effectively rejecting the views of officeholders while they are in office in their local governments.³⁹ This may often lead to frustration as “[l]aws and the directives of legal authorities restrict the ability of citizens to behave as they wish.”⁴⁰ When there is unrest in the public as to whether laws are reflecting its interests—and whether governing officials are doing anything about addressing these interests—it leads to a lack of trust in authority. Accordingly, dissonance between the people and the government grows.

B. *The Public*

Ideally, the relationship of the government and the public is one where the government reflects the public’s view and thus is in harmony with it. However, the “public” in this Article is one that is at odds with its elected officials.⁴¹ This is not a reach, as factions among the voters vacillate in terms of which group is the controlling majority. The framework, then, is one where a particular majority faction that was controlling at the time of governmental elections votes in officials that meet its ideologies and expectations. However, given that these government officials have terms, during the course of their tenure in office the controlling majority faction may change. When this happens, the public—or at least a majority of the public—may presently hold a view distinct from the faction that elected the officials in control. Thus, the “public” takes on a divergent majority view from the “government.” And this phenomenon is where tension develops between these two actors when it comes to desired outcomes for the locality’s cultural identity.

C. *The Artist*

The artist’s role in the government/public/artist power struggle over public art is perhaps the most multifaceted. First, as referenced earlier in this Article, federal legal schemes protect the artist and his or her “moral rights” in the artwork, namely the Visual Artists Rights Act of 1990 (VARA)⁴² located in the Copyright Act of 1976.⁴³ This framework affords artists a great deal of protection if they meet the qualifying VARA

be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.”).

³⁹ It is not until they can exercise their right to vote that they can remove the elected government official. Even then, there is no guarantee that the new officeholder will be able to effectuate change in the local legislative scheme.

⁴⁰ Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 709 (2000).

⁴¹ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 739 (1986) (arguing that the public and the government can be viewed distinctly under the Public Trust Doctrine because some property is “inherently public property”: “[T]he public at large, which despite its unorganized state has property-like rights in the lands held in trust for it—[has] rights that may be asserted even against its own representatives On such a theory, even the legislature itself cannot divest the public of its rights.”).

⁴² Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2012); see also *Carter v. Helmsley–Spear, Inc.*, 71 F.3d 77, 81–82 (2d Cir. 1995) (recognizing that moral rights are those of attribution and integrity).

⁴³ Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012).

criteria, which depends on both the stature of the artist and the art in question.⁴⁴ VARA provides a lot of protection for the artist: perhaps most saliently, the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification that is prejudicial to his or her honor or reputation.⁴⁵ Second, VARA gives an artist the right to prevent any intentional distortion, mutilation, or other modification of that work, and the right to prevent any destruction of a work of the artist's which is of recognized stature if such destruction is "intentional or grossly negligent"⁴⁶

Exceptions to this broad sweep are as follows: modification of a work of visual art which is the result of the passage of time (and is therefore not a distortion, mutilation, or other modification); the modification of a work of visual art which is the result of conservation efforts, or presentation of the work to the public (unless such modification is caused by gross negligence).⁴⁷ However, these protective rights do not apply to any secondary reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item defined as a "work of visual art."⁴⁸ The artist enjoys these rights for the duration of his or her life, both for works created on or after the effective date of VARA and for works created before the effective date of the Act to which the artist still holds title.⁴⁹ Under VARA, the artist's rights may not be transferred, but they may be waived in a written instrument signed by the author that specifies the work of visual art at issue and the uses of that work to which the waiver applies.⁵⁰

Given this backdrop, it becomes clear that an artist's work of visual art is well-protected under VARA. However, one wonders how much the artist's voice matters when the government or the public has divergent opinions on the work that may not harmonize with the artist's own view. The government may very well take a stance on the work that effectively calls for the violation of VARA by intentional destruction, mutilation, or modification of the art. The public, too, may petition for its removal or adaptation because of changing cultural attitudes, as in the case of Confederate monuments erected in the American South, discussed further in Part V of this Article. It appears obvious that, under current law, as long as the artist is alive, the artist's rights over the use of his or her work should control. But still, this construction is not as straightforward as it appears, as

⁴⁴ See 17 U.S.C. § 101 (2012) (defining "work of visual art" as (1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature of other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.); § 106A; see also *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995) (establishing the "recognized stature" test as requiring "(1) that the visual art in question has 'stature,' *i.e.*, is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society") (quoting § 106A(a)(3)(B)).

⁴⁵ § 106A(a)(3)(A).

⁴⁶ § 106A(a)(3)(B).

⁴⁷ *Id.*

⁴⁸ § 106A(a).

⁴⁹ § 106A(d).

⁵⁰ § 106A(e).

the “author”⁵¹ of the work may not have the legal standing to defend his or her work against government control or public pressure after transferring it to the government. The complications that arise are fundamentally ones of power, and serve to undermine the idea that an artist has meaningful control over his or her work after it is placed on public lands.

II. COPYRIGHT LAWSUITS UNDER VARA: THE ARTIST AND THE GOVERNMENT

Traditionally, the legal framework which empowers an artist to reassert dominion over his or her public art arises in the form of a lawsuit against the government under VARA. In such cases, the violation of the artist’s moral “rights”⁵² under VARA is the contested issue.⁵³ The artist can prevail on a moral rights claim against a party (in these cases, the government) in the event of *intentional*⁵⁴ “distortion, mutilation, or other modification” of the work of visual art which would be prejudicial to the artist’s reputation, any destruction of a work of “recognized stature,” and any *intentional or grossly negligent* destruction of that work.⁵⁵ If an artist can prove that his or her work of visual art is of recognized stature and that it has been destroyed, mutilated, or otherwise modified, it is likely that his or her interest in the work can withstand attacks from the defendant.⁵⁶ Indeed, VARA confers significant protection to the artist if he or she meets the correct burden of proof under the statute.⁵⁷ As such, VARA suggests that the artist’s stake in his or her work is perhaps the most explicitly protected legal interest held by all interested parties concerned with long-term preservation of public art.

A. *General Principles for the Living Artist’s Interest to Prevail*

When it comes to the competing interests of the living artist, the public, and the government regarding public art preservation, policy concerns tip the scale in favor of the artist.⁵⁸ Save for arguments as to fair use or transfer of copyright ownership,⁵⁹ the artist is given significant protections under VARA, suggesting that, unless the artist transfers ownership or waives his or her moral rights to the government or some other entity, the

⁵¹ 17 U.S.C. § 101 (2012).

⁵² § 106A(a) (2012).

⁵³ See *Pollara v. Seymour*, 150 F. Supp. 2d 393, 396 n.4 (N.D.N.Y. 2001). (Where the artist plaintiff asserted that her rights were violated under VARA when the mural she painted for a lobbying event was removed without her permission and torn and damaged in the process).

⁵⁴ See *Martin v. City of Indianapolis*, 192 F.3d 608, 614 (7th Cir. 1999) (“This appears to be a case of bureaucratic failure within the City government, not a wilful [sic] violation of plaintiff’s VARA rights.”).

⁵⁵ § 106A(a).

⁵⁶ *Martin*, 192 F.3d at 614.

⁵⁷ This burden of proof requires the plaintiff must show that modification, mutilation, distortion, or destruction of an plaintiff’s work resulted in reputational harm to the plaintiff. However, the First Circuit in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Buchel*, 593 F.3d 38, 53–54 (1st Cir. 2010) stated that the burden of proof has had various interpretations that have not been sufficiently analyzed because many cases that go to litigation are often decided on “threshold questions” such as whether the artist’s work qualifies as a work of “visual art.” The *Massachusetts Museum* court agreed with scholar Melville B. Nimmer that artists have to show that the effect of such modifications and destructions are “prejudicial” to their reputation (i.e., “reputational harm”). *Id.* at 37-38.

⁵⁸ See 17 U.S.C. § 101 (2012) (providing that “authorship” is heavily prioritized).

⁵⁹ See 17 U.S.C. § 106 (2012); 17 U.S.C. § 107 (2012).

artist's interest remains salient. This holds true when certain contexts surrounding the public art merit deference to the living artist who created it. Often, an artist has a particular vision for the work that can only be met in specific ways. Other times, the concern is the nature of the work itself⁶⁰ and what purpose it is supposed to serve and for how long. Naturally, concerns as to adverse impacts on the locality may arise, and in those cases, it is worth exploring the path that is truest to the integrity of public art as a concept.

1. Temporary⁶¹ Nature of the Art

Some artists create their works specifically to serve a purpose for a limited duration, a snapshot in time. One can imagine a scenario where an artist wishes to comment on a particular problem facing a locality in which they display his or her art. This problem may be the construction of a new bridge, and an artist may wish to create a beautiful sculpture that sits upon public lands facing the bridge to simultaneously comment on the construction itself and beautify the otherwise sullied construction site. When construction is complete, the artist may decide the sculpture is now moot as far as his or her vision for the piece is concerned and seek its removal. It could be that the general public or the governing officials enjoy the work or have experienced a boom in tourism for those wishing to see it. However, even in those instances, a living artist's vision—so long as he or she has retained his or her right to the work—should reign supreme. The art is fundamentally temporary in nature, so it is designed to only last for a certain amount of time. To keep the work in place would undermine the artist's rhetorical purpose.

2. Location-Specific⁶² Art

A similar scenario arises if the public art is tied to a particular piece of land. In a case like this, the government may propose to move the art to another public space (perhaps because there is a better use of the land), but the artist is adamant about the art only making sense in that specific space. To the artist, the art is essentially worthless if it is not tied to the specific piece of public land for which it was created.⁶³ A sculpture of a nautical ship overlooking the water may not make sense to the artist's vision if it was moved to a landlocked area. In these scenarios, the living artist's rights do matter,⁶⁴ but

⁶⁰ Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 CHI.-KENT J. INTEL. PROP. 204, 208–09 (2013); *see also* Pollara v. Seymour, 150 F. Supp. 2d 393, 396 n.4 (N.D.N.Y. 2001) (VARA was effectively invoked by the artist when his work was destroyed by the owner of the private building to which the artwork was attached. The court found that the artist should have been consulted before the destruction of his work because the art could have been removed from the defendant's property and preserved without destruction. As such, the plaintiff artist retained his moral rights in the work.).

⁶¹ *See* Smith, *supra* note 2, at 412–13 (noting that some art is not meant to be permanent).

⁶² *See id.* at 410 (suggesting that for some public art that is “site-specific,” the “deliberate incorporation of the location of the art” is an “integral element of the art”).

⁶³ *See* Barnett, *supra* note 60, at 213 (“[A]ny removal of the work from its site would significantly dilute the artistic meaning and importance of the work.”).

⁶⁴ The caveat of course is that VARA does not cover site-specific art, likely because it would render the location inalienable, meaning that any change to the space would necessarily destroy the art in some way if it truly were part of the fiber of the space. A potential argument can be made in favor of extending VARA

perhaps the path of least resistance would be that the artist decides that the art belongs nowhere if not on the public land it was originally placed on. For the artist, the art is location-specific, and it does not make sense anywhere but its original location. Arturo Di Modica's *Charging Bull* sheds light on this idea: a bull representative of economic resilience and prosperity will likely fail to carry that message if placed on agrarian public lands far removed from the economic epicenter of Wall Street.⁶⁵ The location matters; if the case is such that the government has no choice but to move the artwork, the artist should retain the option to remove the artwork from public display altogether in lieu of relocation.

3. Revenue Generating Art

The biggest argument against living artists retaining dominant rights over the public and the government is an economic one.⁶⁶ If a work of public art garners attention and stimulates tourism and the local economy, it becomes harder for the artist's plight to appear sympathetic. An artist who advocates for his or her work's removal due to its temporary intent or location-specific message may face considerable pushback from the government or the public. Still, as long as the artist retains his or her copyright and moral rights in the work, he or she may be able to control the destiny of the art despite the interests of the other two parties.⁶⁷ Whether or not this is an economically perverse outcome, it should not factor into the determination that the "author" of the public art determines its use.⁶⁸ The living artist's rights should be respected as to both the maintenance and desired removal of the public visual art.

to site-specific art, however, but only for outdoor site-specific locations rather than those tied to physical buildings. *See Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006) ("We do not denigrate the value or importance of site-specific art, which unmistakably enriches our culture and the beauty of our public spaces. We have simply concluded, for all of the reasons stated, that the plain language of VARA does not protect site-specific art."); Barnett, *supra* note 60, at 212–13 (Acknowledging the gap VARA has in failing to extend protection to site-specific art, and suggesting that Congress should address this oversight.).

⁶⁵ *See infra* Part II-C.

⁶⁶ Barnett, *supra* note 60, at 214 ("[T]he alteration or destruction of the work could also harm the social and economic well-being of the community. Removing a beloved mural from a neighborhood harms both its aesthetics and lowers property values of the entire community.").

⁶⁷ *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 735 (1989) (Defendant sculptor Reid was determined to be the exclusive owner of the copyright in the contested sculpture. Thus, he sought to prevent its use for any purpose that he did not permit. This case illustrates the strength of copyright ownership and the resultant use of the copyrighted work.); *see also* Jacey Fortin, *Who Owns Art from Guantánamo Bay? Not Prisoners*, *U.S. Says*, *N.Y. TIMES* (Nov. 27, 2017), <https://www.nytimes.com/2017/11/27/us/guantanamo-bay-art-exhibit.html?mwrsm=Email> (insinuating that ownership is foreclosed for prisoners who create their art as part of federally provided art classes for the inmates).

⁶⁸ Rebecca J. Morton, *Carter v. Helmsley-Spear, Inc.: A Fair Test of the Visual Artists Rights Act?*, 28 *CONN. L. REV.* 877, 907 (1996) (suggesting that VARA gives the artist the most influence; "[p]ublic concern for the preservation of any work goes unheeded unless the artist is willing to pursue protection").

B. *The Artist Versus the Government: Kelley v. Chicago Park District*

Perhaps the most famous recent case of an artist asserting a VARA claim against the government is *Kelley v. Chicago Park District*,⁶⁹ where an artist brought an action against the City of Chicago, alleging that the city modified his original work and reduced its size such that his moral rights under VARA were violated.⁷⁰ While the *Kelley* case ultimately hinged on issues of copyright, and whether the piece itself—an elliptical wildflower display installed in Chicago’s Grant Park—was a “work of visual art” under VARA, what is implicit in this case is whose rights govern if the plaintiff can or cannot establish copyrightability. If an artist can meet statutory definitions of whether or not a work is “visual art,” then, conceivably, the artist gets greater rights under VARA and thus is more likely to be triumphant in the overarching issue of preservation of his or her public art. Thus, the case ultimately hinged on whether or not the work itself was a “work of visual art” under VARA. The analysis, however, is valuable for artists seeking relief under VARA, as many artists may not fail on the technicality of whether their work is or is not “visual art.”⁷¹

The artist, Chapman Kelley, was nationally recognized and was known for his paintings of landscapes and flowers.⁷² He received permission in 1984 from the Chicago Park District⁷³ to install a wildflower display in Grant Park, a public space in Chicago.⁷⁴ He called the installation *Wildflower Works*, and it was planted in the public space.⁷⁵ The work was extremely popular and was maintained by volunteers for years.⁷⁶ However, over time, *Wildflower Works* began to deteriorate⁷⁷ and the City of Chicago had a different vision for Grant Park.⁷⁸ The government and the artist had opposing views on the value of the artwork. Kelley had originally been drawn to Grant Park, Chicago because of his artistic vision of engaging with the environment, educating others, and reaching the masses through art.⁷⁹ As his work fell into disrepair, however, it hampered his vision and no longer portrayed his artistic sensibilities⁸⁰ to his satisfaction. Thus, Kelley sued the Chicago Park District under VARA on the ground that his “right of

⁶⁹ *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

⁷⁰ *Id.* at 295.

⁷¹ A statue, painting, or other “fixed” medium is more likely to prevail as a “work of visual art” under VARA. In *Kelley*, the plaintiff created an organic, vegetative garden with sculptural properties, but it was found to be insufficiently “fixed” to support a copyright or a finding of “moral rights” under VARA. *Id.* at 306.

⁷² *Id.* at 291.

⁷³ The Chicago Park District is a government body that is best described as a creature of the state primarily because it is not funded by the city of Chicago and acts independently from the city of Chicago.

⁷⁴ *Kelley*, 635 F.3d at 291.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 294 (Providing background prior to Kelley’s lawsuit, stating that the Chicago Park District and Kelley had argued for decades over issues like city permitting, whether to transfer maintenance of the garden to a nonprofit at no cost to the government, and whether maintenance of the garden was feasible in the face of new construction for the adjacent Millennium Park).

⁷⁸ *Id.* at 291.

⁷⁹ *Id.* at 292.

⁸⁰ 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (2018); 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT §§ 16:1, 16:3 (2018).

integrity” as an artist was violated due to the deterioration of *Wildflower Works*.⁸¹ Kelley claimed that he had the right to prevent the distortion or modification of his work during his lifetime that would be “prejudicial” to his honor or reputation.⁸² The Seventh Circuit, however, ultimately held that VARA did not apply to Kelley’s piece because his underlying public art was not itself copyrightable.⁸³ This was due to its status as a living, vegetative garden, which the judge determined lacked the “fixation” necessary for a valid copyright claim.⁸⁴ Although there was no question that *Wildflower Works* attained “recognized stature”⁸⁵ under VARA, it was merely a technical difficulty that the public art was fundamentally a garden⁸⁶—at least in the eyes of the court—and, thus, Kelley could not establish the very copyright foundation upon which VARA builds.⁸⁷

Even though *Kelley* did not result in a favorable outcome for the plaintiff artist, the case outlines the strong interests that an artist has in his or her public art. The caveat, of course, is that the work must at least be copyrightable—in this case, the fact that Kelley’s work was a garden led to his loss. However, if Kelley’s *Wildflower Works* was instead a bronze statue, it is much more likely that he would have prevailed against the government, as his moral right interests under VARA would have had the copyrighted ground to stand on. Even though the nature of Kelley’s work ultimately undermined his VARA claim, *Kelley* presents a strong showing of the importance of moral rights for the artist of a copyrightable work of recognized stature.⁸⁸

C. *The Charging Bull and the Fearless Girl: A Case Study*

Charging Bull, fondly regarded as a staple of New York City’s financial district, has recently garnered national attention. Arturo Di Modica, an Italian immigrant sculptor, created the bull in 1989.⁸⁹ Though he took an unconventional route in placing his public art—he managed to “plop[] the 3 1/2-ton bovine beneath a Christmas tree in front of the New York Stock Exchange in December of 1989 without a permit”—it was eventually

⁸¹ *Kelley*, 635 F.3d at 291.

⁸² *Id.* at 292.

⁸³ For VARA to apply, the “work of visual art” must be copyrightable. *Id.* at 295. Kelley tried to argue that his work was both a painting and a sculpture, but this argument failed on appeal. *Id.* at 301.

⁸⁴ See 17 U.S.C. § 101 (2012) (stating that a work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.); *Kelley*, 635 F.3d at 303–04 (“[A] living garden lacks the kind of authorship and stable fixation normally required to support copyright Simply put, gardens are planted and cultivated, not authored.”).

⁸⁵ See *Kelley*, 635 F.3d at 293 (“*Wildflower Works* was greeted with widespread acclaim. Chicago’s mayor, the Illinois Senate, and the Illinois Chapter of the American Society of Landscape Artists issued commendations.”).

⁸⁶ See *id.* at 301 (“VARA plainly uses the terms ‘painting’ and ‘sculpture’ as words of limitation [But,] if a living garden like *Wildflower Works* really counts as both a painting and a sculpture, then these terms do no limiting work at all.”) (emphasis in original).

⁸⁷ See *id.* at 299 (“ . . . VARA supplements general copyright protection; to qualify for moral rights under VARA, a work must first satisfy basic copyright standards.”).

⁸⁸ 17 U.S.C. § 106A(a)(3)(B) (2012).

⁸⁹ *New York Post* Editorial Board, *Charging Bull Has Earned Its Spot*, *NEW YORK POST* (Feb. 14, 2018, 10:46 AM), <https://nypost.com/2018/02/14/charging-bull-has-earned-its-spot/>.

accepted as a mainstay of the neighborhood.⁹⁰ Di Modica’s message in relation to the bull’s presence was simple: it was to boost the spirits of American traders after the stock market crash in the years preceding 1989.⁹¹ Di Modica stated that he intended the bull sculpture to be a symbol of “prosperity” and “strength,” one that would serve as a reminder of resilience for years to come.⁹²

However, eventually, a new statue stepped into the ring. This statue, titled *Fearless Girl*, was sculpted by Kristen Visbal, and was installed facing *Charging Bull* head on. *Fearless Girl* was in fact commissioned by State Street Global Advisors, a firm that wanted a statue to “call attention to a lack of women leaders on Wall Street”⁹³ Though the statue of the girl appears to serve a noble purpose and has drawn “countless tourists, a metric ton of media coverage and its share of praise as a symbol of the fight for gender equity,” it has earned the ire of one very interested party: Di Modica. Di Modica stated that he worries about the negative and disruptive effect he believes *Fearless Girl* has had on *Charging Bull*—going so far as to evoke the presence of the statue as a violation of his moral rights as an artist.⁹⁴ Meanwhile, the public and the government appear to have interests largely oppositional to Di Modica’s—to maintain *Fearless Girl* and continue to allow her to implicate *Charging Bull* to serve the rhetorical purpose of gender equality.⁹⁵ The *Charging Bull–Fearless Girl* story is a modern example of the rights of the artist, the opinions of the public, and the stance of local government diverging to a point of seemingly irreconcilable interests.

1. The Artist Versus Both the Government and the Public

The question of what happens when the artist no longer sees his or her artwork as serving its intended purpose and *wants* the art removed even if the public and/or government wishes to keep it there is one that is at the forefront of the *Charging Bull–Fearless Girl* debate. It is clear to Di Modica that his bull and *Fearless Girl* are unwelcome bedfellows. What is remarkable about *Fearless Girl* is that it seems to be designed with *Charging Bull* in mind, manipulating the fact that the bull already exists to push the agenda of the firm that commissioned it.⁹⁶ In this way, the tension is not only in regards to the sculptures themselves, but the way in which the artist gets to control the

⁹⁰ Colin Dwyer, *Sculptor of Wall Street Bull Says 'Fearless Girl' Horns in on His Work*, NPR (Apr. 12, 2017, 5:28 PM), <http://www.npr.org/sections/thetwo-way/2017/04/12/523592057/sculptor-of-wall-street-bull-says-fearless-girl-horns-in-on-his-work>; see also *id.* (noting that the New York Stock Exchange was not happy with the “gift” and removed the bull later that day; however, *Charging Bull* was eventually moved south of Wall Street, where it still stands).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Sarah Cascone, *Is 'Fearless Girl' Actually a Bully? 'Charging Bull' Defender Decries Lass as Corporate Vandalism*, ARTNET NEWS (Mar. 29, 2017), <https://news.artnet.com/exhibitions/fearless-bull-charging-girl-copyright-907208>; see also James Barron, *Wounded by 'Fearless Girl,' Creator of 'Charging Bull' Wants Her to Move*, N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/nyregion/charging-bull-sculpture-wall-street-fearless-girl.html>.

⁹⁵ Barron, *supra* note 94.

⁹⁶ *Id.* (suggesting that the agenda was to use *Charging Bull* as a pawn to assert the message of a dearth of female representation and power in corporate America, thus wrongly likening the bull to an enemy of women’s advancement that it was never intended to be).

message relayed by them. What appears to have been willfully disregarded in this case, however, is Di Modica's interest in having his bull maintain the rhetorical purpose *he* intended for it. Di Modica insists that *Fearless Girl* is “not a symbol” and that it is a mere “advertising trick” that is distorting his artwork's message to drive its own.⁹⁷ Di Modica suggests that *Fearless Girl*'s message has overtaken his, stating that “[t]he girl is standing there like this in front the bull, saying, ‘Now, what are you going to do?’ ”⁹⁸ And because of this messaging, *Fearless Girl* may create the false impression that the bull is there to represent an intimidating, formidable force of male-orchestrated female oppression. Di Modica says that his *Charging Bull* has been distorted into a villain for the financial gain of State Street Global Advisors, given that the firm is responsible for abusing it as the unwelcome counterparty to their commissioned *Fearless Girl*.⁹⁹ Because of Di Modica's strong interest in maintaining the integrity of his statue, he wants a specific measure to be taken by the government to remedy this situation—removal of *Fearless Girl*.¹⁰⁰ The trouble with an artist's demand for affirmative “removal” of his or her work outright, however, is that it is not apparent that VARA addresses this situation, as it does for blocking removal of an artist's work.¹⁰¹ This shortcoming in VARA works against the protection for artists established elsewhere in the statute, as it does not give credence to the reality that erecting a new work of art that functionally “distorts or mutilates” the meaning of an existing work of art may be just as egregious to the original artist as defacing the work itself. For this reason, it is unclear how strong a claim Di Modica has under VARA for the removal of *Fearless Girl*.

The government, however, has a different vision as to how to treat *Fearless Girl*. New York City Mayor Bill de Blasio has made it very clear that he has no intention of removing *Fearless Girl*, tweeting that “[m]en who don't like women taking up space are exactly why we need the Fearless Girl.”¹⁰² Somewhat ironically, a statement like this comes off, at best, as misinformed in view of the artistic interests protected by VARA. The Mayor wrongly focuses only on *Fearless Girl* and the message she is trying to promote: gender equality. There is nothing wrong with this message in itself; what may be problematic under VARA, however, is *Fearless Girl*'s use of *Charging Bull* as a pawn in that message. Indeed, Di Modica and his attorney agree in part with de Blasio's perspective: they too “support the fight for gender equality and . . . do not want the *Fearless Girl* banned entirely.”¹⁰³ What they *do* want, however, is for *Fearless Girl* to be removed from the area where *Charging Bull* sits because it is adulterating Di Modica's message of resilience and turning it into anti-female empowerment propaganda for *Fearless Girl* to capitalize on.¹⁰⁴

⁹⁷ Dwyer, *supra* note 90.

⁹⁸ *Id.*

⁹⁹ *See id.* (reporting that Di Modica believes that the commission distorts the intent of his statue into a villain for the firm's own gain).

¹⁰⁰ Barron, *supra* note 94.

¹⁰¹ *See* 17 U.S.C. § 106A (2012) (failing to mention anything about an artist's rights extending to removing *another* artist's work of visual art as a means to defend the meaning of his or her own work).

¹⁰² Dwyer, *supra* note 90.

¹⁰³ *Id.*

¹⁰⁴ *See* New York Post Editorial Board, *Don't Make the Bull Follow the Girl*, NEW YORK POST (Apr. 20, 2018, 8:33 PM), <https://nypost.com/2018/04/20/dont-make-the-bull-follow-the-girl/> (stating that, in

The government appears so indifferent to Di Modica's interest in preventing his work from being maligned that the city renewed *Fearless Girl*'s temporary permit through 2018.¹⁰⁵ What's more telling—perhaps tragically so—is that the community, including *Fearless Girl* sculptor Kristen Visbal, does not seem to fully appreciate Di Modica's statutory “moral rights” under VARA. In response to Di Modica's dismay at the presence of *Fearless Girl*, Visbal stated, “The world changes and we are now running with this bull.”¹⁰⁶ One would expect Visbal, herself an artist, to appreciate artistic integrity¹⁰⁷ and the importance of an artist's work to retain its intended meaning. However, she too appears to hold a diverging, ultimately self-serving interest in misusing the bull for her own sculpture's gain. She has no intention of removing *Fearless Girl*. Here, the various interests exceed those of the government, the artist(s), and the public; but irrespective of the multitude of interested parties, few seem motivated by preserving the integrity of *Charging Bull*. Who does intend to fight for *Fearless Girl*'s removal is Di Modica.

Though it is a convoluted case, this much is clear from the burgeoning saga of the bronze odd couple: Di Modica has a strong argument for pursuing a lawsuit under VARA. Di Modica's attorney stressed that while a lawsuit has not been pursued yet, there are “issues of copyright” that “needed to be—and still need to be—addressed.”¹⁰⁸ Di Modica and his attorney also have remedial suggestions—removing *Fearless Girl* and placing the statue elsewhere in New York City is one of them.¹⁰⁹ Additionally, an award of damages to Di Modica is a possible outcome, assuming his claims of having his legal rights violated are proven. Still, a VARA claim as to his right of integrity¹¹⁰ may be Di Modica's best bet. Since a scheme of legal protection relevant to the artist's interest in his or her art is codified under VARA, what matters is how to apply it to Di Modica with regard to *Charging Bull*. It is unclear whether Di Modica would be willing to move *Charging Bull* elsewhere, though under VARA, he may have the right to do so if his “integrity” is being compromised by the presence of *Fearless Girl*. Moreover, Di Modica may be able to make a colorable claim that his bull is being intentionally “distorted” or otherwise “modified” by *Fearless Girl*'s deliberately close placement and that this act of placement is prejudicial to his reputation.¹¹¹ On its face, Di Modica's allegations of “distorted” messaging of his work due to *Fearless Girl*'s manipulative presence align neatly with VARA's scope. And certainly, the intentionality threshold underlying both Visbal and the government's actions is met.

insisting that *Fearless Girl* remain, Mayor de Blasio has no “right to hijack an artist's intention and distort his work's actual intent to send an entirely contradictory message”).

¹⁰⁵ Dwyer, *supra* note 90.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* What makes Visbal's statement even more jarring is that she has publicly admired *Charging Bull*, telling the *New York Post* that the bull is “beautiful” and a “stunning piece of art.”

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See 17 U.S.C. § 106A(a)(3) (2012) (DiModica's claim is colorable under the right of integrity hook of the statute, as his work has suffered intentional distortion and mutilation that has in fact been prejudicial to him, since *Charging Bull* has been willfully distorted by *Fearless Girl* so as to appear a threat to female advancement despite its actual message of hope.).

¹¹¹ *Id.*

2. *Fearless Girl's* Bite: Recognized Stature and Fair Use

The trouble with Di Modica's desire to see *Charging Bull* stand independent again is that *Fearless Girl* itself is now a statue of "recognized stature" that likely will have its own VARA protections for Visbal. What is unique is that *Fearless Girl's* "recognized stature" is itself achieved by *Charging Bull's* existing presence. In some ways, this evokes a sort of irony in that *Fearless Girl* somehow cannot stand on her own two feet and have the meaning she wishes to disseminate in her message to the public without the presence of the bull. After all, it is unlikely that *Fearless Girl* would have attained the attention she did if it were not for the public's assumption that *Charging Bull* contained an implicit statement about gender equality.¹¹² If *Charging Bull* were removed, *Fearless Girl* may make very little sense or the work's impact would be significantly hampered—or even destroyed. For these reasons, and in my opinion,¹¹³ it seems that Di Modica has the stronger claim of the two artists when it comes to maintenance and reputational harm under VARA.

However, where *Fearless Girl* may pose a bigger deterrent to Di Modica's triumph on his copyright claims is if Visbal counters with a "Fair Use" Defense.¹¹⁴ The Fair Use Defense is an affirmative defense that an alleged copyright infringer invokes when sued by the copyright holder. Courts have clarified that finding fair use of the original work does not mean that infringement is not taking place, but rather, that this infringement is permissible assuming it passes the four-pronged fair use test.¹¹⁵ Under 17 U.S.C. § 107, the four factors that are considered for determining fair use are applied variably on a case-by-case basis: none are essential alone or together, and courts may weigh them differently. These factors are: (1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹¹⁶ As a whole, courts will analyze what effect the infringing work has on the original work based on the fair use factors. If the court finds that the original work is or would be too adversely affected

¹¹² Dwyer, *supra* note 90.

¹¹³ There is a dearth of actual case law on the matter of a new work deriving stature by relation to an existing work of art to meet this VARA requirement.

¹¹⁴ See 17 U.S.C. § 107 (2012) ("[F]air use of a copyrighted work . . . for purposes such as criticism [and] comment

. . . is not an infringement of copyright." Four factors are considered for determining fair use on a case-by-case basis: "(1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

¹¹⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574–75 (1994) ("It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in 'Oh, Pretty Woman,' under the Copyright Act of 1976, 17 U.S.C. § 106 but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts'") (internal citation omitted) (quoting U.S. CONST. art I, § 8, cl. 8).

¹¹⁶ § 107.

(market harm)¹¹⁷ by the infringing work, or that the infringing work is not sufficiently transforming the work or appropriates too much of it (purpose and character), then fair use will not be accepted as an affirmative defense.¹¹⁸

Given her statue's subject matter, placement, and purpose, Visbal may be able to prove that *Fearless Girl* is meant to comment on *Charging Bull* and thus serves essentially as a criticism of the latter piece that is fundamentally transformative of the original sculpture as a matter of law under 17 U.S.C. § 107.¹¹⁹ Furthermore, the 17 U.S.C. § 107 the Fair Use Defense explicitly applies to VARA claims under 17 U.S.C. § 106A.¹²⁰ What may undermine the “transformative” fair use factor, however, is that *Fearless Girl* does not physically take from *Charging Bull* and transform it into something else.¹²¹ Instead, *Fearless Girl* is more of a commentary on *Charging Bull*, seeking to both undermine *Charging Bull*'s message and to give itself meaning through its proximity and position in relation to the bull. Again, this case appears to be a novel one, in which the relational nature of *Fearless Girl* to *Charging Bull* is the problem. It is unclear what courts would think or whether VARA's framework would be enough to encompass this unique situation. Visbal's best bet is likely a fair use defense to Di Modica's VARA claims, but even then it is unclear whether her own work can withstand a challenge to recognized stature if she were to bring her own VARA claim.

Even still, in cases such as this one—where the original artist is still alive—both the federal statutory scheme under the Copyright Act and general principles of fairness seem to support the artist as having the ultimate say over what happens to his or her work of public art. As long as the artist is still a living party whose moral rights under VARA have been neither transferred nor waived, copyright law would seem to favor his or her interests.¹²² Of course, the *Charging Bull–Fearless Girl* case is complicated by the fact that *Fearless Girl*, too, is a work of visual art of seemingly recognized stature, or perhaps is a transformative commentary strong enough to be considered fair use. Despite this, if the case makes it to court, Di Modica should win in the ring.¹²³

¹¹⁷ Though courts place different weight on the § 107 factors, resultant harm to the market of a copyright holder's work is often considered the most important factor to be considered in whether to accept an infringer's fair use defense. *See Stewart v. Abend*, 495 U.S. 207, 238 (1990) (suggesting that the release of a film harmed Abend's ability to market new versions of his story, and that this market harm was the most important factor in finding infringement of his copyright).

¹¹⁸ *See Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992) (In describing Koons's level of appropriation for fair use purposes, the court said, “Here, the essence of Rogers' photograph was copied nearly *in toto*, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work. In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy.”).

¹¹⁹ *See Cariou v. Prince*, 714 F.3d 694, 710–11 (2d Cir. 2013) (articulating that, when works are sufficiently transformative in nature, they are fair use as a matter of law).

¹²⁰ § 107.

¹²¹ *See Cariou*, 714 F.3d at 711. *Fearless Girl* is unlike Prince's collages, which incorporate copies of other artists' photographs.

¹²² *See* 17 U.S.C. § 106A(3) (2012) Di Modica should be able to prevent the intentional distortion of his work, as the distortion has been prejudicial to his reputation. Furthermore, *Charging Bull* has attained recognized stature: it has been on Wall Street for over thirty years and is widely visited by tourists.

¹²³ On the heels of publication, new developments arose in the *Fearless Girl* and *Charging Bull* story. There is now discussion of moving *Fearless Girl* from Wall Street to a new location—albeit a temporary one. *Fearless Girl* is slated to be moved to Ireland from November 6–8, 2018—for the country's first “Climate Week”—and will then return to Wall Street. Sarah Cascone, *Wall Street's 'Fearless Girl' Is*

III. THE DILEMMA WITH DERIVATIVE WORKS: THE PUBLIC VERSUS THE ARTIST

Public art has the potential to become so influential that the community begins to see it as a source of inspiration and creativity. To that end, the general public (rather than established artists) may wish to create independent works of art which either pay homage to or build upon¹²⁴ public art that already exists. But these secondary creations may infringe on the artist's right¹²⁵ to control derivative works—new works that are based on his or her original creation.¹²⁶ Thus, the artist and the public may have competing interests in the use and purpose of public art. Traditionally, if a work is “fixed”¹²⁷ on or after January 1, 1978, then the author automatically has a copyright in it for the duration of the author's life plus 70 years.¹²⁸ In this way, the protections of copyright law are “artist-centered,” and even if the created work may have cultural value, if made accessible to the public, nothing prevents the artist from disposing of it.¹²⁹ Furthermore, individual copyright protection limits the scope of how and by whom a work may be used—this includes a limitation on public use.¹³⁰ Among these limitations is the ability to

Heading to Ireland to Fight Climate Change, ARTNET NEWS: ART WORLD (Oct. 2, 2018), <https://news.artnet.com/art-world/fearless-girl-ireland-climate-change-summit-1362517>. Additionally, Mayor de Blasio decided that *Fearless Girl* would become a permanent fixture on Wall Street, and that if it is moved to face the New York Stock Exchange (due to “traffic” concerns at its existing location), it would be moved along with *Charging Bull* so that the two would remain together. See J. David Goodman, *‘Fearless Girl’ to Move, and She May Take the Wall Street Bull with Her*, N.Y. TIMES (Apr. 19, 2018) <https://www.nytimes.com/2018/04/19/nyregion/fearless-girl-wall-street-bull-statue-move.html>. Notably, this is a unilateral decision by Mayor de Blasio in contravention of Di Modica's rights. De Blasio's press secretary said, “The mayor felt it was important that the ‘Fearless Girl’ be in a position to stand up to the bull That's why we're aiming to keep them together.” *Id.* This decision makes the argument for Di Modica's VARA claims even stronger and highlights the danger of government officials' ability to override a living artist's rights. The artist's unrest continues.

¹²⁴ See Smith, *supra* note 2, at 369, 372 (discussing the coming-together of graffiti artists to adorn the mural known as *5 Pointz*, formerly located in Long Island); see also Benjamin Sutton, *Graffiti Artists Sue 5Pointz Developer for Whitewashing Their Murals*, HYPERALLERGIC (June 15, 2015), <https://hyperallergic.com/214616/graffiti-artists-sue-5pointz-developer-for-whitewashing-their-murals/> (noting that the artists were unable to prevail on their VARA claims because the art was on private property, and the bundle of rights that come with private ownership tipped the balance in favor of the warehouse owner).

¹²⁵ Assuming the living artist is also the copyright owner.

¹²⁶ 17 U.S.C. § 103 (2012); 17 U.S.C. § 106(2) (2012); see also 17 U.S.C. § 101 (2012) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”).

¹²⁷ See § 101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”).

¹²⁸ *How Long Does Copyright Protection Last?*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-duration.html> (last visited Feb. 20, 2018).

¹²⁹ Wilkes, *supra* note 4, at 193.

¹³⁰ *Id.*

create derivative works, which can include an array of artistic creations stemming from the original copyrighted art.¹³¹

The authorial check that is placed on a copyrighted work has drawn criticism from proponents of preservation and cultural heritage, given that copyright ownership potentially forecloses access to works.¹³² This creates a strange incentive system. On the one hand, proponents of art—like museums or curators—value artists and wish to pay respect to them for their contribution to the broader culture. Simultaneously, these same individuals remain wary of the copyright protection given to artists because it constrains what they can do with an artist’s work.¹³³ Thus, there is a bitter irony to individuals in cultural fields resenting strong copyright ownership for the author under the present copyright scheme. Yes, they value the artist and the integrity of the artist’s work, but they seem to value open access to art that is unencumbered by ownership technicalities even more.¹³⁴

A. *The Public Domain and Fair Use Defense*

When a work is in the “public domain,” an author is either no longer living or copyright has lapsed in some way such that the public may use the work as it wishes. While some things are inherently in the public domain, such as objective historical facts,¹³⁵ subjective ideas and expressions complicate the analysis because they are products of individual creation. If a work is deemed to be in the public domain, in theory, nothing prevents the public from using it to create their own works or forms of expression based on the original. This would seem to be an easy case where the public is asserting its rights over those of the artist. However, there is evidence that even if a work is in the public domain, an individual¹³⁶—such as a member of the public, a curator, or a different artist—still may face creative restrictions depending on who owns the original work.¹³⁷

In these instances where a work of art is in the public domain, but is not free for public use, such individuals may express concern about copyright protection “impoverishing the public domain” by limiting creative expression.¹³⁸ Thus, the fair use defense is viewed as an essential affirmative defense to purported copyright infringement. It functionally says that while a new work of art may ordinarily violate another’s copyright, that new work—for which the fair use defense is raised—is worthy of existing in its own right without fear of infringing copyright laws because it passes the four factor

¹³¹ Derivative works are based on preexisting works and thus can constitute translations, movie adaptations of books, reproduction of art, abridged writings, etc. See § 101

¹³² See Wilkes, *supra* note 4, at 193 (“[C]opyright protection could impede certain works from being publicly displayed or catalogued.”).

¹³³ See *id.* (“Copyright is of particular concern to museum administrators, and perhaps private collectors, who want to publish catalogues containing reproductions of works of contemporary art.”).

¹³⁴ See *id.* (“[C]opyright could potentially subvert the public interest in access to cultural property.”).

¹³⁵ See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (establishing that historical facts or “interpretation” are not protected by copyright and can be “freely used by subsequent authors”).

¹³⁶ “Individual” here refers to either a member of the public, a curator, a different artist, a museum, or any other person or entity wishing to use the original artist’s work in a creative or adaptive way.

¹³⁷ Sonia K. Katyal, *Technoheritage*, 105 CAL. L. REV. 1111, 1142–43 (2017).

¹³⁸ *Id.* at 1136–37.

test. Indeed, opponents of stricter copyright protections believe that copyright law as a scheme “underestimate[s] the importance of the public domain”,¹³⁹ accordingly, these individuals advocate for greater creative opportunities under a fair use rationale. Of course, the fair use defense also has limitations,¹⁴⁰ and the public user of the contested art may not be able to win on a fair use defense. In this way, even this affirmative defense may not help the public overcome the artist’s exclusive rights in the work.

B. *The Relationship Between the Derivative Works Right and Fair Use*

The Derivative Works Right is codified in § 106(2) of the Act and comprises works based upon one or more preexisting works in a form that may be recast, transformed, or adapted—“derivative works.”¹⁴¹ Consider as examples a film adaptation of a famous book, an English translation of an epic poem, or a classical violin recording of a rap record. There are various tests for assessing whether a derivative work is created—i.e., whether it acceptably draws from the original work or expressly infringes the copyright owner’s exclusive right.¹⁴² Derivative works of copyrighted material are covered by § 103(a) of the Copyright Act as part of the subject matter of copyright.¹⁴³ However, subsection § 103(b) of the Act articulates that the copyright within the derivative work only extends to the material that is contributed by the author of the derivative work, separate from any preexisting material.¹⁴⁴ As such, only new contributions created in the derivative work are copyrightable, not the original material. The Derivative Works Test has been established by courts as one that contemplates finding the recasting, transformation, or adaptation of a work into another form while still “representing the ‘original work of authorship.’”¹⁴⁵ In this process, the test gauges whether the work is concrete or permanent in form—the work must be “fixed” to even rise to the level of infringement of the copyright owner’s original work.¹⁴⁶ If a work is found to be a derivative work and was not created by the original author, then there is infringement of the original author’s Derivative Works Right. However, if a work does not infringe as a

¹³⁹ *Id.* at 1138.

¹⁴⁰ See 17 U.S.C. § 107 (2012) (requiring the work to pass a four-factor analysis to count as fair use of another artist’s work).

¹⁴¹ 17 U.S.C. § 106(2) (2012); see also 17 U.S.C. § 101 (2012) (defining “derivative work”).

¹⁴² See *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (establishing a qualitative–quantitative test for finding substantial similarity between a purported derivative work and the original); *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 539 (S.D.N.Y. 2008) (establishing the importance of finding “recast” or “transformed” material from the original work in determining whether a derivative work has been created).

¹⁴³ 17 U.S.C. § 103(a) (2012).

¹⁴⁴ § 103(b).

¹⁴⁵ *Warner Bros.*, 575 F. Supp. 2d at 538 (S.D.N.Y. 2008) (citing *Castle Rock*, 150 F.3d at 143 n.9 (“stating that ‘derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation’ ”); *Twin Peaks Productions, Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1373 (2d Cir. 1993) (“finding a derivative work where a guidebook based on the *Twin Peaks* television series ‘contain[ed] a substantial amount of material from the teleplays, transformed from one medium to another’ ”)).

¹⁴⁶ See *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998) (finding that audiovisual displays assumed a “concrete or permanent” form and were thus derivative works); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992) (establishing the “concrete or permanent” form requirement for derivative works).

derivative work, it may still be an infringing work under an ordinary copyright infringement scheme, such as taking too much of the original work and failing to constitute fair use of the original.¹⁴⁷

Fair use may protect the creator of a would-be derivative work¹⁴⁸ even if that work rises to the level of infringement of the original author's copyright.¹⁴⁹ Here, the § 107 four-factor "fair use" test¹⁵⁰ is applied to the would-be derivative work to determine if its infringement of the original work's copyright is acceptable. Thus, the would-be derivative work either passes as being fair use of the original or fails and is considered infringing without exception. For purposes of this Article, the type of fair use defense raised as applied to original works of public art would most likely be a subsequent creator's appropriation of the earlier art as fair use.¹⁵¹ However, when derivative works created by lay people in the locality do not meet any of the fair use factors (such as having a transformative nature or commenting on or parodying the original), a fair use defense will likely be held invalid and the work will be considered infringing. In those cases, assuming the secondary work is "fixed" and passes the Derivative Works Test, the original artist/copyright owner will likely prevail in showing that his or her exclusive Derivative Works Right was violated.

C. *The Artist as Copyright Owner*

The point at which an artist's work is sufficiently in the public domain or is open to fair use¹⁵² is the subject of much debate.¹⁵³ One view is that if the author of a work of fixed public art still retains his or her copyright, the artwork is not in the public domain, and thus the creation of derivative works is forbidden.¹⁵⁴

For example, if a sculptor copyright owner¹⁵⁵ places a sculpture in a public space, the public cannot legally create any derivative works based on the sculpture without the sculptor's approval, despite the fact that the sculpture is part of the public landscape. This exclusive right for the sculpture would bar, for instance, a local tourism business from creating models or posters of the sculpture and selling them to visitors of the locality. Furthermore, the derivative works right would thwart a local painter from painting the

¹⁴⁷ See *Warner Bros.*, 575 F. Supp. 2d at 539 (holding that a fan's "Lexicon" for the Harry Potter series was not a derivative work infringing J.K. Rowling's derivative works right, but that the "Lexicon" did infringe Rowling's copyright to her series by virtue of ordinary infringement and an unsuccessful fair use defense).

¹⁴⁸ Though a work may count as "derivative," it may be protected under the fair use defense, just as if it were a non-derivative but otherwise infringing work. See *supra* Part III-B.

¹⁴⁹ See *supra* Part II.

¹⁵⁰ See 17 U.S.C. § 107 (2012).

¹⁵¹ See *Cariou v. Prince*, 714 F.3d 694, 711 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006); *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992). In all three cases, the alleged infringer raising a fair use defense was not the original artist. Additionally, all three cases involve new works with varying degrees of appropriation of the original work.

¹⁵² See § 107.

¹⁵³ See PATRY, *supra* note 80, § 9:73 ("Failure to use the more discerning observer test results in the plaintiff effectively obtaining copyright over public domain elements," suggesting that Patry would like a more rigorous test to determine what should be protected under copyright law.).

¹⁵⁴ See 17 U.S.C. § 106(2) (2012) (giving the copyright owner the exclusive right to create and authorize derivative works).

¹⁵⁵ See 17 U.S.C. § 113 (2012).

sculpture and selling the paintings to passersby. A trickier scenario arises when visitors of the sculpture take photographs of the work and then disseminate the photos on social media or otherwise sell them for profit. On its face, it would appear that the sculptor-copyright owner would still retain his or her rights to make models, paint pictures, or take photographs of his or her work. However, § 113(c) of the Copyright Act provides protections for photographs, suggesting that copyright does not include photographs of works if they are made in connection with advertising or commentaries related to the work.¹⁵⁶ Still, while tourism uses may remain intact because of this exception in the scope of copyright, it does not appear that an individual could merely photograph an image and sell it as his own creation for pecuniary gain.

Such limits on others are intended to protect the sculptor's market reach, which would be inhibited by unauthorized works circulating against his or her will.¹⁵⁷ Though such restrictions may chill the locality's profitability if it hopes to visit the public art to take photographs or create related art to sell,¹⁵⁸ a derivative works scheme that favors the artist over the public ultimately coheres with general principles of authorship. The artist, if living and holding a copyright in his or her public art, determines the use and purpose of that work, irrespective of the public's interest. For derivative works then, an artist's claim over his or her public art governs, and the public's use of this art for its own artistic expression is subservient to the copyright-owning artist's interests.

As such, the artist's ability to create his or her own derivative works is paramount, and it matters very little in the legal sense that members of the public wish to create their own art based off of the original—they would be hard pressed to without risking infringement. Even in cases where a fair use defense could be raised, the burden is on the alleged infringer to assert that their infringement is excusable as passing the four factor test and is thus worthy of existing in its own right. As mentioned above, copyright protection favors the living artist, and unless fair use is found, a member of the public will not be successful in creating their own offshoot. Here, it becomes difficult to see where the “people” can regain power over art that surrounds them. However, instances arise in which public interest is elevated to the point of requiring government actors to preserve lands—or works of art—for an ongoing duration of time. This elevation of the public's interest over private interest in art is informed by the Public Trust Doctrine, through which it can be argued that public art in the public domain should be held in trust for the people to enjoy as they wish.

¹⁵⁶ See § 113(c) (“In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.”).

¹⁵⁷ See *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (stating that the infringing derivative work was “likely to fill a market niche that Castle Rock would in general develop”); *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008) (Plaintiffs introduced evidence that showed that defendant's “Lexicon would compete directly with, and impair the sales of, Rowling's planned encyclopedia by being first to market.”).

¹⁵⁸ Consider a local artist selling to tourists hand-sketched drawings in Manhattan's Central Park of a different artist's famous statue.

IV. THE GOVERNMENT AND THE PUBLIC: WHO'S AFRAID OF THE PUBLIC TRUST?¹⁵⁹

Often, a local government wants to remove, move, or modify a work of public art, even when such action goes against prevailing public opinion.¹⁶⁰ In such circumstances, the government may see a better use for the land upon which the artwork sits, or is otherwise convinced that the artwork does not meaningfully contribute to the locality in the same way that an alternative would. However, the public may be able to coerce the government into a “forcing,”¹⁶¹ or compelled ownership of the public art. While property law recognizes eminent domain as a method by which the government may strip a party of ownership of real property, the converse is to mandate continued, or forced, ownership on the government. One way to force ownership of public domain public art would be to utilize the public trust doctrine. Though the doctrine traditionally applies to the protection of land and navigable waters, as explained below, it fits public art and there are sound reasons to expand it. A social objective¹⁶² under the public trust doctrine's application need not be limited to issues of physical access, but can be expanded to include public enjoyment¹⁶³ of public works of art. The following section illustrates possible expansions of the public trust doctrine to examples of public art from Chicago and Los Angeles.

A. *The Public Trust Doctrine and Public Art as Public Domain Property*

The public trust doctrine¹⁶⁴ is a generations-old legal mandate that historically requires governments to hold essential natural resources in trust for the public's benefit.¹⁶⁵ Accordingly, it protects public resources from being abused or diminished under the rationale that the people of the locality ascribe value to preserving such

¹⁵⁹ See Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800 (2004) (stating that the public trust doctrine is an exception to traditional property law in that it holds that some resources are “subject to a perpetual trust that forecloses private exclusion rights”). Functionally, then, the question becomes which resources rise to the level of inalienability to make them sufficiently worthy of “public” ownership.

¹⁶⁰ The parties in this scenario are different and have various considerations that an artist may not. Thus, this Part assumes that there is no living artist with any rights to a contested work of public art. The art is therefore functionally considered to be in the public domain. See Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 157 (2002) (pointing out possibility of “public domain property to which no individual holds any kind of title at all”).

¹⁶¹ See Lee Anne Fennell, *Forcings*, 114 COLUM. L. REV. 1297, 1299 (2014) (defining a “forcing” as an “involuntary imposition[] of ownership”).

¹⁶² See *Friends of the Parks v. Chi. Park Dist.*, 160 F. Supp. 3d 1060, 1069 (N.D. Ill. 2016) (holding that, where defendant government could not continue with plans to build a museum on public lands, “[p]laintiffs have sufficiently pled that the proposed Museum is not for the benefit of the public but will impair public interest in the land and benefit the [Lucas Museum of Narrative Art],” a private nonprofit, “and promote private and/or commercial interests”).

¹⁶³ Kearney & Merrill, *supra* note 159, at 801–03.

¹⁶⁴ See Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations: Ecological Realism and the Need for a Paradigm Shift* (pt. 1), 39 ENVTL. L. 43, 45 (2009) (“At the core of the doctrine is the antecedent principle that every sovereign government holds vital natural resources in “trust” for the public—present and future generations of citizen beneficiaries.”).

¹⁶⁵ Jordan M. Ellis, *The Sky's the Limit: Applying the Public Trust Doctrine to the Atmosphere*, 86 TEMP. L. REV. 807, 810 (2014).

resources rather than doing away with them. The trouble with the public trust doctrine is that it places significance on whether a *public entity* (that is, the government) retains ownership of the property¹⁶⁶—in this way, the “public” and the government interests are assumed to be one.¹⁶⁷ The irony here is that the origin of the public trust doctrine¹⁶⁸ was rooted in the fact that a local government unilaterally tried to dictate the use of public resources according to private actors’ desires rather than public opinion.¹⁶⁹ Still, while the “public” may not be able to dictate the use of government-owned public land, it may exercise legal remedies if the government tries to strike deals with private companies on lands that contain works of art the public views as sufficiently covered under a flexible notion of “public trust.”¹⁷⁰ It goes without saying that public art may often be viewed as having significant social value,¹⁷¹ and under a more democratic definition of “public trust,” public art may be included as “public domain property” protected under the public trust doctrine.¹⁷² Instead of being limited to real property, the public trust doctrine should be expanded¹⁷³ to “account for public cultural interests in art”¹⁷⁴

The general view of the public trust doctrine is that it favors environmental and preservationist concerns over development, but its real purpose is to foster public ownership for the sake of enjoyment of valuable resources over time.¹⁷⁵ Despite the doctrine’s broad mandate, it is still relatively unclear which resources are actually covered by the doctrine or who can sue to enforce it.¹⁷⁶ While the trend has historically been to interpret the scope of the Doctrine’s protection conservatively,¹⁷⁷ through a focus on “uniquely vexed” resources such as land beneath navigable waters,¹⁷⁸ a more

¹⁶⁶ See Kearney & Merrill, *supra* note 159, at 925.

¹⁶⁷ See *Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 171 (Ill. 2003) (upholding the reconstruction of Soldier Field stadium because the Chicago Park District—a government entity—retained title to Soldier Field stadium and, thus, could develop the trust resource in a way that a private entity could not).

¹⁶⁸ In *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 454 (1892), the Illinois legislature granted the entire Chicago lakefront to a private railroad company, in blatant disregard of the inherent value of the land to the public. The Supreme Court said, “[T]he idea that [Illinois’s] legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose,—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.” *Id.* at 454.

¹⁶⁹ See Kearney & Merrill, *supra* note 159, at 930.

¹⁷⁰ See *id.* at 807 (relaying scholar Joseph Sax’s idea that the public trust doctrine should “not be limited . . . but rather should apply ‘in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals’”) (Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556 (1970)).

¹⁷¹ See Barnett, *supra* note 60, at 211–12 (“[S]ome commentators have suggested that Congress extend cultural property-type protections to certain modern works of art.”).

¹⁷² See Epstein, *supra* note 160, at 157 (“Public domain property is of enormous value to all members of the public because of the unfettered use rights that it confers.”).

¹⁷³ This Article’s proposed expansion of the doctrine would recognize that shared public land may itself be more valuable because such land houses culturally significant public art.

¹⁷⁴ Wilkes, *supra* note 4, at 197.

¹⁷⁵ Kearney & Merrill, *supra* note 159, at 925.

¹⁷⁶ *Id.* at 803.

¹⁷⁷ *Eldred v. Reno*, 74 F. Supp. 2d 1, 2 (D.D.C. 1999).

¹⁷⁸ Kearney & Merrill, *supra* note 159, at 928.

expansive view of what qualifies as a “resource” is merited. The argument that is most relevant for expanding the doctrine to public art is furthered by prominent scholar Richard A. Epstein.¹⁷⁹ He suggests that the public trust doctrine should apply to intellectual property—specifically, forms of expression in the public domain.¹⁸⁰ Intellectual property “in the public domain” are works that have lapsed copyrights or are otherwise available for people to use without worry of infringing copyright protections due to those materials’ overarching social value, as is the case with historical facts.¹⁸¹ Because the artist copyright holder is no longer an interested party in a public domain work, the public should own the property.¹⁸² Though a work that has entered the public domain after its copyright has lapsed may not retain as much economic value for the artist as when its copyright was active,¹⁸³ it can be extremely valuable to a secondary user for creative, aesthetic, or inspirational reasons. For this reason, it follows that a work of public art should be considered “public domain property” to be protected under the public trust doctrine. This legal designation keeps a work of public art from suddenly being made private through title transfer to some individual or entity, preventing the public from using or enjoying the work.¹⁸⁴

As it is, a governmental “giveaway” to a private actor under a public trust framework has a strong potential to harm the public interest no matter what form of property is given.¹⁸⁵ When something has been enjoyed and owned by the public—like public art in the public domain—then subsequent privatization of it¹⁸⁶ takes away those shared rights. Epstein writes, “[i]t hardly matters that these are rights to pictures and stories instead of rights to walk along public ways or swim in public waters.”¹⁸⁷ Per Epstein, when a work of public art that is in the public domain is under threat of being removed, relocated, destroyed, or sold by the government to a private entity, then the public trust doctrine should apply to preserve it. Concerned citizens should have the right to evoke the doctrine to protect the public asset. Giving away public property—even if it

¹⁷⁹ While Epstein speaks of intangible goods in the context of term extension, such arguments can be extended to tangible objects such as works of public art.

¹⁸⁰ Epstein, *supra* note 160, at 156–58.

¹⁸¹ See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 245–46 (1918) (holding that copyright does not take historical facts out of the public domain).

¹⁸² See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 673, 680 (S.D.N.Y. 2011) (drawing attention, for class certification purposes, to the distinction between authors who could agree to transfer of their copyright ownership and those who could not because they were unknown authors of “orphan works.” “[H]ere class members would be giving up certain property rights in their creative works, and they would be deemed—by their silence—to have granted to Google a license to future use of their copyrighted works.”). This suggests that, if it can be proven that a copyright holder is no longer an interested party in his or her copyright, then the work can be considered public domain property.

¹⁸³ Epstein, *supra* note 160, at 125.

¹⁸⁴ *Id.* at 157.

¹⁸⁵ *Id.*

¹⁸⁶ When public art is sold or given to a private entity (or relocated or removed for the purpose of selling the land on which public art sits) a host of attacks on the art’s public nature may be commenced, such as destruction, removal, sale, or obscuring. Under such theories, the art’s “publicness” is lost.

¹⁸⁷ Epstein, *supra* note 160, at 157.

is in the form of a marble statue instead of a sandy seabed—is risky business,¹⁸⁸ and the public should retain the rightful check on government power to dispose of public property that it has historically enjoyed under the public trust doctrine.¹⁸⁹

B. The Government's Duty to Hold Public Artwork in Trust for the People

If public art is in the public domain such that it can be protected under the public trust doctrine,¹⁹⁰ then it follows that the government must maintain it despite any fiscal or alternative spatial interests the government may have in transferring it to a private entity. The complication, however, is in determining which pieces of artwork should rise to this level of this protection. This Article proposes that the test for protecting art under the public trust doctrine, though a normative one,¹⁹¹ should focus on whether the public art in question has reached the benchmark of constituting cultural or community identity for the locality. This ensures that culturally significant artworks are protected: as such, this is a superior barometer for measuring community value than a purely fiscal or culturally-blind test. Though it is not mainstream yet, the idea that there is a responsibility to preserve a people's shared heritage—be it through a human artifact, a natural object, or a landscape—is the thrust of viewing cultural heritage as part of public trust.¹⁹² In fact, some eminent scholars have determined the public trust doctrine to be “the most appropriate legal doctrine for explaining the public interest and for protecting the rights of a cultural group in its cultural property,” and have advocated for extending the public trust doctrine to protecting cultural heritage.¹⁹³ A piece of public art can attain so much community significance that it becomes a crucial part of a locality's cultural heritage, elevating the work to a status of evoking community pride.¹⁹⁴ When this happens, the people should retain a public trust interest in the work,¹⁹⁵ with the government acting as trustee for the community's benefit.¹⁹⁶

¹⁸⁸ See *id.* at 157–58 (“[I]t hardly matters whether we start with the Copyright Clause, the First Amendment, or even the public trust doctrine. All roads lead to Rome: the condemnation of government giveaways.”).

¹⁸⁹ See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 651 (1995) (arguing that the public trust doctrine imposes a trust standard and, thus, when this doctrine is applied to significant public art, it “imbues the protection of cultural property with the doctrine's trust relationship and imposes a fiduciary standard upon that relationship”).

¹⁹⁰ See Wilkes, *supra* note 4, at 196 (arguing that, although the “public trust doctrine has never been extended to protect the public interest in works of art,” there is a recognition of “the necessity for more extensive regulation to safeguard public expectations in objects that have become part of a local cultural heritage”).

¹⁹¹ There is no legal framework to determine this, given that this is a proposed idea for incorporating public art into public trust protection.

¹⁹² Joseph L. Sax, *Heritage Preservation As a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1142 (1990).

¹⁹³ Gerstenblith, *supra* note 189, at 647.

¹⁹⁴ Smith, *supra* note 2, at 380–81.

¹⁹⁵ *Id.* at 381.

¹⁹⁶ See *id.* at 383 (“When a piece of public art comes to embody a community's identity and culture, when it becomes a landmark or identifying symbol of a community, when it comes to define a community's social relationships, sustain the community's social rules, or strengthen the community's social values, it transcends being just a piece of art and becomes part of a community's heritage. It becomes ‘the property of

While governments frequently prohibit the destruction of those things that create cultural heritage, works of art are often overlooked as public goods and are instead viewed as private commodities.¹⁹⁷ But the case for including art in a public trust framework becomes obvious when a work of public art is so widely-recognized, or is so iconic to its locality, that its removal, alteration, or sale would pose a deep cultural loss.¹⁹⁸ Public art captures the pulse of a culture as a snapshot in time. It speaks to the achievements of citizens and their expression of both personal and communal identity.¹⁹⁹ Art is an element of a “collective enterprise.”²⁰⁰ Preserving public art as public trust property reinforces the idea that cultural life is just as worthy of supporting as nature.²⁰¹ To erase public art that has become a piece of a people’s cultural heritage is to distort a necessary past upon which a new tomorrow can be built.²⁰² Preserving cultural property is not unlike preventing the adulteration of land: we protect it so as not to render the resource barren.²⁰³ To remove public art of community value would be to render the culture surrounding it void.

1. The *Chicago Picasso*

The *Chicago Picasso* is an untitled sculpture created by Pablo Picasso that was commissioned in the 1960s by Skidmore, Owings & Merrill, one of the architectural firms working on Chicago’s Civic Center, now known as the Daley Center.²⁰⁴ Picasso created the sculpture in steel: the work weighed in at 162 tons and stood fifty feet tall.²⁰⁵ It was dedicated²⁰⁶ to the City of Chicago on August 15, 1967, when then-mayor Richard J. Daley unveiled the work in Daley Plaza. Mayor Daley was particularly thrilled because Picasso had made the sculpture specifically for Chicago.²⁰⁷ Exhibiting uncanny foresight as to the impact the art would one day have, Daley stated at the dedication, “We dedicate this celebrated work this morning with the belief that what is strange to us today will be

mankind and ownership carries with it the obligation to preserve [it].’ ”) (quoting JOSEPH SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 35 (2001)).

¹⁹⁷ Sax, *supra* note 192, at 1142.

¹⁹⁸ See *id.* at 1143 (discussing the public outrage that took place when the private owner of Stonehenge threatened its sale).

¹⁹⁹ See *id.* at 1156 (discussing the importance of artifacts in general as representing culture and politics).

²⁰⁰ *Id.* at 1160.

²⁰¹ *Id.* at 1163.

²⁰² See *id.* at 1157–58 (quoting Abbé Grégoire, that “national objects which, belonging to no one, are the property of all” and indicating that “common property” or “common heritage” must be maintained).

²⁰³ See Gerstenblith, *supra* note 189, at 651 (“The development of the public trust doctrine from a narrow application to protect specific natural resources to a more expansive use to protect the environment parallels the development of our society’s consciousness of, and appreciation for, first, scenic beauty, and then later, the broader environment.”) (footnote omitted).

²⁰⁴ Alan G. Artner, *Chicago’s Picasso Sculpture*, CHI. TRIB. (Dec. 19, 2007, 2:13 PM),

<http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-picasso-story.html>.

²⁰⁵ *Id.*

²⁰⁶ See Wilkes, *supra* note 4, at 196 (“The common law doctrine of public dedication enables the public to acquire rights in property that is [sic] useful to promote the public welfare. The doctrine reflects a combination of gift and contract law.”).

²⁰⁷ Ron Grossman, *50 Years Ago, Picasso’s Sculpture Challenged Chicago’s Imagination*, CHI. TRIB. (Aug. 6, 2017, 11:00 AM), <http://www.chicagotribune.com/news/opinion/commentary/ct-picasso-50-years-daley-plaza-flashback-perspec-0806-jm-20170803-story.html>.

familiar tomorrow.”²⁰⁸ Part of the confusion that Mayor Daley anticipated at the time of the dedication was a debate over *what* the sculpture was supposed to be; onlookers vacillated between thinking it was an animal of some kind, a flying nun, butterfly wings, or the head of a woman.²⁰⁹ Those that disfavored the installation of the sculpture believed that Picasso had no right to create art for Chicago because he was neither born nor raised there.²¹⁰ However, Mayor Daley remained steadfast in preserving the sculpture by the renowned artist because of the community value he believed it would have.²¹¹

Furthermore, Picasso did not accept a penny for his efforts in creating the sculpture, insisting that the *Chicago Picasso* was a gift to the city.²¹² What is even more unusual, given that the sculpture was a gift, is that Picasso refused to transfer the copyright for it to the City of Chicago.²¹³ In fact, there was no actual copyright in the work.²¹⁴ Despite that salient detail, the city incorrectly assumed that it could not collect licensing fees for derivative works such as “ashtrays and shot glasses” containing the sculpture’s image as the sculpture grew increasingly “iconic” of Chicago.²¹⁵ However, in 1970, a federal judge for the Northern District of Illinois ruled that the *Chicago Picasso* could not actually be copyrighted because it was a copy itself of the “maquette,” or model, of what the sculpture would ultimately be.²¹⁶ In its holding, the court noted that “[t]he monumental sculpture did not exist at this point in time and accordingly there could be no copyright in the monumental sculpture”²¹⁷ This “maquette” did not have a copyright notice affixed to it, and pictures of it were published without copyright notice as well.²¹⁸ The Art Institute sold photographs of the maquette, and these too had no copyright notice.²¹⁹

In October 1967, the Public Building Commission of Chicago engraved the granite base of the sculpture to read that the sculpture was “given to the people of Chicago by the artist Pablo Picasso”; thus, it was determined that the work was dedicated in 1967.²²⁰ However, it was not until 1968 that the Commission filed its application for a copyright to the “Chicago Picasso.”²²¹ But, pursuant to the law at the time, copyright could not subsist in a work that was already in the public domain.²²² Thus, the court held that,

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ What must be noted is that Pablo Picasso did not even own a copyright to the *Chicago Picasso*. Thus, there was no copyright over which Picasso could refuse transfer. The Northern District of Illinois held that there could be no copyright without meeting the now-moot notice requirement of the Copyright Act of 1909. The case was heard prior to the codification of the Copyright Act of 1976, so the requirements for copyright were based on the formalities of the 1909 Act, which were eliminated under the current 1976 Act. *See Letter Edged in Black Press, Inc. v. Public Bldg. Comm’n of Chi.*, 320 F. Supp. 1303, 1310 (N.D. Ill. 1970).

²¹⁴ *Id.*

²¹⁵ Grossman, *supra* note 207.

²¹⁶ *Black Press, Inc.*, 320 F. Supp. at 1310.

²¹⁷ *Id.*

²¹⁸ *Black Press, Inc.*, 320 F. Supp. at 1306.

²¹⁹ *Id.* at 1307.

²²⁰ *Id.*

²²¹ *Id.* at 1308.

²²² *Id.* at 1310.

pursuant to the formalities of the copyright laws at the time, the *Chicago Picasso* was “placed into the public domain prior to the attachment of copyright notice” and thus could no longer be copyrighted.²²³ Following this legal clarification, people freely made reproductions of the sculpture, leading to “familiarity, the first step toward love” in the public mind.²²⁴ Indeed, the beloved *Chicago Picasso* still stands today, solidifying its place as an icon of the city.²²⁵

2. The *Great Wall of Los Angeles*

Heralded as a cultural landmark of Los Angeles and a monument to “inter-racial harmony,”²²⁶ The *History of California*—referred to as the *Great Wall of Los Angeles*—serves as a symbol of public art as cultural heritage in the public domain. The mural was created as a community labor of love. In 1974, the Army Corps of Engineers approached the founder of Social and Public Art Resource Center (SPARC),²²⁷ Judith F. Baca, about creating a mural in the Tujunga Flood Control Channel as part of a beautification project.²²⁸ The project, which is ongoing to this day, is unique in that its creation is not rooted in a singular “artist,” but rather, a group comprised of community members and organizations, businesses, government agencies, minors in the juvenile justice system, and other individuals—all known as “Mural Makers.”²²⁹ In this way, the project is truly community-focused. The purpose of the mural is to add the histories of California’s various ethnic groups to the larger cultural dialogue of the city of Los Angeles and tell their stories of struggle and triumph.²³⁰ It is an ongoing project and one that the locality views as part of the fabric of its identity.

The *Great Wall of Los Angeles* is noteworthy because of the significant implications that would result from a governmental attempt to remove it. The project is the product of many entities with both a financial and emotional stake in the venture, so the impetus for the government to act as a trustee over this important marker of cultural heritage is paramount.²³¹ There is something special about shared resources: they

²²³ *Id.* at 1309; see also 47 U.S.C. § 1 (1946) (repealed 1947).

²²⁴ Artner, *supra* note 204.

²²⁵ See Grossman, *supra* note 207 (“ . . . Picasso’s statue grew on Chicagoans. Children delighted in climbing up it and sliding down . . . [T]he plaza became Chicago’s equivalent of the ancient Roman Forum. Visitors asked their Chicago hosts to take them there.”).

²²⁶ *The Great Wall of Los Angeles*, SPARCINLA, <http://sparcinla.org/programs/the-great-wall-mural-los-angeles/> (last visited Feb. 21, 2018).

²²⁷ SPARC’s mission statement reads, “SPARC’s intent is to examine what we choose to memorialize through public art, to devise and innovate excellent art pieces; and ultimately, to provide empowerment through participatory processes to residents and communities excluded from civic debate. SPARC’s works are never simply individually authored endeavors, but rather a collaboration between artists and communities, resulting in art which rises from within the community, rather than being imposed upon it.” *About SPARC*, SPARCINLA, <http://sparcinla.org/about-sparc/> (last visited Oct. 18, 2018).

²²⁸ *The Great Wall — History and Description*, SPARCINLA, <http://sparcinla.org/the-great-wall-part-2/> (last visited Feb. 21, 2018).

²²⁹ *The Great Wall of Los Angeles*, *supra* note 226.

²³⁰ *The Great Wall — History and Description*, *supra* note 228.

²³¹ See Michael A. de Gennaro, *The “Public Trust” Servitude: Creating a Policy-Based Paradigm for Copyright Dispute Resolution and Enforcement*, 37 TEX. TECH. L. REV. 1131, 1151 (2005) (“Real property and intellectual property both retain characteristics of public goods in the sense that the public derives

represent the coming together of people with a common interest in a public good.²³² When people contemplate whether public trust protections should apply to a given resource, they must hold the underlying belief that there are certain pieces of property that are so integral to the identity of the public that the public “has a reasonable expectation of their use.”²³³ Given that baseline, when a work is never privately owned but instead has always been in the public domain, it confers more rights to the general public than those they historically were able to enjoy. What distinguishes the *Great Wall of Los Angeles* from other murals²³⁴ is that it exists on *government property* rather than privately-owned property.²³⁵ Thus, the people have a stronger claim to collective rights over this work instead of diluted-to-nonexistent rights over privately-owned property. And because the *people* created this work of art for themselves, the government would be very hard-pressed to remove the work in any way. If a mural such as the *Great Wall of Los Angeles* becomes such an integral part of the fiber of the cultural heritage of Los Angeles, it should be maintained by the government under the public trust doctrine, even if the government would prefer a more lucrative use of the site.²³⁶ The *Great Wall of Los Angeles* is a living, breathing work of public art with the precise goal of creating cultural heritage by the community, *for* that community. If heritage or resources are to be protected for the enjoyment of the people, this lauded²³⁷ mural comes very close to the paradigmatic goal.

For both the *Chicago Picasso* and the *Great Wall of Los Angeles*, their respective communities have celebrated the works and accepted them as part of their cultural heritage. These works of art have been protected by their local governments in trust for their citizenry and serve as models of effective public art preservation. As such, the public has attained the right to enjoy these works, and to ensure that they remain for however long it finds meaning and significance in them. These examples of public artworks therefore reflect how salient the public trust framework can be in regards to preserving cultural property. It follows, then, that the public trust doctrine’s relationship to community public art can be just as applicable as its relationship to natural resources when it comes to fostering wellbeing. Preserving cultural identity is critical, and a public trust mechanism guarantees that as long as the public wishes to enjoy a work of art, there is a protective mandate ensuring that wish is met.

benefits from them, with or without laws governing them. For this reason, the law must treat shared resources differently, giving respect to the inherent public character of the property being controlled.”).

²³² *Id.*

²³³ *Id.* at 1168.

²³⁴ An example of such a work is *5Pointz*, a graffiti mural painted on private property which was effaced overnight when the owner of the warehouse on which the mural was painted sold the property. See Nina Agrawal, *A New York Lawsuit Asks: Is Graffiti Art Protected Under Federal Law?*, L.A. TIMES (Dec. 17, 2017, 3:00 AM), <http://www.latimes.com/nation/la-na-5pointz-graffiti-art-2017-story.html>.

²³⁵ Ephrat Livni, *A Judge Is Poised to Decide Whether Graffiti Can Be Protected by Law*, QUARTZ (Oct. 20, 2017), <https://qz.com/1107031/new-yorks-5pointz-graffiti-artists-are-suing-a-real-estate-developer-for-destroying-their-work/>.

²³⁶ See Katyal, *supra* note 137, at 1165 (“The role of public trustee requires a sincere commitment to openness.”).

²³⁷ Maximiliano Durón, *Concrete History: Chicana Muralist Judith F. Baca Goes from the Great Wall to the Museum Wall*, ARTNEWS (Apr. 19, 2017, 9:10 AM), <http://www.artnews.com/2017/04/19/concrete-history-chicana-muralist-judith-f-baca-goes-from-the-great-wall-to-the-museum-wall/>.

V. CONFEDERATE MONUMENTS AND COMMUNITY REJECTION

A major caveat to the need for public art protection under the public trust doctrine emerges when the public develops disdain for the public art sufficient to undermine its cultural value. The public trust doctrine focuses on holding resources in the public trust for the “benefit” of citizens, such that they can “enjoy them” over time.²³⁸ If, however, a work of public art is so distasteful to the community or otherwise unvalued, it would not rise to the level of “cultural heritage” that should be protected under the public trust rationale. Thus, a work of public art should be protected under the public trust doctrine only if it has reached the requisite cultural value to the people. To hold a publicly rejected artwork as protectable under the doctrine would appear to be an affront to the notion of a fiduciary duty based on preserving a resource to bring *enjoyment*: a community does not derive pleasure from values it rejects. So, this type of artwork could justifiably be removed or destroyed by the government,²³⁹ assuming again that the artist is not a relevant player in the decision, which follows from the general framework that has been discussed above. If the people do not value a work as intrinsic to their cultural heritage, then that public art, though in the public domain, need not be protected under the public trust rationale.

A. *Confederate Monuments: Undoing “Heritage”*

One of the most divisive and heated issues in the cultural debate over the role of public art has focused on the pervasive presence of Confederate monuments commemorating the Civil War South.²⁴⁰ This problem of competing goals—some more preservationist, some more abolitionist—encapsulates the conflict between public opinion and governmental opinion. Various local and state governments have taken a variety of stances on the issue of Confederate monuments, adding new and nuanced interests to the scheme of public art preservation.²⁴¹ Increasingly, majority factions of the public want to remove the historic public art because they are ideologically against what the art represents. In this way, some of the public desires an outcome that the government is not providing. Still, there is as much resistance to removing “history” among different factions of the public—in which case some of the public is against proposals by the government to remove or relocate monuments. How much of the pro-removal or anti-

²³⁸ Barnett, *supra* note 60, at 214–15.

²³⁹ *Id.* at 215.

²⁴⁰ 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>; Amy Held, *Shrouds Pulled from Charlottesville Confederate Statues, Following Ruling*, NPR (Feb. 28, 2018, 12:28 PM); Meghan Keneally, *How Richmond Is Addressing the Debate over Confederate Monuments One Year After Charlottesville*, ABC NEWS (Aug. 3, 2018, 1:53 PM) (covering the violent 2017 protests in Charlottesville, Virginia over the removal of a statue of General Robert E. Lee).

²⁴¹ See Keneally, *supra* note 240 (stating that political activists in Richmond, VA are striving to have Confederate monuments removed so that the monuments no longer serve as “pilgrimage sites” and locales for white supremacist rallies); Laura Ellyn Smith, *It’s Not Just Confederate Monuments that Need to Come Down*, WASH. POST (Aug. 10, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/08/10/its-not-just-confederate-monuments-that-need-to-come-down/?noredirect=on&utm_term=.2b1bcc14d7bd. (stating that white nationalists have been uniting to defend enshrined icons who represent their push for “white rights.”).

removal rhetoric is rooted in existing racial biases and allegiances is a debate for another time. The more narrowed focus for purposes of this Article is whose opinion should govern in the face of community tumult surrounding art that is no longer viewed as a source of “enjoyment” for the public, treating Confederate statues and monuments as a case study. The Confederate monument debate, then, is a classic example of the public versus the government. It is about the value of history and governmental speech in a modern society.²⁴²

B. *The Public Landscape as a Culture-Creator*

The landscapes that local governments create for the public inevitably shape culture and socialize citizens.²⁴³ As governmental action pertains to Confederate statues and monuments, proponents of removal argue that the “built environment”²⁴⁴ of a locality housing these monuments fosters a misleading rhetoric that has a sinister function: glorifying the Confederacy’s endeavor to preserve slavery.²⁴⁵ Opponents of removing public art that monumentalizes the Confederacy argue that to obliterate history would lead to chaos down the road, in which history would be deleted at the whim of whoever’s opinion controls at the time.²⁴⁶ Adding to this complication is that it is ultimately the state’s role in determining what should be a state-protected artifact of history, as well as balancing “the citizens’ interest in them, and whether the present societal culture demands the removal of some, if not all . . . Confederate monuments.”²⁴⁷

While the states are entrusted with this difficult task of weighing the public and state government’s interests separately, there is concern over whether modern governmental officials could take steps that would potentially constrain or over-empower future officials faced with the same dilemma.²⁴⁸ Oftentimes, states have acted defensively in anticipation of pushback from future generations of citizens advocating for monument removal.²⁴⁹ By drafting such statutes far in advance of any contemporary debate, these

²⁴² The discourse is entrenched in faction fighting between groups of people who want to retain the statues and monuments because of their “historical” significance and opposing groups that want Confederate statues removed because they tip their hat to slavery and racial oppression. The discussion is fundamentally a power struggle in itself.

²⁴³ See Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 3 (2013) (arguing that landscape “inscribes selective and misleading versions of the past in solid, material forms” and that these narratives adversely affect African-American communities in particular because they “transmit ideas about racial power across generations”).

²⁴⁴ *Id.*

²⁴⁵ See Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1082–83 (1995). (Writing that public art is often “self-consciously” chosen to “symbolize the public order and to inculcate in its viewers appropriate attitudes toward that order.”)

²⁴⁶ See L.A. TIMES EDITORIAL BOARD, *Why on Earth Do We Have Confederate Statues in the U.S. Capitol?*, L.A. TIMES (Sept. 22, 2017, 4:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-statues-congress-confederate-lee-booker-20170922-story.html>.

²⁴⁷ Blake Alderman, *Baltimore’s Monumental Question: Can the Heightened Social Conscience Against the Confederacy Rewrite the Constitutional Right to Due Process?*, 5 U. BALT. J. LAND & DEV. 131, 131–32 (2016).

²⁴⁸ Aneil Kovvali, *Confederate Statute Removal*, 70 STAN. L. REV. ONLINE 82, 82–83 (2017).

²⁴⁹ See, e.g., N.C. GEN. STAT. § 100-2.1(b) (2015) (constraining the possibility of removal in the future, stating, “An object of remembrance that is permanently relocated shall be relocated to a site of similar

laws have raised questions about the voting process and the democratic relationship between state legislators and their voters.²⁵⁰ These questions arise because legislative decisions are often made binding on future actions; functionally, they “take power out of the hands of current voters and amplify the effect of decisions by past voters. . . . They are a current attempt to privilege the decisions of a past voting pool over the decisions of the very different modern voting pool.”²⁵¹ Because of this limiting legislation, elected officials have to be even more mindful of how they balance the interests of their modern communities and their history. Furthermore, they must maintain a system where voters still have influence.²⁵² Statutes can be undone:²⁵³ they can either be repealed by the legislature or otherwise declared unconstitutional by the courts. However, undoing law is difficult, and this must be kept in mind when passing new statues designed to address future problems.

Indeed, historic preservation is a salient goal: “Confederate monuments, as standing reminders of all implications of the Civil War, provide the benefits of historical education, social understanding, and cultural inheritance.”²⁵⁴ Yet, a decision to preserve these monuments under a historical or cultural preservation rationale merits consideration of what they actually represent. Yes, historical monuments such as those representing the Confederacy may “provide the benefits of historical context, education, tradition, and information,” but they may simultaneously depict a skewed history that romanticizes the Confederate South instead of giving an accurate portrayal of the horrors of slavery.²⁵⁵ With this conflict in mind, state governments should consider a variety of options that meet both a preservationist goal as well as a landscape-fairness²⁵⁶ goal: the idea that remedying the one-sided historical messaging of Confederate monuments placement by adding other, more honest, accounts of history to the built environment of the locality will improve minorities’ perceptions of themselves. To achieve this, options for Confederate monument removal might include relocation to a less prominent site that serves a historical and educational function; modification of the monument to retell a more accurate account of history; mitigation of the effects of these monuments by

prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated.”). This procedure makes removal near impossible. North Carolina Historical Commission member Samuel Dixon addressed the limitations in this North Carolina law and the need to get creative as to workarounds, stating, “I believe the monuments need to tell the truth and based upon the law that we have today I do not think we can move them.” However, Dixon went on to express his belief that North Carolina can “tell a better story . . . a full and inclusive story” through contextualizing the state’s Confederate monuments with new additions. Martha Waggoner & Gary D. Robertson, *North Carolina Will Keep Three Confederate Monuments at Capitol*, U.S. NEWS & WORLD REP. (Aug. 22, 2018, 6:39 PM), <https://www.usnews.com/news/us/articles/2018-08-22/fate-of-3-more-confederate-monuments-in-nc-to-be-discussed>.

²⁵⁰ Kovvali, *supra* note 248, at 88.

²⁵¹ *Id.* For an example of such legislation, see § 100-2.1(b).

²⁵² Kovvali, *supra* note 248, at 88.

²⁵³ If legislators are convinced that certain laws are deliberately crippling, then perhaps such laws will be repealed over time. Such action is possible unless there is a preemption barrier.

²⁵⁴ Alderman, *supra* note 247, at 140.

²⁵⁵ *Id.* at 155.

²⁵⁶ See Clowney, *supra* note 243, at 13 (suggesting that placing Confederate monuments in prominent positions “deliberately mislead[s] interpretations of history [to] conspire to ingrain ideas about racial hierarchy . . . and send messages that African Americans are not full members of the polity”).

installing new monuments depicting different historical events;²⁵⁷ or outright removal for extreme scenarios where the monument serves no beneficial function, either historically or culturally.²⁵⁸

C. *A Monumental Framework: Pleasant Grove City v. Summum*

It is rather unsurprising that the removal or preservation of Confederate statues and monuments have rarely been litigated. It is a more recent topic of debate that has analogues in state or locality monument removal or placement generally.²⁵⁹ The highest legal authority on the topic of local governments and their monument removal is a Supreme Court case decided in 2009, *Pleasant Grove City v. Summum*.²⁶⁰ This case was argued under a First Amendment doctrine, with the plaintiff religious organization, Summum, arguing that Pleasant Grove City, Utah could not reject the placement of a monument of religious significance to the group in a public park when other, similar monuments existed there.²⁶¹ The city's rejection of Summum's monument was based on its policy of limiting park monuments to those either directly related to the city's history or those donated by groups with longstanding community ties; in this case, the plaintiff organization did not attempt to prove the historical significance of its monument nor the group's connection to the city.²⁶² The Supreme Court, in a majority opinion written by Justice Alito, rejected the court of appeal's holding that parks were public forums under First Amendment jurisprudence, which would have required the government to install Summum's monuments.²⁶³ Reversing the lower court, the Supreme Court held that placing permanent monuments in public parks is not a type of expression to which forum analysis²⁶⁴ applied; instead, such placement constituted *government speech* (rather than speech by the public) and is thus not subject to Free Speech Clause scrutiny.²⁶⁵

²⁵⁷ *Id.* at 46.

²⁵⁸ See Edward T. Linenthal, *The Contested Landscape of American Memorialization: Levinson's Written in Stone*, 25 LAW & SOC. INQUIRY 249, 252 (2000) (book review) (stating that scholar Sanford Levinson contemplates that there may be memorials "so repellent that they should be destroyed").

²⁵⁹ See, e.g., Monumental Task Comm., Inc. v. Foxx, 157 F. Supp. 3d 573, 581 (E.D. La. 2016), *aff'd sub nom.* Monumental Task Comm., Inc. v. Chao, 678 F. App'x 250 (5th Cir. 2017) (Plaintiffs filed for a temporary restraining order and preliminary injunction against the City of New Orleans because the city's mayor, Mitchell Landrieu, had called upon the New Orleans City Council to commence removal of four public monuments: three Confederate monuments and one monument commemorating an 1874 conflict in which members of the white supremacist organization, the White League, attacked and killed members of the city's first integrated police force. The court found for the defendants, holding that no statutory or constitutional rights were violated by the city council's vote to remove the monuments, and that the mayor subsequently signing into law that they be removed from publicly owned property.).

²⁶⁰ 555 U.S. 460 (2009).

²⁶¹ *Id.* at 472.

²⁶² *Id.* at 465-66.

²⁶³ *Id.* at 464; *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1056 (10th Cir. 2007).

²⁶⁴ Public forum analysis under First Amendment jurisprudence addresses locations traditionally utilized for public speech. The types of public forums are traditional public forums, limited public forums, designated public forums, and nonpublic forums. Depending on the type of forum, the government may or may not be able to restrict speech or other forms of First Amendment expression taking place at the forum location. See *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.").

²⁶⁵ *Pleasant Grove*, 555 U.S. at 481.

While the thrust of *Pleasant Grove* is a free speech argument, the local government concerns that the Court articulated with respect to monuments are informative for the Confederate statue debate. This is because they portray the local government interest as highly significant when it comes to decisions relating to public monuments.²⁶⁶ While the Free Speech Clause restricts government regulation of private speech, it does not regulate “government speech.”²⁶⁷ Thus, the Supreme Court interprets the selection, commission, or rejection of monuments as valid exercise of speech by the local government.²⁶⁸ The majority in *Pleasant Grove* was concerned with the proper functioning of government, suggesting that if the government is restrained from making decisions that shape the kind of community image it wishes to foster for its citizens, governance itself would fall into disarray.²⁶⁹

The Court was resolute in its position that permanently displayed monuments on public property represent government speech.²⁷⁰ As Justice Alito wrote in his majority opinion for *Pleasant Grove*, “A monument, by definition, is a structure that is designed as a means of expression,”²⁷¹ noting insightfully that “[g]overnments have long used monuments to speak to the public.”²⁷² “When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”²⁷³ Still, Justice Alito acknowledged that when government decision-makers select the monuments that “portray what they view as appropriate for the place in question,” they take “content-based” factors into account, such as “aesthetics, history, and local culture.”²⁷⁴ Furthermore, Justice Alito attempted to describe the way that monuments convey meaning, suggesting a more fluid view of how to interpret works of art. He wrote that “the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.”²⁷⁵ This view encourages the ethos that people may think for themselves when they are faced with an idea or symbol. For the Court, monuments are given meaning by those who experience them; they do not merely disseminate a particular view.²⁷⁶ When a government entity installs a monument in the public arena, it “does not necessarily

²⁶⁶ See *Monumental Task Comm., Inc., v. Foxx*, 157 F. Supp. 3d 573, 581 (E.D. La. 2016), *aff’d sub nom.*, *Monumental Task Comm., Inc. v. Chao*, 678 F. App’x 250 (5th Cir. 2017) (suggesting that citizens may not “compel” the City to promote their culture).

²⁶⁷ *Pleasant Grove*, 555 U.S. at 467.

²⁶⁸ See *id.* (“A government entity has the right to ‘speak for itself.’”) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)); see also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view . . .”).

²⁶⁹ See *Pleasant Grove*, 555 U.S. at 468 (pointing out that the government may not violate existing constitutional restraints, such as the Establishment Clause).

²⁷⁰ See *id.* at 470 (“Governments have long used monuments to speak to the public.”).

²⁷¹ *Id.* Perhaps implicit in this opinion is a suggestion from Justice Alito that the petitioners were wrong to challenge the government as they did; instead, if they had argued that the government’s *choice* of the monuments violated the Establishment Clause or Free Exercise Clause, the outcome may have been different.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 472.

²⁷⁵ *Id.* at 474.

²⁷⁶ *Id.*

endorse the specific meaning,” but finds that there is some significance to having it on display out in the open.²⁷⁷

It follows then, that if governments can utilize monuments to convey a message, then Confederate statues fall under governments’ purview as well in terms of the controlling point of view as to the monument’s destiny in public rhetoric. However, the Court does not envision a static, unilateral message to be conveyed by a monument. In fact, Justice Alito wrote in *Pleasant Grove* that if a government entity conveys a message by allowing a monument to remain on public property, then it can also alter that message by adding more monuments to the area.²⁷⁸ Importantly, he also contemplated that “messages” in public art can change over time, and people can “reinterpret” what memorials mean as society changes.²⁷⁹ This robust dicta is extremely helpful to any burgeoning conversation about Confederate statue removal because it clearly describes both the government’s rights over monuments generally, *and* how monuments themselves can be imbued with changing meaning given the time and social circumstances.²⁸⁰

This legal framework seems to tip the scale in favor of the local government’s exercise of discretion regarding Confederate statue removal, irrespective of public opinion. Still, as far as public opinion can influence official decision-making, the public can play a role in this governmental determination—at least in the sense of public opinion mattering in official decisions. Ultimately, even if the public does not have the ability to change the treatment of Confederate statues immediately, it always has the power to vote out the governing officials it disagrees with.²⁸¹

D. State Initiatives and Constraints

As aforementioned, states have the power—setting aside legislative limitations penned by prior officials²⁸²—to act when it comes to Confederate statue and monument removal. Of course, while states have an established right to engage in government speech, in making the decision to preserve or remove Confederate monuments, a truly equitable approach must take into account the negative impacts caused by depicting a one-sided version of history.²⁸³ Several southern states that have a sizeable number of Confederate monuments have started taking steps to solve the dilemma of preserving a skewed history while also acknowledging the concerns of citizens objecting to the moral

²⁷⁷ *Id.* at 476–77.

²⁷⁸ *Id.* at 477.

²⁷⁹ *Id.*

²⁸⁰ *See id.* at 477–78 (discussing how the Statue of Liberty has evolved throughout the centuries as to what it represents for people).

²⁸¹ *See* *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 603 (E.D. La. 2016), *aff’d sub nom.*, *Monumental Task Comm., Inc. v. Chao*, 678 F. App’x 250 (5th Cir. 2017) (“[Plaintiff’s] recourse is to the ballot—not the courts.”) (quoting *Palermo Land Co. v. Planning Comm’n of Calcasieu Par.*, 561 So.2d 482, 491 (La. 1990)).

²⁸² In certain instances, localities are driven to search for loopholes in statutory language to get around restricting state laws. *See infra* Part V-B.

²⁸³ SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 107 (Benjamin Lee ed., 1998) (riting, “...foolish indeed is the person who underestimates their [symbols’] importance. Symbols are an important part of the cultural exchange system that, among other things, established relationships of hierarchy and domination.”).

implications of these monuments. While such proposals are fledgling, they mark a necessary commencement to the discussion of Confederate monuments and their public value.

1. Virginia

In September 2017, Richmond City’s mayor, Levar Stoney, established the Monument Avenue Commission (Monument Commission) to study the issue of Confederate statue removal as it pertained to “Monument Avenue” in Richmond, Virginia.²⁸⁴ However, later that same month, the City Council of Richmond introduced a resolution seeking the State General Assembly’s permission to remove five Confederate statues from the city’s “Monument Avenue.”²⁸⁵ The City Council decided to address the issue *without* waiting for the Monument Commission’s decision, despite the mayor’s grant of authority to the specialized Monument Commission.²⁸⁶ Instead of deferring to the mayor’s Commission, the city councilors wrote a resolution to remove the statues, saying that the “large white nationalist rally in Charlottesville . . . ‘demonstrates that memorials to historical figures associated with the Confederate States of America such as these five statues on Monument Avenue continue to inspire racial division.’”²⁸⁷

The rationale for pushing this resolution without waiting for the Monument Commission’s approval was the significance the councilors placed on clearing up ambiguity as to whether or not state laws protected these “war memorials.”²⁸⁸ Councilman Michael Jones was vocal about his thoughts on Confederate statue removal, stating that, despite divisions in public opinion as to whether to preserve the statues in their current location or remove them, “we should be asking if they are morally right.”²⁸⁹ Additionally, Councilman Jones noted that African-Americans comprised just over fifty percent of Richmond’s population stating, “If this city were 51-percent Jewish and you had an avenue lined with swastikas, monuments to Adolf Hitler and the Nazi regime—it would not stand. . . . We wouldn’t even be having this conversation.”²⁹⁰ Councilman Jones’s statements make clear that he believes removing the Confederate statues would not undermine history, but that keeping these statues on Monument Avenue would be to “romanticiz[e]” or “memorializ[e] these men as if they were heroes of all of America.”²⁹¹

²⁸⁴ See Oliver & Robinson, *supra* note 31 (writing that Monument Avenue is one of the “largest and oldest collections of Confederate memorials in the nation”).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* There is apparently a 1997 amendment to the state laws of Virginia that prohibits cities from removing war memorials. See Va. Code Ann. § 15.2-1812 “If such [Confederate or Union monuments or memorials of the War Between the States] 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.”).

²⁸⁹ Shelby Brown et al., *Richmond Councilman Drafts Resolution to Remove Confederate Statues*, WTVR, <https://wtvr.com/2017/09/21/city-councilman-drafts-resolution-to-remove-confederate-statues/> (last updated Sept. 22, 2017, 6:52 PM).

²⁹⁰ *Id.*

²⁹¹ *Id.*

The problem confronting local governments, then, is deciding which version of history should be disseminated to the general public, a public that may vehemently oppose a falsely rosy portrait of the Confederate South.²⁹² As Councilman Jones stated, “It is not just history. . . . It’s a dark part of history that should not be celebrated.”²⁹³ While it is generally accepted that the Civil War was a dark time in American history, the public voiced disagreement with Councilman Jones’ contention that Richmond’s history was not well-served by keeping the city’s Confederate statues in place. One Richmond resident stated, “I’m sorry, but if everybody took something down that offended them, then we wouldn’t have any monuments or anything to look back on as far as our history.”²⁹⁴ The hesitance shown by certain members of the public toward removing the statues may fairly be seen as resistance to paternalism and a reluctance to allow the government to filter history for the public.

A unique perspective on the issue of Confederate statue removal can be gleaned from a historic family—the Lees of Virginia, descendants of Confederate General Robert E. Lee. Many of Lee’s descendants are publicly advocating for the removal of Confederate statues—including those of their ancestor.²⁹⁵ Historians regard the modern-day disagreement in perspectives over the Confederacy as a “masterful” new federal campaign that is “aimed at restoring and bolstering white supremacy in the South through the mythology of the ‘Lost Cause.’”²⁹⁶ Robert E. Lee has in fact become the “centerpiece of the Lost Cause campaign,” giving Confederate sympathizers a symbol to cling to in advancing the “soften[ed],” romanticized Confederate rhetoric.²⁹⁷ Even still, members of Lee’s family believe that “glossing over the maintenance of slavery as the South’s overriding war aim” by advocating for the “Lost Cause” is misplaced.²⁹⁸ As one relative stated, “Supporters of the statues still want to persuade people they’re not about white supremacy. It’s time to bring the statues down.”²⁹⁹ A Virginia resident unrelated to the Lee family gave a more evenhanded statement, suggesting that Lee did good things as well and would not have wanted to be heralded as a champion of slavery. However, she conceded that “we have to acknowledge we’re not living in General Lee’s time period any more” and that “[i]f communities decide to take the statue down, then I’m not against

²⁹² See Tracy Sears, ‘Take ‘Em Down Now’: Residents Have Their Voices Heard on Confederate Statues, WTVR, <http://wtvr.com/2017/09/26/city-residents-have-their-voices-heard-on-confederate-statues/> (quoting a city resident as saying, “These men weren’t heroes. . . . They betrayed our nation. They weren’t fighting for our homeland, they [sic] were fighting for slavery.”) (last updated Sept. 26, 2017, 12:40 AM).

²⁹³ Brown et al., *supra* note 289.

²⁹⁴ Sears, *supra* note 292.

²⁹⁵ See Simon Romero, ‘The Lees Are Complex’: Descendants Grapple with a Rebel General’s Legacy, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/us/lee-family-confederate-monuments-legacy.html> (suggesting that this is in an effort to distance the family name from the Charlottesville, Virginia white supremacist marches).

²⁹⁶ *Id.* The “Lost Cause” is a modern Confederate sympathizer movement that fosters the image of an idyllic, pastoral South that pursued noble “American” aims. The movement strives to obscure historical facts such as the overarching purposes of the Confederacy being secession from America and the continuation of slavery. See Keneally, *supra* note 240.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

it.’³⁰⁰ Such statements reveal the nuances of the removal debate at the state level; and a balance must be struck that is both palatable to the public as well as to the officials.

2. North Carolina

North Carolina is a state that has managed to propose measured suggestions to handling Confederate statue removal despite having limited legislative recourse.³⁰¹ Governor Roy Cooper asked that certain Confederate monuments be removed from Capitol grounds to an alternative location—the Bentonville Battlefield historic site—thus striking a balance between preservation of history and remedying the stain of white supremacy that Confederate statues represent to modern society.³⁰² However, Governor Cooper’s proposal must be approved by the North Carolina Historical Commission (Historical Commission), a government body given the power to control the removal, relocation, or alteration of “objects of remembrance” pursuant to a 2015 state law.³⁰³ The 2015 state law confers a great deal of responsibility on the Historical Commission, mandating that state-owned monuments can only be relocated “when appropriate measures are required by the State” to preserve them, or if removal is necessary for construction.³⁰⁴ Due to the wide variety of interested groups and perspectives, members of the Historical Commission were perplexed as to the best way to proceed with respect to the monuments and whether or not to remove them at all.³⁰⁵ The acting Chairwoman of the Historical Commission, Mary Lynn Bryan, stated, “We’re really not used to . . . having issues that are this deep and this problematic coming before us . . . without having an opportunity to look carefully at the ramifications of what we’re doing.”³⁰⁶ Adding to the debate, North Carolina House Speaker Tim Moore sent a memorandum on monument removal to the Historical Commission suggesting that “ ‘preservation’ of the monuments should be narrowly interpreted and that it doesn’t apply to limiting their ‘potential for exposure to protest or criminal activity.’ ”³⁰⁷ Despite this guidance—and because of the unusual legislative check which prevents the North Carolina governor from acting decisively on the matter—the Historical Commission, overcome with the weight of its responsibility, postponed deciding on Governor Cooper’s proposal to remove the statues to a designated historical site.

The North Carolina public is of mixed opinion. Some interest groups³⁰⁸ advocate for adding more monuments³⁰⁹ instead of removing existing ones.³¹⁰ One citizen opposed

³⁰⁰ *Id.*

³⁰¹ Matthew Burns, *Commission Delays Decision on Moving Confederate Statues*, WRAL, <https://www.wral.com/commission-delays-decision-on-moving-confederate-statues/16966277/> (last updated July 13, 2018).

³⁰² *Id.*

³⁰³ See N.C. GEN. STAT. § 100-2.1(a) (2015) (“[A] monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.”).

³⁰⁴ § 100-2.1(b)(1).

³⁰⁵ Travis Fain, *Cooper Administration Files to Move Confederate Monuments from Capitol*, WRAL (Sept. 8, 2017), <http://www.wral.com/cooper-administration-files-to-move-confederate-monuments-/16935662/>.

³⁰⁶ Burns, *supra* note 301.

³⁰⁷ *Id.*

³⁰⁸ One such group is the “Sons of Confederate Veterans.” *Id.*

to destroying the statues stated that he thought that “history is important,” that “[y]ou have to be able to look back to know where you’re moving forward,” and that “the statues represent a negativity in terms of history.”³¹¹ Meanwhile, another citizen appeared to favor removing the statues, stating that “these statues have been in place for a long time representing hate, representing racism, representing the fact that the South fought for slavery, to keep slavery.”³¹² It appears that at least one government official, Governor Cooper, sympathizes with the latter category of opinion, given his proposal to relocate the Confederate statues.

Governor Cooper’s proposed relocation of the statues to the Bentonville Battlefield historic site may be the best compromise to resolve this issue in his state, given that it is unlikely that state laws would allow for a more extreme alternative.³¹³ An unusual provision in the state statute dictates that a monument, if relocated, “shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated.”³¹⁴ This means that, functionally, the legislature intended for monuments to be thrust upon the citizenry’s vantage point. What Governor Cooper has proposed,³¹⁵ then, is a clever way to get the monuments away from the civic center of the capital—thus, away from the community’s view at large—and move them instead to a historic site, where people who wish to learn about “history” may do so of their own volition. In doing so, Governor Cooper has not been paralyzed by state law, but has instead used it to strike a balance of community interests by fitting the relocation site under the technicalities of the state law.³¹⁶

The Historical Commission stated it would revisit the proposal in the spring of 2018, and ultimately came to a decision³¹⁷ in August 2018 on the heels of protestors taking down a Confederate statue, *Silent Sam*, from the University of North Carolina at Chapel Hill campus.³¹⁸ Governor Cooper commented that “[t]he actions that toppled *Silent Sam* bear witness to the strong feelings many North Carolinians have about

³⁰⁹ A concept I will be calling a “counter-proliferation” approach to historical preservation, which calls for adding more context and content to the historical dialogue via more monuments commemorating different perspectives.

³¹⁰ Fain, *supra* note 305.

³¹¹ Burns, *supra* note 301.

³¹² *Id.*

³¹³ Kovvali, *supra* note 248, at 82 (suggesting that North Carolina’s statute is “designed to prevent removal”).

³¹⁴ N.C. GEN. STAT. § 100-2.1(b) (2015).

³¹⁵ Fain, *supra* note 305.

³¹⁶ *See id.* (“Bentonville, the site of the largest Civil War battle in North Carolina, fits these requirements.”).

³¹⁷ The North Carolina Historical Commission came to a resolution shortly before publication. They decided that three Confederate monuments will remain on the North Carolina Capitol grounds, but that there will be “newly added context about slavery and civil rights.” The commission voted 10–1 to “reinterpret the three monuments with adjacent signs about ‘the consequences of slavery’ and the ‘subsequent oppressive subjugation of African American people.’” Waggoner & Robertson, *supra* note 249; *see also* Vanessa Romo, *After a Year of Rising Tensions, Protesters Tear Down Confederate Statue on UNC Campus*, NPR (Aug. 21, 2018, 5:05 AM), <https://www.npr.org/2018/08/21/640435962/after-a-year-of-rising-tensions-protesters-tear-down-confederate-statue-on-unc-c> (describing the take-down of *Silent Sam* by protestors at the University of North Carolina at Chapel Hill in August 2018).

³¹⁸ Waggoner & Robertson, *supra* note 249.

Confederate monuments. . . . [P]rotesters concluded that their leaders would not—could not—act on the frustration and pain it caused.”³¹⁹ This months-long decision was finally prompted by the divisive actions of a public tired of remaining unheard,³²⁰ and shows the influence that public unrest can have on forcing the hand of change.

3. Bound by Balance

In general, the normative conclusions as to how various local governments might resolve the issues surrounding Confederate monuments—including the state governments of Virginia and North Carolina—all point to balancing. The key to striking the correct balance between a governmental position and changing public opinion is to assess the unique needs of the locality. Confederate monument removal is not a one-size-fits-all issue; rather, it is one that necessitates consideration of a locality’s history—good and bad—and the current governing laws, as well as the direction in which the law might develop. The options are several, ranging from outright removal to relocation, adaptation, modification, and new, commemorative creation. What can be gleaned from studying different states’ approaches is that time is a salient touchstone of public opinion. It can serve both as a tool that embraces change as well as a weapon to hold onto a particular vision of the past. Factions will always arise and stand in opposition to each other; such is the wisdom of Madison.³²¹ However, local initiatives can be instituted that allow the government to move forward and ameliorate the problems of one side versus the other. It is an ongoing conversation between a government official and their electorate. Laws may adapt or laws may restrict; navigating this tension is the real challenge. As with so many issues of divergent opinion and what government ought and ought not to do, the concern is deeply local.

E. *Federal Initiatives and Constraints: Washington, D.C., The White House, and Beyond*

Despite America standing for a vision of public unity and individual freedom, the U.S. Capitol building in Washington, D.C. still houses statues of generals that fought on behalf of the Confederacy for the preservation of slavery.³²² Presently, there is debate among the House of Representatives and members of the Senate as to how to remedy the oxymoronic problem of housing bronze generals who fought for secession at the building that symbolizes America’s states coming together. Representative Barbara Lee and Senator Cory Booker penned the Confederate Monument Removal Act and submitted it to Congress: the legislation would ban statues of individuals who participated in the Confederate rebellion from the Capitol’s National Statuary Hall and other public areas within the building.³²³ While this seems like a sensible move, critics have insinuated that

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ THE FEDERALIST NO. 10 (James Madison).

³²² L.A. TIMES EDITORIAL BOARD, *supra* note 246.

³²³ *Id.*; see also Jordain Carney, *Dems File Bill to Remove Confederate Statues from Capitol*, HILL (Sept. 7, 2017 6:51 PM), <http://thehill.com/homenews/house/349737-dems-file-bill-to-remove-confederate-statues-from-capitol> (“Under the Democratic proposal, states would be able to reclaim their statues. Any statues that are not reclaimed would be given to the Smithsonian.”).

legislation such as this is in fact under-inclusive.³²⁴ Functionally, it would bar “certain villains—rebel soldiers,” while simultaneously allowing other negative historical figures to remain, such as individuals who “brutalized Native Americans.”³²⁵

This dichotomy in removal versus preservation has led to the general attitude in Washington, D.C. that the issue of unseemly monuments should generally be left to the states.³²⁶ The pushback from preservationists has often been along the lines of: “If we take down our Confederate statues today, we’ll have to take down statues of our slave-owning Founding Fathers tomorrow.”³²⁷ To this point, the argument for anti-paternalism measures begins to have some salience: society should be afforded the ability to discern the difference between various symbolic “sins” of the past.³²⁸ Additionally, worries arise as to what might happen if using removal precedent becomes commonplace: different factions may purge from public view different statues of different Americans, all depending on who is in power and what political views are in fashion at the time. Such actions may inhibit a mature and sophisticated discussion of our culture’s dual nature of liberators and enslavers, freedom-lovers and foreign invaders, protectors and genocidal killers.³²⁹

Still, there is a very strong argument to be made for doing away with hateful symbols in public spaces: these memorials and statues represent the worst of America’s past.³³⁰ But because the heart of the matter is fundamentally local, there is reluctance at the federal level to pass legislation that sets national precedent³³¹ Currently, only states can remove statues in the National Statuary Hall Collection; a statue can be replaced “if the state legislature and governor approve a resolution to do so and if it has been displayed in the Capitol for at least a decade.”³³² A state government should know its people and thus should know where they stand in relation to the scars and triumphs of American history.³³³

³²⁴ L.A. TIMES EDITORIAL BOARD., *supra* note 246.

³²⁵ *Id.*

³²⁶ *Id.*; shortly before publication, it was announced that following the aftermath of Charlottesville’s white supremacist rally, the Federal government will be paying to protect Confederate cemeteries across America. This new development, for which the Department of Veterans Affairs has spent “millions of dollars paying for private security at several Confederate cemeteries,” reveals that the federal government will involve itself in the Confederate monument debate, even though it claims to defer to states on the issue of removal. Romo, *supra* note 317. While the VA is technically protecting federal property (the cemeteries) in expending these sums of money to protect Confederate sites, its broader stance (pro-preservation) has arguably been made clear.

³²⁷ L.A. TIMES EDITORIAL BOARD., *supra* note 246.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*; see also Carney, *supra* note 323 (“A spokesman for Speaker Paul Ryan (R-Wis.) said last month that whether or not to remove the statues was ‘decisions [sic] for those states to make.’”).

³³² Cristina Marcos, *Black Lawmakers Say Confederate Statues Should Come out of Capitol*, HILL (Aug. 16, 2017, 6:00 AM), <http://thehill.com/homenews/house/346710-black-lawmakers-say-confederate-statues-should-come-out-of-capitol>.

³³³ See L.A. TIMES EDITORIAL BOARD., *supra* note 246 (“[T]he leaders—and the people—of all 50 states should look closely and decide whether the statues they have sent to Statuary Hall present to the world the face they want it to see.”).

1. A “Presidential” Perspective

As members of the Congressional Black Caucus call for removal of Confederate statues from the U.S. Capitol,³³⁴ President Trump has voiced pushback.³³⁵ Congressional Black Caucus Chairman, Cedric Richmond, and Mississippi Representative, Bennie Thompson, both expressed that “Confederate memorabilia” does not have a place in the U.S. Capitol, as it represents a time of racial animus.³³⁶ President Trump, however, rejected any initiatives to remove the statues, asking at a press conference in Trump Tower, “[W]here does it stop?”³³⁷ Some members of the Black Caucus are advocating for more varied statues from other parts of United States history alongside the Confederate monuments this would “revise and supplement history The goal should be revision and inclusion as opposed to the obliteration of the nation’s history,” Representative Hank Johnson’s spokesman said.³³⁸ This latter solution may be the best way to balance the unfavorable response from the President. He claims, “They’re trying to take away our culture. . . . These things have been there for 150 years, for a hundred years Weak, weak people.”³³⁹ Though it is unclear whether the President fully comprehends the impact these “things” have on minorities, as long as his is the dominant national voice and U.S. Capitol rules regarding statue removal remain in place,³⁴⁰ it is up to Congressional representatives to push for striking the appropriate removal–preservation balance in their home states.³⁴¹

VI. Outcomes and Proposed Solutions

The largest source of discomfort with Confederate statues and monuments is that, for many, they represent a time of hateful racism, oppression, and violence. They serve as

³³⁴ See *supra* Part V-E.

³³⁵ Recently, President Trump praised Confederate general and slavery supporter General Robert E. Lee, at a campaign rally in Ohio in October 2018, stating that he was a “true fighter” and a “great general.” Notably, a descendant of Robert E. Lee, Reverend Robert Lee IV, made a public statement that he was “disheartened to hear Donald Trump, our president, make comments about Robert E. Lee as a great general, as an honorable man These were far from the truth.” Emily C. Singer, *Trump Praises Confederate General Robert E. Lee at Ohio Campaign Rally*, MIC (Oct. 13, 2018), <https://mic.com/articles/191877/trump-confederate-general-robert-e-lee-ohio-rally#.OIU4Wxkb9>.

³³⁶ Marcos, *supra* note 332.

³³⁷ Max Greenwood, *Trump on Removing Confederate Statues: ‘They’re Trying to Take Away Our Culture’*, HILL (Aug. 22, 2017, 11:28 PM), <http://thehill.com/homenews/administration/347589-trump-on-removing-confederate-statues-theyre-trying-to-take-away-our>.

³³⁸ Marcos, *supra* note 332.

³³⁹ Greenwood, *supra* note 337.

³⁴⁰ See *supra* Part V-E.

³⁴¹ See Cristina Marcos, *GOP Lawmaker Breaks with Trump, Says Confederate Statues Should Come Down*, HILL (Aug. 25, 2017, 2:51 PM), <https://thehill.com/homenews/house/347994-gop-lawmaker-breaks-with-trump-says-confederate-statues-should-come-down> (reporting that Representative Sean Duffy of Wisconsin stated that localities should choose “whether they should have those statues up, whether they should be removed to museums or to other parks” Representative Tom Rooney of Florida expressed to the Hill that “Confederate monuments in the Capitol should be removed and relocated to a museum or battlefield. Otherwise, the statues should be given context as symbols of slavery” It is particularly important for states to remove Confederate statues from the Capitol, Representative Rooney expressed, because when the statues are there, “they’re almost in a place of reverence.”).

reminders of the horrors of slavery that plagued America's past and tower over communities that have been shaped by those who supported the losing side of the Civil War.³⁴² In short, Confederate monuments often evoke uneasiness, even disgust, in their viewers. But despite all of this, the correct, albeit somewhat unsatisfying, result should be a case-by-case analysis undertaken by each state government with regard to its collection of Confederate monuments, with priority given to protecting them from outright destruction or removal—as removal carries with it the risk of erasing the past at the expense of understanding today *why* progress is more important than ever.

In this vein, the renowned French scholar of the eighteenth century, Henri Grégoire—known as Abbé Grégoire—devoted much of his life to advocating for preserving cultural heritage, long before it was codified in the law.³⁴³ Grégoire saw cultural property and heritage as integral to national identity and political life, saying that “[t]hose who were willing to see . . . artifacts destroyed . . . were imperiling the most important symbols of the national identity”³⁴⁴ Although Grégoire is heralded as a champion of public art as protectable community heritage,³⁴⁵ his arguments neatly encompass the Confederate statue dilemma.³⁴⁶ As unsavory as it may seem in its application to Confederate statues, Grégoire's legacy rests in his foresight, his ability to see the power that public artifacts of cultural significance can have, even if they are troubling.³⁴⁷ Grégoire believed that a true “patriot” of a nation should not be complacent and forgetful with respect to his nation's past. Rather, he thought that “[t]he true patriot embraces the spirit of liberty, encouraging full realization of the individual's own talent and creativity by protecting those things that express the spirit and that can serve as models and inspirations for the future.”³⁴⁸ The impetus must be placed on the words that contour futurity. To eradicate symbols of a heritage's past is to stunt development in the future.³⁴⁹ The struggle is one between knowledge and ignorance.³⁵⁰ The goal is not to

³⁴² Stone Mountain, for example, is the “literally the largest” Confederate monument “problem” in the world. The monument is a carving of Southern Civil War leaders “etched across three acres of granite” on Stone Mountain's northern face. The mountain's engraving has come to play a role in Georgia's upcoming governor's race, in which some candidates are calling the public mural a “blight” on the state that needs to be removed. Richard Fausset, *Stone Mountain: The Largest Confederate Monument Problem in the World*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/18/us/stone-mountain-confederate-removal.html>.

³⁴³ See Sax, *supra* note 192, at 1142 (suggesting that Grégoire's personal desire to protect cultural values grew into a matter of public concern).

³⁴⁴ *Id.* at 1156.

³⁴⁵ Kathryn R. L. Rand, *Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law*, 27 U. MICH. J.L. REFORM 277, 280 (“Gregoire suggested that expressions of talent and creativity are the fruits of liberty and should be preserved as such, without regard to their origin. Gregoire saw art as the product of individual liberty, not of political regimes.”).

³⁴⁶ See LEVINSON, *supra* note 283, at 112–14; see also Linenthal, *supra* note 258, at 250–51 (describing Levinson's book as analyzing the “production and function of cultural memory as expressed in memorials”).

³⁴⁷ Sax, *supra* note 192, at 1156.

³⁴⁸ *Id.* at 1156–57.

³⁴⁹ See *id.* at 1157 (presenting Grégoire's conception of “past achievement as a form of necessary capital that the citizens of the newly liberated nation would have to employ to create their new society” and suggesting that bad history can be used as fuel and motivation for a better future).

³⁵⁰ *Id.*

glorify, but to inform the public so that it can continue adding to the narrative and forge its own destiny. Grégoire understood the problem of cultural erasure even in the eighteenth century, believing that “to toss onto the revolutionary bonfires all the works of the past was . . . to demean the notion of liberation by converting it into a celebration of willful ignorance.”³⁵¹ The active, thinking person needs to face challenging ideas to understand true liberty and become, in the words of John Stuart Mill, “a beautiful object of contemplation.”³⁵²

Though they represent pain for many, the removal or retention of Confederate statues and monuments should be handled cautiously, by balancing community interests at large with the historical significance they represent.³⁵³ One thing is certain: most, if not all, of the monuments cannot stand as they are. This is because the “history” many of them are espousing is not history at all, but a skewed rhetoric that favors the Confederate South.³⁵⁴ Thus, modifications to the monuments or other remedial measures must be taken to raise the statues to the level of historical accuracy and the significance of these monuments to the South³⁵⁵ rather than a skewed rhetoric that romanticizes the Confederacy. This means that a traditional public trust framework that favors complete preservation of these monuments for public “enjoyment” cannot be employed. Because of their significance to history and American identity, however, these statues should not all be removed and destroyed either. Rather, their important role in the development of our national identity would be better served by “addendums” to their messages, as discussed below. The government should handle the display, modification, or removal of these public works by balancing accurate historical preservation with our present state of cultural awareness. To this end, the local government in charge of modifying or relocating the monuments must take its locality’s view into account and pursue the solution that makes the most sense for its citizenry.³⁵⁶ This is not an unchecked power, however, as various factions may dictate changes in governmental office or policies as to what those historical preservationist moves will look like.

Through careful consideration, the proposed solutions for the statues may range from modifications for historical accuracy, to counter-proliferation approaches, to outright removal.³⁵⁷ The theoretical framework of assessing the struggles of factions among the electorate and their government officials as one of balancing local values is critical to these proposals. However, without stepping back to analyze a locality’s competing interests and its true motivations, it is difficult to find the best solution to the

³⁵¹ *Id.*

³⁵² See JOHN STUART MILL, ON LIBERTY, THE SUBJECTION OF WOMEN, AND UTILITARIANISM, 65 (Modern Library pbk. ed. 2002).

³⁵³ See LEVINSON, *supra* note 283, at 112–14.

³⁵⁴ The artist is not an interested party due to the works being in the public domain. The division of public opinion renders the works unworthy of cultural heritage protection, as there is not enough consensus that the monuments form the identity of a locality or have a bond to the locality. Thus, the government must step in to adapt or remove the work according to public opinion, while preserving historical interests. Of course, part of the problem with Confederate monuments is that they invoke a false or manipulated history that is racially and culturally insensitive. This must be ameliorated for the monuments to even have historical value; as they stand today, many of them do not tell historical truths.

³⁵⁵ See LEVINSON, *supra* note 283, at 113–14.

³⁵⁶ See *infra* Part VI (“Outcomes and Proposed Solutions”).

³⁵⁷ See LEVINSON, *supra* note 283, at 113–15.

problem of Confederate monument preservation. By establishing up front, either through laws or policies, that Confederate monuments do not rise to the level of shared cultural heritage protection under the public trust doctrine, the local government can lay the groundwork for approaching Confederate monument preservation on a case-by-case basis. I propose the following solutions as salient options for state and local governments to try. They are suggestions rooted in paying attention to the needs of the electorate, and none of them can be pursued adequately unless local community values are contemplated. In this process, attention must be given by local governments to the value of art and identity to the locality, both past and present. The hope is that one or a combination of these remedies will improve the Confederate monument issue for states and mitigate the warring opinions of factions of the electorate and the elected government officials. Naturally, to believe that the American public can ever achieve “genuine consensus” is “naïve in the extreme.”³⁵⁸ It is true: not all people can be pleased. Thus, the main consideration for how to move forward must be preserving as much historical art for the community as possible while ensuring that the art’s placement be appropriate and that the “history” be meaningful, rather than an archaic sham meant to divide citizens.

A. A Historical Approach: History Museums

When it comes to defenses of Confederate statues under a “historical preservation” rationale, if the community has spoken and the government would be blatantly at odds with it by retaining the work as it stands, the one useful compromise may be to move the statues to a designated museum or historical space. Doing so would effectively “seculariz[e]” the message that the Confederate statues or monuments represent by isolating them in a place designated for active contemplation of their meanings.³⁵⁹ This approach envisages a government that is unwilling to physically modify³⁶⁰ the monuments *at all* and instead wants to leave them the way they are. Because this is problematic to the public at large—which may have factions that dislike seeing the monuments—if no alteration is to be done due to a perspective that favors completely preserving the artifact, the statue or monument should be absorbed by a local or national history museum or a designated historical space.³⁶¹ This gives the community members a choice—if they wish to see this form of “history,” then they can enter the museum or historical space of their own volition.³⁶² Doing so spares members of the public who view these statues as symbols of hatred or oppression from being subjected to them on a daily

³⁵⁸ *Id.* at 130–31.

³⁵⁹ Linenthal, *supra* note 258, at 257–58. “Secularize” here does not mean removing religious messaging; rather, it means stripping monuments of their pro-Confederate meaning by relocating them to spaces where their history can be contextualized.

³⁶⁰ “Modify” here means to alter a monument’s message by qualifying the person or event depicted with a more accurate historical account. *See infra* Part VI-6.

³⁶¹ New Orleans Mayor Mitch Landrieu stated, “[W]e can begin a new chapter of New Orleans’s history by placing these monuments, and the legacy of oppression they represent, in museums and other spaces where they can be viewed in an appropriate educational setting as examples of our capacity to change.” Mitch Landrieu, *New Orleans Mayor: Why I’m Taking Down my City’s Confederate Monuments*, WASH. POST (May 11, 2017), https://www.washingtonpost.com/posteverything/wp/2017/05/11/new-orleans-mayor-why-im-taking-down-my-citys-confederate-monuments/?noredirect=on&utm_term=.33eebe531e09.

³⁶² *See* Sax, *supra* note 192, at 1160 (“[T]he existence of a discerning public” is an “element[] of a collective enterprise.”).

basis as they would if they remained in open public centers meant for all citizens of the locality.³⁶³ While relocation to a museum or historical space is not always a perfect remedy,³⁶⁴ it at least stops the tyranny of the monuments' permanent presence in public spaces and ameliorates social divisions by enhancing the public's shared experience within the built landscape. This is likely the most palatable solution to the factions warring over Confederate monuments: it preserves "history" while removing the monuments from decontextualized open spaces.

B. A Modification Approach

For those monuments that are not on their face a distressing depiction—such as plaques of text that list Confederate battles or victors—the harm caused by these works may be ameliorated by placing plaques of equal size and communicative significance alongside them, thus mitigating any untruthful exposition.³⁶⁵ If additional text is provided, it should articulate the truth behind the history of the original monument, recognizing that it enshrines and privileges one version of history over another. Additionally, any offensive text could be modified by "sandblasting" it from the monument, thus leaving either a blank space (to allow the public to interpret the monument for itself) or a replacement engraving with a more truthful account of the history being commemorated.³⁶⁶ While this modification approach may not be far-reaching in that some Confederate statues may not have inscriptions that can easily be modified, it may be an important tool for monuments that contain plaques with interpretations rather than accurate historical accounts.

C. A Counter-Proliferation Approach

A popular new theory for handling Confederate statues and monuments is one that proposes adding more monuments to the mix.³⁶⁷ The goal of these proposals is to nullify the negative effects of Confederate monuments by way of counter-proliferation, either by erecting monuments that tell varied narratives of the historical accounts that existing monuments claim to represent or by adding monuments that represent a different chapter of history altogether (such as the Civil Rights Movement).³⁶⁸ The messaging that would

³⁶³ See Clowney, *supra* note 243, at 57 ("The distortions and omissions [of monuments] ultimately drive black citizens from important public spaces and discourage their full participation in the polity.").

³⁶⁴ See Linenthal, *supra* note 258, at 259 (recognizing that, sometimes, monuments are too "charged" with meaning to be contained in a "dispassionate" museum exhibit).

³⁶⁵ See *id.* at 257 (writing that Levinson suggested that interpretive plaques be attached to Confederate monuments to show a balanced and accurate telling of different sides of history; interpretive plaques may "call[] into question the very reason for erecting a monument").

³⁶⁶ *Id.* at 259.

³⁶⁷ This is akin to Justice Louis Brandeis's "more speech" rationale for combating social evils. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). Justice Brandeis's "more speech" rationale was later adopted by the Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) in the form of the "imminent lawless action" requirement for speech to be regulated.

³⁶⁸ Linenthal, *supra* note 258, at 258 (writing that Levinson considered "the erection of a monument to those enslaved by Texas," for example, to mitigate the lopsided rhetoric of existing Confederate monuments).

result from juxtaposing Confederate statues with their Civil Rights-oriented counterparts would be an important shift toward a more meaningful historical balance. The overall purpose then is to fill the public space with more voices that cancel out the harsh effects of the Confederate monuments; this means that the overall message to the public from the monuments will effectively be net neutral. Context is everything,³⁶⁹ and removing the stain of one dominant voice from shared public spaces will arguably allow for the public to derive their own meaningful interpretations of history.

D. An Outright Removal Approach

Outright removal of Confederate monuments and statues is the riskiest approach, as it destroys or removes the statues and monuments altogether. In many ways, to simultaneously advocate for preserving public art that has risen to the level of cultural significance and also argue for removing historic Confederate statues and monuments seems to be a strangely inconsistent position. This is because Confederate monuments, perhaps more so than general public artwork, have come to represent history in addition to cultural heritage; indeed, they are historical artifacts. Of course, these monuments may represent a skewed history that wrongly glorifies acts many feel should be condemned, but this alone does not exclude them from our collective heritage—rather, they are reminders of where we came from and how much further we have yet to go. For this reason, a policy of outright removal or destruction of Confederate monuments should be used sparingly by local governments and only in cases where the negative impact of the monument significantly outweighs any potential benefits.³⁷⁰ For those works that can be dealt with by any of the aforementioned methods, those approaches should be taken.³⁷¹ However, sometimes the depiction in a monument is so egregious or unjustifiable that outright removal may be the only appropriate route. These are cases of heightened distaste, such as a depiction of a slaveholder doing violence to a slave, a depiction of a war general who was a ruthless murderer, or a celebration of figures like the Ku Klux Klan advocating for genocide or racial violence.³⁷² In these extreme situations, there is

³⁶⁹ See Benjamin Means, Book Note, *Monuments to the Past in a Leveling Wind*, 97 MICH. L. REV. 1617, 1626 (1999) (reviewing SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (Benjamin Lee ed., 1998)) (“[T]he meaning of monuments is not after all written in stone, but is subject to interpretation and reinterpretation.”).

³⁷⁰ Removal can happen in two ways: formal removal by the city or state or informal removal by the people. In August 2018, the latter form was employed as the public took Confederate monument removal into its own hands: protestors brought down *Silent Sam*, a monument dedicated to Civil War soldiers standing on the University of North Carolina at Chapel Hill. Tensions had been rising in North Carolina as to the role of Confederate monuments in public spaces; more specifically, “[c]alls for [the statue’s] removal grew louder following the deadly white supremacist rally in Charlottesville, Va., last August. However, university officials have maintained that a state law designed to protect a ‘monument, memorial or work of art owned by the state’ prohibited the removal of the divisive symbol.” Romo, *supra* note 317. This recent occurrence demonstrates that America is still deeply struggling with the issue of the Confederacy and how its commemoration in public art fits into the framework of modern democracy. When citizens feel they are unheard by their government, they can—and will—take removal measures on their own.

³⁷¹ See *supra* Part VI-A-C.

³⁷² See, e.g., *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 581 (E.D. La. 2016), *aff’d sub nom.*, *Monumental Task Comm. V. Chao*, 678 F. App’x 250 (5th Cir. 2017) (In this case, a statue commemorated the white supremacist organization, the White League, attacking and killing members of the New Orleans’ first integrated police force.).

less historical *value*;³⁷³ instead, the aim is rightly seen as a gratuitous or inflammatory depiction with a message of oppression or glorification of racism. For these statues and monuments, removal may be the best way to acknowledge the interests of the public. This is because the daily reminder is so painful to the people whose ancestors suffered fates similar to those depicted by the statues that the reasons for removing them outweigh the reasons for preserving them.

E. Power to the People

The government undoubtedly has responsibilities to its voting public. Its duties necessarily contemplate the preservation, removal, or adaptation of public works. Confederate statues and monuments are a form of public art, but are perhaps more aptly defined as objects of history. This designation informs the duties that the government owes to its electors, with respect to these monuments both from a preservationist standpoint, as well as a social one. The balancing of the public's valuation of the monuments and the state's perceived historical interests involves careful attention to the cultural landscape of the locality. Public space tells stories in itself, shaping how people in the community think and are socialized.³⁷⁴ Civic spaces are loaded with messages. As a consequence, each local government must carefully consider its own contribution to the built environment and which Confederate monument removal or modification strategy makes the most sense for the needs of the populace which it governs. In certain extreme circumstances, the public interest in outright removal may make the most sense. For instance, an annual city poll may reveal that the majority faction has shifted to supporting Confederate monument removal, while perhaps earlier polls indicated a preference for preservation. This places the impetus on the government to acknowledge the public. If a government does not adhere to the citizenry's voice, the changing factions may employ the classic Madisonian remedy until they are heard: voting officials out of office. Though legal precedent and modern interpretations of Confederate monument removal favor local governmental control, the public always remains a significant player, pushing the direction of the fight.³⁷⁵

³⁷³ See Levinson, *supra* note 245, at 1094 (“[O]ne must always ask whether a monument to the Confederate dead—and the articulation of secessionist constitutional theory—is equivalent to memorializing those who fought to maintain chattel slavery and the abuse of African Americans.”).

³⁷⁴ See Clowney, *supra* note 243, at 3 (“[C]areful scholarship in the social sciences demonstrate [sic] that the landscape operates much like a tectonic fault; although its presence is seldom scrutinized, its impact remains powerful.”).

³⁷⁵ A new National Memorial for Peace and Justice opened to on April 26, 2018, paying homage to African American victims of lynching via monuments. See <https://museumandmemorial.eji.org/memorial>.; see also <https://www.cnn.com/travel/article/lynching-memorial-montgomery-alabama/index.html> (The Memorial allows for counties to take replicas of the deceased back to their locales as a form of remembrance and accountability. “Surrounding the memorial, replicas of each of the monuments will also be on display. Each county represented here will have the opportunity to take one of the figures back to their communities as a way to remember and to begin a conversation. It will also be obvious which counties do not claim their monuments... The opportunity is also a challenge -- which counties are ready for truth and reconciliation?”).

CONCLUSION

The substantive conflicts of interest that long-term preservation of public art pose to a locality's elected governmental officials, the artist(s), and the public comprise a rich debate informed by many voices. The varied opinions as to how to handle the preservation, adaptation, or removal of public art both qualify and harmonize with each other. Naturally, different scenarios dictate the outcome of whose opinion controls. In the end, the debate over each interested party comes down to a balancing act. Any analysis of public art necessitates correctly balancing the interests of each party to achieve an outcome in accordance with the overall spirit of the law and goal of cultivating cultural heritage. And in some instances, the existing legal framework must be stretched to encompass assets of heritage that have not yet been given their own laws.

In general, when public art is determined to be a mainstay of a locality, then the public art should be held in public trust for the people. This determination is refined by the presence or absence of the artist, who may be able to control what happens to his or her work under VARA, provided that the work meets the statute's qualifying criteria.³⁷⁶ If the artist is living and does retain his or her rights, the length and nature of the art's maintenance will be cabined by the artist's vision for his or her work. Thus, in this instance, maintenance will be according to the artist's wishes. This right also extends to derivative works based on the interested artist's work, limiting what the public or government may expressively do with the art.

If, however, the artist is deceased or otherwise does not retain rights in his or her public art, then control over the art should belong to the public under a modern reading of the public trust doctrine.³⁷⁷ The government will have to hold the public art in trust for the people if it has reached the level of embodying cultural heritage for the locality. The hook for qualification under public trust will depend on whether the community has embraced the art as part of its identity.³⁷⁸ If the art has not attained this marker of heritage, or the public decides that the art is no longer of value to the community, then the government need not hold it in trust and may dispose of or retain the work as it deems appropriate.

While the aforementioned checks and balances on long-term preservation of public art are informative, the pressing issue of Confederate statue and monument removal contemplates a slightly different framework³⁷⁹—one entrenched in local or state government control. In such scenarios, it is the government's obligation to weigh community interests as well as its own historical preservation goals. There are a number of routes the government can take in making its ultimate decision, but at its core it is a balancing act that keeps its finger on the pulse of public opinion. Though majority factions shift and there may be years of lag between governing officials' views and their electorate's, the system of democratic voting ultimately empowers the public despite it having a seemingly subservient role in Confederate monument decision-making.

³⁷⁶ See *supra* Part II.

³⁷⁷ See *supra* Part IV.

³⁷⁸ See *id.*

³⁷⁹ A framework that excludes both any interest from the original author/artist and the "cultural heritage" signifier.

The outlines of power are opaque, but the parties—the governing officials, the artist(s), and the public—all find a meaningful role when it comes to rights surrounding long-term maintenance of public art. Perhaps Idyllic Isle will find an amicable remedy; for all one knows, the government may adapt to the current pressures of its citizens, or poll them for their present take on *Bliss Is Ignorance*. Conceivably, the community may come to a consensus over whether or not the work is indicative of their cultural heritage, thereby informing their recommendation to the government as to whether to hold the work in trust or use discretion over its future treatment. Given that shift, the government may consult with the artist to assess his feelings about the work's continued presence or removal, thus respecting his rights under VARA before taking any action. Alternatively, *Bliss Is Ignorance* may be modified by adding a placard that explains how society has shifted and that the sculpture merely represents a snapshot of history from one perspective. Moreover, the work may be added to a local historical space or moved to a slightly less public location. Instead, the artist may wish to remove the art altogether, or may otherwise be persuaded that adding more artwork around *Bliss Is Ignorance* contextualizes his work for future generations. The outcomes are not always clear, but all parties have a salient voice in terms of whose opinion governs where. Ours may not be a perfect world, but by maintaining public art, it can at least be a meaningful one.