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Kathleen Riley

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THE LONG SHADOW OF THE CONFEDERACY IN AMERICA'S SCHOOLS: STATE-SPONSORED USE OF CONFEDERATE SYMBOLS IN THE WAKE OF *BROWN V. BOARD*

Critics of Confederate symbols have become increasingly vocal in recent years, forcing state and local governments to reevaluate their use of such symbols in public settings. This Note tracks the proliferation of Confederate symbols in American society since the 1950s, arguing that such use of these symbols, especially in the realm of public schools, stands in violation of the Constitution. Particularly, the Note analyzes the viability of possible legal remedies to school-sponsored racism based on the lack of government free speech rights, Thirteenth Amendment protections against "Badges of Inferiority," and Fourteenth Amendment claims under the Equal Protection and Due Process Clauses. Furthermore, this Note presents an analogy of the issues surrounding state-sponsored use of Confederate symbols to those issues addressed in First Amendment Establishment Clause jurisprudence.

INTRODUCTION

From 1951 to 1971, the University of Texas-Arlington had a "rebel" theme.¹ The Confederate battle flag was the official school banner.² As such, the Confederate flag was emblazoned on the school uniforms of athletes and band members³ and waved proudly at football games.⁴ The Confederate flag was featured in athletic facilities such as the swimming pool and the basketball court.⁵ The song "Dixie" acted as the unofficial fight song.⁶ The university's student center epitomized the theme. A Confederate flag flew from a flagpole in front of the building.⁷ Inside, the upstairs meeting rooms were named for Confederate war heroes while portraits of these heroes hung throughout the building.⁸ White students literally sat upon effigies of African Americans: the upholstery on the student center's furniture and the drapes displayed slaves working in the fields.⁹ In celebration of the school's theme, the university's Homecoming Week was called

¹ Mike Eskridge, *Debate on Confederate Themes Recalls U. Texas-Arlington's 'Rebel' History*, THE SHORTHORN VIA UNIVERSITY WIRE (Tex.), Mar. 8, 2000, available at LEXIS, Nexis Library, UWIRE File.

² *Id.*

³ *Id.*

⁴ Bill Butler, *Changing of the Guard; Minorities, Women, Internet, Third Parties Will Affect Future Elections*, ARIZ. REPUBLIC, Jan. 2, 2000, at J1.

⁵ Eskridge, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

"Old South Week."¹⁰ The homecoming king was named "Mr. Johnny Reb,"¹¹ and the homecoming queen was named "Miss Dixie Belle."¹² As part of the festivities, mock slave auctions were held throughout the Homecoming Week.¹³ Such widespread offensive use of Confederate symbols has long since disappeared at the University of Texas-Arlington.¹⁴ Similarly, political battles are resulting in the removal of Confederate memorabilia from state facilities and symbols throughout the South. Despite this, public schools remain relatively immune to these changes. This Note argues that state-sponsored use of Confederate symbols in public schools is unconstitutional.

Some of America's children go to arguably racist schools. While private individuals possess the free speech right to display Confederate symbols, the government does not share that right. State-sponsored displays of Confederate symbols are most harmful to students who may be forced to wear Confederate flags on their athletic uniforms, sing "Dixie" at school functions, walk past large murals of Confederate flags between classes, or live under the shadow of a state flag that incorporates the Confederate flag. *Brown v. Board of Education* recognized a concern for the emotional well-being of African American children,¹⁵ and although that goal has been significantly fulfilled through school desegregation, vestiges of government-sponsored racial oppression remain in the form of state-sponsored Confederate schools.

Part I of this Note surveys the background of the Confederate flag: the purpose of its original creation; its renewed use by state governments in response to school desegregation; the modern use of Confederate symbols by state governments in the year 2001, both in society generally and in public schools; and the failure of modern legal challenges to Confederate symbols. Confederate symbols are difficult to analyze legally, requiring review of multiple constitutional issues.¹⁶ Part II details the legal arguments for the unconstitutionality of state-sponsored use of Confederate symbols: that the government does not possess free-speech rights; that state-sponsored use of Confederate symbols is prohibited under the Thirteenth Amendment; that the state-sponsored use of Confederate symbols is arguably unconstitutional under the Fourteenth Amendment; and that the issues implicated

¹⁰ *Id.*

¹¹ Eskridge, *supra* note 1.

¹² Butler, *supra* note 4.

¹³ Eskridge, *supra* note 1.

¹⁴ Dissent over the rebel theme began in 1961, when the university first admitted African American students. *Id.* Although the students voted three times to keep the theme, the UT System Board of Regents abolished the theme in 1971. *Id.*

¹⁵ 347 U.S. 483 (1954).

¹⁶ Beattie I. Butler, *Muzzling Leviathan: Limiting State Powers of Speech and Expression*, 5 KAN. J.L. & PUB. POL'Y 153, 161 (1996) ("This issue does not squarely fit into any established analytical framework. Instead, fashioning a solution requires appeal to particular concerns in constitutional theory and reasoning by analogy.").

by state-sponsored use of Confederate symbols are analogous to those addressed by the Establishment Clause of the First Amendment. Part III looks to the remedying of school-sponsored racism by discussing the status of the government as a role model for public opinion, the role of Confederate symbols in society, and the possible legislative avenues for the removal of state-sponsored Confederate symbols from public schools. Part III also summarizes the unlikely success of legal actions against Confederate-themed schools.

I. CONFLICTING INTERPRETATIONS OF CONFEDERATE SYMBOLS

The Confederate flag and other symbols of the Confederacy are a continual source of public debate. Many people believe that the Confederate flag represents a sort of regional pride — a Southern heritage.¹⁷ For those individuals, complaints about the Confederate flag are an offense against their Confederate ancestors who fought and died in the Civil War.¹⁸ Other people believe that the Confederate flag represents slavery and the continuing racism against African Americans.¹⁹ For those individuals, the Confederate flag is an attack on racial identity and a symbol of the power of white America.²⁰

A. *The Origin of Confederate Symbols*

The Confederate flag that has been used throughout the South since the 1950s and 1960s is the Confederate battle flag, not the official flag of the Confederate States of America. The Confederate battle flag, with its crossed blue bars of white stars on a red background, is also known as the Southern Cross.²¹ It was designed in 1861 by General P.G.T. Beauregard as an alternative to the Confederacy's official flag, the "Stars and Bars," which had been too easily confused with the United States' "Stars and Stripes" during battle.²² The Confederate government never officially recognized the Southern Cross battle flag.²³

¹⁷ *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997) ("We recognize that the Georgia flag conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression.").

¹⁸ *Id.* The Sons of Confederate Veterans is a strong proponent of this interpretation of the Confederate flag. For more information, see <http://www.scv.org/education/genworks/colors.htm>.

¹⁹ *Coleman*, 117 F.3d at 530; see also The Official Website of the National Association for the Advancement of Colored People, at <http://www.naacp.org> [hereinafter NAACP].

²⁰ *Coleman*, 117 F.3d at 530; NAACP, *supra* note 19.

²¹ *Confederate Battle (Square) AKA "Southern Cross,"* at <http://www.anyflag.com/history/conbatsq.htm>.

²² *Id.*

²³ *Id.*

The song "Dixie" was written by Daniel Emmett for use in minstrel shows.²⁴ Minstrel shows were comedic shows performed throughout the South by white men in black-face.²⁵ The shows satirized the lives of African Americans on plantations, making slavery seem like a pleasant way of life for uneducated African Americans.²⁶ Minstrel shows started becoming popular in the 1840s,²⁷ but the song "Dixie" only became very popular in the South during the Civil War, eventually being considered a Confederate war song.²⁸ A version of "Dixie" was played at Jefferson Davis' inauguration.²⁹

B. *The Reactionary Use of Confederate Symbols in the Wake of Brown*

In the 1950s, many states strongly opposed school desegregation and *Brown v. Board of Education*.³⁰ Governor George Wallace of Alabama first raised the Confederate flag over Alabama's state capitol building in protest when then-U.S. Attorney General Robert Kennedy visited him in the hope of convincing him not to oppose the integration of the University of Alabama.³¹ Also in response to *Brown*, Georgia altered its state flag, removing the Confederate national emblem to create a new flag incorporating the Confederate battle flag.³² Many state governments passed laws and made declarations promising not to integrate schools, including Georgia, Louisiana, Mississippi, South Carolina,³³ and Texas.³⁴ Some states contemplated the riddance of public schools altogether, an example being Georgia's passage of a state constitutional amendment in November 1954 to make all of their public schools private, using tuition credits in order to avoid integration.³⁵ Georgia passed a law making desegregation a felony,³⁶ and Mississippi passed legislation to

²⁴ Victor Goode, *Cultural Racism in Public Education: A Legal Tactic for Black Texans*, 33 HOW. L.J. 321, 323 (1990).

²⁵ *Id.* at 324.

²⁶ *Id.*

²⁷ Steve Levin, *For Some, 'Dixie' Now Too Symbolic of Old South*, PITTSBURGH POST-GAZETTE, Sept. 4, 1998, at A-1.

²⁸ Goode, *supra* note 24, at 323.

²⁹ *Id.*

³⁰ 347 U.S. 483 (1954).

³¹ NAACP v. Hunt, 891 F.2d 1555, 1558 (11th Cir. 1990); James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capit[o]ls*, 101 YALE L.J. 505, 508-09 (1991).

³² Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 906 (1998).

³³ *Progress Report: Integration — State by State*, NEWSWEEK, Feb. 6, 1956, at 26.

³⁴ *State by State: The Progress of Integration*, NEWSWEEK, Sept. 10, 1956, at 28.

³⁵ Tom Opdyke, *History Unfurled: '56 Flag Change Rationalization Not Documented*, ATLANTA J. & CONST., Aug. 2, 1992, at F1.

³⁶ *Id.*

fine schools for allowing white and black students to attend school together.³⁷ In March 1956, eleven Southern states signed an anti-integration "Southern Manifesto."³⁸ Once forced to accept African American students, individual schools continued to show their defiance by adopting "rebel themes."³⁹ Of course, the *Brown* era also sparked a revival of the Ku Klux Klan and private acts of violence against African Americans.⁴⁰

C. Modern State Use of Confederate Symbols

Today, the Confederate flag is disappearing. In response to protest by African American rights groups like the NAACP, South Carolina moved its Confederate flag down from atop the state capitol building.⁴¹ Georgia has changed its state flag after years of similar dispute to de-emphasize its rebel flag component.⁴² For the many Confederate symbols that remain, there is strong political pressure for their removal. Mississippi continues to receive criticism over its state flag that

³⁷ See *State by State: The Progress of Integration*, *supra* note 34.

³⁸ See Opdyke, *supra* note 35.

³⁹ See *infra* notes 48-69 and accompanying text.

⁴⁰ By mid-1957, the Klan had staged major public meetings in the Carolinas, Georgia, Tennessee, Alabama, Louisiana, and Texas. MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 28 (1995).

⁴¹ As the result of an economic boycott from the NAACP, South Carolina finally took down the Confederate flag from its state capitol on July 1, 2000; the flag was then raised at a Confederate monument in front of the capitol grounds. See Gene Crider, *Out from Under the Flag*, *HERALD* (Rock Hill, S.C.), July 1, 2000, at 1A. The NAACP and other flag opponents were not completely satisfied with the result and would have preferred a less public location for its display. *Id.* The highlight of the boycott was a march of 46,000 protestors upon the state capitol in January 2000. See Mark Curnutte, *Civil War Symbol Continues to Divide; Is it All About States' Rights, or Segregation?*, *CINCINNATI ENQUIRER*, Jan. 23, 2000, at A1. The Confederate flag was first raised atop the capitol in 1962. While some argue that it was a defiant stance toward racial desegregation, others claim that it was merely in recognition of the Civil War centennial anniversary. See Crider, *supra*.

⁴² In January 2001, the Georgia legislature approved a new state flag, making the Confederate flag only one of several historic flags depicted in the new design. See Paul Duggan, *Georgia Senate Quickly Approves New State Flag; Redesign De-Emphasizes Confederate Battle Cross*, *WASH. POST*, Jan. 31, 2001, at A2. The new flag features the Georgia state seal on a blue background, with five small historic flags, one being the Confederate flag, under the seal. *Id.* The phrase "Georgia's History" is written above the small flags to ensure that they not be interpreted as racist. See Jeffrey Gettleman, *Georgia House Shrinks Flag's Rebel Cross; The South: Another State Moves to End Divisive Issue as a Symbol is Minimized on the New Banner*, *L.A. TIMES*, Jan. 25, 2001, at A1. The Confederate flag has been reduced from composing two-thirds of the state flag to a mere one percent of the new flag. *Id.* The old, Confederate-based state flag was created by the Georgia legislature in 1956 in an act of defiance to racial desegregation. *Id.*

incorporates the Confederate flag.⁴³ The Sons of Confederate Veterans has proposed specialized license plates featuring the Confederate flag in Tennessee, Virginia and West Virginia.⁴⁴ Although court decisions have found in favor of Confederate license plates,⁴⁵ public criticism of the plates is strong.⁴⁶ Some Southern states such as Virginia and Arkansas have declared April to be Confederate History Month, resulting in annual debate each spring.⁴⁷

D. Modern State Use of Confederate Symbols in Public Schools

Today, middle schools and high schools throughout the South and in a few

⁴³ In May 2000, the Mississippi Supreme Court held that the 1894 law that designated the current state flag as the official state emblem had actually been repealed in 1906. Gina Holland, *Flag Panel Asks Students for Ideas*, ADVOCATE (Baton Rouge), Sept. 20, 2000, at 5B. In response, former Governor William Winter chaired a commission to study the flag and seek designs for a new state flag. *Id.* Mississippi schoolchildren were given the opportunity to propose new designs and/or argue why the current state flag should remain. *Id.* In a statewide vote in April 2001, the citizens of Mississippi decided against changing the state flag. *See* Dahleen Glanton, *Given Choice, Mississippi Wraps Itself in Rebel Stars*, CHI. TRIB., Apr. 18, 2001, at 1. The proposed change would have replaced the Confederate flag component of the state flag with a cross and a circle of twenty white stars to represent Mississippi's admission to the Union as the twentieth state. *Id.*

⁴⁴ Jack Achiezer Guggenheim & Jed M. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 563-65 (2000). In May 1999, the Tennessee State Senate voted to create the "Sons of the Confederacy" plate. *Id.* In Virginia, the state legislature also approved the specialized plates in 1999, but would not allow for the Confederate flag or the battle flag of the Army of Northern Virginia to be part of the plate. *Id.*

⁴⁵ *See* Sons of Confederate Veterans v. Holcomb, 129 F. Supp. 2d 941 (W.D. Va. 2001) (holding specialty license plates to be a designated public forum and thus any limitation on a Confederate logo unconstitutional).

⁴⁶ *See, e.g.,* Jim Wallace, *Bill Would Authorize Confederate Plates; Displays Have Caused Controversy in Other States*, CHARLESTON DAILY MAIL, Feb. 22, 2001, at P1A.

⁴⁷ The Virginia chapter of the NAACP objects to that state's annual declaration of April as Confederate History Month. Holly A. Heyser, *Gilmore, NAACP to Talk Over April Declaration[:] His Confederate History Month Endorsement Has Drawn Objections*, VIRGINIAN-PILOT, Apr. 27, 2000, at B3. Governor Gilmore, who has declared April to be Confederate History Month every year he has been in office, as did his predecessor Governor Allen, emphasizes that the proclamation condemns slavery. *Id.* Arkansas Governor Mike Huckabee received less dissent in 2000 over his annual proclamation of April as Confederate History Month. As part of the festivities on April 23, 2000 on the Arkansas capitol grounds, hundreds of Confederate flags lined the capitol lawns, a bell tolled 2,500 times to remember the thousands of Arkansas soldiers who died during the Civil War, several speeches were made, and members of living-history groups fired a gun salute and marched around the perimeter of the capitol grounds, singing. Julia Silversman, *Celebration Honors Dead of Civil War[:] Flying Battle Flag A Cue to History, Speakers Say*, ARK. DEMOCRAT-GAZETTE, Apr. 23, 2000, at B1.

other locations still celebrate a “rebel theme.” At Haralson County High School in Georgia, the school’s mascot is a cartoon Confederate general and the school’s nickname is the Rebels.⁴⁸ Recently, when a painting of the Confederate flag that overlooked the football stadium and campus was vandalized, the student body overwhelmingly supported its replacement.⁴⁹ For Haralson’s 2000 Homecoming game, school officials predicted that African American students would boycott the game in protest of the Confederate flag painting.⁵⁰ Although all of the African American football players and band members showed up to play at the game, a noticeable tension was present throughout the day.⁵¹ Many of the Homecoming floats that paraded through the town earlier that day displayed Confederate flags, and several of the vehicles in the parking lot that evening were draped in Confederate flags.⁵² African American cheerleaders from the visiting school were very fearful, asking their fellow white cheerleaders to surround them as the troupe crossed the field.⁵³ At Haralson, only a small percentage of the student body is African American (60 of the 900 students).⁵⁴

At Hays High School in Austin, Texas, the school mascot is the Rebels and the school symbol is the Confederate flag, which is emblazoned on football uniforms and booster club t-shirts.⁵⁵ The Confederate flag is also present in the band hall and the gymnasium.⁵⁶ At Hays, fifty-eight percent of the student body is white, forty percent is Hispanic, and only two percent is African American.⁵⁷ At McKinley Junior High School in West Virginia, a 30-year-old mural displays a Confederate flag crossed with an American flag.⁵⁸ The school’s principal and school board refuse to heed the requests of the West Virginia chapter of the NAACP for the mural’s removal.⁵⁹ At Warsaw Middle School in Maine, students replaced the school logo of a soldier waving a Confederate flag with a rendition of the Liberty Bell.⁶⁰ The logo was adopted when the school was founded in 1967 in response to

⁴⁸ Jingle Davis, *Haralson Officials Don’t Expect Black Boycott*, ATLANTA J. & CONST., Sept. 29, 2000, at 4C.

⁴⁹ *Id.*

⁵⁰ See Jingle Davis & Chandler Brown, *Politics Ends, Football Begins With Kickoffs; Hot High School Issues: Prayer, Flag Controversies Fail to Upstage Games*, ATLANTA J. & CONST., Sept. 30, 2000, at 3E.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Robert W. Gee, *Confederate Flag Debated in Kyle; Hays High School’s Familiar Banner*, AUSTIN AM.-STATESMAN, Sept. 18, 1999, at B1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Charlotte Ferrell Smith, *NAACP Wants Flag Deleted from Mural: Group Urges More Minority Programming*, CHARLESTON DAILY MAIL (W. Va.), Aug. 15, 2000, at P2A.

⁵⁹ *Id.*

⁶⁰ *Warsaw Middle School Abandons Confederate Logo*, CENT. ME. MORNING SENTINEL,

a dispute with Maine Central Institute.⁶¹ Although not adopted out of racial animus, the logo was replaced because of its association with hate groups.⁶² The Confederate flag has even made it to Iowa. The local school board has recently considered getting rid of the Confederate flag as a symbol of the Rockwell-Swaledale Community Schools.⁶³ Proponents of the symbol tried to differentiate the Confederate flag from the school's version, which uses black instead of navy.⁶⁴

Many schools are named after Confederate heroes. In an extreme case, Nathan Bedford Forrest High School in Jacksonville, Florida is named after the slave-trading Confederate general who founded the Ku Klux Klan.⁶⁵ Called the Rebels, school athletes wear the Confederate Army's colors on their uniforms.⁶⁶ Throughout the South, there are at least 15 other schools named after Forrest.⁶⁷ In Texas, nine of the 974 football teams in the state have the Rebel as a mascot.⁶⁸ In New Orleans, 22 schools have changed their names, but 27 schools are still named after slave owners.⁶⁹

E. Confederate Flag Cases

Very little legal precedent exists in the area of state-sponsored use of Confederate symbols. Of those cases that have considered the issue, the courts have always rejected removal of Confederate flags. The Eleventh Circuit considered the removal of the Confederate flag from atop the Alabama capitol building in *NAACP v. Hunt*.⁷⁰ In *Hunt*, the Eleventh Circuit rejected the NAACP's claim that such state-sponsored use of the Confederate flag was unconstitutional. The court belittled the plaintiffs' claim as being merely a problem of their "own emotions,"⁷¹ and told the plaintiffs to turn to the legislature for relief because "the federal judiciary is not empowered to make decisions based on social sensitivity."⁷²

In *Coleman v. Miller*, an African American citizen of Georgia unsuccessfully

Oct. 7, 1998, at b1.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 'Rebel' School Flag Stirs Flap, TELEGRAPHHERALD (Dubuque, Iowa), Mar. 21, 2000, at B12.

⁶⁴ *Id.*

⁶⁵ Dennis Cauchon, *Many Indifferent to Racist School Names*, USA TODAY, Feb. 9, 1998, at 1A. See also Sandy Strickland, *Second-Guessing School Name Started Early at Forrest High*, FLA. TIMES-UNION, Feb. 28, 1999, at B-1.

⁶⁶ Cauchon, *supra* note 65.

⁶⁷ *Id.*

⁶⁸ Bob Ray Sanders, *School Mascot Variety Shows Some Ingenuity*, FORT WORTH STAR-TELEGRAM, Feb. 2, 2000, at Metro p.1.

⁶⁹ See Cauchon, *supra* note 65.

⁷⁰ 891 F.2d 1555 (11th Cir. 1990).

⁷¹ *Id.* at 1565.

⁷² *Id.*

challenged Georgia's incorporation of the Confederate flag into the official state flag.⁷³ The Eleventh Circuit stated the legal requirements of the claim:

Because . . . the flag and the 1956 statute adopting the current design are facially neutral . . . [plaintiff] 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.⁷⁴

The court found no disproportionate racial effect and upheld summary judgment for the state.⁷⁵ Relying on the Eleventh Circuit's holding in *Coleman*, a district court in another case summarily dismissed an African American's claim against the display of Confederate symbols in the city of Selma, Alabama.⁷⁶ The Fifth Circuit has addressed the use of Confederate symbols by schools in two cases. In *Augustus v. School Board*, the Fifth Circuit upheld a district court's temporary injunction against the school-sponsored display of Confederate symbols in the form of a Confederate flag and the school's nickname, the "Rebels" (both of which were first adopted by a majority vote of the student body in 1958).⁷⁷ The injunction was part of the court's ongoing review of Escambia High School's racial desegregation, and most likely would not have been issued had the court not retained continuing jurisdiction.⁷⁸

[W]here a pre-existing condition of a school which is placed under a court order to obtain a unitary school system inherently prevents students of both races from enjoying an equal education at that school, a federal court has the power and the obligation to require a change in that pre-existing condition.⁷⁹

The Fifth Circuit upheld a similar injunction in *Smith v. St. Tammany Parish School Board*.⁸⁰ In that case, a district court banned the official display of Confederate symbols that were "expressing the school board's or its employee's desire to maintain segregated schools."⁸¹

⁷³ 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1199 (1998).

⁷⁴ *Id.* at 529.

⁷⁵ *Id.* at 530-31.

⁷⁶ See *Grayson v. Selma*, No. 98-0826-CB-M, 1999 U.S. Dist. LEXIS 1945 (S.D. Ala. Feb. 10, 1999).

⁷⁷ 507 F.2d 152 (5th Cir. 1975).

⁷⁸ *Id.* at 158 ("Only as a last resort should the court arrogate to itself the position of administering any part of the day-to-day operation of the school system.").

⁷⁹ *Id.* at 156.

⁸⁰ 448 F.2d 414 (5th Cir. 1971).

⁸¹ *Id.* at 415.

So far, the courts have narrowly interpreted the First, Thirteenth, and Fourteenth Amendments. Yet, just as *Brown* reinterpreted *Plessy v. Ferguson*,⁸² recognizing that society could evolve new standards of civil rights, the prior opinions on state-sponsored use of Confederate symbols by the Fifth and Eleventh Circuits may someday be overruled by future evolving societal standards.⁸³ Although *Augustus* and *St. Tammany Parish* were limited holdings, the courts seem willing to at least consider the harmful use of Confederate symbols in schools. The United States Supreme Court has yet to address any state-sponsored Confederate symbol issue.

II. LEGAL ARGUMENTS AGAINST STATE-SPONSORED CONFEDERATE SYMBOLS

A. *Lack of Government Speech Rights*

Federal and state governments do not possess constitutional rights similar to those of a private citizen: "[T]he First Amendment protects an individual's right to speak, not the government's [T]he government cannot take refuge in an Amendment that provides that the government 'shall make no law'"⁸⁴ The law is undisputed that a private individual cannot be censored when he or she chooses to display a Confederate flag on the back of a pickup truck or from a flagpole,⁸⁵ but a state government can be stopped from displaying Confederate symbols.⁸⁶ The fundamental purpose of the Bill of Rights is to protect individuals from government interference with their rights. The Bill of Rights does not grant rights to the government; it restricts government actions.

⁸² 163 U.S. 537 (1896) (finding separate railroad passenger cars for African Americans and whites constitutional).

⁸³ Some scholars are similarly optimistic about a more judicially activist treatment of Confederate symbols cases:

[O]ne of the most profound legal developments of the past forty years has been the judiciary's willingness to cast aside the blinders of the *Plessy/Pace* era and to adopt a legal vision that recognizes the complex relationship between law and social reality. This contemporary legal vision refuses to evaluate state action in a vacuum and is sensitive to the context and relationships of power.

Forman, *supra* note 31, at 511. *Pace* refers to *Pace v. Alabama*, 106 U.S. 583 (1883) (finding no equal protection violation in a Alabama statutory scheme that punished interracial fornication more severely than intraracial fornication).

⁸⁴ See Forman, *supra* note 31, at 518.

⁸⁵ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding an individual's free expression right to burn the American flag).

⁸⁶ See, e.g., *supra* notes 80-81 and accompanying text (discussing the *St. Tammany Parish* case).

B. *Thirteenth Amendment: Badge of Inferiority*

The terms “badge of servitude,” “badge of inferiority,” and “badge of slavery” are used interchangeably by the courts to represent the Thirteenth Amendment’s prohibition against any representation of slavery or involuntary servitude.⁸⁷ Upon the amendment’s creation, the Supreme Court read the Thirteenth Amendment very literally as merely prohibiting slavery and involuntary servitude.⁸⁸ The Court would only invoke the Thirteenth Amendment when dealing with an actual situation of indentured servitude.⁸⁹ At the same time, some members of the Court considered expanding the scope of the Thirteenth Amendment to exclude a so-called “badge of slavery,” any sort of reminder of slavery and the sentiments that an African American was marked as somehow inferior to America’s white majority.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country.⁹⁰

This dissenting interpretation of the Thirteenth Amendment became the Court’s majority opinion in *Brown*.

Brown is the foundational case for understanding the harmful effects of Confederate symbols in schools, and is where the idea of a “badge of slavery” or

⁸⁷ U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.”).

⁸⁸ For an historical review of Supreme Court cases prior to *Brown* to demonstrate the narrow interpretations of the Thirteenth and Fourteenth Amendments, see JOHN R. HOWARD, *THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN* (1999).

⁸⁹ See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, an African American man challenged a Louisiana statute mandating separate passenger train cars for African American and white passengers:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. at 551; see also *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁹⁰ *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

"inferiority" fully emerged.⁹¹ In *Brown*, the United States Supreme Court mandated the racial integration of public schools, remarking that, "[t]o separate [children in grade schools and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁹² The Supreme Court also quoted the lower court that had ruled against the African American children:

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.⁹³

Although the *Brown* Court did not specifically analyze the case under a Thirteenth Amendment "badge of slavery" argument, the Court's continuous use of the term "inferiority" in describing the psychological effects of segregated schools on African American students demonstrated an underlying acceptance of the "badge of slavery" or "inferiority" argument.⁹⁴ A modern Supreme Court in *Planned Parenthood v. Casey* described the transition from a *Plessy* interpretation of "badge of inferiority" to a *Brown* interpretation:

⁹¹ Modern critical race theorists, however, contend that the *Brown* Court's characterization of African American self-esteem was inaccurate:

Black self-esteem was central to the opinion and decision rendered in *Brown*. Unfortunately, the Court did not have a firm understanding of black self-esteem. Most importantly, the Court did not understand the importance of black institutions in nurturing healthy black self-esteem. Had the Court known this, perhaps it would have written an opinion that preserved and strengthened black schools while at the same time promoting racially mixed schools.

Roy L. Brooks, *Analyzing Black Self-Esteem in the Post-Brown Era*, 4 TEMP. POL. & CIV. RTS. L. REV. 215, 224 (1995). Recognizing that *Brown* will not likely be reversed and that integrated schools are here to stay, it is this author's opinion that state governments should do as much as possible to prevent racist feelings and refrain from displaying Confederate symbols.

⁹² *Brown*, 347 U.S. at 494.

⁹³ *Id.*

⁹⁴ The racially segregated schools in *Brown* were held unconstitutional under the Fourteenth Amendment's Equal Protection Clause. "Separate educational facilities are inherently unequal." *Id.* at 495.

The *Plessy* Court considered “the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.” Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not . . . , this understanding of the facts and the rule it was stated to justify were repudiated in [*Brown*].⁹⁵

Unfortunately, modern use of “badge of slavery” or “inferiority” analysis is almost nonexistent. One complication is that the argument has been muddled with the analysis of the Fourteenth Amendment’s Equal Protection Clause.⁹⁶ When the Supreme Court mentions the notion of a “badge of slavery” or “inferiority,” the argument is either mentioned only in passing and not linked to the Thirteenth Amendment,⁹⁷ or rejected by the Court altogether.⁹⁸ Yet on one occasion, the Court recognized the congressional right to identify and legislate against “badges of slavery.”⁹⁹ Although a disjointed and muddled claim, through the Supreme Court’s continuing use of “badge of inferiority” rhetoric in equal protection analysis, the Thirteenth Amendment’s “badge of slavery” argument is still alive enough today that any court should be willing to address a “badge of inferiority” argument

⁹⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 862-63 (1992) (citations omitted).

⁹⁶ U.S. CONST. amend. XIV, § 1. For example, Justice Stevens, in his *Shaw v. Hunt* dissent, linked equal protection with “badge of inferiority”:

The supposedly insidious messages that *Shaw I* contends will follow from extremely irregular race-based districting will presumably be received in equal measure by *all* state residents. For that reason, the claimed violation of a shared right to a color-blind districting process would not seem to implicate the Equal Protection Clause at all precisely because it rests neither on a challenge to the State’s decision to distribute burdens and benefits unequally, nor on a claim that the State’s formally equal treatment of its citizens in fact stamps persons of one race with a badge of inferiority.

Shaw v. Hunt, 517 U.S. 899, 923-24 (1996) (emphasis in original).

⁹⁷ See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 241 (1995) (“These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”) (Thomas, J., concurring in part).

⁹⁸ See, e.g., *Memphis v. Greene*, 451 U.S. 100 (1981) (reversing the Court of Appeals’ decision that the closing of a road through a white neighborhood and thus restricting access to a closely-located black neighborhood was the manifestation of a “badge of slavery” under the Thirteenth Amendment).

⁹⁹ *Jones v. Mayer Co.*, 392 U.S. 409, 440 (1968) (“Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”).

brought before it.

A "badge of slavery" or "inferiority" argument would be the best way to challenge Confederate symbols in public schools. "By linking present racial discrimination to this nation's history of slavery and apartheid, a Thirteenth Amendment analysis uniquely addresses existing racial and economic injustice as modern relics and badges of slavery."¹⁰⁰ When an African American athlete is forced to don a uniform emblazoned with a Confederate flag and the school's nickname of the "Rebels," that student is literally wearing a badge of slavery.¹⁰¹ That student is wearing something that represents the Southern ideals of the Civil War, ideals that inarguably include a defense of slavery. A student who wears such a uniform is being told by school officials and his fellow students that the enslavement of his ancestors was proper and that such enslavement might suit him as well. Just like Jim Crow laws limiting the voting rights of African Americans or enforcing segregated accommodations, a student who is forced to wear a school uniform celebrating the South's slavery era suffers from a badge of slavery. It does not matter if the African American athlete is the star athlete, superior in skill to all of his white teammates. The African American student is being told his place in society.

The modern role of a badge of slavery in public schools is not limited to the student athlete's team uniform. Any African American student who has to "dress down" for gym class may have to wear a similarly hurtful school-sanctioned uniform. Any African American student who eats lunch in the school cafeteria or attends functions in the school auditorium will likely be sitting under the shadow of a large Confederate flag mural, bold-lettered lyrics to the school fight song "Dixie," or portraits of Confederate war heroes. Even an African American student who receives mail from the school, such as a report card or a school handbook, that displays the school's Confederate symbols in the letterhead, suffers from the effect of a badge of slavery. School-sponsored use of Confederate symbols is a constant reminder of slavery and America's history of racial prejudice.

C. Fourteenth Amendment: Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws."¹⁰² Unlike Thirteenth Amendment jurisprudence, the Court's interpretation

¹⁰⁰ Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 1 (1995). Unfortunately, a Thirteenth Amendment claim failed in *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

¹⁰¹ See Forman, *supra* note 31, at 515 ("[T]he government's choice of a discriminatory symbol stigmatizes blacks. The knowledge that one's own government has knowingly and willfully chosen an exclusionary, denigrating symbol has a damaging effect.").

¹⁰² U.S. CONST. amend. XIV, § 1.

of the Equal Protection Clause is well defined. The United States Supreme Court has firmly established that a state's violation of equal protection requires a showing of both disparate impact¹⁰³ and discriminatory intent.¹⁰⁴ Courts will often consider only an extreme example of disparate impact.¹⁰⁵ In establishing discriminatory intent, a court looks at several factors, including evidence of disparate impact, the historical background of the decision or law at issue, the sequence of events leading up to the decision, any deviations from procedure in making the decision, and the legislative history of the decision.¹⁰⁶

Equal protection analysis of state-sponsored use of Confederate symbols is extremely difficult because of the element of disparate impact. If all public school children suffer from school-sponsored Confederate symbols, African Americans are not being targeted individually, thus undermining any argument that the

¹⁰³ See *Washington v. Davis*, 426 U.S. 229, 239 (upholding an employment application test for the District of Columbia Metropolitan Police Department which was disproportionately failed by African Americans compared to white applicants). The Court said, "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242.

¹⁰⁴ See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1976) ("[Official] action will not be held unconstitutional solely because it results in a racially disproportionate impact Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); see also *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding an Alabama Constitutional provision that disenfranchised persons convicted for crimes of "moral turpitude," including writing bad checks, unconstitutional because the law disproportionately hurt African Americans and was enacted with discriminatory intent).

¹⁰⁵ See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The Court held a voting redistricting plan unconstitutional as a gerrymandering effort to rid the City of Tuskegee, Alabama of African American voters. A square-shaped area was redistricted into a 28-sided figure removing all but four or five of the 400 African American voters while not removing a single white voter. *Id.*; see also *Yick Wo v. Hopkins*, 118 U.S. 351 (1886). The Court held a city ordinance requiring laundry permits for laundries not located in a brick or stone building unconstitutional because of the extreme disparate impact on Chinese laundries. Over 200 Chinese nationals had requested permits and been denied, while all but one of the petitions filed by non-Chinese were granted. *Id.* But see *Palmer v. Thompson*, 403 U.S. 217 (1971) (upholding a city's decision to close all municipal swimming pools following court-ordered integration because of the neutral impact on the city's residents and based on the city's reasonable budgetary cutbacks).

¹⁰⁶ The impact of the official action . . . may provide an important starting point [in analyzing disparate impact]. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

Confederate symbols are intended to represent racial prejudice as opposed to Southern pride. In *Hunt*, the Eleventh Circuit commented on the problem of establishing disparate impact in regard to the NAACP's fight to get the Confederate flag down from atop the Alabama state capitol building: "[T]here is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position."¹⁰⁷ Similarly, the defendant in *Grayson* — the Selma, Alabama municipal government — was granted a motion to dismiss by the district court of Southern Alabama because, "[u]nder the Eleventh Circuit's rulings, it is clear that Plaintiff cannot set forth a claim for relief — the Confederate iconography offends equally and therefore there can be no disparate impact and no Constitutional violation."¹⁰⁸ The Eleventh Circuit ruled against the plaintiff in *Coleman* for the same reason: "After carefully reviewing the record, and drawing all inferences in the light most favorable to appellant, we find no evidence of a similar discriminatory impact imposed by the Georgia flag."¹⁰⁹

With such a difficult disparate impact standard, any claim against a school that displays Confederate symbols would ultimately fall short of being found unconstitutional under the Equal Protection Clause. The school would be subjecting all of its students to the symbols, African American and white alike. An African American plaintiff might attempt to argue that the effect on the viewer of the Confederate symbols is disparate, and that white students interpret the rebel flag as a form of Southern heritage while African American students see it as a symbol of oppression, but such a distinction cannot defeat the fact that all students are subjected to the symbols. Unfortunately, unless there is an extreme shift in legal interpretation of the Equal Protection Clause's disparate impact element, the fact that both white and black students are subjected to the same symbol will act as a bar to any equal protection claim against state-sponsored Confederate symbols.

Even if a court found disparate impact, the discriminatory intent standard for an equal protection claim is also difficult to establish. Public schools had varying reasons for first deciding to display Confederate symbols.¹¹⁰ In establishing an individual school's reasons, it would be unlikely that the plaintiff would find any evidence of intent behind the policy, let alone a smoking gun proving racial prejudice. Even the most unseemly use of Confederate symbols can be rationalized away with claims of Southern heritage and school spirit, thus obscuring any discriminatory intent. Considering the outright hostility Southern governments had toward desegregation in the 1950s and the timing of the local school policies, many of the decisions to display Confederate symbols must have been racially motivated.

In the midst of school desegregation under *Brown*, many school districts faced the chore of consolidating separate schools for whites and African Americans into

¹⁰⁷ NAACP v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990).

¹⁰⁸ Grayson v. Selma, No. 98-0826-CB-M, 1999 U.S. Dist. LEXIS 1945, at *5.

¹⁰⁹ Coleman v. Miller, 117 F.3d 527, 530 (11th Cir. 1997).

¹¹⁰ For examples of school intent, see *supra* notes 48-69 and accompanying text.

single integrated schools. State and local governments displayed their hostility toward desegregation, with schools changing their school names to honor Confederate war heroes, or making the school mascot a Confederate soldier.¹¹¹ In *Coleman*, the Eleventh Circuit took judicial notice of the Southern hostility toward *Brown*:

As many of Georgia's politicians and citizens openly resisted the Supreme Court's desegregation rulings, increasing numbers of white Southerners began expressing renewed interest in their Confederate heritage. It was in this environment of open hostility to the Supreme Court's civil rights rulings and of developing interest in Confederate history that the Georgia General Assembly acted to redesign its state flag. It chose as an official state symbol an emblem that historically had been associated with white supremacy and resistance to federal authority.¹¹²

In some cases, courts have even found discriminatory intent in the school-sponsored use of Confederate symbols. In *Smith v. St. Tammany Parish School Board*, a district court supervised the desegregation of six all-African American schools and five all-white schools.¹¹³ When the plaintiffs returned to the court seeking the removal of all Confederate symbols from one of the schools, the district court noted the obvious discriminatory intent of the symbols:

The Confederate battle flag, since the decision by the U.S. Supreme Court on May 17, 1954 in *Brown v. Board of Education*, has become a symbol of resistance to school integration, and to some, a symbol of white racism in general. In this connection, the principal of the Covington High School understands today's symbolism of the Confederate battle flag as well as he understands the symbolism of a Black Panther or a Black Power flag. But none of these flags are constitutionally permissible in a unitary school system where both white and black students attend school together.¹¹⁴

¹¹¹ See Butler, *supra* note 16, at 164.

[S]outhern states resisted federal attempts to enforce civil rights in the form of desegregation of public facilities and overall racial integration. In this context, the decision to fly the Confederate flag—already a symbol of the South's first attempt at sovereignty—amounted to a dissident response to what southerners perceived as forced ideological change.

Id.

¹¹² *Coleman*, 117 F.3d at 528.

¹¹³ 302 F. Supp. 106, 107 (E.D. La. 1969).

¹¹⁴ *Smith v. St. Tammany Parish Sch. Bd.*, 316 F. Supp. 1174, 1176 (E.D. La. 1970) (citations omitted), *aff'd*, 448 F.2d 414 (5th Cir. 1971).

Whether described as Southern heritage or opposition to desegregation, any school displaying Confederate symbols must inevitably recognize the racial significance of its actions.¹¹⁵ Unfortunately, such discriminatory intent will not be inferred. To demonstrate discriminatory intent would require a case-by-case analysis of every Confederate-themed public school.

As a secondary issue, in another line of Fourteenth Amendment cases the Supreme Court has held that it will not give effect to private biases.¹¹⁶ When schools display Confederate flags, they enable racist students and community members to more easily express private racist sentiments. For the racist individual, the school seems to be supporting his cause.

D. First Amendment: Analogy to the Establishment Clause

The Establishment Clause of the First Amendment is also applicable to the school-sponsored Confederate symbols issue. Admittedly, race does not equal religion,¹¹⁷ but the Supreme Court's treatment of religious establishment in schools is analogous to the effects of established racism present when schools display Confederate symbols.¹¹⁸ Like religion, a student's race is fundamental to that

¹¹⁵ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding a state miscegenation law unconstitutional because there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification").

¹¹⁶ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984).

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect.

Id. at 433. In *Palmore*, a Florida state court divested the natural mother of custody of a child in favor of the natural father because the white mother had remarried an African American man. The state court had based this upon the prejudice the child would face due to living in a biracial household. See also *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding a California state law (Proposition 14), which prevented the state from regulating an individual's right to refuse to sell or lease real property based on the race of the buyer, violative of the Fourteenth Amendment because it was an affirmative state action designed to authorize private discrimination).

¹¹⁷ See *NAACP v. Hunt*, 891 F.2d 1555, 1565-66 (11th Cir. 1990) (denying plaintiff's Establishment Clause claim against the flying of the Confederate flag atop the Alabama capitol).

¹¹⁸ See *Butler*, *supra* note 16:

At first glance, constitutional concerns over government establishment of religion

individual's identity.¹¹⁹ Race is arguably an even more immutable trait than religion because, unlike a religious minority, a racial minority cannot hide his or her minority status by refraining from discussing it with others.¹²⁰

Courts should consider the generalized goal of achieving racial equality and stretch their analysis of the Establishment Clause to incorporate state-established racial favoritism.¹²¹ The expansion of Establishment Clause analysis should be of special consideration in the area of public education, where impressionable students might be indoctrinated into the majority's set of beliefs, be they about the best religion or the best race.

The Supreme Court has developed three tests to determine violations of the Establishment Clause. First and most historic, the Court uses the *Lemon* test to

and the rights of individuals with respect to religious free speech may have the least bearing on this issue. However, because this inquiry frames the issue as one of the state's ability to express ideas, cases dealing with the state's relationship to its citizens in religious matters best shed light on the fundamental issues involved here.

Id. at 162.

¹¹⁹ For an example of judicial recognition of the importance of race to an individual's identity, see *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991):

While traits such as race, gender, or sexual orientation may be altered or concealed, that change can only occur at a prohibitive cost to the average individual. Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self.

Id. at 1548 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1616 (2d ed. 1988)).

¹²⁰ See *Butler*, *supra* note 16:

[T]he message received here is stronger, more alienating and more invidious than those in the religious context. There, constitutional principles require sensitivity to others based upon what they believe. Here, legislation alienates people based upon who they are. People can change the former, but not the latter. If legislation cannot alienate people for what they believe, it should not be able to do so for who they are.

Id. at 164.

¹²¹ [T]he issues which divide a culturally and ideologically diverse modern America would have been difficult, if not impossible, to anticipate from the standpoint of a culturally and ideologically more homogenous eighteenth century America. Today, however, modern pluralism requires expanding the boundary between public powers and private freedoms beyond that set by the Establishment Clause.

Id. at 154.

determine whether there has been an establishment of religion.¹²² The three-prong *Lemon* test holds that there has been an establishment where there is not a clearly secular purpose, the primary effect is the advancement of religion, or there are excessive entanglements with religion.¹²³ If the Establishment Clause were expanded to apply to an establishment of racial preference, in order to apply the *Lemon* test, a court would hold that a racial preference had been established where there is clearly a racial purpose, the primary effect is the advancement of one race, or there are excessive entanglements with race. Applying this translated *Lemon* analysis to state-sponsored use of Confederate symbols would most likely result in a finding of an establishment of race. Without evidence of discriminatory intent, school officials would likely argue that the Confederate symbols represent Southern heritage and thus are not used for a *clearly* racial purpose. Thus, the first prong of our modified *Lemon* test would fail.

Notwithstanding this, only one prong of the test need be met to find an establishment. Under the second prong, school officials would argue that the racially prejudicial effect of Confederate symbols would not be the primary effect. Such a determination would be a close call for a court to decide, requiring analysis on a case-by-case basis.

The third prong seems the strongest for finding a racial establishment. Regardless of one's interpretation of Confederate symbols, it would be impossible to deny their widespread interpretation as racially prejudiced, and therefore, state-sponsored Confederate symbols would appear to excessively entangle the school in race. Due to the fact that only one prong of the *Lemon* test need be satisfied to find an establishment, success of a racial establishment claim seems likely when analogized to the *Lemon* test for establishment of religion.

The Supreme Court's second Establishment Clause test is the endorsement test from *County of Allegheny v. ACLU*, holding that the government unconstitutionally endorses religion when it conveys a message that religion is "favored," "preferred," or "promoted" over other beliefs.¹²⁴ If courts were to apply this test to state-sponsored use of Confederate symbols, the endorsement test would require a finding that the government endorses a message that one race is favored, preferred, or promoted over others. For African American students, Confederate symbols in schools send a message of racial prejudice and inferiority. The endorsement test would be made even easier to prove with evidence of a school's discriminatory intent in displaying Confederate symbols, and an individual school's history of racial conflict. Under an endorsement test, racial establishment could be easily

¹²² *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state statutes that would partially pay the salaries of teachers of secular subjects in parochial schools).

¹²³ *See id.* at 612-13.

¹²⁴ 492 U.S. 573 (1989) (holding a nativity scene in a town square violative of the Establishment Clause because it stood apart from other Christmas decorations on display in the square).

shown at most Confederate-themed schools.

A third Establishment Clause test, the coercion test, was developed by the Supreme Court in *Lee v. Weisman*.¹²⁵ Under the three-prong coercion test, unconstitutional coercion occurs when: (1) the government directs; (2) a formal religious exercise; (3) in such a way as to oblige participation of objectors.¹²⁶

Unfortunately, the coercion test would not easily translate into a racial establishment situation. If a court were to create a racial coercion test, by analogy, racial coercion would occur when: (1) the government directs; (2) a formal sanctioning of racial bias; (3) in such a way as to oblige the participation of the racial minority. The difficulty would be in defining a formal sanctioning exercise of racial bias. A performance of the song "Dixie" at a school rally or football game might be enough of a sanctioning exercise. School uniforms emblazoned with Confederate symbols, homecoming parades with strong Confederate themes, or any other official exercise implicating racial bias might also be enough to implicate the coercion test. In our liberal translation of the coercion test to incorporate racial establishment, it appears possible that claims of racial establishment could be proven.

Justice O'Connor gave an eloquent explanation of the evils of government establishment in *Lynch v. Donnelly*: "Endorsement sends 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."¹²⁷ Justice O'Connor advocated the use of a reasonable person standard to determine if a state's religious establishment made the reasonably prudent person feel like a religious outsider. Her statements would ring true for racial establishment as well. An African American student attending school under the shadow of the Confederacy is made to feel like a racial outsider.¹²⁸

¹²⁵ 505 U.S. 577 (1992) (invalidating a school district's policy of allowing principals to invite clergy to give invocations and benedictions in the form of nonsectarian prayer at graduation ceremonies).

¹²⁶ *Id.* at 586.

¹²⁷ *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Lynch*, the Supreme Court allowed the display of a nativity scene and other holiday decorations in a downtown shopping area in Pawtucket, Rhode Island. The Court looked at the totality of the display and established the so-called Reindeer Rule, which allows for the display of some religious symbols if they are surrounded by other secular symbols such as reindeer, Santa Clauses, and candy canes. *Id.* at 671-72.

¹²⁸ See *Butler*, *supra* note 16:

No conduct could symbolize a union between state and divisive ideology [sic] more clearly than purposefully reviving a bygone icon and brandishing it atop the state's principal facility, where elected officials make laws aimed at representing all people and their interests. . . . Throngs of school children many probably studying the Civil War and the civil rights movement, tour the State House each year. The message received says "the decisions which come from within stand for this State

III. REMEDYING THE RACISM OF SCHOOL-SPONSORED CONFEDERACY

A. *Government as Role Model*

The government holds a special role in establishing public opinion. Government symbols have a propagandizing effect on society.¹²⁹ If the government's opinion agrees with an individual's opinion, that person will feel that the opinion is correct and in the political majority.¹³⁰ An individual whose opinion is not represented by the government will feel as if he or she is in the political minority. Because of the substantial power the government has in influencing public opinion, the government must be a leader in the effort to promote equality and avoid reiterating racist ideals through state-sponsored use of Confederate symbols.¹³¹ The government must be a role model in discouraging racial prejudice.

and *all* its people, yet we choose to wrap them in a package and stamp it with a seal that says some of you do not matter."

Id. at 164.

¹²⁹ See *id.* at 165 ("The primary effect of a welfare system is assistance to the needy and less privileged, not the endorsement of egalitarianism. But when the state adopts a symbol as its own, the legislation is the idea itself, the primary effect of which is to put forth state-sponsored ideology [sic].").

¹³⁰ See Eric A. Posner, *Social Norms, Social Meaning, and the Economic Analysis of Law: A Conference Sponsored by the University of Chicago Law School and the John M. Olin Program in Law and Economics*, 27 J. LEGAL STUD. 765 (1988).

More should be said about the state's role as a norm entrepreneur. Official pronouncements play an important role, because officials enjoy the attention of the nation and thus can cheaply create focal points—for example, Hitler spinning out theories of Jewish influence. The effectiveness of politicians in this way accounts for the heavily symbolic content of so much political behavior. Officeholders and candidates for office must endlessly shake hands with, march in parades with, and attend the ceremonies of people who belong to powerful ethnic organizations, because once a politician associates himself with a minority group, attempts by him later to exploit circumstances and blame national problems on that group will lack credibility.

Id. at 788 ("Jim Crow laws enabled whites to signal racial discrimination, by giving them an opportunity, never taken, to publicly display their rejection of racial norms. These laws do not so much enforce segregation as constantly remind everyone that everyone else is sending the signal.").

¹³¹ See Bein, *supra* note 32.

State display of a public symbol sets up a complex interrelationship of state, symbol, and citizen. The identity of each, and its past relationship with the others, will powerfully influence the interplay among the three. In a nation based on the principle that the citizens *are*—at a fundamental level—the state, public symbols

B. *The Role of Confederate Symbols*

Symbols hold a special place in an individual's attitudes about society.¹³² In the South, Confederate symbols have strong significance, but interpretations are not unanimous. The two conflicting interpretations of Confederate symbols are Southern heritage and racial hatred. There can be no resolution to this debate, as neither side can ever hope to convince the other of its opinion. Instead, the state governments of the South must recognize the dichotomy of opinions and do what they can to satisfy both. Southern pride, heritage, and history can be amply respected in historical monuments, museums, battlefield sites, etc. Conversely, racial hatred can be prevented by not forcing the public to live with Confederate symbols on a daily basis. School is a place for learning and should be supportive of all races and religions, all cultures and beliefs.¹³³ The school's role is not to institutionalize one side of a controversial societal debate. For *Brown* to be fully implemented, the courts must recognize the harm caused when the government condones racism.¹³⁴

must function in an evenhanded and inclusive manner if they are to treat all citizens equally.

Id. at 916.

¹³² See Posner, *supra* note 130.

Symbols matter because a person's manifested attitude toward symbols tells others something about that person's character. People rely heavily on this information when deciding whether to engage in cooperative behavior in all realms of life. Indeed, because symbols matter so much, people's efforts to show respect for them lead to significant forms of conformity that can be described as "social norms." When symbols change, some people obtain advantages in forming cooperative relationships while other people lose advantages they had. Because changes in symbols can thus result in material loss for some people, these people resist when the government or other people challenge a particular system of symbols.

Id. at 766-67.

¹³³ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954):

Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 793.

¹³⁴ See Goode, *supra* note 24:

Public schools transmit normative cultural values. But the thirteenth and fourteenth amendments, and their progeny, are available as checks on cultural racism in that

C. Legislative Action

In an ideal world, the legislature would step in to remove Confederate symbols from public schools. The state legislatures, through the political process, have already made great gains in removing Confederate symbols from other public sectors.¹³⁵ Public schools, however, historically have been left in the domain of local communities, meaning that local values typically dictate their regulation. Unfortunately, in some of these communities, racism is one of the values imparted.

Because of the localized regulation of public schools, regardless of the importance of battling racism, it is unlikely that a uniform school district ban on school-sponsored displays of Confederate symbols will be achieved in most Southern states. The display of Confederate symbols in public schools is not a high profile issue compared to Confederate flags atop capitol buildings, Confederate flags incorporated in state flags, or Confederate license plates. The general public does not know what is going on in schools outside their localities. The average person has no direct involvement with more than a few schools at best. The Confederacy lives in the shadows of these schools, obscured from our vision.

D. Legal Action

The Supreme Court has never heard a state-sponsored Confederate symbols case. Instead, the issue of state-sponsored Confederate symbols has been relegated to the Eleventh and Fifth Circuits because of their Southern jurisdictions. Until a similar issue arises in another circuit, or until the Supreme Court finally grants review of an Eleventh or Fifth Circuit case, we will not know whether a judicially activist interpretation of the First, Thirteenth, and Fourteenth Amendments might be enough to find state-sponsored use of Confederate symbols unconstitutional. The issues implicated by *Brown* are similarly unripe for judicial review. School desegregation has run its course. Those rare situations in which courts banned the school-sponsored use of Confederate symbols as part of a continuing desegregation order are relatively extinct in modern times.¹³⁶ The best hope for individuals opposed to state-sponsored Confederate symbols is to seek political recourse.

acculturation process. These tools ought to be employed as one tactic in the larger political struggle by people of color and our allies to help the school district eliminate and move beyond its racist conduct.

Id. at 338.

¹³⁵ For details on the removal of Confederate symbols from other public sectors, see *supra* notes 41-47 and accompanying text.

¹³⁶ For discussion of these types of cases, see *supra* notes 77-81 and accompanying text.

CONCLUSION

Brown was a courageous decision in which the Court departed from precedent in favor of recognizing the realities of American racial prejudice. Unfortunately, the dream of racial equality manifested in *Brown* has not been fully realized. Today, the Court should once again step beyond the bounds of precedent to remove some of the last vestiges of slavery from our society in the form of state-sponsored use of Confederate symbols, so that the intent of *Brown* may be fulfilled.

Unfortunately, it is difficult to foresee this happening. Today, the legal arguments for the unconstitutionality of state-sponsored Confederate symbols are extremely limited. The Thirteenth Amendment has virtually disappeared from constitutional discourse despite the continuation of racial oppression originating from slavery. The Fourteenth Amendment's strict disparate impact requirement makes an Equal Protection claim against a universally-applied Confederate symbol impossible, regardless of differing interpretations by the viewer. Finally, although religion and race are of similar importance to an individual's identity, the Establishment Clause of the First Amendment only provides protection to religion.

Even a small object at sunset casts a long shadow. Although only in existence for a short time, the Confederacy has cast a 136-year shadow of racism in this country. While courts have long struggled with racism, they have, as if battling a shadow, found their target difficult to strike. Ultimately, racism must be eliminated at the source — in the hearts and minds of America's people. To effectuate this change, legislatures and courts must be willing to take bold action in providing an illuminated educational environment. Ending school-sanctioned displays of Confederate symbols is the first step.

Kathleen Riley