Landscape Fairness: Removing Discrimination from the Built Environment

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LANDSCAPE FAIRNESS: REMOVING DISCRIMINATION FROM THE BUILT ENVIRONMENT

Stephen Clowney*

Abstract

At its core, this Article argues that the everyday landscape is one of the most overlooked instruments of modern race-making. Drawing on evidence from geography and sociology, the Article begins by demonstrating that the built environment inscribes selective and misleading versions of the past in solid, material forms. These narratives—told through street renamings, parks, monuments, and buildings—ultimately marginalize African American communities and transmit ideas about racial power across generations.

After demonstrating that the landscape remains the agar upon which racial hierarchies replicate themselves, this Article then pivots and examines current efforts to rid the built environment of discriminatory spaces. It argues that contemporary attacks on the landscape are doomed to fail. The approaches suggested by academics in law and geography either turn a blind eye to the political economy of local decisionmaking or fail to consider entrenched legal precedent.

The final section of the Article lays out a policy proposal that could spark a new focus on issues of “landscape fairness.” It argues in favor of a set of basic procedural requirements that would force jurisdictions to reconsider the discriminatory places within their borders. Procedural mandates would force government to internalize values it might otherwise ignore, allow citizen-critics to challenge dominant historical narratives, and push communities to view the past (and future) in much more diverse terms.

INTRODUCTION

During the last fifty years, African Americans have made appreciable gains in the struggle for political standing and economic status. Legislative enactments and judicial pronouncements that once enshrined the edifice of white privilege

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have been readily dismantled by activists and elected officials. Yet, despite many successes, the promise of full equality for African Americans remains elusive. Commentators express alarm that myths about race, forged during the era of chattel slavery, continue to distort how individuals view the world and construct their identities. In particular, observers worry that negative meanings associated with “blackness” twist African American life into something “qualitatively different from [that] enjoyed by Whites.” A host of recent empirical studies confirm the view that race remains a socially significant category of perception; black hospital patients receive less aggressive treatment than whites, banks award white loan recipients nearly twice as much investment capital as similarly situated blacks, governments site toxic facilities in minority communities at alarming rates, and African Americans receive longer and harsher prison sentences than their white counterparts. The question we must ask is: Why? What accounts for


3 See, e.g., Johnson, supra note 1, at 381–82.


5 See Charles S. Cleeland et al., Pain and Its Treatment in Outpatients with Metastatic Cancer, 330 NEW ENG. J. MEDICINE 592, 595 (1994) (showing that African American patients are more likely to receive inadequate cancer treatment than white patients); AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP’T HEALTH & HUMAN SERVS., AHRQ PUB. NO. 09-0002, NATIONAL HEALTHCARE DISPARITIES REPORT 176–87 (2008), available at http://www.ahrq.gov/qual/nhdr08/nhdr08.pdf (revealing that African Americans, as compared to their white counterparts, are more likely to receive potentially inappropriate prescription medication and experience poor provider-patient communication).


8 See David B. Mustard, Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts, 44 J.L. & ECON. 285, 285, 312 (2001) (finding, in a study of 77,236 federal offenders that controlled for numerous variables, that African Americans received considerably longer prison sentences than whites and were more likely to be sentenced to prison rather than probation).
the staunch resolve of the color line, even as the law itself has become more and more “colorblind”?

This Article contends that the law has largely ignored one of the most significant instruments of modern race-making: the everyday landscape. The landscape, put simply, “is not innocent.” It inscribes selective and misleading versions of the past in solid, material forms. These narratives ultimately marginalize certain communities—particularly African American communities—and transmit ideas about racial power across generations. This Article’s aim is not only to decry this duplicity, but also to focus attention on promising regulatory mechanisms for addressing landscape’s power to reinforce racial hierarchies. Specifically, legal insights on the value of procedural fairness have the potential to redress the absences, inclusions, and marginalizations currently buried in the landscape.

At first glance, attacking the hydra of modern racism with ideas about the built environment may seem like a rather mild and ineffectual approach. Skeptics will surely ask what a landscape-based approach can hope to accomplish where powerful antidiscrimination laws have already failed. This Article posits that several decades of careful scholarship in the social sciences demonstrate that the landscape operates much like a tectonic fault; although its presence is seldom scrutinized, its impact remains powerful.

Geographers in particular have worked tirelessly to expose the landscape’s meaning and muscle. At the most basic level, they define landscape as a tangible

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[9] This Article is not the first to ask this question. For decades, critical race theorists have argued that “[c]olorblind in law is not colorblind in fact.” Stephen Reinhardt, Remarks at UCLA Law School Forum on Affirmative Action: “Where Have You Gone, Jackie Robinson?,” 43 UCLA L. Rev. 1731, 1733 (1996). See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (exploring the role of law in shaping racial hierarchy in America). The point here is only that the work begun by critical race scholars remains incomplete.


arrangement of human and natural phenomena—an alchemy of man-made structures, land surface features, and vegetation. As such, it can be read and interpreted as a text. Artifacts placed on the land, like words inscribed in a book, tell stories about memory, identity, and history. The choices a locality makes as it designs buildings, consecrates memorials, and names streets reveal its tastes, values, and hopes in a highly visible form. Examples abound. For instance, the decision to erect a war memorial at the heart of the National Mall, rather than, say, a monument to an artist or writer, imparts a particular message about our social world; as a nation, we value wartime sacrifice and believe the work of soldiers merits special remembrance. The landscape, in effect, becomes our “unwitting autobiography.”

The geography literature offers another keen insight on the power of the built environment. Landscape does more than record a locality’s ideals; it also works


In the geography literature, “landscape” has a rather tortured definition. Professor Cosgrove states, “In geographical usage landscape is an imprecise and ambiguous concept whose meaning has defied the many attempts to define it with the specificity generally expected of a science.” COSGROVE, supra note 14, at 13; see also Mitch Rose & John Wylie, Animating Landscape, 24 ENV’T & PLAN. D: SOC’Y & SPACE 475, 475 (2006) (explaining that at times “the term ‘landscape’ itself [seems] beyond rescue”).


Fred Inglis, Nation and Community: A Landscape and Its Morality, 25 SOC. REV. 489, 489 (1977) (noting that landscape provides “the most solid appearance in which a history can declare itself”).

See Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) (holding that placement of monuments in a public park constitutes government speech); Groth, supra note 14, at 1 (“Landscape denotes the interaction of people and place: a social group and its spaces, particularly the spaces to which the group belongs and from which its members derive some part of their shared identity.”); see also Sanford Levinson, Written in Stone: Public Monuments in Changing Societies 9–11 (1998) (addressing the contests over Civil War era public monuments); Peirce F. Lewis, Axioms for Reading the Landscape: Some Guides to the American Scene, in THE INTERPRETATION OF ORDINARY LANDSCAPES: GEOGRAPHICAL ESSAYS, supra note 14, at 11, 12 (arguing that all human landscapes have meaning); Richard H. Schein, Acknowledging and Addressing Sites of Segregation, 19 FORUM. J. 34, 38 (2005) (stating that the landscape reveals our values in tangible form).

See Lewis, supra note 18, at 12.

The landscape is more than just a pretty view awaiting our interpretation. See Richard H. Schein, Race and Landscape in the United States, in LANDSCAPE AND RACE IN
to “re-inscribe or perpetuate the very ideas . . . that we see reflected in it.” 21 That is, communities mold their surroundings to reflect their worldview, and the physical durability of the landscape then carries those meanings forward and influences how future generations view events that confront them. 22 Returning to the World War II Memorial as an example, it both reveals the values of its creators and instills future visitors with a normative vision about the importance of patriotism and martial heroism. 23 Thus, landscape and identity are mutually constitutive of one another—landscapes are shaped by and in turn influence the societies that create them. 24

This inherent capacity of landscapes to create structures of meaning has profound implications for the process by which racial categories are created, inhabited, and reproduced. Landscapes do not arise through the work of a divine hand to celebrate the deserving and promote truthful accounts of history. 25 Rather, the built environment is shaped by the tastes of government leaders and ruling elites—the only groups with sufficient resources to organize costly building projects and install permanent memorials on the land. 26 It takes little effort to see

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22 KENNETH E. FOOTE, SHADOWED GROUND: AMERICA’S LANDSCAPES OF VIOLENCE AND TRAGEDY 33 (1997); Owen J. Dwyer, Symbolic Accretion and Commemoration, 5 SOC. & CULTURAL GEOGRAPHY 419, 422 (2004); Audrey Kobayashi & Linda Peake, Racism Out of Place: Thoughts on Whiteness and an Antiracist Geography in the New Millennium, 90 ANNALS ASS’N AM. GEOGRAPHERS 392, 394 (2000); Schein, supra note 18, at 38 (arguing that the landscape’s “existence and presence as a tangible, visible scene works to keep . . . memories alive”).


24 See Dwyer & Alderman, supra note 16, at 165; Kobayashi & Peake, supra note 22, at 394.

25 See Dwyer, supra note 22, at 426.

that those with dominion over the land may use their power to teach the public their own desired political and historical lessons. The landscape, as a result, tends to either exclude the heritage and memories of subaltern groups or appropriate their stories for dominant-class purposes.

The landscape of Natchez, Mississippi captures the principle in full. Nearly 150 years after the conclusion of the Civil War, the city of Natchez remains widely celebrated for its “astonishingly determined” effort to preserve the heritage and imagery of the Old South. In particular, leading citizens have worked tirelessly to refurbish a collection of antebellum plantations—vast white-pillared estates surrounded by ornate gardens and lush magnolia trees. Scholars have demonstrated, conclusively, that the history of these properties is soaked in the sweat of African American slaves. Property owners have removed the slave quarters—the most prominent material trace of black history—from these otherwise painstakingly restored

27 See Kobayashi & Peake, supra note 22, at 397 (arguing that “dominant power blocs . . . use racialized representations to maintain cultural and moral legitimacy” (citation omitted)).

28 Levinson, supra note 18, at 10 (showing that “those with political power within a given society organize public space to convey . . . desired political lessons”); James E. Young, The Texture of Memory: Holocaust Memorials and Meaning 2 (1993) (“Memory is never shaped in a vacuum; the motives of memory are never pure.”); Dwyer & Alderman, supra note 16, at 169 (“Because of white opposition, African Americans have struggled and often been unsuccessful in commemorating the [civil rights] Movement within the traditional core of urban memorial space.”); Steven Hoelscher, The White-Pillared Past: Landscapes of Memory and Race in the American South, in Landscape and Race in the United States, supra note 20, at 39, 48 (“[L]andscapes are especially powerful media for dominant groups to present their case to the world.”); Kirk Savage, History, Memory, and Monuments: An Overview of the Scholarly Literature on Commemoration, Nat’l Park Serv., http://www.nps.gov/history/history/resedu/savage.htm (last visited Nov. 19, 2012).


31 See Linda Lange, Time Leaves Natchez Undisturbed, Milwaukee J. & Sentinel, Nov. 9, 1998, at H8 (“In the antebellum era, the agriculture-based economy depended heavily on slave labor for work in the fields. The planter class also relied on slave craftsmen and brick masons in construction of opulent estates.”). See generally D. Clayton James, Antebellum Natchez (1968); Natchez Before 1830 (Noel Polk ed., 1989).
plantation estates. Hoelscher, supra note 28, at 60 (stating that the mention of slavery in Natchez has been confined to a few specific sites and that tours of the mansions continue to venerate the antebellum period); Leonard Pitts, Jr., Bed, Breakfast . . . And a Denial of Black History, MIAMI HERALD, Mar. 9, 2003, at 1L (discussing the conversion of slave quarters on Natchez plantations into fancy bed and breakfasts). As one commentator has noted, the “near complete absence of a black perspective . . . is astonishing.” Id. Moreover, when landscape features do acknowledge the existence of antebellum African Americans, they present the slave system as a benign institution, universally referring to enslaved blacks as “servants” or “cooks” or “butlers.” Ex 35. Examined as a whole, it becomes clear that the landscape of Natchez is a subtle form of dominance. The concrete, three-dimensional reality of the municipality creates an ideological narrative that hides the contribution of blacks and exonerates whites from any complicity with the horrors of the past.

Although the built environment remains the agar upon which racial hierarchies replicate themselves, no legal scholarship has yet analyzed the interaction between landscape and race or suggested practical tools to disrupt the ongoing process of racialization. This Article sets out to fill the void. It begins, in Part I, by closely scrutinizing the landscape in one modern American city—Lexington, Kentucky—to demonstrate how the built environment continues to marginalize African Americans and ingrain ideas about racial difference. It shows that the city’s monuments, memorials, parks, and roads all conspire to broadcast a message of white superiority, convince African Americans to accept themselves as marginal players in Lexington’s history, and physically exclude blacks from important civic spaces.

After highlighting the effect of landscape unfairness on black communities, the Article turns toward devising a policy proposal that could prevent the further subordination and invisibility of minority groups. Part II of this Article explores the academic literature in both law and geography for potential solutions to the landscape problems facing African Americans. Geographers, for their part, counsel that oppressed groups should attempt to offer “progressive/emancipatory/liberatory” counternarratives that expose the symbolic meanings of the land. Legal academics, confronted with any question of racial discrimination, generally advocate erecting statutory proscriptions that either ban or criminalize the noxious activity in question. Although these reform traditions both pack some theoretical

32 Hoelscher, supra note 28, at 60 (stating that the mention of slavery in Natchez has been confined to a few specific sites and that tours of the mansions continue to venerate the antebellum period); Leonard Pitts, Jr., Bed, Breakfast . . . And a Denial of Black History, MIAMI HERALD, Mar. 9, 2003, at 1L (discussing the conversion of slave quarters on Natchez plantations into fancy bed and breakfasts).

33 Hoelscher, supra note 28, at 54.

34 Id.

35 Id.

36 Id.

punch, neither offers much hope of altering the built environment. The problem is this: current proposals to intervene in the landscape either rely on legal dead ends or disregard the political economy of local government decisionmaking.

Part III—the final section of this Article—searches for a new, more practical approach to transforming racialized landscapes. Rather than advocate for a sweeping ban on any landscape practice tinted with a hint of racism, this section pushes for something less grandiose and more achievable. It argues that the law should impose a set of basic procedural requirements on government bodies to ensure they thoughtfully consider the effects of any actions that significantly alter the landscape. The basic idea is that forcing government actors to contemplate landscape values they might otherwise neglect will lead inevitably to better informed, more rational, and racially sensitive decisionmaking. At the same time, stricter procedural requirements will open the landscape to greater public participation, thus enhancing democratic accountability and transparency.

I. THE LANDSCAPE OF LEXINGTON: AN EXAMPLE OF RACE-MAKING

The principal argument of this Article is that the American landscape has played a crucial, and largely unexamined, role in the creation and maintenance of racial hierarchies. To make this theoretical claim more concrete, the pages that follow present empirical evidence, on the microlevel of municipal development, of the tangled relationship between race and the built environment. This Article offers a contribution to the larger contemporary debate about the persistence of the color line by documenting how the landscape (1) communicates messages of white supremacy, (2) misrepresents the history of black communities, and (3) physically excludes African Americans from important civic spaces.

The subject of this research is Lexington, Kentucky. The city offers several advantages for a case study of this type. First, the power struggle between Lexington’s historically black population and its wealthier white community roughly parallels the political dynamic in the broader United States. Critics will point out that the focus on state action threatens to limit the scope of my proposed solution. Admittedly spaces constructed by private individuals, without any government action or intervention, would fall outside the reach of the suggested procedural remedy. Note, however, that government action can be defined broadly. California and New York have adopted procedure-based environmental protection statutes that apply to government decisions on land use permits, including projects financed or approved by government. See CAL. CODE REGS. tit. xiv, §§ 15000–15387 (2011); N.Y. COMP. CODES R. & REGS. tit. 6 §§ 617.1–617.20 (2011). A similarly broad scheme focused on landscape issues would capture most, but admittedly not all, significant building projects in a municipality.

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39 See Eugene J. McCann, Race, Protest, and Public Space: Contextualizing Lefebvre in the U.S. City, 31 ANTIPODE 163, 163–64 (1999) (demonstrating that Lexington has traditionally been a racially divided city); Schein, supra note 10, at 210 (“Lexington is struggling to join the twenty-first century, especially in terms of its race relations or, more
city and nation, blacks constitute a significant—but not decisive—voting block.\(^{40}\) This demographic reality should lead to some useful conclusions about African Americans’ ability to resist a white majority’s influence over the physical setting. Second, Lexington sits at the crossroads of four distinct political/historical regions—the North, South, Midwest, and Appalachian Mid-Atlantic.\(^{41}\) It is therefore unlikely that current spatial practices can be attributed to particular sectional characteristics, cultural traditions, or ethnic practices. Finally, the citizens of central Kentucky have long cared about, and fought over, landscape issues. From the original dispossession of the Indians to the more recent crusade to preserve local farmland, ideas about land, property, and the environment have been stitched with heavy thread into the social fabric of the city.\(^{42}\) Though few places directly match Lexington’s obsessive concern with its physical milieu, scholars have noted, “The study of extreme instances often helps to illuminate the essentials of a situation.”\(^{43}\) In short, examining Lexington is fruitful not because it is perfectly representative of how Americans think about the built environment, but because it crisply reveals how landscapes work and why they matter.

Within Lexington, this research has concentrated on two sites: the old courthouse square and a recently constructed public park. These places represent a cross section of the types of spaces that average citizens move through in their daily routines. It is these kinds of everyday spaces that best reveal how the built environment uncritically smuggles ideas about race and racial hierarchy into the ether of everyday existence.

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\(^{40}\) The major difference between Lexington and the larger country is that the Bluegrass region has a much lower percentage of Latinos. Critics could charge that by focusing on the black-white binary, this Article is examining race through an inappropriately narrow lens. This criticism has some theoretical force, and my ideas about property and landscape have been shaped by living in places where the black-white social relations structure the spatial trajectories of everyday life.


\(^{42}\) See Schein, supra note 37, at 815.

A. Courthouse Square

1. A Landscape of White Supremacy

Perhaps the most obviously racialized space in Lexington is the Courthouse Square, a large public plaza in the heart of downtown. It takes little imaginative work to see that the square tells a narrow history of elite, white Lexington at the expense of African American memory and identity. Foremost, monuments honoring Confederate war heroes dominate the commons. A memorial to cavalry officer John Hunt Morgan, for example, commands the western edge of the plaza. Morgan, a hemp merchant from Lexington, became known as the “Thunderbolt of the Confederacy” for his freewheeling guerilla raids on Union positions in Kentucky and Tennessee. Supplementing the Morgan sculpture, a nineteen-foot statue of John Breckinridge, the Confederate Secretary of War and erstwhile Vice President of the United States, stands guard over the main entrance to the commons.

As Victor Turner has noted, “Objects speak,” and the statues that venerate the Confederacy convey an obviously racialized message. Take, for example, the

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44 For more on the history and form of courthouse squares, see Edward T. Price, The Central Courthouse Square in the American County Seat, 58 GEOGRAPHICAL REV. 29 (1968).

45 There is a rich scholarly literature on Confederate statuary and memory of the Civil War. See, e.g., KIRK SAVAGE, STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND MONUMENT IN NINETEENTH-CENTURY AMERICA 129–208 (1997); David W. Blight, “For Something Beyond the Battlefield”: Frederick Douglass and the Struggle for the Memory of the Civil War, 75 J. AM. HIST. 1156, 1178 (1989); Steven Hoelscher, Making Place, Making Race: Performances of Whiteness in the Jim Crow South, 93 ANNALS ASS’N AM. GEOGRAPHERS 657, 663 (2003).


47 The Breckinridge Statue: Something About Its Appearance and Where It Will Stand, LEXINGTON MORNING TRANSscript, July 10, 1887, at 2. The statue is eight feet tall and sits on an eleven-foot-high pedestal.


50 There has never been any doubt in the black community about the meaning of statues dedicated to the Confederacy. Take, for example, Frederick Douglass’s rage at monuments to Robert E. Lee. Douglass “considered them an insult to his people and the Union.” Blight, supra note 45, at 1169; see also Jonathan Leib, The Witting Autobiography of Richmond, Virginia: Arthur Ashe, the Civil War, and Monument Avenue’s Racialized Landscape, in LANDSCAPE AND RACE IN THE UNITED STATES, supra note 20, at 187, 191.
reaction of author Mamie Fields to a sculpture of John C. Calhoun, the tireless
defender of slavery and states’ rights, in Charleston, South Carolina. “Blacks took
that statue personally,” Fields recalled, “Calhoun [seemed to] look[ed] you in the
face and tell[ed] you, ‘Nigger, you may not be a slave, but I am back to see you stay
in your place.’”51 Confederate memorials in Kentucky have faced similar
criticisms. Lexingtonians—mostly black Lexingtonians—argue that the veneration
of John Hunt Morgan conveys a message of “marked racism,”52 while a nearby
monument to Jefferson Davis has faced protests because it “rekindles memories of
hostile Southern resistance to African-Americans’ quest for freedom.”53

That these statues stick like a bone in the throat of the black community
should not surprise. The monuments’ use of traditional commemorative forms
coupled with the enormous outlays of capital entailed in such installations infuses
the landscape with a luster of civic authority and cultural legitimacy.54 Moreover,
the artistic composition of the statues cements the notion that Lexington
intentionally moored ideas about racial stratification in the physical geography of
the plaza. The design of the Morgan memorial, in particular, undermines any
notion that Courthouse Square presents an impartial narrative above racial bias.55

(discussing the resistance of the black citizens of Richmond to the Lee monument in 1887
and 1890); Alexander Tsesis, The Problem of Confederate Symbols: A Thirteenth
Amendment Approach, 75 TEMP. L. REV. 539, 554 (2002) (“Confederate symbols express a
nostalgic longing for the Old South.”). But see GEORGE SCHEDLER, RACIST SYMBOLS &
REPARATIONS 43 (1998) (arguing that “the more pervasive [the Confederate flag] becomes
in popular culture the more it loses the racist overtones”).

51 Karen Fields, What One Cannot Remember Mistakenly, in HISTORY AND MEMORY
IN AFRICAN AMERICAN CULTURE 150, 156 (Geneviève Fabre & Robert O’Meally eds.,
1994).

52 Maryjean Wall, Time to Back a New Horse, LEXINGTON HERALD-LEADER, Nov.

53 Doris Wilkinson, Let Rotunda Statuary Reflect Strength of Black Women,

54 Owen J. Dwyer, Location, Politics, and the Production of Civil Rights Memorial
Landscapes, 23 URB. GEOGRAPHY 31, 32 (2002).

55 Critics have charged that such reactions are overwrought, and that the Morgan and
Breckinridge statues merely reflect Lexington’s sympathies and historical experiences
during the Civil War. See, e.g., Donald G. Shelton, Column Attacking John Hunt Morgan
inspection, this argument burns off like a thin morning fog. In truth, the vast majority of
citizens and soldiers in Kentucky, which did not secede, sided with the cause of the Union.
WALL, supra note 41, at 63. Union generals such as Thomas Leonidas Crittenden, Thomas
John Wood, Kenner Garrard, Barton S. Alexander, and John Buford all represented
Kentucky during the war. EZRA J. WARNER, GENERALS IN BLUE: LIVES OF THE UNION
COMMANDERS 100, 569, 167, 581, 52 (1964). Even Lexington, more outwardly Confederate
than the rest of the state, had stronger ties to the North—300 Confederate and 1,300 Union
veterans lie buried in Lexington Cemetery. Telephone Interview with Daniel ScaI,
President & Gen. Manager of Lexington Cemetery (Oct. 10, 2012). Yet, despite this
The twenty-foot monument depicts a dignified incarnation of Morgan sitting calmly astride a well-muscled stallion. Yet historians agree that in life, he rode a small mare and forged a reputation for daring and roguish bravado. This discrepancy—the gap between history and memory—did not occur spontaneously through either accident or artistic whimsy. As Professor Kirk Savage has demonstrated, the portrayal of the Confederate general as a disciplined officer, riding with easy control of his animal was a common feature in the sculptural iconography of the time and carried a well-understood meaning. The equestrian in equipoise, Savage writes, was an “overripe metaphor” that worked beautifully “as a model of leadership for a white supremacist society trying to legitimate its own authority. [It] is at once a retrospective image of the benevolent master . . . and a prospective image of a postwar white government claiming to know what is best for its own black population.” Architecture critic Catherine Bishir agrees, claiming that Morgan’s sculptural avatar is the embodiment of the “confident leader who calmly controls not only the horse but the racially stratified society in which he operates.” In short, the Confederate sculptures nestled in the heart of Lexington definitively encode the landscape with a racialized presence—a perpetual reminder that public space belongs to the white majority, both now and into the future.

Those who defend the project of Confederate remembrance will, of course, take issue with any claim that the city government has endorsed antebellum attitudes about racial difference. The potential lines of attack are easy to spot. First, some will argue that Lexington has no moral responsibility for memorial projects that were organized by private groups. This argument is easily dismissed. Local newspaper accounts reveal that city officials worked closely with the sculptor of the Morgan statue and helped fashion “every detail” of the final design. The same is true of the Breckinridge monument. Moreover, the prominent placement of the memorials on sacred municipal land—near Main Street and in the shade of history, the landscape of Courthouse Square masks the strength of unionism and promotes a romantic ideal of Confederate honor and gentility.

57 See SAVAGE, supra note 45, at 133–35.
58 Id. at 135.
59 Bishir, supra note 46, at 80.
60 Id. at 78.
61 See Louise Taylor, Historical Statue Earns Interest: A Colorful Century at Fayette Courthouse, LEXINGTON HERALD-LEADER, Dec. 13, 2002, at A14 (showing that the Breckinridge statue was funded by a $10,000 gift from the government).
the Courthouse—further suggests an officially sanctioned longing for the Confederacy, and helps claim civic space for the Lost Cause tradition.62

Skeptics will also contend that contemporary Lexington should not be tarred with decisions made by city fathers during the early twentieth century. Although this claim carries some theoretical force, on close inspection it, too, crumple under the weight of evidence. In 2010, Lexington redeveloped Courthouse Square with a goal of making the area more attractive and pedestrian friendly.63 To implement this plan, the city built a new glass and steel pavilion, embedded LED lighting in the walkways, and reworked the walking paths.64 The city council also made a conscious decision to retain the Confederate memorials and chose to move the statue of John Breckinridge from the interior of the square to a more visible location along the city’s primary traffic artery.65 The result is a thoroughly modern landscape that continues to inscribe a “white pillared” version of the past.66

Lexington’s Courthouse Square is not unique. Across the South, similar memorial spaces sit at the heart of both large cities and small towns. That these scenes remain so commonplace does not render them harmless. The prominent position of Confederate sculptures along Main Street and the deliberately misleading interpretations of history conspire to ingrain ideas about racial hierarchy, cement conclusions about racial difference, and send messages that African Americans are not full members of the polity.

2. Black History, Concealed

In addition to encouraging fidelity to a social order founded on racial terror, Courthouse Square also conceals the narratives of Lexington’s African American community.67 Before the war, the northwest corner of the commons, known regionally as Cheapside, was the site of the largest slave auction in the state, and one of the most important slave-trading districts in the South.68 Locals claim that the Cheapside moniker derives from the area’s reputation for selling older and cheaper slaves—the more valuable chattels were taken directly from the

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62 See Dwyer, supra note 22, at 420 (noting that courthouse lawns commonly “attract a plethora of memorials, all of them seeking to legitimate the cause they represent via close association with the seat of government”).
64 Id.
65 Id.
66 Id.
67 See Foote, supra note 22, at 322–32 (noting that the landscape conceals much African American history and that more could be done to bring that history to light).
68 See Kellogg, supra note 41, at 25 (discussing Lexington’s role as an important slave trading market); McCann, supra note 39, at 170 (referring to Lexington as a “major regional slave market”).
countryside to auctions in the Deep South.69 Although this history, staked in blood, permeates the area, no heroic statuary commemorates the local African American community.70 The landscape fails to honor the sacrifice of the twenty-four thousand black Kentuckians who fought in the Civil War;71 it fails to recognize the role of slave labor in fostering regional prosperity; and it fails to enshrine a single African American politician, thinker, or artist in the pantheon of the city’s heroes.72 Moreover, no public memorial records that after emancipation, the plaza was the site of violent mob attacks against blacks who transgressed socially enforced codes of behavior.73 Like a shadow on a cloudy day, black history has silently disappeared from the environs of Lexington’s Courthouse Square.

Admittedly, there is one landscape feature that acknowledges what Toni Morrison might call an “Africanist Presence.”74 A historical marker erected in 2003 concedes that Courthouse Square hosted Lexington’s slave auction block.75 But this single exception to the dominant-class rendering of the landscape proves the larger rule—Lexington still seems to favor the mythology of the Confederacy over the gritty history of its black community. Note, for example, that during the

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69 See Schein, supra note 18, at 37.
70 Owen J. Dwyer, Interpreting the Civil Rights Movement: Place, Memory, and Conflict, 52 PROF. GEOGRAPHER 660, 663 (2000) (arguing that American memorial landscapes have routinely marginalized the presence of African Americans).
71 ANNE E. MARSHALL, CREATING A CONFEDERATE KENTUCKY: THE LOST CAUSE AND CIVIL WAR MEMORY IN A BORDER STATE 20 (2010). The invisibility of blacks in Civil War statuary is not unusual. African Americans also lack a place in the post–Civil War era fictional literature. As Professor Daniel Aaron writes, “Although black slavery was the root cause of the War, it is hard to name one War novel containing a fully realized Negro character.” DANIEL AARON, THE UNWRITTEN WAR: AMERICAN WRITERS AND THE CIVIL WAR 333 (1973); see also DAVID W. BLIGHT, BEYOND THE BATTLEFIELD: RACE, MEMORY, & THE AMERICAN CIVIL WAR 112 (2002) (“Slavery, the war’s deepest cause, and black freedom, the war’s most fundamental result, remain the most conspicuous missing elements in the American literature inspired by the Civil War.”); Savage, supra note 28 (discussing how African American soldiers were removed from mainstream public memory).
72 See McCann, supra note 39, at 170 (describing the lack of memorials to the subjugation of black slaves, or to the bravery of those involved with the underground railroad).
2010 redesign of the plaza—the same renovation that lifted John Breckinridge into
the spotlight—the city placed the slave auction marker in a peripheral corner
behind the Courthouse building. The location, far from the main pedestrian
thruway, is so marginal that the local paper initially insisted, incorrectly, that the
city removed the plaque altogether.

Less visible but just as telling, the design and construction of the slave auction
marker received no direct support from local or state government, a stark contrast
to the tens of thousands of dollars in public funds spent on projects dedicated to
Confederate memory. Only the bootstrapping organization and fundraising of a
local black fraternity ensured that the landscape of Courthouse Square holds any
reminder of the solemn turns in Lexington’s history. And even with the marker in
place, taking in the full sweep of the built environment leads a casual observer
straightforwardly to the conclusion that the two-hundred-year presence of African
Americans in the state’s history barely deserves mention.

3. Physical Exclusion

So far, this subsection has attempted to demonstrate that the landscape injects
ideas about race and power into the scenes of everyday life. Before moving on, this
Article explores more concretely how the “tradition of white . . . ownership” of
public space imposes actual, material costs on black communities. Foremost, this
Article argues that racialized landscapes physically exclude African Americans
from important public arenas and deny them the opportunity to fully participate in
civic and economic life.

In Lexington, for instance, interviews with local stakeholders establish that
some members of the black community feel compelled to entirely avoid
Courthouse Square out of respect for the memory of the slave auctions. Civic
leaders are uniformly aware of the area’s history and described the space as “not
inviting,” “not a center for all,” and “not a comfortable place.” Others,
especially in the older generation, refuse to patronize nearby businesses as a protest against the racial hierarchy that remains embedded within the landscape. At the very least, many blacks do not feel part of the plaza’s community and fail to make free and efficient use of the commons. In this regard, Lexington’s black community is not unique. A burst of scholarly research has established that African Americans in other parts of the country feel similarly “constrained,” “shutout,” “traumatized,” and “frozen” when confronted with mainstream civic landscapes and employ strategies to avoid “the indignities of racialized space.”

The subtle exclusion of African Americans exacts a heavy toll. In Lexington, blacks end up ostracized from Courthouse Square—the social and political hub of the Bluegrass region. Local African Americans may fail to exploit the farmers’ market or the civic festivals that draw thousands of revelers into downtown each week. And, more pertinently, they may avoid the cascade of public lectures, demonstrations, memorial celebrations, and political rallies that the square

83 Interview with Sonia Price, Dir. of the African Am. Studies & Research Program, Univ. of Ky. (June 22, 2011).
85 See McCann, supra note 39, at 173; see also OWEN J. DWYER & DEREK H. ALDERMAN, CIVIL RIGHTS MEMORIALS AND THE GEOGRAPHY OF MEMORY 26 (2008) (noting that Lexington’s African American community is well aware of the racialized history of Courthouse Square).
86 See IFILL, supra note 79, at 22 (“In the contemporary physical landscape, continued white control of the terms in which public space in multiracial communities is defined and developed is a vestige of white supremacist notions of racial place.”); McCann, supra note 39, at 168 (“While it is widely acknowledged that public spaces often constrain the actions of women, cultural studies literature has begun to show how bourgeois public space has similar effects on people of color . . . .” (citation omitted); Susan Ruddick, Constructing Difference in Public Spaces: Race, Class, and Gender as Interlocking Systems, 17 URB. GEOGRAPHER 132, 136 (1996) (“[S]cholars in black and cultural studies . . . have noted the ways in which roles of visible minorities have been scripted in and through public space.”).
87 Robert R. Weyeneth, The Architecture of Racial Segregation: The Challenges of Preserving the Problematical Past, PUB. HISTORIAN, Fall 2005, at 11, 33 (“One way that African Americans could minimize some of the indignities of racialized space was simply to avoid these places.”); Nanda R. Shrestha & Wilbur I. Smith, Geographical Imageries and Race Matters, in GEOGRAPHICAL IDENTITIES OF ETHNIC AMERICA: RACE, SPACE, AND PLACE 279, 280 (Kate A. Berry & Martha L. Henderson eds., 2002) (explaining that blacks feel “traumatized” and “frozen” in certain geographies).
88 See McCann, supra note 39, at 170 (arguing that the area around Courthouse Square is the “heart of the contemporary downtown financial area”); Cheapside Park One of the Most Historic Places in Lexington, LEXINGTON LEADER, June 30, 1938, § 3, at 47 (“A detailed history of Cheapside would be a history of Lexington itself.”).
regularly hosts. Such outcomes inevitably corrode the entire city’s public life. As Berman argues, “The glory of modern public space is that it can pull together all . . . different sorts of people . . . . It can both compel and empower all these people to see each other, not through a glass darkly but face to face.” Hierarchical landscapes, like Courthouse Square, set fire to this important crucible of participatory democracy.

The physical exclusion that results from racialized space also wreaks havoc on the economic prospects of black Americans. Professor Sherrilyn Ifill’s ethnographic study of Maryland, for example, uncovered that African Americans purposively spurned real estate opportunities along the Eastern Shore because the landscape in those communities was stamped with memories of racial violence and intimidation. Ifill sums up that “decisions about where to look for a new home, where to stop late at night for gas or for a bite to eat, and where to send one’s children to school” are all informed by whether a community’s public spaces broadcast a message of racial hierarchy or fosters rigid power relations.

In Lexington, the message transmitted by Courthouse Square is clear. The Confederate statues that abut Main Street proclaim, quite loudly, the subordinate position of local African Americans. These memorials, and the negative emotions they evoke, push blacks out of the public square, denying them access to important municipal rituals and increasing feelings of invisibility within the community. Thus, Lexington demonstrates that stakes in debates over the built environment remain high. Contests over the landscape are about more than pretty sculptures; they fundamentally affect the way that racial attitudes reproduce themselves across time.

**B. Thoroughbred Park**

The message of racial difference carved into Courthouse Square spirals out into parts of the city removed from the urban core. Take, for example, Thoroughbred Park, a three-acre triangle of land that serves as the southern gateway to downtown. The park, at first glance, is a marvelous space. A lush rolling hill, which echoes the surrounding Bluegrass countryside, towers over a

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90 See McCann, supra note 39, at 170–71 (discussing physical constraints on African American’s participation in the life of the city). For more on the square’s importance to Lexington, see Schein, supra note 84, at 390–91.


92 See Ifill, supra note 79, at 20–21; see also Shrestha & Smith, supra note 87, at 280 (stating it is not uncommon among some racial minorities to avoid areas marked by events rooted in racism).

93 Ifill, supra note 79, at 21.

94 Kevin Nance, *Architects Reveal Plans for New Park: Themes Will Be Bluegrass, Horses*, LEXINGTON HERALD-LEADER, Oct. 28, 1989, at A1 (stating that goal of park was to “bring the quality of the Kentucky countryside directly into downtown Lexington”). For
superbly crafted stone wall, a fountain, and a group of bronze racehorses that
careen toward an imaginary finish line. Although the grassy knob and winding
footpaths of Thoroughbred Park may initially seem far removed from the
Confederate stronghold of the courthouse, all is not as it appears. On closer
inspection, this setting, too, crafts myths about white achievement, elides African
American history, and excludes blacks from central Lexington.

1. White Presence, Black Absence

Any critique of Thoroughbred Park must begin by tracing the history and
meaning of the landscape’s many statues and memorial signs. In the early 1990s,
the city government of Lexington and its allied private foundations agreed that the
grounds of the park would record the history of horseracing in the Bluegrass area.
The site would symbolize, in tangible form, Lexington’s international reputation as
an equine mecca. To achieve that end, the grounds of the park “commemorate
outstanding people and horses in the thoroughbred industry.” Statues of famous
jockeys and celebrated horses stand sentinel on the park’s grass, and the
pathways brim with plaques dedicated to the champions of the horse industry, from
George Washington (a renowned horse breeder) and Bing Crosby (a technical
innovator) to the contemporary financiers who continue to push the business
forward.

Although aesthetically satisfying, the narrative of the horse industry, carved in
bronze and presented as gospel, is profoundly incomplete—and profoundly
racialized. Thoroughbred Park presents the public with a misleading version of the
region’s history that ultimately champions the deeds of elite whites and writes out
the labor and lives of African American workers. The park, for example, offers no
mention of the (mostly black and Hispanic) trainers, stable hands, and barn
foremen who have provided the unseen manpower and moxie essential to the
industry’s survival. Perhaps more egregious, Thoroughbred Park also fails to
commemorate any of the black jockeys who dominated horseracing in the late
nineteenth century, even though the park’s memorial apparatus repeatedly
references that era of the sport. The space makes no room for even prominent
historical figures like Oliver Lewis, the first jockey to win the Kentucky Derby, or
Isaac Murphy—the winningest jockey of all time, a well-known Lexingtonian, and
a member of the Horseracing Hall of Fame. That a rider of Murphy’s stature fails

general background on the Bluegrass landscape, see Karl Raitz & Dorn Van Dommelen,
Creating the Landscape Symbol Vocabulary for a Regional Image: The Case of the

95 Nance, supra note 94.
96 Id.
97 Randy Romero, Pat Day, Bill Shoemaker, Jerry Bailey, Don Brumfield, Chris
McCarron, and Craig Perret are all represented in the statuary.
98 See Schein, supra note 37, at 821.
99 For more on Murphy, see WALL, supra note 41, at 110.
to appear in the narrative suggests that the omission of black figures stems not from benign neglect, but an active attempt to conceal the role of African Americans in horseracing’s origin story.

It is worth repeating that the ability of dominant (white) groups to inscribe their version of history into the built environment has enduring consequences. The power of landscape—and its insidiousness—lies in its ability to make selective accounts of the past seem normal. Lexington’s Thoroughbred Park, emplaced like a geological outcropping in the landscape, asserts that the contributions of the black community are insignificant. Visitors, by and large, must accept this account as part of the natural order of things because they cannot see the contested process of selecting, forgetting, and reassembling narratives that underlies the site. Moreover, the park’s physical permanence allows it to project forward the myth that blacks have not supported the horse industry—the one endeavor that largely defines the region’s identity. The landscape, in short, is not a passive vessel, but an active vehicle that produces and shapes the future.

2. Physical Exclusion

Beyond the misleading historic narrative, the easiest proof that Thoroughbred Park has marginalized the black community can be found in the story of the park’s unique, hilly topography. In 1989, when Lexington first announced the plans to convert a string of auto-related businesses into Thoroughbred Park, the site demarcated a boundary between two contrasting socioeconomic areas. On one side, the parcel fronted a rich, white section of the city. Across the property, and clearly visible to motorists entering downtown, loomed the black neighborhood of...
the northeast—a place represented in the local news media as poor, violent, and overrun by disaffected teenagers.108

Local business interests argued, sometimes forcefully, that the view was not conducive to Lexington’s redevelopment efforts and, as a result, the large rolling hillside of Thoroughbred Park was built.109 The mound was “literally built for the park to effectively hide the [African American residential district] from view.”110 For anyone approaching downtown from the interstate highway, Lexington’s black neighborhood—and black bodies—remain firmly out of sight, tucked neatly behind the grassy partition. An editorial in the local paper succinctly captured the dynamic; “Though aesthetically pleasing, the park is historically false. The ‘rolling bluegrass hills’ are manmade. . . . [T]he park not only ignores [the black neighborhood], but also screens it from view. It is a whitewash. It is telling that almost every African American . . . instantly recognizes this racial effect.”111

Thus, the construction of the artificial hillside in Thoroughbred Park stands easily as an emblem for the mischief that built environments have unleashed in black communities. The park normalizes and cements borders between socially constructed racial zones.112 It physically corrals, through division and enclosure, the scope of the local African American neighborhood.113 And, finally, it proclaims an easily intelligible message about who exactly belongs on which side of Main

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107 Id.
108 See McCann, supra note 39, at 171.
109 See, e.g., Dottie Bean, Humana Pledges $500,000 for Thoroughbred Park, LEXINGTON HERALD-LEADER, Feb. 20, 1990, at B1 (describing the view as “singularly unattractive”); Robert Kaiser, Work to Begin Next Week on Thoroughbred Park, LEXINGTON HERALD-LEADER, Apr. 11, 1991, at A1 (describing site as a “scene of urban decay”); Nance, supra note 104 (quoting mayor saying that park would “act as an entrance to the city that will tell people they’re coming into something nice”); Shelia M. Poole, Foundation Unveils Its Plan for East Downtown Park, LEXINGTON HERALD-LEADER, Oct. 27, 1988, at B1 (complaining about the view); see also Bettye Lee Mastin, Panel Sought Referendum on Urban Renewal Plan in ’64, LEXINGTON HERALD-LEADER, Sept. 13, 1984, at D5 (reporting that the city had attempted to demolish the neighborhood in question during the height of the urban renewal period).
110 Schein, supra note 10, at 214; see also McCann, supra note 39, at 179 (making the case that contemporary public spaces are “designed to keep the frequency of uncomfortable encounters to a minimum and to maintain a rigid power relation between Whites and people of color”); Weyeneth, supra note 87, at 13 (arguing that built environment has long been designed to “manage[] contact between whites and blacks”).
112 Spatial control has long been a strategy used by dominant classes to fix racial difference and “‘demonstrat[e]’ the superiority of one race over the other.” Hoelscher, supra note 45, at 671.
113 See McCann, supra note 39, at 171; Schein, supra note 10, at 217.
Street; blacks, the park seems to say, are unwelcome and “out of place” in the white-dominated world of downtown.\footnote{McCann, supra note 39, at 171 (arguing that the state produces space to maintain hierarchies, and that groups who are not included are continually made to feel “out of place”); see also Kobayashi & Peake, supra note 22, at 393 (explaining that “whiteness” is a “profoundly geographic phenomenon” based on the control of space).}

In sum, Thoroughbred Park is not an obviously racialized space. No statues or plaques proclaim the innate inferiority of African Americans or celebrate white supremacist heroes. And yet the park’s space still retains a strong racial meaning. In particular, the decisions to hide a black neighborhood and erase black jockeys from the history of the local thoroughbred industry convey a message about the relative worth and standing of African Americans in the local community.

\section*{C. Wrapping Up}

At this point, it should come as no surprise that revolutionaries, as one of their first tasks, often seek the physical destruction of spaces that symbolize the regimes they have replaced.\footnote{See LEVINSON, supra note 18, at 12.} In 1985, after the death of Albania’s brutal dictator, Enver Hoxha, protesters smashed statues of their former leader and vandalized government property.\footnote{See id. at 15.} Similar scenes have engulfed Afghanistan, Russia, and Iraq after recent regime changes. The reason is clear; landscapes influence the societies that produce them. Like the chemicals in a dark room, the built environment develops ideas about community values, notions of personal identity, and feelings of belonging.\footnote{See Hoelscher, supra note 45, at 662; David W. Blight, \textit{W.E.B. Du Bois and the Struggle for American Historical Memory}, in \textit{HISTORY AND MEMORY IN AFRICAN AMERICAN CULTURE}, supra note 51, at 45, 51.}

In the United States, the landscape has played a particularly active role in shaping black lives. Again and again, the built environment has either physically excluded African Americans or presented a weaponized version of history that symbolically annihilates their accomplishments. While this Article has focused primarily on sites of race-making in central Kentucky, it is a somber fact that thousands of other locations remain complicit in reproducing outdated notions about the black-white binary. In some places, the machinery of race is easily visible. The French Quarter of New Orleans, for instance, offers an obelisk dedicated to the White League, a paramilitary organization that led resistance to African American enfranchisement.\footnote{See Dwyer, supra note 22, at 421. To the credit of New Orleans, the Liberty Monument has been moved to a slightly less visible location than it occupied for many years.} In a similar vein, the government of North Carolina has built twenty-four memorials on the capital grounds in Raleigh, including half-a-dozen dedicated to the Confederacy—but not one African
American stands among the honored.¹¹⁹ And across the South, schools still bear the name of the Klan’s founder.¹²⁰ At other sites, race lingers inconspicuously. Scholars claim the design of contemporary public spaces,¹²¹ historic preservation districts,¹²² national parks,¹²³ and everyday road signs¹²⁴ all subtly ingrain ideas about racial power.

There is, however, some good news; unlike social problems rooted in the currents of culture and history, the troubles that stem from landscape unfairness can be fixed swiftly by dedicated and creative local governments. We have the capability, in ways both large and small, to expose the absences in the landscape and alter its physical framework and meanings.

II. CURRENT EFFORTS TO REFORM THE LANDSCAPE

Drawing on extensive theoretical work about landscape, the previous Part sought to identify how the built environment marginalizes African American communities and reproduces ideas about racial power. This Article now pivots and tries to find solutions to the knotty problems posed by landscape unfairness. How, exactly, can communities remove the taint of racial hierarchy from the surroundings they inhabit? Is it possible for localities to devise a principled framework to guide decisions about racialized spaces, or, on the contrary, is each place so context dependent that overarching theories provide little traction?

Rather than reinventing the wheel, it may be useful to begin by asking whether scholars already claim any solutions to the landscape problems facing

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¹¹⁹ Austin, too, drips with reminders of the slaveholding past. For example, the Memorial to Confederate Veterans reads, “Died for states rights guaranteed under the Constitution[.] The people of the South, animated by the spirit of 1776, to preserve their rights, withdrew from the federal compact in 1861. The North resorted to coercion. The South, against overwhelming numbers and resources, fought until exhausted.” LEVINSON, supra note 18, at 55. Monument Avenue in Richmond is another example of a prominent racialized space. See Leib, supra note 50, at 190.

¹²⁰ There are at least two public high schools named after Nathan Bedford Forrest (a Confederate general and founder of the Klan): one in Jacksonville, Florida and another in Chapel Hill, Tennessee. See Name Dropping: Should School Names That Honor Supporters of Slavery Be Changed?, CURRENT EVENTS, Dec. 8, 2008, at 7 (describing controversy over school in Florida named after Nathan Bedford Forrest). Forrest’s name also adorns other buildings and spaces throughout the South. For example, in Memphis, there is a park named after Forrest, while the Reserve Officers’ Training Corps (ROTC) building at Middle Tennessee State University bears Forrest’s name. The National Center for Education Statistics also shows school districts routinely name schools after Robert E. Lee, Stonewall Jackson, and Jefferson Davis.

¹²¹ See McCann, supra note 39, at 179.

¹²² See Schein, supra note 20, at 10.


¹²⁴ See Schein, supra note 20, at 10–11; Dwyer & Alderman, supra note 16, at 166.
African Americans. As mentioned earlier, the legal literature is of little help; scholars of law rarely examine the spatial trajectories of everyday life and they have largely ignored the problems that the built environment imposes on black communities. Geographers, in contrast, have long offered suggestions to mitigate the harms caused by landscape unfairness. Although details vary, the thrust of the geography literature is that minority groups should alter the landscape by building their own counterdiscourses. According to this scholarly tradition, African Americans should craft their own monuments, mark their own histories, and contribute to the visible form of the American scene.

After kicking the tires and checking under the hood, this Article argues that geographers’ attempt to inject impartiality into the landscape has major shortcomings, which virtually ensures that the real world condition of African Americans will not improve. More specifically, the following Section contends that the suggestion that blacks impose counternarratives on the landscape fails to grapple with the political realities of decisionmaking at the local level and the stunted economic power of African American communities.

A. The Potential Power of Counternarratives: Kelly Ingram Park

Geographers routinely argue that subaltern groups should resolve landscape imbalances by crafting their own counterdiscourses. Professors Kobayashi and Peake, for instance, write that minority communities must take it upon themselves to “[d]isrupt established attributes of place and the confining boundaries that have literally allowed whiteness to take place” and “engage in coalition building in order to resist the creation of racialized hierarchies.” 125 The potential of this approach is clear. Staking a tangible presence in places that have traditionally reflected the hopes of white men would signal that African Americans, too, have been an integral part of the national story. A more inclusive landscape could also reduce minority groups’ sense of alienation, 126 spark new discourses about the legacy of racial oppression, 127 and bring the achievements of outsiders into mainstream historical narratives. 128

To put flesh on the bones of this theory, the geography literature has repeatedly pointed to the success of Kelly Ingram Park in Birmingham, Alabama as empirical proof that campaigns to emplace counternarratives can dismantle the

125 Kobayahi & Peake, supra note 22, at 393, 398.
126 See Dwyer & Alderman, supra note 85, at 3.
127 See Derek H. Alderman, Naming Streets for Martin Luther King Jr.: No Easy Road, in Landscape and Race in the United States, supra note 20, at 213, 222.
implicit bias in the American landscape. The park, once ensconced in the national imagination as the site of Bull Connor’s attack on young civil rights protestors, was remade in the early 1990s to commemorate the struggle to desegregate Birmingham’s public facilities and commercial enterprises. Local activists convinced the city to rededicate the space as a “Place of Revolution and Reconciliation” and commissioned a series of steel sculptures to capture iconic moments of the civil rights campaign in Alabama. Visitors to the park must now wind their way through large-scale installations that depict protestors standing firm against snarling dogs, mechanized water cannons, and mass arrests.

The overall effect of the change has been nothing less than transformative. Most obviously, the landscape of Kelly Ingram Park validates, in stone and steel, the historical contributions of African Americans to the country’s freedom struggle and publicly scrutinizes the city’s white power establishment. As one visitor remarked on seeing the space for the first time, “I was witnessing the transformation of Birmingham’s official history.” Priscilla Cooper, the institute’s education program consultant, said, “[Whites from the suburbs will finally] have to face the truth. They must tell the students what really happened.” The statues’ visceral presence along the park’s pathways has also encouraged scenes of cathartic emotional release. A place once touched by tragedy, shame, and violence now sparks an outpouring of community pride and symbolizes the new standing of the city’s black population.

129 See, e.g., Dwyer & Alderman, supra note 85, at 18–19; Thomas H. Cox, From Centerpiece to Center Stage: Kelly Ingram Park, Segregation, and Civil Rights in Birmingham, Alabama, 18 S. HISTORIAN 5, 5 (1997); Dwyer, supra note 54, at 38; Schein, supra note 20, at 8; Dell Upton, Commemorating the Civil Rights Movement, 40 DESIGN BOOK REV. 22, 22–23 (1999).
130 See Dwyer, supra note 70, at 662.
131 See Dwyer, supra note 54, at 36–38.
132 Id. at 38 (quoting Frederick Kaimann, Kelly Ingram Park Has Look to Go with Institute Design, BIRMINGHAM NEWS, Nov. 15, 1992, at 36P).
133 See Dwyer & Alderman, supra note 85, at 19.
134 Inscriptions on the sculptures proclaim key slogans from the 1963 campaign: “Segregation is a sin,” “Warriors of a Just Cause,” and “We Ain’t Afraid of Your Jail.” Another sculpture, of two children behind jail bars, encourages viewers to both stand with the children on the inside of the cell and then outside as oppressor.
135 See Owen J. Dwyer, Interpreting the Civil Rights Movement: Contradiction, Confirmation, and the Cultural Landscape, in THE CIVIL RIGHTS MOVEMENT IN AMERICAN MEMORY 5, 8 (Renée C. Romano & Leigh Raiford eds., 2006).
137 Id.
138 For more on the power of memorials to provide a focus for emotional release, see Foote, supra note 22, at 179.
139 See Whitehouse, supra note 136.
B. Political and Economic Realities

The happenings in Birmingham demonstrate that the geographers’ claim about the importance of counternarratives carries water. A large-scale remaking of the American landscape could, in theory, bestow real and lasting benefits on black populations. The geography literature, however, consistently fails to recognize the practical difficulties of replicating the success of Kelly Ingram Park at a larger spatial scale or in different localities. In particular, geographers seem reluctant to acknowledge that any significant change to the built environment requires vast stores of political capital and economic resources—assets that local black communities traditionally lack.

Even in Birmingham, landscape change occurred only as a result of an unusual confluence of three demographic and political events—a model difficult to reproduce at the national level. First, the legacy of the civil rights struggle, still fresh in the minds of many locals, left behind a core of African American activists with intense motivation to record their experiences in the built environment.140 Second, as a result of declining white population in the 1970s, Birmingham became one of the few American cities where blacks constitute a majority of registered voters and control the levers of political power.141 Third, in the early 1990s, the city’s white business community—a potential adversary to any major change in the downtown landscape—was seeking fresh ways to address the city’s reputation as a hotbed of racism.142 As a result, the local chamber of commerce avidly supported the redesign of the park and helped procure $4 million in private funding.143 The story of Birmingham then, demonstrates the potential power of large-scale landscape change, but also reveals that emplacing counternarratives in the built environment requires a far more complex mix of sustained activism, political will, and financial support than geographers have indicated. In few other locations will the perceived interests of all stakeholders line up quite so neatly to allow African Americans to infuse the land with their memories and accounts of history.

The empirical research on the politics of renaming civic infrastructure in honor of Martin Luther King, Jr. makes this point explicitly. Social scientists have discovered that, across the country, attempts by African American communities to rename landscape features after King often face “insurmountable” opposition from white majorities who believe that the legacy of the civil rights leader “is too

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140 See Cox, supra note 129, at 20 (showing that the initial task force behind the museum and park project was a “biracial group composed of civil right veterans, community leaders and city officials”).
141 “A declining white population in Birmingham allowed African Americans to take control of the city’s government during the 1970s.” Upton, supra note 129, at 26.
142 See Dwyer, supra note 54, at 37.
143 The funding went toward both the park and the construction of a civil rights museum. Id. at 38; see also Sandy Coleman, Birmingham’s Civil Rights Institute Presents A Compelling History of the Movement, BOS. GLOBE, Feb. 26, 1995, at B21.
narrowly racial” to be commemorated in integrated public spaces. As Professor Derek Alderman has written, “Many whites do not personally identify with King . . . . The renaming of major thoroughfares is frequently disrupted by the protests of the street’s business owners and operators, who cite the financial costs of changing their address and the social stigma . . . of being associated with the black community.”

Indeed, in cities both large and small—from Phoenix to Danville, and from San Diego to Statesboro—whites have either successfully resisted attempts to name streets after the civil rights leader or substituted smaller roads for the major thoroughfares originally proposed by black activists. Efforts to honor King have faced particular difficulty in localities without large black communities. On average, African Americans constitute nearly 40% of the population in locations with a renamed street. In over a third of the successful locations, African Americans make up more than 50% of the population. This statistical portrait demonstrates that any call for African Americans to mold their own landscapes overlooks the political reality on the ground: black communities often lack the power to impose their vision of the future on white majorities.

African Americans have also encountered difficulties in other quests to remake the built environment with their own counternarratives. For example, large memorial projects dedicated to the civil rights movement, such as statues and museums, have often met resistance from whites, who view these endeavors as displacing white history and memory. As one scholar summarized, “Main Street,

144 Dwyer, supra note 54, at 48.
145 Derek Alderman, Street Names and the Scaling of Memory: The Politics of Commemorating Martin Luther King, Jr. Within the African American Community, 35 AREA 163, 164 (2003). Comedian Chris Rock famously lampooned the stigma of streets named in honor of Martin Luther King. “Martin Luther King stood for non-violence. Now what’s Martin Luther King? A street. And I don’t . . . [care] where you live in America, if you’re on Martin Luther King Boulevard, there’s some violence going down.” Bring the Pain (HBO television broadcast June 1, 1996).
146 See Dwyer & Alderman, supra note 16, at 169 (“Many of America’s roadways named for Martin Luther King, Jr., are side streets or portions of roads located within poor, black areas of cities . . . .”).
147 DWYER & ALDERMAN, supra note 85, at 51.
148 Id.
149 See, e.g., IFILL, supra note 79, at 20 (“Many whites in Talbot County viewed the plans to create a memorial to Frederick Douglass as a threat to their conception of the courthouse lawn as a ‘sacred’ space set aside to honor white heroes.”); Dwyer, supra note 70, at 667 (arguing that civil rights museums fail to examine issues of contemporary racism as a result of pressure from corporate and government donors); Dwyer & Alderman, supra note 16, at 169 (“Because of white opposition, African Americans have struggled and often been unsuccessful in commemorating the [civil rights] Movement within the traditional core of the urban memorial space.”); Lorri Helfand, Not the Time for King Honor, ST. PETERSBURG TIMES, Sept. 13, 2007, at 1 (discussing white opposition to a plan to honor Martin Luther King with a memorial plaza in Largo, Florida).
the county courthouse, and city hall remain devoted to remembering white-dominated historical narratives.”150 Similarly, the campaign to recognize the role of African Americans in the Civil War has encountered fierce opposition. The design of the Freedman’s Memorial—a monument dedicated to capturing the spirit of emancipation—was hijacked by white political interests and twisted to portray African Americans not as active agents in the struggle for their own liberation, but as passive automatons who received the gift of freedom from white leaders.151 Moreover, recent efforts by African Americans to expand displays about the black experience at Civil War battlefields “have encountered resistance both inside and outside” the National Parks Service.152 At Manassas Battlefield, for example, archaeological evidence of African American life has been deliberately removed from the park, meaning that “issues of slavery, oppression, racism, Reconstruction, and Jim Crow are prevented from becoming part of the national story.”153 The cascade of examples reveals, again and again, that when African Americans have taken it upon themselves to challenge dominant historical narratives and paint the landscape with more diverse memories, they have found themselves politically outgunned and outmaneuvered.

Further complicating the quest for counternarratives, many landscape projects—especially monuments and memorials—are financed through private donations.154 Thoroughbred Park in Lexington, for instance, required over $8 million in gifts from individual donors before construction commenced.155 This dynamic creates difficulties for memorial activists concerned about honoring African American heroes and creating spaces that record the diverse experiences of minority groups. The problem, in a nutshell, is that compared to whites, African Americans control far less wealth and, therefore, face larger obstacles navigating the bramble of inflexible costs necessary to remake the built environment.156

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150 Dwyer & Alderman, supra note 16, at 169.
151 Monuments devoted to capturing the spirit of emancipation have been particularly ripe targets for intervention by white elites. The most famous example is Ball’s Freedman’s Monument. Other examples include Ward’s Henry Ward Beecher Monument and Scofield’s Emancipation Panel. For a thorough treatment of the African American presence of Civil War sculpture, see Boime, supra note 41, at 171–79 (arguing that images of emancipation, including the famous Freedman’s Monument “were designed to emphasize the dependence of the emancipated slaves upon their benefactors”). See generally Savage, supra note 45.
152 Savage, supra note 28.
153 Paul A. Shackel, Memory in Black and White: Race, Commemoration, and the Post-Bellum Landscape 180 (2003).
Indeed, in 2007, the financial wealth\(^{157}\) of the median white family hovered around $43,000, while the equivalent African American family’s financial wealth was closer to $500.\(^{158}\) Given these vast disparities in access to capital, it is little wonder that even when black communities have won permission to alter the landscape, they often experience difficulty finding the resources necessary to effect change. The North Carolina Freedom Monument, a large-scale project intended to “recognize and honor the African American experience” on the statehouse grounds, remains unbuilt after nearly fifteen years of fundraising.\(^{159}\) Likewise, the campaign to construct a memorial to African American Civil War veterans in Hagerstown, Maryland has gained very little traction, despite support from the city government.\(^{160}\) Even the well-publicized effort to erect a Martin Luther King, Jr., Memorial on the National Mall languished for years under the weight of weak fundraising efforts.\(^{161}\) African Americans were either unable or unwilling to contribute major gifts to the project, and the sponsors were forced to rely on large corporate donations to fuel construction efforts.\(^{162}\)

At the end of the day, the process of assembling the landscape remains a ruthlessly political endeavor. As the first Part of this Article described, rival interest groups have continuously struggled to embed visual representations of 

\(^{157}\) Financial wealth is a household’s net worth minus the equity it has accrued in owner-occupied housing. This statistic seems especially relevant in the landscape context, as it is unlikely that families would mortgage their homes to make a contribution to a monument campaign or memorial project.


\(^{161}\) See George E. Curry, *Money and the MLK Memorial, St. Louis AM.* (Aug. 25, 2011 12:15 AM), http://www.stlamerican.com/business/local_business/article_8d0eddfe-ce9a-11e0-b1a0-001cc4c002e0.html (discussing details on fundraising and noting the few black donors).

\(^{162}\) *Id.; see also Stephon Johnson, Black Philanthropy Lacking in MLK Memorial Fundraising, N.Y. AMSTERDAM NEWS*, Jan. 13, 2011, at 1, 34 (“[W]hen it comes to donations by millionaire or billionaire African-Americans they seem to be nowhere among the major donors.”).
their histories, their ideals, and their worldviews into the built environment. For 250 years, elite white men have been the decisive winners of this contest, controlling the narratives told through the land and, in the process, erasing some stories from public display. To counteract the problem of landscape unfairness, geographers stress that African Americans and other subaltern peoples should pry open the whiteness of these sites by emplacing their own marks on the landscape. Although this solution to the problem of landscape unfairness has a strong theoretical underpinning, relying on market mechanisms to balance the landscape seems doomed to fail. In addition to the danger of creating a semiotic jumble of monuments and memorial plazas, most African American communities simply lack the political power and financial resources to effect sweeping changes to the built environment. Thus, academics and activists concerned about the representation of African Americans in the landscape should not continue to grasp at the scholarly vapor put forth by geographers, but rather accept the hard demographic realities and seek new levers to help black communities remake their surroundings.

III. LAW & LANDSCAPE: CAN WE BAN RACIALIZED SPACES?

The law remains the most systematic method of providing “high-level, generalized, rules” to manage complex social conflicts.163 It is tempting, therefore, to inquire if the law, as currently practiced and interpreted, can provide an antidote to the problem of racially charged landscapes. What legal strategies could litigants deploy? And, more importantly, would their arguments find any traction in a court of law?

The most direct, and potentially powerful, approach would call upon the law to ban landscapes that perpetuate racist ideologies or alienate minority populations. Such a tactic has obvious promise. Law, unlike geography, offers minority groups a robust stash of weapons to protect themselves against the tyranny of majority decisionmaking.164 During the last fifty years, litigants have proven especially adept at using federal civil rights guarantees to chisel away at the grievous racial harms inflicted on black communities. Courtroom battles to achieve greater school desegregation,165 integrated housing,166 and access to public accommodations have

163 Levinson, supra note 18, at 75.
164 See, e.g., Vikram David Amar, California Constitutional Conundrums—State Constitutional Quirks Exposed by the Same-Sex Marriage Experience, 40 Rutgers L.J. 741, 763 (2009) (“[A] constitution protects minorities from unreasonable and oppressive acts imposed on them through government by the majority—that is, from the potential ‘tyranny of the majority.’”).
all been won under the aegis of federal law. Given this history, it seems plausible that patches of the constitutional text could also help African Americans roll back the worst abuses enshrined in the built environment.

Despite the inherent advantages, pursuing a substantive ban on racialized landscapes would be a mistake. On close inspection, the approach suffers from both practical and conceptual infirmities. As an initial matter, the current shape of American law, as announced by the Supreme Court, would make it difficult for activists to raze racialized spaces through the legal process. During the last two decades, judges have considerably narrowed the ability of litigants to sue government actors under the First and Fourteenth Amendments—the civil rights protections most relevant to the landscape context. A more theoretical difficulty also looms. Even if courts do eventually show an increased willingness to smoke out race-based injustice, it would be unwise to vest judges with the power to interpret culturally contested landscapes. Courts, as a general matter, lack the institutional competence to tease out the meaning and implications of the built environment. Moreover, it is questionable whether those individuals sitting behind the bar—almost invariably members of the cultural elite—are best positioned to ascertain the meaning of spaces they may never see or use.

A. The Practical Problems with Pursuing a Ban on Racialized Spaces

The animating thesis of this section is that activists interested in upending racialized landscapes should rethink any strategy that depends on judicial action. These concerns are chiefly instrumental. Although the text of the Constitution provides an obvious staging ground to contest government actions that shape the meaning of the built environment, in recent years courts have erected “substantial roadblocks to the prosecution of civil rights cases.” These roadblocks will make it difficult, if not impossible, to effectuate a ban on racialized spaces. In fact, the pathway to legal victory appears so constricted that activists’ time, energy, and money seem better spent on political organizing, mobilization, and direct action at the local level.

168 See City of Richmond v. Croson, 488 U.S. 469, 552–53 (1989) (Marshall, J., dissenting) (“[A] majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial justice.”).
169 A stumbling block in the fight against discriminatory spaces is that no government has fashioned a statute or code section that explicitly bans landscapes that ingrain ideas about racial difference. Thus, any attempt to attack the built environment must find cover under some broader piece of civil rights legislation.
171 Id.
1. The Weakness of a Fourteenth Amendment Approach

Some observers will surely argue that the Equal Protection Clause of the Fourteenth Amendment could disrupt at least some of the public landscapes that ingrain archaic ideas about race. The text of the amendment, which provides that no state may “deny to any person within its jurisdiction the equal protection of the laws,” has consistently been interpreted to bar invidious discrimination based upon race. Indeed, a series of landmark cases during the last fifty years has demonstrated the power of equal protection jurisprudence to remove the stigma of racial difference and undo the structures of white supremacy. The decisions in *Brown v. Board of Education*, *Loving v. Virginia*, and *NAACP v. Button* all applied the lever of the Fourteenth Amendment to upend unjust power relationship between white majorities and black citizens.

Despite its illustrious history in the federal courts, the Equal Protection Clause offers little hope for those seeking to midwife an era of racially balanced landscapes. In the Supreme Court’s recent jurisprudence, the justices have shackled the expansive potential of the constitutional text to mend social wrongs. Current case law demands that a litigant challenging a facially neutral

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1 A number of scholars have written that flying the Confederate flag on public property violates the Equal Protection Clause. See, e.g., James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991).

173 U.S. CONST. amend. XIV, § 1.

174 See, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291–92 (1978); Washington v. Davis, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”); Rice v. Sioux City Mem’l Park Cemetery, 349 U.S. 70, 80 (1955) (Black, J., dissenting) (arguing that the Court should not dismiss a claim of racial bias under the Fourteenth Amendment even though the petitioner was the only person affected).


176 388 U.S. 1 (1967).


government action under the Equal Protection Clause satisfy a two-pronged test to maintain a claim. The litigant must first establish that the government’s undertaking produces disproportionate effects along racial lines, and then demonstrate that racial discrimination was a substantial or motivating factor behind the act.179

These requirements, according to scholars, have sidelined many attempts to remedy contemporary racial disparities.180 In particular, academics worry that divining the existence of discriminatory intent among government decisionmakers has become “virtually impossible,”181 “almost impossible,”182 “nearly impossible,”183 “difficult if not impossible,”184 and “prohibitively difficult.”185

Consider the Lexington native who argues that the Confederate memorials emplaced on the courthouse are not only a personal affront, but also a serious violation of the rights conferred by federal law. Could the litigant demonstrate that racial discrimination was a motivating factor in the decisions to erect the Breckenridge and Morgan statues? Although observers agree that white southerners erected Confederate monuments as part of larger campaigns to rewrite the meaning of the Civil War and stake a message of “absolute racial difference” upon the land,186 in Lexington at least, it appears that city fathers avoided making

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180 See, e.g., David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. REV. 935, 951–54 (1989) (discussing how the need to show discriminatory intent fails to address many race-based harms).
181 John J. Delaney, Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Do Land Use Regulations that Preclude Reasonable Housing Opportunity Based upon Income Violate the Individual Liberties Protected by State Constitutions?, 33 U. BALT. L. REV. 153, 186 (2004).
186 Hoelscher, supra note 45, at 663, 671; see also SAVAGE, supra note 45, at 130–39 (examining the racial politics behind the memorialization of Robert E. Lee); Leib, supra note 50, at 190 (“[M]onuments . . . were . . . constructed at the height of the Lost Cause era, when Southern whites were (re)writing the history of the Confederate cause . . . .”).
any overtly race-based statements to the local media.\textsuperscript{187} Thus, even though the landscape has a disparate impact on black citizens, which prevents all community members from making full use of vital public spaces,\textsuperscript{188} the Equal Protection Clause offers no relief.\textsuperscript{189}

Moreover, even if African Americans could present direct evidence that racial discrimination motivated the design of the landscape, southern judges have proved stubbornly resistant to removing racialized symbols from state-owned property. Take, for example, the struggle over the Confederate flag. There can be little argument that racial animus motivated the decision of southern states to revive the Confederate battle flag during the 1950s and '60s.\textsuperscript{190} The events preceding the flag’s reemergence in South Carolina,\textsuperscript{191} Alabama,\textsuperscript{192} and Georgia\textsuperscript{193} all confirm that the symbol was raised, not as a historical artifact, but as a badge of defiance to court-ordered integration in the wake of \textit{Brown}.\textsuperscript{194} Despite the factual record and historical background, courts have routinely rejected claims that the Equal

\textsuperscript{187} I have looked through newspaper archives at the University of Kentucky and have yet to find any direct statements that the purpose of the statues was to oppress African Americans.

\textsuperscript{188} \textit{See supra} Part I.

\textsuperscript{189} \textit{But see} Hunter v. Underwood, 471 U.S. 222, 232 (1985) (striking down a 1901 provision of the Alabama Constitution that denied the franchise to people convicted of crimes of moral turpitude after finding that the law was clearly motivated by racial animus).

\textsuperscript{190} \textit{See Tsesis, supra} note 50, at 601–07.

\textsuperscript{191} \textit{See I. Bennett Capers, Flags, 48 HOW. L.J. 121, 162–63 (2004); Tim Smith, Banner—Traced to One Man Work of Single Racially Motivated Lawmaker Brought Rise of Confederate Flag to Chambers, AUGUSTA CHRON., Jan 30, 2000, at B2.}

\textsuperscript{192} \textit{See Forman, supra} note 172, at 507–08; Claude Sitton, Robert Kennedy Unable to Budge Alabama Governor on Race Issue, N.Y. TIMES, Apr. 26, 1963, at 1.


\textsuperscript{194} James MacKay, a member of the 1956 Georgia legislature that incorporated the Confederate battle flag into the state flag, testified that the Confederate battle flag was adopted as a symbol of resistance to integration. Coleman, 912 F. Supp. at 528. Dan Carter, a professor of southern history at Emory University has testified that “[b]y the mid-1950s, the Confederate battle flag had become the single most important symbol of white supremacy and defiant opposition to federally mandated laws on non-discrimination.” Coleman, 117 F.3d at 529 n.5; see also J. Michael Martinez, \textit{Traditionalist Perspectives on Confederate Symbols, in Confederate Symbols in the Contemporary South} 243, 254–55 (J. Michael Martinez et al. eds., 2000) (discussing the origins of the Ku Klux Klan’s use of the Confederate battle flag). Before World War II, display of the flag “was considered disrespectful unless it was displayed at a reunion or for another important purpose designed to honor memories of veterans who served in the Confederate forces during the war.” \textit{Id.} After the war, the Klan began displaying the flag “as part of a conscious effort to identify its message of intolerance and fear of other races with Confederate symbols.” \textit{Id.} at 255.
Protection Clause mandates the removal of the battle flag from state property.\(^{195}\) \textit{NAACP v. Hunt}\(^{196}\) illustrates the principle in full. In \textit{Hunt}, the Eleventh Circuit determined that the source of the plaintiffs’ grievance stemmed not from the shame and anger caused by viewing the Confederate flag, but an inability to control their “own emotions.”\(^{197}\) Other courts have reached similar conclusions,\(^{198}\) demonstrating that the Fourteenth Amendment offers little shelter to those seeking landscape fairness. Even when plaintiffs have summoned evidence against the discriminatory symbols that mar the built environment, courts have hesitated to impose the guarantee of equal protection.\(^{199}\)

2. The Weakness of a First Amendment Approach

While the Equal Protection Clause may be the first stop in the search for a method to ban racialized spaces, it is not the only plot of constitutional ground worth exploring. Activists may also be tempted to argue that the First

\(^{195}\) Coleman, 117 F.3d at 528 (challenging Georgia state flag); NAACP v. Hunt, 891 F.2d 1555, 1559 (11th Cir. 1990) (challenging “the flying of the flag atop the Alabama capital dome”); Holmes v. Wallace, 407 F. Supp. 493, 494 (M.D. Ala. 1976), aff’d, 540 F.2d 1083 (unpublished table decision) (challenging Alabama’s display of the Confederate flag over the state capitol).

\(^{196}\) 891 F.2d 1555.

\(^{197}\) Id. at 1565.

\(^{198}\) See, e.g., Coleman, 117 F.3d at 530–31 (holding that the incorporation of the Confederate flag within the Georgia state flag does not violate citizens’ equal protection rights); Holmes, 407 F. Supp. at 497 (holding that flying the Confederate flag on the dome of the state capital does not constitute the “deprivation of any rights, privileges, or immunities secured by the Constitution”).

\(^{199}\) Not only does the equal protection doctrine fail to unmake racially divisive geographies, an aggressive reading of the Supreme Court’s Fourteenth Amendment jurisprudence may actually prevent localities from enacting other programs designed to integrate existing spaces. The Supreme Court’s affirmative action cases, in particular, raise a thicket of problems for the notion of landscape fairness. In the affirmative action cases, the Court has been increasingly skeptical of arguments that a particular program is justified because it would combat discriminatory acts that occurred in the past. The position is summed up by Justice Scalia’s statement in \textit{Adarand} that “there can be no such thing as either a creditor or a debtor race. . . . In the eyes of government, we are just one race here. It is American.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part). If the Court’s view holds—that all racial classifications are equally suspect—then attempts to disrupt existing racialized territory by introducing landscape forms that celebrate nonwhite groups may face a stiff challenge. See id. at 224 (majority opinion) (discussing equal protection scrutiny of racial classifications). There is, however, a key difference between affirmative action issues and the problem of landscape fairness. The wrongs imposed by the landscape are not just historical. They continue to emit messages of racial inferiority today. In fact, landscapes bolster the argument that defenders of affirmative action often try to make: “The past is never dead. It’s not even past.” \textit{William Faulkner, Requiem for a Nun} 92 (1950).
Amendment’s guarantee of free speech has the power to invalidate racialized monuments and rebalance the landscape. The argument is easy enough to follow. The guiding light of free speech case law is that the government cannot discriminate against a speaker based upon distaste for his viewpoint or message. Yet when governments construct expressive landscape features like monuments and memorial parks, they invariably make content-based decisions about who has the right to speak in public places.

Examples abound. State officials in Georgia recently agreed to hang a portrait of statesman Sonny Perdue outside of the office of the governor, while simultaneously rejecting a petition to position a portrait of Martin Luther King, Jr. in the same hallway. In choosing to honor Perdue and exclude King, the government validated one group’s speech while displacing the expression of a rival faction—very kind of viewpoint discrimination traditionally barred by the First Amendment. Similarly, Georgia’s decision to erect statues of Confederate icons like John Gordon and Benjamin Hill on the statehouse lawn, rather than using the space to glorify hometown heroes like W.E.B. DuBois, has carved certain

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200 See, e.g., Owen M. Fiss, State Activism and State Censorship, 100 YALE L.J. 2087, 2100 (1991) (“The state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard.”).

201 See, e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (arguing the heart of the First Amendment is the prevention of viewpoint discrimination); Police Dep’t v. Mosley, 408 U.S. 92, 95 (1972) (“[The] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).


203 Joseph Blocher, Viewpoint Neutrality and Government Speech, 52 B.C. L. REV. 695, 726 (2011) (“[A] principled method of distinguishing between government speech and viewpoint discrimination seems impossible to articulate.”); see also LEVINSON, supra note 18, at 83 (“In the age of the activist state, governmental speech is a pervasive method of regulation . . . .”).


206 During the war, Gordon was one of Lee’s most trusted advisors. After the war, Gordon became governor of the state. There is evidence that he also served as the head the state’s Ku Klux Klan. See RALPH LOWELL ECKERT, JOHN BROWN GORDON: SOLDIER, SOUTHERNER, AMERICAN 145 (1989). Hill served in the Confederate Senate and, after the war, became an outspoken critic of Reconstruction. ROBERT PRESTON BROOKS, HISTORY OF GEORGIA 309 n.1 (1913).
(white) voices into the state’s most sacred civic space at the expense of other (blacker) worldviews.

Despite the obvious tension between viewpoint neutrality and landscape design, attacking racialized spaces with the cudgel of the First Amendment will almost certainly fail to transform the built environment. Why? A kink in recent Supreme Court jurisprudence makes it clear that the government’s own expression “is exempt from First Amendment scrutiny.”

That is, when the government speaks, it does not need to maintain even a scintilla of viewpoint neutrality—it can freely choose sides and condemn those who hold beliefs it finds repugnant. A recent case demonstrates that this principle applies squarely to landscape issues. In Pleasant Grove City v. Summum, a religious community known as the Summum sought to place a monument in a public park on the outskirts of Pleasant Grove, Utah. Although the park already hosted an assortment of privately donated sculptures, Pleasant Grove refused the monument, arguing that the piece was inconsistent with the city’s purported message of showcasing local history. The Summum then brought suit under the First Amendment, insisting that the city had engaged in viewpoint discrimination by excluding the group from a public forum intended for the display of permanent monuments.

In a unanimous opinion, the Court ruled against the Summum. The decision noted, as an initial matter, that monuments displayed on public property certainly constitute a form of government speech: “A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for

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207 Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 553 (2005). It should be noted, however, that the government speech doctrine is not limitless. See Pleasant Grove City v. Summum, 555 U.S. 460, 482 (2009) (Stevens, J., concurring) (“For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”); Daniel W. Park, Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values, 45 GONZ. L. REV. 113, 145 (2010) (“The only clear limit on government speech is the Establishment Clause of the U.S. Constitution.”).

208 See Blocher, supra note 203, at 708–09 (arguing that if Democrats controlled the Department of Education, they could, in theory, “decide that all federally funded schoolchildren should be taught that Republicans are vile racists”); Developments in the Law: State Action and the Public/Private Distinction, 123 HARV. L. REV. 1248, 1293 (2010) (“Expansion of the government speech doctrine . . . threatens to erode constitutional protections by allowing the government to discriminate based on viewpoint in an increasingly wide range of circumstances.”). See generally MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

209 Summum, 555 U.S. at 465.

210 Id. (including a display of the Ten Commandments, a historic granary, a wishing well, and a September 11 monument).

211 Id.

212 Id. at 466.
the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.” The opinion by Justice Alito then affirmed that “government speech is not restricted by the Free Speech Clause.” The Court justified the loophole in its commitment to viewpoint neutrality by explaining that the state must have the ability to privilege certain facts and opinions for government to function properly. “If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed,” Alito writes, “debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”

With government speech doctrine standing as good law, it seems near impossible that activists can tame racialized landscapes with the Free Speech Clause. Just as the Summum could not force Pleasant Grove to accept their monument, black Georgians cannot compel the state government in Atlanta to hang a painting of King or install a statue of LeRoy Johnson—the state legislator who desegregated the Georgia General Assembly and pushed to revise the literacy test that had kept many African Americans from voting. In the landscape arena, First Amendment jurisprudence is not a sword to constrain government, but a shield to protect it.

To review, activists intent on unmaking racialized landscapes should think twice before pursuing any strategy that rests on the whims of judicial decisionmaking. Although the text of the Constitution seems to provide lawyers with room to attack discriminatory places, courts have turned an increasingly deaf ear toward civil rights cases based on racial bias. Current legal rules, like the intent standard in Fourteenth Amendment cases and the government speech doctrine in First Amendment disputes, so narrow the opportunity for courtroom victories that memorial activists should shift their efforts toward other, more direct, forms of engagement.

B. The Conceptual Problems with Pursuing a Ban on Racialized Spaces

The doctrinal narrowness of modern civil rights law is not the only difficulty confronting those who seek to outlaw racialized landscapes through judicial action. The approach also suffers from inherent conceptual weaknesses. The problem is twofold. First, there are reasons to be skeptical that courts have the institutional competence to make judgments about the meaning and implications of the built

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213 Id. at 470. It is worth noting that the scope of the Summum decision remains open for debate. A close reading reveals that it may not always be true that all monuments amount to government speech.

214 Id. at 469.

215 Id. at 468 (citing Keller v. State Bar of Cal., 496 U.S. 1, 12–13 (1990)).

environment. Even well-trained readers of the land sometimes struggle to tease out a single, coherent meaning from contested landscapes. Second, aggressive judicial intervention in disputes over cultural ideals often triggers harmful waves of public backlash that undermine the goals of the original ruling.217 As Professor NeJaime has argued, court decisions that compel change “disrupt the natural evolution of social change, thereby provoking backlash” that puts “substantial obstacles in a social movement’s path.”218 In light of these dynamics, even if courts demonstrated a willingness to take a more aggressive stance against racialized spaces, litigants should hesitate before asking them to intervene.

1. A Question of Institutional Competence

As an initial matter, those hoping to vest judges with the power to make legally privileged readings of the landscape should pause and consider whether courts have the competencies required to complete the job in an analytic and objective fashion.219 I worry that they do not. Unlike analyzing a car accident, which draws on a common experience of the everyday person, or applying well-defined legal principles to questions about the admissibility of evidence, assessing the meaning of the built environment would compel judges to engage in sociological and cultural analysis that far exceeds their institutional expertise.220 Few members of the judicial class have any training in the disciplines most concerned with unraveling the meaning of the built environment—geography, architecture, and city planning.221

217 See Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431, 473 (2005) (arguing that court rulings can cause political backlash when “they alter the order in which social change would otherwise have occurred”); see also William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. Pa. L. Rev. 419, 519 (2001) (“The most serious criticism of the Court would be that it has meddled so much in the political process as to have ‘corrupted’ it.”).


219 Many scholars worry that judges lack the competence to interpret legislative history, a subject much closer to their area of expertise than landscape analysis. See, e.g., Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, 50 Stan. L. Rev. 1833, 1833–34, 1858–63 (1998) (discussing the argument against judges interpreting legislative history).

220 See Thomas Healy, Stigmatic Harm and Standing, 92 Iowa L. Rev. 417, 471 (2007) (“Judges may be able to evaluate whether a plaintiff has lost money, faces increased competition, or has been deprived of the ability to enjoy a particular forest. But they are simply not competent to evaluate the meaning of social phenomenon.”).

221 See W. Michael Schuster, Claim Construction and Technical Training: An Empirical Study of the Reversal Rates of Technically Trained Judges in Patent Claim Construction Cases, 29 Quinnipiac L. Rev. 887 (2011). Mr. Schuster analyzed the undergraduate majors of U.S. district court judges, finding that few have degrees in the
Of course, as the previous sections of this Article suggested, a host of places across the country remain so unquestionably infected with archaic ideas about race that even a layman could properly decode them. The downtown of Fort Mill, South Carolina, is home to a monument dedicated to “faithful slaves,” an intersection in central New Orleans commemorates a paramilitary group that worked to disenfranchise African Americans, and sites across the United States paint Native Americans as unenlightened savages.

However, the difficulty with greater judicial oversight of the landscape is that other places offer a more complex set of messages that threaten to stretch courts’ know-how and institutional capacities. Imagine, for example, a statue of Confederate general James Longstreet sitting at the border of a traditionally black neighborhood. During the Civil War, Longstreet loyally served the cause of the South, winning key military victories at Fredericksburg, Second Bull Run, and Chickamauga. Yet, after the struggle, Longstreet defected to the Republican Party, enjoyed a long and successful career working for the U.S. government, embraced equal political rights for African Americans, and led black troops in defense of the Reconstruction-era government of New Orleans. Anyone exposed to even the faintest hint of postmodern theory can spot the dilemma awaiting a court in this case. Given Longstreet’s history, is the statue a spatial primer on white domination, or does it symbolize the possibility of racial reconciliation among formerly antagonistic groups? If reasonable minds could disagree about the interpretation, how would a judge decide which reading to privilege?

social sciences (other than political science and economics). Id. at 923–24. To be fair, these same kinds of problems—actually, these exact problems—regularly pop up in First Amendment cases, especially those involving art. See Christine Haight Farley, Judging Art, 79 Tul. L. Rev. 805 (2005) (describing how judges have struggled to define what constitutes art).


226 Id. at ix.

227 Id. at 167 (detailing Longstreet’s work as United States Commissioner of Railroads).

228 See Jeffry D. Wert, General James Longstreet: The Confederacy’s Most Controversial Soldier 410–11 (1993) (detailing Longstreet’s argument that Southerners must accept the terms offered by the North, including black suffrage).

229 Piston, supra note 225, at 123 (“Longstreet led the state’s largely black troops against the insurgents, many of whom were Confederate veterans.”).
Defenders of substantive bans on racialized landscapes might contend that creative legal thinking can unwind the knot. A court could, for example, establish a presumption as a starting point for analysis. The doctrine could state that if some identifiable group of people reasonably takes offense at a government sponsored message of second-class citizenship, then the challenged landscape would be razed or, perhaps, subjected to some form of heightened scrutiny. 230 Although such an approach would screen out claims by the isolated curmudgeon who sees a racial insult at every turn, it would also raise other seemingly insoluble problems for judges to unlock. For example, would “identifiable groups” of all sizes have the power to raise a claim? Of equal import, a presumption fails to offer any systematic or reliable method for judges to measure what constitutes a “reasonable” response to culturally contested symbols. The consequences of this uncertainty could have far-reaching effects. If courts are handed the authority to demand the destruction of racialized spaces without an objective set of standards to ground their decisionmaking, innocent landscapes might be destroyed, racist places might be preserved, and inconsistent decisions would likely spring up between jurisdictions like mushrooms after a rain.

In sum, there are many reasons to doubt that a panel of judges can competently weigh and evaluate the claims of those who must experience the landscape’s close, visceral presence in the course of their daily spatial routines. At the most fundamental level, judges lack the training to read the messages stitched into the built environment. Moreover, many spaces resist single, clear interpretations, thereby increasing the difficulty of articulating coherent legal tests and, ultimately, enmeshing judges in the midst of disputes that they lack the tools to solve.

2. A Question of Political Backlash

In addition to fears that the entire interpretive project is plagued with ambiguities, a court-centered strategy may also trigger damaging political backlash against landscape fairness issues. An emerging chorus of “backlash scholars” has demonstrated that when courts announce decisions that diverge too sharply from prevailing norms, opponents will endeavor to delegitimize the transformative aspects of the ruling and contest the ethical vision that underpins it. 231 More

231 See, e.g., Carlos A. Ball, The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath, 14 WM. & MARY BILL RTS. J. 1493, 1494 (2006) (examining the political backlash against the gay rights movement and arguing that political backlash is “a foreseeable consequence of controversial judicial victories that require majority groups to reassess in fundamental ways the manner in which they have in the past treated and understood minority groups.”); Klarman, supra note 217, at 473 (arguing that court rulings cause backlash when “they alter the order in which social
specifically, scholars have shown that backlash sparks efforts to restrict the class of individuals protected by the legal change, attacks on the moral worth of the new regime’s beneficiaries, and efforts to catalogue how the ruling results in “unfair, absurd, or otherwise normatively undesirable outcomes.” The danger of these effects is clear: they ultimately impede the realization of the goals of the original lawsuit.

Would a judicial ruling that mandates widespread landscape reform trigger such potentially unproductive results? The answer, almost certainly, is yes. Any decision that orders a dramatic change to the built environment would likely ruffle the feathers of important stakeholders within a community. Take, for example, the landscapes that celebrate the achievements of the Confederacy. These spaces remain the most viscerally racialized places in the South and would be the obvious first targets of a judicial campaign against discriminatory environments.

Nonetheless, large swaths of the region’s citizenry still profess affection for the Lost Cause and continue to value the memorials that transmit its values and creeds. Public surveys reveal that a majority of southerners find it appropriate for public officials to acclaim Confederate leaders, and in certain places a majority of citizens still wish the South had emerged victorious from the war. Consider, too, the recent tumult in Richmond, Virginia, over the fate of Monument Avenue, a cherished row of Confederate memorials. In the mid-1990s, the city council approved a proposal to erect a statue of tennis great Arthur Ashe amidst the statues

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232 Krieger, supra note 231, at 493.

233 See Jonathan I. Leib, Separate Times, Shared Spaces: Arthur Ashe, Monument Avenue and the Politics of Richmond, Virginia’s Symbolic Landscape, 9 CULTURAL GEOGRAPHIES 286 (2002) (outlining the racial politics that underlie Richmond’s monuments to Confederate heroes).


235 David Weigel, How Many Mississippi Voters Wish the South Had Won the Civil War?, SLATE (Apr. 25, 2011, 2:03 PM), http://www.slate.com/blogs/weigel/2011/04/25/how_many_mississippi_voters_wish_the_south_had_won_the_civil_war.html (reporting that only 21% of Mississippi Republicans said they were glad the North won the Civil War).
of Lee, J.E.B. Stuart, and Stonewall Jackson. Although the council never contemplated moving or destroying any of the Confederate statues, tensions between whites and blacks still flared dramatically. One caller to a Richmond radio station commented, “We need to protect our heritage . . . . We don’t need blacks on Monument Avenue . . . . They’ve taken over our city; they’ve tried to take over our government. If you’ve got daughters like I’ve got daughters, they’re trying to take them over, too.”

Given these sociological facts, it seems appropriate to worry that a judicial attack on Confederate landscapes would harden racial attitudes and complicate the implementation of further reforms to the built environment.

Professor Michael Klarman has demonstrated how this dynamic gripped the South in the aftermath of Brown v. Board of Education. He argues, persuasively, that the Brown decision sparked a wave of anger that hampered the enforcement of desegregation orders for nearly a decade. Klarman writes, “By propelling southern politics dramatically to the right on racial issues, Brown created a political climate conducive to the brutal suppression of civil rights demonstrations.” Supreme Court rulings on affirmative action programs have also engendered widespread anger and resentment amongst whites. Many academics believe that the Grutter v. Bollinger and Gratz v. Bollinger

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237 Leib, supra note 233, at 300.
238 See Eskridge, supra note 217, at 519 (“The most serious criticism of the Court would be that it has meddled so much in the political process as to have ‘corrupted’ it.”); Klarman, supra note 217, at 473; (arguing that judicial opinions cause backlash because “they alter the order in which social change would otherwise have occurred”); NeJaime, supra note 218, at 952. Not every academic would agree, however. A handful of scholars contend that fears about backlash have been greatly exaggerated. See Randall Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 HARV. L. REV. 1327, 1330 (1986) (“Given the apparent inevitability of white resistance and the uncertain efficacy of containment, proponents of racial justice should be wary of allowing fear of white backlash to limit the range of reforms pursued.”). As Professor Schragger has argued, there are reasons to be skeptical of activists shaping their “behavior to avoid backlash or to seek to ameliorate conflict in this way. Theories of political backlash are often based on small, historical samples over relatively short timeframes . . . and they tend to overestimate the impact of Court decisions.” Richard C. Schragger, The Relative Irrelevance of the Establishment Clause, 89 TEX. L. REV. 583, 637 (2011). While this observation, as a general matter, may contain a dose of truth, it flounders when confronted with the specific history of disputes over racial justice. Judicial decisions that have attempted to disrupt entrenched racial hierarchies have consistently ignited counterproductive backlashes.
240 Id. at 11.
242 539 U.S. 244 (2003).
decisions have undermined long-term support for race-conscious diversity programs; tastemakers and opinion leaders have rallied against the injustice of “reverse discrimination,” the mere suggestion that the government unfairly disadvantages whites carries “a powerful political punch,” and policies against affirmative action have become law in Washington, California, and Texas. In addition to these fights, disputes over access to integrated neighborhoods, criminal justice reform, and school busing have spawned further recoil from dominant groups that undermines the cause of racial justice.

According to scholars who study backlash, the lesson to be drawn from previous clashes over racial meaning is that judges should not prematurely constitutionalize issues that enflame primordial passions when the nation has yet to reach consensus. “Force of law,” after all, “is often little better than force of arms” in settling matters when the country is intensely divided. Taking this advice to heart, those interested in changing norms about public space should consider a more incremental approach to achieving landscape fairness than a substantive ban. As Professor Dan Kahan puts it, activists are often better off proceeding with “gentle nudges” rather than with “hard shoves.” A slower, step-by-step approach seems poised to ward off complaints that outside agitators have unfairly confiscated prized social endowments. Although not as satisfying to radicals, it may better serve the goal of landscape fairness over the long term.

A close examination of American legal precedents and cultural norms helps explain why racialized landscapes maintain their hold on dozens of cities and towns across the country. First and foremost, racialized spaces often have the firm backing of dominant political groups who seek to inscribe their own versions of history onto the land. And second, direct legal attacks on places that ingrain ideas about racial difference seem both quixotic and conceptually troublesome. Along

249 Levinson, supra note 223, at 1107.
these lines, any successful attempt to improve the balance of the landscape should both empower subaltern communities and navigate the political economy of dominant group decisionmaking at the local level. Otherwise, meaningful change is unlikely to be forthcoming.

IV. LANDSCAPE IMPACT ASSESSMENTS: AN ALTERNATIVE APPROACH

As earlier sections of this Article detailed, the problem of unbalanced, exclusionary landscapes imposes a disparate set of costs on African American populations. In principle, this form of discrimination is a solvable social dilemma. As the success of Kelly Ingram Park demonstrates, municipalities have the capacity to design, build, and maintain spaces that honor African Americans. Again and again, however, local governments have used their discretion to engrave the stories of dominant groups upon the landscape while ignoring the history and perspectives of subaltern communities. Can anything reverse the trend?

The pages that follow argue that what is required to rebalance the landscape is no less than a comprehensive procedural strategy that would integrate consideration of the built environment into the fiber of municipal decisionmaking. The following section begins with a forward-looking proposal. To prevent the production of new discriminatory spaces, a scheme should be implemented that would require municipalities to prepare, publish, and review a detailed impact assessment before approving any proposed construction projects. The document, in a nutshell, would describe the racial impacts of actions that reshape built environment. This Article refers to this initiative as the Landscape Impact Assessment program and argues that it would force local governments to consider the landscape outcomes of their decisionmaking and encourage them to mitigate the inequities caused by new building projects.

The Article then concludes with an attempt to dislodge established sites of discrimination. The regulatory regime envisioned would compel jurisdictions to reassess the divisive landscapes presently embedded within their borders. Specifically, the scheme would enforce a sunset provision on existing monuments and honorary spaces; each memorial in a municipality would face destruction unless the relevant local government deliberated over the meaning of the space and voted to reaffirm its value to the landscape.

This double-barreled approach has several firm advantages. The procedural mandates of both schemes would have the democracy-enhancing virtue of

251 See supra Part I.
252 See supra Part II.
253 See supra Part I.
254 Alexander Bickel, among others, made the case that procedural remedies are particularly appropriate in cases where parties find it difficult to settle on acceptable substantive rules. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 150–53, 177–83 (1962).
exposing the policy process to greater public participation, thus generating better-informed and more racially sensitive decisions.\(^{255}\) In addition, focusing on procedure does not require any sweeping overhaul of the machinery of local government. Many jurisdictions are already familiar with writing impact statements to comply with state-level environmental regulations,\(^{256}\) while the evaluations of older memorials could take place during already-scheduled city council meetings. Finally, this Article puts forth that unlike attempts to outlaw racialized spaces, a procedural approach to landscape fairness will unite the interests of all parties concerned with the fate of the built environment: subaltern groups, dominant political parties, and local governments.

A. Impact Assessments and the Future of the Landscape

1. The Architecture of the Landscape Impact Assessment Program

The goal of the Landscape Impact Assessment (LIA) proposal is to stop the production of discriminatory spaces by encouraging municipalities to consider the racial effects of actions that significantly affect the landscape. Before examining the inherent strengths of this approach, it may be helpful to pause and briefly explain the nuts and bolts of the program. What, exactly, would such a scheme ask of cities?

Under the LIA program, a local jurisdiction would need to complete three core tasks before approving any decision that affects the built environment.\(^{257}\) First, it would produce a draft impact assessment that analyzes how a proposed project would affect the meaning of the landscape. The manufacture of this document is the marrow of the entire LIA project and requires that municipalities engage in more than a mindless exercise in boilerplate. To ensure thoughtful compliance, the scheme would compel governments to describe the landscape at issue, chronicle its history, clarify what the space means to the people who live


\(^{257}\) More specifically, I envision that the LIA requirement would apply to the full spectrum of local government decisions that affect the built environment: infrastructure planning, the approval of development agreements, zoning judgments, historic preservation standards, street renamings, discretionary building permit decisions, and subdivision regulations.
there, and explain whether the proposed construction efforts would negatively impact minority populations or ingrain ideas about racial power.\footnote{258}

The draft LIA would not end with a description of the land. The scheme would also call upon local governments to inform citizen-voters of reasonable alternatives to any proposal that is found to negatively impact minority communities. The scope of this analysis should include discussion of other feasible sites, designs, signage, and technologies that have the potential to mitigate encoded messages of racial power. For example, in a case where a municipality proposed building a Confederate monument in the town square, several alternatives could be imagined—the local government could place the artwork in a less visible location, erect prominent signage questioning the underlying valor of the Confederate cause, or choose to honor a hero from a different age. Following the analysis of the alternate courses of action, the LIA would conclude by providing a nonarbitrary reason for why the government chose to reject those options. The sweep of the LIA would, therefore, reveal the costs and benefits associated with altering the landscape and outline strategies to ameliorate unintended racial consequences.

After completing the draft, the municipality would then need to complete a second critical task: making the report available for review and comment by the citizenry. Under LIA, localities would be required to accept both written comments from citizens and information offered at public hearings. The purpose of the hearings is both to inform local citizens about the possible landscape effects of proposed construction projects and to elicit their views about projected changes.\footnote{259} Importantly, such interventions rarely happen under the current landscape regime. In Lexington, historic preservation officer Bettie Kerr reported that the city held no public hearings to discuss the recent relocation of the statue dedicated to

\footnote{258 A proper analysis of the land would also closely examine the relationship between the proposed action and the spectrum of past, present, and reasonably foreseeable future changes to the built environment. A consideration of these cumulative effects would better capture the landscape’s broad meanings and prevent jurisdictions from segmenting a project into smaller, less burdensome actions. The LIA system could borrow a definition of “cumulative impact” from the environmental context. The Council on Environmental Quality defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions... from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7 (2012).}

\footnote{259 Of course, not everyone remains enthusiastic about the inherent value of public hearings. Critics often complain that community forums offer few useful insights, fail to draw a representative sample of the public, and do little more than legitimate decisions that have already been made. See, e.g., Barry Checkoway, The Politics of Public Hearings, 17 J. APPLIED BEHAV. SCI. 566, 566–72 (1981) (“Public hearings are used to achieve agency ends rather than to make effective use of citizen participation.”); Daniel J. Fiorino, Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms, 15 SCI. TECH. & HUM. VALUES 226, 230–31 (1990) (noting that hearings do not draw a representative sample of the public).}
Confederate General John Breckinridge. Moreover, neither municipal records nor media reports reveal that the city provided any official opportunity for public input into the redesign of the courthouse plaza.

LIAs make such evasions impossible. The system would ensure the robust participation of private citizens by requiring governments to publish the report on the Internet; welcome local advocacy groups into the decisionmaking process; and advertise the meeting through news outlets, in local community centers, and with signs at the site of the proposed project. Additionally, all LIA hearings would take place at a location within the affected community (not in a faraway municipal office building) and after regular work hours, as studies have repeatedly demonstrated that attendance at public hearings spikes if the meetings occur in the evening. These tweaks to the traditional public hearing model will, hopefully, provide minority communities with a meaningful opportunity to comment on the scope of the LIA and on the analysis found in the document.

The final phase of the process would require the LIA drafters to convey to the relevant decisionmakers a final report that reflects on the information gleaned during the period of public intervention. The document should include a response to all substantive written comments and oral remarks received at the public hearing. This requirement is critical since it forces decisionmakers to grapple with criticisms and concerns they might otherwise have overlooked. Although some

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261 The city, it appears, only revealed finalized plans to the public. In its defense, the city notes that the public was free to talk with the designer and elected officials at the unveiling of the plans. See Beverly Fortune, Public Gets View of Downtown Streetscape Improvement Plans, LEXINGTON HERALD-LEADER, July 29, 2009, at D3.
264 See Checkoway, supra note 259, at 567 (explaining the ineffectiveness of advertising only in the legal section of newspapers).
265 Id. (explaining how the location of public hearings affects turnout); Walton & Saroff, supra note 263, at 35 (“An analysis of daytime versus evening hearings indicated that attendance is significantly higher at evening hearings.”).
may raise alarms at the burdens such a condition threatens to impose, note that some environmental regulations enforce a similar obligation, which have not proved overly taxing. 268 Armed with the completed LIA, the final decisionmaker would then have four choices. It could: (1) deny the project’s application because it deems the landscape impacts unacceptable; (2) approve a revised project that includes mitigation strategies designed to reduce landscape discrimination; (3) approve the original project while adopting a finding of “No Observable Effect on the Landscape” (NOEL); or (4) approve the original project and promulgate a “Declaration of Other Concerns” conveying its view that, while the proposed project will have significant adverse impacts on minority communities, other specified considerations justify approval. 269

2. Why the LIA Scheme Works

The thrust of the LIA proposal needs reemphasis here: its mandates are solely procedural. Local governments remain free to approve any and all proposed changes to the built environment, no matter how racially insensitive. Nonetheless, the inner workings of the program have the potential to remake the landscape. The well of the LIA’s power draws from three distinct streams. First, it empowers black communities in their clashes with city hall over the narratives being inscribed on the land. Second, it pushes government officials to consider more sophisticated (and more race-conscious) information when making decisions about the landscape. And third, LIAs mitigate the psychic harms that discriminatory places impose on African Americans. The procedural requirements, in other words, create substantive outcomes.

268 NEPA’s implementation regulations require that an agency must respond to “any responsible opposing view which was not adequately discussed in the draft statement.” 40 C.F.R. § 1502.9(b) (2012).

269 NEPA has a similar, but more extensive, basic format. NEPA requires that an environmental assessment (EA) be prepared by a federal agency to determine if an impact statement is necessary. The EA is a concise summary of the proposed action and the possible environmental effects. If an agency expects no significant environmental impacts it can issue a finding of no significant impact (FONSI) and refrain from authoring the more detailed environmental impact statement (EIS). See Uma Outka, NEPA and Environmental Justice: Integration, Implementation, and Judicial Review, 33 B.C. ENVTL. AFF. L. REV. 601, 603–05 (2006) (explaining NEPA’s basic procedures); Emily M. Slaten, “We Don’t Fish in Their Oil Wells, and They Shouldn’t Drill in Our Rivers”: Considering Public Opposition Under NEPA and the Highly Controversial Regulatory Factor, 43 IND. L. REV. 1319, 1325–28 (2010).
Empowering Black Communities

The LIA scheme upends disputes about the landscape by handing black communities two new weapons in the struggle to return balance to the built environment. First, the structured participation requirements would become an effective tool for citizens to pressure government officials about landscape issues. Currently, parties concerned about the meaning of the built environment must spend considerable organizational and political capital just to establish a beachhead for their voices and interests. To cite one example, in the early 2000s a group of landscape activists in Kentucky struggled to find a space to express their view that the grounds of the state capital excluded African Americans. They careened between appealing to unsympathetic legislators, uncaring agency administrators, and a bemused press corps. Like an echo in the woods, the activists’ arguments quickly faded from public consciousness and found no traction with government decisionmakers.

The LIA program, in contrast, would grant citizens automatic access to the seat of local power. The scheme’s public hearing requirement purposively channels and amplifies criticism of the built environment toward those with ultimate authority over the land. This result substantially reduces the transaction costs of dissent. Citizens who once struggled to organize and obtain information about local construction projects would now know exactly where to voice their frustrations—and government officials would be compelled to listen and


274 The transaction costs of participating in the democratic process can lead to suboptimal policy outcomes. See David A. Super, Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law, 157 U. PA. L. REV. 541, 565 (2008) (“An actor recognizing the value of an option that minimizes burdens on other players may nonetheless eschew cooperative, dialogic policymaking processes for several reasons. First, she may seek to avoid the transaction costs of such processes.”).
Consequently, the number of individuals who voice complaints about discriminatory landscapes and raise questions about the significance of the built environment should swell. It is also worth noting that, as a result of the lower cost of participation, the quality of the debate about the meanings embedded in the landscape will improve. Under an LIA program, activists can expend more effort crafting their arguments about the importance of the physical environment rather than scrambling to find an audience for their complaints.

In addition to the public hearing process, the requirement that a locality explain its actions in written records would also empower African American communities in their attempts to ward off the bruises inflicted by discriminatory places. Written accounts of the decisionmaking process would lead to a heightened level of transparency and public scrutiny over landscape decisions, with consequent political implications that elected officials disregard at their peril. Additionally, the final written LIA document could serve as the basis for lawsuits against the government. Although the LIA has no substantive mandate, persons or groups affected by the landscape decision could still challenge the adequacy of the LIA procedures or the local jurisdiction’s decision to issue a NOEL finding. This threat has already proven effective in the environmental context. Nonprofit groups have routinely used the prospect of litigation under the National Environmental Protection Act—another solely procedural statute—to influence the outcome of local government decisions about the disposal of waste materials, the construction of airports, and the siting of highways. Thus, both theory and

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275 For a rich discussion on the benefits of reducing the costs associated with engaging in dissent, see STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 118–20 (1999).


279 ENVT. LAW INST., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT 28–29 (2010); see also Boling, Making the Connection: NEPA Processes for National Environmental Policy, 32 WASH. U. J.L. & POL’Y 313, 325 (2010) (finding that, on average, “129 lawsuits are filed challenging NEPA compliance each year”); David S. Mattern, Reader-Friendly Environmental Documents:
practice reveal that a comparatively undemanding procedural mandate has the potential to substantially rebalance the dynamic between the white majorities and subaltern groups in their struggles over the fate of the built environment.

(b) Changing Government Behaviors

Beyond empowering black communities, the LIA process also compels government actors to make better-informed and more racially conscious decisions about the fate of the built environment. The scheme advances toward this goal along two fronts. To start, LIAs solve a market failure in the production of information. Under the current land use regime, the meaning of the built environment remains inaccessible to decisionmakers. The government is not required to compile information about the landscape, no other party has sufficient resources or incentives to produce it, nor is it obvious that officials have authority to spend public funds to acquire such information. Thus, even officials who want to prevent the incursion of landscape unfairness into black communities may not have the information necessary to effectuate that goal. LIAs solve this problem. The procedural mandates compel government officials to gather information about the landscape and then review, understand, and address the knowledge that they scrape together. Basic democratic theory suggests that compiling more and better information should enrich the decisionmaking process and produce better outcomes. Empirical studies have largely confirmed this insight—gathering relevant information from a diversity of sources changes the behavior of decisionmakers and, ultimately, generates better and more creative solutions to difficult problems.

Opportunity or Oxymoron?, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,624, 10,625 (2009) (“[B]ecause of NEPA’s procedural nature, the threat of litigation is an obvious and important tool for project opponents.”).

281 The same argument was made about environmental data before the passage of NEPA. See Karkkainen, supra note 276, at 910.

282 As Professor Sunstein has argued, America strives to be a “deliberative democracy in which representatives, accountable to the people, . . . make decisions through a process of deliberation . . . . Without better information, neither deliberation nor democracy is possible. Legal reforms designed to remedy the situation are a precondition for democratic politics.” Cass R. Sunstein, Informing America: Risk, Disclosure, and the First Amendment, 20 FLA. ST. U. L. REV. 653, 658 (1993); see also Cary Coglianese et al., Seeking Truth for Power: Informational Strategy and Regulatory Policymaking, 89 MINN. L. REV. 277, 277 (2004); Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 HARV. L. REV. 1422, 1423 (2011) (“[I]nformation is the lifeblood of effective governance.”); Thomas O. McGarity, Regulatory Reform in the Reagan Era, 45 MD. L. REV. 253, 259 (1986).

283 Deborah Gruenfeld et al., Group Composition and Decision Making: How Member Familiarity and Information Distribution Affect Process and Performance, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 4 (1996) (arguing that the inclusion of a devil’s advocate “can lead groups to generate more arguments, apply more
The LIA system further promises to change legislator behavior by injecting a new policy norm into government: local officials should not sanction projects that engrave racial hierarchy into the landscape. Of course, working in the shadow of a procedural-based law will not immediately alter the behavior of decisionmakers. It is easy to envision bureaucrats occasionally resisting the LIA process by approving developments with obvious and unabated impacts on black communities. Proponents of norm activation theory, however, suggest that to consistently ignore the recognizable harms may not be sustainable. The repeated approval of projects that damage black people and black neighborhoods conflicts strongly with the widely (although not universally) shared taboo against overtly racist acts. Over time, the tension between the harms identified by the LIA and the decisionmakers’ (presumed) antiracist ideals will cause many officials to internalize or accommodate the new norm governing the landscape. They may acquiesce for several reasons (because they were previously sympathetic to the needs of black communities, they desire to act consistently with their internal norms, or they received pressure from peers) but, eventually, their behavior should change under the weight of new expectations.

(c) Undoing the Violence of Memory

The LIA regime offers one final advantage. As the first Part of this Article detailed, the landscape decisions of elected officials effectively erase African American histories from the built environment. Although the LIA scheme cannot

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strategies, detect more novel solutions, use multiple perspectives simultaneously, and generally outperform groups without this type of influence”); Karen A. Jehn et al., Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups, 44 ADMIN. SCI. Q. 741, 747 (1999) (“When a task is complex . . . discussing and debating competing perspectives and approaches is essential . . . . The constructive discussions and debates needed to accomplish complex tasks depend on the availability of informational diversity . . . .”).


285 See, e.g., Daniel Koontz, Hostile Public Accommodations Laws and the First Amendment, 3 N.Y.U. J.L. & LIBERTY 197, 239 (2008) (“Social norms against racism are often sufficient to restrain racist proprietors from expressing their feelings in public, especially considering that proprietors have an economic incentive not to tarnish their reputation.”); Daniel Ibsen Morales, A Matter of Rhetoric: The Diversity Rationale in Political Context, 10 CHAP. L. REV. 187, 218 (2006) (arguing that “there are now strong social norms against overt racism”).

286 See Iglesias, supra note 284, at 504–05.
guarantee the construction of new physical spaces that exalt the black experience, it can help African Americans reclaim territory in the underlying battle over communal memory. A sustained and inclusive deliberation about the meaning of the land would cement African Americans’ own stories within the official histories of cities, counties, and states. Indeed, the true strength of the LIA may rest in its ability to enshrine a mechanism that allows black citizens to bring hidden memories out of the shadows and have them recognized in an official government forum.

Take, for example, the contested history of lynching. Between 1890 and 1968 nearly 3,500 blacks were systematically and brutally killed in communities scattered across the United States. Given the horror, it should surprise no one that reverberations of these deaths can still be felt within African American neighborhoods. “[B]lack Americans,” scholars have observed, “share a kind of communal memory of lynching that is not bound by region or by time,” and continue to view the specter of these incidents as “a powerful source of deep distrust, disconnection, and cynicism . . . between blacks and whites.” Yet, despite the ongoing repercussions, most communities have actively buried this legacy. Rather than confront the history of racial violence, locales have simply ignored the haunting presence of lynching’s memory, denying African


289 IFILL, supra note 79, at xi.

290 IFILL, supra note 287, at 269; see also James Brooke, Memories of Lynching Divide a Town, N.Y. TIMES, Apr. 4, 1998, at A6 (describing the reverberations of a 1925 lynching on the white and black communities in a small Utah town).

291 See IFILL, supra note 79, at 134 (“Some whites simply do not regard these incidents as having continuing relevance . . . . For them, discussing lynching is merely an exercise in dredging up the past . . . .”).

292 See CYNTHIA CARR, OUR TOWN: A HEARTLAND LYNCHING, A HAUNTED TOWN, AND THE HIDDEN HISTORY OF WHITE AMERICA 34, 103 (2006) (reporting that white communities have generally tried to act like lynchings never happened); IFILL, supra note 79, at xiii (arguing that dominant political interests downplay the history and effects of lynching); Garland, supra note 287, at 795 (discussing the attempt to deny and forget lynching); Ifill, supra note 287, at 266 (noting that “few public efforts have been launched to address the devastating history of lynching in the United States”).
Americans the dignity of having their experiences understood and their stories acknowledged.293

The LIA process can help diffuse the raw emotion that haunts such unexamined memories. Lynchings, for example, enter the ambit of the LIA program because the killings had a heavily spatial component; mobs chose the site of their executions for darkly symbolic purposes.294 The offenders’ macabre sense of space often led them to kill their victims on public land within view of the local courthouse, thus reinforcing the message that black bodies stood outside of the protection of the legal system.295 The LIA program would force local communities to examine these episodes. Upon the remodeling or redevelopment of any space where a lynching occurred, a final LIA report (which must discuss race) and the community participation requirements would compel a retelling of previously one-sided stories. The process would drag submerged black perspectives onto firm ground and provide a vehicle to confront the anger and confusions that still unsettle black-white relationships. Moreover, conducting these conversations about the landscape in an official government forum conveys the elementary principle that people deserve to be consulted about decisions that impact their lives.296

The transformative power of reexamining the past is not idle speculation.297 Humanities scholars who study Holocaust remembrance have demonstrated that the debates surrounding the design of a Holocaust memorial generate more sophisticated thought and introspection about the fate of Europe’s murdered Jews than any completed monument.298 As Professor Young observes, continuous

293 See CARR, supra note 292, at 369 (describing lynching as “a living secret” that people “never stopped having feelings about”); IFILL, supra note 79, at 132–53 (arguing that it is critical for victimized communities to have their stories heard); MADISON, supra note 288, at 2 (arguing that communities need “closure” on lynching). Note, too, that lynching also traumatized whites. See IFILL, supra note 79, at 140–41.

294 See WILLIAM FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH, GEORGIA AND VIRGINIA, 1880–1930, at 41 (1993) (showing that “[m]ass mobs chose execution sites for explicitly symbolic reasons”); KARLA F.C. HOLLOWAY, PASSED ON: AFRICAN AMERICAN MOURNING STORIES 62–63 (arguing that “[l]ynch mobs had both a macabre and sick sense of occasion and space”); PATTERSON, supra note 287, at 205 (“The selection of the lynch site was a decision loaded with religiopolitical symbolism.”).

295 See IFILL, supra note 79, at 8–9.


297 Holocaust remembrance has struggled with these issues. See, e.g., JAMES E. YOUNG, AT MEMORY’S EDGE: AFTER-IMAGES OF THE HOLOCAUST IN CONTEMPORARY ART AND ARCHITECTURE 119 (2000).

298 See id. at 92; BRIAN LADD, THE GHOSTS OF BERLIN: CONFRONTING GERMAN HISTORY IN THE URBAN LANDSCAPE 11 (1997) (“The process of creating monuments, especially where it is openly contested, as in Berlin, shapes public memory and collective identity.”); James E. Young, The Counter-Monument: Memory Against Itself in Germany Today, 18 CRITICAL INQUIRY 267, 267–70 (1992) (“[T]he surest engagement with memory lies in its perpetual irresolution.”); see also Pierre Nora, Between Memory and History: Les
reflection can remake and renew the life of memory, while “the finished monument . . . completes memory itself, puts a cap on memory-work, and draws a bottom line underneath an era that must always” unsettle civilized peoples.\textsuperscript{299} Legal theorists, too, acknowledge that deliberation about the past in recognized public forums can reshape the contours of official memory and help heal the wounds of formerly subjected groups. For instance, in her work on truth and reconciliation committees, Professor Ifill shows that many communities have recreated themselves by engaging in difficult, systematic discussions about the traumas hidden within the coils of history.\textsuperscript{300} She notes that the opportunity to challenge official histories is a key element in the reconciliation process and goes “a significant way in balancing the harm done.”\textsuperscript{301}

Summing up, the LIA program has potential to reshape the ways that communities will construct the built environment. The ultimate triumph of the LIA process, however, may not hinge entirely on concrete changes to the landscape. A LIA regime can also succeed by enshrining a more inclusive set of memories into local history and by providing African Americans the opportunity to tell their own stories (in their own voices) to local powers. It is precisely because silence was used to coerce complicity and impose terror in black neighborhoods that truth-telling and public speaking remain so vital to the struggle to define what kind of memory to preserve and in whose name.\textsuperscript{302}

3. Answering Objections

(a) Political Economy

Of course, not everyone will agree that the LIA program mounts an effective assault on the problem of landscape fairness. Skeptics of the idea would have several bridges to defend their fortress. Most notably, this Article has yet to address whether locally dominant political groups would ever willingly adopt an LIA regime. Arguably, the same factions that have worked to construct discriminatory landscape features would conspire to oppose any law that helps black communities defend their interests. Admittedly, this criticism merits scrutiny. Yet, on close examination, the complaint does little to derail the case for landscape impact assessments.

To start, the underlying premise of the critique—that dominant political groups will resist the LIA idea—lacks a solid foundation. LIAs, as mentioned

\textsuperscript{299} YOUNG, \textit{supra} note 297, at 92.

\textsuperscript{300} \textit{See} IFILL, \textit{supra} note 79, at 117–31 (looking at reconciliation and lynching in an international context).

\textsuperscript{301} \textit{Id.} at 128 (quoting T ERESA GODWIN PHELPS, SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS 55 (2006)).

\textsuperscript{302} \textit{Id.} at 127–28.
above, do not command any particular substantive outcome. Instead, the proposal encourages municipalities to draw a diverse set of voices into the decisionmaking vortex and thoughtfully disclose the downstream consequences of its actions. The scheme, in other words, adopts—rather than resists—the political philosophy of groups most likely to oppose the LIA’s underlying aims. The focus on procedure, for example, preserves “individual choice while avoiding direct governmental interference.”

Moreover, the information-forcing component should appeal to those with a pro-market political bent, as it addresses a market failure without otherwise clogging the free flow of ideas. Finally, the inviting rather than punitive design grants all citizens (not just African Americans) an opportunity to participate in shaping the landscape and, consequently, works to diffuse claims that any one group has received special protections or additional rights.

For those not yet convinced, note that sponsors of the impact assessment approach could also make the scheme more politically acceptable by mandating that the LIA documents consider the built environment’s effect on gender as well as race. Geographers have forcefully argued that the landscape plays a dramatic role in the construction of gender identities. Although a feminist critique of the landscape lies beyond the scope of this Article, strong evidence exists that the built environment is not just “scenery for the playing out of gender,” but rather a tool to “shape the ways gender identities and relations are played out, reinforced or modified.”

Women, too, have been denied equal access to important public

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305 The American experience with environmental regulations adds weight to the argument that procedural laws often incite fewer political objections than purely substantive legal rules. The success and longevity of procedure-based statutes like NEPA, the Emergency Planning and Community Right to Know Act, the 1996 amendments to the Safe Drinking Water Act, and California’s Proposition 65, all demonstrate that it remains remarkably difficult to incite public anger or moral outrage against a statute that seeks only to ensure that the parties have contemplated all sides of an issue.
306 See generally A COMPANION TO FEMINIST GEOGRAPHY (Lise Nelson & Joni Seager eds., 2005) (discussing all aspects of the feminist geography including contexts, work, city, body, environment, state, and nation); GILLIAN ROSE, FEMINISM & GEOGRAPHY: THE LIMITS OF GEOGRAPHICAL KNOWLEDGE (1993) (discussing the intersection of feminist thought with the practice of human geography); FEMINISMS IN GEOGRAPHY: RETHINKING SPACE, PLACE, AND KNOWLEDGES (Pamela Moss & Karen Falconer Al-Hindi eds., 2008) (providing a unique, reflective approach to what feminist geography is and who feminist geographers are).
places and excluded from prominent roles in the nation’s memorial landscapes.\textsuperscript{308} Expanding, slightly, the ambit of the LIA report to tackle the intersection of place and gender should capture the additional political support necessary to enact the scheme into law.

\textit{(b) Cost}

Another criticism that opponents could make against the LIA proposal is that its costs would far outweigh any of the ultimate benefits. LIAs, like any government regulation, would impose a new set of expenses on local jurisdictions.\textsuperscript{309} The costs of the program include the hiring of staff to produce and disseminate the draft reports, organize public hearings, and respond to comments received from interested parties about landscape issues. The LIA process would inevitably delay some construction projects, increasing financial costs for developers and their allies. Additionally, legal fees could become a significant expense if activists aggressively challenge the adequacy of a jurisdiction’s compliance with the procedural mandates.

One may accept the full weight of this criticism yet still recognize that a system of LIAs produces valuable society-wide benefits. A reminder of the existing system may help explain. Recall that government agents, under pressure from locally dominant groups, currently use the land to record selective versions of the past—versions that valorize white heroes, fail to acknowledge black suffering, and disregard African American accomplishment.\textsuperscript{310} The distortions and omissions ultimately drive black citizens from important public spaces and discourage their full participation in the polity. Gerald Smith, a professor at the University of Kentucky, asks a question that encapsulates the problem: “Why would African Americans want to go anywhere there’s a confederate soldier? There’s a painful memory in that.”\textsuperscript{311} Arguably, the costs of this current reality—the exclusion of black people from vital civic spaces, the attendant loss of their voices, and the sting of demoralization—far outweigh the monetary expense imposed by an LIA regime. That is, if we put “on-screen” the full panoply of costs that accrue under both systems, we may conclude that the impact assessment approach actually comes with the lower price tag, even though it forces governments to absorb a set of expenses that show up on a municipal budget.

\textsuperscript{308} See \textit{The Dictionary of Human Geography} 244–48 (Derek Gregory et al. eds., 5th ed. 2009).
\textsuperscript{309} Iglesias, \textit{supra} note 284, at 514.
\textsuperscript{310} See \textit{supra} Part I.
\textsuperscript{311} Interview with Gerald Smith, Professor of History, Univ. of Ky. (June 22, 2011).
B. Sunset Provisions and the Landscape’s Past

The LIA scheme would do much to prevent the construction of projects that threaten to carve racial fault lines into the built environment. Even at its best, however, the proposal does not fully untangle the knot of landscape unfairness. The core weakness is easily visible to the naked eye: LIAs would have little power to challenge the divisive landscapes that already mar the American scene. Put more bluntly, discriminatory places built before the passage of an LIA statute would linger on without rebuke, freely transmitting their messages of racial difference from one generation to the next. To patch this hole, this Article envisions a set of regulations that would require municipalities to confront the racialized landscapes presently ensconced within their borders. Specifically, the scheme would enforce a sunset provision on all existing monuments and honorary spaces. In use since the founding of the republic, sunset clauses provide that a government policy will cease to have legal effect on a predetermined date unless a legislature takes affirmative steps to extend the measure.\(^{312}\) Thus, under a sunset regime each memorial in a jurisdiction would face destruction unless the relevant local government deliberated over the meaning of the space and voted to reaffirm its value to the landscape.\(^{313}\)

It is an obvious point that threatening to demolish thousands of cherished monuments raises difficult questions about what kind of memory societies should preserve. Arguably, the destruction of memorial landscapes amounts to an attack on a community’s shared history and cultural understandings. As Professor Brophy has eloquently argued, “[R]emoval . . . threatens our memory of the past. It is not that I have any particular interest in honoring someone like Thomas Ruffin, who . . . wrote an opinion that released a man from criminal liability for abusing a slave in his custody.”\(^{314}\) “Yet,” Brophy writes, “I think we should keep his name on the dormitory on the University of North Carolina campus because it is part of

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\(^{312}\) Black’s Law Dictionary defines a “sunset law” as a “statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.” BLACK’S LAW DICTIONARY 1574 (9th ed. 2009). Defined loosely, we can trace the intellectual lineage of sunsets as far back as Thomas Jefferson, who wrote, “Every constitution . . . and every law naturally expires at the end of 19 years.” Letter from Thomas Jefferson to James Madison, (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 396 (Julian P. Boyd ed., 1958). Additionally, Alexander Hamilton, in The Federalist No. 26, argued in favor of limiting military appropriations for two-year periods in order to encourage periodic legislative oversight of expenditures. THE FEDERALIST NO. 26 (Alexander Hamilton).

\(^{313}\) But see Alfred L. Brophy, The Law and Morality of Building Renaming, 52 S. TEX. L. REV. 37, 46–51 (2010) (discussing complications that could arise from gifts to cities that are conditioned on the presence of memorials).

\(^{314}\) Id. at 66.
our history and because we should remember that there was a time when his ideas were triumphant.\footnote{315}

This argument against upsetting the established order carries with it a heavy theoretical and emotional punch. Ultimately, however, claims that removing monuments amounts to rewriting history are wrongheaded. The fundamental difficulty with Brophy’s argument is that the landscape has never been a neutral record of the past. As this Article has labored to explain, the landscape is a normative discourse fashioned by powerful groups and used to express messages about who belongs and who does not.\footnote{316} Thus, changing the composition of a jurisdiction’s monuments does not erode any universal, objective truth in the name of political correctness; rather, it initiates a process of critically rethinking what values a community holds and who deserves the honor of being remembered in steel and stone.

Forcing locales to reimagine the landscape has two primary benefits for communities. First, a consensus has emerged in the academic literature that legislation with temporal limits produces information effects that ultimately improve decisionmaking.\footnote{317} The logic of the argument is easy enough to follow. To extend the life of a policy encumbered with a sunset provision requires a reboot of the legislative process in later time periods.\footnote{318} Most scholars agree that these subsequent stages of procedure provide an additional opportunity to integrate valuable information into the policy process and guard against the continuation of unwise decisions.\footnote{319} In the landscape context, for example, a sunset provision would compel elected officials to reevaluate its memorial spaces—some of them hundreds of years old. As questions about the value of individual monuments came forward, municipalities would have an opportunity to incorporate fresh scholarly

\footnote{315 Id. at 67.}
\footnote{316 See supra Part I.}
\footnote{318 See Gersen, supra note 317, at 251.}
research into their assessments of the people, places, and events that they have honored. New historical understandings should ultimately push local governments to reappraise the value and meaning of existing landscapes. Some cities may choose to remove a small handful of monuments, but many more should tweak the built environment to promote the inclusion of minority groups and improve the historical accuracy of memorial spaces.

Second, changing the default rule on policy continuation would have the democracy-enhancing virtue of improving oversight and accountability of local politicians. Under the current legal regime, elected officials often choose to sidestep conflicts over controversial spaces rather than risk upsetting a deep-pocketed interest group—like the United Daughters of the Confederacy—that could recruit and fund a credible challenger. Like a lightning flash from a hot cloud, sunset provisions would shatter legislators’ ability to continue ignoring landscapes that marginalize subaltern groups. Faced with the looming destruction of a memorial space, the law would force an elected official to “deliberate” upon racialized places, “come to a new resolution” on their value, and cast a “vote in the face of [potentially angry] constituents.” The accountability that results from requiring legislators to record a position on landscape fairness would open up fresh avenues for localized democratic expression. For the first time, African Americans unsatisfied with the shape of the built environment would know who stands in sympathy with their ideals—and who does not. Legislators who continually vote to re-anchor racialized monuments and memorials would face the potential loss of political support from African Americans (and their allies), and an attendant drop in campaign contributions.

Importantly, these benefits could be achieved at an acceptable cost to municipalities. At first blush, however, observers concerned about the efficiency of local governments may balk at the scale of the undertaking. In New York City alone, over one thousand monuments lie scattered across the metropolis, and in Chicago, the park system hosts nearly two hundred memorial fountains and

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320 See, for example, the recent case of Simkins Dorm at the University of Texas. As new scholarly information came to light about William Simkins, the university fell under more and more pressure to remove his name from a student dorm. Brophy supra note 313, at 37.

321 See, e.g., Finn supra note 319, at 447.


sculptures. Requiring local jurisdictions to evaluate thousands of monuments could, conceivably, throw sand in the gears of municipal government and divert time and resources from more important undertakings. There are two defenses to this claim. First, over the long haul, sunset clauses would promote efficiency and good government by chipping away at the presence of exclusionary landscapes and better integrating minority communities into the social fabric of cities. Second, governments could easily structure sunset clauses to reduce the strain on individual legislators. One promising option would cabin the scope of the sunset program by requiring elected officials to evaluate spaces only after a private citizen filed an official “reassessment request.” Alternatively, the scheme could grant municipal governments a generous ten- or fifteen-year period to assess the monuments and memorial spaces within their borders. Dispersing the work over a larger span of time would allow elected officials to treat the landscape with the moral seriousness it deserves, without encroaching too far on the other business of government. It is also comforting that bigger cities—the places with the most memorial landscapes and the largest burdens under this scheme—have entire departments dedicated to maintaining and evaluating public art. In New York City, for example, both the Art and Antiquities Division and the Design Commission could provide the city with expertise on the most controversial spaces, further lightening the burden of the legislative body.

To sum up, the proposal to regulate monuments through a web of sunset clauses is a purely procedural mandate that does not require any destruction. As with the LIA regime, sunset provisions would not impose unwanted substantive changes on unsuspecting municipalities. Local jurisdictions would remain free to reanchor any landscape features under their control, as long as the legislative body recorded a public vote to reaffirm the threatened monument. Thus, rather than exact a widespread razing of the land, enacting a sunset clause would begin a public conversation about the shape of the built environment and make it more difficult for governments to protect the memorial landscapes that marginalize subaltern groups.

CONCLUSION

It is the spring of 2009 and I am standing under the rotunda of the capitol building in Frankfort, Kentucky. My wife has just taken the oath of office for the

Kentucky Bar and I am trying to find her among a throng of state officials and excited family members. As I wait, my eyes lock on the Jefferson Davis statue.

Looking at Davis, I feel a hot anger crawl under my skin. Why is he here? Why does a state that never joined the Confederacy—a state that sent thousands of its sons to die in Union colors—honor the founder of a republic raised solely to preserve black slavery? The moment suddenly gets worse. A father coaxes his young daughter, dressed in a Mickey Mouse t-shirt and cut-off jeans, to stand in front of the statue. As she looks up at Davis and smiles, her father snaps a picture. The caption on the statue’s pedestal where she rests her hand is the final dagger: “Jefferson Davis: Patriot • Hero • Statesman.”

A landscape like the capitol grounds in Frankfort, Kentucky, would have garnered few supporters in the early days of the American Republic. Many in the founders’ generation liked to claim that democratic governance rendered commemorative landscapes obsolete—a holdover from the days of mass illiteracy and superstition. True memory, it was thought, did not lay sealed in bronze or entombed in earthworks. Rather, it resided in the living hearts of the people.

Since the founders’ time, American opinion has dramatically changed course. Cities and towns now routinely embed histories and conduct meanings through the built environment. Commemorative landscapes have become utterly commonplace. Yet, despite its omnipresence, legal scholarship has not fully examined the role of the landscape in the cultural practices of the nation.

This Article has attempted to fill the scholarly void with three insights. First, the landscape plays a powerful role in shaping how communities think about race and racial power. All too often, a city’s parks, street names, monuments, and memorial spaces conspire to tell stories that praise white achievement, ignore or misrepresent the history of African Americans, and work to physically exclude blacks from important civic spaces. Second, current efforts to reform the landscape seem doomed to fail. The approaches suggested by academics in law and geography either turn a blind eye to the political economy of local decisionmaking or fail to consider entrenched legal precedent. Third, adopting a set of basic procedural requirements that encourage municipalities to consider the landscape’s absences and marginalizations would result in better-informed and more racially sensitive decisionmaking. Procedural rules would force government to internalize values it might otherwise ignore, allow citizen-critics to challenge dominant historical narratives and push communities to view the past (and express its hopes for the future) in much more diverse terms.

327 Reflecting on Congress’ unwillingness to fund a monument to George Washington, John Quincy Adams remarked that “democracy has no monuments.” 1 MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, 433 (Charles Francis Adams ed., Phila., J.B. Lippincott & Co. 1874).