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A Monumental Undertaking – Tackling Vestiges of the Confederacy in the Florida Landscape

Juanita Solis

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A Monumental Undertaking – Tackling Vestiges of the Confederacy in the Florida Landscape

By: Juanita Solis

“The past is never dead. It’s not even past.”¹

Symbols of the Confederacy have been a volatile topic across the country as recent events have spurred new resistance to their display. Part I of this note provides a brief introduction into the current controversy surrounding Confederate monuments in the United States, with a particular emphasis on the erected memorials in the Florida landscape. Part II argues that Confederate monuments were mainly erected with the intention of advancing racial subordination during time periods in American history where black Americans resisted white supremacy. As shown by the events that followed right-wing violence in both South Carolina and Virginia, this note argues that contemporary displays of monuments and other Confederate symbols continues to serve this purpose. Part III goes on to describe constitutional challenges which have proved to be ineffective in addressing the display of these monuments, as well as legislative efforts which suffer from resistance of interpretation. Finally, through various examples, this note concludes that activists in support of the removal of Confederate symbols will be better served by dedicating their efforts to community remembrance projects and dedications.

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¹ William Faulkner, Requiem for a Nun 92 (1950).

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I. INTRODUCTION

On June 17, 2015, Dylann Roof, a 21-year-old white supremacist, massacred nine black members of the Mother Emanuel African Methodist Episcopal Church in Charleston, South Carolina during a Bible study meeting.² Photos of Roof later surfaced depicting him with the Confederate battle flag in one hand, and a gun in the other.³ Roof would later admit that he intended to start a race war.⁴ In response to this horrific act of terror, pressure grew to eliminate Confederate iconography from other public spaces across the South.⁵ Although many opposed public

² See Ralph Ellis, Ed Payne, Evan Perez, & Dana Ford, *Shooting suspect in custody after Charleston church massacre*, CNN (June 18, 2015, 11:50 PM), <http://www.cnn.com/2015/06/18/us/charleston-south-carolina-shooting/index.html>.

³ Frances Robles, *Dylann Roof Photos and a Manifesto are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>.

⁴ See Lenny Bernstein, Sari Horwitz, & Peter Holley, *Dylann Roof’s racist manifesto: ‘I have no choice,’* THE WASH. POST. (June 20, 2015), https://www.washingtonpost.com/national/health-science/authorities-investigate-whether-racist-manifesto-was-written-by-sc-gunman/2015/06/20/f0bd3052-1762-11e5-9ddc-e3353542100c_story.html?utm_term=.ad5748637396.

⁵ *Id.*

displays honoring the Confederacy, their objections were met with little success.

Although public debate surrounding Confederate monuments across the states seemed to be dying down, on August 12, 2017, a “Unite the Right” rally in Charlottesville, Virginia brought national attention to this issue once again.⁶ What began as a protest of the removal of a Confederate statue by Neo-Nazis, Klansmen, and White Nationalists, later developed into a murderous act of domestic terror.⁷ While carrying torches and waving Confederate flags, protesters chanted phrases like, “You will not replace us. Jews will not replace us,” according to the New York Times.⁸ In the wake of this event, officials in other Southern states quickly moved for the removal of Confederate monuments fearing similar violence and unrest.⁹ Despite numerous high-profile removals,¹⁰ a substantial number of Confederate Civil War monuments, memorials, and symbols remain in public spaces around the country. More than piles of brass and marble, Confederate memorials continue to exist as proxies for our country’s racist legacy. This note aims to highlight the historical context in which Confederate monuments were generally erected to point out that current display of Confederate memorials continues to serve an exclusionary purpose. In light of the fact that prior constitutional challenges and legislative efforts have generally proved to be ineffective in addressing contemporary display of Confederate symbols, communities who wish to bring about change in the Florida landscape should consider community remembrance projects as more effective alternatives.

II. CONFEDERATE MEMORIALS ACROSS THE COUNTRY – A SPLC STUDY

Following the massacre in Charleston,¹¹ the Southern Poverty Law Center (“SPLC”) launched an effort to catalog and map Confederate

⁶ See Sheryl G. Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 20, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region®ion=top-news&WT.nav=top-news>.

⁷ *Id.*

⁸ *Id.*

⁹ See Jess Bidgood, Mathew Bloch, Morrigan McCarthy, Liam Stack, & Wilson Andrews, *Confederate Monuments Are Coming Down Across the United States. Here’s a List*, N.Y. TIMES (last updated Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html>.

¹⁰ *Id.*

¹¹ *Id.*

iconography in public spaces around the Country in the last 150 years.¹² The report – *Whose Heritage? Public Symbols of the Confederacy* – identifies 1,503 examples of monuments and statues; flags; city, county and school names; lakes, dams and other public works; state holidays; and other symbols that honor the Confederacy.¹³ Relying on federal, state, and local databases, the SPLC tallied a wide range of Confederate symbols in the public spaces of a total of 31 states around the country.¹⁴ Many of these memorials were located in states that belonged to the Union such as New York and California.¹⁵

In its study, the SPLC takes into account everything from Stone Mountain in Georgia, to a workaday obelisk in Anniston, Alabama, which commemorates Major John Pelham.¹⁶ As part of an extensive list of Confederate iconography, the report identifies more than 718 Confederate monuments and statues on Public property, 551 of which were dedicated or built prior to 1950.¹⁷ Although a state-by-state list of government-sanctioned Confederate symbols is included, the report does not mention nearly 2,600 Civil War battlefields, museums, cemeteries and other places that are largely historical in nature.¹⁸ The SPLC also tallied 45 Confederate monuments that were dedicated or rededicated during the civil rights movement, and 32 since the year 2000.¹⁹ While there have been at least 100 attempts at the state and local levels to remove or alter publicly supported symbols of the Confederacy, the vast majority of these memorials remain.²⁰

III. REMNANTS OF THE CONFEDERACY IN THE FLORIDA LANDSCAPE

Ranking 10th out of 31 states mentioned in the study, the state of Florida has dedicated 61 confederate markers or monuments since 1861.²¹ Excluding those on battlefields and cemeteries, there are 25 Confederate monuments that are currently displayed on public land in the state of Florida.²² Most were commissioned during the Jim Crow era and built by

¹² The S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* (Apr. 21, 2016), https://www.splcenter.org/sites/default/files/whoseheritage_splc.pdf [hereinafter SPLC Report].

¹³ *Id.* at 8.

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 8.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 9.

²² *Id.*

the United Daughters of the Confederacy.²³ Moreover, the report notes 7 public schools, 6 public parks, and 14 roads, streets, or highways that were named after prominent Confederates.²⁴ Like North Carolina, Kentucky, and Louisiana, Florida has also Confederate holidays authorized in its state code even though it did not officially observe them as a state in 2016.²⁵

Following the events in Charlottesville, authorities in Florida struggled to avoid a repeat of the fatal violence that erupted at the University of Virginia: in Gainesville, FL, a statue, nicknamed “Old Joe,” which stood in front of the Alachua County Administration Building for nearly 113–years. On August 14, 2017, the United Daughters of the Confederacy – the same group that erected the statue in 1904 – hired O.T. Davis Monument Company to remove it.²⁶ Although the statue’s removal had been in the works for months, protests caused several failed attempts to relocate it. Since its removal, the statue has been relocated to Oak Ridge Cemetery near Rochelle, southeast of Gainesville.

In another instance, commissioners in Hollywood, Florida, approved a plan to rename streets named after Confederate commanders; Robert E. Lee, John Bell Hood, and Nathan Bedford Forrest (the first grand wizard of the Ku Klux Klan).²⁷ On August 30, 2017, Commissioners spent nearly five hours debating the issue as they listened to more than 130 people who signed up to speak. Some of the speakers included Congresswoman Debbie Wasserman Schultz and State Representative Joe Geller. In anticipation of the vote, protesters peacefully gathered outside City Hall with signs and posters. Although a call to rename Forrest Street went ignored 15 years ago, the controversy around these street names resurfaced in 2015 when vandals painted over street signs.²⁸ While all three streets extend through the entire city, only two — Forrest and Hood

²³ *Id.*, *supra* note 12; *see also* Mario Ariza, *Florida has More than 30 Confederate Monuments*, NEW TROPIC (Aug. 13, 2017), <https://thenewtropic.com/florida-30-confederate-monuments-taking-them-down> [hereinafter New Tropic Report].

²⁴ SPLC Report, *supra* note 12, at 19–20.

²⁵ *Id.* at 10.

²⁶ Andrew Caplan, *Confederate Statue Removed from Downtown Gainesville*, THE GAINESVILLE SUN (last updated Aug. 14, 2017, 11:32 PM), <http://www.gainesville.com/news/20170814/confederate-statue-removed-from-downtown-gainesville>.

²⁷ Susannah Bryan, *Under Pressure, Hollywood to Rename Streets Honoring Confederate Generals*, SUN SENTINEL (July 3, 2017, 8:45 PM), <http://www.sun-sentinel.com/local/broward/hollywood/fl-sb-confederate-streets-hollywood-drama-20170703-story.html>.

²⁸ Susannah Bryan, *Street Fight: When Hollywood Shrugged Over Confederate Street Names, One Man Stood Firm*, SUN SENTINEL (July 9, 2017, 6:05 PM), <http://www.sun-sentinel.com/local/broward/hollywood/fl-sb-confederate-streets-hollywood-benjamin-israel-20170705-story.html>.

— run through the predominantly black Liberia neighborhood.²⁹ Under current plans, reports note that Forrest Street is expected to become Savannah Street, Hood Street will change to Macon, and Lee will become Louisville.³⁰

In spite of these efforts, a great number of monuments still stand. A few of these include, a 50-foot pillar topped with a statue of General Lee in the center of Pensacola, a well-preserved monument of the Confederate soldiers of Jackson County that stands just north of the courthouse in a traffic circle, and a Confederate monument in a park in Jacksonville, Florida which is itself called “Confederate Park.”³¹ Consistent with the SPLC’s findings, many of the monuments in Florida dedicated to the Confederacy were erected in more recent years. In St. Cloud, Florida, a Confederate monument commemorating Robert E. Lee Road stands despite the fact that the city was founded in large part by thousands of Union veterans.³² The monument in St. Cloud along with at least 30 others nationwide were unveiled in the 21st century as most were erected during the 1950s and ‘60s in the midst of the civil rights movement.³³ Moreover, plinths, plaques and obelisks found in Old Town, Trenton, and White Springs, Perry County, and St. Cloud were all dedicated in the past 15 years.³⁴

IV. CONFEDERATE SYMBOLS & THEIR HISTORICAL LINKS

In addition to compiling a list of Confederate monuments and symbols spread over 31 states – plus the District of Columbia – the SPLC outlines two major time periods during which the dedication of these monuments spiked.³⁵ Both involved times of extreme civil rights tension. A common misconception among supporters of these symbols is that Confederate

²⁹ Susannah Bryan, *Hollywood Ready for Final Vote on Confederate Streets – and So Are Protesters*, SUN SENTINEL (Aug. 28, 2017, 6:50 PM), <http://www.sun-sentinel.com/local/broward/hollywood/fl-sb-street-names-hollywood-protest-20170828-story.html>.

³⁰ *Id.*

³¹ Mario Ariza, *Florida has More than 30 Confederate Monuments*, NEW TROPIC (Aug. 13, 2017), <https://thenewtropic.com/florida-30-confederate-monuments-taking-them-down> [hereinafter New Tropic Report].

³² *Id.*

³³ Katie Zezima & Aaron Williams, *The Battle Over Our Nation’s Confederate Remnants*, THE WASH. POST. (Sept. 12, 2017), https://www.washingtonpost.com/graphics/2017/national/confederate-monuments/?utm_term=.de5f6c1daf24.

³⁴ *Id.*

³⁵ The S. Poverty L. Ctr., *Whose Heritage? Public Symbols of the Confederacy* 19–20 (Apr. 21, 2016), https://www.splcenter.org/sites/default/files/whoseheritage_splc.pdf [hereinafter SPLC Report].

monuments were shortly erected after the war's end in 1865.³⁶ Instead, most monuments were built between the 1890s and 1950s.³⁷ Unlike the earlier memorials that were built to mourn dead soldiers from the Civil War, these monuments tended to glorify leaders of the Confederacy like General Robert E. Lee, or General "Stonewall" Jackson.³⁸ Statues were placed in front of state buildings, city squares, and courthouses, and not in cemeteries, as was common in earlier years. According to the report,

[t]wo distinct periods saw a significant rise in the dedication of monuments and other symbols. The first began around 1900, amid the period in which states were enacting Jim Crow laws to disenfranchise the newly freed African Americans and re-segregate society. This spike lasted well into the 1920s, a period that saw a dramatic resurgence of the Ku Klux Klan, which had been born in the immediate aftermath of the Civil War.

The second spike began in the early 1950s and lasted through the 1960s, as the civil rights movement led to a backlash among segregationists. These two periods also coincided with the 50th and 100th anniversaries of the Civil War.³⁹

Around the turn of the 20th century, the country saw another spike in the emergence of Confederate monuments and symbols.⁴⁰ Founded in the 1890s, organizations like the United Daughters of the Confederacy and the Sons of Confederate Veterans were instrumental in raising funds to build these monuments.⁴¹ For many blacks in the South, emancipation had done little to change the omnipresent threat of violence in their lives. Through the enforcement of Jim Crow laws, and the systematic exclusion of African-Americans from participating in Southern governments, whites aimed to reassert their control over the South by enforcing and systematically disenfranchising and disempowering black individuals.⁴² In 1896, the U.S. Supreme Court upheld the constitutionality of state laws which racially segregated public facilities deemed to be "separate but

³⁶ *Id.* at 9.

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ *Id.* at 9.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

equal” in *Plessy vs. Ferguson*.⁴³ Following this landmark case, a spike in the dedication of Confederate monuments is recorded.⁴⁴ Moreover, a final spike is reported around 1909 after the creation of the National Association for the Advancement of Colored People (“NAACP”), which steadily continued until the reemergence of the Ku Klux Klan (“KKK”).

Once the construction of Confederate monuments began to taper off, a backlash to the Civil Rights Movement spread Confederate symbols in other ways. According to the SPLC, the country’s more than 718 monuments are only a part of a total of 1,503 symbols of the Confederacy tallied in public spaces.⁴⁵ In 1954, Southern states experienced a sudden rise in the dedication of schools named in honor of Confederate soldiers following the Supreme Court’s decision in *Brown v. Board of Education*.⁴⁶ In addition, the Confederate battle flag – rather than Confederate monuments – became more prevalent in its usage as a symbol of resistance to desegregation in the 1950s and 60s. The decision to fly the flag over state capitols and city halls across the region came at time when states began to push back against the federal government’s growing enforcement of civil rights in the South.⁴⁷ In 1956, Georgia redesigned its state flag to include the Confederate battle flag.⁴⁸ Similarly, in 1962, South Carolina placed the flag atop its capitol building.⁴⁹ Scholars have argued that there is no need to inquire into the motives behind this action as during a 1960 speech celebrating the secession centennial, Senator John D. Long – the Senator that introduced the resolution to raise the flag – addressed the South Carolina Senate to praise the Ku Klux Klan stating, “[w]e honor them and we are proud of them.” The legislator asked members of the senate to “dismiss from your consideration any little–sister sob stories about the South’s brutality to the slave and its inhuman

⁴³ *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁴⁴ SPLC Report, *supra* note 12, at 5.

⁴⁵ *Id.*

⁴⁶ *See Id.* at 6 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“Brown I”; declaring racially segregated public schools unconstitutional); *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (“Brown II”; ordering the desegregation of public schools “with all deliberate speed.”)).

⁴⁷ *Id.*

⁴⁸ *See Acts and Resolutions of the General Assembly of Georgia*, No. 29, 1 General Acts and Resolutions 38 (1956) (“Redesigned to look like the Confederate flag after the Supreme Court’s ruling in *Brown v. Board of Education*, the Georgia state flag is a replica of the Confederate flag.”); *see also* James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 *YALE L.J.* 505, 505 (1991) (“In Alabama, the Confederate flag was raised in 1963 as part of Governor Wallace’s “Segregation Forever” campaign.”).

⁴⁹ SPLC Report, *supra* note 35, at 9.

treatment of captive and fugitive slaves.”⁵⁰ Three years later, Alabama followed after Governor George Wallace raised the Confederate flag at the state capitol as a visual reminder of his “Segregation Forever” campaign.⁵¹ Although the Confederate flag had been used sparingly for decades, it “became a mainstay at Ku Klux Klan rallies as the organization launched a campaign of bombings, murders, and other violence against African Americans and civil rights activists.”⁵² According to the SPLC, the flag was not only extensively used by the KKK as part of a campaign of terror against black Americans during the civil rights movement, but it was also commonly utilized by segregationists in positions of power in their defense of Jim Crow.⁵³ Today, the state flags of Alabama, Arkansas, Florida, and Georgia still contain elements of the Confederate flag.⁵⁴

While the “Lost Cause” had been a narrative of loss before the 1890s, it became a narrative of Southern victory over the rights of black Americans and Yankee rule. According to the study conducted by the SPLC, monuments and other symbols were spread across public property with the intention of projecting a message that the ideals fought for in the Civil War were still alive and strong in the South.⁵⁵ Given that these ideals were rooted in viewing African Americans as chattel, the rise of the use of the Confederate flag during the Civil Rights movement was a response to the increasing claims of African Americans to equality.⁵⁶ Despite well-documented history of the Civil War, many Southerners continue to view the war as a “noble endeavor” fought to defend Southern honor and the region’s resistance in the face of Northern aggression.⁵⁷ Thus, in their reappearance, Confederate symbolism coincided with resurgent white political power. As described in *The Washington Post* by Karen L. Cox, a history professor at the University of North Carolina at Charlotte, Confederate dedications were “part of a campaign to paint the Southern cause in the Civil War as just and slavery as a benevolent institution The monuments were put up as explicit symbols of white supremacy.”⁵⁸ “Not content to disenfranchise black men,” Cox adds, “Southern whites went on a lynching spree.”⁵⁹ According to the study conducted by the SPLC, “[t]his deeply rooted but false narrative is the result of many

⁵⁰ Darnell L. Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521, 531 (2001).

⁵¹ Forman, *supra* note 48, at 505.

⁵² SPLC Report, *supra* note 12, at 6.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

decades of revisionism in the lore and even textbooks of the South that sought to create a more acceptable version of the region's past." In this way, erecting statues and memorials to the Confederacy allowed Southerners to not only honor those who fought in the war, but to also justify their cause, *and* vindicate a social order which subordinated blacks to whites.⁶⁰

V. THE CONFEDERACY & ITS LASTING IMPACT

As part of the national debate surrounding Confederate iconography, supporters of the removal of these emblems argue that there is an important distinction between acknowledging the past and honoring the legacy of white supremacy. On the other hand, opponents of the removal or modification of these statues see them as parts of the Nation's historical record, which allow for important teaching moments of how far we've come as a nation.⁶¹ While symbols and statues dedicated to the Confederacy were originally erected to exclude black Americans from full participation in public life and remind them remind of their subordinate position in the South, this note argues that they continue to serve as signposts that tell of the present-day perils of American racism.

Symbolizing more than the Civil War and an era of slavery, Confederate monuments continue to stand for resistance to equality in the twentieth century. As illustrated by the tragic events in both Charleston and Charlottesville, racial tension and animus in the United States is not only a part of the nation's past. In *Stained Flags: Public Symbols and Equal Protection*, Robert Bein discusses the symbolic power of a flag by noting that a symbol's impact must be evaluated by what it means to the "public body represented" by it. Bein argues that when a symbol such as the Confederate flag does not treat all citizens underneath it equally, the excluded member is alienated from a national (or state) identity.⁶² Under this analysis, Bein notes that since the Confederate flag has been continually used throughout this century as a symbol by racist groups like the KKK or the White Aryan Resistance in their opposition to the equal treatment of blacks, "[i]t is clear that the Confederacy's battle flag serves

⁶⁰ Karen L. Cox, *The Whole Point of Confederate Monuments is to Celebrate White Supremacy*, WASH. POST. (Aug. 16, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-confederate-monuments-is-to-celebrate-white-supremacy/?utm_term=.d4fc61315e23.

⁶¹ See *infra* notes 175–178 and accompanying text.

⁶² Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 900 (1998).

to divide residents of the South along racial lines.”⁶³ Moreover, in *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, Darnell Weeden adds that “[b]ecause of its appeal to a prurient interest in race relations, the Confederate flag is ‘the most inflammatory symbol that the South has.’”⁶⁴ In light of the fact that the historical record fails to support the contention that the Confederacy was about states’ rights rather than slavery, Weeden argues that to conclude that the flying of the Confederate flag continues to foster a climate of racism is inevitable as Confederate symbols continue to communicate “sympathy with slavery, Jim Crow Laws, or that African–American subservience is inescapable.”⁶⁵ Photographed holding the Confederate battle flag and a handgun, Dylann Roof did so because the flag held particular symbolism to him and to others reading his website.⁶⁶ Similarly, the impassioned responses that resulted from the discovery of these photographs demonstrate the lasting significance of the Confederate flag in the minds of many as a symbol of hate.⁶⁷

Similar to the responses evoked by the display of the Confederate battle flag, violent responses to the removal of Confederate monuments demonstrate that while the force from these symbols stem from their history, their continued public display stands for a resistance to racial and political equality of African–Americans and other minorities in the United States. Despite the fact that arguments have been made regarding Confederate symbols as representative of a narrative that depicts the Civil War as a battle for states’ rights and Southern heritage,⁶⁸ contemporary displays of exclusionary symbols continue to be used to intimidate and oppress racial minorities in the South. In *North Carolina’s Heritage Protection Act Cementing Confederate Monuments in North Carolina’s Landscape*, Kasi E. Wahlers argues that “[t]he fact that most of the monuments seen today were not erected in the years immediately following the Civil War changes their meaning for many people, who see them not as paying contemporaneous homage to war veterans, but instead as signaling to the public that white supremacy remains pervasive in the minds of many.”⁶⁹ Similarly, in *Landscape Fairness: Removing Discrimination from the Built Environment*, Stephen Clowney

⁶³ *Id.* at 921.

⁶⁴ Weeden, *supra* note 50, at 551.

⁶⁵ *Id.* at 541.

⁶⁶ Maurie McInnis, *Richmond Reoccupied by Men Who Wore the Gray*, SLATE (July 1, 2015), http://www.slate.com/articles/news_and_politics/history/2015/07/confederate_flag_it_s_not_a_symbol_of_southern_heritage_it_has_always_been.html.

⁶⁷ *See supra* note 5 and accompanying text.

⁶⁸ Weeden, *supra* note 50, at 540.

⁶⁹ Kasi E. Wahlers, *North Carolina’s Heritage Protection Act Cementing Confederate Monuments in North Carolina’s Landscape*, 94 N.C. L. REV. 2176 (2016).

points to scholarship in the social sciences to argue that the everyday landscape is a significant instrument of modern race-making as it “inscribes selective and misleading versions of the past in solid, material forms.”⁷⁰ According to Clowney, although white Southerners originally erected Confederate monuments with the intention of rewriting the meaning of the Civil War and sending a message of racial superiority to colored minorities, landscapes, parks, and statues continue to marginalize African American communities by praising a white-dominated historical narrative that ignores or misrepresents the history of African Americans.⁷¹

As illustrated by the manner in which a protest against the removal of a Confederate monument brought together a group of white supremacists in Charlottesville ranging from white nationalists to armed “Patriot” groups, Confederate monuments, like the Confederate battle flag, continue to be associated as a symbol of racial subordination for some.⁷² Although present day opposition against the removal of Confederate monuments has not always come in the form of violent demonstrations by racist hate groups, other forms of resistance following the events in Charleston and Charlottesville help provide insight into today’s political divide. As a consequence of the national reflection that began in Charleston, New Orleans Mayor Mitch Landrieu signed an ordinance calling for the removal of four Confederate monuments.⁷³ Hours after a statue of Confederate General Robert E. Lee was removed from the New Orleans’ Lee Circle, Mayor Landrieu delivered a powerful speech at Gallier Hall which pointed out that Confederate monuments “purposefully celebrate a fictional, sanitized Confederacy, ignoring the death, ignoring the enslavement and the terror that it actually stood for.” In response to this event, Mississippi State Representative Karl Oliver voiced his opposition through social media by calling the action in New Orleans “heinous and horrific.”⁷⁴ He went on to write: “If the, and I use this term extremely loosely, “leadership” of Louisiana wishes to, in a Nazi-ish fashion, burn books or destroy historical monuments of OUR HISTORY,

⁷⁰ Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 3 (proposing that “all existing monuments and honorary spaces” should be subjected to a sunset provision in order to be reevaluated).

⁷¹ *Id.* at 21.

⁷² *Flags and Other Symbols Used By Far-Right Groups in Charlottesville*, SOUTHERN POVERTY LAW CENTER, (Aug. 12, 2017), <https://www.splcenter.org/hatewatch/2017/08/12/flags-and-other-symbols-used-far-right-groups-charlottesville>.

⁷³ See Logan Strother, Spencer Piston, & Thomas Ogorzalek, *Are Confederate Monuments Our Heritage or Symbols of Hate?*, NEWSWEEK (July 9, 2017), <http://www.newsweek.com/are-confederate-monuments-our-heritage-or-symbols-hate-633678>.

⁷⁴ See Kate Royals, Rep. Karl Oliver: *Those Removing Confederate Monuments ‘Should Be Lynched’*, MISSISSIPPI TODAY (May 21, 2017), <https://mississippitoday.org/2017/05/21/rep-karl-oliver-those-removing-confederate-monuments-should-be-lynched>.

they should be LYNCHED!”⁷⁵ Although the lawmaker has since apologized, the message drew “likes” from two of Oliver’s fellow Republican lawmakers, Representative John Read and Representative Doug McLeod.⁷⁶

Moreover, as a response to New Orleans’ removal of some of its most prominent Confederate sculptures, lawmakers in other Southern states were prompted to enact laws that would make it harder for cities to take down Confederate monuments from public property.⁷⁷ Commonly known as “Heritage Protection Acts,” or “HPAs,” these laws seek to protect Confederate statues and symbols from being removed or altered.⁷⁸ The states that have anti-removal laws include: North Carolina, South Carolina, Georgia, Mississippi, Kentucky, Tennessee and most recently, Alabama, which enacted its law in the Spring of 2017.⁷⁹ Although the Acts

⁷⁵ *Id.*

⁷⁶ See Amy B. Wang, *Lawmaker Apologizes after Saying Leaders ‘Should be LYNCHED’ for Removing Confederate Statues*, WASH. POST. (May 22, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/22/lawmaker-says-louisiana-leaders-should-be-lynched-for-taking-down-confederate-statues/?utm_term=.2072ad9cf036.

⁷⁷ See Cultural History Artifact Management and Patriotism Act of 2015, ch. 170, 2015 N.C. Sess. Laws 435, 435–36 (codified as amended at N.C. GEN. STAT. §§ 100–2, 100–2.1, 144–5, 144–9, 147–36, 160A–400.13 (2015)) (the Act was approved July 23, 2015). The official title of the Act is the “Cultural History Artifact Management and Patriotism Act of 2015.” *Id.* However, statutes of this kind are commonly called “Heritage Protection Acts.” See, e.g., Tennessee Heritage Protection Act of 2016, ch. 601, 2016 Tenn. Pub. Acts ___ (codified at TENN. CODE ANN. § 4–1–412 (2015)); Alfred L. Brophy, *North Carolina Heritage Protection Act*, FACULTY LOUNGE (July 16, 2015), available at <http://www.thefacultylounge.org/2015/07/north-carolina-heritage-protection-act.html>.

⁷⁸ See Jessica Bliss & Holly Meyer, *In the South, Confederate Monuments Often Protected, Hard to Remove Thanks to State Laws*, TENNESSEAN (last updated Aug. 17, 2017), <http://www.tennessean.com/story/news/2017/08/17/south-confederate-monuments-often-protected-hard-remove-state-laws/573226001/>; see also John Moritz, *Governor McCrory Signs Bill, Protecting North Carolina Confederate Monuments*, ABC 11 (July 24, 2015), <http://abcll.com/politics/mccrory-signs-bill-protecting-confederate-monuments/876469> (describing Governor McCrory’s reaction to the bill). An example of this is seen in Mississippi’s proposed “Heritage Initiative” to amend its state constitution. See *State Heritage*, MISS. SEC’Y OF STATE CONST. INITIATIVES, <https://www.sos.ms.gov/Elections/Initiatives/InitiativeInfo.aspx?Id=46>. Mississippi’s “Heritage Initiative” sought to reverse any renaming of structures originally named to honor the Confederacy, amend the Mississippi Constitution to designate a Confederate Heritage Month, and amend the state curriculum to include information about the state’s Confederate history. *Id.* The initiative also required that a state flag of equal size be displayed wherever the U.S. flag is on display. *Id.*

⁷⁹ See GA. CODE ANN. § 50–3–1(b) (2015) (preventing removal or alteration of military monuments); MISS. CODE ANN. § 15–15–81 (2015) (preventing removal of military monuments and renaming of public property named after military events or figures); S.C. CODE ANN. § 10–1–165 (2015) (outlining different memorials that may not be removed or altered, by stating that state property named after historic figures may

vary considerably, each contains a provision for monument protection.⁸⁰ These laws generally restrict the removal, relocation, or alteration of any monument or “display of a permanent character” located on public property.⁸¹ Many of the laws require that either the legislature or a state commission approve any local effort to remove a monument. For instance, a Mississippi law states that statues, landmarks and memorials can’t be taken off public property unless they block drivers from seeing the road or are put in another approved location.⁸² While these legislative acts do not specifically target Confederate monuments or symbols, Heritage Protection Acts such as the one passed in North Carolina in July 2015 for example, were enacted following contentious public debate and rampant vandalism of Confederate monuments.⁸³ Thus, it has been inferred by many that the purpose of such legislation is to mainly protect these monuments.⁸⁴

Unlike the aforementioned states, Florida has not passed similar anti-removal laws. In spite of recently facing the “Soldiers’ and Heroes’ Monuments and Memorials Protection Act,” the bill was withdrawn from consideration by the Florida legislature.⁸⁵ Introduced in January 20, 2017, the Act was intended to impose criminal penalties for “criminal mischief” which caused damage to certain remembrances erected to honor or commemorate a soldier or historical military figure. Although the Florida

not be renamed, and preventing amendments to the statute without two-thirds vote of the North Carolina General Assembly); Tennessee Heritage Protection Act of 2016, ch. 601, 2016 Tenn. Pub. Acts (codified at TENN. CODE ANN. § 4-1-412 (2016)) (preventing removal of monuments in dedication of the military and renaming of public property but allowing counties and towns a mechanism to seek waiver of this prohibition); S.B. 13, 2016 Leg., Reg. Sess. (Ala. 2016) (prohibiting any alteration to monuments or naming conventions honoring an enumerated list of historical events without first obtaining a waiver); H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (preventing removal of military monuments or renaming of public property).

⁸⁰ See, e.g., GA. CODE ANN. § 50-3-1(b) (2015); MISS. CODE ANN. § 55-15-81 (2015); S.C. CODE ANN. § 10-1-165(a) (2015); TENN. CODE ANN. § 4-1-412 (2015).

⁸¹ See N.C. GEN. STAT. § 100-2.1(b) (2015) (The statute protect protects “objects of remembrance” from removal and defines such objects as “a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina’s history.”).

⁸² See MISS. CODE ANN. § 55-15-81 (2013).

⁸³ See e.g., Wahlers, *supra* note 80, at 2176 (citing N.C. GEN. STAT. § 14-127.1 (2015) (prohibiting, among other acts, vandalism to “statue[s] or monument[s] situated in any public place” in North Carolina)).

⁸⁴ Colin Campbell, *NC House Could Ban Removal of Confederate and Other Monuments*, NEWS & OBSERVER (July 15, 2015, 5:58 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article27345613.html> (interpreting the statute as directly targeting Confederate monuments).

⁸⁵ The Florida Senate, *SB 418: Soldiers’ and Heroes’ Monuments and Memorials Protection Act*, (last visited Dec. 21, 2017), <https://www.flsenate.gov/Session/Bill/2017/00418>.

legislature did not follow in the steps of its Southern neighbors, this type of monument protection legislation has generated controversy in some states. Claims brought against these HPAs involve criticism of the use of vague language in these statutes, which according to some, engenders confusion as to their proper scope.⁸⁶ Other opponents have argued that localities, rather than state legislature, should be given the authority to erect, contextualize and remove statues as they deem appropriate for their communities.⁸⁷ Finally, others have suggested that this form of legislation should be amended to include provisions that allow for the installation of plaques contextualizing these monuments as a more simple way to alter these laws.⁸⁸ Despite the fact that some HPAs allow for Historical Commissions to grant waivers from these limitations,⁸⁹ critics have argued that this exception, in addition to involving a long and convoluted process, still allows individuals to be sued by “any person who can demonstrate a real interest in a memorial through aesthetic, architectural, cultural, economic, environmental, or historic injury.”⁹⁰

Examined as a whole, it becomes clear that heated—and often violent—debates over whether to remove monuments to the Confederacy point to a lasting relevancy of the initial meaning of these monuments in the contemporary South. While to many white Southerners, Confederate symbols represent regional heritage and pride, they have a starkly different meaning to others who view them as emblems of slavery, racism, and the nation’s long history of oppression of African-Americans. Suggestions that the Confederate iconography in the United States exists solely as reminders of the violence that marginalized communities faced in the past suggests that what occurred then, is no longer happening now. The divide between those who think Confederate statues flags and other symbols should be preserved and those wish to rid our landscape of them, demonstrates that it is not simply about stone or metal, or a difference of opinion regarding the Confederacy, but about what these things represent

⁸⁶ See, e.g., Wahlers, *supra* note 80, at 2196 (calling for revisions on the part of the North Carolina General Assembly to address the statute’s broad reach, as the “application of the ‘displays of a permanent character’ provision can produce idiosyncratic results.”).

⁸⁷ See Seth McLaughlin, *Virginia State Law Protecting Confederate Monuments May Be Revised*, WASH. POST. (Aug. 24, 2017), <https://www.washingtonpost.com/news/2017/aug/24/confederate-monuments-law-in-virginia-may-be-revis/>; see also Madison Park, *Removal of Confederate Monuments Stirs Backlash in Statehouses*, CNN (last updated May 12, 2017), <http://www.cnn.com/2017/05/12/us/confederate-monument-state-bills/index.html>.

⁸⁸ Wahlers, *supra* note 80, at 2196.

⁸⁹ TENN. CODE. ANN. § 4-1-412 (2016).

⁹⁰ See Cari W. Gervin, *The Tennessee Heritage Protection Act Shields Confederate Monuments*, NASHVILLE SCENE (Sept. 28, 2017), <https://www.nashvillescene.com/news/cover-story/article/20976874/the-tennessee-heritage-protection-act-shields-confederate-monuments>.

to many people regarding our country's efforts – or lack thereof – to confront its legacy of genocide and slavery.

VI. PRACTICAL PROBLEMS WITH ALTERNATIVE APPROACHES AS MEANS TO ADDRESS RACIALIZED SYMBOLS

A. *Rethinking Judicial Action*

In considering what should be done about the nation's lingering memorials to the Confederate States of America, supporters of their removal may have a difficult time relying on strategy that depends on judicial action. While activists may be tempted to call upon the law to effectuate change in landscapes that perpetuate racist ideology or alienate minority populations, the Supreme Court has erected roadblocks to the prosecution of civil rights cases in recent years.⁹¹ On close inspection, this approach is unlikely to be successful for the reasons discussed below.

1. The Weakness of a Fourteenth Amendment Approach

The text of the Fourteenth Amendment, which provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws,”⁹² has consistently been interpreted to bar discrimination based on race.⁹³ As shown by a series of landmark cases, the Equal Protection Clause has been used to as a way to undo the structures of white supremacy and racial subordination. The decisions in *Brown v. Board of Education*,⁹⁴ *Loving v. Virginia*,⁹⁵ and *NAACP v. Button*,⁹⁶ all applied the Fourteenth

⁹¹ Cloney, *supra* note 70, at 58–61.

⁹² U.S. Const. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁹³ See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291–92 (1978); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”); *see also* *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 80 (1955) (Black, J., dissenting) (arguing that the Court should not dismiss a claim of racial bias under the Fourteenth Amendment even though the petitioner was the only individual affected).

⁹⁴ *Brown v. Board of Education*, 347 U.S. 483, 873 (1954).

⁹⁵ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁹⁶ *NAACP v. Button*, 371 U.S. 415 (1963) (finding that a Virginia statute restricting a lawyer's ability to solicit clients violated the NAACP's First and Fourteenth Amendment rights).

Amendment to bring about change in unjust power relationships between white and black Americans. However, despite its history in federal courts, the Equal Protection Clause of the Fourteenth Amendment has been interpreted more narrowly in its potential to amend social wrongs.⁹⁷ Although a primary goal of the Equal Protection Clause is to prevent intentional governmental conduct that discriminates on the basis of race,⁹⁸ current case law demands that a litigant challenging a facially neutral government action under the Equal Protection Clause must satisfy a two-pronged test to bring a claim. Once it has been established that the government's undertaking results in disproportionate effects among different racial groups, the litigant must then prove that racial discrimination was the intent or motivating factor behind the act.⁹⁹ Discriminatory impact alone is not sufficient to serve as a basis for a violation of equal protection of the laws.¹⁰⁰ However, as shown by recent jurisprudence, proving the existence of discriminatory intent is no easy task.

The resistance by judges to removing racialized symbols from state-owned property is most clearly seen in the struggle over the removal of Confederate flag in recent years.¹⁰¹ In 1990, the Eleventh Circuit rejected the National Association for the Advancement of Colored People's ("NAACP") claim that the Constitution of the United States and federal statutes mandate the removal of the flag from the Alabama state capitol in *NAACP v. Hunt*.¹⁰² Central to its reasoning was the conclusion that there was no unequal application of state policy as all citizens were exposed to the flag, and citizens of all races could be offended by its position.¹⁰³ Rather than finding that the plaintiffs' grievance stemmed from having to view a flag as a symbol of a history of vocal resistance to racial and political equality for African-Americans, the court found that it was "not certain that the flag was hoisted for racially discriminatory reasons."¹⁰⁴ Instead, the court concluded that the source of the plaintiffs' grievance stemmed not the Confederate flag or the law itself, but an inability to

⁹⁷ See *infra* notes 116 and accompanying text.

⁹⁸ *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985) (quoting *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 264–65 (1977)).

⁹⁹ *Id.* at 225–26.

¹⁰⁰ See *Washington v. Davis*, 426 U.S. 229, 238–42 (1976) (deciding that in order to hold the government liable for racial discrimination under either the Fifth or Fourteenth Amendments, the plaintiff had to show discriminatory intent).

¹⁰¹ See Forman, *supra* note 48, at 507.

¹⁰² *NAACP v. Hunt*, 891 F.2d 1555, 1559 (11th Cir.1990) (rejecting challenge to the "flying of the flag atop the Alabama capitol dome" on First Amendment grounds).

¹⁰³ *Id.* at 1562.

¹⁰⁴ *Id.* at 1565.

control their “own emotions.”¹⁰⁵ In other words, plaintiffs had to turn elsewhere for relief as they couldn’t prove that racial animus motivated the decision to display the Confederate flag on the Alabama state capitol.

Like in *Hunt*, the Eleventh Circuit found that the incorporation of the Confederate flag within the Georgia state flag did not violate citizens’ equal protection rights in *Coleman v. Miller*.¹⁰⁶ In *Coleman*, the plaintiff argued that the state’s adoption and display of the flag was racially discriminatory and violated his right to equal protection under the Fourteenth Amendment.¹⁰⁷ While the district court in fact found that the adoption of the Georgia flag was partly motivated by racism,¹⁰⁸ the court of appeals did not reach the question of discriminatory intent as it rejected the plaintiff’s Fourteenth Amendment challenge because it could find no present disparate effect.¹⁰⁹ In its analysis of the disparate impact, the *Coleman* court required that the plaintiff “present specific factual evidence to demonstrate that the Georgia flag presently imposes on African–Americans as a group a measurable burden or denies them an identifiable benefit.”¹¹⁰ The court rejected the plaintiff’s argument of disparate impact based on his perception of the flag as a symbol of racial segregation and its subsequent psychological effect on him.¹¹¹ In the absence of specific evidence of measurable or identifiable disparate impact, the court concluded that there had been no Fourteenth Amendment violation.¹¹²

As seen in a more recent example, the U.S Supreme Court refused to hear the appeal of Carlos E. Moore, an African–American lawyer from Grenada, Mississippi on November 27, 2017.¹¹³ In *Moore v. Bryant*,¹¹⁴ Moore challenged the design of the Mississippi flag under the 14th Amendment’s equal–protection clause, as it remains the last state flag in

¹⁰⁵ *Id.* at 1565.

¹⁰⁶ *Coleman v. Miller*, 912 F. Supp. 522, 525–28 (N.D. Ga. 1996), *aff’d*, 117 F.3d 527 (11th Cir. 1997).

¹⁰⁷ *See Coleman*, 117 F.3d at 528.

¹⁰⁸ *See Coleman v. Miller*, 885 F. Supp. 1561, 1569, 1572 (N.D. Ga. 1995) (denying motion for preliminary injunction).

¹⁰⁹ *See Coleman*, 117 F.3d at 530–31 (rejecting plaintiff’s challenge to the Georgia flag under the First Amendment).

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Olivia Beavers, *Supreme Court Rejects Case Challenging Use of Confederate Emblem in Mississippi Flag*, THE HILL (Nov. 27, 2017), <http://thehill.com/regulation/court-battles/362066-supreme-court-rejects-case-challenging-use-of-confederate-emblem-on>.

¹¹⁴ *Moore v. Bryant*, 205 F. Supp. 3d 834 (S.D. Miss. 2016), *aff’d*, 853 F.3d 245 (5th Cir. 2017).

the U.S. to incorporate the Confederate emblem.¹¹⁵ Although countless arguments have been made regarding the Confederate battle flag as a symbol that deeply offensive to black Americans,¹¹⁶ both the U.S. District Court for the Southern District of Mississippi and the Fifth Circuit Court of Appeals ruled that Moore lacked legal standing to challenge the state flag.¹¹⁷ In its decision, the district court found that Moore’s “argument that he *feels* like a second-class citizen does not give rise to a legal injury.”¹¹⁸ Moreover, the court found Moore had no constitutional right to be free from anxiety from state displays of historical racism.¹¹⁹ Although on appeal the 5th Circuit didn’t deny that the flag might have a deep and personal effect on Moore, the court found that the plaintiff’s alleged stigmatic injury was not the type over which he could sue the state.¹²⁰

2. The Weakness of a Thirteenth Amendment Approach

In his lawsuit challenging the constitutionality of the Mississippi state flag, Moore alleged that the incorporation of the Confederate battle emblem in the state flag violated not only the Fourteenth Amendment, but the Thirteenth Amendment as well.¹²¹ To support his allegation that the Confederate battle emblem is a vestige of slavery that incites racial violence, Moore pointed to the mass killing of nine African-Americans church members in Charleston, South Carolina.¹²² Additionally, Moore cited a November 2015 incident at a Wal-Mart in Tupelo, Mississippi where a man set off an explosive to protest Wal-Mart’s decision to cease the sale of Confederate-themed merchandise; and a 2014 hate crime at the University of Mississippi where university students draped a noose and

¹¹⁵ See Robert Barnes, *Supreme Court Asked to Consider Mississippi’s Use of Confederate Image*, WASH. POST. (Sept. 10, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-asked-to-consider-mississippi-use-of-confederate-image/2017/09/10/0c52b366-94b9-11e7-aace-04b862b2b3f3_story.html?utm_term=.5588b46cbd64; see also Merrit Kennedy, *Supreme Court Rejects Case Over Confederate Emblem on Mississippi Flag*, NPR (Nov. 27, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/27/566737228/supreme-court-rejects-case-over-confederate-emblem-on-mississippi-flag>.

¹¹⁶ See, e.g., Forman, *supra* note 48, at 507 (arguing that state displays violate First and Fourteenth Amendments); Bein, *supra* note 62, at 911–13 (arguing that the Confederate battle flag cannot act as a unifying symbol of the South because it excludes Southern blacks. Alienation from the flag results in alienation from the national (or state) identity. Unless a flag is inclusive, a flag does not treat all citizens underneath it equally). *Id.* at 914–15; see also Weeden, *supra* note 50, at 542.

¹¹⁷ *Id.*

¹¹⁸ Moore, 205 F. Supp. 3d at 853.

¹¹⁹ *Id.* at 854.

¹²⁰ Moore, 205 F. Supp. 3d at 249.

¹²¹ *Id.* at 838.

¹²² *Id.*

the former Georgia state flag—which contained the Confederate battle emblem – around the neck of a statue of the University’s first African–American student.¹²³

While courts have maintained the judiciary’s role under the Thirteenth Amendment as limited only to enforcing the Amendment’s prohibition of literal enslavement,¹²⁴ it is important to note that scholars have argued that display of Confederate symbols on official state property should be prohibited under the Thirteenth Amendment.¹²⁵ In addition to prohibiting slavery or involuntary servitude, the Supreme Court has held that the Thirteenth Amendment also empowers Congress to end any lingering badges and incidents of slavery.¹²⁶ The Court, however, has failed to specify as to how lower courts should define the badges and incidents of slavery in the absence of congressional action.¹²⁷ In his article, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, Alexander Tsesis contends that state use of Confederate symbols violates Thirteenth Amendment because they serve to exclude black individuals from the dominant narrative.¹²⁸ As one of the remaining vestiges of the ante–bellum South, the Confederate battle flag, represents a badge of servitude.¹²⁹ According to Tsesis, “[w]hen Confederate symbols are placed on tax–supported property they reinvigorate the psychological incidents of servitude, comforting supremacists with the message that while overt racism is no longer tolerated, the nod and wink variety still is countenanced.”¹³⁰ Although in principle, the federal government should be able to prohibit the states from displaying Confederate symbols because they “place persons, in particular blacks, on notice that they are outsiders living freely only at the dominant group’s behests,”¹³¹ courts have been reluctant to find a private right of action as previously mentioned. In *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, William M. Carter suggests that due to the fact that “there is currently no consistent approach to determining the Thirteenth Amendment’s self–executing scope that would comport both with the Amendment’s original purposes as well as a vision of the Amendment as having continuing vitality,” courts have refused to take on a more

¹²³ *Id.*

¹²⁴ See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1312 (2007).

¹²⁵ See generally Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002).

¹²⁶ Carter, *supra* note 124, at 1312.

¹²⁷ *Id.*

¹²⁸ Tsesis, *supra* note 125, at 543.

¹²⁹ *Id.* at 556.

¹³⁰ *Id.* at 555.

¹³¹ *Id.* at 611.

expansionist approach which would help combat various forms of inequality.¹³²

3. The Weakness of a First Amendment Approach

In addition to challenging the constitutionality of the public displays of Confederate symbols under the Fourteenth and Thirteenth Amendment, litigants have also argued that the First Amendment's guarantee of free speech has the power to invalidate racialized monuments in the landscape because it is a form of racist government speech that affects the speech rights of black Americans.¹³³ Ultimately, the argument relies on the principle that when a government constructs or maintains Confederate monuments, memorial parks, and other dedications on public land for example, it is invariably making decisions about the message it wants to emit. By limiting the monuments it hosts to those that emit a particular point of view, the government is preventing all community members from having their voices heard in these public spaces.¹³⁴ For instance, in choosing to host a Confederate monument in the "Plaza de la Constitution," – while excluding a monument to the Union War dead – the city of St. Augustine in Florida is validating one group's speech and ignoring the expression of their opponents.¹³⁵ Thus, by dedicating or maintaining expressive monuments and symbols that support the voices of a white majority at the expense of other views, Governments are discriminating against alternative viewpoints. In principle, the First Amendment would generally bar this. Certainly, one major issue with this argument is that it is not always clear when the government is speaking for itself rather than unconstitutionally restricting others' speech. Nevertheless, this argument is doomed to fail as the Supreme Court has held that the Free Speech Clause does not regulate government

¹³² Carter, *supra* note 124, at 1366.

¹³³ See, e.g., Owen M. Fiss, *State Activism and State Censorship*, 100 *Yale L.J.* 2087, 2100 (1991) ("The state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard.").

¹³⁴ Joseph Blocher, *Government Property and Government Speech*, 52 *WM. & MARY L. REV.* 1413, 1432 (2011) ("[E]ven when defined simply as a thing or place, property does have expressive value."). See generally Timothy Zick, *Speech and Spatial Tactics*, 84 *TEX. L. REV.* 581 (2006) (describing how physical spaces can discipline speech); see also Sanford Levinson, *Thomas Ruffin and the Politics of Public Honor: Political Change and the "Creative Destruction" of Public Space*, 87 *N.C. L. REV.* 673, 692 (2009).

¹³⁵ Sheldon Gardner, *Local Officials Differ on Whether St. Augustine's Confederate Memorials Should Be Kept*, *ST. AUGUSTINE RECORD* (May 27, 2017), <http://www.sar-cdn.com/news/local-news/2017-05-27/local-officials-differ-whether-st-augustine-s-confederate-memorials>.

speech.¹³⁶ Supreme Court jurisprudence on the government speech doctrine makes clear that the government does not infringe upon the free speech rights of an individual when it refuses to use a viewpoint of neutrality in its own speech.¹³⁷ In fact, state governments can make their own content-based decision as they are exempt from First Amendment scrutiny.¹³⁸

In *Pleasant Grove City v. Sumnum*, the Supreme Court refused to apply the Free Speech Clause to a City's acceptance of a privately donated, permanent monument for installation in a public park located in Pleasant Grove, Utah.¹³⁹ The Sumnum, a religious organization, then brought suit under the First Amendment, insisting that the city had engaged in viewpoint discrimination by excluding the group from a public space in its refusal to accept the monument containing the Seven Aphorisms of Sumnum.¹⁴⁰ Although the park already hosted 11 permanent, privately donated displays, including a Ten Commandments monument,¹⁴¹ Pleasant Grove refused the monument, arguing that it limited Park monuments to those either directly related to the City's history or donated by groups with longstanding community ties.¹⁴²

In a unanimous opinion, the Supreme Court ruled against the Sumnum and found that the placement of a permanent monument in a public park was a form of government speech and was therefore not subject to scrutiny under the Free Speech Clause.¹⁴³ According to the majority, "[a] monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure."¹⁴⁴ The Court reasoned that the state must have the ability to privilege certain facts and opinion for government to function properly.¹⁴⁵ In his opinion, Justice Alito concluded, "[i]f every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed," Alito

¹³⁶ David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006) (Fagundes argues that government speech deserves constitutional protection only in occasions where the speech furthers democratic self-government).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 481 (2009).

¹⁴⁰ *Id.* at 466.

¹⁴¹ *Id.* (In addition to the Ten Commandments, the park included a display of a historic granary, a wishing well, and a September 11 monument).

¹⁴² *Id.*

¹⁴³ *Id.* at 465.

¹⁴⁴ *Id.* at 470. A close reading of the Sumnum decision reveals that its scope remains open for debate. It may not always be true that all monuments amount to government speech.

¹⁴⁵ *Id.*

writes, “debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”¹⁴⁶

Similarly, in *Walker v. Texas Division, Sons of Confederate Veterans*, the Supreme Court held that the Texas Department of Motor Vehicles did not violate the First Amendment in refusing to issue a license plate with the Confederate battle flag.¹⁴⁷ The case involved the Texas Division of the Sons of Confederate Veterans that sought to have a specialty license plate issued in the state of Texas with an image of the Confederate Battle Flag. After the denial of their request, the group sued, claiming that denying a specialty plate was a violation of their First Amendment rights.¹⁴⁸ In a 5–4 decision, the Court found that license plates are government speech and thus, as the speaker, the Texas Department of Motor Vehicles Board could not violate the speech clause of the First Amendment.¹⁴⁹

In the alternative, litigants have also argued in support of the regulation or restriction of Confederate symbols – in particular, the Confederate flag – by pointing out that racist hate speech falls outside the protection of the First Amendment. Government restrictions on hate speech, however, often fail to survive First Amendment scrutiny. While racist hate speech undermines the constitutional principle of equality, as a general matter, such expressions are protected speech. Because of the difficulties in applying a definition of racist speech that is not unconstitutionally vague and/or overbroad, the Supreme Court has found that the government simply may not outlaw symbols of hate or bigotry, such as the swastika or the Confederate battle flag under the First Amendment. The Supreme Court recently reaffirmed this principle in *Matal v. Tam*.¹⁵⁰ Decided in 2017, the Court found that there is no exception to First Amendment protections for hate speech. In *Matal*, the Patent and Trademark Office (PTO) refused to register “The Slants” as a band’s trademark under a Lanham Act, on the ground that the name might be offensive to Asian Americans. While the government’s intention was

¹⁴⁶ *Id.* at 468 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990)).

¹⁴⁷ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2245 (2015) (“[W]hen [the] government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017) (In *Matal*, the Supreme Court held that trademarks are private, not government, speech. *Id.* at 1757–61. The Court concluded that § 2(a)’s bar on the registration of disparaging marks discriminated based on viewpoint. *Id.* at 1763 (Alito, J.); *id.* at 1765 (Kennedy, J.). The Court explained the disparagement provision “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” *Id.* at 1751 (Alito, J.).

to only deny the band certain protections that trademarks get against unauthorized use by third parties, the Court found that viewpoint discrimination – including against allegedly offensive viewpoints – is unconstitutional. In his opinion, Justice Samuel Alito wrote:

[The idea that the government may restrict] speech expressing ideas that offend . . . strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.

In light of the case law mentioned above, individuals who intend to bring about change in Florida landscape by seeking the removal of Confederate symbols should consider prior case law before pursuing strategies that solely rely on judicial action. Although the Supreme Court has made clear that racially motivated laws that have a disparate impact on blacks violate the Equal Protection Clause – even if they are considered to be facially neutral¹⁵¹ – courts have limited the instances in which individuals can prevail in cases based on racial bias. Under current jurisprudence, it is extremely difficult to prove both present disparate effect and discriminatory intent, as required to bring an Equal Protection case. Even in occasions where courts may find a Confederate symbol’s display results from racist intent, litigants will have a hard time proving *present* disparate effect that goes beyond injuries that are not clearly traceable to the Confederate symbol in question. Moreover, under the government speech doctrine in First Amendment, individuals cannot force states to erect certain monuments in support of the Union, or symbols to honor civil rights leaders in the same way that the Sumnum could not force Pleasant Grove to accept its monument, or the Texas Division of the Sons of Confederate Veterans could not force the Board to adopt its specialty License Plates. Following the Court’s decision in *Matal*, governments cannot prohibit a public display of Confederate symbols under the First Amendment unless the public display is deemed to have been conveyed in a manner that constitutes a true threat.¹⁵²

¹⁵¹ See *Hunter v. Underwood*, 471 U.S. 222, 227 (1985); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); see also *Personnel Admin. v. Feeney*, 442 U.S. 256, 272 (1979).

¹⁵² *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

B. Issues With the “Museum Solution”

In his book, *Written in Stone: Public Monuments in Changing Societies*, Sanford Levinson argues that over time, the destruction of civic monuments has become a central symbol of revolutionary transformation.¹⁵³ Levinson expresses that there is something totalitarian about the notion that public space must be completely “cleansed” of reminders of past evil.¹⁵⁴ For this reason, he discusses a series of possible responses to Confederate symbols in the Texas public landscape, which according to him, implicitly emits a message of racist culture.¹⁵⁵ These range from destroying the monuments of Confederate soldiers, to adding a brand new monument honoring either slaves or the Union soldiers who emerged victorious.¹⁵⁶ According to Levinson, the more “moderate” or “intermediate” solution includes moving the offensive statue from the “sacred space” such as the Capitol grounds, to a Historical Museum.¹⁵⁷ In this section, I aim to examine the strengths and weaknesses of this proffered solution.

One way of defending the maintenance of such monuments on public grounds is for individuals and/or communities to view them through lenses of aesthetics or history.¹⁵⁸ Through this method, political or cultural traces attached to the monuments at the time of their creation can be overlooked as communities decide which monuments should stay or be relocated.¹⁵⁹ As expressed by some Americans, statues can also be removed from public land, but preserved for posterity either by a private collector, or by a museum.¹⁶⁰ Certainly, this option differs from simply relocating Confederate monuments from one city’s public grounds to another and displayed without an explanation of the circumstances of the Civil War.¹⁶¹ In any event, one purpose of museums is to place such artifacts in their proper historical context, “by transforming them from tutelary objects to historicized emblems of a past that may well be viewed as no

¹⁵³ See generally Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (1998) (describing the efforts of government entities to influence public opinion through public monuments).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Levinson, *supra* note 119, at 692.

¹⁵⁸ *Id.* at 690.

¹⁵⁹ *Id.*

¹⁶⁰ Holland Cotter, *We Need to Move, Not Destroy Confederate Monuments*, N.Y. TIMES, (Aug. 20, 2017), <https://www.nytimes.com/2017/08/20/arts/design/we-need-to-move-not-destroy-confederate-monuments.html>.

¹⁶¹ Bryan Woolston, *Kentucky Town Welcomes Confederate Statue Removed from Louisville*, NEWSWEEK (May 30, 2017), <http://www.newsweek.com/confederate-monuments-louisville-kentucky-617198>.

longer possessing a genuine normative claim on us today.”¹⁶² Monuments could be adorned with plaques that explain what the Confederacy stood for and contextualize the manner in which most of these memorials were erected as part of a campaign of often state-sanctioned white supremacist terror and oppression. This position would also allow State governments (and thus taxpayers) from having to pay to maintain monuments dedicated to the Confederacy, without having to destroy them.¹⁶³ Furthermore, continued display of artifacts that are seen by some, as valuable parts of our complex cultural heritage would continue, even if they no longer serve as symbols of the initial purpose of which many of them were intended for.¹⁶⁴

However, as described by Levinson in his article, *Thomas Ruffin and the Politics of Public Honor: Political Change and the “Creative Destruction” of Public Space*, “such aestheticizing or historicizing moves may be much easier to make (and to be found tolerable) the more distant the past and, perhaps, the more the sheer ignorance about the specific events or persons that might be commemorated.”¹⁶⁵ In light of the fact that Confederate symbols gained prominence around the turn of the 20th century, and then once more during the civil rights movement, they cannot be considered to be part of a distant past.¹⁶⁶ Moreover, as their continued display emits selective versions of a past that valorizes white heroes, and fails to acknowledge black suffering, others may not view this strategy as a truly “neutral” solution.¹⁶⁷ Individuals who feel only the destruction of these symbols can resolve the issue will feel that their placing in a state museum will not rid them of all public esteem. Instead, they will continue to exalt their Confederate subjects, who fought to preserve slavery and racial subordination. Moreover, it is possible that any museum with Civil War memorabilia inside can become a shrine for those that continue to admire the values of the Confederacy. At the same time, those who believe in the causes of the Confederacy will object to the explicit political and cultural meanings of such displacement.¹⁶⁸ And, of course, it is also possible to argue that although the statues were not originally meant to educate future generations about the evils of racial segregation, it is nonetheless a lesson of American history which will be diminished if removed from prominent public and put display in a museum.

¹⁶² Levinson, *supra* note 119, at 693.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 691.

¹⁶⁶ *See supra* Part I.

¹⁶⁷ *See supra* Part II.

¹⁶⁸ *Id.* at 695.

Whatever the merits of this solution may be in some instances, it not sufficient to resolve the all tensions generated by contemporary displays of Confederate iconography. While this option may settle conflict over what to do with *one* Confederate statue of a particular general, it does not tell us what to do with the numerous other statues dedicated to commemorate the same Confederate figure.¹⁶⁹ In most cases, there may be no such need for multiple artifacts of the same thing.¹⁷⁰ Thus, facing the question of when the destruction of some public artifacts is permissible, will still be inevitable.¹⁷¹ Moreover, according to Levinson, “[s]ome artifacts, after all, depend for their power on occupying certain spaces.”¹⁷² The solution mentioned above also fails to resolve what to do with larger scale monuments,¹⁷³ such as the 50-foot pillar topped with a statue of General Lee in the center of Pensacola.¹⁷⁴ In those instances, for example, there may be no feasible alternative between leaving it where it is, or destroying it.

C. *Issues with the Complete Destruction of Monuments*

In addition to the complications of a court-centered strategy or the “museum solution,” activists should consider the problems that may result with the complete destruction of Confederate monuments. Although some observers and participants hope to dispose visible traces of the Confederacy, other Americans still believe that keeping them where they stand helps preserve evidence of this vitally important chapter in our past.¹⁷⁵ Despite growing consensus about the problematic aspect of these emblems, groups who stand against Confederate symbols have even been compared to “the Taliban in Afghanistan” in their desire to remove monuments.¹⁷⁶ Former Secretary of State, Condoleezza Rice, articulated this point during an interview with Cameron Smith of *AL.com* in May 2017:

One of the things about statues and monuments and the like is that for those who weren't a part of that history, it

¹⁶⁹ *Id.* at 696.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 695.

¹⁷³ *Id.*

¹⁷⁴ New Tropic Report, *supra* note 17.

¹⁷⁵ See David Wright, *Pence: Confederate Monuments Help Us 'Remember Our History'*, CNN (Aug. 22, 2017), <http://www.cnn.com/2017/08/22/politics/mike-pence-confederate-monuments/index.html>.

¹⁷⁶ Associated Press, *Maine Gov. LePage: Removing Confederate Statues Like Losing 9/11 Memorial*, CHICAGO TRIBUTE (Aug. 17, 2017, 10:29 PM), <http://www.chicagotribune.com/news/nationworld/ct-paul-lepage-confederate-statues-20170817-story.html>.

can be a reminder . . . Nobody is alive today who remembers the Civil War, but by looking at that, you can trigger what it meant and what it was like. You don't have to honor the purposes of people whose history now shows that they were on the other side of history, but you better be able to remind people.

So, I myself and not much for whitewashing history. I don't like the renaming, I don't like the taking down [of] various monuments. I know that, for instance, the flag — the Confederate flag — I agree completely with Nikki Haley and others. That was a battle flag of the defeated Confederacy. That's a different matter. But these historical figures, we need to remember who they are, what they stood for, and why we've moved on.¹⁷⁷

While possible to argue that history that the history the statues' defenders want to preserve is in fact a distorted memory, it is also important that individuals take into account that a strategy such as this one may trigger damaging political backlash against other strategies employed to make the landscape more balanced. As shown by the tumult in Charlottesville, Virginia, a large population of the nation's citizenry still desires to keep current dedications and memorials that transmit the values of the Confederacy.¹⁷⁸ Besides the large costs that come with the removal of monuments,¹⁷⁹ it is unlikely that most Southern states will comply. Public surveys reveal that not only do a majority of Southerners believe it is appropriate for cities to exalt Confederate leaders, but in certain places, some still wish the South had emerged victorious from the war.¹⁸⁰ Given

¹⁷⁷ Cameron Smith, *A Conversation on Democracy with Condoleezza Rice*, AL.COM (May 18, 2017, 3:27 PM), http://www.al.com/opinion/index.ssf/2017/05/a_conversation_on_democracy_wi.html.

¹⁷⁸ Jon Cohen, *Views on Confederates, Circa 2001*, WASH. POST. (Apr. 8, 2010, 10:57 AM), http://voices.washingtonpost.com/behind-the-numbers/2010/04/views_on_confederates_circa_2001.html; *See also* David Weigel, *How Many Mississippi Voters Wish the South Had Won the Civil War?*, SLATE (Apr. 25, 2011, 2:03 PM), http://www.slate.com/blogs/weigel/2011/04/25/how_many_mississippi_voters_wish_the_south_had_won_the_civil_war.html (reporting that only 21% of Mississippi Republicans said they were glad the North won the Civil War).

¹⁷⁹ These may include costs for hiring a third-party company to remove and transport the monument, police staffing, and replanting costs. In some cases, private donors have covered part of the costs. *See* Carson Chambers & Ryan Smith, *Confederate Statue Removal Will Cost Hundreds of Thousands of Dollars*, ABC NEWS (last updated Aug. 17, 2017, 12:00 PM), <http://www.abcactionnews.com/news/region-tampa/hillsborough-board-of-county-commissioners-say-removing-confederate-memorial-is-expensive>.

¹⁸⁰ *See supra* note 155 and accompanying text.

these facts, it may be counterproductive to seek the rapid destruction of all confederate monuments and symbols as this may result in more violence and further complicate the implementation of other reforms to the built environment.

Furthermore, it is also important to consider that neither destroying, or moving Confederate monuments and symbols will entirely resolve the problem of only having some community members feel like their voices and beliefs are represented in the symbols that are being displayed in their communities. Rather than advocating for a sweeping ban on any Confederate monuments decorating a landscape, community groups must consider the different types of statues that dominate public squares or university campuses, the naming of government, and other buildings reinforce the point that any consideration of what to do with Confederate memorials must go beyond these statues.¹⁸¹ In the case of names of buildings dedicated to the Confederacy, there appear to be no intermediate solutions.¹⁸² Similar to large-scale monuments, these names must either remain or be changed. As pointed out by the SPLC report, at least 109 public schools are named after prominent Confederate figures,¹⁸³ 7 alone of which are located in the state of Florida,¹⁸⁴ despite the fact that they have predominately black student populations.¹⁸⁵

VII. ESTABLISHING COUNTER-NARRATIVES – AN ALTERNATIVE APPROACH

In looking to the future, the need for racial reconciliation and social transformation requires a set of conversations regarding slavery, its legacy, and thoughtful responses thereto. While scholars of law have rarely examined the problems that the built environment imposes on black communities, in his article, Clowney points out that “[g]eographers, in contrast, have long offered suggestions to mitigate the harms caused by landscape unfairness. Although details vary, the thrust of the geography literature is that minority groups should alter the landscape by building

¹⁸¹ Levinson, *supra* note 119, at 684.

¹⁸² *Id.* at 695.

¹⁸³ SPLC Report, *supra* note 11, at 8.

¹⁸⁴ *Id.* at 19.

¹⁸⁵ Jay P. Greene, Brian Kisida & Jonathan Butcher, Manhattan Institute, What’s in a Name? The Decline in The Civic Mission of School Names 2 (2007), available at http://www.manhattan-institute.org/pdf/cr_51.pdf (emphasis added) (in “What’s in a Name? The Decline in the Civic Mission of School Names,” Greene, Jay et al. conclude that there has been a shift from the naming schools “after ‘people worthy of emulation,’” including presidents, to presumably less controversial “natural” beings after studying school-naming practices in seven states. In Florida, only five schools were named after George Washington while 11 have been named after a “sea cow” or manatee).

their own counter discourses. According to this scholarly tradition, African Americans should craft their own monuments, mark their own histories, and contribute to the visible form of the American scene.”¹⁸⁶ With this in mind, the pages that follow describe one strategy that can be utilized in response to the continued display of Confederate monuments and other symbols which continue to ignore the history and perspectives of African Americans. Keeping in line with Clowney’s suggestion that “any successful attempt to improve the balance of the landscape should both empower subaltern communities and navigate the political economy of dominant group decision making at the local level,”¹⁸⁷ this note argues for the creation of remembrance memorials as a way to help influence the force of collective memory in which a community’s remembrance of racial injustices in the past can help influence the way individuals deal with those that are still seen today.

To better help Southern communities remember the past and understand current realities of institutionalized racism and its implications in the United States, state legislatures or county commissions should strive to create task forces to propose and fund the development of commemorative events, monuments, memorials, or remembrance museums to accurately portray a national legacy of racial discrimination. In the spirit of Langston Hughes’s poem “I, Too,”¹⁸⁸ these permanent and public sites can help communities emit a message of the African–American story as being central to the country’s narrative. Given that remembrance museums or memorials serve to dedicate spaces to the collection, preservation, research, and exhibition of African American historical and cultural materials, a conversation can be started about the values and beliefs held by a community that may have previously muted by the ideals of a white majority. Through these projects, community groups can have the opportunity to investigate the history of slavery in their own backyard to further understand its significance and be able to commemorate the contributions of black Americans who originated from those areas. Keeping in mind the underlying political variables which shape the decisions of governments to keep or maintain these monuments, symbols, or names in dedication of the Confederacy, these remembrance initiatives can serve as an alternative option that may lead to better informed, more rational, and racially sensitive decision making in dozens of communities. In an effort to assist the efforts of local communities, the following sections point to examples of more recent

¹⁸⁶ Clowney, *supra* note 70, at 44.

¹⁸⁷ *Id.* at 23.

¹⁸⁸ Langston Hughes, I, Too, in *The Collected Poems of Langston Hughes* 46, 46 (Arnold Rampersad & David Roessel eds., 1995).

endeavors, which set out to position counter-narratives in the American landscape.

A. *EJI's Community Remembrance Project*

The Equal Justice Initiative's ("EJI") Community Remembrance Project is part of a campaign to recognize the victims of lynching by collecting soil from lynching sites and building a lasting memory of the racial injustice that occurred in the South.¹⁸⁹ In the Spring of 2018, the nonprofit will open its Memorial to Peace and Justice dedicated to victims of lynching in Montgomery, Alabama.¹⁹⁰ While there are currently no prominent monuments or memorials in the United States that commemorate the victims of these attacks, in Montgomery alone, there are 59 monuments and memorials to the Confederacy.¹⁹¹ Through various forms of data collection, EJI has identified "more than 4,000 lynchings, which took place between 1877 and 1950 and involved black men, women, and children, who were hanged, burned alive, shot, drowned, and beaten to death by white mobs."¹⁹² The project, made possible by MASS Design Group,¹⁹³ recognizes community grief and victims of mass violence through the gathering of community members with the purpose of collecting soil across lynching sites in Alabama.¹⁹⁴ The soil is then labeled with the date of the lynching and the victim's names (if recorded), and used as part of an exhibit that will reflect the history of lynching. In addition, the memorial also hosts 800 suspended columns representing the 800 counties across 12 states where lynchings took place, each column inscribed with the names of the murdered.¹⁹⁵ Rather than ignoring its history, this project serves as an example of one of many solutions through which a community can confront ongoing challenges of racial inequality.

B. *The West Medford Afro-American Remembrance Project*

Furthermore, the West Medford Afro-American Remembrance Project serves as another example of a multi-year project intended to document the legacy of blacks from one of the oldest Afro-American

¹⁸⁹ See Equal Justice Initiative, *Community Remembrance Project*, <https://eji.org/national-lynching-memorial> (last visited Mar. 17, 2018) [*hereinafter* EJI's Community Project].

¹⁹⁰ *Id.*

¹⁹¹ SPLC Report, *supra* note 12, at 17.

¹⁹² *Id.*

¹⁹³ EJI's Community Project, *supra* note 189.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

communities in the United States.¹⁹⁶ A committee comprising of several longstanding residents partnered with the Medford Historical Society, the Department of Sociology and Anthropology from Tufts and Brandeis University, and students from Medford High School, to document the lives and achievements of those who were pioneers of the community through teaching materials and the development of a website.¹⁹⁷ The project, funded by Medford Historical Society, Tufts and Brandeis Universities, and the U.S. Department of Education, is included as a part of Project LOCAL (Learning Our Community's American Lore).¹⁹⁸

As part of this initiative, oral histories were conducted under the supervision of Tufts Department of Sociology and Anthropology, Associate Professor, Rosalind Shaw in 2005 and 2006.¹⁹⁹ The collection involves oral histories of notable figures, both living and dead, who played a significant role in the life of the neighborhood.²⁰⁰ Students in Shaw's class, "Place, Race and Memory: The West Medford Afro-American Remembrance Project," were each assigned a person or a couple to research and interview along with "resource people" who are in some way uniquely connected to the person.²⁰¹ In the case of deceased subjects, students were instructed to compile the biographies through interviews with at least three people who knew the subjects well.²⁰² The completed oral histories were then digitized and added to Tufts Digital Library²⁰³, and biographies along with other materials are used to create an exhibit at the Medford Historical Society Museum.²⁰⁴ Some of these materials include, audiocassette interviews, transcripts, student papers, and release forms.²⁰⁵ Intended to help preserve West Medford's African-American history, the topics covered include growing up in West Medford, school desegregation, employment opportunities, as well as a general sense of

¹⁹⁶ *The West Medford Afro-American Remembrance Project*, Medford Historical Society & Museum, <http://www.medfordhistorical.org/medford-history/afro-american-remembrance-project> (last visited Dec 21, 2017).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Helene Ragovin, *West Medford Remains a Jewel of African-American History*, Tufts Journal, <http://tuftsjournal.tufts.edu/archive/2005/march/corner/index.shtml> (last visited Dec. 21, 2017).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See, e.g.*, West Medford African-American Remembrance Project, <https://corpora.tufts.edu/> (follow "West Medford African-American Remembrance Project" hyperlink) (last visited Dec 21, 2017).

²⁰⁴ *See supra* note 196.

²⁰⁵ *See supra* note 196.

what it was like to grow up in this area as an African–American during the mid–twentieth century.²⁰⁶

C. *The National Museum of African American History and Culture*

At the national level, the recent opening of the National Museum of African American History and Culture (“NMAAHC”) located in on the National Mall in Washington, D.C., has helped document a long and rich history of African Americans in the United States.²⁰⁷ Maintained by the Smithsonian, the museum is dedicated to the collection, preservation, research, and exhibition of African American historical and cultural material reflecting the breadth and depth of the experiences of persons of African descent living in the United States. Before its opening in 2016, the museum conducted an “Antiques Roadshow” project in 15 cities which encouraged people to provide their own family heirlooms, and yielded around 40,000 of the objects now displayed by the museum.²⁰⁸ While it holds a wide range of exhibits detailing the nation’s racial history, the museum’s displays also document an evolving story of persistent inequality through the exhibition of more modern artifacts like; a “Justice 4 Trayvon” placard, a photo of a house following Hurricane Katrina, and newspaper cutouts after the election of President Obama.²⁰⁹ Due to its powerful displays, docents were trained to help visitors cope with their emotions. With the intention of creating a space for reflection, the museum also set aside a space called the “contemplative court,” where people can take a moment to come to terms with what they have seen.²¹⁰

VIII. CONCLUSION

While there are many today who see Confederate emblems as symbols of history, region, or even as statements in favor of states’ rights, these monuments have generally been first and foremost, symbols of white supremacy intended to exclude African–Americans from full participation in public life. Used to communicate a history of racial oppression and to intimidate in the present, Confederate monuments have seen various

²⁰⁶ See, e.g., *Digital Collections & Archives*, Tufts University, <http://sites.tufts.edu/dca/tag/west-medford/> (last visited Dec. 21, 2017).

²⁰⁷ Alicia DeSantis & Josh Williams, *I, Too, Sing America: The National Museum of African American History and Culture*, N.Y. TIMES (Sept. 15, 2016), http://www.nytimes.com/interactive/2016/09/15/arts/design/national-museum-of-african-american-history-and-culture.html?_r=0 (on file with the Washington and Lee Law Review).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

efforts to be modified or removed all together. Given the current difficulties of relying on judicial intervention or legislative interpretations, communities may better challenge the dominant historical narratives by shifting their efforts toward investing in remembrance projects or dedications as a more direct form of engagement.