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# Baltimore's Monumental Question: Can the Heightened Social Conscience Against the Confederacy Rewrite the Constitutional Right to Due Process?

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# COMMENTS

## BALTIMORE'S MONUMENTAL QUESTION: CAN THE HEIGHTENED SOCIAL CONSCIENCE AGAINST THE CONFEDERACY REWRITE THE CONSTITUTIONAL RIGHT TO DUE PROCESS?

Blake Alderman

### I. Introduction

Monuments are preserved in order to remember, educate the public on, and acknowledge the monuments' historical significance. Maryland's monuments are designated by two authorities: the Board of the Maryland Historical Trust and smaller municipal commissions.<sup>1</sup> The Board examines local monuments to be submitted to the national registry, whereas the smaller commissions are appointed and operate to preserve local Baltimore monuments.<sup>2</sup> On June 30, 2015, Baltimore City Mayor Stephanie Rawlings-Blake announced the creation of a Special Commission to review all Baltimore City Confederate historical monuments.<sup>3</sup>

The Commission's appointment stems from a recently heightened national awareness of racism embedded in government culture. In the past year, racial tensions have increased between African-American citizens and the government through both physical violence and symbolic messages. Following a United States Supreme Court ruling on governmental issuance of license plates bearing the Confederate flag, Maryland and other states faced the challenge of Confederate symbols in their own communities.<sup>4</sup> Maryland faces a unique challenge of balancing state-protected historical monuments, the citizens' interest in

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1. *See generally* MD. CODE ANN., LAND USE § 8 (2016) (delegating authority to afford historic preservation protection between the State and local authority); *see also* MD. CODE ANN., STATE FIN. & PROC. § 5A (2016).
  2. MD. CODE ANN., LAND USE § 8-201 (2016).
  3. Stephanie Rawlings-Blake, *Mayor Rawlings-Blake Announces Review of Baltimore's Confederate Statues*, CITY OF BALTIMORE (June 30, 2015), <http://mayor.baltimorecity.gov/news/press-releases/2015-06-30-mayor-rawlings-blake-announces-review-baltimore%E2%80%99s-confederate-statues>.
  4. *See* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

them, and whether the present societal culture demands the removal of some, if not all of Baltimore City's Confederate monuments.

This comment will address whether the mayor of Baltimore City and a specially elected city commission may legally authorize the removal of historically protected Confederate monuments when removal constitutes deprivation of a property interest.<sup>5</sup> The citizens satisfy enacted state criteria in order to be beneficiaries of historical and educational monument preservation, creating a legitimate claim to the continued receipt of those acknowledged benefits.<sup>6</sup> This comment will also address whether Baltimore City and the Special Commission's actions have complied with procedural due process protections afforded to citizens' property interests.<sup>7</sup>

Following six months of investigation, the Commission recommended in January 2016 that the Roger B. Taney Monument and the Robert E. Lee and Thomas J. "Stonewall" Jackson Monuments be removed.<sup>8</sup> The Commission must prepare an official report for Mayor Rawlings-Blake, who will have the final say on the monuments' fates.<sup>9</sup> Although the report is slated for release in early spring, as of March 11, 2016, nothing has been published.<sup>10</sup>

## II. Background

### A. *The Policy of Preservation in Baltimore City's Commission for Historical and Architectural Preservation*

Baltimore has gained the moniker of "Monumental City" due to the large number of historic monuments standing within Baltimore City alone.<sup>11</sup> In furtherance of the title, Maryland "was the first municipality in the United States to design a comprehensive program for the preservation of its outdoor monuments."<sup>12</sup> The Maryland code recognizes the historical preservation of monuments in two places: the land use and real property article and the finance and procurement arti-

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5. See *infra* Part IV and accompanying analysis.

6. See *infra* Part IV and accompanying analysis.

7. See *infra* Part IV.(D-E) and accompanying analysis.

8. Luke Broadwater, *Baltimore City Commission Recommends Removal of Two Confederate Monuments*, BALT. SUN (Jan. 14, 2016), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-confederate-monuments-20160114-story.html>.

9. *Id.*

10. *Homepage*, SPECIAL COMMISSION TO REVIEW BALTIMORE'S PUBLIC CONFEDERATE MONUMENTS, <http://baltimoreplanning.wix.com/monumentcommission> (last visited March 11, 2016).

11. Conservation of Baltimore City's Monuments, Memorials & Sculpture by the Commission for Historical & Architectural Preservation Commission, CITY OF BALTIMORE, <http://archive.baltimorecity.gov/Government/BoardsandCommissions/HistoricalArchitecturalPreservation/MonumentsandConservation/MonumentProgramExhibit.aspx> (last visited March 11, 2016).

12. *Id.*

cle.<sup>13</sup> The two statutory distinctions refer to different bodies governing Maryland historical preservation. The finance article governs the Maryland Historical Trust and, in pertinent part, the Trust's board, which examines, prepares, and suggests historical monuments on a national scale.<sup>14</sup>

Maryland statute allows the creation of a commission to review subjects of historical designation.<sup>15</sup> Any such commission is required to contain at least five members with a majority residing in the jurisdiction in which the commission is created.<sup>16</sup> Although a catch-all provision in the statute allows the appointing jurisdiction to appoint members within specific areas of expertise, commission member requirements as a whole are directed towards informed historical monument preservation.<sup>17</sup> Maryland jurisdictions, such as Baltimore City, have the power to elect commissions to determine and designate local historical monuments.<sup>18</sup> To serve this purpose, every jurisdiction has the authority to elect commissions subject to statutory requirements.<sup>19</sup> In 1964, Article Six of the Baltimore City Municipal Code established the Commission for Historical and Architectural Preservation ("CHAP") through the Department of Planning.<sup>20</sup> CHAP's members are appointed by the mayor and work in the City's Department of Planning.<sup>21</sup>

On December 8, 2015, CHAP adopted new rules and regulations for historic preservation and historic preservation guidelines pursuant to the City code requirements.<sup>22</sup> CHAP's adopted mission statement is to "enhance and promote the culture and economy of Baltimore through the preservation of buildings, structures, sites, and neighborhoods that have aesthetic, historic, and architectural value" in ways including, but not limited to, conserving monuments, providing preservation-oriented recommendations to the local government, and coordinating with other City agencies.<sup>23</sup> CHAP's rules embody the

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13. See *supra* note 1 and accompanying text. See *infra* notes 14-15 and accompanying text.

14. MD. CODE ANN., STATE FIN. & PROC. § 5A-311 (2016).

15. MD. CODE ANN., LAND USE § 8-201 (2016).

16. § 8-202.

17. § 8-202(b)(2).

18. § 8-104.

19. § 8-201, 202.

20. *Baltimore City Historic Preservation Rules and Regulations*, CITY OF BALTIMORE, 1 (Dec. 8, 2015) [hereinafter *CHAP Rules and Regulations*] <http://chap.baltimorecity.gov/sites/default/files/CHAP%20RULES%20AND%20REGULATIONS%2012%209%2015.pdf>.

21. *Id.*

22. BALTIMORE CITY, MD., REV. ORDINANCE 15-408, art. 6, § 2-11 (2015); *CHAP Rules and Regulations*, *supra* note 20, at 1; *Baltimore City Historic Preservation Design Guidelines*, CITY OF BALTIMORE (Dec. 8, 2015), <http://archive.baltimorecity.gov/Portals/0/agencies/chap/public%20downloads/NEW%20CHAP%20DESIGN%20GUIDELINES%20-%2012%208%2015.pdf>.

23. *CHAP Rules and Regulations*, *supra* note 20, at 1.

statutory policy of preservation by enacting additional procedural safeguards, such as hearings, to further protect historical material.

*B. Constitutionally Protected Property Interests*

The Due Process Clause of the Fifth Amendment provides that “no person shall be deprived of life, liberty, or property, without due process of law.”<sup>24</sup> Due process requirements are equally applied to the states through the Fourteenth Amendment, as well as through due process provisions in state constitutions.<sup>25</sup> The creation of an individual property interest protected by procedural due process begins with affirmative and independent state action.<sup>26</sup> The U.S. Supreme Court has been hesitant to explicitly define the state action required to create a property interest, but has established a required threshold a valid property interest must meet.<sup>27</sup> Property interests sufficient to invoke the Due Process Clause require “more than an abstract need or desire for it. He must have more than a unilateral expectation. He must, instead, have legitimate claim of entitlement to it.”<sup>28</sup>

*C. The Present Renewed Interest in Maryland’s Confederate Monuments*

On June 18, 2015, the U.S. Supreme Court ruled in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* that license plates were government speech, therefore holding the state’s denial of an application for license plates printed with the Confederate flag as constitutional.<sup>29</sup> The decision was public and controversial, highlighted by an increase in racism-fueled violence. On the same day the U.S. Supreme Court

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24. U.S. CONST. amend. V.

25. U.S. CONST. amend. XIV § 1; M.D. CONST. art. 24 (“That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”).

26. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

27. *But see Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972). “[T]he range of interests protected by procedural due process is not infinite.” *Id.*

28. *Id.* at 577.

29. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2256 (2015) (5-4 decision) (Alito, J., dissenting). “Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?” *Id.* at 2256 (comparing the majority’s analysis of Confederate license plates).

announced its decision, a shooting occurred in Charleston, South Carolina.<sup>30</sup> Dylann Storm Roof, a twenty-one-year-old white man, killed nine African Americans during a Bible study.<sup>31</sup> After he was apprehended his anti-black views were made public, specifically the use and promotion of the Confederate flag.<sup>32</sup>

Following the shooting and South Carolina citizens' demands that the Confederate flag be removed from flying at the state capitol, Mayor Rawlings-Blake announced the creation of a Special Commission to examine all of the City's Confederate historical monuments. Of the seven individuals appointed to the Special Commission, four are members of CHAP.<sup>33</sup> The four monuments examined are "the Confederate Soldiers and Sailors Monument on Mount Royal Avenue, the Confederate Women's Monument on West University Parkway, the Roger B. Taney Monument on Mount Vernon Place, and the Robert E. Lee and Thomas J. "Stonewall" Jackson Monument in the Wyman Park Dell."<sup>34</sup>

#### D. *The Historical Relevance of the Monuments*

##### i. Historical background of the monuments not recommended for removal

The Confederate Soldiers and Sailors Monument, also known as the Spirit of the Confederacy Monument, was erected in 1903 to commemorate the Civil War.<sup>35</sup> The statute depicts an angel supporting a wounded Confederate soldier and bears the inscription "Gloria Victis" or, "Glory to the Vanquished."<sup>36</sup> In 1918, the Civil War was commemorated again in the erection of the Confederate Women Monument.<sup>37</sup> The monument portrays two women, one of whom is caring for a soldier, and is inscribed with "In difficulty and danger, regardless of self, they fed the hungry, clothed the needy, nursed the wounded and comforted the dying."<sup>38</sup> The monuments are not representative of in-

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30. Nick Corasaniti, et al., *Charleston Massacre Suspect Held as City Grieves*, N.Y. TIMES (June 19, 2015), <http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html>.

31. *Id.*

32. *Id.*

33. Rawlings-Blake, *supra* note 3.

34. *Id.*

35. *Maryland Military Monument Inventory*, MD. DEP'T OF VETERANS AFFAIRS (Jan. 2014), <https://veterans.maryland.gov/wp-content/uploads/sites/2/2014/03/Jan-2014-MMM-Inventory.pdf> (indexing monuments from the Governor's Commission on Maryland Military Monuments).

36. *Spirit of the Confederacy Monument in Bolton Hill*, MONUMENT CITY, <http://monumentcity.net/2009/04/01/confederate-soldiers-sailors-monument-baltimore-md/> (last visited March 11, 2016).

37. MD. DEP'T OF VETERANS AFFAIRS, *supra* note 35.

38. *Confederate Women of Maryland Monument*, MONUMENT CITY, <http://monumentcity.net/2009/04/01/confederate-soldiers-sailors-monument-baltimore-md/> (last visited March 11, 2016).

dividuals, but rather of how the Civil War affected women and young soldiers. Based on the Special Commission's recommendation, the glorification of a group is more socially acceptable than of specific individuals.<sup>39</sup> Accordingly, the Special Commission voted six to one to keep the two monuments, but to "add context" to address the racial implications of the Civil War.<sup>40</sup>

ii. Historical significance of the monuments recommended for removal

The Roger B. Taney Monument on Mount Vernon Place is an 1887 recast of the original 1871 monument in front of the Anne Arundel County State House.<sup>41</sup> The re-casted monument depicts the U.S. Supreme Court Justice in his judicial robes holding a copy of the United States Constitution.<sup>42</sup> Born in Calvert County, Maryland, Justice Taney sat on the U.S. Supreme Court from 1836-1864.<sup>43</sup> Despite his near thirty-year term, Justice Taney is most remembered for authoring the majority opinion in *Dred Scott v. Sandford*.<sup>44</sup>

The "Lee-Jackson" Monument is the most recent monument commemorating the Civil War, with its erection in 1948, and depicts two of the War's famous generals.<sup>45</sup> The monument is inscribed with quotations from both generals.<sup>46</sup> General Lee is quoted with the phrase, "Straight as the needle to the pole Jackson advanced to the execution of my purpose," while General Jackson's inscription reads, "So great is

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39. Broadwater, *supra* note 8.

40. *Id.*

41. Roger B. Taney, (sculpture), SMITHSONIAN ART INVENTORIES CATALOG, <http://siris-artinventories.si.edu/ipac20/ipac.jsp?uri=full=3100001~!11336~!0#focus> (last visited March 11, 2016); Roger B. Taney, Md. STATE ART COLLECTION, [http://msa.maryland.gov/msa/speccol/sc1500/sc1545/apc\\_website/apcsculpture\\_taney.html](http://msa.maryland.gov/msa/speccol/sc1500/sc1545/apc_website/apcsculpture_taney.html) (last visited March 11, 2016).

42. Taney, (sculpture), *supra* note 41.

43. Taney, Md. STATE ART COLLECTION, *supra* note 41.

44. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (rejecting a slave's argument that his domicile in a free state under the Missouri Compromise established citizenship that would permit him to sue his owner for freedom), *superseded by* U.S. CONST. amend. XIV (1868); *but see id.* at 425. "For if the father of young Darnall had manumitted him in his lifetime, and *sent him to reside in a State which recognized him as a citizen*, he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, *as a citizen of the United States*; and the *State officers and tribunals would be compelled, by the paramount authority of the Constitution, to receive him and treat him as one of its citizens*, exempt from the laws and police of the State in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although *such laws were deemed by it absolutely essential to its own safety.*" *Id.* at 425 (emphasis added).

45. MD. DEP'T OF VETERANS AFFAIRS, *supra* note 35.

46. *Lee-Jackson Monument*, (sculpture), SMITHSONIAN ART INVENTORIES CATALOG, <http://siris-artinventories.si.edu/ipac20/ipac.jsp?session=14T736937B7C9.7247&profile=ariall&uri=link=3100009~!1171503~!3100001~!3100002&aspect=Browse&menu=search&ri=2&source=~!siartinventories&term=Lee-Jackson+Monument%2C&index=ALTIT> (last visited March 11, 2016).

my confidence in General Lee that I am willing to follow him blindfolded.”<sup>47</sup> The bottom of the statue bears the artist’s signature and an inscription that states, “They were great generals and Christian soldiers and waged war like gentlemen.”<sup>48</sup> In addition to depicting figures central to the Civil War, the monument was the first double equestrian monument in both the United States and Europe when erected in 1948.<sup>49</sup>

### III. Issue

#### A. *Whether Historic Monuments Provide Benefits Sufficient to Create a Valid and Constitutionally Protected Property Interest for Baltimore and its Citizens*

The U.S. Supreme Court has continuously held that legitimate property interests have existed where an individual was “receiving. . . benefits under statutory and administrative standards defining eligibility for [those benefits]. . . has an interest in continued receipt of those benefits that is safeguarded by procedural due process.”<sup>50</sup> The government benefits from historical preservation are codified in Maryland’s land use article as “the *preservation and appreciation* of those sites, structures, and districts for the *education and welfare of the residents* of each local jurisdiction.”<sup>51</sup> Maryland statute extends these benefits with other eligibility requirements that proposed monuments must meet in order to gain the protection benefit associated with historic preservation.<sup>52</sup>

#### B. *Whether Removal of Historic Monuments and Its Benefits Violates a Valid and Constitutionally Protected Property Interest for Baltimore and Its Citizens*

Baltimore City has enacted CHAP’s rules and regulations which contain criteria to become a member of CHAP.<sup>53</sup> Baltimore City, pursuant to and in accordance with the land use article of the Maryland

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47. *Id.*

48. *Id.*

49. CINDY KELLY, *Lee and Jackson Monument, 1948*, in *OUTDOOR SCULPTURE IN BALTIMORE: A HISTORICAL GUIDE TO PUBLIC ART IN THE MONUMENTAL CITY* 198, 198-199 (The Johns Hopkins Univ. Press ed., 2011), available at [http://media.wix.com/ugd/ce643a\\_3fc2ea66caf5488bac679f5142e88552.pdf](http://media.wix.com/ugd/ce643a_3fc2ea66caf5488bac679f5142e88552.pdf).

50. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972) (holding that a person entitled to welfare benefits by meeting statutorily imposed requirements had a continued property interest in receiving them); see *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also *Flemming v. Nestor*, 363 U.S. 604 (1960).

51. MD. CODE ANN., LAND USE § 8-104(b) (2016) (emphasis added).

52. § 8-102 (requiring a purported monument to be a “site, structure, or district of historic, archaeological, or architectural significance” for historical preservation).

53. See *infra* Part IV.C.ii and accompanying analysis.



code, has enacted implicit statutory criteria to determine eligibility for the benefits of historic preservation.<sup>54</sup> The citizens not only meet CHAP's member criteria, but also meet the statutory requirements of local residents with a direct interest in local economy, tradition, education, culture, and welfare, rendering them eligible to receive the benefits associated with historic preservation.<sup>55</sup> The citizens, as individuals and a whole, meet incorporated requirements to participate in CHAP, gaining those educational and cultural benefits associated with a public dialogue on historical preservation.<sup>56</sup> This comment will address whether the City and the Special Commission's removal of the monuments implicates and denies the citizens property interest in continuing to receive those benefits.<sup>57</sup>

*C. The Disparity Between the City's Actions, Policy in Support of Historic Preservation, and the Special Commission's Recommendation to Remove Historical Confederate Monuments*

Baltimore City has repeatedly acknowledged and reaffirmed the benefits associated with monument preservation.<sup>58</sup> This comment will address Baltimore's explicit recognition of the citizens' benefits by not only their place in CHAP's newly adopted regulations, but also in the City and State code.<sup>59</sup> The Due Process Clause provides that no persons may be denied their life, liberty, or property without due process of law.<sup>60</sup> This comment will also address how Baltimore City's affirmative action in maintaining these benefits impacts the application of due process when removal of the monuments constitutes city action removing existing government benefits.<sup>61</sup>

Both CHAP and the Special Commission are governed by the land use article of the Maryland code on historic preservation.<sup>62</sup> Clear legislative intent mandates commission operation under a policy of preservation, not of removal.<sup>63</sup> Although the Special Commission's recommendation is subject to the mayor's final decision, the Special Commission's recommendation to remove the monuments is in direct contrast with codified public policy as well as CHAP's recently enacted mission statement.<sup>64</sup> This comment will address that, even in the ab-

54. See *infra* Part IV.C.iii and accompanying analysis.

55. See *infra* Part IV.C.iv and accompanying analysis.

56. *Id.*

57. See *infra* Part IV(D-E) and accompanying analysis.

58. See *generally infra* Part IV.C and accompanying analysis (examining the ways in which Baltimore City has recognized the benefits of historic preservation through statutory law and substantive municipal law).

59. See *infra* Part IV.B.i-ii and accompanying analysis.

60. U.S. CONST. amend. V.

61. See *infra* Part IV.D-E and accompanying analysis.

62. See *generally* Md. Code Ann., Land Use §§ 8-101 – 8-501 (2016) (governing historic preservation in Maryland).

63. § 8-102 (2016).

64. *CHAP Rules and Regulations*, *supra* note 20 at 1.

sence of a constitutional violation, there is a glaring disparity between Maryland's unwavering policy in support of historical preservation and the Special Commission's recommendation to the mayor.<sup>65</sup>

#### IV. Analysis

##### A. *The Municipality of Baltimore City and Its Citizens Both Have the Standing Required to be Parties to a Civil Claim of Unconstitutional Government Action*

In order to successfully assert a claim of unconstitutional action, not only must Baltimore citizens have standing to bring a claim, but also assert that Baltimore City is amenable to be sued. Valid citizen standing exists pursuant to Section 1983 of the United States Code, providing any person deprived of constitutional rights through state action with the remedy of a civil claim.<sup>66</sup> Following codification, the U.S. Supreme Court has struggled to determine whether the provided remedy allows a claim to be brought against a state or municipal government.<sup>67</sup> The U.S. Supreme Court conducted extensive inquiries into legislative intent and the statute's overall history.<sup>68</sup> Following the Court's decision in *Monell v. Department of Social Services of City of New York*, a local government entity has no qualified immunity "when implementation of its official policies or established customs inflicts the constitutional injury" and may be subject to suit as a result.<sup>69</sup> Baltimore City's charter explicitly defines itself as a corporate entity with the capacity to sue and be sued.<sup>70</sup> Prior to the merits of the Baltimore citizens' claim of unconstitutional action, both parties are qualified and amenable to be sued.

##### B. *Baltimore City Has Repeatedly Acknowledged the Social, Educational, and Cultural Benefits Stemming from Monument Preservation*

The preservation of history serves multiple purposes.<sup>71</sup> In memorializing significant aspects and figures from the past, the present devel-

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65. See *infra* Part IV.D-E and accompanying analysis.

66. Civil Rights Act of 1871, 42 U.S.C. § 1983 (2016).

67. See *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]), *overruled by Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 665 (1987) (stating that a "fresh analysis of the debate on the Civil Rights Act of 1871" required overruling previous decisions). See also *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

68. *Monell*, 437 U.S. at 665-668 (focusing on the historical debates of H.R. 320's Sherman amendment prior to codification).

69. *Id.* at 708; *but see Moor v. County of Alameda*, 411 U.S. 693, 710 (1973) (holding that a municipal government is not vicariously liable for government-employed police officer).

70. Charter of Baltimore City, ch. 351, art. I § 1 (2014); see *infra* note 81.

71. *Introduction to MANAGING HISTORIC SITES AND BUILDINGS: RECONCILING PRESERVATION AND PRESERVATION*, 2 (Gill Chitty & David Baker, eds. 1999).

ops context and insight for those depicted. Arguably, one of the most important reasons for historic preservation is in favor of future insight and development. By preserving both the good and bad parts of history, the present society is not only informed of historical achievements, but also aware of mistakes once made and to be avoided in the future.<sup>72</sup> The ethical benefits to cities and citizens alike confirm the need for the protection of landmarks and other historical markers, specifically monuments.<sup>73</sup> Confederate monuments, as standing reminders of all implications of the Civil War, provide the benefits of historical education, social understanding, and cultural inheritance.<sup>74</sup>

- i. The existing government benefits from historic preservation are recognized by the City's continuous efforts in conservation and protection

In the last fifty years, Baltimore City, both by its own actions through the mayor and CHAP, has undertaken multiple campaigns and fundraising efforts to promote historical preservation and protection.<sup>75</sup> Following its founding in 1964, CHAP worked with various Baltimore City Mayors for the specific purpose of preserving and protecting historical monuments.<sup>76</sup> CHAP's 1977 inventory of Baltimore City's monuments and historic buildings found 123 monuments within the municipal borders.<sup>77</sup> Between 1980 and 1986, Baltimore City and CHAP jointly funded and executed "The Baltimore Bronze Project" in efforts to preserve and rehabilitate the City's forty-five bronze historical monuments.<sup>78</sup> CHAP's authority merged with the Baltimore City Department of Planning in 2004 to specifically dedicate more funds to historic monument preservation.<sup>79</sup>

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72. *Id.* at 2 (stating "Preservation of what has been inherited from the past is a matter for ethical framework.").

73. *Id.*

74. *Id.* (stating "These [monuments] can be sources of confusion, and, at the same time, valuable in a holistic view of the historic environment. What is now becoming understood as a truly 'sustainable' approach seeks to retain a full range of options for choice in the future, and not to diminish long term historic assets for the short-term purpose of making them instantly and easily intelligible.").

75. See generally Kathleen G. Kotabara, *A Report on the Conservation of Baltimore City Monuments, Memorials, & Sculpture*, COMM'N FOR HISTORICAL & ARCHITECTURAL PRES. (CHAP) (December 2013) [hereinafter "Monument Report"], available at <http://www.baltimorecity.gov/sites/default/files/CHAPs%20Monument%20Program%20Publication%202013%20Update.pdf> (reporting all CHAP activity in monument preservation).

76. *Id.* at 2.

77. *Id.* (stating that "CHAP was given this responsibility because of its mission, expertise, and ordinance requirements. (Article 6 of the Baltimore City Code.)").

78. Monument Report at 3.

79. *Id.*

CHAP's recent efforts reiterate not only the City's understanding of the importance of preservation, but also the understanding of its citizens. In 2007, Baltimore citizens volunteered in conjunction with the City to establish "a new City-wide Adopt-A-Monument Program, intended to supplement the City's investment in monument conservation."<sup>80</sup> The citizens most recently used their Adopt-A-Monument program for the "Lady Baltimore" project, funding both the removal and preservation of the original sculpture and the creation of a replica sculpture on the Baltimore Battle Monument.<sup>81</sup> The continued actions of Baltimore City and its citizens to preserve historic monuments indicate mutual recognition of the historical, educational, and cultural benefits resulting from their conservation.

- ii. The benefits of historic preservation are codified in the Maryland code, the Baltimore City code, and CHAP's rules and regulations

State action regarding the preservation of historical monuments is given significant statutory weight in its codified public purpose: "to preserve sites, structures, and districts of historical, archaeological, or architectural significance and their appurtenances and environmental settings."<sup>82</sup> The land use article of the Maryland code provides the option to elect commissions to further achieve that purpose.<sup>83</sup> In addition to membership and appointment requirements, the code specifically defines the purpose and powers of all commissions.<sup>84</sup> The public purpose of a commission is "to *preserve sites, structures, and districts of historical. . . significance.*"<sup>85</sup> An identical provision is enacted in the subtitle of the Baltimore City code governing CHAP.<sup>86</sup>

On December 8, 2015, the Baltimore City Department of Planning approved CHAP's proposed rules and regulations.<sup>87</sup> In addition to internal rules and procedures for committee action, CHAP established "Criteria for Evaluation" to evaluate potential subjects of historic preservation.<sup>88</sup> In determining historical significance, CHAP considers what, if any, benefit the monument provides in its preservation:

The quality of significance in Baltimore history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, public interiors, structures, and objects

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80. *Id.* at 5.

81. *Id.* at 7.

82. MD. CODE ANN., LAND USE § 8-102 (2016).

83. *See generally* § 8-2 (allowing the creation of historic preservation commissions and defining their purpose and authority).

84. §§ 8-101, 102, 201, 202, 205, 302, 303, 305.

85. § 8-102 (emphasis added).

86. BALTIMORE CITY, MD., CODE § 2-9 (2015).

87. *CHAP Rules and Regulations, supra* note 20, at 8; *See generally* BALTIMORE CITY, MD., CODE § 2 (2015) (governing CHAP's creation, authority, purpose, and procedures.).

88. *CHAP Rules and Regulations, supra* note 20, at 8.

that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

1. That are associated with *events that have made a significant contribution to the broad patterns of Baltimore history*; or
2. That are associated with the *lives of persons significant in Baltimore's past*; or
3. That embody the *distinctive characteristics of a type, period, or method of construction*, or that represent the work of a master, or that possess high artistic values, or that represent *a significant and distinguishable entity* whose components may lack individual distinction; or
4. That have *yielded or may be likely to yield information important in Baltimore prehistory or history*.<sup>89</sup>

Based on standards set by the National Park Service for the National Register of Historical Places, CHAP initially adopted these considerations in their 2012 publication of Baltimore's historic landmarks.<sup>90</sup> CHAP differentiates the designation of historic landmarks and districts from monuments.<sup>91</sup> However, CHAP identically incorporated these factors into their new rules and regulations that specifically address the historic preservation of public art and monuments. By doing so, CHAP reinforces the need for monuments to provide beneficial memories of significant contributions, persons, periods, or information within Baltimore's history.<sup>92</sup>

- iii. The Taney and Lee-Jackson monuments provide the citizens of Baltimore with City-recognized benefits that would cease if the monuments were removed

The City's rationale justifying monument preservation specifically indicates the purpose and benefit of historical context. CHAP's standards consider historical value on the basis of the depiction of a significant event, person, period, or information.<sup>93</sup> The use of the word "or" indicates that in order to qualify, a monument is permissively worth historical value even if it only satisfies one of the considerations.<sup>94</sup> Absent from any published standard or regulation is a provi-

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89. *Id.* (emphasis added).

90. *National Register of Historic Places*, NAT'L PARK SERV., [https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15\\_2.htm](https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_2.htm) (last visited March 11, 2016); *Baltimore City's Designated Landmark List*, Commission For Historical and Architectural Preservation, 1 (July 2012) [hereinafter "CHAP Landmark List"] <http://chap.baltimorecity.gov/sites/default/files/Baltimore%20City%20Landmarks%20publication.pdf>.

91. See generally CHAP Landmark List at 1 (detailing the City's parallel effort in preserving historically designated districts and landmarks).

92. *CHAP Rules and Regulations*, *supra* note 20, at 8.

93. See generally *id.* (requiring a monument to depict a significant event, person, period, or information in Baltimore history).

94. *Id.*

sion demanding that historical value be contingent on its acceptability in the present social landscape.<sup>95</sup>

Justice Taney was a significant person to Baltimore both as a Maryland citizen elected to the U.S. Supreme Court and in his authorship of the decision in *Dred Scott v. Sandford*.<sup>96</sup> While that decision has since been overturned, Justice Taney and his depiction now represent “how history has changed, interpreted, and has progressed throughout the centuries” as well as “the historical perspective of the 19th century.”<sup>97</sup> Justice Taney’s monument meets CHAP’s historical considerations for preservation in its depiction of not only a significant person, but also of a significant event in Baltimore history.<sup>98</sup> Confederate Generals Lee and Jackson were responsible for the majority of wartime decisions in the Confederacy, in which Maryland was included.<sup>99</sup> In addition to depicting persons significant to Maryland’s role in the Civil War, the monument was the sole double equestrian monument in both the United States and Europe when installed in 1948, fulfilling CHAP’s mission through the preservation of highly distinct and masterful artistic values.<sup>100</sup>

Historic preservation of these monuments has provided Baltimore City and its citizens with the benefits of historic education, tradition, information, and social context.<sup>101</sup> The citizens of Baltimore have a valid property interest in the continued receipt of these benefits.<sup>102</sup> In recommending and instituting a process to remove the monuments, the Special Commission will deny the citizens of the benefits associated with historical preservation.<sup>103</sup> Established property interests are afforded constitutional protection.<sup>104</sup> If government action implicates a property interest, the infringement is valid only when it is done in accordance with procedural due process of law.<sup>105</sup>

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95. *Id.* The standards clearly indicate the importance of preserving monuments that either provide or have the potential to provide information about Baltimore. Absent racial implications, the Civil War and its depictions are informative of Baltimore’s role in history. Should race become a consideration, the monuments arguably now and will provide information to prevent Baltimore from committing atrocities comparable to those of the Civil War. *Id.*

96. Taney, MD. STATE ART COLLECTION, *supra* notes 41.

97. *Id.*

98. CHAP Rules and Regulations, *supra* note 20, at 8.

99. KELLY, *supra* note 49.

100. *See supra* Part IV.B.i-ii and accompanying analysis.

101. *Id.*

102. *See infra* Part IV.C and accompanying analysis.

103. *See infra* Part IV.D-E and accompanying analysis.

104. *See generally* U.S. CONST. amend. XIV (requiring no denial of life, liberty, or property without Due Process of law).

105. *Id.*

- C. *Baltimore City Created the Baltimore Citizens' Constitutionally Protected Property Interest when it Created Standards of Eligibility for the Citizens to Receive the Benefits Associated with Historic Preservation*
- i. An individual property interest in the continued receipt of benefits subject to due process is created when an individual is eligible for the benefit based on state-created criteria

An individual's property interest requires property, a benefit stemming from the property, and the individual's "legitimate claim of entitlement" to receive the benefits.<sup>106</sup> The U.S. Supreme Court has noted that property exists in many different forms, including in the form of an existing receipt of government benefits.<sup>107</sup> While the designation of property does not require positive or negative economic value, CHAP's preservation of the City's monuments creates benefits of honor, protection, expert review, and economic tax incentives according to CHAP's 2012 Designated Landmark List. The recognized benefits that stem from the preservation of Baltimore City's monuments therefore satisfy the threshold requirement of "property" in determining whether a property interest has been created.<sup>108</sup>

In order to foster a legitimate claim of entitlement, an individual must show what elements of state law support eligibility to receive a benefit that is reasonably expected based on "rules or understanding [from state law] that secure certain benefits and that support claims of entitlement to those benefits."<sup>109</sup> Once an individual's interest is established, there is an inherent constitutional protection of a property interest in the continued receipt of the benefit.<sup>110</sup>

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106. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

107. *Id.* at 576 ("Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process."); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also* *Flemming v. Nestor*, 363 U.S. 603 (1963).

108. *Phillips*, 524 U.S. at 169 (stating "we [the Court] have never held that a physical item is not "property" simply because it lacks a positive economic or market value."); CHAP Landmark List, *supra* note 90 at 1, 2; *see also* *CHAP Rules and Regulations*, *supra* note 20, at 8 (indicating the importance of "significance of Baltimore history" is shown by preservation of monuments).

109. *Roth*, 408 U.S. at 578 (comparing a valid property interest resulting from eligibility of statutory terms to receive welfare with a valid property interest specifically defined in an employment contract).

110. *Id.* at 576.

- ii. Baltimore City, through CHAP and the Special Commission, created benefit eligibility criteria in CHAP's rules and regulations on membership

CHAP's rules and regulations govern procedural elements including, but not limited to, the committee's role, meetings, and membership requirements.<sup>111</sup> The mayor of Baltimore appoints thirteen citizens to serve as committee members, each eligible for two four-year terms.<sup>112</sup> CHAP members also have the discretionary power to appoint committees "for special purposes or study."<sup>113</sup> This power, in conjunction with the mayor's power of member appointment, allowed the creation of the seven-member Special Commission, four of whom are current CHAP members.<sup>114</sup> Based on the criteria established in the rules and regulations, any citizen of Baltimore meets CHAP's membership requirements and is eligible for a committee position. The eligibility to be elected to CHAP vests Baltimore citizens with direct access to the benefits of historical preservation. Because all citizens are eligible, a valid basis exists to claim an interest in the benefits stemming from CHAP's historical preservation.

- iii. The Baltimore City code, governed by Maryland statute, created benefit eligibility criteria in historic preservation statutes

Title Eight of Maryland's Land Use statutes govern historic preservation.<sup>115</sup> Maryland general provisions outline the purpose of state historic preservation as well as the importance for local governments to achieve such preservation.<sup>116</sup> The statute allows local jurisdictions to enact legislation or other legal safeguards for the purpose of historic preservation.<sup>117</sup> In defining the purpose of these safeguards, the Maryland statute recognizes the benefits of historic preservation as well as implicitly creating criteria to receive those benefits.<sup>118</sup> The statutory criteria require that eligible recipients be reflective of local heritage, subject to the local property and economy, and residents of the local

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111. *CHAP Rules and Regulations*, *supra* note 20 at 2-3.

112. *Id.*

113. *Id.*

114. Rawlings-Blake, *supra* notes 3, 33.

115. *See generally* MD. CODE ANN., LAND USE § 8 (2016) (governing state and local historic preservation efforts).

116. *See generally* MD. CODE ANN., LAND USE § 8-104 (2016) (defining the powers of a legislative body and the purpose of local law).

117. § 8-104(a) (2016) (stating "The legislative body of each local jurisdiction, by local law, may regulate: the construction, reconstruction, alteration, moving, and demolition of sites or structures of historical, archaeological, or architectural significance; the construction, reconstruction, alteration, moving, and demolition of sites and structures within districts; and the appurtenances and environmental settings of sites and structures within the limits of the local jurisdiction."); *See generally* § 8-104(b) (defining the purpose of local law in historic preservation).

118. § 8-104.



jurisdiction.<sup>119</sup> As a result of eligibility, recipients receive the codified benefits.<sup>120</sup>

Pursuant to Maryland's statutory historic preservation title, the Baltimore City code adopted and incorporated similar regulations.<sup>121</sup> Article Six of the code governs local historic and architectural preservation and contains provisions comparable, if not identical, to the Maryland code.<sup>122</sup> In explicitly detailing the purpose of historic preservation, the Baltimore City code similarly and implicitly adopts criteria for receiving the benefits of preservation.<sup>123</sup> The criteria require that preservation benefits go directly to local residents with an implicit interest in their local education, culture, economy, and general welfare.<sup>124</sup>

- iv. Baltimore citizens have a legitimate property interest in the monuments that are subject to procedural due process

The U.S. Supreme Court has continuously maintained that the threshold showing for a property interest is a legitimate individual claim of entitlement. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, creditors succeeded on a legitimate claim of entitlement to benefits of a property interest from funds deposited into a statutorily formed bank account.<sup>125</sup> The Court found a legitimate claim of entitlement existed because the creditors, eligible to deposit and receive interest from the account, were therefore afforded an interest in continuing to receive the benefit of interest.<sup>126</sup>

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119. § 8-104(b)(1); § 8-104(b)(2-3); § 8-104(b)(5).

120. § 8-104(b) (recognizing that historic preservation "safeguard[s] the heritage of the local jurisdiction. . . stabilize[s] and improves property values. . . foster[s] civic beauty. . . strengthen[s] local economy; and promote[s] the preservation and appreciation [of history] . . . for the education and welfare of the residents of each local jurisdiction.").

121. *See generally* BALTIMORE CITY, MD., REV. ORDINANCE 15-408, art. 6 (2015) (governing historic and architectural preservation in Baltimore City).

122. *Compare id.* (requiring that recipients of benefits of historic preservation are local with an implicit interest in education, culture, and welfare), *with* MD. CODE ANN., LAND USE § 8-104(a) (2016) (requiring that recipients be reflective of local heritage, subject to local property and economy, and residents of the local jurisdiction).

123. REV. ORDINANCE, art. 6 § 1-4(a).

124. *Id.* The similarity between the two statutory provisions and the resulting criteria indicates that because the Maryland Code governs the Baltimore City Code, the City adopts and incorporates State policy. *Id.*

125. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

126. *Id.* The creditors had "more than a unilateral expectation" to funds deposited into a statutorily-created account. "It was property held only for the ultimate benefit of Webb's creditors. . . [and] only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors *thus had a state-created property right* to their respective portions of the fund." *Id.* (emphasis added).

The citizens of Baltimore City meet every element of government-established criteria to receive the benefits stemming directly from historical preservation. Any citizen of Baltimore City is eligible to become a member of CHAP, meeting criteria in CHAP's rules and regulations as an individual or as a collective group.<sup>127</sup> Additionally, Baltimore citizens meet every element of implicit state and municipal criteria to be eligible for historic preservation benefits.<sup>128</sup> The citizens are local residents with a direct interest in their local economy and education. As a result, the citizens are subject to all local historical context, tradition, and welfare.<sup>129</sup> Because the citizens have met substantive criteria, their interest in the associated historical, educational, and social benefits rises above an abstract need or unilateral expectation.<sup>130</sup> A legitimate claim of entitlement is supported by the citizens' eligibility at the state, municipal, and municipal agency level.<sup>131</sup> City residents have a legitimate claim of entitlement to the benefits stemming directly from the preservation of Baltimore's Confederate monuments.<sup>132</sup>

*D. Baltimore City and the Special Commission's Meetings to Determine the Removal of the Taney and Lee-Jackson Monuments Violate the Procedural Due Process Rights Afforded to a Constitutionally Protected Property Interest*

- i. Procedural due process requires a prior notice and an opportunity for a pre-deprivation hearing

The Fifth and Fourteenth Amendments' protection of property interests allows individuals to rely on a sense of security.<sup>133</sup> Because the citizens have met state-determined requirements, due process affords

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127. See *supra* Part IV.B.i and accompanying analysis.

128. See *supra* Part IV.B.ii and accompanying analysis.

129. See REV. ORDINANCE 15-408, art. 6.

130. See *supra* Part IV.B and accompanying analysis.

131. See *supra* Part IV.

132. CHAP Landmark List, *supra* note 90, at 2; WILLIAM THOMAS ALDERSON & SHIRLEY PAYNE LOW, *Interpretation of Historic Sites*, 26 (2nd ed. 1996) ("Clearly, nostalgia is one of the prime motivations [to visit historical monuments.] Other visitors appear to be searching for their cultural roots and for a sense of belonging. They want to experience the sense of continuity that the site can help provide as a tangible link with the past."); *contra* Monumental Task Comm., Inc v. Foxx, No. CV 15-6905, 2016 WL 311822, at \*16 (E.D. La. Jan. 26, 2016) ("Moreover, rather than establish that any of the Plaintiffs acquired an interest to the . . . monuments. . . Plaintiffs merely argue that certain exhibits 'call into question who owns the monument[s]' and the land on which they sit. Accordingly, Plaintiffs have failed to demonstrate a recognized property interest in the monuments within the purview of the Fourteenth Amendment, as required for a likelihood of success on the merits.") (emphasis added) (internal citations omitted).

133. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.").

reliance on the continued receipt of government benefits.<sup>134</sup> In determining whether procedural due process has been afforded, the right of the individual is weighed against “whether the government has sufficient justification for taking away a person’s . . . property.”<sup>135</sup> In weighing those interests, procedural due process generally requires a hearing when government denial implicates a significant property interest.<sup>136</sup> If Baltimore City’s historically designated monuments are removed, not only will Baltimore City residents be denied the benefits of their property interest, but also be unconstitutionally denied the protections of procedural due process.

- ii. Baltimore City, through CHAP and the Special Commission, violated procedural due process when it failed to hold sufficient hearings

The U.S. Supreme Court has held that a hearing is required when removal of a government benefit would deny the recipient of an essential or fundamental necessity.<sup>137</sup> In the context of welfare benefits, a recipient was entitled to a hearing because his reliance on the income was a foundation of his daily life.<sup>138</sup> The monuments do not provide the citizens of Baltimore any monetary benefit. However, the equitable and unique benefits of the monuments are foundational to the daily lives, existence, culture, and education of every citizen.<sup>139</sup> These benefits are so essential that they have been recognized in Maryland statute, Baltimore City code, and through the creation of CHAP.<sup>140</sup> Having demonstrated the degree to which the monuments and their benefits are essential, the citizens of Baltimore are entitled to procedural due process of law.

Determining a potential violation of due process requires that the interests of the government be weighed against the interests of the citizen(s).<sup>141</sup> The amount of procedure sufficient to satisfy due process is directly related to the amount of injury, loss, or equitable de-

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134. *Id.* at 576. “It is a purpose of the ancient institution of property *to protect those claims upon which people rely in their daily lives*, reliance that must not be arbitrarily undermined.” *Id.* (emphasis added); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (stating “Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that . . . benefits are a ‘privilege’ and not a ‘right.’”) (quoting *Sherbert v. Verner*, 347 U.S. 398, 404 (1963)).

135. *Monumental Task Committee, Inc. et al. v. Anthony R. Foxx et al.*, No. 15 Civ. 6905, 2016 WL 311822, at \*12, (U.S.D.C. 2016).

136. *Goldberg*, 397 U.S. at 264.

137. *Id.* at 266.

138. *Id.*

139. *See supra* Part IV.B and accompanying analysis.

140. *Id.*

141. *Monumental Task Committee, Inc. et al. v. Anthony R. Foxx et al.*, No. 15 Civ. 6905, 2016 WL 311822, at \*12, (U.S.D.C. 2016).

nial to the individual.<sup>142</sup> Baltimore City's Confederate monuments provide benefits so fundamental that they are protected by the State and City regulations.<sup>143</sup> While the monetary support of welfare is limited, the monuments provide citizens with a fundamental understanding of history, culture, and education that is fundamental to their autonomy.<sup>144</sup> The citizens of Baltimore, having demonstrated a legitimate claim of entitlement to those benefits, are therefore due substantial legal process in the form of a hearing before Baltimore City may remove the monuments and terminate their associated benefits.<sup>145</sup>

The United States Court of Appeals for the Sixth Circuit has broadly outlined the ways in which a plaintiff may prevail on a procedural due process claim against a municipality.<sup>146</sup>

Under circuit precedent, a § 1983 plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an established state procedure that itself violates due process rights, or (2) a "random and unauthorized act" causing a loss for which available state remedies would not adequately compensate the plaintiff. . . . If . . . the City's action was the result of an established state procedure, then the question would be whether that procedure violated due process rights.<sup>147</sup>

Following the sixth circuit's approach, the citizens of Baltimore have a claim arising under the first factor. Founded on the lack of opportunity for public testimony and the inadequacy of the meetings to qualify as hearings, the citizens of Baltimore will succeed on a claim for the violation of their procedural due process rights.<sup>148</sup>

Mayor Rawlings-Blake announced the Special Commission's creation and purpose of the Confederate monument review on June 30, 2015.<sup>149</sup> On September 4, 2015, the names and occupations of the Commission members were released.<sup>150</sup> The announcement also in-

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142. *Goldberg*, 397 U.S. at 262-63 ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which. . . [the person] may be "condemned to suffer grievous loss" and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.") (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, (1951)) (Frankfurter, J., concurring).

143. *See supra* Part IV.B and accompanying analysis.

144. *Supra* note 132 and accompanying text.

145. *Warren v. City of Athens, Ohio*, 411 F.3d 697, 709 (6th Cir. 2005) ("Generally, the process that is due before a property deprivation includes prior notice and an opportunity for a predeprivation [sic] hearing.") (referencing *Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir. 1994)).

146. *Id.* at 709.

147. *Id.* at 709-10.

148. *See infra* notes 149-167 and accompanying text.

149. Rawlings-Blake, *supra* note 3.

150. Stephanie Rawlings-Blake, *Mayor Rawlings-Blake Announces Appointment of Members to Special Commission to Review Baltimore's Confederate Statues*, CITY OF

cluded the date, time, and location of Special Commission meetings. They were to be held Thursday, September 17 at 9:00 a.m., Thursday, October 29 at 9:00 a.m., Tuesday, December 15 at 5:00 p.m., and Thursday, January 14, 2016 at 10:00 a.m. at the City Department of Planning.<sup>151</sup> These times were published on the mayor's official city blog and a separate CHAP-created website about the Special Commission.<sup>152</sup> Of the four meetings, only the December 15 meeting welcomed public testimony.<sup>153</sup>

Public testimony revealed equally strong citizen opinions for and against the monuments' removal during the December 15 meeting.<sup>154</sup> However, regardless of preference, the broad range of individual interests expressed was significantly outweighed by the time and actions of the Special Commission.<sup>155</sup> The Special Commission heard testimony for less than three hours in the only meeting allowing public testimony.<sup>156</sup> Those three hours occurred in one meeting out of four, and in the context of a six month investigatory and reviewing process.<sup>157</sup>

The Special Commission's limitation of public opportunity was explicit in their agenda and presentations from the remaining three meetings, none of which invited public testimony.<sup>158</sup> The presentation from the first meeting on September 17, 2015 outlined the Special Commission's purpose, goals, and methods of achievement. The presentation addressed the subsequent meetings, noting that the public may attend all but only testify at one of them.<sup>159</sup> The presentation proposed methods to collect testimony such as by mail, voicemail, a suggestion box, an online form, or allocating time at meetings.<sup>160</sup> Of

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BALTIMORE (Sep. 4, 2015) <http://mayor.baltimorecity.gov/news/press-releases/2015-09-04-mayor-rawlings-blake-announces-appointment-members-special-commission>.

151. *Id.*

152. *Id.*; See generally SPECIAL COMMISSION TO REVIEW BALTIMORE'S PUBLIC CONFEDERATE MONUMENTS, *supra* note 10 (detailing the Special Commission's actions).

153. Rawlings-Blake, *supra* note 150.

154. See Previous Meetings and Reference Materials, SPECIAL COMMISSION TO REVIEW BALTIMORE'S PUBLIC CONFEDERATE MONUMENTS, <http://baltimoreplanning.wix.com/monumentcommission#!schedule/cro0> (last visited March 11, 2016).

155. *Id.*

156. SPECIAL COMMISSION TO REVIEW BALTIMORE'S PUBLIC CONFEDERATE MONUMENTS, *supra* note 154.

157. See SPECIAL COMMISSION TO REVIEW BALTIMORE'S PUBLIC CONFEDERATE MONUMENTS, *supra* note 10.

158. PowerPoint Presentation on composition, outline, and outcomes of the Mayor's special initiative, SPECIAL COMMISSION TO REVIEW BALTIMORE'S PUBLIC CONFEDERATE MONUMENTS 1 (Sep. 17, 2015) [hereinafter "Commission PowerPoint"], available at [http://media.wix.com/ugd/ce643a\\_0e63fcb6288f47fdb188b237726000c5.pdf](http://media.wix.com/ugd/ce643a_0e63fcb6288f47fdb188b237726000c5.pdf).

159. *Id.* at 13-14, 16-17.

160. *Id.* at 17.

these, the Special Commission selected two.<sup>161</sup> However, the same presentation states under the heading of “Public Testimony” that “Staff recommends that public testimony be collected via a limited number of, but clearly defined. . . methods.”<sup>162</sup> In directly expressing the desire to limit public testimony, the Special Commission infringed on the procedural due process afforded to the citizens.<sup>163</sup>

In applying the prescribed balancing test, Baltimore City’s actions, through the Special Commission, must be weighed against the nature of the citizens’ property interest being denied and the procedure that led to the denial.<sup>164</sup> The opportunity for citizen testimony to be heard was minimal and grossly outweighed by the time spent in meetings without public input.<sup>165</sup> Three hours in the context of a six month investigation does not rise to an adequate hearing, let alone a “meaningful” one.<sup>166</sup> Regardless of other methods selected to allow citizens an opportunity to be heard, the Special Commission explicitly noted the limitation of public testimony as one of the Commission’s goals.<sup>167</sup> Baltimore City’s stance that the monuments’ removal benefits the public is the opposite of a legally defined public benefit and indicative of how little opportunity the public has had to be heard.<sup>168</sup> Ultimately, the totality of the circumstances shows that neither the Special Commission’s actions nor meetings rose to the level of a pre-deprivation hearing required by due process.<sup>169</sup>

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161. *Id.*

162. *Id.* at 16.

163. *Id.* at 17.

164. Monumental Task Committee, Inc. et al. v. Anthony R. Foxx et. al., No. 15 Civ. 6905, 2016 WL 311822, at \*12, (U.S.D.C. 2016).

165. *See supra* notes 154, 158.

166. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972) (holding that “the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount”); *see* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 552, 62 (1965) (holding that the “Due Process Clause requires the hearing to be ‘meaningful.’”).

167. *See supra* note 158, at 16.

168. *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694, 694 (Ch. 1832) (stating that public benefit does not require direct or immediate participation, but is determined in individual context of time and community.; *see also* R. E. H., Annotation, *Public Benefit of Convenience as Distinguished from Use by the Public as Ground for the Exercise of the Power of Eminent Domain*, 54 A.L.R. 7, n.12 (1928).

169. *Bell v. Burson*, 402 U.S. 535, 541-42 (1971). “It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.” *Id.* *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 896 (6th Cir. 1991) (“Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard. But, when a

- E. *In the alternative, Baltimore City and the Special Commission's Non-Compliance with the Maryland Open Meetings Act Violates the Procedural Due Process Rights Afforded to a Constitutionally Protected Property Interest*
- i. The Maryland Open Meetings Act establishes procedure affording protections equivalent to procedural due process

Maryland recently enacted the Open Meetings Act, ("the Act"), effective October 1, 2014.<sup>170</sup> The policy of the Act highlights the importance of the public's role and observation of government action.<sup>171</sup> The Act also recognizes the essential nature of the effectiveness of public involvement by stating that "[t]he *conduct of public business* in open meetings increases the faith of the public in government and enhances the effectiveness of *the public in fulfilling its role in a democratic society*."<sup>172</sup> While emphasizing the need for a continuous conversation between the public and the government, the Act proposes policy mirroring the protections of procedural due process.<sup>173</sup> The similarities in rationale are further legitimized by the Act's requirement of public notice and an open session for the public, a direct comparison to the constitutional rights of notice and opportunity to be heard.<sup>174</sup>

- ii. Baltimore City, CHAP, and the Special Commission are governed by the Maryland Open Meetings Act

The Act applies to "a *public body* meeting to consider. . . a special exception, variance, conditional use, or zoning classification, the enforcement of any zoning law or regulation, *or any other zoning matter*."<sup>175</sup> CHAP and the Special Commission are contained in the City's Department of Planning, rendering a zoning matter such as monument removal subject to the Act. The Special Commission is sitting as a public body, therefore subjecting it to the control of the Act.

The Act specifically lists criteria necessary to be a public body subject to the Act.<sup>176</sup> A public body must be more than two people, and

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relatively small number of persons are affected on individual grounds, the right to a hearing is triggered.").

170. *See generally* MD. CODE ANN., GEN. PROV., § 3 (2016) (codifying the Open Meetings Act).

171. *See generally* § 3-102 (codifying the Act's legislative policy).

172. § 3-102(b)(2) (emphasis added).

173. *See* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (requiring that a hearing between the public and the government be meaningful).

174. GEN. PROV. §§ 3-301, 3-302.

175. § 3-103.

176. *See generally* MD. CODE ANN., GEN. PROV. § 3-101(h)(1-2) (2016). "Public body" includes any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by the State or the political subdivision." MD. CODE ANN., GEN. PROV. § 3-101(h)(2)(i) (2016).

the body must be “created by. . . a county or *municipal charter*, . . . an ordinance, a rule. . . or an order of the chief executive authority of a political subdivision of a state.”<sup>177</sup> Sitting as seven individuals representative of the municipality of Baltimore City, the Special Commission is a public body governed by the Act. Further support for the Act’s jurisdiction over the Special Commission is CHAP’s incorporation by reference of the Act in their recently adopted rules and regulations.<sup>178</sup> The Special Commission, consisting of four CHAP members and created through CHAP, is legally required to hold proceedings in compliance with the Act.

- iii. Baltimore City and the Special Commission violated Baltimore citizens’ procedural due process rights when they violated the Maryland Open Meetings Act

The Act requires not only that public body general conduct be held openly, but also that the public have sufficient access to the deliberations, rationale, and assertion of their role in a democratic society.<sup>179</sup> In support of the citizens’ role in public decisions, the Act states, “it is the public policy of the State that the *public be provided with adequate notice* of the time and location of meetings of public bodies, which shall be held in *places reasonably accessible* to individuals who would like to attend these meetings.”<sup>180</sup> The mayor announced the dates and times of the Special Commission’s meetings in a September press release, at least two weeks prior to the Commission’s first meeting.<sup>181</sup> Although the citizens were provided with adequate notice of the times, the times of the meetings themselves are reflective of the Commission’s explicit intent to limit public inclusion and access.

The Special Commission meeting in December 2015, which invited public testimony, complied with the Act’s requirements and policy of public involvement in municipal decisions.<sup>182</sup> However, this one meeting is also the only instance in which the Special Commission arguably complied with the Act. All other Special Commission meetings, while open to public attendance, were scheduled on weekdays during work hours, generally around 9 a.m.<sup>183</sup> While facially neutral, the practical implication of these meeting times prevents any citizen working full-

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177. MD. CODE ANN., GEN. PROV. § 3-101(h)(1)(i-ii) (3, 5, 6, 8) (2016) (emphasis added); *see generally* Charter of Baltimore City, ch. 351, art. I § 1 (2014) (establishing Baltimore City as a municipality); *supra* note 81.

178. *CHAP Rules and Regulations*, *supra* note 20, at 3.

179. GEN. PROV. § 3-102.

180. *Id.*

181. Rawlings-Blake, *supra* note 150.

182. *See id.*; SPECIAL COMMISSION TO REVIEW BALTIMORE’S PUBLIC CONFEDERATE MONUMENTS, *supra* note 10; MD. CODE ANN., GEN. PROV. § 3-102 (2016).

183. Rawlings-Blake, *supra* note 150.



time from attending the meetings without skipping work.<sup>184</sup> The Special Commission could have argued compliance with the Act if the non-testimonial meetings were at other times, giving citizens barred from one meeting time the opportunity to attend another.<sup>185</sup> Unfortunately, absent that or other efforts accounting for the working citizen, the Special Commission violated the Act.

The Act functions and embodies the same policies as the procedural safeguards afforded by the Due Process Clause.<sup>186</sup> Both require the government to act with consideration of the fundamental role of citizens in federal, state, and local government.<sup>187</sup> Accordingly, both protect the citizen's right to assert a claim against the government.<sup>188</sup> Comparison of the overarching policy with the Special Commission's actions, statements, and procedural operation yields a glaring inequality with the protections afforded and the consideration given.<sup>189</sup> The Special Commission violated the Act in the inaccessible nature of the meetings and in the disparity between the amount of opportunity given to the citizens when compared with the time spent in review.<sup>190</sup> The Special Commission has unquestionably satisfied the notice requirement when a public body considers a citizen interest. However, the limited access to meetings considered in conjunction with the minimal amount of citizen opinion ultimately solicited denied the public an opportunity to be heard.<sup>191</sup> By violating the Act, the Special Commission denied the citizens of Baltimore an opportunity to voice a legitimate claim to their property interests in the monuments.<sup>192</sup> If the Confederate monuments and their recognized benefits are removed, Baltimore City, through the Special Commission, will have denied every citizen of Baltimore of their constitutionally protected rights.

## V. Conclusion

As of March 11, 2016, the Special Commission has not released their formal written report.<sup>193</sup> Pursuant to the report and its publication, Mayor Rawlings-Blake will make the final decision on the fate of

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184. *Id.* (showing the three meeting periods scheduled during normal full-time work hours).

185. *Id.*

186. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); MD. CODE ANN., GEN. PROV. §§ 3-301, 3-302.

187. *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 708 (1978).

188. *See supra* Part IV.E.i and accompanying analysis.

189. *Rawlings-Blake*, *supra* note 150.

190. *See supra* Part IV.E and accompanying analysis (analyzing the Special Commission's actions and their application to procedural Due Process).

191. *See supra* Part IV.D and accompanying analysis.

192. *See supra* Part IV.E and accompanying analysis.

193. SPECIAL COMMISSION TO REVIEW BALTIMORE'S PUBLIC CONFEDERATE MONUMENTS, *supra* note 10.

Baltimore's Confederate monuments.<sup>194</sup> This decision, however, should be made in consideration of the monuments' value both as property and as what they represent.<sup>195</sup> Historical monuments provide the benefits of historical context, education, tradition, and information.<sup>196</sup> Regardless of the embodied context or message, historical monuments provide an undeniable benefit:

Many people have a romantic view of a past that they believe was less hurried and more relaxed than the time in which they live. They now minimize or ignore the hardships of the past—*hardships that, by the way, are seldom interpreted at the sites*. Instead, visitors contrast the best of the past with some of the worst of our own jet-paced, plastic, and computerized age. For many visitors, then, the historic site is a form of escape.<sup>197</sup> The historical capacity of a monument provides benefits—statutorily recognized benefits—to Baltimore citizens regardless of race, ideology, or culture.

Since the monuments' installation, citizens of Baltimore have received these benefits and integrated them into not only an understanding of belonging, but into their everyday autonomy and awareness.<sup>198</sup> The constitutional right to procedural due process protects the continued receipt of fundamental benefits, especially when they are inherent in an individual's life.<sup>199</sup> These inherent benefits rise above a unilateral desire or abstract need, supporting a legitimate claim of entitlement to a property interest.<sup>200</sup> Presently, the Special Commission has not shown Baltimore citizens the consideration that due process not only affords, but guarantees.<sup>201</sup> Absent increased public involvement or other Special Commission's actions to rectify the present, they have denied the citizens of Baltimore the procedural due process of law afforded at the local, state, and federal levels.<sup>202</sup>

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194. Broadwater, *supra* note 8.

195. *See supra* Part IV.C.

196. *Id.*

197. ALDERSON & LOW, *supra* note 132, at 26 (emphasis added).

198. *See supra* Part IV.B and accompanying analysis.

199. *Id.*

200. *See supra* Part IV.B and accompanying analysis; *see also supra* Part II.B and accompanying text.

201. *See supra* Part IV.D-E and accompanying analysis.

202. *See supra* Part IV and accompanying analysis.