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DO PUBLIC CONFEDERATE MONUMENTS CONSTITUTE RACIST GOVERNMENT SPEECH VIOLATING THE EQUAL PROTECTION CLAUSE?

SCOTT HOLMES¹

INTRODUCTION

Protesters pulled down a Confederate soldier statue from its pedestal on the campus of the University of North Carolina in August 2018 and outgoing Chancellor Carol Folt removed the remaining base when she resigned in January 2019.² Displeased with Chancellor Folt's decision, the UNC Board of Governors ordered her to leave early and has yet to decide whether the Confederate Monument will be reinstalled.³ Another Confederate Monument was removed on March 12, 2019 from the historic court house in Winston-Salem, North Carolina, as one of about 115 Confederate Monuments that have been removed from public places around the United States in the last few years.⁴

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2. N'dea Yancey-Bragg, *UNC Chancellor Carol Folt resigns, approves removal of 'Silent Sam' Confederate statue*, USA TODAY (Jan. 14, 2019), <https://www.usatoday.com/story/news/nation/2019/01/14/carol-folt-unc-chancellor-resigns-approves-silent-sam-removal/2577206002/>.

3. Hannah McLellen, *In less than a month, the Board of Governors will present a plan for Silent Sam*, THE DAILY TARHEEL (Apr. 25, 2019), <https://www.dailytarheel.com/article/2019/04/bog-silent-sam-update-0425>; Jane Stancill and Carli Brosseau, *UNC board tells Chancellor Folt to leave her job in 2 weeks - earlier than expected*, NEWS & OBSERVER (Jan. 15, 2019), <https://www.newsobserver.com/news/local/article224561590.html>; Jane Stancill, *"Sheer Cowardice": Board of Governors member rejects UNC's Silent Sam Proposal*, NEWS & OBSERVER (Dec. 14, 2018), <https://www.newsobserver.com/news/local/article22628220.html>; Joe Knott, *Don't let a mob decide on Silent Sam*, NEWS & OBSERVER (May 17, 2019), <https://www.newsobserver.com/opinion/article230535489.html> (Board of Governors member, Joe Knott, argues that the Confederate Monument should be returned to the campus of UNC Chapel Hill).

4. Associated Press, *Confederate Statue Removed from Historic North Carolina Court*, (March 12, 2019), <https://www.wwaytv3.com/2019/03/12/confederate-statue-being-removed-in-winston-salem/>.

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In August 2017, protesters toppled the Confederate Monument at the historic courthouse in Durham, North Carolina.⁵

The debate about removing Confederate Monuments from public spaces has become the contested space where communities are wrestling with racial identity amidst the resurgence and growth of white supremacists groups.⁶ The effort to remove public symbols of the Confederacy reignited when white supremacist Dylann Roof murdered nine African Americans worshipping at the Emanuel Methodist Episcopal Church in downtown Charleston, South Carolina on June 17, 2015 under the banner of the Confederate Flag.⁷ Since then local governments have reevaluated the placement of Confederate symbols in public places. This debate reached a fever pitch when a white supremacist murdered anti-racism activist Heather Heyer in Charlottesville, Virginia during the “Unite the Right” rally organized by white supremacists opposed the removal of the Robert E. Lee Monument.⁸ Confederate Monuments have are now the site of resistance and rallying place where supporters of the Confederacy and anti-racism protesters confront each other physically and ideologically.⁹ Like segregated buses and lunch counters of the civil rights era, Confederate Monuments are now the place where protesters gather to resist government sponsored Confederate symbols endorsing racial inequality.

The government plays an important role in the political and cultural discussion about race, controlling a large share of the market-place of ideas. To the extent the government regulates private speech, the First Amendment of the United States Constitution protects individual racist speech.¹⁰ But are there constitutional constraints when it is the government, and not a private individual promoting racial inequality?

5. *Id.*

6. Chris Woodyard, *Hate Group Count Hits 20 Year High Amid Rise in White Supremacy*, report says, USA TODAY (Feb. 20, 2019), <https://www.usatoday.com/story/news/nation/2019/02/20/hate-groups-white-power-supremacists-southern-poverty-law-center/2918416002/>.

7. Adam K. Raymon, *A Running List of Confederate Monuments Removed Across the Country*, NEW YORK INTELLIGENCER (Aug. 25, 2017), <http://nymag.com/intelligencer/2017/08/running-list-of-confederate-monuments-that-have-been-removed.html> (“Before June 17, 2015, most Americans didn’t think much about the more than 700 Confederate monuments around the nation. And then Dylann Roof, a 21-year-old white supremacist, massacred nine black churchgoers in Charleston, South Carolina”).

8. Sarah E. Gardner, *What we Talk about when we talk about confederate monuments*, ORIGINS, Vol. 11 Issue 5 (Feb. 2018), <http://origins.osu.edu/article/what-we-talk-about-when-we-talk-about-confederate-monuments>.

9. Martha Quillin, *Silent Sam is gone, but pro-Confederacy and anti-racist groups still clash at UNC*, NEWS & OBSERVER (Feb. 23, 2019), <https://www.newsobserver.com/news/local/article226690084.html>.

10. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396, 112 S. Ct. 2538, 2550 (1992) (Striking down an ordinance prohibiting private racial hate speech as an unconstitutional content based restriction on private speech: “Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”).

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This article explores whether there are constitutional constraints on government speech endorsing racial inequality. In particular, what are the constitutional implications for local governments and universities with Confederate monuments in prominent public places?

Confederate monuments in public spaces constitute government speech.¹¹ The government has almost unrestricted power to speak, but there are a few constitutional limitations on government speech.¹² For example, the government cannot endorse a preference for religion without violating the Establishment Clause.¹³ Are there similar constitutional limits on the power of government to endorse white supremacy, promote racial inequality, encourage racial prejudice, or engage in racial hate speech?¹⁴

In a concurring opinion in *Pleasant Grove City, Utah v. Summum*, Justices Ginsburg and Stevens suggest that, in addition to the Establishment Clause of the First Amendment, government speech is also limited by the Equal Protection Clause of the Fourteenth Amendment:

Finally, recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. 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**. Together with the checks imposed by our democratic processes, these constitutional safeguards ensure that the effect of today's decision will be limited.¹⁵

11. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470, 129 S. Ct. 1125, 1132 (2009) ("Permanent monuments displayed on public property typically represent government speech.").

12. *Id.* at 467–68, 129 S. Ct. at 1130 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

13. *Id.* at 468–69, 129 S. Ct. at 1131–32 (2009) ("This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'").

14. Sanford Levinson, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 86 (2018); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 209 (2012) ("I thus see value in recognizing that, at least under some circumstances, government may deny individuals the equal protection of the laws when its expression intentionally classifies individuals as worthy or not worthy of respect based on their class status"); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13 (2000) ("In other words, in order to treat people with equal concern, the government may not express, in words or deeds, that it values some of us more than others."); L. Darnell Weedon, *A Growing Consensus: State Sponsorship of Confederate Symbols Is an Injury-in-Fact As A Result of Dylann Roof's Killing Blacks in Church at A Bible Study*, 32 BYU J. PUB. L. 113, 149 (2017).

15. *Pleasant Grove City, Utah*, at 482, 129 S. Ct. at 1139 (Ginsburg and Stevens, concurring) (emphasis added)

It is a logical extension of the principle that the Establishment clause limits government religious speech that the Equal Protection Clause should also limit government racist speech. Just as the Establishment Clause limits government speech, “it seems equally thinkable that an amendment associated with ‘a new birth of freedom’ would prohibit the state from articulating on its flag a message of white hegemony and African American subordination.”¹⁶

Part I of this article reviews cases where plaintiffs unsuccessfully attempted to challenge Confederate Flags as racist government speech in public spaces.¹⁷ The Courts in those cases applied a restrictive traditional equal protection analysis, requiring proof of differential treatment on the basis of race. Rejecting the idea that the Equal Protection Clause could apply to pure government speech, those Courts erroneously rejected the proposition that racially stigmatizing harm resulting from government messaging is sufficient to bring a claim under the Equal Protection Clause. These cases demonstrate that the current Equal Protection jurisprudence is not up to the task of analyzing and regulating government racist speech.

Part II of this article explores how Courts could look to the Establishment Clause of the First Amendment for guidance on how to constitutionally restrain improper government speech under the Equal Protection Clause.¹⁸ This section explores how key Establishment Clause doctrines such as the “endorsement test,” the “reasonable observer,” and the “coercion test” might apply in the context of equal protection analysis. It also considers how less restrictive standing requirements under the Establishment clause would allow people stigmatized by government racist speech to challenge that speech in Court.

Part III of this article turns to the example of Confederate Monuments and summarizes the events that have resulted in these monuments becoming the focal point for the struggle over American racial identity.¹⁹ This section ends with a particular focus on the debate over the Confederate Monument on the Campus of the University of North Carolina at Chapel Hill (“UNC Chapel Hill”).

Part IV of this article will consider how a Court might analyze the Confederate Monument at UNC Chapel Hill through a constitutional lens.²⁰ First, it will look at the evidence that the Confederate Monument was erected with racially discriminatory intent. This will involve a review of the history of

16. Levinson, *supra* note 14.

17. See *infra* notes 24 to 62 and accompanying text.

18. See *infra* notes 63 to 98 and accompanying text.

19. See *infra* notes 99 to 150 and accompanying text.

20. See *infra* notes 151 to 306 and accompanying text.

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post-civil war Reconstruction, the white supremacy campaign, and the rise of the “Lost Cause” mythology that inspired the Daughters of the Confederacy to erect Confederate Monuments throughout the South. This section will demonstrate that the Confederate Monuments were erected with the explicit governmental intent to endorse racial inequality. Next this section will explore how Confederate Monuments disproportionately impact African Americans and how African Americans opposed to Confederate Monuments have standing to challenge these monuments, even under the current restrictive traditional Equal Protection analysis. Then this section explores how a Court could analyze the Confederate Monument through the Establishment Clause lens of the “coercion” test and the “endorsement” test. The section concludes that a “reasonable observer,” aware of the history of the Confederate Monument at UNC Chapel Hill, would conclude that the monument is unconstitutional government speech favoring members of the white racial group while making members of the African American racial group feel like outsiders. It also concludes that the Confederate Monument conveys a government message promoting racial inequality that is sufficiently strong to coerce or affect the behavior of those opposed to racism.

Part V briefly considers how provisions of the North Carolina Constitution might provide an independent grounds to challenge government speech endorsing racial discrimination.²¹ Article I Section 9 prohibits race discrimination and could be interpreted, like a civil rights statute, to prohibit government speech creating a racially hostile living and learning environment.

This article concludes that the Equal Protection Clause should create an outer limit to the government’s ability to engage in speech endorsing racial inequality, prejudice and discrimination.²²

I. EQUAL PROTECTION CASES INVOLVING CONFEDERATE FLAGS

Lower courts have wrestled with the Constitutional implications of government speech endorsing racism in the context of Confederate flags in public spaces.²³ In *NAACP v. Hunt*, the Eleventh Circuit considered a civil rights equal protection claim by the NAACP to have the Confederate flag removed from the capitol grounds of Alabama.²⁴ The *Hunt* Court acknowledged that

21. See *infra* notes 307 to 331 and accompanying text.

22. See *infra* notes 332 to 335 and accompanying text.

23. Norton *supra* 14 at 184.

24. *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1559 (11th Cir. 1990).

“a racially motivated statute may be unconstitutional even if it is facially neutral.”²⁵ The Court also acknowledged that, in the context of school desegregation, an order prohibiting schools from expressing racial animus was proper.²⁶ However, the Court granted summary judgement stating,

[b]ecause there are two accounts of why Alabama flies the flag, however, . . . it is not certain that the flag was hoisted for racially discriminatory reasons. Moreover, there is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position.²⁷

The Court held there was insufficient evidence of racial animus and disparate impact to survive summary judgment.²⁸

This opinion has been criticized for ignoring that Confederate Flags cause disproportionate harm to African Americans and have an undisputed history of conveying racially discriminatory intent. Helen Norton has pointed out how the *Hunt* Court failed to explore the actual harm that the Confederate flag inflicts upon African Americans, and how it might deter them from participating in government.²⁹ James Forman, Jr. has argued that the Court erred because the historic record demonstrates that the Confederate flag was raised to express discrimination against African Americans and is a form of racist government speech chilling the rights of minorities.³⁰

The Eleventh Circuit again considered the Confederate Flag on capitol grounds in Georgia in *Coleman v. Miller*.³¹ The Court noted Coleman’s allegations that

the flag’s Confederate symbol, which is often used by and associated with hate groups such as the Ku Klux Klan, inspires in him fear of violence, causes him to devalue himself as a person, and sends an exclusionary message to Georgia’s African-American citizens. He also asserts that the flag’s use of the Confederate symbol forces him to adopt a message—namely, the endorsement of discrimination against blacks—that he finds morally offensive.³²

25. *Id.* at 1562.

26. *Id.* (“In *Smith v. St. Tammany Parish School Bd.*, 448 F.2d 414 (5th Cir.1971), the Fifth Circuit upheld an order banning “symbols or indicia expressing the school board’s or its employee’s desire to maintain segregated schools . . .” The *Smith* decision, however, was based upon the broad discretion vested in the district courts to achieve the constitutional end of desegregation.”).

27. *Id.* 1562.

28. *Id.*

29. Norton *supra* 14 at 185.

30. James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 506 (1991); see also, Weeden, *supra* note 14 at 123–24 (“Moreover, there is an unequal application of the state policy since it should now be common knowledge that even if all people of all races are exposed to the flag, black people, living in the state because of a history of slavery and Jim Crow, are disproportionately injured when Alabama flies that flag over its capitol”).

31. *Coleman v. Miller*, 117 F3d 527 (11th Cir 1997).

32. *Id.* at 529.

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The Court reasoned that Coleman “must first demonstrate that the flying of the Georgia flag produces disproportionate effects along racial lines, and then must prove that racial discrimination was a substantial or motivating factor behind the enactment of the flag legislation.”³³

When considering the record, the Court found no evidence of “disproportionate racial effect,” dismissing his examples when the Confederate flag chilled African American residents’ exercise of their rights as “anecdotal evidence of intangible harm” without “any evidence regarding the impact upon other African–American citizens or the comparative effect of the flag on white citizens.”³⁴ The Court concluded the evidence was insufficient to establish ‘disproportionate effects along racial lines.’³⁵

The *Coleman* Court accepted that the Confederate flag was motivated by racial animus, but concluded that there was no evidence of disparate impact because “all citizens are exposed to the flag,” and “citizens of all races are offended by its position.”³⁶

This opinion has been criticized for failing to consider the actual harm that racist speech causes.³⁷

An African American plaintiff should not be required to show obvious disproportionate impact by means of racial lines by producing specific factual evidence to demonstrate that a state flag that includes a Confederate symbol, in this case the Confederate flag, inflicts a considerable subordination burden upon African Americans as a group that is not experienced by whites. The disproportionate impact of racial subordination is a self-evident proposition because state sponsorship of the Confederate flag is plainly understood as government speech inviting and encouraging racial discrimination by whites.³⁸

Even if some supporters of Confederate Monuments claim that the monuments represent a benign “heritage,” the historical record demonstrates the purpose and effect of the Confederate monuments, then and now, is to celebrate white supremacy in our history. African Americans who still suffer the systemic harm arising from our history of racial apartheid should not have to prove racial disparate impact from racially motivated speech because the

33. *Id.*

34. *Id.* at 530.

35. *Id.*

36. *Id.*

37. Norton *supra* 14 at 186 (The Court “cursorily declined to credit the various behavioral and expressive harms alleged by individual African Americans as establishing the requisite effects for equal protection purposes”).

38. Weeden, *supra* note 14 at 137.

effect of such speech should be self-evident. Here, the Court failed to understand that, although white people may be offended by the Confederate flag, the harm to white people is qualitatively different because government speech conveying racial inequality is a verbal act causing unique harm to African Americans. The ancestors of the white people championing Confederate symbolism were not enslaved, lynched, and subjected to Jim Crow segregation.

The Fifth Circuit also has addressed the Confederate flag embedded in the State flag of Mississippi.³⁹ The District Court provided a detailed historic account summarizing the racial meaning of the Confederate flag,⁴⁰ and concluded

[t]he Confederate battle emblem's meaning has not changed much in the intervening decades. It should go without saying that the emblem has been used time and time again in the Deep South, especially in Mississippi, to express opposition to racial equality. Persons who have engaged in racial oppression have draped themselves in that banner while carrying out their mission to intimidate or do harm.⁴¹

Nevertheless, the Fifth Circuit rejected Moore's claim on the grounds that he could not describe a legally cognizable injury-in-fact to support standing.⁴²

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]

Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.

Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁴³

The Court rejected Moore's claim that the racial stigma conveyed by the Confederate flag was a sufficient injury-in-fact to support standing. According to the Court, Moore must show differential treatment against him personally on the basis of race, disparate treatment, accompanying the stigmatic injury, in order to support standing to sue.⁴⁴ A racial classification by itself,

39. *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir.), *cert. denied*, 138 S. Ct. 468 (2017).

40. *Moore v. Bryant*, 205 F. Supp. 3d 834, 838-844 (S.D. Miss. 2016), *aff'd*, 853 F.3d 245 (5th Cir. 2017).

41. *Id.* at 844.

42. *Moore*, 853 F.3d at 249.

43. *Id.*

44. *Id.* ("Accordingly, to plead stigmatic-injury standing, Plaintiff must plead that he was personally subjected to discriminatory treatment").

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according to the *Moore* Court, is insufficient to provide standing, without the showing of individualized harm.⁴⁵

In reaching this conclusion, the *Moore* Court relied upon *Allen v. Wright*.⁴⁶ In that case, Plaintiffs asserted harm arising from Government financial aid and federal tax exemptions to “discriminatory private schools,” impairing “their ability to have their public schools desegregated.”⁴⁷ The *Allen* Court held that the stigma of racial classifications was insufficient to provide standing without additional facts showing denial of treatment on the basis of race.

Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. . . . Our cases make clear, however, that such injury accords a basis for standing only to “those persons who are personally denied equal treatment” by the challenged discriminatory conduct.⁴⁸

When analyzing the Confederate flags as government speech, these courts applied an overly restrictive view of the Equal Protection Clause and standing requirements. The Courts were wrong to reject racial stigma as a sufficient basis to make an Equal Protection claim. This rejection of stigmatic harm, as a basis for standing, is contrary to other Supreme Court cases where Plaintiffs have succeeded in challenging government speech encouraging racism without showing individualized harm.

In *Anderson v. Martin*, the Supreme Court struck down a Louisiana statute requiring ballots designate the race of candidates for elected office.⁴⁹ The Court noted this case was not about the denial of any benefit or a restriction on the right to vote.⁵⁰ The Court did not find any denial of benefit or individualized harm. Rather, the Court was concerned with how the government uses speech and messaging to encourage racism.⁵¹

45. *Id.*

46. *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984), *abrogated by*, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377 (2014) (“The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief”).

47. *Id.* at 752-53, 104 S. Ct. at 3325.

48. *Id.* at 755, 104 S. Ct. at 3326.

49. *Anderson v. Martin*, 375 U.S. 399, 84 S. Ct. 454 (1964).

50. *Id.* at 402, 84 S. Ct. at 455-56 (“It has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise.”).

51. *Id.* (“It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race.”)

But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.⁵²

In *Anderson*, the Plaintiffs showed no injury-in-fact, and there was no proof that displaying race on the ballot aided or burdened the right to vote. Indeed, the Court said “[t]he vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.”⁵³ The policy was race-neutral, applying to all candidates regardless of their race.⁵⁴ Nevertheless, the Court interpreted the content and context of the government speech, and concluded that the government message facilitated racial inequality and was therefore unconstitutional.⁵⁵ *Anderson* shows that the Equal Protection Clause is concerned with government messaging when the speech endorses, encourages and supports racial inequality or prejudice.

In another context of racial school desegregation, stigmatic harm was an important basis for ruling “separate but equal” racially segregated schools unconstitutional. If separate schools offered truly equal educational opportunities, black students could not name a tangible deprivation of a benefit, unequal treatment, or individualized harm. That is why the *Brown* Court focused on the stigmatic injury to the racial classification to African American students.

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system. Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.⁵⁶

52. *Id.* at 402, 84 S. Ct. at 456.

53. *Id.*

54. *Id.* (“The State contends that its Act is nondiscriminatory because the labeling provision applies equally to Negro and white.”)

55. *Id.* at 403, 84 S. Ct. at 456 (“We see no relevance in the State’s pointing up the race of the candidate as bearing upon his qualifications for office. Indeed, this factor in itself ‘underscores the purely racial character and purpose’ of the statute.”).

56. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494–95, 74 S. Ct. 686, 691–92 (1954), supplemented sub nom. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753

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Modern equal protection civil rights litigation is founded in part on the principle that racial stigma and the psychological harm caused by racial messaging is sufficient to assert an Equal Protection claim of discrimination claim under the Constitution.

A similar concern for stigmatizing psychological harm can be seen in voting rights cases where the shape of a district conveyed racial stigma, even without a showing of racial vote dilution.⁵⁷ Rejecting Justice Souter's assertion that there can be no equal protection violation in voting cases unless there is a showing of both racial intent and voting dilution (disparate impact), a majority of the United States Supreme Court in *Shaw v. Reno* concluded that government messaging promoting racial classifications violated the Equal Protection Clause when the shape of a district was so bizarre as to connote racial gerrymandering, even then there was no showing of disparate impact.⁵⁸

As we have explained, however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.⁵⁹

Racialized government messaging in voting and education have therefore formed the basis of Equal Protection challenges based upon the racial stigma arising from government endorsement of racial divisions.

The Court's analyzing the Confederate Flag cases applied an overly restrictive and narrow view of the Equal Protection Clause in the context of government messaging. This approach makes it nearly impossible for individuals to challenge government racist speech under the Equal Protection Clause because the denial of a tangible benefit and individualized disparate harm are always necessarily lacking. L. Darnell Weeden has criticized the denial of Moore's strict standing requirements.

(1955); see also, Rachel Bayefsky, Psychological Harm and Constitutional Standing, 81 Brook. L. Rev. 1555, 1596 (2016).

57. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 513-15 (1993) (discussing the view that racially conscious redistricting could give rise to constitutionally cognizable expressive harms).

58. *Shaw v. Reno*, 509 U.S. 630, 644, 113 S. Ct. 2816, 2825 (1993) ("Appellants contend that redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' ... demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.").

59. *Id.* at 650, 113 S. Ct. 2828.

The federal appeals court disregarded Moore's claim that he suffered injury-in-fact because the Mississippi state flag stigmatized him. The court rejected Moore's stigmatic injury argument because, according to the court's revisionist interpretation of Article III, "stigmatic injury accords a basis for standing only to those persons who are personally denied equal treatment" by the challenged discriminatory conduct.⁶⁰

Under Weeden's view, the entire personal injury-in-fact requirement has been erroneously read into the Constitution contrary to legal or historical authority.⁶¹ At the very least, the Equal Protection Clause has become too narrowly construed when it does not reach government action that inflicts racial stigmatization and through expressive harm.

In order for the Equal Protection Clause to limit government racist speech, expressive and stigmatic harm must be enough to establish standing. If the Equal Protection Clause limits government racist speech, then the analysis of the government racist speech should not require disparate treatment or the denial of a benefit because government speech often does not correspond to differential state treatment or conduct. A pure speech analysis under the Equal Protection Clause requires an analysis similar to jurisprudence under the Establishment clause.

II. A MODIFIED ESTABLISHMENT CLAUSE ANALYSIS UNDER THE EQUAL PROTECTION CLAUSE

When Moore made his case for standing to challenge the Confederate flag, he pointed to the Establishment Clause as providing the appropriate analogous analysis for constitutional limits on government speech.⁶² The Court recognized that "[t]he Establishment Clause context offers the only area outside of the Free Speech Clause in which courts have, to date, seriously wrestled with the constitutional implications of government speech."⁶³ The *Moore* Court, however, rejected the attempt limit speech under the Equal Protection Clause in a manner similar to the Establishment Clause, contrasting the two:

The reason that Equal Protection and Establishment Clause cases call for different injury-in-fact analyses is that the injuries protected against under the Clauses are different. The Establishment Clause prohibits the Government from endorsing a religion, and thus directly regulates Government

60. Weeden, *supra* note 14 at 126 (2017).

61. *Id.* at 125 ("Since the injury-in-fact test is without an identifiable constitutional source, it appears that the Supreme Court just made up the 'injury-in-fact' concept"); see also, Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163, 169-70 (1992).

62. *Moore*, 853 F.3d at 249 ("[D]rawing on Establishment Clause cases, which were not presented to the district court, Plaintiff argues that exposure to unavoidable and deleterious Government speech is sufficient to confer standing.").

63. Norton *supra* 14 at 187.

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speech if that speech endorses religion. . . . Accordingly, Establishment Clause injury can occur when a person encounters the Government's endorsement of religion. . . . The same is not true under the Equal Protection Clause: the *gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging*.⁶⁴

If Justices Ginsburg and Stevens are correct that "government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses,"⁶⁵ then the *Moore* Court incorrectly assumed that the Equal Protection Clause does not concern "differential governmental messaging."⁶⁶ The text and history of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution strongly demonstrate a constitutional policy against government sponsored racism in general and the "badges and incidents of slavery" in particular.⁶⁷ And, as discussed above, the Supreme Court has shown concern for government messaging racial inequality.⁶⁸

The Supreme Court's treatment of government speech in the context of the Establishment Clause is a helpful guide for Courts wrestling with the analysis of racist government hate speech.⁶⁹ But, one significant difference between the Establishment Clause and the Equal Protection Clause is that the Establishment Clause does not absolutely prohibit government speech on religion and allows for some religious speech under certain circumstances. The Equal Protection Clause, however, absolutely prohibits State sponsored intentional

64. *Moore*, 853 F.3d at 250.

65. *Pleasant Grove City, Utah*, 555 U.S. at 482, 129 S. Ct. at 1139 (Ginsburg and Stevens, concurring) (emphasis added).

66. *Moore*, 853 F.3d at 250.

67. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 625 (2012) ("Virtually every commentator since *Jones* has assumed that the 'badges and incidents of slavery' can refer to contemporary issues of injustice. Thus, many have engaged in efforts to 'compare contemporary harms to past practices in an effort to identify the 'lingering effects of slavery.'"); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43, 88 S. Ct. 2186, 2204-05 (1968) ("For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom, namely, the same right * * * to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.' Civil Rights Cases, 109 U.S. 3, 22, 3 S. Ct. 18, 29. Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.").

68. See *supra* notes 50 to 60 and accompanying text.

69. Norton *supra* 14 at 188 ("[W]e can choose to learn from courts' experience wrestling with whether and when government's religious speech impermissibly 'establishes' religion when confronted with the parallel challenge of determining whether and when government's hateful speech might deny 'the equal protection of the laws.'").

racial discrimination. Therefore, constitutional limits on government speech promoting intentional racial discrimination should be more stringent and restrictive than government speech on religion.

The Free Speech Clause of the First Amendment restricts government regulation of private speech; it does not regulate government speech.⁷⁰ A government entity has the right to “speak for itself.”⁷¹ “[I]t is entitled to say what it wishes,”⁷² and to select the views that it wants to express.⁷³ However, government sponsored displays which endorse religion violate the Establishment Clause of the First Amendment to the United States Constitution.⁷⁴ When analyzing whether Government action violates the Establishment Clause, Courts have applied the *Lemon* test.⁷⁵

“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁷⁶

Supreme Court Justices have interpreted this test in primarily two ways: 1) the government endorsement / reasonable observer test, and 2) the “coercion” test.

Endorsement, the Reasonable Observer, and Coercion

70. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S.Ct. 2055 (2005) (“[T]he Government’s own speech ... is exempt from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n. 7, 93 S.Ct. 2080 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression”).

71. *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 120 S.Ct. 1346 (2000).

72. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510 (1995).

73. See *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S.Ct. 1759 (1991); *National Endowment for Arts v. Finley*, 524 U.S. 569, 598, 118 S.Ct. 2168 (1998) (SCALIA, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view”); see also, *Pleasant Grove City, Utah*, 555 U.S. at 467–68, 129 S. Ct. at 1131 (2009).

74. Leonard W. Levy, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT, 196-197(1994); *Stone v. Graham*, 449 U.S. 39, 41, 101 S. Ct. 192, 194 (1980) (“The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths,³ and no legislative recitation of a supposed secular purpose can blind us to that fact.”); *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 875–76, 125 S. Ct. 2722, 2742 (2005) (Upholding a lower court injunction prohibiting Ten Commandments displays in courthouses, and stating “[g]iven the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause.”); *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 578–79, 109 S. Ct. 3086, 3093 (1989), abrogated by *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811 (2014) (declaring unconstitutional a crèche nativity display on the grand staircase of the county courthouse as violating the Establishment Clause).

75. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S. Ct. 2105, 2111 (1971).

76. *Id.* (Citations omitted).

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In the context of government speech and displays, the *Lemon* test has been refined by Justice O'Connor as an "endorsement test."⁷⁷

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. ... Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.⁷⁸

She explained in more detail in a different case:

As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message "that religion or a particular religious belief is favored or preferred." ... If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to non-adherents that they are outsiders or less than full members of the political community.⁷⁹

Under the "Endorsement analysis," the Court evaluates the government message through the lens of a "reasonable observer."⁸⁰ The government speech should be viewed through the eyes of "an objective observer, acquainted with the text, legislative history, and implementation of the statute" in assessing its secular or sectarian purpose and effect.⁸¹ Courts ask whether a reasonable observer would conclude that the government had communicated "a message to non-adherents that they are outsiders, not full members

77. *Lynch v. Donnelly*, 465 U.S. 668, 687–89, 104 S. Ct. 1355, 1367 (1984) ("Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.").

78. *Id.*

79. *Cnty. of Allegheny*, 492 U.S. at 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted); Norton *supra* 14 at 190.

80. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (adopting the perspective of "an objective observer, acquainted with the text, legislative history, and implementation of the statute" in assessing its secular or sectarian purpose and effect); *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J., concurring) (asking whether a reasonable observer would conclude that the government had communicated "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community").

81. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308.

of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁸²

Justice O’Connor contrasted her “endorsement” approach to the Establishment Clause from a “coercion” approach.⁸³

An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.⁸⁴

As articulated by Justice Kennedy, who is among those most often associated with coercion analysis: “[G]overnment may not coerce anyone to support or participate in any religion or its exercise Forbidden involvements include compelling or coercing participation or attendance at a religious activity, requiring religious oaths to obtain government office or benefits, or delegating government power to religious groups.”⁸⁵ “Under this approach, courts should find government to violate the Establishment Clause only when its religious or antireligious speech-or other action-coerces behavioral change, rather than when it inflicts expressive harm.”⁸⁶

The Endorsement is better suited to the Equal Protection Clause because the Equal Protection Clause absolutely prohibits race discrimination while the Establishment clause merely prohibits preference for religion but does not bar all government religious speech. The “coercion test” narrowly construes government speech in order to allow government to participate in religious speech, so long as government doesn’t coerce behavior along religious lines. Under no circumstances should the government encourage racism; and so, the Constitution should prohibit any government endorsement of racial inequality.

Standing under the Establishment Clause

82. *Lynch*, 465 U.S. at 688 (1984) (O’Connor, J., concurring); See B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1411 (2014) (offering a critique of the “reasonable observer” test. “And one might fear that symbols and practices will be understood as less problematic when they reflect the expectations and cultural background of judges, many of whom are white, male, and Christian. Thus, the reasonable observer still risks embodying an overwhelming majoritarian bias when used to interpret social meaning.”)

83. *Cnty. of Allegheny*, 492 U.S. at 627-28 (O’Connor, J., concurring in part and concurring in the judgment) (citations omitted).

84. *Id.*

85. *Id.* at 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (citations omitted).

86. Norton *supra* 14 at 188-89.

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It is easier to show standing to bring a claim under the Establishment Clause for the expressive harms caused by government endorsement of religion than it is to show individualized intentional particularized harm under the restrictive traditional Equal Protection Clause analysis above. A person offended by unconstitutional government religious speech has standing to bring suit if they are a taxpayer or there is offensive contact with government religious speech.

Federal and state taxpayers ordinarily do not have standing as taxpayers to challenge government expenditures.⁸⁷ Under *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968), however, state and federal taxpayers have taxpayer standing to assert an Establishment Clause challenge against specific legislative appropriations that directly benefit religion.⁸⁸ In *Hein v. Freedom from Religion Found., Inc.*, the Supreme Court denied standing because the challenged Executive expenditures “were not expressly authorized or mandated by any specific congressional enactment.”⁸⁹ After *Hein*, the future of taxpayer standing under *Flast* is uncertain.⁹⁰ Under current doctrine municipal taxpayers ordinarily have standing to challenge the misuse of municipal funds.⁹¹ The future vitality of municipal taxpayer standing is also uncertain.⁹²

In the non-taxpayer standing cases, most plaintiffs challenging a governmental religious symbol under the Establishment Clause need only show some variation of “direct and unwelcome contact” with the symbol to satisfy the injury-in-fact requirement of the Court’s Article III standing doctrine.⁹³ Some courts have required allegations that the plaintiff altered their behavior

87. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343, 345 (2006); David Spencer, *What’s the Harm? Nontaxpayer Standing to Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL’Y 1071, 1097 (2011) (Footnote 2).

88. Spencer, *supra* note 88 at 1097 (Footnote 2).

89. 551 U.S. 587, 608 (2007).

90. Spencer, *supra* note 88 at 1097 (Footnote 2) (citing Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 119).

91. *Id.*

92. *Id.* (citing *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, No. 06-6533, 2011 WL 475186, at *19-20 (6th Cir. Feb. 11, 2011). (Sutton, J., concurring) (arguing that the justification for municipal taxpayer standing is no longer defensible in contemporary America and in light of the Supreme Court’s current standing doctrine more generally)).

93. *Id.* at 1072 (FootNote 21); See also for a discussion of the disarray among lower courts in determining injury-in-fact standing for Establishment Clause purposes, see David Harvey, *It’s Time to Make Non-Economic or Citizen Standing Take a Seat in ‘Religious Display’ Cases*, 40 DUQ. L. REV. 313, 315, 321-63 (2002) (describing the split in circuits); Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 501-04 (1995) (noting how the Supreme Court has failed even to discuss standing in many of its Establishment Clause cases).

to avoid the religious symbol or display.⁹⁴ “Of the circuits that have addressed standing in the religious symbol context, only the Second, Third, and Eighth Circuits have left open the possibility that altered behavior is necessary to establish injury-in-fact. In most circuits, therefore, a showing of altered behavior is sufficient, but not necessary, to satisfy Article III standing’s injury-in-fact requirement.”⁹⁵

Where government speech is involved, government endorsement of racial inequality should be more constitutionally restricted than government speech about religion. Some Government speech about religion is permitted, so long as the Government does not endorse on religion or coerce behavior. No government speech endorsing intentional racism should be allowed in light of the strong prohibition on racism articulated in the text and history of the Reconstruction Amendments to the United States Constitution.

If religious favoritism in government displays conveys a message endorsing the favored religious group, then government statements endorsing racial inequality similarly convey a message favoring white Americans. And if standing for non-favored groups exists in religious speech cases, it should also exist in racially discriminatory government speech cases.

Surely the message that one is an “outsider[], not [a] full member[] of the political community” because of one’s race is not somehow less injurious than the message that one is an outsider because of one’s religion. For many, race is just as central to self-identity as religion; indeed, race may be more central because it is immutable. Moreover, the scars that remain from our nation’s sad history of excluding racial minorities from full political participation are surely at least as deep as those that remain from past instances of religious exclusion, and very likely a good deal deeper. The only way, then, to extend nontaxpayer Establishment Clause standing to suits involving reli-

94. See, e.g., *Harris v. City of Zion*, 927 F.2d 1401, 1405-06 (7th Cir. 1991) (holding that plaintiffs suffered cognizable injury because they “mightily str[o]ve[] to avoid any visual contact” with the city seal and thereby evinced a “willingness ... to incur a tangible, albeit small cost that validates the existence of genuine distress and warrants the invocation of federal jurisdiction” (internal quotation marks omitted)); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (finding injury where plaintiffs “have been led to alter their behavior--to detour, at some inconvenience to themselves, around the streets they ordinarily use”); Spencer, *supra* note 88 at 1077 (Footnote 22 and 23).

95. Spencer, *supra* note 88 at 1078; The Second Circuit found standing where there was both direct contact and altered behavior, so it is impossible to know if altered behavior was necessary. *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 490-91 (2d Cir. 2009). In the only Third Circuit case on point, the court did not decide whether either direct contact or altered behavior will give rise to standing because it concluded the plaintiffs’ allegations failed to satisfy even the laxer direct and unwelcome contact test. *ACLU of N.J. v. Twp. of Wall*, 246 F.3d 258, 265-66 (3d Cir. 2001). The Eighth Circuit has explicitly declined to decide between the two tests because in its only case directly on point it concluded that the plaintiffs satisfied both. *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1030 (8th Cir. 2004), *adopted in relevant part*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc).

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gious favoritism in the distribution of government benefits without destroying the Allen rule and dramatically expanding standing to challenge alleged government discrimination is to accept the wholly untenable position that government discrimination on the basis of religion somehow conveys a “message” that government discrimination on other grounds does not.⁹⁶

As a result, I advocate for an analysis under the Equal Protection Clause which would restrict government speech when a reasonable observer, aware of the history of the speech, would interpret the government speech as favoring racial inequality. Under such a test, a person offended by racist government messaging would have standing to bring a claim under the Equal Protection Clause to restrict that message.

The next sections look at the example of Confederate Monuments in public places and considers how Courts could consider this government speech through the lens of the traditional equal protection analysis, the modified “coercion” test under the Establishment clause, and the modified endorsement / reasonable observer test. A “reasonable, objective observer” who views the “text” of the Confederate monument and is acquainted with the history leading to and the actual implementation of the statue, must conclude that the Confederate monuments were erected to with the express purpose of advancing a campaign of white supremacy and revisionist civil war history. The historic record shows that Confederate Monuments were erected to glorify the false mythology of the “Lost Cause” and spread white supremacy.⁹⁷

III. HOW CONFEDERATE MONUMENTS HAVE BECOME THE CONTESTED SITE FOR THE STRUGGLE OVER AMERICAN RACIAL EQUALITY

The debate about removing public symbols of the Confederacy became widespread when white supremacist Dylann Roof murdered nine African Americans worshipping at the Emanuel Methodist Episcopal Church in downtown Charleston, South Carolina on June 17, 2015 under the banner of

96. Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test, 123 HARV. L. REV. 1999, 2017–18 (2010) (Citing *Tseming Yang, Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 121 n.11 (1997) (“[R]ace and religion occupy places of similar importance because both greatly affect an individual’s self-identity.”)).

97. *Moore*, 205 F. Supp. 3d at 842 (“Another piece of the South’s revisionist campaign was the movement to construct Confederate monuments throughout the country. The construction of these memorials happened in waves connected to the racial climate of the South.”).

the Confederate Flag.⁹⁸ The attack sparked a new national discussion on Confederate memorials, and many states and municipalities began removing the landmarks.⁹⁹ Tensions culminated on August 12, 2017, when protestors gathered to oppose the planned removal of a statue of Confederate general Robert E. Lee in Charlottesville, Virginia.¹⁰⁰ The “Unite the Right” protest was composed of white supremacists, neo-Nazis, and members of the Ku Klux Klan, and was met with large groups of counter-protestors.¹⁰¹ The night before the protest, approximately 250 white supremacists congregated on the campus of the University of Virginia.¹⁰² They marched in formation, “two by two,” to the statue of Thomas Jefferson.¹⁰³ These white supremacists carried lit torches and chanted white nationalist slogans.¹⁰⁴ Shortly before 2 p.m., after some fighting had broken out, a speeding car rammed into the counter-protesters, killing Heather Heyer and injuring twenty others. James Alex Fields, Jr. was charged and convicted of second-degree murder, along with other counts; for driving his car into the group of peacefully dispersing counter-protestors.¹⁰⁵ Two other “Unite the Right” supporters, Jacob Scott Goodwin and Alex Michael Ramos, were sentenced to eight and six years in prison, respectively, for participating in the beating of a black man during the Charlottesville protest. And Richard R. Preston, a Ku Klux Klan leader, was sentenced to four years in prison for firing his gun during the rally.¹⁰⁶

Since Charlottesville, the debate has continued, with supporters of removal pointing to a legacy of racism and systemic oppression, and detractors claiming the monuments to be important artifacts of the cultural heritage of the United States.¹⁰⁷ Only days after Charlottesville, on August 14, 2017, over 100 protesters gathered in Durham, North Carolina where some of them toppled a statue of a Confederate soldier in front of the historic Durham County

98. Raymon, *supra* note 7.

99. *Id.*

100. Joe Heim, *Recounting a day of rage, hate, violence and death*, WASHINGTON POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.97922fb39e05.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Jonathan M. Katz and Farah Stockman, *James Fields Guilty of First Degree Murder in Death of Heather Heyer*, NEW YORK TIMES, (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/us/james-fields-trial-charlottesville-verdict.html>.

106. Christine Hauser and Julia Jacobs, *Three Men Sentenced to Prison for Violence at Charlottesville Rally*, NEW YORK TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/us/kuuk-charlottesville-richard-preston.html>.

107. Miles Parks, *Confederate Statues were built to further a white supremacist future*, NATIONAL PUBLIC RADIO (Aug. 20, 2017), <https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future>.

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Courthouse.¹⁰⁸ The group was composed of members of the Democratic Socialists of America, Workers World Party, and Industrial Workers of the World., as well as other residents disturbed by the Confederate monument and white supremacist demonstrators.¹⁰⁹ The felony charges against those involved in the Durham protest were dropped before trial and on February 19, 2018, a Judge dismissed the charges against two of the protestors and acquitted a third. The charges against the remaining defendants were dropped the following day.¹¹⁰

After the removal of the Confederate monuments, the North Carolina Governor Roy Cooper said that he understood the frustration of the protestors who toppled the statute, and agreed that confederate monuments should be removed, but that there was a better way to remove the monuments.¹¹¹ He went on to say “[s]ome people cling to the belief that the Civil War was fought over states’ rights. But history is not on their side. We cannot continue to glorify a war against the United States of America fought in the defense of slavery. These monuments should come down.”¹¹²

A few days after the toppling of the Confederate Monument in downtown Durham, a monument of Confederate general Robert E. Lee at Duke University’s chapel was vandalized.¹¹³ The statue was removed three days later. In a press release, Duke President Vincent Price stated the statue was removed over concerns of student safety and that the removal presented an opportunity for the Duke community to learn and heal.¹¹⁴

Leaders around the Country began considering the removal of Confederate symbols. In New York, religious leaders removed two plaques commemorating Gen. Robert E. Lee outside an Episcopal church in Brooklyn.¹¹⁵ At

108. Maggie Astor, *Protestors in Durham Topple a Confederate Monument*, NEW YORK TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/14/us/protesters-in-durham-topple-a-confederate-monument.html>.

109. *Id.*

110. Graham, *supra* note 1.

111. Roy Cooper, *North Carolina Monuments*, MEDIUM (Aug. 15, 2017), https://medium.com/@NC_Governor/north-carolina-monuments-b7ead3c471ee.

112. *Id.*

113. Ray Gronberg, *Vandals Strike statue of Confederate General Robert E. Lee at Duke University*, DURHAM HERALD SUN, (Aug. 17, 2017), <https://www.heraldsun.com/news/local/counties/durham-county/article167702402.html>.

114. Vincent Price, *Duke Removes Robert E. Lee Statue From Chapel Entrance*, DUKE TODAY (Aug. 19, 2017), <https://today.duke.edu/2017/08/duke-removes-robert-e-lee-statue-chapel-entrance>.

115. Molly Crane-Newman, Thomas Tracy, and Larry McShane, *Religious leaders remove Brooklyn plaques honoring Robert E. Lee, prompting threats from alt-right protesters*, NEW YORK DAILY NEWS (Aug. 17, 2017), <http://www.nydailynews.com/new-york/brooklyn/robert-e-lee-plaques-removed-brooklyn-article-1.3416400>.

Bronx Community College, busts of Lee and Stonewall Jackson were removed from a sculpture display, the “Hall of Fame for Great Americans.”¹¹⁶ College president Thomas Isekenegbe commented that the busts would be replaced with historical pieces that generate a “space where all people feel respected, welcomed, and valued.”¹¹⁷ In Boston, the only Confederate monument in the state of Massachusetts was covered after Charlottesville and later removed by the state’s Department of Conservation and Recreation.¹¹⁸ Governor Charlie Baker had called for the removal, noting that the memorial and others like it represented “symbols . . . that do not support liberty and equality for the people of Massachusetts and the nation.”¹¹⁹ In Maryland, a statue of former Supreme Court Chief Justice Roger B. Taney, the author of the *Dred Scott* decision, was taken down.¹²⁰ Governor Larry Hogan endorsed the removal in a statement, commenting that “While we cannot hide from our history — nor should we — the time has come to make clear the difference between properly acknowledging our past and glorifying the darkest chapters of our history.”¹²¹

Lawmakers in several states have passed legal barriers to removing monuments. In May 2017, the governor of Alabama signed into law a bill that barred municipalities from “altering, renaming or removing monuments, memorial streets, or memorial buildings that have been on public property for more than 40 years.”¹²² This effectively included most of the Confederate monuments in the state.¹²³ In Memphis, Tennessee, city leaders were able to circumvent similar state restrictions by selling the statues of Confederate President Jefferson Davis and Civil War general Nathan Bedford Forrest to a privately-owned nonprofit who then removed the statues.¹²⁴

The North Carolina General Assembly passed a similar law in 2015 preventing local governments from moving any “object of remembrance” sitting

116. Leonica Valentine and Bruce Golding, *Bronx Community College removed Confederate busts*, NEW YORK POST (Aug. 18, 2017), <https://nypost.com/2017/08/18/bronx-community-college-removes-confederate-busts/>.

117. *Id.*

118. Cistella Guerra, *State’s only Confederate memorial will be removed*, BOSTON GLOBE (Oct. 2, 2017), <https://www.bostonglobe.com/metro/2017/10/02/state-only-confederate-memorial-will-moved-state-archives/fiFFyZcJxK7A529ugIzjFN/story.html>.

119. *Id.*

120. Pamela Wood and Erin Cox, *Roger Taney statue removed from Maryland State House grounds overnight*, BALTIMORE SUN (Aug. 18, 2017), <http://www.baltimoresun.com/news/maryland/politics/bs-md-taney-statue-removed-20170818-story.html>.

121. *Id.*

122. *Id.*

123. *Id.*

124. Emanuella Grinberg and Nicole Chavez, *Confederate Statues Come down in Memphis*, CNN, (Dec. 21, 2017), <https://www.cnn.com/2017/12/21/us/memphis-confederate-bedford-davis-statues/index.html>.

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on public property.¹²⁵ The law prohibits the removal of monuments by requiring approval of the North Carolina Historical Commission.¹²⁶ The North Carolina Historical Commission is also appointed and controlled by a republican majority committed to maintaining confederate monuments.¹²⁷

Protesters gathered at UNC Chapel Hill on August 20, 2018 and pulled down the top part of the Confederate monument representing the figure of a confederate soldier.¹²⁸ In the weeks that followed, several people were arrested at clashes between Confederate monument supporters, opponents, and police.¹²⁹ After UNC announced a proposal to build a new building for the monument, more protests erupted, more people were arrested, and teaching assistants threatened to withhold grades.¹³⁰ This proposal was rejected by the Board of Governors.¹³¹ Like the N.C. Historical Commission, the UNC Board of Governors is appointed by the Republican majority of the North Carolina General Assembly who favor keeping Confederate monuments in

125. Jaweed Kaleem, *In some states, it's illegal to take down monuments or change street names honoring the Confederacy*, LOS ANGELES TIMES (Aug. 16, 2017), <http://www.latimes.com/nation/la-na-confederate-monument-laws-20170815-htmlstory.html>.

126. N.C. Gen. Stat. Ann. § 100-2.1(a)

127. Erica Hellerstein, *N.C. Historical Commission Votes to Punt on Removing Confederate Monuments from Capitol*, INDEPENDENT WEEKLY (Sept. 22, 2017), <https://indyweek.com/news/archives/n.c.-historical-commission-votes-punt-removing-confederate-monuments-capitol/>; Gary Robertson, *NC GOP Leaders don't want confederate monuments moved*, CITIZENS TIMES (Sept. 21, 2017), <https://www.citizen-times.com/story/news/local/2017/09/21/nc-gop-leaders-dont-want-confederate-statues-moved/691454001/> ("North Carolina Republican lawmakers on Thursday pressed a state panel not to grant Democratic Gov. Roy Cooper's request to relocate Confederate monuments from the old Capitol grounds, with one leader predicting that any such approval would be overturned in court.").

128. Jesse James Deconto and Alan Blinder, *Silent Sam' Confederate Statue is Toppled at University of North Carolina*, NEW YORK TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/unc-silent-sam-monument-toppled.html>.

129. Carli Brosseau and Tammy Grubb, *Silent Sam supporters and opponents square off again at statue's former site*, NEWS & OBSERVER (Sept. 9, 2019), <https://www.newsobserver.com/news/local/article218067295.html> (Protesters were arrested September 8, August 30, August 25, and August 20, when Confederate Monument was pulled down.); Associated Press, *8 Arrested at Confederate Statue protest blame officers*, (Sept. 10, 2018), <https://www.apnews.com/21026ee6babb45e1acf08f8a2bf64b8c>.

130. Steven Johnson, *Silent Sam Protesters at Chapel Hill Embrace a new tactic: a 'Grade Strike'*, THE CHRONICLE OF HIGHER EDUCATION (Dec. 7, 2018), <https://www.chronicle.com/article/Silent-Sam-Protesters-at/245288> ("Just as the fall semester is set to close, activists say, at least 79 teaching assistants and instructors have joined a rare "grade strike," pledging to withhold more than 2,000 final grades unless the university meets their conditions"); Susan Svrluga, *UNC In turmoil over Silent Sam, the Confederate Monument toppled by protesters*, WASHINGTON POST (Dec. 13, 2018), https://www.washingtonpost.com/education/2018/12/13/unc-turmoil-over-silent-sam-confederate-monument-toppled-by-protesters/?utm_term=.ac7fdd5803c6.

131. Sarah Willets, *UNC Board of Governors Rejects Proposal for a New On-Campus Facility to House Silent Sam*, INDEPENDENT WEEKLY (Dec. 14, 2018), <https://indyweek.com/news/northcarolina/unc-board-of-governors-rejects-silent-sam/>.

public spaces. Their support for confederate monuments bring them into conflict with the UNC administration, faculty, and student body who oppose the Confederate monument on campus.¹³² Members of the Board of Governors have expressed their wish for Silent Sam to be returned to the Campus.¹³³ Some members of the conservative UNC Board of Governors have said the Confederate Monument should be placed in a prominent place on the campus of UNC Chapel Hill to honor that part of its history.¹³⁴ Republican Board of Governors member Thom Goolsby has said the Confederate Monument needs to return immediately to the campus of UNC Chapel Hill, “We cannot stand for this outrage,” “Silent Sam should be re-erected under the law, he said, and it should have already been done.”¹³⁵

Nevertheless, Chancellor Folt announced her decision to have the remaining base of the Confederate Monument removed as she also announced her resignation.¹³⁶ Announcing her unilateral decision to remove the base and remainder of the Confederate Monument without the approval of the Board of Governors, Chancellor Folt explained that her decision was, “the right one for our community – one that will promote public safety, enable us to begin the healing process and renew our focus on our great mission.”¹³⁷

Chancellor Folt based her opinion that the Confederate Monument posed a public safety threat upon the report of an independent panel of safety experts who noted three main reasons the Confederate Monument poses a new and unique threat to the campus. First, “The University faces a high risk of violence, civil disorder and property damage if the Monument is restored to

132. Julia Jacobs, *U.N.C. Chancellor to Leave Early after Ordering Removal of ‘Silent Sam’ Statue’s base*, NEW YORK TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/us/silent-sam-statue-removal-unc.html> (“The statue’s toppling touched off political tensions between North Carolina’s Republican-dominated legislature, which elects the board of governors, and the university community, a liberal enclave in a red state. Mr. Smith, the chairman of the board of governors, which is elected by the state legislature, reacted angrily to the initial toppling of the statue, calling it vandalism.”).

133. Jeffrey C. Billman, *UNC Board of Governors Member Thom Goolsby’s Got a Plan to Re-Erect Silent Sam*, INDEPENDENT WEEKLY (Jan 17, 2019), <https://indyweek.com/news/northcarolina/unc-board-of-governors-thom-goolsby-silent-sam/> (“That decision, then, will ultimately fall to the Board of Governors, a mostly conservative bunch appointed by the Republican-controlled General Assembly. And one of its most conservative members—and probably its biggest Silent Sam apologist—former state senator Thom Goolsby of Wilmington, has a “great suggestion”: Take the \$5 million Folt wanted to use to build a history center to house Silent Sam and instead put the Confederate statue back where it once stood, in McCorkle Place, then build some sort of structure to protect it from the rabble and “allow people to present their views, and actually allow different points of view, and perhaps even encourage other statues to be put up.”); Knott, *supra* note 3.

134. Stancill, *supra* note 3.

135. *Id.*; see also, Knott, *supra* note 3.

136. Jacobs, *supra* note 136.

137. Chancellor Folt, *Chancellor Folt announces resignation, orders Confederate Monument pedestal to be removed intact*, UNC CHAPEL HILL (Jan 14, 2019), <https://www.unc.edu/posts/2019/01/14/folt-resignation-orders-confederate-monument-pedestal-removed/>

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campus” as a result of new organized protests against the Monument.¹³⁸ Second, “Over the last few years the nature of college campus protests has changed dramatically” in that protesters are more willing to use violence to further their political goals.¹³⁹ And Third, [r]eturning the Monument to any open area such as McCorkle Place will draw significant local, state and national attention, and significant protest actions will resume. The Safety Panel concluded, based on media posts and patterns of past events centered on the Monument, “it will literally be under siege.”¹⁴⁰

As a result of her decision to remove the remainder of the Confederate Monument, the Board of Governors ordered Chancellor Folt to leave early.¹⁴¹ The UNC Board of Governors has not made a final determination as to whether the Confederate Monument should be returned to the UNC Campus, but the Board appears to be deeply divided and at an impasse.¹⁴²

Even after the removal of the Confederate Monument at the University of North Carolina at Chapel Hill, pro-monument and anti-racism protesters continue to gather and clash.¹⁴³ Also After the Confederate Monument was removed, members of the “Heirs to the Confederacy,” were charged with vandalism and ethnic intimidation for writing racial graffiti on the “Unsung Founders” Memorial (a monument to people of color who built the university).¹⁴⁴

The Confederate monument at UNC Chapel Hill, like those in other places,¹⁴⁵ has become the focal point for the reexamination of the legacy of slavery, “energizing the debate over the significance of commemoration,

138. *Recommendation for the Disposition and Preservation of the Confederate Monument: A Four Part Plan presented by UNC-Chapel Hill to the UNC Board of Governors*, Appendices, “Summary of Safety and Security Considerations,” Appendix A-2, 6-7, (Dec. 3, 2018), <https://bot.unc.edu/files/2018/12/Final-Report.pdf>.

139. *Id.*

140. *Id.*

141. Jacobs, *supra* note 136.

142. Joe Killian, *In major reversal, UNC Board of Governors chair voices opposition to return of ‘Silent Sam,’* NC POLICY WATCH (May 23, 2019), <http://www.ncpolicywatch.com/2019/05/23/in-major-reversal-unc-board-of-governors-chair-voices-opposition-to-return-of-silent-sam/>.

143. Quillin, *supra* note 9.

144. Molly Olmsted, *Two Members of the ‘Heirs to the Confederacy’ Charged with Vandalizing UNC Slave Memorial with Urine, Racial Slurs*, SLATE MAGAZINE (Apr. 9, 2019), <https://slate.com/news-and-politics/2019/04/unc-slave-memorial-vandalized-charges.html>.

145. Joe Johnson, *Chatham County leaders get feedback about whether to remove a Confederate statue*, NEWS & OBSERVER, (Mar. 18, 2019), <https://www.newsobserver.com/news/local/article228083204.html> (“Elizabeth Haddix, who is a civil rights attorney, said she would like to see the statue taken down. ‘Every time I come around the traffic circle and see that statue, it is a monument to white supremacy,’ she said. ‘The historical documents show what it stands for. The statue needs to come down. It’s about time it comes down.’”).

memory of the Civil War has again served as an important vehicle for negotiation of American Identity.”¹⁴⁶ The question about whether the reinstall the Confederate monument on the campus of UNC Chapel Hill is an opportunity to consider how the Equal Protection Clause could restrict government speech promoting racial inequality.

IV. DOES THE CONFEDERATE MONUMENT ON THE CAMPUS OF UNC CHAPEL HILL REPRESENT UNCONSTITUTIONAL GOVERNMENT SPEECH ENDORSING RACIAL INEQUALITY?

This section considers how the Courts might interpret the Confederate Monument at UNC Chapel Hill as unconstitutional government speech under the Equal Protection Clause. There is strong historical evidence that the Confederate Monument was erected with the intent to convey a government message endorsing racial inequality. In addition to discriminatory intent, there are multiple ways to show that the racial message conveyed by the Confederate Monuments disproportionately impact African Americans. Under the present political circumstances, the public safety concerns and violence associated Confederate Monuments cause more than just an expressive harm of racial stigmatization and would likely meet the requirements of a claim under the restrictive equal protection clause analysis applied in the Confederate Flag cases. And, under the less restrictive modified standards from the Establishment clause, the coercion and endorsement tests, a person offended by the Confederate Monument would be able to assert a claim for its removal under the Equal Protection Clause.

Discriminatory Intent

Under a traditional equal protection analysis, a plaintiff would have to show that “racial discrimination was a substantial or motivating factor” motivating the erection of the Confederate Monument.¹⁴⁷ A “modified coercion test” would ask whether the government speech conveyed a message endorsing racial inequality that was so offense as to coerce or affect the behavior of those who come in contact with it. A “modified endorsement test” would ask whether a “reasonable observer, “acquainted with the text, legislative history, and implementation” of the statue” would discern a racially discriminatory “purpose or effect.”¹⁴⁸ When applying this “reasonable observer” test, the Court would determine whether the government communicated a message to

146. Thomas Brown, *THE PUBLIC ART OF CIVIL WAR COMMEMORATION* 13 (2004)

147. *Coleman*, 117 F.3d at 529 (citing *Hunter v. Underwood*, 471 U.S. 222, 225–26, 105 S.Ct. 1916, 1919–20 (1985)).

148. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (adopting the perspective of “an objective observer, acquainted with the text, legislative history, and implementation of the statute” in assessing its secular or sectarian purpose and effect).

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racial minorities that they are outsiders, not full members of the political community, and an accompanying message to a majority white population that they are insiders, insiders, favored members of the political community.¹⁴⁹

When answering these questions, the history of the intent of the people erecting the monument and the historic context of its design and erection are central to discerning whether there is discriminatory purpose or intent. “Monuments and memorials are political constructions, recalling and representing histories selectively, drawing popular attention to specific events and people and obliterating others.”¹⁵⁰ Monuments are erected for political purposes to “promote selective and dominant historical narratives,” “present and encourage future possibilities,” and help “establish the social dynamics of inclusion and exclusion.”¹⁵¹ Monuments seek to convey dominant worldviews and once erected become “social property.”¹⁵² The interpretation of monuments can change over time with “social relations, concepts of nation and opinions on past events.”¹⁵³ For example, tearing down monuments erected by Communist authorities after the fall of communism in eastern Europe “was a sign of regime change through post-socialist space.”¹⁵⁴ Therefore, when interpreting monuments it is important to review the history of the political and cultural context at the time the monument was erected.

Reconstruction, White Supremacy and the Myth of the “Lost Cause”

In the aftermath of the Civil War, white southern elites faced the destruction of their wealth and an existential challenge to their political power. They suffered destruction of two-thirds of their wealth, two-fifths of their livestock, one-fourth of their white male relatives between the age of twenty and forty, half of their farm machinery, most of their railroads and industrial infrastructure, and an overall sixty percent decrease in their wealth.¹⁵⁵ The passage of the Reconstruction Acts, the Thirteenth, Fourteenth, and Fifteenth

149. *Lynch*, 465 U.S. at 688 (1984) (O’Connor, J., concurring) (asking whether a reasonable observer would conclude that the government had communicated “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”)

150. Federico Bellentani and Mario Panico, *The meanings of monuments and memorials: toward a semiotic approach*, Vol 2 Issue 1 PUNCTUM INTERNATIONAL JOURNAL OF SEMIOTICS, 37 (2016), http://punctum.gr/?page_id=513, https://orca.cf.ac.uk/96405/1/Bellentani_Panico_The%20meanings%20of%20monuments.pdf.

151. *Id.* at 37.

152. *Id.*

153. *Id.* at 38.

154. *Id.*

155. Alan T. Nolan, *The Anatomy of the Myth*, in *THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY*, Gary W. Gallagher and Alan T. Nolan, eds. 13 (2010).

Amendments, and the new state constitutions, opened the doors of political power African Americans and recently freed slaves.¹⁵⁶ A coalition between black Republicans and white Populists, a “Fusion” interracial coalition, took control of the North Carolina General Assembly, the governorship, and “countless local offices, threatening the power of both the remnants of the old planter class and the emerging industrial leaders of the New South.”¹⁵⁷ As a result, White Southern Democrats organized and conducted a systematic political and violent “white supremacy campaign” to retake power from the coalition of white and African American citizens.¹⁵⁸ Conventions were held throughout the South, not to ensure the rights of people recently freed from slavery, but to reestablish rule based upon white supremacy.¹⁵⁹ The campaign for white supremacy in North Carolina led to a “White Declaration of Independence” in Wilmington, North Carolina in 1898 announced by future Mayor Alfred Waddell,¹⁶⁰ followed by a violent coup against the governing black middle class, killing African Americans, driving black business and political leaders from the city, and seizing their homes and businesses.¹⁶¹ White supremacist leaders of the coup killed Black citizens and threw their

156. Laura F. Edwards, *Captives of Wilmington*, in *DEMOCRACY BETRAYED*, eds. David S. Cecelski and Timothy Tyson, 117 (1998).

157. Timothy Tyson and David Cecelski, *Introduction to Democracy Betrayed*, in *DEMOCRACY BETRAYED*, eds. David S. Cecelski and Timothy Tyson, 4 (1998).

158. H. Leon Prather, Sr., *We Have Taken a City*, in *DEMOCRACY BETRAYED*, eds. David S. Cecelski and Timothy Tyson, 20-21 (1998); Moore, 205 F. Supp. 3d at 840 (“Upon the readmission of the Confederate states to the Union, the South committed itself to two “new” causes—the continuation of a racial caste system and the endurance of Antebellum culture. During Reconstruction, organizations like the Ku Klux Klan, Knights of the White Camellias, and the White League sought to preserve white supremacy by using intimidation and violence to terrorize African-Americans.”)

159. Moore, 205 F. Supp. 3d at 844 (“In 1890, Mississippians held a Constitutional Convention. Its purpose was clear. ‘Our chief duty when we meet in Convention, is to devise such measures, consistent with the Constitution of the United States, as will enable us to maintain a home government, under the control of the white people of the State,’ said State Senator Zachariah George. In other words, the Convention was not intended to ensure the proper implementation of the post-Civil War Constitutional Amendments, but rather to permit ‘white people’ to take back their state from the multi-racial coalition which had governed Mississippi after the War.”)

160. *White Declaration of Independence*, November 9, 1898, (<http://core.ecu.edu/umc/wilmington/scans/ticketTwo/whiteDeclaration.pdf>) (“Believing that the Constitution of the United States contemplated a government to be carried on by an enlightened people; Believing that its framers did not anticipate the enfranchisement of an ignorant population of African origin, and believing that those men of the State of North Carolina, who joined in forming the Union, did not contemplate for their descendants subjection to an inferior race: — We, the undersigned citizens of the City of Wilmington and County of New Hanover, do hereby declare that we will no longer be ruled, and will never again be ruled by men of African origin. This condition we have in part endured because we felt that the consequences of the War of Secession were such as to deprive us of the fair consideration of many of our countrymen. We believe that, after more than thirty years, this is no longer the case.”); WILMINGTON STAR NEWS (Nov. 17, 2006) (<https://www.starnewsonline.com/news/20061117/white-declaration-of-independence>)

161. Michael Honey, *Class, Race, and Power*, in *DEMOCRACY BETRAYED*, eds. David S. Cecelski and Timothy Tyson, 174-176 (1998).

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bodies into the Cape Fear river.¹⁶² “The ‘revolution’ in North Carolina came at the end of a series of white supremacy movements that swept the South and inaugurated a one party system that ruled the region for two-thirds of the twentieth century.”¹⁶³ The massive white supremacy campaign led to the cultural and legal separation of the races in politics, housing, employment, education, marriage, and society – enforced by law and by white terrorism, racial intimidation, and lynching.¹⁶⁴

In conjunction with and as a part of the white supremacy campaign, southern white elites promoted a false historical narrative and mythology of the civil war, known as the “Lost Cause,” in ORDER to elevate white elites, rationalize defeat,¹⁶⁵ and justify the continued subjugation and oppression of African Americans.¹⁶⁶ White southern elites, predominantly the United Daughters of the Confederacy, spread this “Lost Cause” legend through art work, books, pamphlets, school text books, and Confederate memorials.¹⁶⁷

162. Prather, Sr., *supra* note 162 at 35.

163. Honey, *supra* note 165 at 178.

164. Raymond Gavins, *Fear, Hope, and Struggle*, in DEMOCRACY BETRAYED, eds. David S. Cecelski and Timothy Tyson, 188-189 (1998); Moore, 205 F. Supp. 3d at 840-41 (“Racial violence continued through the 1870s as local Klan groups lynched, beat, burned, and raped African-Americans. Despite the Klan’s record of violence, ‘Southerners romanticized it as a chivalrous extension of the Confederacy.’”).

165. Moore, 205 F. Supp. 3d at 842 (“How the War would be remembered continued to be a point of contention between Union and Confederate veterans. At an event in 1900, Union veteran Albert D. Shaw argued that ‘the keeping alive of sectional teachings as to the justice and rights of the cause of the South, in the hearts of the children, is all out of order, unwise, unjust, and utterly opposed to the bond by which the great chieftain Lee solemnly bound the cause of the South in his final surrender.’ Confederate veteran John B. Gordon responded, ‘In the name of the future of the manhood of the South I protest. What are we to teach them? If we cannot teach them that their fathers were right, it follows that these Southern children must be taught that they were wrong. Are we ready for that? For one I am not ready! I never will be ready to have my children taught I was wrong, or that the cause of my people was unjust and unholy.’”).

166. Nolan, *supra* note 159 at 13. (“Leaders of such a catastrophe must account for themselves. Justification is necessary... a Georgia veteran who at one time commanded the United Confederate Veterans organization said, ‘If we cannot justify the South in the act of Secession, we will go down in History solely as brave, impulsive but rash people who attempted in an illegal manner to overthrow the Union of our Country.’”); Moore, 205 F. Supp. 3d at 841 (“Alongside the terror permeating the South, there was a prominent movement to ensure the “proper” historical recollection of the Civil War—that the Southern cause had been just and necessary.”).

167. Kristen L. Cox, DIXIE’S DAUGHTERS: NEW PERSPECTIVES ON THE HISTORY OF THE SOUTH, 1-3 (2003);

Moore, 205 F. Supp. 3d at 841 (This campaign was taken up by Confederate veterans and social groups. Women’s auxiliary groups initially organized locally, but evolved into an influential national organization called the United Daughters of the Confederacy (UDC). By 1912, the UDC had 45,000 members spread across over 800 chapters. It raised funds for Confederate monuments, promoted the celebration of Confederate holidays, maintained Confederate museums, and established “Children of the Confederacy” educational programs. Children in these programs learned history in the form of catechisms (a series of fixed questions and answers used for instruction), a method typically reserved for teaching religious doctrine. As one historian noted, ‘to the children memorizing the UDC’s catechisms, not only did the correct answers come from the truth-telling chapter leaders, but more importantly, they came straight from God.’”).

Briefly stated, the “Lost Cause” caricature of history advanced the several false historical narratives. First, slavery was not the main cause of the civil war; rather, tariff disputes, control of investment banking, means of wealth and the conflict between industrial and agricultural societies caused the war.¹⁶⁸ Abolitionists were characterized as troublemakers and provocateurs, manufacturing a conflict between north and south.¹⁶⁹ Next, the South created a nationalistic/cultural narratives that suggested Southerners were descendants of the English Norman Cavaliers who had vanquished the Anglo-Saxon tribes whose descendants were in the North, thereby creating a “mythic past of exiled cavaliers and chivalrous knights.”¹⁷⁰ The “Lost Cause” myth also provided a variety of explanations and rationalizations for the military loss, suggesting trickery, unfairness, betrayal, and inadequate manpower and resources, while idealizing the bravery and tactical brilliance of the confederate soldier and the saintliness of military leadership.¹⁷¹ The “Lost Cause” myth portrayed an idealized home front, painting the southern planter as gentle, graceful, aristocratic, and the slave as supportive of the humane, superior culture.¹⁷² Important to the “Lost Cause” narrative was the idea the secession was a lawful constitutional right and so Confederates were not traitors.¹⁷³ The “Lost Cause” narrative also suggested that southern states would have voluntarily given up slavery, and that slaves were content, faithful and satisfied with their treatment.¹⁷⁴ Taken as a whole, this narrative replaced historical

168. Nolan, *supra* note 159 at 15. The assertion that slavery was not the primary cause of the civil war is flatly contradicted by the Congressional record of prewar legislation on the expansion of slavery in the western states, and the prewar statements of southern political leaders themselves who declared the defense of slavery as the reason for the war. *Id.* at 19-20. This also includes the Constitution of the Confederacy which protected the right to own slaves in Article 4, Section 9. *Id.* at 20; Moore, 205 F.Supp.3d 834, 839 (“Confederate Vice President Alexander H. Stephens stated in March 1861, the ‘corner-stone’ of the Confederacy ‘rests upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition. This, our new government, is the first in the history of the world, based upon this great physical, philosophical, and moral truth.’”)

169. *Id.* at 15-16. Although Abolitionists caused trouble for slave owners, the collective consensus has long been that slavery was evil. *Id.* at 20-21.

170. *Id.* at 16-17.

171. *Id.* at 17-18. Although the North had a larger population and capacity to make war, its victory was not inevitable, and its success the result of seizing major ports and cities, decimating confederate armies in battle, and roaming at will through the Confederacy. *Id.* at 22.

172. *Id.* at 17. Southern Elite were not noble, gentle, kind people. They owned, beat, and tortured African Americans, and sometimes raped African American women and raised their own children as property. There were divisions within the southern communities over the military draft and taking supplies from civilians. *Id.* at 24. Also the Confederate soldier was not uniformly brave and committed. As many as 20,000 confederate soldiers deserted the night before the battle at Antietam. Desertion perpetually paralyzed the Confederate Army. *Id.* at 24-25.

173. *Id.* at 18. The North never politically or legally conceded the idea that there was a legal right to secede. When the issue reached the United States Supreme Court, the Court ruled that secession was unlawful. *Texas v. White*, 74 U.S. 700, 725, (1868).

174. *Id.* at 20-21. Far from giving up slaves, Confederate States made it a criminal offense to speak against slavery and enshrined slavery in its Constitution. *Id.* at 21. The historical record of slavery flatly contradicts assertions slaves were well treated and content to be owned as property. Slaves fled in massive

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fact with a mythology that righteous, wise, superior white men who were good to their slaves lawfully seceded from the United States to defend themselves from Northern aggression, fighting with honor and glory and failing in the face of unfair odds and overwhelming Northern power.¹⁷⁵

One political consequence of the “Lost Cause” myth is that it helped facilitate reunion with the North when the North acknowledged the “heroism and nobility” of the Confederate effort.¹⁷⁶ Another political consequence of the “Lost Cause” mythology was the betrayal of African American southerners abandoned by federal troops and political protection as a result of the compromise of 1877 which permitting segregation, lynching, and racial subjugation in the South.¹⁷⁷

By 1913, when the Confederate Monument at UNC Chapel Hill was erected, the “Lost Cause” myth was generally accepted in the North and South, and the historical caricature was the POLITICAL backdrop of “reunion” of white Americans. Yale historian David Blight captured the spirit of Confederate Monument building when describing a “Jim Crow reunion” of Northern and Southern soldiers at Gettysburg in 1913 saying “white supremacy might be said to have been the silent, invisible, master of ceremonies.”¹⁷⁸ President Wilson spoke at the Gettysburg reunion in July 1913 declaring “a quarrel forgotten.”¹⁷⁹

The ceremonies at Gettysburg in 1913 represented a public avowal of the deeply laid mythology of the Civil War that had captured the popular imagination ... as a tragedy that forged a greater unity, as a soldier’s call to sacrifice in order to save a troubled, but essentially good, Union, not as a crisis of a nation in 1913 still deeply divided over slavery, race, competing definitions of labor, liberty, political economy, and the future of the West.¹⁸⁰

In short, the President and the media adopted the “Lost Cause” as the nationally accepted explanation for the Civil War. News reports omitted any discussion of slavery or secession, and suggested that the war was fought

numbers when given the chance, and over 180,000 former slaves fought for the Union against the slave owning Confederacy. *Id.* 21-22.

175. *Id.* at 26-27.

176. *Id.* at 28.

177. *Id.* at 28-29. “In short, the success of the teachings of the Lost Cause led to the nation’s abandoning even its half-hearted effort to protect African Americans and bring them into the United States as equal citizens. Jim Crow, lynch law, and disenfranchisement followed.”

178. David W. Blight, *RACE AND REUNION*, 9-10 (2001).

179. *Id.* at 383-384.

180. *Id.* at 386.

over differing notions of “idealism,” “sovereignty of states.”¹⁸¹ Black newspapers were resentful of the Gettysburg reunion as segregation deepened, lynching persisted, and President Wilson aggressively racially segregated federal agencies.¹⁸²

Culturally, the victory of the “Lost Cause” myth also could be seen in 1913 when D.W. Griffith and Thomas Dixon began their collaboration creating the movie “Birth of a Nation.” Based upon the book “The Clansman,” the movie was a fiercely racist epic about the victimized south and the heroism of the Ku Klux Klan in defending white honor.¹⁸³ Premiering across the nation in 1915, this hugely successful movie conveyed the idea that blacks did not want emancipation and that emancipation was a dangerous disaster.¹⁸⁴ In the movie, Klan members castrate and kill a black man who supposedly raped and killed a white woman.¹⁸⁵ This movie was shown in both the White House and in Congress.¹⁸⁶

The United Daughters of the Confederacy built Confederate Monuments to promote the “Lost Cause” mythology and white supremacy.

In addition to the historical context when the Confederate Monument was erected, Courts should also consider the intention of the designer, author, and promoter of Confederate Monuments. Designers construct monuments to convey meaning and control readers’ interpretations, making “assumptions about its social background, education, cultural traits, tastes, and needs.”¹⁸⁷ “As a consequence, texts always refer to specific readerships, anticipating certain interpretations while resisting others.”¹⁸⁸

The predominant designer and promoter of Confederate Monuments across the South was the United Daughters of the Confederacy (“UDC”).¹⁸⁹ The UDC’s main objective was to vindicate and glorify the Confederate generation with the “Lost Cause” mythology.¹⁹⁰ Founded in 1894, the UDC organized and built Confederate Monuments, cared for Confederate veterans and widows, promoted and published pro-southern textbooks.¹⁹¹ The UDC also

181. *Id.* at 387-88.

182. *Id.* at 390.

183. *Id.* at 394-396.

184. *Id.* at 395.

185. *Id.*

186. *Id.*

187. Bellentani and Panico, *supra* note 154 at 31.

188. *Id.*

189. Cox, *supra* note 171 at 49-52.

190. *Id.* at 3-5; Moore, 205 F. Supp. 3d at 841-42 (“What the South lost on the battlefield, it sought to recover in the collective memory of the next generation. ‘We have pledged ourselves to see that the truth in history shall be taught,’ proclaimed UDC officer Kate Noland Garnett, and there ‘shall be no doubt in the minds of future generations as to the causes of the war, and why Southern men were forced to take up arms to defend their homes from the invading North.’”)

191. *Id.* at 2-3; Moore, 205 F. Supp. 3d at 841.

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advanced and supported the political white supremacy campaign which disenfranchised and terrorized African Americans.¹⁹²

UDC members placed the Confederate flag and portraits of Confederate heroes in southern classrooms and helped teachers plan history lessons.¹⁹³ Their goal was to shape the new South by teaching children the principles of the Confederacy, “replete with racial stereotypes, emphasized the inferiority of blacks, and exaggerated the benevolence of slave ownership.”¹⁹⁴ The UDC resisted any effort to change racial inequality and glorified “Redeemers” who fought against threats to white supremacy.¹⁹⁵ The UDC hailed Redeemers for “placing white supremacy on an enduring and constitutional basis.”¹⁹⁶ The UDC included the KKK among the Redeemers and officially commended the Klan for helping to restore southern home rule and white supremacy.¹⁹⁷ The UDC wrote articles for a magazine called the *Confederate Veteran*, and in one essay UDC member Laura Martin Rose praised Klansman as saviors of the white south, reviewing the movie “Birth of a Nation” as “more powerful than all else in bringing about the realization of ‘things as they were’ during Reconstruction.”¹⁹⁸ Rose wrote widely on white supremacy and the Redeemers, including a primer on the KKK for use by schoolchildren.¹⁹⁹

In 1902 the UDC convened its national convention in Wilmington, North Carolina.²⁰⁰ They were welcomed by Mayor Alfred Moore Waddell who had led the violent attack to end “Negro Rule” in Wilmington and who delivered the “White Declaration of Independence.”²⁰¹ The UDC convention was designed to “vindicate the men of the Confederacy,” and show that “history should be made to serve its true purpose by bringing its lessons into the present and using them as a guide to the future.”²⁰² The UDC used monuments

192. *Id.* at 14.

193. *Id.* at 121.

194. *Id.* at 39, 122, 129, 160.

195. *Id.* at 106-107.

196. *Id.* at 107.

197. *Id.* at 107; *Moore*, 205 F. Supp. 3d at 842 (“The UDC also defended the KKK. One set of catechisms ended with a lesson teaching children that the Klan “protected whites from negro rule.””³⁵ At a speech at the 1913 UDC Convention, UDC Historian General Mildred Rutherford stated, “[t]he Ku Klux Klan was an absolute necessity in the South at this time. This Order was not composed of ‘riff raff’ as has been represented in history, but of the very flower of Southern manhood. The chivalry of the South demanded protection for the women and children of the South.””)

198. *Id.* at 95, 107-108.

199. *Id.* at 107.

200. *Id.* at 93.

201. *Id.* at 93-94; See *supra*, note 164

202. *Id.* at 93.

and the unveiling ceremonies to advance the cause of rewriting history along the lines of the “Lost Cause,” and to advance white supremacy.

Unveiling ceremonies for Confederate Monuments involved children in an effort to “transmit the values of the Confederate generation to future generations of white southerners,” and so the singing of “Dixie” along with “America,” waiving the Confederate Flag and the United States Flag were viewed as patriotic.²⁰³ The UDC made sure that monument unveiling was celebrated as an important moment in history.²⁰⁴ Speakers were selected to advance the cause of the UDC and political dignitaries were selected to praise the Confederacy and its “heroes.”²⁰⁵

In addition to organizing and raising funds for the Monument at Chapel Hill, Durham, and other North Carolina Counties, the United Daughters of the Confederacy organized a commemoration to the Ku Klux Klan outside Concord, North Carolina in 1926.²⁰⁶

IN COMMEMORATION OF THE “KU KLUX KLAN” DURING THE RECONSTRUCTION PERIOD FOLLOWING THE “WAR BETWEEN THE STATES” THIS MARKER IS PLACED ON THEIR ASSEMBLY GROUND. THE ORIGINAL BANNER (AS ABOVE) WAS MADE IN CABARRUS COUNTY. ERECTED BY THE DODSON-RAMSEUR CHAPTER OF THE UNITED DAUGHTERS OF THE CONFEDERACY. 1926.

In the case of the Confederate Monument at UNC Chapel Hill, the UDC raised funds, helped design, and organized the unveiling ceremony. On June 1, 1908, the Board of Trustees of the University of North Carolina approved a request from the North Carolina chapter of the United Daughters of the Confederacy (UDC) to erect a Confederate monument on the University’s Chapel Hill Campus. Specifically, the UDC requested a monument of “a handsome and suitable monument on the grounds of our State University, in memory of the Chapel Hill boys, who left college, 1861-65 and joined our Southern army in defense of our State.”²⁰⁷ Francis Venable, President of the University of North Carolina at Chapel Hill at that time, helped organize and raise donations for the Monument. In a solicitation letter seeking donations for the Monument written June 12, 1911, President Venable wrote:

203. *Id.* at 64-65.

204. *Id.* at 61.

205. *Id.* at 60-62.

206. See S.L. Smith, *NORTH CAROLINA’S CONFEDERATE MONUMENTS AND MEMORIALS* 35 (1941) (reciting UDC monument’s inscription “In Commemoration of the ‘Ku Klux Klan’ During the Reconstruction Period”).

207. *Minutes of the Board of Trustees*, in the Board of Trustees of the University of North Carolina Records #40001, University Archives, Wilson Library, University of North Carolina at Chapel Hill (Jun. 1, 1908), <https://dc.lib.unc.edu/cdm/singleitem/collection/40001/id/3475>.

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A fitting monument is to be erected on the campus this year to the sons of the University who heard the call of their country and served in the war of 1861-1865. This will commemorate the heroic era in the history of the University and I believe the glorious record to be unparalleled among the colleges of this or any other country. Further, it demonstrates the greatest lesson that a man can learn, namely, that the call of duty is supreme. The monument will stand as a lesson in stone and bronze to all succeeding generations. Fifty years have passed since the old mother gave her bravest and best to the sacrifice of their country. No more time must be lost in marking here the great sacrifice and it must be fittingly, worthily done.²⁰⁸

The program at the unveiling of the Confederate Monument took place June 2, 1913.²⁰⁹ Major Henry A. London introduced Governor Locke Craig who spoke. In his introduction, London said:

As one of the students of this University who left its halls to serve as a soldier of the confederacy, following Lee to Appomattox, I appreciate most highly this monument erected in memory of my comrades both dead and living. May it forever remain as an object lesson to teach all future generations that duty is 'the sublimest word in the English language' and that the sons of this University were willing to suffer and, if need be, sacrifice their lives in devotion to duty. We thought we were right, and now we know it.²¹⁰

Julian Carr was a North Carolina industrialist, philanthropist, and white supremacist. He also spoke at the unveiling of the Confederate Monument.²¹¹ During the 1913 dedication of "Silent Sam," a Confederate monument on the University of North Carolina at Chapel Hill's campus, Julian Carr urged those in attendance to support the maintenance of white supremacy "with the same vigor that their Confederate ancestors had defended slavery."²¹² In his commemorative speech, Carr stated:

208. University President Francis Venable, *Solicitation Letter to J.M. Wiggins, Jr. for Funds for the Confederate Monument*, in the University of North Carolina Papers #40005, University Archives, Wilson Library, University of North Carolina at Chapel Hill (June 12, 1911), <https://dc.lib.unc.edu/cdm/singleitem/collection/40005/id/887>.

209. *Program for the dedication of the Confederate Monument, 1913*, UNC Libraries, accessed May 24, 2019, <https://exhibits.lib.unc.edu/items/show/3687>. The Program shows that unveiling ceremony began with playing the music of "Dixie," Major Henry A. London introduced Governor Locke Craig. Then Mrs. Marshall Williams, Mrs. Henry London, President Francis Venable, and General Julian S. Carr spoke before the unveiling.

210. Major Henry London, *Introduction of Gov. Craig by Maj. H.A. London*, (Jun. 2, 1913), <http://archive.org/stream/aschairmanofmonu00lond#page/n5/mode/2up>.

211. Julian Carr, *Unveiling of Confederate Monument at University*, UNC Libraries, accessed May 24, 2019, <https://exhibits.lib.unc.edu/items/show/5519>.

212. *Id.*

The present generation, I am persuaded, scarcely takes note of what the Confederate soldier meant to the welfare of the Anglo Saxon race during the four years immediately succeeding the war, when the facts are, that their courage and steadfastness saved the very life of the Anglo Saxon race in the South—When ‘the bottom rail was on top’ all over the Southern states, and to-day, as a consequence the purest strain of the Anglo Saxon is to be found in the 13 Southern States—Praise God.²¹³

Later in the commemoration speech, Carr told a personal anecdote about the part he played in terrifying the newly emancipated:

One hundred yards from where we stand, less than ninety days perhaps after my return from Appomattox, I horse-whipped a negro wench until her skirts hung in shreds, because upon the streets of this quiet village she had publicly insulted and maligned a Southern lady, and then rushed for protection to these University buildings where was stationed a garrison of 100 Federal soldiers. I performed the pleasing duty in the immediate presence of the entire garrison, and for thirty nights afterwards slept with a double-barrel shot gun under my head.²¹⁴

Carr extolled the University of North Carolina’s contribution to the ranks of Confederate Soldiers in the fight against the United States of America. The University of North Carolina was “[i]n the foremost rank of the schools whose students rallied ‘around the Stars and Bars stands on own beloved University.’”²¹⁵

History shows it was the intention of the designers and promoters of the Confederate Monument at Chapel Hill to advance the false narrative of the “Lost Cause” and the related political goals of white supremacy.

Racially Disproportionate Effect, Disparate Impact

Under a traditional Equal Protection analysis, after establishing discriminatory intent, it would then become necessary to show a disproportionate racial effect.²¹⁶

In *Coleman v. Miller*, the Eleventh Circuit rejected a claim that African American citizens are disproportionately affected by racist government symbolism.²¹⁷ The Court concluded that anecdotal evidence of intangible harm, without any evidence regarding the impact upon other African-American citizens or the comparative effect on white citizens, is insufficient to establish

213. *Id.*

214. *Id.*

215. *Id.*

216. *Coleman*, 117 F.3d at 529 (11th Cir. 1997); *Lucas v. Townsend*, 967 F.2d 549, 551 (11th Cir.1992); *East-Bibb Twiggs Neighborhood Ass’n v. Macon Bibb Planning & Zoning Comm’n*, 896 F.2d 1264, 1266 (11th Cir.1989)).

217. *Coleman*, 117 F.3d at 530 (11th Cir. 1997).

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“disproportionate effects along racial lines.”²¹⁸ The *Coleman* Court accepted the fact that the confederate flag represents racial animus, but concluded that there was no evidence of disparate impact because “all citizens are exposed to the flag,” and “citizens of all races are offended by its position.”²¹⁹

Disparate impact on African Americans is easier to show for Confederate Monuments in the present political and cultural context than it was a few years ago. As discussed above, Confederate monuments have become the place where supporters of the Confederacy and anti-racism activists challenge the racial identity of America. As a result, government sponsored racial messages inherent in the Confederate monuments have created serious safety risks of violence, public safety concerns, and tangible harm to African Americans fearing the rising tide of white supremacy in the United States. It is easier now than it has been before to name and quantify the unique harm Confederate Monuments in prominent public spaces cause the African Americans. Psychological and sociological studies could be used here, as they were in *Brown v. Board of Education*, to demonstrate empirically the qualitative and quantitative difference.²²⁰

The Department of Psychology at the UNC Chapel Hill issued a statement detailing the kinds of psychological harm caused by the Confederate Monument, which reads in part:

... First, monuments such as “Silent Sam” signal that Black students, staff, and faculty are not welcome, fully valued, or appreciated at UNC and that their histories, experiences, perspectives and voices are not worthy of respect and consideration. Second, preserving symbols of racism and sexism serves to create a hostile learning environment for Black students that has negative implications for their educational experiences. Third, the monument’s continued presence threatens the physical and psychological integrity of our community. Fourth, the monument is offensive and undermines our shared community values of equality, respect, and acceptance of all people.²²¹

The UNC Department of Psychology grounded its statement about the “hostile learning environment” to Black students and the physical and psy-

218. *Id.*

219. *Id.*

220. Leading up to the Court’s historic decision in *Brown v. Board of Education*, numerous studies were conducted that detailed the severe psychological impacts of segregation and its impediment to equal educational opportunities. *Brown*, 347 U.S. at 494 (internal quotations omitted).

221. UNC Department of Psychology, *Departmental Statement*, (Oct. 16, 2018), <https://psychology.unc.edu/2018/10/16/departamental-statement-on-silent-sam/>.

chological threats in “decades of research in psychology and neuroscience.”²²² The Departmental statement highlights how symbols of cultural racism creates a sense of “minority group inferiority” and “majority superiority” that is internalized by minority students and harms their well-being and impacts their academic success.²²³ The Department noted that “[t]he continued presence of “Silent Sam” has the potential to compromise the attainment rates, cognitive functioning, and mental health of Black people on our campus and within the larger community.”²²⁴ The UNC Department of Psychology described a kind of disproportionate impact on Black students and community members that goes beyond anecdotal evidence of harm and mere stigma. Based upon “decades of research,” the UNC Department of Psychology connects the Confederate Monument as a symbol of cultural racism to a hostile learning environment that negatively impacts the ability of African American students to learn. This kind of evidence would meet the requirements of the restrictive Equal Protection analysis (mis)applied in the Confederate Flag cases.

Racially Coercive, Racially Offensive Speech Affecting Conduct

People who have encountered the Confederate Monument at UNC Chapel Hill have been offended to the point of altering the behavior as a result of the racial government messaging. The “coercion test” asks whether the government speech coerces a behavioral change.²²⁵ Translated into terms of race discrimination, the coercion test would prohibit Government speech which was so racially provocative that it altered the behavior of the people offended by the racial speech.

When interpreting the meaning of the Confederate Monument, Courts should consider how the readers/users of the Confederate Monument alter their behavior as a result of the monument. Monuments are erected based upon assumptions about the background, education, culture of the “model reader.”²²⁶ “Model users” are those who “conform” to the “interpretative habits and use the built environment according to the designer’s intentions.”²²⁷ Others may use the monument and interpret it differently, leading to desecration or “resistant performances” against the intended meaning of the monument.²²⁸ Conflicted meanings of the Monument may create “hot” monuments, which “elicit in users uncomfortable or even traumatic emotions.”²²⁹

222. *Id.*

223. *Id.*

224. *Id.*

225. Norton *supra* 14 at 188–89.

226. Bellentani and Panico, *supra* note 154 at 31.

227. *Id.* at 32.

228. *Id.*

229. *Id.* at 34.

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This happens when there is a “gap between the meanings promoted by political elites and how users differently interpret, contest and resist them.”²³⁰ Given contested cultures, different interpretive communities interpret the monument in a particular way based upon cultural traits such as “language, race, ethnicity, class, religion, political views, socio-economic interests and needs.”²³¹ Different interpretive communities interpret monuments differently based upon different cultural backgrounds.²³²

In the case of the Confederate Monument at UNC Chapel Hill, the model readers or users at the time of its unveiling, were white male students at UNC who would experience the Confederate Monument as they studied to become leaders in the State of North Carolina. Women and minorities could not attend the University, nor could they vote or participate in any political process. To the extent the University was also populated by African Americans, they conducted the necessary physical and domestic labor at the university and experienced the Monument as further evidence of their permanent exclusion from equality, education and political power. The model user of the monument would have likely supported and agreed with the “Lost Cause” mythology and campaign for white supremacy of the times. The Confederate Monument was intended to instruct the white male students at UNC Chapel Hill that dying for the cause of the Confederacy was a patriotic sublime duty of service. The preservation of white supremacy was expressly named in the Confederate Constitution and the speeches at the unveiling of the Confederate Monument.²³³

In the present political and cultural climate as described above, the Confederate Monument has become a “hot” monument as a site for resistance to the older ideology of the “Lost Cause” and white supremacy. The governmental message of racial inequality conveyed by the Confederate monument has affected the behavior of UNC students and community members who have gathered to protest the Confederate Monument. Protesters gathered at UNC on August 20, 2018 and removed the top part of the Confederate monument representing the figure of a confederate soldier.²³⁴ Several people were arrested at clashes between Confederate monument supporters, opponents, and police on August 30 and September 8, 2018.²³⁵

230. *Id.* at 34. An example of a hot monument is the Red Army memorial of Tallinn where residents rioted over a dispute about its relocation.

231. *Id.* at 39.

232. *Id.*

233. See *supra*, note 172 and notes 215-219 and accompanying text.

234. Deconto and Blinder, *supra* note 132.

235. See *supra*, note 133.

Prior to the Confederate Monument's removal, Maya Little was arrested for smearing blood and red paint on the Confederate Monument.²³⁶ Little engaged in a variety of efforts to have the Confederate Monument removed including pamphleteering, conferences, panel discussions, and organizing protests.²³⁷

At her trial for defacing the Confederate Monument, witnesses testified about the racist history of the Confederate Monument and its public safety risk according to the Chapel Hill Mayor and Police Chief.²³⁸ Although the Orange County District Court found her responsible, the Court did not enter judgment or impose a penalty.²³⁹ Prior to resting her case, Little read a prepared statement which said in part,

[w]hen a white supremacist statute is protected by law, demanding dignity is illegal. When a university spends almost \$400,000 to silence and conceal dissent, showing truth is punished. I put my blood on Silent Sam because despite every machination to preserve and make pristine, our blood was always visible. Silent Sam represents a university built on Black anguish. He was a noose on a campus that was built by Black slave labor and sustained by a workforce without a living wage – a university that still forces its black children to eat and live in buildings named for people who would have lynched them. It displays monuments to slaveholders and segregationist, but not to the 21-year-old black man murdered by a racist motorcycle gang on its grounds. Sam has fallen. He did not bleed. But we have bled, and further, we have been forced to hide those wounds and clean that blood.²⁴⁰

Maya Little is an example of someone affected by the Government racial message conveyed by the Confederate Monument who was compelled to challenge and contextualize that message with red paint and her own blood.

236. Cole Villena, *Maya Little Isn't Done Fighting White Supremacy at UNC*, INDEPENDENT WEEKLY (Dec. 18, 2018), <https://indyweek.com/news/northcarolina/maya-little-white-supremacy-unc/> ("Little was a regular face during the spring semester's round-the-clock sit-in at the statue's base. But she first burst into the public consciousness in April, when she covered the statue in a mixture of red paint and her own blood, an act for which law enforcement and UNC officials slapped her with vandalism charges and university Honor Court violations. ... Earlier this month, after the protests that followed the Board of Trustees' proposal, she was charged again with inciting a riot and assaulting an officer."). Little was acquitted of these additional charges.

237. *Id.*

238. Virginia Bridges, *UNC Student who poured blood and ink on Silent Sam Confederate statue found guilty*, DURHAM HERALD SUN (Oct 15, 2018), <https://www.heraldsun.com/news/local/article219844085.html> ("In their testimonies, UNC students and current and former professors who study African-American history said Silent Sam was built on violence against black people and to perpetuate the ideals of the Confederacy. Chapel Hill Mayor Pam Hemminger and Police Chief Chris Blue also testified that the statue has created a public safety issue for the campus and town, and they have asked for it to be removed.").

239. *Id.* (Relevant case law indicates the law of necessity requires the defendant's actions would "help stop the clear and immediate threat of harm," Cabe said.)

240. Maya Little, *Statement to the Court* (Oct. 15, 2018) (on file with author)

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She would be able to show that the racist government speech offended her to the point of altering and coercing her behavior under the “coercion test.”

Endorsement of Racial Inequality and the Reasonable Observer

Under the “Endorsement analysis,” the Court evaluates the government message through the lens of a “reasonable observer.”²⁴¹ The government speech should be viewed through the eyes of “an objective observer, acquainted with the text, legislative history, and implementation of the statute” in assessing its secular or sectarian purpose and effect.²⁴² When applying this test, Courts ask whether a reasonable observer would conclude that the government had communicated “a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”²⁴³

A reasonable observer aware of the history of the Confederate Monuments and the historical context of their building would believe that the Confederate Monument conveyed a message celebrating the “Lost Cause” mythology of the civil war and white supremacy. Like the UNC Department of Psychology, the reasonable observer would view the Confederate Monument as a symbol of cultural racism creating a sense of “minority inferiority” and “majority superiority,” the kind of insider/outsider attitude prohibited by the endorsement test.²⁴⁴ A reasonable observer of the Confederate Monument and its history would conclude, as many UNC Academic Departments have concluded that: 1) the Confederate Monument is a symbol of white supremacy and racial discrimination, 2) its placement in a prominent place on the UNC Campus harms students, affects their ability to learn, and harms the reputation of the University, and 3) that the racial messages of the Confederate Monument inspire violence and create a public safety risk.²⁴⁵ In addition to

241. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (adopting the perspective of “an objective observer, acquainted with the text, legislative history, and implementation of the statute” in assessing its secular or sectarian purpose and effect); *Lynch*, 465 U.S. at 688 (1984) (O’Connor, J., concurring) (asking whether a reasonable observer would conclude that the government had communicated “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”).

242. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308.

243. *Lynch*, 465 U.S. at 688 (1984) (O’Connor, J., concurring); See Hill, *supra* note 83 at 1411.

244. UNC Department of Psychology, *Departmental Statement*, (Oct. 16, 2018), <https://psychology.unc.edu/2018/10/16/departamental-statement-on-silent-sam/>.

245. UNC Department of Anthropology (<https://anthropology.unc.edu/departement-of-anthropology-statement-concerning-uncs-confederate-monument/>); UNC Department of Religion (<https://religion.unc.edu/departamental-statement-silent-sam/>); UNC Department of History (<https://history.unc.edu/silent-sam/>); UNC Department of Psychology (<https://psychology.unc.edu/2018/10/16/departamental-statement-on-silent-sam/>); UNC Department of

academic departments, other student and faculty groups have issued statements against the Confederate Monument echoing these concerns.²⁴⁶

Some argue that the Confederate Monuments do not represent efforts to implement and sustain racial discrimination; rather, the Monuments represent a benign “heritage,” and “not hate.”²⁴⁷ These supporters of the Confederate monument echo the “Lost Cause” mythology. They point out that these are monuments to veterans of war. Like their predecessors, the present supporters who say “heritage, not hate,” try to divorce the civil war from slavery.

This line of argument found currency in a Virginia trial court decision protecting the statue of Robert E. Lee in which the Court held that the monument

English and Comparative Literature (<https://englishcomplit.unc.edu/2018/08/departamental-statement-on-silent-sam/>); UNC Department of Classical Studies had a particular problem with Julian Carr’s references to Classical literature in his speech. (<https://classicalstudies.org/scs-blog/kmcardle/blog-removing-silent-sam-confederate-statues-and-misuse-classics-unc-chapel-hill>); UNC Department of African, African American, and Diaspora Studies (<https://aaad.unc.edu/home/on-diversity/>); UNC Department of Music (<https://music.unc.edu/2018/10/05/departament-statement-on-silent-sam/>); UNC Department of Art (<https://art.unc.edu/about/departamental-statement-calling-for-the-removal-of-silent-sam/>); UNC Department of American Studies (<https://americanstudies.unc.edu/silentsam-statement/>); UNC Department of Biology (<https://bio.unc.edu/diversity-and-inclusion/>); UNC Department of Geography (<https://geography.unc.edu/people/faculty/updated-statement-on-silent-sam/>); UNC Department of Political Science and the Chairs of the College of Arts and Sciences (<https://politicalscience.unc.edu/2018/10/unc-political-science-silent-sam-statement/>); UNC School of Information and Library Science (<https://www.dailytarheel.com/article/2018/03/sils-faculty-silentsam-0306/>); UNC Department of Romance Studies (<https://romancestudies.unc.edu/2018/08/roms-silent-sam-statement/>); UNC Department of Communications (<https://comm.unc.edu/2017/11/statement-silent-sam/>); UNC Department of Education (<https://soe.unc.edu/about/silent-sam-statement.php>); UNC School of Law (<https://www.charlotteobserver.com/news/local/education/article181348661.html>); (<http://www.law.unc.edu/news/2017/10/26/faculty-statement-on-silent-sam/>); UNC School of Social Work (<https://ssw.unc.edu/files/pdf/Statement-on-Silent-Sam.pdf>); UNC Odom Institute for Research in Social Science (<https://ssw.unc.edu/files/pdf/Statement-on-Silent-Sam.pdf>); UNC Gillings School of Global Public Health (<https://sph.unc.edu/files/2018/08/Statement-by-the-Chairs-of-the-UNC-Gillings-School-of-Global-Public-Health-1.pdf>)

246. Undergraduate Senate, Student Government (<https://senate.unc.edu/statement-on-silent-sam/>); Graduate workers in the UNC Department of Communication (<https://silencesam.com/graduate-workers-in-uncs-department-of-communication-statement-of-support/>); Faculty Executive Committee (<https://facultygov.unc.edu/2018/08/statement-on-silent-sam/>); Letter signed by 450 Faculty (https://www.washingtonpost.com/education/2018/09/06/hundreds-unc-faculty-members-urge-officials-not-restore-silent-sam-statue-its-original-location/?utm_term=.1a97281f82cb); Letter signed by 60 Black Faculty members (<https://diverseeducation.com/article/125505/>); UNC Black Congress (<https://www.dailytarheel.com/article/2018/06/black-congress-letter-0622>); UNControllables, UNC NAACP, Campus Y and UNC QTPOC (<https://www.dailytarheel.com/article/2017/08/four-unc-student-organizations-demand-silent-sam-be-taken-down>)

247. Rick Neale, *Sons of Confederate Veterans insist it's heritage, not hate*, FLORIDA TODAY, (Aug. 26, 2017), <https://www.floridatoday.com/story/news/2017/08/25/sons-confederate-veterans-insist-its-heritage-not-hate/546009001/>.

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could be interpreted as a “war memorial,” and not a symbol of white supremacy.²⁴⁸ In that case, the Court was interpreting a 1907 Virginia law prohibiting the removal of “war memorials.”²⁴⁹ According to the trial court, whatever else the Confederate monuments represented, they constituted “war memorials” protected by the state law.²⁵⁰ The Court did not reach the City’s argument that the monuments violate the equal protection clause as government racist speech.²⁵¹

The focus of Confederate Memorials as mere war memorials, like any other war, echoes the “Lost Cause” mythology which tried to convert a treasonous violent revolt defending slavery into a lawful, legitimate war. This ahistorical thinking ignores the unequivocal historic record that the Civil War was fought to protect the institution of racial enslavement. Celebrating soldiers of the Confederacy is inextricably linked to the racial cause for white supremacy for which they fought, and no amount of emphasis on “heritage” can separate the death of a poor white soldier from the 3.9 million African Americans freed as a result of Confederate defeat.

While some supporters of confederate symbols claim that they are not motivated by racism or support white supremacy, other supporters of confederate symbols explicitly rally around confederate monuments to advance white supremacy.²⁵² Two of the people who protested in favor of keeping the Confederate monument at UNC have been arrested for hate crimes and vandalizing the “Unsung Founders” monument to people of color who help build the University by writing racist slurs.²⁵³ It is unclear, even among present day supporters for Confederate symbols, which ones disavow the racist meaning

248. Brigit Katz, *Judge Rules Charlottesville's Confederate Statues Are War Monuments*, SMITHSONIAN, (May 3, 2019), <https://www.smithsonianmag.com/smart-news/charlottesvilles-confederate-monuments-are-protected-judge-rules-180972096/>.

249. *Id.*

250. *Id.*

251. *Id.* “Other legal questions still have to sussed out—like whether the state law violates the equal protection clause of the Fourteenth Amendment, which effectively states that governing bodies must extend similar treatment to all individuals in similar conditions. “[T]he government is prohibited from conveying messages that denigrate or demean racial or religious minorities,” Slate’s Micah Schwartzman and Nelson Tebbe explain. “While private citizens may engage in hate speech under existing law, the government may not demean racial or religious minorities without running afoul of the guarantee of equal protection contained in the 14th Amendment.” The plaintiffs have filed a motion to exclude an equal protection defense, according to Tyler Hammel of the Daily Progress.” *Id.*

252. Raymon, *supra* note 7; Heim, *supra* note 101.

253. Zachery Eanes, *UNC monument, art installation vandalized with ‘racist language’ early Sunday*, NEWS & OBSERVER, (Mar. 31, 2019), <https://www.newsobserver.com/news/local/article228670494.html> (“UNC also said that University Police were in the process of obtaining a warrant to arrest one of the individuals “who is known to be affiliated with the Heirs to the Confederacy and was identified on surveillance tape.”); Olmsted, *supra* note 148.

of these symbols and which ones embrace white supremacy. The people who try to reinterpret the Confederate Monument in a way that removes it from its connection to white supremacy are unreasonable and ahistorical in their interpretation and are contradicted by every major academic department of the UNC Chapel Hill.²⁵⁴

Visual Interpretation, Location, and Intertextuality

Another important aspect of interpreting the meaning of the Monument involves evaluating its visual aspects. Symbolic analysis of monuments requires consideration of the text, materials, dimensions, location, form, shape, color, brightness, and lighting.²⁵⁵ Height conveys status, and “upper class,” and lofty ideals.²⁵⁶ The high position of a figure on a pedestal conveys power, looking down, and the viewer, with less power, looking up at the soldier.²⁵⁷ Similarly, the large size of a monument depicts the ideal as larger than life.²⁵⁸ The angular shape of a monument, in pillars, like spears and staffs, suggests aggression, militarism.²⁵⁹

The Confederate Monument on the University of North Carolina Chapel Hill campus was located at the center of McCorkle Place. McCorkle Place abuts East Franklin Street, one of the main access points to both the University’s campus and the town of Chapel Hill. The Monument sat less than a mile from Old Chapel Hill Cemetery, where hundreds of the African American slaves forced to build the University lie buried in unmarked graves.²⁶⁰ Surrounding McCorkle Place, where the Monument was located, are student dormitories and academic buildings.²⁶¹ The Monument is a representation of a Confederate Soldier facing north, rifle in hand.²⁶² At the front of the base of the monument is a brass plaque depicting a woman “clad in classical dress, representing North Carolina, resting her hand on the shoulder of a seated student, convincing him to take up arms.”²⁶³ The text on the left side of the

254. See *supra*, note 249.

255. Bellentani and Panico, *supra* note 154 at 36; Gill Abousnnouga and David Machin, *War Monuments and the Changing Discourses of Nation and Soldierly*, in SEMIOTIC LANDSCAPES: LANGUAGE, IMAGE, SPACE, eds. Adam Jaworski and Crispin Thurlow 217-240 (2010).

256. Gill Abousnnouga and David Machin, *supra* note 260.

257. *Id.*

258. *Id.* at 235.

259. *Id.* at 236.

260. See Tammy Grubb, *Chapel Hill Cemetery Marker ‘Is Making Something Right That Has Been Wrong*, NEWS & OBSERVER (Sept. 18, 2016), <https://www.newsobserver.com/news/local/community/chapel-hill-news/article102699662.html>; Stephani Lopez, *Hundreds of Unmarked Graves Discovered at Cemetery Near UNC Chapel Hill*, WTVD (ABC-11), (Nov. 12, 2015), <https://abc11.com/news/unmarked-graves-discovered-at-cemetery-near-unc-/1082118/>.

261. UNC Chapel Hill, *Interactive Map of McCorkle Place*, <https://maps.unc.edu/unc-museum/mccorkle-place/>.

262. Commemorative Landscapes of North Carolina, *Confederate Monument UNC (Chapel Hill)*, <https://docsouth.unc.edu/comm/land/monument/41/>.

263. *Id.*

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Confederate monument states: “ERECTED UNDER THE AUSPICES / OF THE / NORTH CAROLINA DIVISION / OF THE UNITED DAUGHTERS OF / THE CONFEDERACY / AIDED BY THE ALUMNI OF / THE UNIVERSITY”²⁶⁴ On the right side of the monument the monument states, “TO THE SONS OF THE UNIVERSITY / WHO ENTERED THE WAR OF 1861 – 65 / IN ANSWER TO THE CALL OF THEIR / COUNTRY AND WHOSE LIVES / TAUGHT THE LESSON OF / THEIR GREAT COMMANDER THAT / DUTY IS THE SUBLIMEST WORD / IN THE ENGLISH LANGUAGE”

Taken together, the text, shape, size and angularity of the Confederate Monument is a call to arms romanticizing, idealizing, and glorifying the Confederate side in the Civil War. The references to the Confederacy and the United Daughters of the Confederacy suggest an idealization of the soldier fighting for the South against the United States. Viewers look up at a soldier seen as a “son,” who answered the sublime call of duty to fight for the Confederacy.

Also important in the interpretation of the meaning of Monuments is location of the Monument, its physical context, and the intertextual references to other monuments and texts.²⁶⁵ “As part of the broader cultural context, the spatial settings in which monuments are located largely affect their interpretations.”²⁶⁶ The Confederate Monument’s location in the center of the main quad at the Country’s oldest state university is important. Its location at the State’s flagship university advanced the educational goals of the UDC, and conveyed the University’s support for the “Lost Cause” propaganda and white supremacy. UNC Chapel Hill adopted and endorsed the values of the UDC when it placed the Confederate Monument in its front yard. And, the University will readopt and condone again those values if it returns the Confederate Monument to its place in the central quad.

The UDC placed many confederate monuments around North Carolina in public places, predominantly in front of Courthouses. With more than 92 Confederate monuments on public land, excluding those placed in cemeteries, North Carolina is home to some of the highest numbers of Confederate monuments in the South.²⁶⁷ About half of the North Carolina’s 100 counties from mountains to the coast host a Confederate monument on courthouse

264. *Id.*

265. Bellentani and Panico, *supra* note 154 at 39-40.

266. *Id.*

267. Erika Williams, *Confederate Statue Removed From NC Courthouse Grounds*, COURTHOUSE NEWS SERVICE, (Mar. 12, 2019), <https://www.courthousenews.com/confederate-statue-removed-from-nc-courthouse-grounds/>.

lawns or other public areas.²⁶⁸ Confederate monuments situated in front of courthouses are just as problematic, if not more so, than memorials to the Confederacy placed at educational institutions, universities, and schools. The placement of Confederate monuments in front of courthouses must have been demoralizing and threatening to families of recently freed slaves who had hoped to find at the courthouse the “Equal Protection of the Law” codified in the Fourteenth Amendment as a direct consequence of the defeat of the Confederacy and the end of slavery. Placement of Confederate Monuments outside courthouses conveyed to white and black citizens that the legacy of the Confederacy, the “Lost Cause” propaganda and white supremacy, would govern the community and not the “Equal Protection of the Law” set forth in the Reconstruction Constitutional Fourteenth Amendment.²⁶⁹

Under a modified “reasonable observer” endorsement approach to the Equal Protection Clause, the Court would conclude that a reasonable person, aware of the history of the Confederate Monuments and the historical context of their building, would believe that the Confederate Monument conveyed a message celebrating the “Lost Cause” mythology of the Civil War and white supremacy. The Confederate Monument constitutes unconstitutional government speech promoting racial inequality in violation of the Fourteenth Amendment.

V. THE CONFEDERATE MONUMENT CONSTITUTES RACIALLY DISCRIMINATORY GOVERNMENT SPEECH IN VIOLATION OF ART I SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.

The North Carolina Constitution offers another avenue for challenging governmental speech endorsing racial inequality. Article I Section 19 of the North Carolina Constitution provides that “No person shall be denied the

268. *Id.*

269. Confederate monuments sit outside court houses in: Albemarle (1925), Asheville, 1896, Bakersville (2011), Burgaw (1914), Burnsville (2009), Clinton (1916), Columbia (1902), Concord (1892), Currituck (1918), Dallas (2003), Danbury (1990), Dobson (2000), Durham (1924), Elizabeth City (1911), Gastonia (1912), Graham (1914), Greenville (1914), Hendersonville (1905), Hertford (1912), Laurinburg (1912), Lincolnton (1911), Louisburg (1923), Lumberton (1907), Marion (unknown dedication), Morganton (1918), Newton (1907), Oxford (1909), Pittsboro (1907), Plymouth (1928), Roxboro (1931), Person County (1922), Rutherfordton (1910), Shelby (1907), Snow Hill (1929), Statesville (1906), Taylorsville (1958), Trenton (1960), Wadesboro (1906), Warrenton (1913), Waynesville (1940), Wilkesboro (1998), Wilson (1926), Winton (1913). At Schools in North Carolina: Asheville, Vance Elementary School, Charlotte, Zebulon B. Vance High School, Henderson, Kerr-Vance Academy, Northern Vance High School, Vance Charter School, Vance County Early College High School, Vance County Middle School, Vance County High School, Zeb Vance Elementary School. See Carolina Civil War Monuments”. North Carolina Department of Cultural Resources. *North Carolina Civil War Monuments*, <https://ncmonuments.ncdcr.gov/>.

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equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.”²⁷⁰ This provision was added during the 1970 Amendments to the North Carolina Constitution just after enactment of federal civil rights laws such as Title VII, Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.²⁷¹ Prior to the amendment, the North Carolina Constitution only included the “law of the land clause.”²⁷² The North Carolina Constitutional Commission noted that this provision “adds to the present law of the land provision a guarantee of equal protection of the laws and a prohibition against improper discrimination by the State.”²⁷³ The separate clause prohibiting improper discrimination by the State has never been interpreted by the North Carolina Supreme Court. As a separate provision, it is reasonable to interpret it as offering more protection against race discrimination than the Equal Protection Clause standing on its own, otherwise it is unnecessary.²⁷⁴

The “no discrimination” clause should be interpreted in the same manner as civil rights statutes enacted at that time.

A civil rights statutory reading of the “no discrimination” clause of Article I Section 19 would allow for claims of race discrimination when the State creates a racially hostile environment. Pursuant to *Berry v. School District of City Benton Harbor*, this reading is supported by a federal court interpretation of the Michigan Constitution which contains a similar provision adopted at the same time as Article I Section 19.²⁷⁵ Article I Section 2 of the Michigan constitution provides: “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political

270. N.C. Const. art. I, § 19.

271. Title VII, Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e-2(Title VII states that “It shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”).

272. North Carolina Constitution of 1868, Article I Section 17. “No person ought to be taken, imprisoned or disseized of his freehold, liberties, or privileges, or outlawed or exiled or in any manner deprived of his life, liberty, or property but buy the law of the land.”

273. REPORT OF THE NORTH CAROLINA STATE STUDY COMMISSION TO THE NORTH CAROLINA STATE BAR AND THE NORTH CAROLINA BAR ASSOCIATION 74 (1968); *State v. Berger*, 368 N.C. 633, 643, 781 S.E.2d 248, 254–55 (2016) (considering the 1968 Study Commission Report as persuasive in Constitutional additions in the 1970 Constitution).

274. *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)(“ A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided.”).

275. *Berry v. Sch. Dist. of City of Benton Harbor*, 467 F. Supp. 721, 730 (W.D. Mich. 1978)

rights or **be discriminated against in the exercise thereof because of religion, race, color or national origin**.²⁷⁶ *Berry* interpreted this provision as providing more protection than the Equal Protection Clause.²⁷⁷ The Court noted that the separate provisions “clearly indicates that discrimination and equal protection of the laws are two different concepts under the Michigan Constitution, and thus when a court relies on the anti-discrimination clause it should not be guided by the traditional equal protection analysis.”²⁷⁸

Therefore “no showing of an intent or purpose to discriminate must be proven before liability can be imposed, for that would defeat the clear, plain intent of the drafters proclaimed on August 1, 1963.”²⁷⁹ The *Berry* Court noted that “[i]f this court were to read an intent requirement into the anti-discrimination clauses of Article I, section 2, . . . it would violate basic principles of constitutional interpretation which require that this court give effect to the plain meaning of the words used in the constitutional provision, as these words were understood by the people who adopted the Constitution.”²⁸⁰ The Court concluded that the intent to discriminate is not necessary to bring a claim under the “no discrimination provision which provides broader protection against race discrimination than the Equal Protection Clause.”²⁸¹ The Michigan Court of Appeals has followed this decision and held that “as a matter of law, disparate effect, and not discriminatory purpose, was the appropriate standard for testing the constitutionality of the city’s ordinance under art. 1, § 2.”²⁸²

If the “no discrimination” clause of Article I Section 19 of the North Carolina Constitution is interpreted like a civil rights statute, then state speech creating a racially hostile living and learning environment would be actionable. The Supreme Court has held, when unwelcome speech or other workplace behavior affects protected class members and is sufficiently severe or

276. MI CONST Art. 1, § 2 (Emphasis Added)

277. *Berry*, 467 F. Supp. at 730 (“Each provision prohibits discrimination; the words “discriminate,” “discrimination” and “non-discrimination” are words that do not appear in the Fourteenth Amendment, and it is clear that the drafters of the Michigan Constitution, by the use of these words, intended that the Michigan Constitution was to have a broader reach than the Fourteenth Amendment.”).

278. *Id.* at 730–31.A

279. *Id.*

280. *Id.*

281. *Id.* at 730–31 (“This clearly indicates that discrimination and equal protection of the laws are two different concepts under the Michigan Constitution, and thus when a court relies on the anti-discrimination clause it should not be guided by the traditional equal protection analysis.”).

282. *Detroit Branch, N.A.A.C.P. v. City of Dearborn*, 173 Mich. App. 602, 615, 434 N.W.2d 444, 449 (1988) (Summarizing and Following the *Berry* opinion); But see *Harville v. State Plumbing & Heating Inc.*, 218 Mich. App. 302, 314, 553 N.W.2d 377, 383 (1996) (reaching a difference conclusion and interpreting Article I Sec 2 as coextensive with the Equal Protection Clause).

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pervasive to create a hostile environment, it constitutes unlawful discriminatory conduct by altering the target's terms and conditions of employment.²⁸³ As applied to the UNC Confederate Monument, this would mean that students, staff, and faculty could challenge the Confederate Monument on the grounds that it creates a racially hostile learning and living environment. Just as the University of North Carolina should not be able to hang nooses from trees on campus, so to the University should not protect and maintain a monument celebrating the traitorous violent defense of human enslavement.

In North Carolina, "[t]he essence of a hostile environment claim is that an individual has been required to endure a work environment that, while not necessarily causing any direct economic harm, or even significant psychological or emotional harm, substantially affects a term or condition of employment."²⁸⁴ The North Carolina General Assembly has declared: "It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex, or handicap by employers."²⁸⁵

The UNC Departmental statements, letters of opposition and student protests against the Confederate Monument described above resoundingly show a consensus that the Confederate Monument creates a hostile living and learning environment.²⁸⁶

While North Carolina courts have not applied the concept of a hostile environment to an education setting outside of the integration cases, it is clear that hostile educational environments have a detrimental impact on students' abilities to access equal education opportunities.²⁸⁷ Teachers are held accountable and can be denied benefits if they are found to have created a hostile school environment that interferes with students' abilities to learn.²⁸⁸ "It is well established that the presence of a Confederate flag even in a place of private employment, and even less than continuously, can create or contribute to an actionable hostile work environment."²⁸⁹

283. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

284. *Lewis v. N.C. Dep't of Corr.*, 153 N.S. App. 449, 452 (2002).

285. N.C. Gen. Stat. § 142-422.2.

286. UNC Departmental statements, *supra* note 249.

287. *Brown*, 347 U.S. at 494-95, 74 S. Ct. at 691-92.

288. *Hassel v. Onslow County Bd. of Educ.*, 362 N.C. 299, 304 (2008).

289. *Moore*, 853 F.3d at 251.

The Fourth Circuit has upheld a school's policy prohibiting clothing depicting a confederate flag.²⁹⁰ In that case, the school district's dress code forbade clothing that would be distracting in an educational setting or that bore offensive language or imagery and did not explicitly forbid the confederate flag.²⁹¹ The Court held that "based on a long history of racial tension and the potential for different interpretations of the meaning of the Confederate flag, school officials could prohibit clothing that contained images of that flag."²⁹² The *Hardwick* Court specifically noted that its decision to uphold the Confederate Flag ban was tied to past incidents of disruption in school in reaction to the flag and that "[t]hese incidents, some involving the Confederate flag and some not, demonstrate continued racial tension exists in [] schools."²⁹³ The confederate flag shirt at question in *Hardwick* led to a number of incidents between students and created a hostile school environment that significantly impaired students' ability to learn. The presence of the Confederate Monument on campus would harm students and they would be "handicapped in [their] pursuit of effective graduate instruction. Such restrictions impair and inhibit [their] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn."²⁹⁴

CONCLUSION

Because the United States has never taken proactive and mindful steps to heal from our history of racism, we are doomed to repeat patterns of racist controversy and blind ourselves to the way history has woven racial disparities into the fabric of our culture, economy, institutions, and political systems. The social illness of racism still infects us, and there is a great deal of cultural, educational, social, political, and legal work we can do to heal from racism.

It is important for individuals, families, communities, congregations, local governments, and state governments to lean into the difficult conversations

290. *Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013).

291. *Id.* at 430.

292. *Id.* at 431.

293. *Id.* at 438.

294. *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 641 (1950) (holding that students of color admitted to a university graduate program must be treated like all the other students in the program).

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about race across the divide, and use techniques such as “truth and reconciliation” commissions,²⁹⁵ restorative justice circles, and racial equity training²⁹⁶ to help us heal from our history of racial apartheid in the United States.²⁹⁷

The Equal Protection Clause should limit government speech which encourages racial inequality, racial prejudice, and racially hostile public environments. Current equal protection law is erroneously restrictive and ineffectual in its application to pure government racist speech. The Establishment Clause offers some guidance on how Courts would apply the equal protection clause to cases of racist government speech. Confederate Monuments, built to advance the mythology of a “Lost Cause” explanation for the Civil War and to advance white supremacy, constitutes the kind of Government speech that should be restricted by the Equal Protection Clause. In addition, the North Carolina Constitution Article I Section 19 offers an avenue of challenge race discrimination in North Carolina without having to show improper governmental racial motive. People seeking equal access to education and equal justice under the law should not have to pass a memorial to the Confederacy as a reminder of the violent defense of racial human enslavement, Jim Crow, and racial segregation of the past.

295. Erika Wilson, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513, 519 (2017) (“Finally, unlike other countries with a robust history of racial or ethnic discrimination, the United States routinely shies away from convening a truth and reconciliation process acknowledging its past. While there have been some isolated attempts at establishing truth and reconciliation, in individual localities like the City of Greensboro, North Carolina, for example, there has not been a country-wide comprehensive attempt at Truth and Reconciliation around America’s history of slavery and discrimination. The United States does not ensure that its citizens understand or remember that past. Consequently, as the election of Donald J. Trump to the presidency revealed, racism remains the Great American Dilemma.”)

296. Racial Equity Institute, <https://www.racialequityinstitute.com/our-process>. (“Our experience is that the goals of understanding and addressing racism can rarely be achieved in a three-hour or one-day workshop. Racism is a fierce, ever-present, challenging force, one which has structured the thinking, behavior, and actions of individuals and institutions since the beginning of U.S. history. To understand racism and effectively begin dismantling it requires an equally fierce, consistent, and committed effort.”)

297. Fania E. Davis, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE* 41 (2019) (“We have reached a historical point in this country where it is clear that if we do not seek both justice and healing justice, injustice will keep replicating itself ad nauseum and we will find ourselves intoning the very same social justice demands generation after generation. Taken together, restorative justice as a movement conscious of racial justice and social justice as a movement conscious of restorative justice offer a way forward.”). “My dream is that restorative justice as a worldview inspired by indigenous insights and as a medium of holistic change – on intrapersonal, interpersonal, intragroup, intergroup, and system levels – might help move us from an ethic of separation, domination and extreme individualism to one of collaboration, partnership, and interrelatedness.” *Id.* at 93