

VIRGINIA LAW REVIEW ONLINE

VOLUME 104

JANUARY 2018

45–57

ESSAY

PAYNE V. CITY OF CHARLOTTESVILLE AND THE DILLON'S RULE RATIONALE FOR REMOVAL

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I. INTRODUCTION

ON December 19, 2016, the City of Charlottesville's Blue Ribbon Commission on Race, Memorials, and Public Spaces released a 328-page report to the City Council which, among other things, recommended either the removal or “transform[ation]-in-place” of the city's monument of Robert E. Lee in what is now known as Emancipation Park.¹ On February 6, 2017, the Charlottesville City Council voted, three to two, to relocate the Lee Monument.² Two weeks later, a group of citizens and pro-Confederate activists filed a lawsuit against the city, *Payne v. City of Charlottesville*, requesting an injunction and alleging that the removal violated Va. Code § 15.2-1812, which regulates localities' abilities to create and remove war memorials.³ The injunction was granted and as litigation pended, white

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¹ City of Charlottesville Blue Ribbon Comm'n on Race, Memorials, and Pub. Spaces, Report to City Council 8–10 (Dec. 19, 2016), <https://perma.cc/C2F5-DWCX>.

² Chris Suarez, Charlottesville City Council Votes to Remove Statue from Lee Park, Daily Progress (Feb. 6, 2017), <https://perma.cc/W9PY-CCB2>.

³ Complaint at 9–11, 16, *Payne v. City of Charlottesville*, No. 17-145 (Va. Cir. Ct. Feb. 2017).

nationalists, led in part by University of Virginia alumni Richard Spencer and Jason Kessler, organized a massive rally to protest the monument's removal.⁴ The rally ended in the murder of Heather Heyer, the deaths of two police officers in a helicopter crash, and countless injuries.⁵ On October 3, the Charlottesville state circuit court overruled the city's demurrer and held that Va. Code § 15.2-1812 prevented the city from removing the Lee Monument, allowing the case to go to trial and the monument to remain standing.⁶ The ultimate outcome of *Payne v. City of Charlottesville* will have a significant impact across the state, home to 96 of the country's 700-plus Confederate monuments.⁷

Many legal issues have been raised in the weekend's aftermath, from the First Amendment protection of hate speech⁸ to the constitutionality of the monuments under the Fourteenth Amendment⁹ to state prohibitions on "unlawful paramilitary activity."¹⁰ The heart of the issue—the reason why the Lee Statute still stands today—is the legal relationship between the Commonwealth of Virginia and its localities.

Virginia is a Dillon's Rule state, meaning local governments may only exercise those powers expressly granted to them. This includes the authority to construct war memorials, which was first granted to all Virginia counties in 1904 and then all localities (adding cities and towns) in 1997 through various versions of Va. Code § 15.2-1812. Prior to the statute, localities were required to request a specific grant of authority—an Act of Assembly or Joint Resolution from the Virginia legislature—to construct such memorials. Without some form of authorization,¹¹ it was illegal for the locality to construct these

⁴ *Payne v. City of Charlottesville*, No. CL 17-145, 16 (Va. Cir. Ct. Oct. 3, 2017) (ruling on demurrer); Vincent Law, *The 'Unite the Right' Rally Is Going To Be A Turning Point For White Identity In America*, AltRight.Com (Aug. 5, 2017), <https://perma.cc/CN8G-MVQL>.

⁵ Benjamin Hart & Chas Danner, *Three Dead and Dozens Injured After Violent White-Nationalist Rally in Virginia*, N.Y. Mag. (Aug. 13, 2017), <https://perma.cc/6EFS-M7F8>.

⁶ *Payne*, No. CL 17-145 at 16.

⁷ S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy 10–11* (April 21, 2016), <https://perma.cc/43SU-TGLF>.

⁸ Leslie Kendrick, *How to Defend the Constitution When the KKK Comes to Town*, CNN: Opinion (July 12, 2017), <https://perma.cc/E9H8-VCW7>.

⁹ See Micah Schwartzman & Nelson Tebbe, *Charlottesville's Monuments Are Unconstitutional*, Slate (Aug. 25, 2017), <https://perma.cc/7HZC-W5HR>.

¹⁰ Laura Jarrett, *Charlottesville Suing to Stop Private Militias at Future Rallies*, CNN (Oct. 12, 2017), <https://perma.cc/YH2E-9JCY>.

¹¹ Other grants of authority could have been read to include the construction of war memorials in public spaces. In 1908, that the General Assembly granted cities and towns the

monuments in a Dillon's Rule state. Any restrictions applicable to the localities' subsequent treatment of such monuments are governed exclusively by the state authority under which they were built,¹² unless those localities impose further restrictions on themselves, as Virginia statutes generally do not apply retrospectively.¹³ Accordingly, monuments built in cities prior to 1997, such as Charlottesville's 1924 Lee Monument,¹⁴ are either unauthorized (*ultra vires*) or authorized by a specific Act of Assembly. The only restrictions on removal that are applicable to these pre-1997 monuments are those found within the original grant of authority, those imposed by localities on themselves, or the deeds associated with it—not Va. Code § 15.2-1812.

Only three authorities have directly weighed in on the question of whether Va. Code § 15.2-1812 applies to memorials created in cities prior to 1997: the state circuit court for the City of Danville,¹⁵ the current Attorney General Mark Herring,¹⁶ and the state circuit court for the City of Charlottesville,¹⁷ respectively. They have reached varying conclusions, none of which are binding on other circuit courts across the state. When properly considering what the statute purports to authorize counties (and later cities) to do, it is clear that the statute cannot be read to apply to war memorials built in cities such as Charlottesville before

authority to “establish and maintain parks, playgrounds and boulevards.” 1908 Va. Acts ch. 349. Whether this would or would not have empowered cities and towns to create war memorials, given the state's adoption of Dillon's Rule, is beyond the scope of this analysis. However, Professor Richard Schragger's analysis of the ability to create and beautify parks as applied to the Charlottesville statute suggests that such a power included the ability to create war memorials within those parks. Richard Schragger, *Opinion, Is Charlottesville's Robert E. Lee Statue Illegal?*, *Richmond Times-Dispatch* (Aug. 30, 2017), <https://perma.cc/LXY7-268M>.

¹²The controversies on August 11th and 12th demonstrate the benefits of local control. The city democratically decided to remove the statue, and the potential of the state law to prevent its removal has created a window of uncertainty filled by violence and pain. Still, Dillon's Rule is the law in Virginia. See *infra* Part II. This Essay proceeds within that framework and argues that, even within it, removal is still a viable option for many statues.

¹³See brief discussion *infra* Part III and notes 62–63 and accompanying text.

¹⁴City of Charlottesville, *History and Gardens of Emancipation Park*, <https://perma.cc/7WPP-6Z97>.

¹⁵*Heritage Preservation Ass'n v. City of Danville*, No. CL15000500-00, slip. op. at 2 (Va. Cir. Ct. Nov. 7, 2015).

¹⁶Letter from Mark R. Herring, Att'y Gen. of Va., to Julie Langan, Dir., Va. Dep't of Historic Res., concerning § 2.2-505 (Aug. 25, 2017), <https://perma.cc/M24G-CUZ8> [hereinafter “Herring Letter”].

¹⁷*Payne v. City of Charlottesville*, No. CL 17-145, at 7 (Va. Cir. Ct. Oct. 3, 2017) (ruling on demurrer).

1997, as evidenced by the statute's history, the text of the statute, and relevant Virginian common law on Dillon's Rule and retroactivity.¹⁸ At trial, the court should correct its previous reasoning, find Va. Code § 15.2-1812 to be inapplicable, and solely consider the legality of the removal based on other possible restrictions (if any) in balance with the city's affirmative defenses.

II. THE 1904 STATUTE OPERATES AS A SPECIFIC, PROSPECTIVE GRANT OF AUTHORITY

The ability of Virginian cities to create and remove memorials has changed over time and is limited, first and foremost, by Virginia's adoption of Dillon's Rule,¹⁹ an interpretive methodology for municipal authority which "limits the power of local governments to those expressly granted by the state or those necessarily implied or essential to express powers."²⁰ Thus, "[w]hen a local ordinance exceeds the scope of this authority, the ordinance is invalid."²¹ Should it be reasonably unclear whether a locality, such as a city or county, has a power or not, "the doubt must be resolved against the local governing body."²² In other words, if a city wants to create a memorial of any kind, it must first find the authority to do so in an existing state law or ask the state legislature for permission. Any ordinances enacted by a locality beyond the scope of its powers are invalid and any locality actions above and beyond what state law authorizes are illegal.²³

Prior to any broader statutory authority regarding monuments, the state regularly granted such permission to localities through Acts of

¹⁸ See discussion *infra* Part III.

¹⁹ The namesake of Dillon's Rule is Judge Forest Dillon, who authored an important treatise on the law of municipalities and articulated the rule as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable." *Dillon's Rule: The Case for Reform*, 68 Va. L. Rev. 693, 693–94 (1982) (emphasis omitted) (citing 1 John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th ed. 1911)).

²⁰ *TransDulles Ctr. v. USX Corp.*, 976 F.2d 219, 224 (4th Cir. 1992).

²¹ *City of Chesapeake v. Gardner Enter.*, 482 S.E.2d 812, 814 (Va. 1997).

²² *Bd. of Supervisors v. Reed's Landing Corp.*, 463 S.E.2d 668, 670 (Va. 1995).

²³ For a more thorough discussion of municipal and state powers, see generally Richard C. Schragger, *When White Supremacists Invade A City*, 104 Va. L. Rev. Online 58 (2018).

Assembly, which often included varying restrictions on removal or modification. For example, in 1901 and 1902, the General Assembly passed such acts for seven counties.²⁴ In 1903, it passed seven more.²⁵ Attorney General Mark Herring, in his own analysis, noted that “[s]ome of these Acts contain restrictions on the disturbance of the monument, others are silent, and . . . one Act contains such a restriction and a related Act does not.”²⁶

In February 1904, seemingly in lieu of passing many additional individual acts of assembly, the General Assembly passed an act (the “Act”) to empower the circuit court of a county, with the support of the county’s board of supervisors, to authorize “the erection of a Confederate monument upon the public square of such county at the county seat thereof.”²⁷ More restrictive than some of the individualized grants of authority, the General Assembly provided that “thereafter,” counties “or any other person or persons whatever” could not “disturb or interfere” with such monuments nor “prevent the citizens of [the] county from taking all proper measures and exercising all proper means for the protection, preservation, and care of the same.”²⁸ Importantly, the grant of authority is limited *exclusively* to counties.²⁹ It is unclear why the state did not, at the same time, grant this power also to cities and towns. Overall, however, it is clear that the 1904 Act operated as a very specific kind of authority and did not mean to be comprehensive nor to apply to all war memorials built by counties.³⁰ It began merely as a grant of authority to *only* counties to build *only* Confederate monuments *only* in

²⁴ See 1901 Va. Acts ch. 38 (Appomattox); 1902 Va. Acts ch. 176 (Essex); *id.* at ch. 177 (Isle of Wight); *id.* at ch. 183 (Smyth); *id.* at ch. 332 (Louisa); *id.* at ch. 386 (Chesterfield); *id.* at ch. 427 (Madison).

²⁵ See 1903 Va. Acts ch. 58 (King William); *id.* at ch. 83 (Amelia); *id.* at ch. 116 (Bedford); *id.* at ch. 117 (Campbell); *id.* at ch. 130 (Botetourt); *id.* at ch. 307 (Greensville); *id.* at ch. 465 (Mecklenburg). These acts fall within what the Southern Poverty Law Center identified as the first peak in Confederate memorialization, from 1900 to 1914. S. Poverty L. Ctr., *supra* note 7, at 14–15.

²⁶ Herring Letter, *supra* note 16, at 5.

²⁷ 1904 Va. Acts ch. 29.

²⁸ *Id.*

²⁹ *Id.*

³⁰ It is not clear exactly why the statute was passed in 1904, nor why its grant of authority was so limited. For greater discussion about the state’s intentions, see generally Schragger, *supra* note 23.

public squares.³¹ Any other monument in any other place would need separate authorization outside of the statute.

In 1988, the General Assembly passed a law which sought to “amend and reenact” Va. Code § 15.1-270, a recodification of the Act. The 1988 legislation made two significant changes, though the prospective nature and limited scope of the Act stayed constant.³² First, the statute granted counties the authority to construct memorials for the Revolutionary War, the War of 1812, and the Mexican War.³³ This made clear that counties wishing to build memorials to unlisted wars would still need to seek authorization from the state legislature. Second, the General Assembly changed the clause from its prior reading of “if such shall be erected it shall not be lawful thereafter”³⁴ to disturb or interfere with the memorials, to “[i]f such are erected, it shall be unlawful”³⁵ to disturb or interfere with them. The change simplified the statute’s language but did *not* remove the conditional, proscriptive phrasing. Thus, even taking into account the removal of the word “thereafter,” the effect of the statute remained the same: if a county chooses to erect a memorial under the authority of *this* statute, it cannot disturb or interfere with the memorial. Such a construction facially has no application to monuments erected previously under a different grant of authority.

In 1997, the General Assembly again changed the statute in several impactful ways. Most importantly for our purposes, the general grant of authority now applied to any “locality,” not just counties.³⁶ Next, the General Assembly expanded the list of conflicts for which a memorial could be created and moved this list to a different section of the statute.³⁷ Finally, the statute broadened the authority of both counties and cities by allowing localities to place memorials on any of their property, not just within their public squares.³⁸

The most recent amendments to the statute were passed in 1998, which broadened the statute’s scope but kept its proscriptive format.

³¹ 1904 Va. Acts ch. 29.

³² 1988 Va. Acts ch. 284; Herring Letter, *supra* note 16, at 2.

³³ 1988 Va. Acts ch. 284; *contra* 1904 Va. Acts ch. 29. Prior amendments and recodifications had previously added World War I, World War II, and other wars.

³⁴ 1988 Va. Acts ch. 284.

³⁵ *Id.*

³⁶ 1997 Va. Acts ch. 587 at 1114.

³⁷ *Id.*

³⁸ *Id.*

That statute, codified at Va. Code. § 15.2-1812, now authorizes localities to erect “monuments or memorials for any war or conflict, or . . . any engagement of such war or conflict,” though it still includes a list of well-known conflicts as examples.³⁹ Additionally, the statute enables a locality to erect such monuments anywhere within its “geographical limits” and not just upon its own property.⁴⁰ The amendments also added a definition of “disturb or interfere,” which notably includes “removal” and “placement of Union markings or monuments on previously designated Confederate memorials” and vice versa, though it does not explicitly include relocation.⁴¹ Most importantly, while the General Assembly yet again broadened the statute, it kept the same conditional, prospective phrasing.⁴² The common sense reading of the statute remained, and still remains to this day, that the limitations on removal imposed by the statute apply exclusively to those memorials erected under the statute’s authority—not to those erected prior to the passage of the statute. Thus, memorials erected by *cities* prior to the 1997 (or 1998) amendments simply do not fall within the scope of the statute and are not prevented by the Act or its progeny from being removed or relocated.

III. THIS PROSPECTIVE GRANT OF AUTHORITY CANNOT BE READ TO APPLY RETROACTIVELY

The above reading of Va. Code. § 15.2-1812 makes it impossible to apply the removal restrictions to monuments built under other grants of authority.⁴³ If a monument was built under no grant of authority, the above statute, and the prior authorities, certainly do not retroactively authorize the illegally built statue and then restrict its removal. By the same token, the statute’s removal restrictions cannot be read to apply retroactively to monuments built under totally different authorities

³⁹ Va. Code Ann. § 15.2-1812 (2017).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (“*If such 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.*” (emphasis added)).

⁴³ As discussed above, prior legislative acts also could not be read as a source for this authority. See *supra* notes 19–42 and accompanying text.

because Virginia's common law on retroactivity doctrine and the statute's legislative history prevent such a reading.

Since 1904, the rule in Virginia has been that the state's statutes "are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question."⁴⁴ The principle behind such a rule is to minimize the interference between new laws with old rules or contractual agreements. As recently as 2015, the Supreme Court of Virginia affirmed that the state "does not favor retroactive application of statutes" unless there is an "express manifestation of intent by the legislature."⁴⁵ Additionally, "[i]t is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention."⁴⁶ Moreover, courts are particularly cautious in finding a statute to have a retroactive effect on government actors:

Especially do courts shrink from holding an act retrospective when it affects public objects and duties, and, when it affects rights accrued and acts done by law for the public interest and necessities, it must be presumed that the law makers of the new act did not intend it to be retrospective, unless that intent be expressed in the language, or plainly appear upon the face of the act itself.⁴⁷

Given the weight of the restriction imposed by Va. Code. § 15.2-1812 on localities, the conditional and prospective phrasing of the statute's removal clause, and the public nature of the statutes at issue, the language of the statute and the legislative intent are not manifest enough for any court to hold that the statute applies retroactively. Even if a court should find that the language of the statute is ambiguous or debatable, the court's subsequent course of action is clear: without the language or intent being "manifest beyond reasonable question,"⁴⁸ the court must find that the statute does not apply retroactively.

This limiting interpretation of the statute is further evidenced by the attempt of the Virginia General Assembly to enact a bill which explicitly extended the protections of the statute retroactively to war memorials built under other grants of authority. A proposed amendment sought to eliminate the key conditional, prospective phrase ("[i]f such are

⁴⁴ *Arey v. Lindsey*, 48 S.E. 889, 890 (Va. 1904).

⁴⁵ *Bailey v. Spangler*, 771 S.E.2d 684, 686–87 (Va. 2015).

⁴⁶ *Ferguson v. Ferguson*, 192 S.E. 774, 777 (Va. 1937).

⁴⁷ *City of Richmond v. Supervisors of Henrico Cty.*, 2 S.E. 26, 30 (Va. 1887)

⁴⁸ *Arey*, 48 S.E. at 890.

erected”) and added: “The provisions of this subsection shall apply to all such monuments and memorials, regardless of when erected.”⁴⁹ While in all other renditions of the statute⁵⁰ the restrictions on removal are tied to the grant of authority, this draft detached them from each other, giving the restrictive clause independent operation. Such a sentence would effectively separate the removal restrictions from the general grant of authority.

The amendment was proposed during the 2016 session, after the October 2015 decision in Danville and the July 2015 removal of the Confederate Flag from state grounds in South Carolina, a response to the tragic murder of nine black Americans by white supremacist Dylann Roof.⁵¹ It was ultimately vetoed by Virginia Governor Terry McAuliffe. The Governor defended his veto as follows:

There is legitimate discussion going on in localities across the Commonwealth regarding whether to retain, remove, or alter certain symbols of the Confederacy. These discussions are often difficult and complicated. They are unique to each community’s specific history and the specific monument or memorial being discussed. This bill effectively ends these important conversations.

* * *

I am committed to supporting a constructive dialogue regarding the preservation of war memorials and monuments, but I do not support this override of local authority.⁵²

The Governor’s justifications summarize important policy arguments for not erroneously construing the current statute to apply retroactively to grants of authority independent of the statute. Note also that the City of Charlottesville Blue Ribbon Commission on Race, Memorials, and Public Spaces relied on this specific legislative history when recommending that the City Council remove or transform the city’s Lee Monument.⁵³

⁴⁹ H.B. 587, 2016 Gen. Assemb., 2016 Sess. (Va. 2016) (proposed amendment).

⁵⁰ See *supra* notes 19–42 and accompanying text.

⁵¹ Stephanie McCrummen & Elahe Izadi, Confederate Flag Comes Down on South Carolina’s Statehouse Grounds, *Wash. Post* (July 10, 2015), <https://perma.cc/FZ44-4MLF>; S. Poverty L. Ctr., *supra* note 7, at 10–11.

⁵² Governor’s Veto of H.B. 587, 2016 Gen. Assemb., 2016 Sess. (Va. 2016).

⁵³ City of Charlottesville Blue Ribbon Comm’n, *supra* note 1, at 22.

In another case,⁵⁴ the Danville circuit court properly adhered to state precedent and the legislative history when it held that Va. Code § 15.2-1812 was inapplicable to a monument, which commemorated the Sutherlin Mansion as “the Last Capitol of the Confederacy,” for two reasons: first, because the statute did not apply retroactively, and, second, because the memorial at issue was not a war memorial. In its brief, three-page opinion, the court succinctly concluded that, “[a]s a matter of law, Virginia Code § 15.2-1812 does not apply retroactively to the monument at issue in this litigation, which was donated to the City of Danville in 1994 and erected . . . in 1995.”⁵⁵ The court’s focus in this holding was clearly on the years that the monument was received and formerly established. Given that both of these actions occurred prior to the statute’s inclusion of all localities—not just counties—in 1997, the statute was not applicable.

In contrast, when the Charlottesville Circuit Court overruled the city’s demurrer in *Payne v. City of Charlottesville*, it misunderstood the operation of the statute and did not adhere to the principle established in *Arey* that statutes generally only operate prospectively. Instead the court decided that the statute applied retroactively, based on the “content and wording of the statute itself,” as well as “[l]ogic and common sense.”⁵⁶ The court found that the 1997 amendment of the statute was “expanding protections as well as the power and authority originally applicable to the counties,” but did not recognize that those protections were only operative to actions taken from that same grant of authority.⁵⁷

This reasoning runs counter to *Arey*, which establishes that the court cannot read in what it interprets to be the “common sense” reading of the statute when the question is whether or not the statute applies retroactively. Instead, the court’s outcome must be dictated by “the face of the instrument or enactment” that is “manifest beyond reasonable question.”⁵⁸ The court’s insistence that its interpretation is common sense simply does not change the face of the statute nor its contradictory

⁵⁴ *Heritage Preservation Ass’n v. City of Danville*, No. CL15000500-00 (Va. Cir. Ct. Nov. 7, 2015).

⁵⁵ *Id.* at 2.

⁵⁶ *Payne v. City of Charlottesville*, No. CL 17-145, at 4 (Va. Cir. Ct. Oct. 3, 2017).

⁵⁷ *Id.*

⁵⁸ *Arey v. Lindsey*, 48 S.E. 889, 890 (Va. 1904); see also *Gloucester Realty Corp. v. Guthrie*, 30 S.E.2d 686, 688 (Va. 1944) (noting that statutes are presumed to be prospective unless “plainly so intended”).

legislative history, which must govern under *Arey*. In other words, the lack of legislative history supporting the court's interpretation and the plain language of the statute dictate that the court only applies it to monuments which were built under its authority, which could not have included the 1924 Lee Monument in Charlottesville, which is a city.

The Charlottesville Circuit Court placed substantial reliance on the outcome of *Sussex Community Services Association v. Virginia Society for Mentally Retarded Children, Inc.*, which said, in dictum, that “we have never imposed a requirement that any specific word or phrase be used in order to support a finding of clear legislative intent or retroactive application.”⁵⁹ The key difference between the statute at issue in *Sussex* and the one at issue here is the word “any” and the lack of a conditional, prospective clause. The statute in *Sussex* read: “A family care home, foster home, or group home . . . shall be considered for all purposes residential occupancy by a single family when construing *any* restrictive covenant which purports to restrict occupancy or ownership of real or leasehold property to members of a single family.”⁶⁰ If that statute were to apply prospectively—and thus mimic the structure of Va. Code § 15.2-1812—the *Sussex* statute would read: “If a restrictive covenant is formed which purports to restrict occupancy or ownership of real or leasehold property to members of a single family, then a family care home, foster home, or group home shall be considered for all purposes residential occupancy by a single family.” Put another way, if Va. Code § 15.2-1812 were written similarly to the statute at issue in *Sussex*, it would read like the version vetoed by Governor McAuliffe in 2016.⁶¹ The legislature chose a different construction, and the court should not read intent into the statute, no matter how “inescapable,” “impossible,” or nonsensical that may seem to a particular court.⁶²

Finally, in *Payne* the Charlottesville Circuit Court made a great deal out of a general state policy to protect war memorials even when they may fall out of favor within a locality,⁶³ but this general policy was clearly defeated when a retroactive version of the statute was vetoed by Governor McAuliffe in 2016. This is further demonstrated by the

⁵⁹ 467 S.E.2d 468, 470 (Va. 1996).

⁶⁰ *Id.* at 469 (emphasis added).

⁶¹ See *supra* notes 52–60 and accompanying text.

⁶² *Payne*, No. CL 17-145 at 4–6.

⁶³ *Id.* at 4–5 n.2.

statute's evolution, which consistently limited itself only to those conflicts that it saw as important.

Further, when the Act was originally passed, it only applied to *Confederate* memorials.⁶⁴ As noted previously, the amended 1988 statute was expanded to include the Revolutionary War, the War of 1812, and the Mexican War (in addition to the previously included World Wars I and II, the Korean War, and the Vietnam War).⁶⁵ Such an ad hoc addition of conflicts, which specifically favored some conflicts over others, does not reflect a policy of protecting all war memorials, especially those that may fall out of favor in a particular locality.

IV. OTHER RESTRICTIONS ON REMOVAL

Even if a statue was not constructed under the authority of Va. Code § 15.2-1812, other restraints on removal may exist, including locality-specific constraints and monument-specific constraints. Localities have restricted their own abilities to remove or relocate such memorials through, for example, local ordinances, charters, or other planning documents. For example, the City Attorney Allen Jackson reportedly advised Richmond's City Council that the four Confederate statues on Monument Avenue could not be removed due to a provision of Richmond's City Charter and its master plan.⁶⁶

Monument-specific constraints include those found in transfer instruments and grant programs. As summarized by Attorney General Herring, "a monument may have been donated to the locality subject to reversionary terms or conditions in the transfer instrument triggered by the locality's attempt to remove or disturb the monument," or "a locality might have received funding for the acquisition, maintenance, preservation or enhancement of the monument through a grant program

⁶⁴ 1904 Va. Acts ch. 29.

⁶⁵ 1988 Va. Acts ch. 284.

⁶⁶ Jeremy Lazarus, City Attorney: City Council Has No Authority to Remove Confederate Statues, *Richmond Free Press* (Oct. 6, 2017), <https://perma.cc/9JA7-XQ7C>. A closer look at the actual text of the city charter calls this conclusion into question, though. See *Richmond City Charter*, § 17.05 (2006) ("It shall be the further duty and function of the Commission to preserve historical landmarks and to control the design and location of statuary and other works of art which are or may become the property of the City, and the *removal*, relocation and alteration of any such work; and to consider and suggest the design of harbors, bridges, viaducts, airports, stadia, arenas, swimming pools, street fixtures and other public structures and appurtenances." (emphasis added)).

that places restrictions on any alteration of the monument.”⁶⁷ However, it is critical to realize that any constraints placed on the city through transfer instruments or grant programs are obligations only to the original parties in the transaction, creating an entirely different procedural dynamic and significantly limiting the population with standing to challenge the city’s actions.

V. CONCLUSION

In the Commonwealth of Virginia, under Dillon’s Rule, the most appropriate reading of the statute is as a prospective and historically limited grant of authority which comes with embedded restrictions. Every statue erected by a locality in the Commonwealth needs authorization,⁶⁸ and many localities derived authority to build war memorials from the 1904 statute. However, this was simply not the case in cities, since the statute narrowly applied only to Confederate monuments in county public squares for eighty-four years. Indeed, the statute did not apply to cities at all for nearly a century. From its inception and throughout its amendments, the statute’s scope remained limited and its conditional, prospective phrasing remained constant. The statute’s limited scope and phrasing dictate a reading that does not have any bearing on the removal of statues built under other grants of authority. In order to apply these restrictions retroactively to illegally-built statues or to statues built under other grants of authority, the state legislature would need to make it manifestly clear on the face of the statute that it is meant to apply retroactively. Thus, as a Dillon’s Rule state a careful reading of Va. Code § 15.2-1812 and its history yields the appropriate result: Va. Code § 15.2-1812 has no bearing on war memorials built in cities prior to 1997 and does not prevent their removal.

⁶⁷ Herring Letter, *supra* note 16, at 5.

⁶⁸ See *supra* notes 19–22 and accompanying text.