RIGHTS TO REMOVE: CONSTITUTIONAL MUNICIPAL RIGHTS TO REMOVE CONFEDERATE MONUMENTS FROM PUBLIC PROPERTY

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ABSTRACT

Confederate Monuments have become a topic of heated controversy in popular opinion and courts following upticks in race motivated violence, causing cities across the country to take steps to remove them. In many of the states where these monuments are most populous, however, municipalities have been unable to legally

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accomplish this goal. Removal of Confederate Monuments has been rendered difficult or impossible for these cities by a combination of two factors: limited state constitutional rights for municipalities, and state statutes specifically protecting monuments from municipal alteration or removal.

Limited state constitutional rights for municipalities renders Confederate Monument removal difficult because under current federal law, municipalities have no federal constitutional rights against their states. Thus, municipalities are dependent on their state constitutions to provide rights they may assert against their state. Because of this, when municipalities bring First and Fourteenth Amendment claims against their state to protest enforced maintenance of these monuments, their claims fail. Further, absent any state constitutional rights, municipalities cannot bring state law claims against their state.

In addition to their lack of constitutional protections, municipalities seeking to remove Confederate Monuments may face specific state statutes protecting monuments from removal or alteration. Many of these state statutes are of recent vintage and have functioned primarily to protect Confederate Monuments.

The 2017 case of State v. Birmingham exemplifies the struggle of municipalities attempting to remove Confederate Monuments without having state constitutional rights and while burdened by a state statute protecting monuments. There Birmingham argued that recent First Amendment developments in government speech and political process doctrine precedent made Alabama's statute unconstitutional. The state, however, successfully held that Birmingham had no federal constitutional rights to assert against it.

This result, however, should not have occurred under a proper understanding of government speech and political process doctrine, which together work to give municipalities a modicum of control sufficient to allow them to remove Confederate Monuments even in states that provide municipalities no rights under the state constitution.

INTRODUCTION

In recent history, removal of Confederate monuments has become an issue on the forefront of national debate with responses varying in states and cities across the country.[1] Recent race motivated acts of

1. *See* Andrea Benjamin et al., *Set in Stone? Predicting Confederate Monument Removal*, 53 P.S.: POLITICAL SCIENCE & POLITICS 237, 237 (2020),

violence such as the Charleston SC church shooting on June 17, 2015, the August 12, 2017 Charlottesville NC car attack, and the May 25, 2020 killing of George Floyd have focused popular attention on the racist history and motivation behind Confederate monuments, causing widespread calls for their removal.[2] Where cities have had the legal capacity to remove or relocate Confederate monuments in response to popular demand, many have made changes that reflect peoples' conflicted views regarding these monuments. However, in jurisdictions where removal by cities has been made legally difficult or impossible, Confederate monument removal has become a flashpoint issue for messy questions of constitutional rights at the municipal level which states, and municipalities are currently navigating to resolution in state and federal courts.[3]

Two common features characterize jurisdictions where local resolution of Confederate monument removal is not possible and thus controversy has become the most heated. First, Confederate monument removal has become a flashpoint issue for states having limited or no "home rule," or state constitutional provisions for municipal autonomy.[4] Because under current federal law municipalities have no enumerated rights under the United States Constitution,[5] municipalities are dependent on state constitution

https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/set-in-stone-predicting-confederate-monument-removal/9702ED7AD10038BF244AC98B87593429/core-reader.

2. *See Removal of Confederate Monuments and Memorials*, WIKIPEDIA, https://en.wikipedia.org/wiki/Removal_of_Confederate_monuments_and_memorials#:~:text=On%20April%2011%2C%202020%2C%20Governor,explaining%20why%20they%20were%20erected (Jan. 17, 2022, 10:30 AM).

3. *See* Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 60–61 (2018) ("Constitutionally and legislatively subordinate to state legislatures, cities cannot effectively self-govern in important ways. Cities only exercise 'state' power derivatively and that exercise is often and easily overridden. At the same time, however, cities generally do not enjoy constitutional or civil rights . . . Under current doctrine, a city *qua* city cannot readily invoke the First Amendment to protect its decision to remove Confederate monuments. . . . The city has few rights, but also enjoys limited powers.").

4. *See* Jim Bennett, *Without Home Rule the State Always Wins*, AL.COM (Mar. 1, 2016, 7:50 PM), https://www.al.com/opinion/2016/03/without_home_rule_the_state_al.html (finding municipal efforts to remove Confederate monument unlikely to succeed in Alabama, a state with no home rule provisions).

5. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363 (2009) ("[A] political subdivision, 'created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'") (quoting Williams v. Baltimore, 289 U.S. 36, 40 (1933)).

provisions for any rights they may have.[6] Thus, when state constitutions provide no rights for municipalities, they are legally unable to enforce claims against their state.[7] Second and relatedly, Confederate monument removal has been brought to the forefront of popular attention in states which have implemented "Statue Statutes;"[8] state legislative acts specifically removing monuments from local jurisdiction to state control and providing strict protective measures for existing monuments.[9] These Statue Statutes allow limited or no procedure for removal of existing monuments, including Confederate monuments, at the municipal level.[10]

A ready example of how limited home rule provisions at the state constitutional level and Statue Statutes combine to prevent Confederate monument removal is the recent case of *State v. City of Birmingham*.[11] In May, 2017 the Alabama state legislature enacted a statute that made it illegal to remove, alter, or disturb a monument on public property standing for over forty years.[12] The city of Birmingham recently tested the application of this statute after it placed a plywood barrier around a monument dedicated to Confederate soldiers in one of its public areas, Linn Park.[13] Birmingham defended its measures on the grounds that as a municipality it had rights of free speech and due process not to display a monument it disagreed with, citing United States Supreme Court

6. *See* Trenton v. New Jersey, 262 U.S. 182, 187 (1923) ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the State.").

7. *See* Schragger, *supra* note 3, at 60–61.

8. *See* Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statute Statutes"*, 91 TEMP. L. REV. 1, 7 (2018) ("In some states, legal issues about the relative power of state and local authorities have combined with the underlying causes of the recent monument disputes in a particularly toxic way. More specifically, many of the most intense conflicts have taken place in states with statutes that restrict the ability of local communities to alter monuments to the Confederacy in public places . . . . Following Richard Schragger's recent work on the invasion of Charlottesville by white supremacists, this Article refers to these state controls over Confederate monuments as 'statue statutes.'").

9. *See id.* "Virginia law authorizes localities to erect war memorials to certain wars (including the 'War Between the States') and then bars their removal. This 'statue statute' was amended in 1997 to include cities within its ambit." Schragger, *supra* note 3, at 63.

10. *See* Bray, *supra* note 8, at 20–44.

11. *See* 299 So. 3d 220 (Ala. 2019).

12. *See* ALA. CODE § 41-9-232(a) (2021).

13. *See Birmingham*, 299 So. 3d at 223–24; *see also* Brakkton Booker, *Confederate Monument Law Upheld by Alabama Supreme Court*, NPR (Nov. 27, 2019, 4:46 PM), https://www.npr.org/2019/11/27/783376085/confederate-monument-law-upheld-by-alabama-supreme-court.

decisions *Gomillion v. Lightfoot*[14] and *Washington v. Seattle School District No. 1*.[15] After a ruling for the city by a lower court, the Alabama Supreme Court unanimously found Birmingham had violated the statute and required the city to remove the plywood barrier surrounding the monument.[16] In its ruling the Alabama Supreme Court held that as a municipality Birmingham had no constitutional rights against the state under either the United States or Alabama Constitutions,[17] citing controlling state cases as well as United States Supreme Court cases *Hunter v. Pittsburgh*,[18] *City of Trenton v. New Jersey*,[19] *Williams v. Baltimore*,[20] and *Ysursa v. Pocatello Education Association*.[21]

This note, using *State v. City of Birmingham* as my prime example, will examine both features giving rise to the result of municipal legal inability to remove Confederate monuments–limited municipal rights and Statue Statutes–and argue that the result they produce is unconstitutional. Part I will discuss how, contrary to the holding in *Birmingham*, the Supreme Court's limited municipal rights under the United States Constitution has important qualifications and further, has been modified by government speech doctrine developed in *Pleasant Grove City, Utah v. Summum*[22] and *Walker v. Texas Division, Sons of Confederate Veterans, Inc*.[23] This qualified understanding of limited municipal rights would give municipalities control over removal of Confederate monuments on their public property even in states that do not allow any municipal autonomy under their own constitutions. Part II will argue that state enacted Statue Statutes are constitutionally impermissible because they are

14. *See* 364 U.S. 339 (1960).

15. *See* 458 U.S. 457 (1982); *see also Birmingham*, 299 So. 3d at 224, 229, 232.

16. *See Birmingham*, 299 So. 3d at 227–28 "(Having thus concluded that the City defendants' actions were in violation of § 41-9-232(a), we must now consider whether the City possesses 'individual' constitutional rights to assert against the State. The State maintains that a municipality has no individual, substantive constitutional rights and that the trial court erred by holding that the City has constitutional rights to free speech and due process of law.").

17. *See id.* at 234–35 ("Accordingly, for all the foregoing reasons, we conclude that the circuit court erred in concluding that the City had a right to free speech and due process of law pursuant to the United States and Alabama Constitutions.").

18. *See* 207 U.S. 161, 178–79 (1907).

19. *See* 262 U.S. 182, 188 (1923).

20. *See* 289 U.S. 36, 40 (1933).

21. *See Birmingham*, So. 3d 220, 231 (*citing* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. at 353 (2009)).

22. *See* 555 U.S. 460, 462 (2009).

23. *See* 576 U.S. 200, 208–09 (2015).

arbitrary and violate political process doctrine articulated in the line of cases beginning with *Gomillion v. Lightfoot* and developed in *Hunter v. Erickson*,[24] *Washington v. Seattle School District No. 1*, and *Romer v. Evans*.[25] Specifically, I will examine the history and function of Statue Statutes to show that they exist to promote and maintain a message of white supremacy that violates the Fourteenth Amendment and to make it difficult or impossible for municipalities to remove Confederate monuments. Finally, I will conclude that limited municipal rights reserved under Constitutional jurisprudence and expanded by government and compelled speech and political process doctrine each provide means for municipalities to legally remove Confederate Monuments from their public property.

I. HISTORY AND JURISPRUDENCE OF LIMITED MUNICIPAL RIGHTS

Understanding the history and context of limited municipal rights under the federal constitution helps identify and place current Confederate Monument removal controversies. First, it is important to precisely analyze the scope of the constitutional holding that municipal rights are limited and determined by state constitution rather than federal, because there are important qualifications to this bright line rule. For instance, even though *Birmingham* asserts that municipalities are mere subdivisions of the state, Birmingham had standing to sue its State and be sued (and fined) by it, showing that even in a state with no home rule provisions municipalities are still treated in some ways as entities separate from the state.[26] Further, Alabama acknowledged that the monument at issue was a joint gift to the city of Birmingham and the State, that Birmingham owned the park where the monument was located, and that Birmingham solely maintained the monument at its own expense.[27] These acknowledged qualifications on municipal subordination to the state demand a closer examination to determine whether additional qualifications, such as

24. *See* 364 U.S. 339, 343–45 (1960); 393 U.S. 385, 391 (1969).

25. *See* 458 U.S. 457, 467–70 (1982); 517 U.S. 620, 625–26 (1996).

26. "In the years since *Gomillion*, the Court has allowed municipalities to participate, alongside individuals, in constitutional litigation against the state. While the Court has not explicitly addressed the presence of the municipalities in these cases, the implication of cases like *Romer v. Evans* and *Washington v. Seattle School District No. 1* is that municipalities can suffer injury, and therefore have standing, when the state violates the constitutional rights of their residents." Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 391 (2013).

27. *See* State v. City of Birmingham, 299 So. 3d 220, 223 (Ala. 2019).

the city's capacity to remove the monument from its property, may also be implied.

Limited municipal rights–the federal constitutional doctrine *Birmingham* relied on that the State constitution provides municipalities' only source of rights–is articulated in a line of cases from *Hunter v. Pittsburgh, Trenton v. New Jersey, Williams v. Mayor & City Council of Baltimore,* to *Ysursa v. Pocatella*.[28] All these cases demonstrate the severe historic limits on municipal rights against their states in federal constitutional jurisprudence, but also show important constitutional qualifications on state power. In order to show that *Birmingham's* reliance on these cases was misplaced, I will examine each of these early cases to discover important qualifications that should alter the result of *Birmingham's* decision.

A. Hunter, Trenton, and Williams

In *Hunter v. Pittsburgh* and *Trenton v. New Jersey,* the Supreme Court established limited (or nonexistent) municipal rights under the United States Constitution,[29] confirming municipalities' lack of federal constitutional remedy against their state in *Williams v. Baltimore.*[30] However, in each of these cases the Supreme Court also held important caveats to state power over municipalities with important implications over whether municipalities have the right to remove Confederate Monuments from their public property.[31]

In *Hunter,* a municipality protesting its forced annexation to another town covered all bases for constitutional claims, alleging violation of Article I prohibitions against taxation and impairment of contract, Fifth Amendment prohibition on taking property, as well as

28. *See* 393 U.S. 385, 392–93 (1969); 262 U.S. 182, 187 (1923); 289 U.S. 36, 40 (1933); 555 U.S. 353, 362 (2009).

29. *See Ysursa,* 555 U.S. at 362 (holding "[s]tate political subdivisions are 'merely . . . department[s] of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit'") (quoting Trenton v. New Jersey, 262 U.S. 182, 187); *see also Trenton*, 262 U.S. at 186–87 (holding "[t]he state, therefore, as its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, united the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States") (quoting *Hunter,* 207 U.S. at 178–79).

30. *See* 289 U.S. 36, 47–48 (1933).

31. *See Hunter*, 207 U.S. at 178–79 (1907); *Trenton*, 262 U.S. at 186–87; *Williams*, 289 U.S. at 47–48.

abridgement of Ninth, Tenth and Fourteenth Amendment rights.[32] In crushing the municipality's final appeal for autonomy on all these fronts, the Supreme Court dismissed its "extraordinary" contract claim as "difficult to deal with . . . except by saying that it is not true,"[33] and swept aside all other federal constitutional claims by holding that for municipalities "the state is supreme and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by the Constitution of the United States."[34] Policy considerations for the Supreme Court's evisceration of Allegheny's claims are clear from Hunter's text.[35] In his majority opinion, Justice Moody observed "this court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors" before citing a paragraph of fourteen such prior cases, indicating judicial exhaustion over the topic.[36]

In *Trenton*, a municipality protested the state's assessment of fees after its purchase of a private water company to supply citizens' needs, arguing that municipal ownership should not change the company's status when the water company had been immune from fees prior to the municipality's purchase.[37] The Supreme Court decided the municipality's claim for violating the Constitution's contracts clause and the Fourteenth Amendment claim taking property without compensation[38] in favor of the state.[39] The Supreme Court held that the contracts and the due process clauses simply did not apply in Trenton's case because "The relations existing between the state and the water company were not the same as those between the state and the city," and reasoned that since the state had both the power and duty to ensure wellbeing of its citizens through provision of services, it could regulate these services as it saw fit.[40] Trenton, because it was acting for state purposes by providing these services, had no separate

32. *See Hunter*, 207 U.S. at 176–77.
33. *Id.* at 177.
34. *Id.* at 179.
35. *See id.* at 178–79.
36. *Id.* at 177–78.
37. *See Trenton*, 262 U.S. at 184.
38. *See id.* at 183.
39. *See id*. at 192.
40. *Id.* at 185–86.

constitutional rights against the state that it could assert in federal court.[41]

In *Williams*, the Supreme Court ruled void a municipality's claim that the state's legislated exemption of a particular railroad from municipal taxes was unconstitutional[42] since "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."[43]

Although all these cases show the severe limits of municipal rights under the federal constitution, these cases also hold important caveats to state power as well. In both *Hunter* and *Trenton*, the Supreme court distinguished between municipal proprietary and governmental capacities, indicating that different rights could attach when considering municipal ownership in a proprietary capacity.[44] In *Hunter* the Court noted "[it] will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for government purposes."[45] This qualification suggests, as argued in II. A. of this note, that even in states that have no municipal protections in their constitutions, municipalities have proprietary rights when not acting for state government purposes.[46] *Trenton* further developed this important constitutional caveat to unbounded state control over its municipalities:

> [municipalities] have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity.[47]

41. "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state." *Id.* at 187.

42. *See* Williams v. Baltimore, 289 U.S. 36, 38–40 (1933).

43. *Id*. at 40.

44. *See* Hunter v. Pittsburgh, 207 U.S. 161, 179 (1907); *see also* Trenton v. New Jersey, 262 U.S. 182, 191 (1923).

45. *Hunter*, 207 U.S. at 179.

46. *See id.*

47. *Trenton*, 262 U.S. at 191.

Thus, in both cases the Court provided for a limited proprietary exception to state control over municipalities.[48] Whereas municipalities are subject to unqualified state control when they act for state purposes such as provision for general welfare, this control may not extend to instances where municipalities act in specifically municipal capacities.[49] Although the Court does not define what proprietary municipal purposes or state purposes are, it does find that municipalities have liability, and thus implied control over some contexts. This important point will be further developed in II. A.[50]

Additionally, *Williams* brings up a second important point for my argument's purposes; namely that the Supreme Court may find a state's treatment of its municipality violates its own constitution.[51] The Court had no problem evaluating the municipality's claim against the state under its own Constitution in the forum of the Supreme Court, showing that plaintiff municipalities have standing to sue in federal court for violation of the state's constitution.[52] Thus, even though a municipality may not have rights against its creator state under the Fourteenth Amendment, it may still have standing to claim the state has enacted a law that violates its own constitution.[53] This caveat holds significant implications for the line of cases including *Gomillion v. Lightfoot*, *Romer v. Evans,* and *Washington v. Seattle School District No. 1* and will be explored in depth in Part III. A. of this note.[54]

B. Ysursa v. Pocatello Education Association

State v. City of Birmingham cited to *Ysursa v. Pocatello Education Association*[55] specifically to show that "the Supreme Court . . . rejected the idea that municipalities may be analogized to private corporations for free-speech purposes."[56] In *Ysursa*, public employee unions could not use payroll deductions to fund political activities and sued to be allowed to so, citing violation of their freedom of speech

48. *See id.*; *see also Hunter*, 207 U.S. at 179.

49. *See Hunter*, 207 U.S. at 179.

50. *See Trenton*, 262 U.S. at 191–92.

51. *See* Williams v. Baltimore, 289 U.S. 36, 40 (1933).

52. *See id.* at 42–44 (citing multiple Supreme Court cases where arbitrary state laws were challenged as unconstitutional exercises of state power).

53. *See id.*

54. *See* 364 U.S. 339 (1960); *see also* 517 U.S. 620 (1996); *see also* 458 U.S. 457 (1982).

55. *See* 555 U.S. 353 (2009).

56. State v. City of Birmingham, 299 So. 3d 220, 231 (2019) (citing *Ysursa*, 555 U.S at 363).

under the First Amendment.[57] The Supreme Court reversed the lower court's finding that the plaintiff's claim was valid against municipalities but not against the state, finding again that a municipality was merely "a subordinate unit of government created by the State to carry out delegated governmental functions."[58]

Most interestingly for purposes of this note, however, *Ysursa's* holding that public employee union's freedom of speech claim was constitutionally invalid rested on the proposition that the government "is not required to assist others in funding the expression of particular ideas, including political ones."[59] Chief Justice Roberts' proposition here anticipates the analogous proposition in *National Federation of Independent Business v. Sebelius*,[60] where he found that although the government (this time, Congress) was constitutionally empowered to regulate commerce, it could not compel commerce into existence.[61] Here, like *Sebelius*, Robert draws a clear distinction between compelling an entity to act (constitutionally impermissible) and regulation of that act once it comes into existence (constitutionally permissible).[62] In *Ysursa*, plaintiffs could not compel the government to "speak" by forcing it to subsidize political contributions through its payroll system, a prohibition that extends regardless of whether the government is at state or local level.[63] This exemption provides an important platform for an argument against compelled government speech, as explored in II. B.

II. MUNICIPAL FIRST AMENDMENT CLAIMS: GOVERNMENT AND COMPELLED SPEECH

When municipalities have challenged the validity of Statue Statutes, arguing these violate their First Amendment rights by forcing them to express the message conveyed by Confederate monuments, states have countered by claiming municipalities have no First Amendment rights against their parent state.[64] Thus, when states do not grant municipalities any corollary right to free speech under their own constitutions the argument comes to an end; the municipality

57. *See Ysursa*, 555 U.S. at 355.
58. *Id.* at 363.
59. *Id.* at 358.
60. *See generally* 567 U.S. 519 (2012).
61. *See id.* at 521.
62. *See Ysursa*, 555 U.S. at 363.
63. "[T]hat interest extends to all public employers at whatever level of government." *Id*.
64. *See* State v. City of Birmingham, 299 So. 3d 220, 228 (2019).

cannot assert any federal constitutional right or any state constitutional right.[65] Here, I argue that even in states with limited or no home rule provisions in their constitutions, however, states do have a federal constitutional right to assert against compelled monument display. To understand why this is the case it is important to note that two First Amendment theories battle in analyzing municipalities' claims against their states; the developing doctrine of government speech, and the more established First Amendment concept of compelled speech.[66] Again, *Birmingham* showcases these two threads of First Amendment claims by municipalities against their states.[67] There Birmingham relied on government speech cases of *Pleasant Grove City, Utah v. Summum* and *Walker v. Texas Division, Sons of Confederate Veterans, Inc*., to argue its right to expression through its monuments, and Alabama conversely argued Birmingham's right only existed against private, not government parties, thus Birmingham was compelled to keep its monuments per state statute.[68] Turning on this argument, Birmingham's government speech bid to remove its Confederate monument failed.[69] Here, however, based on the *Walker* test for government speech and *Ysursa's* ban on compelled government speech, state claims of this type can be shown to be unconstitutional because the municipality, not the state, is the government speaker.[70] Because the municipality is expressing its own identity and not the state's through its monuments the proprietary exceptions from state control found in *Hunter*, *Trenton*, and *Williams* apply.[71] Further, I will conclude that under *Ysursa's* holding that a government speaker may not be compelled to promote another's speech. Thus municipalities, as

65. *See* Schragger, *supra* note 3, at 68–72.

66. Ellen Hunt, *What Is A Confederate Monument?: An Examination of Confederate Monuments in the Context of the Compelled Speech and Government Speech Doctrines*, 37 L. & INEQUALITY 423, 430–31 (2019) ("Two doctrines within First Amendment jurisprudence—government speech and compelled speech—provide a framework for understanding how to confront the place of Confederate monuments in a contemporary context. Government speech, when the government speaks for itself, is immune from First Amendment challenges. Compelled speech is an exception to government speech's immunity. The government cannot force others to speak for it.").

67. *See Birmingham*, 299 So. 3d at 235–37.

68. *See id.* at 228–32.

69. *See id.* at 234.

70. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 209 (2015)*; see also* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 361 (2009).

71. *See* Hunter v. Pittsburgh, 207 U.S. 161, 179 (1907); Trenton v. New Jersey, 262 U.S. 182, 186–87 (1923); Williams v. Baltimore, 289 U.S. 36, 47–48 (1933).

government speakers conveying a proprietary message, may not be compelled to speak by the state.

A. Government Speech

Government speech doctrine is a recent development[72] in First Amendment jurisprudence, spanning cases from *Rust v. Sullivan*[73] to *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[74] In a nutshell, Government speech doctrine holds that in non-public fora the government need not be neutral in its speech but may promote its own viewpoint.[75] When it does so, the government is immune from First Amendment claims brought against it by private parties.[76] This means, in practice, that private claims of First Amendment violation against the government which would ordinarily merit strict scrutiny if taking place in a public forum, when taking place in a non-public forum are only subject to rational basis review.[77] This result is exemplified in *Walker*, where plaintiffs claimed viewpoint discrimination in violation of the First Amendment–normally a trigger for strict scrutiny–when Texas refused to produce its vanity license plate design.[78] Because license plate design was a state created non-public forum, however, the state's desire not to be associated with it was sufficient to overcome plaintiffs' First Amendment claims, even though it would not have been sufficient in a traditional public forum.[79] For purposes of this argument, the most important cases for government speech are *Summum* and *Walker*, so an analysis of each to the question of Confederate monuments on municipal property follows.

At first glance and arguably rightly, *Summum* appears to be the strongest argument for municipal control over monuments on its property because it is a case that specifically deals with municipal control over monuments on municipally owned property.[80] Similar to the facts in *Birmingham*, there the city of Pleasant Grove, Utah, sought

72. *See* Hunt, *supra* note 66, at 431; Leslie Gielow Jacobs, *Government Identity Speech Programs: Understanding and Applying the New Walker Test*, 44 PEPP. L. REV. 305, 314 (2017); David S. Day, *Government Speech: An Introduction to a Constitutional Dialogue*, 57 S.D. L. REV. 389, 389–90 (2012).

73. *See generally* 500 U.S. 173 (1991).

74. *See generally* 576 U.S. 200 (2015).

75. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009).

76. *See id.* at 481.

77. *See id.*

78. *See Walker*, 576 U.S. at 206–07.

79. *See id.* at 214–15.

80. *See Summum*, 555 U.S. at 464.

to reject a monument from its public park,[81] although in *Summum* the monument was merely proposed rather than installed and protected by statute.[82] The monument's donors challenged the city's refusal of its monument on free speech grounds, reasoning that public parks are traditional public fora, thus the city could not refuse their monument while accepting others without engaging in viewpoint discrimination that violated their First Amendment rights.[83] In finding for the city, the Court noted "'municipalities generally exercise editorial control over donated monuments'" and thence reasoned that "Public parks are often closely identified in the public mind with the *government unit* that owns the land."[84] Further, the Court found that not only were parks identified with their government unit owner by observers, parks "commonly play an important role in defining the identity that a *city* projects to its own residents and to the outside world."[85] The Court then went on to hold that this editorial control and public identification with the municipality justified a municipality's decision to accept some monuments and reject others, overcoming the plaintiffs' First Amendment objection that the municipality was engaging in impermissible viewpoint discrimination.[86]

In *Walker*, as detailed above, the Court went further to articulate what constitutes non-public fora and government speech.[87] Its analysis has guided courts and authorities to use factors to determine both of these identifications by analyzing "the government's expressive purpose, editorial control, role as literal speaker, and ultimate responsibility."[88] This test attempts to answer the question, important for discussion of municipal control over Confederate monuments on its public property, of who the speaker is in a given context and thus who should have control of the message being conveyed.[89]

81. *See id.* at 465.

82. *See id.*

83. *See id.* at 473. "In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument." *Id.* at 466.

84. *Summum*, 555 U.S. at 472 (emphasis added).

85. *Id.* (emphasis added).

86. *Id.* at 480–81.

87. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 217–18 (2015).

88. *See* Hunt, *supra* note 66, at 431; Mary Jean Dolan, *Why Monuments Are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 11 (2008); Jacobs, *supra* note 72, at 345.

89. *See* Jacobs, *supra* note 72, at 345.

Applying this test in the context of municipalities with Confederate monuments on their public property, it appears abundantly clear that municipalities fit the identity of government speakers who should have control over the message conveyed by monuments on their public property.[90] First, it is uncontroversial that Confederate monuments are expressive.[91] Second, municipalities exercise initial control over what monuments are erected on their public property.[92] Monuments are typically commissioned by municipalities or accepted as donations, then carefully placed according to plan, showing intentionality and ownership of the monuments.[93] Third, as Summum points out, the *government unit* that owns public land is identified with it, making the municipality the literal speaker in regard to monuments thereon.[94] This point clearly argues for the municipality alone to be considered government speaker in context of its public parks and associated monuments.[95] Fourth, ultimate responsibility for the monuments on municipally owned land also rests in the hands of the municipality, which is liable for its

90. "The monument display context presents an easier case, and a less mixed message, on this factor. Applying the majority reasoning, Pleasant Grove City is the literal speaker because the municipality is intentionally displaying a message originally created by a private group, in circumstances where the public perception is that municipalities are responsible for any messages conveyed by monuments located in municipal parks. In addition, the monument donor's act is a one-time event; whatever message is communicated by the monument was the donor's message at the point of conveyance, and may not be today. But the municipality that continues to display the monument, without any modification or added explanation, is 'speaking' its message on a long-term, ongoing basis." Dolan, *supra* note 88, at 36–37.

91. "A monument, by definition, is a structure that is designed as a means of expression." Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

92. *See, e.g.*, State v. City of Birmingham, 299 So. 3d 220, 223 (2019); *Summum*, 555 U.S. at 473–74; Schragger, *supra* note 3, at 63; 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, 133 (2016).

93. *See Summum*, 555 U.S. at 470–71; Dolan, *supra* note 88, at 34.

94. *See Summum*, 555 U.S. at 472.

95. "Municipal decisions on donated monuments easily satisfy the *Johanns* majority's minimalist interpretation of the political accountability requirement; under its rule, all that is required is legislative involvement and administrative control. Applying that standard to municipal park monuments, political accountability is enhanced by virtue of the closer connection between citizens and their local government, as compared with federal, or even state, governments." Dolan, *supra* note 88, at 30.

upkeep and maintenance.[96] This is demonstrable even in municipalities where the state prohibits monument removal or alteration by the fact municipalities are fined or otherwise punished for violating the prohibitions.[97] Rather than taking responsibility for protection of monuments on itself, states with Statue Statutes hold municipalities liable for their violations.[98]

Conversely applying the *Walker* test for government speech to states in regard to municipally owned parks containing Confederate monuments, it is evident that the state does not meet the qualifications of government speaker. Still uncontroversial, monuments are expressive.[99] However, the municipality rather than the state does exercises initial control over whether monuments are erected in municipal parks.[100] Further, *Summum* identifies the municipality, not the state, as the literal speaker,[101] and whereas the state may try to wrest ultimate control over monuments' fates from municipalities, the fact that states fine municipalities for failing to maintain monuments and prevent their alteration and removal show that municipalities, not states, are ultimately responsible for them.[102] Thus under the *Walker* test municipalities, not states, are the government speaker in regard to monuments on municipally owned property.

Despite this argument, government speech has been considered a dead end for municipalities seeking to remove their Confederate monuments against the wishes of their state.[103] Voicing this view, *State v. Birmingham* dismissed Birmingham's government speech claim by asserting that Birmingham misunderstood government speech doctrine and had no First Amendment rights against its parent

96. "The monument is . . . owned and maintained by the City . . . with no funds being provided from the State of Alabama for maintenance and upkeep." *Birmingham*, 299 So. 3d at 223; *see* Dolan, *supra* note 88, at 37.

97. *See Birmingham*, 299 So. 3d at 236–37.

98. *See id.* at 237–38.

99. *See id.* at 237.

100. *See* Dolan, *supra* note 88, at 22–24 (providing numerous examples of municipalities commissioning and accepting monuments).

101. Pleasant Grove City v. Summum, 555 U.S. 460, 461–62 (2009) ("The City has selected monuments that present the image that the City wishes to project to Park visitors; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument; and it has now expressly set out selection criteria."). *Id.*

102. *See id.* at 461 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2004)).

103. *See* Richard C. Schragger, *What Is "Government" "Speech"? The Case of Confederate Monuments*, 108 KY. L.J. 665, 693–94 (2020); Hunt, *supra* note 66, at 431.

state.[104] Alabama concluded that "nothing in *Summum*, *Walker*, or any other authority cited by the City defendants supports the circuit court's conclusion that a government entity's ability to "speak" or to engage in expression confers on that government entity the rights and protections included in the Free Speech Clause of the First Amendment."[105] Parsing this conclusion, Alabama appears to concede that Birmingham was capable of speech and expression and engaged in them, but argued that its speech was constitutionally unprotected.[106] Thus the state could regulate Birmingham's expression as it chose, including forcing Birmingham to continue expressing itself through unwanted monuments.[107]

Although Alabama's argument, thus understood, would work if Alabama had absolute and unqualified sovereignty over Birmingham, *Summum's* theory of government speech as well as Supreme Court cases defining the limits of state power over municipalities–*Hunter*, *Trenton*, and *Williams*–work to undermine Alabama's conclusion. Identifying the municipality rather than the state as government speaker in cases of Confederate Monuments on municipally owned land changes the result for cases like Birmingham where states dismiss cities' government speech based claims because municipalities have no First Amendment rights against their state.[108] *Hunter*, *Trenton*, and *Williams*, as shown in I. A.–C., hold that municipalities have no rights against their state when acting for state government purposes, seeming to support this conclusion. However, each of these cases qualify the state's absolute supremacy when it comes to proprietary municipal functions.[109] And, as argued in *Summum*, municipalities project their municipal rather than state identities through their parks and choice of monuments.[110] Projecting municipal identity is definitionally a municipal rather than state government function: it is not a "state purpose" to express a city's identity.[111] This places public parks and the monuments chosen for them–municipality identifying expressions–outside the sweeping powers the state holds over the

104. *See Birmingham*, 299 So. 3d at 229.

105. *Id.*

106. *See id* at 228–29 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

107. *See id*. at 232 (quoting Williams v. Baltimore, 289 U.S. 36, 40 (1933)).

108. *See* Hunter v. Pittsburgh, 207 U.S. 161, 181 (1907); Trenton v. New Jersey, 262 U.S. 182, 192 (1923); *Williams*, 289 U.S. at 48.

109. *See Hunter*, 207 U.S. at 179; *Trenton*, 262 U.S. at 191–92.

110. *See Summum*, 555 U.S. at 473.

111. *See id.*

municipality under *Hunter*, *Trenton*, and *Williams*.[112] Because a municipalities' projection of its identity through its parks is a proprietary function, it falls into the constitutionally protected zone of municipal interests reserved in these cases.

B. Compelled Speech

The question then remains, can the state compel municipalities to continue to express themselves through unwanted monuments in their public parks? Under compelled speech jurisprudence, when the state compels a person to speak its unwanted message the state violates the person's First Amendment rights.[113] However, as noted in *Hunter*, *Trenton* and *Williams*, municipalities have no First Amendment rights against their states.[114] Here the holding in *Ysursa v. Pocatello Education Association*, that a government speaker may not be compelled to promote another's free speech, comes into play.[115] As argued above, municipalities, not states, are government speakers in regard to Confederate Monuments in their public parks since they express their municipal identity through their parks and because viewers identify parks with municipalities. Thus, transposing *Ysursa's* holding to the situation of municipalities and states, the municipality, as government speaker, may "decline[] to promote" the state's message in its proprietary forum without abridging the state's right to speak.[116] Under *Ysursa*, a municipality's rational basis purpose of avoiding the appearance of partisanship by refusing to display Confederate monuments is sufficient to overcome the state's interest to compel the municipality to speak. Pursuing *Ysursa's* line of argument, a municipality is "under no obligation to aid" the state in its goal of preserving Confederate Monuments through its public parks.[117] At a minimum, *Ysursa* gives a municipality the negative right

112. *See id.* at 472.

113. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943); Wooley v. Maynard, 430 U.S. 705, 713–14 (1977).

114. *See Hunter*, 207 U.S. at 176; *Trenton*, 262 U.S. at 192; Williams v. Baltimore, 289 U.S. 36, 47 (1933).

115. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 355 (2009) ("Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities. Such a decision is reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity. That interest extends to government at the local as well as state level, and nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities.").

116. *Ysursa*, 555 U.S. at 355.

117. *Id.* at 359.

of silence in regard to expressing itself through monuments on its public property, even if it confers no positive right on the municipality to express itself through monuments the state does not approve.

In conclusion, government speech as articulated in *Summum* and *Walker* shows that a municipality rather than its state is the government speaker in regard to municipally owned parks and the monuments they contain. This means the speech falls in the proprietary exclusion from state control reserved in *Hunter*, *Trenton*, and *Williams*. Finally, *Ysursa's* prohibition against compelled government speech prevents the state from forcing a municipality to promote a proprietary message against its will.

III. MUNICIPAL EQUAL PROTECTION CLAIMS: STATE CONSTITUTION AND POLITICAL PROCESS

Since municipalities "unquestionably wield[] state power,"[118] municipalities must abide by the Fourteenth Amendment.[119] Maintenance of Confederate monuments poses an equal protection concern for municipalities owning them because the history of Confederate monuments shows that often their purpose was to promote white supremacy [120] and current perceptions suggest they still function to do so.[121] Since white supremacy aims to treat people differently based on race, it threatens minorities' Fourteenth

118. Hunter v. Erickson, 393 U.S. 385, 389–90 (1969).

119. *Id.* at 392.

120. *See, e.g.*, Hunt, *supra* note 66, at 426 (finding authorities agree most Confederate monuments were erected during the Jim Crow era, well after the end of the Civil War, with another significant surge between Supreme Court's decision in *Brown v. Board of Education* and the assassination of Martin Luther King Jr.); Schragger, *supra* note 103, at 669 (asserting most Confederate monuments were constructed between 1900 and the late 1920's "as Southern states marked symbolically what they had been permitted to achieve legally through Jim Crow"); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 597–98 (2002) (holding that the Confederacy's Constitution "reflected its supremacist foundation" and Confederate culture considered slavery "to be an equalizer for the white race"); Zachary Bray, *From "Wonderful Grandeur" to "Awful Things": What the Antiquities Act and National Monuments Reveal About the Statue Statutes and Confederate Monuments*, 108 KY. L.J. 585, 589 (2020) (stating most historians argue and the American Historical Association concluded Confederate monuments "were created to support the initiation or retention of legal segregation, and for the most part these monuments were designed and sited to intimidate African Americans and reinforce their political disenfranchisement after Reconstruction").

121. *See* Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 634–35 (2019) (finding that beginning in 1889 Confederate Monuments were erected to celebrate an ongoing culture and symbolize white supremacy).

Amendment guaranty of equal protection of the laws,[122] giving municipalities a vested interest in removing the Confederate monuments that promote it.[123] This interest, as demonstrated in *Williams*, may give municipalities a state constitutional cause of action when states enact arbitrary legislation that is unrelated to any valid state goal.

Municipalities have such a cause of action in state Statue Statutes.[124] Although Statue Statutes as a class are facially neutral, purportedly affording protection to all monuments from a class of conflicts or a period of time,[125] the history and timing surrounding their passage as well as the way they have subsequently been used show that they were intended and now function primarily to protect Confederate monuments, which threaten minority Fourteenth Amendment rights and thus do not have a valid state purpose.[126]

122. *See, e.g.*, *id.* at 636–37 (finding that the organizations responsible for many Confederate Monuments seek to spread the "Lost Cause" movement, which "has its roots in white anxiety and fear of a loss of standing in society" and "applauds a social order based on innate racial inequality"); *List of Confederate Monuments and Memorials*, WIKIPEDIA (Dec. 28, 2020), https://en.wikipedia.org/wiki/List_of_Confederate_monuments_and_memorials (citing the American Historical Association's conclusion that "the erection of Confederate monuments during the early 20th century was 'part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South'", *Smithsonian Magazine's* claim that "these memorials were created and funded by Jim Crow governments to pay homage to a slave-owning society and to serve as blunt assertions of dominance over African-Americans", and University of Chicago historian Jane Dailey's assertion that many times "these memorials were created and funded by Jim Crow governments to pay homage to a slave-owning society and to serve as blunt assertions of dominance over African-Americans"); Tsesis, *supra* note 120, at 598 (finding Confederate symbols "support not only that entity's governmental reality but also its entrenched separatism between races"); Hunt, *supra* note 66, at 425 (quoting Confederate Vice President's address stating the Confederacy was "founded upon . . . the greatest truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition").

123. *See, e.g.*, Hunt, *supra* note 66, at 427–29 ("Monuments serve as a reminder who has the economic and social power").

124. *See, e.g.*, Williams v. Baltimore, 289 U.S. 36, 46 (1933) ("If the evil to be corrected can be seen to be merely fanciful… the court may intervene and strike the statute down").

125. *See, e.g.*, S.C. CODE ANN. § 10-1-165 (2021); GA. CODE ANN. § 50-3-1(c) (2021); MISS. CODE ANN. § 55-15-81 (2021); TENN. CODE ANN. § 4-1-412 (2021); N.C. GEN. STAT. ANN. § 100-2.1 (West 2021); VA. CODE ANN. §15.2-1812 (2021); ALA. CODE §§ 41-9-230–41-9-237 (LexisNexis 2021).

126. Tsesis, *supra* note 120, at 611.

A. State Constitution Limit on State Control of Municipalities

In its dismissal of Birmingham's equal protection claim in *State v. City of Birmingham*, Alabama cites *Williams v. Mayor and City Council of Baltimore* as standing for the proposition that "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."[127] In doing so, the Court failed to account for the remainder of Justice Cardozo's reasoning in *Williams*, which found Maryland's disputed statute exempting a particular railroad from municipal taxation did not violate its own constitution because it was not "arbitrary" but rather "Furtherance of the public good is written over the face of this statute from beginning to end as its animating motive."[128] Similar to Maryland's constitutional requirement for non-arbitrary legislation, Alabama's constitution provides that "[t]he legislature shall pass general laws under which local and private interests shall be provided for and protected" and defines a general law as " . . . a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class."[129] The Alabama constitution thus gives municipalities and their citizens a state provided right similar to that Judge Cardozo found in Maryland: a right to laws that respect their welfare rather than reflect the legislature's special interests.[130] In the context of Alabama's state constitution, then, a better reading of *Williams*' holding is that an Alabama state statute exempting a particular class that would otherwise be subject to municipal control may be passed if local and private interests are provided for and protected. Because local and private interests are threatened by Alabama's Statue Statute, municipalities and their citizens may have a cause of action against the Statue Statute under the Alabama Constitution.

B. Political Process Limit on State Control of Municipalities

The holding that state sovereignty over municipalities is qualified even in states with limited home rule is confirmed at the federal level by a line of Constitutional cases following *Gomillion v. Lightfoot* that developed political process doctrine.[131] This is a federal court doctrine

127. *Williams*, 289 U.S. at 40.
128. *Id.* at 41.
129. ALA. CONST. art. IV, §§ 109, 110.
130. *Williams*, 289 U.S. at 41.
131. 364 U.S. 339, 353–54 (1960).

holding that a state's alteration of the political process making equal protection claims more difficult for municipalities or citizens to bring may be unconstitutional.[132] Rather than being a positive right for municipalities, it places a limit on states' ability to arbitrarily legislate in regard to lower levels of government.[133] This is shown in *Gomillion*, where in determining Alabama violated the Fourteenth Amendment by altering the City of Tuskegee's boundaries for gerrymandering purposes, the Court tellingly found "the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."[134] In *Washington v. Seattle School District No. 1*[135] and *Hunter v. Erickson*,[136] the Court refined this holding to target cases where voters enacted specific measures to bypass local attempts to desegregate schools and provide nondiscriminatory housing.[137] The Court found in both these cases that alteration of the structure of local government had been used to make racial equal protection claims, and only racial equal protection claims, more difficult to pursue.[138] In *Romer v. Evans*, the Court moved beyond requiring a finding of racial discrimination to hold a statute unconstitutionally deprived a municipality of control.[139] There, after several Colorado municipalities passed ordinances to ban discrimination against homosexuals, voters held a referendum to amend the state constitution

132. *Id.* at 347.

133. *Id.*

134. *Id.* at 344–45.

135. 458 U.S. 457, 470 (1982) (". . . [A] different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process").

136. 393 U.S. 385, 392–93 (1969) ("The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size").

137. *See Hunter*, 393 U.S. at 386; *See Seattle Sch. Dist. No. 1*, 458 U.S. at 459.

138. *Hunter*, 393 U.S. at 390 ("Only laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' must run § 137's gauntlet"); *Seattle Sch. Dist. No. 1*, 458 U.S. at 474 ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests").

139. *See* 517 U.S. 620, 635 (1996).

to specifically prohibit protection of homosexuals from discrimination.[140] The Court found this structural change exempting control over a targeted class was unconstitutional because it "impos[ed] a broad and undifferentiated disability on a single named group" and "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[141]

Equipped with a clarified understanding of the constitutional holding of *Williams* and subsequent political process cases, the constitutionality of states' Statue Statutes–which definitely exempt a particular class that would otherwise be under municipal control–becomes immediately suspect. Whereas in *Williams* the statute exempting the railroad from taxation could be justified because it was insolvent but transported "millions of passengers, and suppl[ied] the only railroad service between the capital of the state and its most populous city" thus, "the rescue of such a road might be dictated by the public interest when a road in some other territory might wisely be abandoned to its fate,"[142] an analysis of statutes protecting Confederate monuments presents a far different picture both of intent and function, one that shows they were "enacted 'because of,' not merely 'in spite of,' its adverse effects upon"[143] municipal control over monuments in public parks.[144] An examination of the purpose and function Statue Statutes shows they impose and maintain a message of white supremacy, a goal clearly at odds with Fourteenth Amendment equal protection.[145] Like the amendments in *Romer, Seattle School District No. 1*, and *Hunter*, Statue Statutes exempt Confederate monuments from municipal control in order to make it more difficult for municipalities to promote equal protection under the laws by removing this message from their midst.[146] Thus under political process doctrine Statue Statutes are constitutionally suspect.

140. *See id.* at 624.

141. *Id.* at 632.

142. Williams v. Baltimore, 289 U.S. 36, 43 (1933).

143. *Seattle Sch. Dist. No. 1*, 458 U.S. at 471 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

144. *See generally* Bray, *supra* note 8.

145. *See generally id.*

146. *See* Romer v. Evans, 517 U.S. 620, 624 (1996); *Seattle Sch. Dist. No. 1*, 458 U.S. at 461; Hunter v. Erikson, 393 U.S. 385, 386–87 (1969).

IV. THE HISTORY AND FUNCTION OF STATUE STATUTES

Scholars, politicians, and local news sources have noted Statue Statutes' recent vintage and surmised they were passed in response to changing cultural attitudes toward the message Confederate monuments convey.[147] For instance, South Carolina's Statue Statute, § 10-1-165 (2020), was passed in 2000 as "part of a legislative compromise that removed the Confederate battle flag from atop the state capitol building"[148] and Georgia's 2001 monument protection,[149] codified at § 50-3-1 was "part of an attempted compromise to resolve a long-simmering conflict" over Georgia's state flag, which "included Confederate designs and symbols."[150] Mississippi's § 55-15-81 was passed in 2004, its Notes of Decisions showing this statute has been used only once; by Mississippi's Division of Sons of Confederate Veterans to challenge the University of Mississippi's removal of Confederate monuments.[151] Tennessee's Statue Statute is even more recent: its first monument protection law was passed in 2013 and was then revised by Tennessee Heritage Protection Act of 2016 and codified at § 4-1-412.[152] Its legislative history and response from Sons of Confederate Veterans showing recognition that the law specifically protected Confederate monuments.[153] Some of the Statue Statutes'

147. *See generally* Bray, *supra* note 8.

148. S.C. CODE ANN. § 10-1-165 (2021); Bray, *supra* note 8, at 41 ("No Revolutionary War, War of 1812, Mexican War, War Between the States, Spanish-American War, World War I, World War II, Korean War, Vietnam War, Persian Gulf War, Native American, or African-American History monuments or memorials erected on public property of the State or any of its political subdivisions may be relocated, removed, disturbed, or altered").

149. GA. CODE ANN. § 50-3-1(c) (2021) ("Any other provision of law notwithstanding, the memorial to the heroes of the Confederate States of America graven upon the face of Stone Mountain shall never be altered, removed, concealed, or obscured in any fashion and shall be preserved and protected for all time as a tribute to the bravery and heroism of the citizens of this state who suffered and died in their cause").

150. Bray, *supra* note 8, at 34.

151. *See* MISS. CODE ANN. § 55-15-81 (2021); Miss. Div. of Sons of Confederate Veterans v. Univ. of Miss., 269 So. 3d 1235, 1238 (Miss. Ct. App. 2018) ("SCV filed its original petition on September 18, 2014, in the Lafayette County Chancery Court, requesting an injunction against the University of Mississippi (UM), in response to UM's diversity plan that set out to move, rename, or recontextualize confederate monuments, street names, and building names on its Oxford, Mississippi, campus").

152. *See* TENN. CODE ANN. § 4-1-412 (2021).

153. ". . . [W]hen the original 2013 version of the statute was enacted, the Tennessee Division of the Sons of Confederate Veterans hailed it as "one of the greatest documents in modern history," in part because it would "clearly hereafter

dates are even more telling–North Carolina's was enacted July 2015,[154] a month after the massacre of nine black church members by a white supremacist in Charleston, South Carolina.[155] Alabama's Statue Statute was enacted in 2017, the same year a white supremacist drove his truck into a crowd of peaceful protesters in Charlottesville Virginia, killing one of them and injuring nineteen.[156] Even looking at the Statue Statute with the longest history, Virginia's § 15.2-1812 based on a 1904 State Act, shows that is the product of frequent amendments to preclude Confederate monument removal by local governments and enforced selectively in order to protect them.[157] Perception that these Statue Statutes were enacted in order to protect Confederate monuments specifically is borne out by examination of their calls for enforcement. A summary of the use of Statue Statutes by state is instructive in this regard.

protect" a number of Confederate monuments, including some targeted for removal or renaming by local government officials in Memphis. The Tennessee Division of the Sons of Confederate Veterans also pointed out that its own chief of protocol and lieutenant commander wrote and introduced the bill to the Tennessee House, and its division commander introduced the bill to the Tennessee Senate." Bray, *supra* note 8, at 27; "Under the current version of Tennessee's statue statute, a waiver must receive a two-thirds vote of the entire board by a roll call vote. This is a change from the original version of the statute, which allowed a majority of the members of the Tennessee Commission's board present at the waiver hearing to grant waivers. The current version of the statute also contains an amendment to the original 2013 version that allows virtually anyone aggrieved by the final decision of the waiver process to seek review of the Commission's decision in court." *Id.* at 28.

154. *See* N.C. GEN. STAT. ANN. § 100-2.1 (West 2021); Bray, *supra* note 8, at 36 ("North Carolina's statue statute, enacted in 2015, is another example from the recent crop of statutes often referred to as Heritage Protection Acts").

155. *See* Benjamin Wallace-Wells, *The Fight Over Virginia's Confederate Monuments*, THE NEW YORKER (Nov. 27, 2017), https://www.newyorker.com/magazine/2017/12/04/the-fight-over-virginias-confederate-monuments.

156. *Charlottesville Car Attack*, WIKIPEDIA (Dec. 20, 2020), https://en.wikipedia.org/wiki/Charlottesvillecarattack.

157. *See generally* VA. CODE ANN. §15.2-1812 (West 2021); Bray, *supra* note 8, at 24–25 ("The statute also provided that neither the local government nor any other person could 'prevent the citizens of said county from taking all proper measures and exercising all proper means for the protection, preservation, and care of' such a monument. The statute was then further amended or recodified in 1910, 1930, 1945, 1962, 1982, 1988, 1997, 1998, 2005, and 2010. In addition to this general statue statute, as noted above, several Confederate monuments in Virginia were created by monument-specific state statutes, some of which contain specific restrictions on whether the monument at issue can be disturbed. As a result, some local governments may face additional restrictions on modifying or removing monuments").

A. Overview of Statue Statutes

A brief overview of six states' Statue Statutes shows they are primarily used to protect Confederate Monuments and symbols. South Carolina's section 10-1-165 protects monuments to a list of wars as well as to Native American and African American history and has been used thirteen times since its inception in 2001,[158] a full ten dealing with Confederate or racially divisive monuments.[159] Tellingly, in the three applications to removal of non-Confederate monuments, section 10-1-165 was held not to be an absolute bar against removal.[160]

158. *See* S.C. CODE ANN. § 10-1-165 (2021).

159. *See* S.C. Op. Att'y Gen. 2020 WL 4365489, at *4 (S.C.A.G. July 21, 2020) (finding Meriwether Monument to be "abhorrent testament to Jim Crow" but protected by law); Brief of Respondent at *3–4, State v. Waller, 2019 WL 1595892 (S.C. 2019) (No. 2015-cp-24-00514) (describing contested monument to veterans of 20th century Wars which segregated veterans by race); Brief of Respondents at *1, Waller v. State, 2019 WL 1595893 (S.C. 2019) (No. 2018-002214) (clarifying that monument segregated of veterans by race on only as to World Wars, not subsequent wars); Brief of Appellants at *1, Waller v. State, 2019 WL 659350 (S.C. 2019) (No. 2018-002214) (describing list of World War I and II veterans on monument as separated into "white" and "colored" categories); Complaint at *1, Waller v. State, 2015 WL 3596644 (S.C. Com. Pl. 2015) (No. 2015-cp-24-0514) (bringing challenge to South Carolina's "Heritage Act" which prevented removal of segregated lists of veterans of World Wars I and II); S.C. Op. Att'y Gen. 2015 WL 1093151, at *1 (S.C.A.G. Feb. 25, 2015) (Attorney General opinion the Confederate Battle Flag could not be moved from Summerall Chapel under the Heritage Act); S.C. Op. Att'y Gen. 2014 WL 2757536, at *3 (S.C.A.G. June 10, 2014) (Attorney General opinion that Confederate Battle Flag in Summerall Hall was protected by the Heritage Act); S.C. Op. Att'y Gen 2004 WL 3058237, at *2 (S.C.A.G. Dec. 13, 2004) (Attorney General opining that city could not move monuments within Wade Hampton Veterans Park); S.C. Op. Att'y Gen 2001 WL 957759, at *3 (S.C.A.G. July 18, 2001) (opining that Confederate heritage groups who maintain Confederate Monuments have protections under Heritage Act).

160. *See* S.C. Op. Att'y Gen. 2020 WL 2044371, at *4 (S.C.A.G. Apr. 10, 2020) (Holding, in regard to WWII dedicated library, "[i]t is this Office's opinion that a court likely would hold the protections listed in the Heritage Act, S.C. Code Ann. § 10-1-165, apply to the Cooper River Memorial Library (the 'Library'). The remaining questions in the request letter, however, require factual findings which are beyond the scope of this Office's opinions"); Complaint at 6, USS Clagamore SS-343 Restoration & Maint. Ass'n, Inc., v. Patriots Point Dev. Auth., 2019 WL 8135331 (S.C. Com. Pl. 2019) (No. 2019-cp-10-1950) (complaint against decommission of Navy donated Cold-War era submarine); Trial Order at 13, USS Clamagore SS-343 Restoration and Maint. Ass'n, Inc. v. Patriots Point Dev. Auth., 2020 WL 1038741 (S.C. Com. Pl. 2020) (No. 2019-cp-10-1950) (finding, in regard to Navy donated Cold-War era submarine: "PPDA's decision to repurpose the Clamagore into a reef is a quintessential discretionary— not ministerial—act for which the PPDA is immune from liability under the SCTCA").

Virginia's Statue Statute, section 15.2-1812,[161] is cited in six cases, all of which concern Confederate monument removal.[162] North Carolina's monument protection law, section 100-2.1, was relied on in one case brought by the Daughters of the Confederacy, North Carolina Division, Inc., in their unsuccessful suit against the City of Winston-Salem to enjoin removal of a Confederate monument from the Forsyth County Courthouse.[163] Tennessee's Heritage Protection Act has been used in connection with two cases, both dealing with Confederate monuments.[164]

All Mississippi court references citing to its Statue Statute have to do with Confederate Monument removal.[165] Finally, only three of Georgia's twenty-seven court record uses of section 50-3-1 do not

161. VA. CODE ANN. § 15.2-1812 (West 2021) ("A locality may, within the geographical limits of the locality, authorize and permit the erection of monuments or memorials for the veterans of any war or conflict, or any engagement of such war or conflict, to include the following : Algonquin (1622), French and Indian (1754–63), Revolutionary (1775-1783), War of 1812 (1812-1815), Mexican (1846-1848), Civil War (1861-1865), Spanish-American (1898), World War I (1917-1918), World War II (1941-1945), Korean (1950-1953), Vietnam (1965-1973), Operation Desert Shield-Desert Storm (1990-1991), Global War on Terrorism (2000-), Operation Enduring Freedom (2001-), and Operation Iraqi Freedom (2003-)").

162. *See* Anonymous v. Stoney, No. 201037, 2020 WL 6063251, at *1 (Va. Oct. 8, 2020); Stoney v. Anonymous, No. 200901, 2020 WL 5094625, at *1 (Va. Aug. 26, 2020);

Davis v. Northam, No. 3:20-cv-403-HEH, 2020 WL 4274571, at *3 (E.D. Va. July 24, 2020);

Norfolk v. Commonwealth of Virginia, No. 2:19cv436, 2020 WL 6323758, at *1 (E.D. Va. July 2, 2020); City of Norfolk v. Commonwealth of Virginia, No. 2:19cv436, 2020 WL 6330050, at *1 (E.D. Va. Jan. 10, 2020); Payne v. City of Charlottesville, No. CL 17-145, 2017 WL 11461042 at *1 (Va. Cir. 51 Oct. 3, 2017).

163. *See* United Daughters of the Confederacy v. City of Winston-Salem, 853 S.E.2d 216, 218 (N.C. Ct. App. Dec. 15, 2020).

164. *See* Hayes v. City of Memphis, No. W2014-01962-COA-R3-cv, 2015 WL 5000729, at *1 (Tenn. Ct. App. Aug. 21, 2015); Sons of Confederate Veterans v. City of Memphis, No. M2018-01096-COA-R3-cv, 2019 WL 2355332, at *6 (Tenn. Ct. App. June 4, 2019), *appeal denied* (Oct. 14, 2019).

165. *See* MISS. CODE ANN. § 55-15-81 (West 2021); Miss. Div. of Sons of Confederate Veterans v. Univ. of Miss., 269 So. 3d 1235, 1238 (Miss. Ct. App. 2018); Miss. Op. Att'y Gen. 2017 WL 5558444, at *2 (Miss. A.G. Oct. 13, 2017); Miss. Op. Att'y Gen. 2017 WL 5558441, at *1 (Miss. A.G. Oct. 2, 2017); Miss. Op. Att'y Gen. 2017 WL 5558442, at *1 (Miss. A.G. Oct. 2, 2017); Reply Brief of Appellant at *11, Miss. Div. of Sons of Confederate Veterans v. Univ. of Miss., 2017 WL 9287271 (Miss. 2017) (No. 2017-ca-00546); Brief of Defendant-Appellee, Miss. Div. of Sons of Confederate Veterans v. Univ. of Miss., 269 So. 3d 1235 (Miss. Ct. App. 2018) (No. 2017-ca-00546); Brief of Appellant at *2, Miss. Div. Sons of Confederate Veterans v. Univ. of Miss., 2017 WL 9285477 (Miss. 2017) (No. 2017-ca-00546).

specifically refer to Confederate monuments.[166] Thus, the record clearly shows the function of state Statue Statutes has been to protect Confederate monuments.

B. Alabama's Statue Statute

A more particular look at Alabama's Statue Statutes provides detail about how these statutes function. Alabama has a suite of laws to protect its monuments, spanning from sections 41-9-230 through 41-9-9-237.[167] The above cited case of *State v. City of Birmingham* expressly relied on sections 41-9-232, 41-9-234, and 41-9-235 in its reasoning.[168] Interestingly, the statute was implicated in another 2019 case unconnected to Confederate monuments, where the Alabama Attorney General asserted authority to enforce Alabama's Minimum Wage Act against Birmingham based on its successful suit in *State v. City of Birmingham*.[169] However, the court found that unlike the Minimum Wage Act, which was a field preemption law, the Memorial Preservation Act regulated primary conduct.[170] This admission clearly shows that the intent of Alabama's Memorial Preservation Act was to remove any discretion from municipalities for removal of their monuments and exert direct authority over them at state level, and further, that the statute has been used selectively to protect Confederate Monuments but to except other applications.

Examination of the two administrative decisions citing the Memorial Preservation Act is also instructive. Attorney General Opinion No. 2018-009 uncontroversially determined that voted on alterations of remains of a Confederate monument were valid when the vote took place before the statute's enactment,[171] but close attention to Opinion No. 2018-008 provides evidence of gamesmanship and the statute's true intent–to protect commemoration of promoters of white supremacy.[172] The Alabama Corrections Department Commissioner requested the Attorney General's opinion on renaming two facilities, both of which had held their name for over

166. *See* Complaint at ¶ 11, Nix v. United States, No. 2:11-cv-12-WCO (N.D.Ga. Jan. 21, 2011); Brief in Support of Defendants at 3, Newdow v. United States, 2006 WL 3890023 (9th Cir. Nov. 21, 2006).

167. *See* ALA. CODE §§ 41-9-230–41-9-237 (2021).

168. *See* State v. City of Birmingham, 299 So. 3d 220, 224–25 (Ala. 2019).

169. *See* Lewis v. Governor of Alabama, 944 F.3d 1287, 1307 (11th Cir. 2019) (Pryor, J., concurring).

170. *See id.*

171. *See* Ala. Op. Att'y Gen. No. 2018-009, at *1 (Ala. A.G. Nov. 21, 2017).

172. *See* Ala. Op. Att'y Gen. No. 2018-008 at *2 (Ala. A.G. Nov. 21, 2017).

forty years and so fell under the statute's reach.[173] The Attorney General arrived at different answers to the questions, finding that the Commissioner could rename the first facility, Decatur Community Based Facility and Community Work Center, because "the Decatur Community Based Facility and Community Work Center is named after the City of Decatur, and not in honor of Stephen Decatur for whom the city was named."[174] However, the Commissioner could not rename the Frank Lee Youth Center, even though the new name would still include Frank Lee's name, because "the prohibition on a building being 'renamed' is not qualified."[175] The Legislature could have stated "renamed *except for that part of the name not including the honored person's name*."[176] Why the dismissive attitude toward renaming the Decatur Facility and the contrasting overprotection of the name of the Frank Lee facility? Identifying the namesakes of the facilities provides a clue. Stephen Decatur, Jr., for whom the city and first facility were named, was a United States naval officer who served in the American Revolution.[177] A. Frank Lee, on the other hand, was an Alabama Corrections Department Commissioner in the 1960's who upheld racial segregation in Alabama's prison system.[178]

Alabama's use of its Memorial Preservation Act shows that its function is to primarily and selectively protect Confederate monuments. Further, as *Lewis v. Governor of Alabama* demonstrates, the Memorial Preservation Act is enforced differently and more expansively than other laws, since it is specifically targeted to preempt municipal decision-making regarding monuments on their property.[179]

Summing up the history and function of state Statue Statutes, the record shows that they protect and maintain monuments that impose message of white supremacy on municipalities. This goal is at odds with Fourteenth Amendment because it denies minorities equal protection of the laws.[180] State Statutes make removal of Confederate Monuments more difficult by altering the structure of local

173. *See id*. at *1.
174. *Id.* at *1.
175. *Id.* at *2.
176. *Id.*
177. *See Stephen Decatur*, WIKIPEDIA (Dec. 24, 2020), https://en.wikipedia.org/wiki/Stephen_Decatur#Legacy.
178. *See* Lee v. Washington, 390 U.S. 333, 333–34 (1968); *Frank Lee*, ALA. DEP'T OF CORR., http://www.doc.state.al.us/facility?loc=1 (last visited Feb. 19, 2022).
179. *See* Lewis v. Governor of Ala., 944 F.3d 1287, 1312 n.4 (11th Cir. 2019).
180. *See generally* U.S. CONST. amend. XIV, § 1.

government, similar to state enactments in *Gomillion*, *Erickson*, *Washington*, and *Romer*.[181] As in these cases, Courts should find Statue Statutes are unconstitutional also because they make equal protection claims more difficult to resolve by removing control to a different level of government.

CONCLUSION

To conclude, even when municipalities have limited or no rights granted under their state constitutions, they still have valid constitutional claims to remove Confederate monuments on their publicly owned property. This result is allowed by Supreme Court cases like *Hunte*r and *Trenton* where municipalities had limited or no rights against their state under their state constitution, because these cases explicitly allow for proprietary exceptions. Further, Government Speech doctrine developed in *Summum* and *Walker* identifies municipalities, not states, as government speakers in regard to municipal public parks. Because municipal expression of municipal identity through monuments is both a proprietary function and government speech, under *Ysursa* municipalities may decline to promote the message of Confederate Monuments by refusing to maintain them on their property, and states may not compel them to do so.

Further, municipalities have a valid equal protection claim against state Statue Statutes since Confederate monuments promote white supremacy and Statue Statutes make it difficult, if not impossible, for municipalities to legally address their continued promotion. *Williams* shows that municipalities may have claims against their state that may be heard in federal court when the state enacts arbitrary legislation to remove an area typically under municipal control in violation of state constitutional provisions. This result was developed on the federal level in political process doctrine in *Gomillion*, *Erickson*, *Washington*, and *Romer* to hold that it is unconstitutional for states to make equal protection more difficult by altering the structure of local government. Because Statue Statutes specifically make it more difficult for a municipality to bring equal protection claims by changing the level of government at which these claims may be resolved, they should be found unconstitutional as well.

181. *See* Gomillion v. Lightfoot, 364 U.S. 339, 340, 347 (1960); Hunter v. Erikson, 393 U.S. 385, 386, 389–90 (1969); *Washington*, 458 U.S. at 462–63, 483; Romer v. Evans, 517 U.S. 620, 623–24 (1996).

Thus, even where municipalities have limited or no state constitutional rights and hence no rights under the federal constitution and are further hampered by state Statue Statutes banning monument removal, both government speech and political process doctrine arguably offer municipalities a modicum of power sufficient to allow them to constitutionally remove Confederate Monuments from their public property.