

## NOTES

### STANDING TO CHALLENGE THE LOST CAUSE

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*In this Note, I contest the constitutionality of the public Confederate symbols that are pervasive throughout the South. Just months before the Charlottesville “alt-right” rally protesting the removal of a Confederate monument, the Fifth Circuit held that a plaintiff challenging the constitutionality of the Mississippi flag, which contains the Confederate battle flag in its top left corner, lacked standing. The decision prevents courts from remedying the unconstitutional harms inflicted by Confederate memorialization. It is particularly consequential in communities like Hanover County, Virginia, in which most residents are white and favor keeping Confederate symbols in two public schools: Stonewall Jackson Middle School, Home of the Rebels, and Lee-Davis High School, Home of the Confederates. I argue that courts should utilize the coercion test from Establishment Clause doctrine to analyze the harms caused by racially discriminatory government speech, satisfying Article III standing requirements. I further argue that the coercion test is particularly useful when applied to racially discriminatory government speech by public school boards, like in Hanover County, because the heightened harmful effects of Confederate symbolism on children mirror those of religious coercion.*

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### INTRODUCTION

Before toeing the line at Pole Green Park, the girls of the Lee-Davis High School cross country team would wish each other good luck one by one between drills and strides. We double-checked the placement of the blue and orange ribbons in our hair. We tightened the laces on our spiked shoes. A few minutes before the gun went off, the gangly group of girls—mostly between the ages of fourteen and eighteen years old—huddled up, put our hands together, and chanted loudly so that the entire field could hear: “C-O-N-F-E-D-E-R-A-T-E-S, OH YES! C-FEDS ARE THE BEST!”

Lee-Davis High, Home of the Confederates, is one of four high schools in Hanover County, Virginia.<sup>1</sup> In the fall of 2018, the school had 1,478 students, 79.8% of whom were white and 9.7% of whom were black.<sup>2</sup> The school building bears the images of Robert E. Lee and Jefferson Davis and has previously displayed pride in the mascot through murals, banners, and other paraphernalia.<sup>3</sup>

I did not think twice about our team’s pre-race routine until much later than I care to admit. The first time I truly vocalized my opposition to my high school’s mascot—and the first time I recall seeing others do the same—was after Dylann Roof murdered nine black individuals during a

<sup>1</sup> Hanover County Public Schools, Our Schools, [http://hanover.ss12.sharpschool.com/about\\_us/our\\_schools](http://hanover.ss12.sharpschool.com/about_us/our_schools) [https://perma.cc/G3PA-WDAT] (last visited Apr. 5, 2019).

<sup>2</sup> School Quality Profiles: Lee Davis High, Va. Dep’t of Educ., <http://schoolquality.virginia.gov/schools/lee-davis-high#fndtn-desktopTabs-enrollment> [https://perma.cc/E9V4-V8-3R] (last visited Apr. 5, 2019).

<sup>3</sup> Change the Name (@ldhsnamechange), Twitter (Apr. 29, 2018, 1:48 PM), <https://twitter.com/ldhsnamechange/status/990649090575826944> [https://perma.cc/BJY9-YMLX].

bible study with the intent of starting a “race war.”<sup>4</sup> A photograph of him holding the Confederate flag later surfaced online.<sup>5</sup> The second time I voiced opposition to my school’s mascot was in 2017,<sup>6</sup> after serving as a legal observer at the violent “alt-right” rally in Charlottesville, Virginia, in which white supremacists marched to oppose the removal of the city’s statue of Robert E. Lee.<sup>7</sup>

Like many across the world, members of the Hanover community were shocked by the display of violent racism in Charlottesville and the murder of Heather Heyer. Students, alumni, staff, and parents associated with Stonewall Jackson Middle School, Lee-Davis High School, and Hanover County at large organized to change the names and mascots of both

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<sup>4</sup> Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy* 6 (2016), [https://www.splcenter.org/sites/default/files/com\\_whose\\_heritage.pdf](https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf) [<https://perma.cc/43SU-TGLF>] [hereinafter *Whose Heritage?*].

<sup>5</sup> *Id.* at 6–7.

<sup>6</sup> I have taken an active role in efforts to petition the Hanover County School Board to change the names of both schools. See, e.g., John Harvey, *Could the Confederacy Be Kicked Out of Our Schools?*, *Herald-Progress* (Dec. 13, 2017), <https://web.archive.org/web/2018-0117114009/http://www.herald-progress.com/could-the-confederacy-be-kicked-out-of-our-schools>; Michael O’Connor, *Groups Call for Removal of Lee-Davis, Stonewall Jackson School Names in Hanover*, *Richmond Times-Dispatch* (Dec. 13, 2017), [http://www.richmond.com/news/local/hanover/groups-call-for-removal-of-lee-davis-stonewall-jackson-school/article\\_3fd705fa-7721-5113-bb4b-ebf29dfd5eaf.html](http://www.richmond.com/news/local/hanover/groups-call-for-removal-of-lee-davis-stonewall-jackson-school/article_3fd705fa-7721-5113-bb4b-ebf29dfd5eaf.html) [<https://perma.cc/C2MP-254D>]; Megan Pauly, *Public Weighs in on Confederate Names of Virginia Schools*, *Community Idea Stations* (Feb. 7, 2018), <http://ideastations.org/radio/news/public-weighs-confederate-names-virginia-schools>.

<sup>7</sup> See Adele Stichel et al., *A View from August 12th Observers*, *Va. Law Wkly.* (Sept. 6, 2017), <https://www.lawweekly.org/col/2017/9/6/a-view-from-august-12th-observers> [<https://perma.cc/7KYJ-W45L>] (reflection on rally co-written by author); Mary Wood, *Standing Up for Charlottesville: Students, Faculty, Alumni and Staff Bear Witness to Protests as They Defend Community*, *Univ. of Va. Sch. of Law* (Aug. 16, 2017), <https://www.law.virginia.edu/news/201708/standing-charlottesville> [<https://perma.cc/AD3E-TKJ4>] (“When we were driving I got these texts from friends [including Courtney Koelbel ’19 and Amanda Lineberry ’19] who were legal observers and they were already like ‘Don’t come, there’s already fighting, it’s chaos.’”).

schools.<sup>8</sup> Activists started online petitions both for<sup>9</sup> and against<sup>10</sup> changing the schools' names. Efforts to keep the names gained far more public support than efforts to change them.<sup>11</sup>

The Hanover County School Board decided to initiate its own survey to gather public opinion about the names. It made clear at the time the survey was announced that it had no intention of changing them.<sup>12</sup> In March, the School Board released findings that showed over seventy-five percent of respondents supported the names.<sup>13</sup> The School Board subsequently voted to keep them.<sup>14</sup> Recently, the Hanover County Unit of the NAACP filed a complaint against Hanover County and its school board,

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<sup>8</sup> See, e.g., Rachel Levy, *Confederate Public School Names Do Harm*, All Things Educ. (Sept. 21, 2017), <http://allthingsedu.blogspot.com/2017/09/confederate-public-school-names-do-harm.html> [<https://perma.cc/HMW5-SQSL>]; Debbie Truong, *In a Community Where Civil War Ties Run Deep, Schools Named After Confederate Figures Find Broad Support*, Fredericksburg.com (Mar. 30, 2018), [https://www.fredericksburg.com/news/education/in-a-community-where-civil-war-ties-run-deep-schools/article\\_01345f36-3435-11e8-be93-730f6e9ecfbc.html](https://www.fredericksburg.com/news/education/in-a-community-where-civil-war-ties-run-deep-schools/article_01345f36-3435-11e8-be93-730f6e9ecfbc.html) [<https://perma.cc/2QNG-KE3F>].

<sup>9</sup> Support Change at Lee-Davis High School, Home of the Confederates in Virginia, Change.org, <https://www.change.org/p/hanover-county-public-schools-support-change-at-lee-davis-high-school-home-of-the-confederates-in-virginia> [<https://perma.cc/3N6W-CCG8>] (last visited Apr. 5, 2019).

<sup>10</sup> Keep Lee-Davis High School and Stonewall Jackson Middle School Names as They Are, Change.org, <https://www.change.org/p/keep-lee-davis-high-school-and-stonewall-jackson-middle-school-name-as-it-is> [<https://perma.cc/G7YT-F7RW>] (last visited Apr. 5, 2019).

<sup>11</sup> Justin Mattingly, *How to Give Input on Whether to Change Names of Confederate-Honored Schools in Hanover*, Richmond Times-Dispatch (Jan. 29, 2018), [http://www.richmond.com/news/local/education/how-to-give-input-on-whether-to-change-names-of/article\\_852fde89-2a95-5aab-a717-7ca38cf25365.html](http://www.richmond.com/news/local/education/how-to-give-input-on-whether-to-change-names-of/article_852fde89-2a95-5aab-a717-7ca38cf25365.html) [<https://perma.cc/5AEX-UU9W>] (“Dueling online petitions, open to anyone, each have more than 2,000 signatures with the petition opposing name changes at 7,427 signatures, as of 1:30 p.m. Monday. The petition to change the names is at 2,029, as of the same time.”).

<sup>12</sup> *Id.* (“‘To ensure our intentions are clear to the public, we are not currently seeking to change the names of any of our schools,’ said [School Board Chairwoman Sue] Dibble, reading from a prepared statement. ‘Rather, we are simply interested in providing an avenue for our community to offer input on the topic in a consistent and organized manner.’”).

<sup>13</sup> Justin Mattingly, *More than 13,000 People Responded to Hanover’s Survey on Changing Confederate School Names. Here’s What They Said.*, Richmond Times-Dispatch (Mar. 30, 2018), [http://www.richmond.com/news/local/education/more-than-people-responded-to-hanover-s-survey-on-changing/article\\_66ec4a17-0990-5a4f-8ad7-3351cd694622.html](http://www.richmond.com/news/local/education/more-than-people-responded-to-hanover-s-survey-on-changing/article_66ec4a17-0990-5a4f-8ad7-3351cd694622.html) [<https://perma.cc/4ZAS-NKW5>] (“A tick over three in four respondents said the school names and mascots should be kept.”).

<sup>14</sup> Justin Mattingly, *Hanover School Board Votes to Keep Confederate School Names*, Richmond Times-Dispatch (Apr. 10, 2018), [http://www.richmond.com/news/local/education/hanover-school-board-votes-to-keep-confederate-school-names/article\\_e17ef654-bb00-5bc4-8a23-ad9c789b7d0d.html](http://www.richmond.com/news/local/education/hanover-school-board-votes-to-keep-confederate-school-names/article_e17ef654-bb00-5bc4-8a23-ad9c789b7d0d.html) [<https://perma.cc/JFR4-4M5Q>].

arguing that the Confederate names and imagery violate the First and Fourteenth Amendments and the Equal Education Opportunity Act.<sup>15</sup>

One can find Confederate symbols—flags, monuments, street names, school names, mascots, and so on—throughout much of the United States, particularly within the South. Nationally, there are at least 780 monuments and statues for the Confederacy, 103 public schools named for Confederate icons, and 80 localities and 10 U.S. military bases named for Confederates.<sup>16</sup> Confederate memorialization began right after the Civil War ended in 1865 and activity spiked during two later periods: first in the early 1900s as Southern states were enacting Jim Crow laws and re-segregating society after Reconstruction, and next during the heart of the Civil Rights Movement from the mid-1950s to the later 1960s.<sup>17</sup>

Confederate symbolism is persistent despite the clarity with which Confederate leaders conveyed their racist intentions,<sup>18</sup> the extensive use of the flag by the Ku Klux Klan as it terrorized African-American communities during the Civil Rights Movement,<sup>19</sup> and its use today by white supremacists like Dylann Roof<sup>20</sup> and the “alt-right” activists in Charlottesville.<sup>21</sup> Many still celebrate the Confederacy as a part of their heritage, “cling[ing] to the myth of the Lost Cause.”<sup>22</sup> These modern celebrations are rooted in decades of revisionism by groups dedicated to honoring the Confederacy, such as the United Daughters of the Confederacy.<sup>23</sup>

In this Note, I contest the constitutionality of public Confederate symbols. Just months before the Charlottesville “alt-right” rally, the U.S.

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<sup>15</sup> Complaint for Declaratory and Injunctive Relief at 1–2, *Hanover Cty. Unit of the NAACP v. Hanover Cty.*, No. 3:19-cv-00599 (Aug. 16, 2019).

<sup>16</sup> Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy* (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [<https://perma.cc/GFE4-LGN7>] (last visited July 29, 2019).

<sup>17</sup> *Whose Heritage?*, *supra* note 4, at 14–15.

<sup>18</sup> See, e.g., Alexander H. Stephens, *The Corner Stone Speech* (Mar. 21, 1861), *reprinted in* Henry Cleveland, *Alexander H. Stephens, in Public and Private, With Letters and Speeches, Before, During, and Since the War* 717, 721 (Philadelphia, National Publishing Co. 1886) (“Our new government is founded upon . . . the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.”); see also *infra* Section II.A.

<sup>19</sup> *Whose Heritage?*, *supra* note 4, at 8.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> See Andrew Katz, *Unrest in Virginia: Clashes Over a Show of White Nationalism in Charlottesville Turn Deadly*, *Time*, <http://time.com/charlottesville-white-nationalist-rally-clashes/> [<https://perma.cc/2R2X-5GS3>] (last visited Apr. 5, 2019).

<sup>22</sup> *Whose Heritage?*, *supra* note 4, at 8.

<sup>23</sup> *Id.* at 8, 18.

Court of Appeals for the Fifth Circuit denied standing to a plaintiff challenging the constitutionality of the Mississippi flag, which contains the Confederate battle flag in its top left corner.<sup>24</sup> The decision prevents courts from remedying the unconstitutional harms inflicted by Confederate memorialization. It is particularly consequential in communities like Hanover County, Virginia, in which most residents are white and favor keeping Confederate symbols in their schools. I argue that courts should use the coercion test from Establishment Clause doctrine to analyze the harms caused by racially discriminatory government speech, satisfying Article III standing requirements. I further argue that the coercion test is particularly useful when applied to racially discriminatory government speech by public school boards because the heightened harmful effects of Confederate symbolism on children mirror those of religious coercion. I add to a growing number of scholarly reflections on the constitutionality of Confederate symbols, but my argument is distinguishable by its analysis of the recent *Moore v. Bryant* opinion and its focus on the utility of the coercion test in schools.

### I. CURRENT CIRCUIT COURT TREATMENT

The Equal Protection Clause of the Fourteenth Amendment asserts that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>25</sup> A facially neutral law<sup>26</sup> violates the Equal Protection Clause if the plaintiff can prove that the law was motivated by a discriminatory intent *and* that it had a disparate impact, according to the two-step analysis laid out in *Hunter v. Underwood*.<sup>27</sup> To satisfy the discriminatory

<sup>24</sup> *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017), cert. denied, 138 S. Ct. 468 (2017).

<sup>25</sup> U.S. Const. amend. XIV, § 1.

<sup>26</sup> Some scholars argue that imposing a more stringent standard on facially neutral laws is inappropriate, given the relative ease with which one can “cloak racially motivated legislation in facially neutral language.” I. Bennett Capers, *Flags*, 48 *How. L.J.* 121, 138 (2004). Professor Capers argues that the Eleventh Circuit, rather than applying an “anti-differentiation” standard from *Washington v. Davis*, 426 U.S. 229 (1976), should have applied an “anti-subordination” test as exemplified in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), or an alternative “equal citizenship” approach as exemplified by *Lawrence v. Texas*, 539 U.S. 558 (2003). *Id.* at 139–40; see also Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 *U. Ill. L. Rev.* 615, 637–38.

<sup>27</sup> 471 U.S. 222, 225–28 (1985); *Davis*, 426 U.S. at 242 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (“[O]fficial action will not be held unconstitutional solely because it results in a racially

intent element of the *Hunter* test, the plaintiff must prove that race was a motivating factor in the adoption of the law (though not necessarily *the* motivating factor).<sup>28</sup> Then, “the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.”<sup>29</sup> The plaintiff must then demonstrate that the law has “a disproportionately adverse effect upon a racial minority.”<sup>30</sup> Though both elements are important, the Court has suggested that it is discriminatory intent that is most offensive to the Constitution.<sup>31</sup>

In order for a plaintiff to have standing to bring such a challenge, she must meet the three requirements of Article III standing.<sup>32</sup> First, she must have “suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>33</sup> Second, a causal connection must exist between her injury and the defendant’s conduct.<sup>34</sup> In other words, “the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”<sup>35</sup> Finally, it must be “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”<sup>36</sup>

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disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”)

<sup>28</sup> *Hunter*, 471 U.S. at 228 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

<sup>29</sup> *Id.* (citing *Mt. Healthy*, 429 U.S. at 287).

<sup>30</sup> *Pers. Admin. v. Feeney*, 442 U.S. 256, 272 (1979).

<sup>31</sup> See, e.g., *id.* at 274 (“[I]mpact provides an ‘important starting point,’ but purposeful discrimination is ‘the condition that offends the Constitution.’” (quoting *Arlington Heights*, 429 U.S. at 266, and then quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971))); *Arlington Heights*, 429 U.S. at 265 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.” (internal quotation marks omitted) (quoting *Davis*, 426 U.S. at 242)); Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 *Seton Hall L. Rev.* 897, 909 (1998).

<sup>32</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Allen v. Wright*, 468 U.S. 737, 752–53 (1984) (holding that a plaintiff who alleges discriminatory government conduct but does not claim that she personally has been discriminated against lacks Article III standing).

<sup>33</sup> *Lujan*, 504 U.S. at 560 (citations omitted) (first quoting *Allen v. Wright*, 468 U.S. 737, 771 (1984); and then quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

<sup>36</sup> *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

Only two circuits—the Fifth and the Eleventh—have addressed the question of whether a government’s use of Confederate symbols violates the Equal Protection Clause. The Eleventh Circuit originally held that the state’s flying of the Confederate flag upon its capitol dome was constitutional.<sup>37</sup> It later upheld as constitutional the Georgia state flag, which previously contained the Confederate battle flag, because the plaintiff did not present sufficient facts to establish standing.<sup>38</sup> The Fifth Circuit reached a similar conclusion in a challenge to Mississippi’s use of the Confederate battle flag within its own state flag.<sup>39</sup>

### A. The Eleventh Circuit

The first challenge in the Eleventh Circuit to public Confederate symbolism occurred in *NAACP v. Hunt*.<sup>40</sup> The NAACP and various state legislators brought an action challenging the flying of the Confederate flag above the Alabama state capitol dome<sup>41</sup> under the First, Thirteenth, and Fourteenth Amendments.<sup>42</sup> For their Fourteenth Amendment claim, the NAACP argued that flying the Confederate flag on Alabama’s capitol grounds was “‘tantamount to holding public property for racially discriminatory purposes’ and that it denied its members their rights to equal education, equal economic opportunity, and equal protection.”<sup>43</sup> The court disagreed with the NAACP for two key reasons. First, it asserted that the Fourteenth Amendment “requires equal laws, not equal results.”<sup>44</sup> It rejected the idea that the flying of the Confederate flag on capitol grounds had a disproportionate impact on racial minorities because “[c]itizens of all races are offended by its position.”<sup>45</sup> Second, the court did not find the

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<sup>37</sup> *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990).

<sup>38</sup> *Coleman v. Miller*, 117 F.3d 527, 529–31 (11th Cir. 1997).

<sup>39</sup> *Moore v. Bryant*, 853 F.3d 245, 249 (5th Cir. 2017).

<sup>40</sup> 891 F.2d at 1558–59. Note that the first challenge to Alabama’s practice of flying the Confederate flag above the Alabama capitol dome was in *Holmes v. Wallace*, 407 F. Supp. 493 (M.D. Ala. 1976), *aff’d* without publishing opinion, 540 F.2d 1083 (5th Cir. 1976), prior to the creation of the Eleventh Circuit. Alabama state legislator Alvin Holmes challenged the practice under the Thirteenth and Fourteenth Amendments. *Holmes*, 407 F. Supp. at 494. The defendants’ motion to dismiss was granted on the grounds that the plaintiff did not have standing because the alleged violation of the flag code at issue did not create any rights in private individuals which could form the basis of plaintiff’s civil rights claim. *Id.* at 497.

<sup>41</sup> *Hunt*, 891 F.2d at 1555.

<sup>42</sup> *Id.* at 1558.

<sup>43</sup> *Id.* at 1562.

<sup>44</sup> *Id.* (citing *Pers. Admin. v. Feeney*, 442 U.S. 256, 273 (1979)).

<sup>45</sup> *Id.*



requisite discriminatory intent in the state's actions, given the two justifications for flying the flag: one focused on discrimination and the other on state heritage.<sup>46</sup> Therefore, the court found that it could not be "certain that the flag was hoisted for racially discriminatory reasons."<sup>47</sup> The court also rejected the plaintiffs' Thirteenth Amendment claim and First Amendment claims.<sup>48</sup>

The Eleventh Circuit revisited these issues seven years later in *Coleman v. Miller*.<sup>49</sup> The plaintiff, an African-American resident of Georgia, alleged that the Georgia state flag, which partially contained the Confederate battle flag, violated his rights under the Fourteenth Amendment.<sup>50</sup> The court rejected both claims.<sup>51</sup> The court was more sympathetic to the argument that public Confederate symbols were products of discriminatory intent,<sup>52</sup> but ultimately found that the plaintiff "failed to present sufficient specific factual evidence to support" his claims.<sup>53</sup> In its view, the plaintiff relied on his own testimony of "intangible harm to two individuals" to demonstrate an injury-in-fact, and this anecdotal evidence was insufficient "without any evidence regarding the impact upon other African-American citizens or the comparative effect of the flag on white citizens."<sup>54</sup> Still, while the court rejected the equal protection claim, its analysis indicated that it might be more amenable to such a claim given a different record.

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1564–66.

<sup>49</sup> 117 F.3d 527 (11th Cir. 1997).

<sup>50</sup> *Id.* at 528. The plaintiff also brought a First Amendment claim against the State, alleging that Georgia's use of the Confederate battle flag within its flag compelled him to endorse a message that he found "morally objectionable." *Id.* at 531. The court rejected this claim summarily, holding that the flag's design did not compel the plaintiff to endorse or acknowledge a message with which he did not agree. *Id.*

<sup>51</sup> *Id.* at 528.

<sup>52</sup> *Id.* ("The current flag design was adopted during a regrettable period in Georgia's history when its public leaders were implementing a campaign of massive resistance . . ."); *id.* at 530 ("But because the Confederate battle flag emblem offends many Georgians, it has, in our view, no place in the official state flag.").

<sup>53</sup> *Id.* at 529.

<sup>54</sup> *Id.* at 530.

*B. The Fifth Circuit*

The Fifth Circuit had its first chance to consider the question presented in *Hunt* and *Coleman* recently in *Moore v. Bryant*.<sup>55</sup> Though not hostile to the plaintiff's arguments, the court ultimately found him unable to satisfy Article III's standing requirements.<sup>56</sup> Moore advanced three theories of standing: stigmatic injury, hostile workplace and physical injury, and harm to his daughter.<sup>57</sup> The court rejected his stigmatic injury argument, finding that he "must plead that he was personally subject to discriminatory treatment," and had failed to do so.<sup>58</sup> Moore drew on Establishment Clause doctrine to argue "that exposure to unavoidable and deleterious Government speech is sufficient to confer standing," but the court found the doctrine categorically inapplicable.<sup>59</sup>

Moore also attempted to distinguish his case from *Allen v. Wright*.<sup>60</sup> *Allen* concerned a challenge to the Internal Revenue Service's provision of tax exemptions to segregated private schools and held that stigmatic injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct."<sup>61</sup> Moore argued that *Allen* was "factually inapplicable," and "if *Allen* applies, then symbolic, government, hate speech will be insulated from review."<sup>62</sup> The court disagreed, holding that "*Allen* and its progeny make clear that [Establishment Clause-type] injuries are not a basis for standing under the Equal Protection Clause—that is, exposure to a discriminatory message, without a corresponding denial of equal treatment, is insufficient to plead injury in an equal protection case."<sup>63</sup> The court rejected Moore's argument that *Allen* was factually distinct: "That Plaintiff alleges that he personally and deeply feels the impact of Mississippi's state flag, however sincere those allegations are, is irrelevant to *Allen*'s

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<sup>55</sup> 853 F.3d 245, 248 (5th Cir. 2017).

<sup>56</sup> *Id.* at 249.

<sup>57</sup> *Id.* at 249–53.

<sup>58</sup> *Id.* at 249 (citing *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003)).

<sup>59</sup> *Id.*

<sup>60</sup> 468 U.S. 737 (1984).

<sup>61</sup> *Id.* at 739, 755 (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)).

<sup>62</sup> *Moore*, 853 F.3d at 249.

<sup>63</sup> *Id.* at 249–50 (citing *Allen*, 468 U.S. at 755). "Indeed, other courts have rejected attempts to cross-pollinate Equal Protection Clause standing jurisprudence with Establishment Clause cases." *Id.* at 250 (citing *NAACP v. Home*, 626 F. App'x 200, 201 (9th Cir. 2015) (unpublished)).

standing analysis unless Plaintiff alleges discriminatory treatment.”<sup>64</sup> Finally, the court found that Moore’s argument—that if he has no standing then no one does—was not a sufficient reason to find standing.<sup>65</sup>

Moore, a prosecutor in the state of Mississippi, next argued that he had standing to challenge the constitutionality of Mississippi’s state flag because he was forced to encounter the flag at work and he suffered physical injuries because of this exposure.<sup>66</sup> Exposure to the Confederate flag in a private workplace *can* possibly create or contribute to a hostile work environment.<sup>67</sup> However, the court found that this argument suffered from the same defect as the first: stigma alone is insufficient to satisfy the injury-in-fact requirement, even if the source of the injury is frequently confronted or the stigmatic harm is “strongly, sincerely, and severely felt.”<sup>68</sup> Put differently, “under Title VII, exposure to a hostile work environment alone is the injury; under the Equal Protection clause it is not.”<sup>69</sup>

Moore’s final argument for standing was based on harm to his daughter caused by two Mississippi statutes that required her exposure to the flag at school.<sup>70</sup> The first requires public school children to learn about the history of Mississippi’s flag and study “proper respect therefor,”<sup>71</sup> and the second requires that a pledge of allegiance to the Mississippi flag be taught in public schools.<sup>72</sup> The Fifth Circuit held that the statutes do not facially violate the Constitution, as the first does not require any specific level of respect for the flag, and the second does not require students to

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<sup>64</sup> *Id.* at 251 (citing *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 822 (7th Cir. 2014)); *In re U.S. Catholic Conference v. Baker*, 885 F.2d 1020, 1025–26 (2d Cir. 1989) (finding that under *Allen*, clergy do not have special standing status based on the sincerity of their beliefs); *Medhi v. U.S. Postal Serv.*, 988 F. Supp. 721, 731 (S.D.N.Y. 1997) (“Plaintiffs in this case have not alleged a personal denial of equal treatment, and thus any claim that the Postal Service has denied the plaintiffs equal protection by refusing to put up the Muslim Crescent and Star must be dismissed for want of standing.”).

<sup>65</sup> *Moore*, 853 F.3d at 251 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982)).

<sup>66</sup> *Id.* at 251–52.

<sup>67</sup> *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1288–89, 1302–04 (11th Cir. 2012) (finding that a genuine issue of material fact existed as to whether alleged workplace incidents in which African-American employee’s driving instructor used racial epithets during training, employee found banana peels on his delivery truck, and employee witnessed individuals at his terminal wearing shirts or hats bearing Confederate flags constituted severe or pervasive harassment based on employee’s race).

<sup>68</sup> *Moore*, 853 F.3d at 251–52.

<sup>69</sup> *Id.* at 252 (citation omitted).

<sup>70</sup> *Id.*

<sup>71</sup> Miss. Code Ann. § 37-13-5(1), (3) (1972).

<sup>72</sup> *Id.* § 37-13-7(2).

say the pledge.<sup>73</sup> Accordingly, Moore’s claim rested on “an assertion that Mississippi could, but need not, apply its law in an unconstitutional way,” and that assertion was “too speculative to support standing.”<sup>74</sup>

## II. A REBUTTAL TO *COLEMAN* AND *MOORE*

In short, the Fifth and Eleventh Circuits’ rejection of plaintiffs’ challenges to public Confederate symbols focused on what they deemed a lack of tangible injury. Such an emphasis is inadequate<sup>75</sup> when evaluating racially discriminatory government speech,<sup>76</sup> which is “categorically different from ordinary legislative policy-making.”<sup>77</sup> If one accepts that public Confederate symbols are racially discriminatory government speech, then their harms are best analyzed using Establishment Clause tests designed for evaluating such speech.<sup>78</sup>

<sup>73</sup> *Moore*, 853 F.3d at 253.

<sup>74</sup> *Id.*

<sup>75</sup> Though the court’s emphasis was misplaced, this does not mean that the plaintiffs in the Fifth and Eleventh Circuit cases put forward the strongest cases possible. See Capers, *supra* note 26, at 141 (“Ultimately, the Eleventh Circuit [in *Coleman*] was able to point to the plaintiffs’ failure to present ‘specific factual evidence’ to refute the court’s assessment that the Confederate flag imposes no disproportionate effect along racial lines. Rather than relying on empirical data or expert testimony and reports from sociologists, as the NAACP had done to great effect in *Brown*, the plaintiffs in *Hunt* and *Coleman* instead relied on personal, anecdotal evidence. One could argue that the failure on the part of the plaintiffs to present data supporting their claim of disparate impact was fatal, though whether the Eleventh Circuit would have been receptive to, or persuaded by, such data is questionable.” (footnotes omitted)).

<sup>76</sup> See Bein, *supra* note 31, at 910 (“The *Coleman* court based its rejection of the plaintiff’s equal protection claim on the contrast it perceived between the effect of the flag and the impact of more concrete legislation such as the disenfranchisement provision considered in *Hunter v. Underwood*. Such an emphasis on concrete effect may make sense in the context of equal protection cases that challenge laws that have a directly discernible impact on the citizenry, but is inappropriate in the analysis of the impact of a public symbol like a state flag.” (footnotes omitted)).

<sup>77</sup> *Id.* at 911.

<sup>78</sup> It should be noted that the City of Charlottesville has made a similar equal protection argument as a *defense*. If the court were to accept this defense, that would seem to eliminate standing issues. Answer to Amended Complaint at 3, *Payne v. City of Charlottesville*, No. CL 17-145 (Jan. 16, 2018) (“Virginia Code § 15.2-1812, as applied to the City in this case, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I Section 11 of the Constitution of Virginia.”); Defendants’ Brief in Opposition to Plaintiff’s Motions for Partial Summary Judgment and to Strike Equal Protection Affirmative Defense at 27–35, *Payne v. City of Charlottesville*, No. CL 17-145 (Jan. 11, 2019). The City was sued shortly after its City Council voted to remove a memorial to Confederate general Robert E. Lee in one of the city’s public parks. The plaintiffs sought to enforce a Virginia law that grants localities the authority to create war memorials, but then restricts their ability to alter or remove them. The city and others, including myself, have argued

*A. Public Confederate Symbols as Racially Discriminatory Government Speech*

The logic of a constitutional challenge to public Confederate symbols under the Equal Protection Clause first requires establishing that Confederate symbols are racially discriminatory government speech. Whether Confederate symbols are racially discriminatory is hotly contested.<sup>79</sup> As late as 1990, the Eleventh Circuit framed the plaintiffs' claims in *NAACP v. Hunt* as problems of their "own emotions," and directed the plaintiffs to seek relief from the legislature as "[t]he federal judiciary is not empowered to make decisions based on social sensitivity."<sup>80</sup> Seven years later, the Eleventh Circuit occupied a middle ground in the debate by "recogniz[ing] that the Georgia flag [containing the Confederate battle emblem] conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression."<sup>81</sup>

In the lower court's opinion in *Moore v. Bryant*, the U.S. District Court for the Southern District of Mississippi unpacked the history of the Confederate flag in the United States and specifically in Mississippi with great detail.<sup>82</sup> The opinion, authored by Judge Carlton W. Reeves, acknowledged that some individuals believe that Mississippi's secession from the Union had nothing to do with slavery, but drew attention to Mississippi's Declaration of Independence at the time of its secession from the Union, which states explicitly that its "position is thoroughly identified with the institution of slavery—the greatest material interest of the world."<sup>83</sup> The court emphasized that a "core tenet" of the Confederate Constitution was

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the statute is inapplicable in that case. See, e.g., Amanda Lineberry, *Payne v. City of Charlottesville* and the Dillon's Rule Rationale for Removal, 104 Va. L. Rev. Online 45 (2018). But the court has thus far disagreed with this argument and the case is ongoing. Its unique posture may allow for adjudication of the merits of the issue, but this Note focuses on the potential for plaintiffs to bring affirmative claims challenging public Confederate memorialization.

<sup>79</sup> See, e.g., *Coleman v. Miller*, 117 F.3d 527, 530, 531 n.8 (11th Cir. 1997) ("We recognize that the Georgia flag conveys mixed meanings. . . . Having concluded that appellant has failed to demonstrate that the Georgia flag presently imposes a discriminatory racial effect, we need not decide whether discrimination against African-Americans was a motivating factor in the flag bill's passage."); *NAACP v. Hunt*, 891 F.2d 1555, 1562 (11th Cir. 1990) ("Because there are two accounts of why Alabama flies the [Confederate] flag, however, it is not certain that the flag was hoisted for racially discriminatory reasons." (citation omitted)).

<sup>80</sup> 891 F.2d at 1565.

<sup>81</sup> *Coleman*, 117 F.3d at 530.

<sup>82</sup> 205 F. Supp. 3d 834, 838–49 (S.D. Miss. 2016).

<sup>83</sup> *Id.* at 838–39 (quoting J.L. Power, Proceedings of the Mississippi State Convention, Held January 7th to 26th, A.D. 1861, at 47 (Jackson, Miss., Power & Cadwallader 1861)).

the right of white people to own black slaves,<sup>84</sup> and the protection of slavery was codified in Confederate law.<sup>85</sup>

The court aptly captured the continued usage of Confederate symbolism after the Civil War by groups interested in holding tight to the Lost Cause. This included the rise of white supremacist terrorist organizations such as the Ku Klux Klan (“KKK”), the White Camellias, and the White League, who lynched, beat, burned, and raped African Americans throughout Reconstruction.<sup>86</sup> At the same time, women’s auxiliary groups—most predominantly the United Daughters of the Confederacy (“UDC”)—organized to ensure a “proper” historical recollection of the Civil War.<sup>87</sup> The UDC “raised funds for Confederate monuments, promoted the celebration of Confederate holidays, maintained Confederate museums, and established ‘Children of the Confederacy’ educational programs.”<sup>88</sup> The UDC’s educational programs for children included teaching them that the KKK was a necessity in the South and “protected whites from negro rule.”<sup>89</sup> Confederate symbolism proliferated<sup>90</sup> and the Confederate battle flag became an emblem of the Dixiecrats, who energized the next generation of segregationists.<sup>91</sup> In many instances, new uses of the Confederate flag in Southern states were a direct result of the Supreme Court’s decision in *Brown v. Board of Education*.<sup>92</sup> In the words of the district court, “[w]hat the South lost on the battlefield, it sought to recover in the collective memory of the next generation.”<sup>93</sup>

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<sup>84</sup> Id. at 839 & n.13 (quoting Confederate States of America Const. art. I, § 9(4) (“No . . . law denying or impairing the right of property in Negro slaves shall be passed.” (alteration in original))).

<sup>85</sup> Id. at 839 (citing Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 *Temp. L. Rev.* 539, 543 (2002)).

<sup>86</sup> Id. at 840 (citing Derrick Bell, *Race, Racism, and American Law* 229–30 (6th ed. 2008)).

<sup>87</sup> Id. at 841 (citing Gaines M. Foster, *Ghosts of the Confederacy* 161–62 (1987)).

<sup>88</sup> Id. (citing Foster, *supra* note 87, at 108, 116, 172).

<sup>89</sup> Id. at 842 (quoting Amy Lynn Heyse, *The Rhetoric of Memory-Making: Lessons from the UDC’s Catechisms for Children*, 38 *Rhetoric Soc’y Q.* 408, 428 (2008) (internal quotation marks omitted)).

<sup>90</sup> As discussed above, the number of Confederate monuments in the South grew significantly and within two distinct waves—one at the turn of the twentieth century and the other during the modern Civil Rights Movement. Id. at 842–43 (citing *Whose Heritage?*, *supra* note 4, at 9).

<sup>91</sup> Id. at 843 (citing Staff Post Writers, *Around the Hall—Wallace Pickets Greet Delegates*, *Birmingham Post*, July 17, 1948; Kari Frederickson, *The Dixiecrat Revolt and the End of the Solid South, 1932–1968*, at 136–37 (2001)).

<sup>92</sup> *Smith v. St. Tammany Par. Sch. Bd.*, 316 F. Supp. 1174, 1176 (E.D. La. 1970).

<sup>93</sup> *Moore*, 205 F. Supp. 3d at 841.

Certainly, the opinion of the district court does not prove that the use of Confederate symbolism by the government is per se discriminatory in all contexts. A plaintiff still needs to make a particularized factual showing of the discriminatory intent of a specific public Confederate symbol. However, the court's opinion demonstrates the solid foundations on which such an argument can be made.

Consider, for example, the history of Lee-Davis High School. The school's name was chosen by the then three-member Hanover County School Board on April 30, 1958, "in the memory and honor of two prominent members of the Confederacy, General Robert E. Lee and President Jefferson Davis."<sup>94</sup> The new high school consolidated two schools in the eastern end of the county: Washington-Henry and Battlefield Park High Schools.<sup>95</sup> Students from each high school were asked to offer suggestions for the new school's name.<sup>96</sup> Students from Battlefield High suggested that the school be called Jefferson Davis High, while students from Washington-Henry High suggested William White High, in honor of a teacher who had taught at both high schools and who had been killed during World War II.<sup>97</sup> As a compromise, County School Board member B.W. Sadler suggested that the school be called Lee-Davis High.<sup>98</sup> He reasoned that students at Battlefield Park were called "The Rebels," and students at Washington-Henry were called "The Statesmen," and "Lee-Davis" captured both since Jefferson Davis had been a rebel and Robert E. Lee had been a general and statesman.<sup>99</sup>

Though *Brown v. Board of Education*<sup>100</sup> had been decided four years earlier and schools were constitutionally required to integrate, Washington-Henry and Battlefield Park were both segregated.<sup>101</sup> The students who

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<sup>94</sup> Hanover County School Board, Minute Book (Apr. 30, 1958) (copy on file with Virginia Law Review Association).

<sup>95</sup> Lee-Davis High School, Our School, [http://ldhs.hcps.us/about\\_us/our\\_school](http://ldhs.hcps.us/about_us/our_school) [<https://perma.cc/N23W-RXPS>] (last visited Mar. 19, 2019).

<sup>96</sup> Dan Sherrier, The History of Lee-Davis and Patrick Henry High Schools: Part II, Herald-Progress, Oct. 2, 2008, at A-2.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (citation omitted). In local discussions, some have argued that Lee-Davis High School was named in anticipation of the Civil War Centennial Celebrations in 1961, but there is no evidence of this in local news articles or in the School Board minutes, and the weight of the decision to rename the schools after Confederates is unchanged by the timing of the centennial.

<sup>100</sup> 347 U.S. 483 (1954).

<sup>101</sup> See Dan Sherrier, Gandy High Alumni Reflect on School Days, Herald-Progress, Sept. 10, 2009, at A-1.

suggested the new names from those schools were likely entirely white.<sup>102</sup> Black students in Hanover County attended a separate school called John M. Gandy High, located in Ashland and built in the early 1950s.<sup>103</sup> The name change occurred during “Massive Resistance” to school desegregation in Virginia,<sup>104</sup> falling also within the second spike in Confederate memorialization identified by the Southern Poverty Law Center.<sup>105</sup> Massive Resistance was active and effective in Hanover County. In August of 1954, the Hanover County Board of Supervisors passed a resolution that called for maintaining segregated schools and requested that the state government “do everything in [its] power legally possible to continue the teaching of white and negro children in different school buildings and transporting them in different buses.”<sup>106</sup>

Hanover schools exclusively educated white students until 1963, when ten black students applied to Virginia’s Pupil Placement Board for admission to white high schools.<sup>107</sup> Six of these students enrolled in Lee-Davis High School in the fall.<sup>108</sup> However, school buses, the faculties, and even the school board offices remained segregated. The black students who transferred to Lee-Davis had to ride the bus to Gandy High, where they then took another segregated bus to one of the two white high schools—even if the white school was closer to their home.<sup>109</sup> Hanover County

<sup>102</sup> See *id.* (“Gandy High shut down in 1969, when Hanover’s system became racially integrated.” (emphasis added)); Sherrier, *supra* note 96 (“Juniors at Battlefield Park and Washington-Henry brainstormed names for their new school. Each school submitted one name to the School Board. ‘Battlefield Park students suggested the name Jefferson Davis, ‘the first and only president of the Confederate States’ . . . ,’ the March 20, 1958 H-P stated.” (emphasis added)).

<sup>103</sup> Sherrier, *supra* note 101.

<sup>104</sup> James H. Hershman, Jr., *Massive Resistance*, Encyclopedia Va. (June 29, 2011), [https://www.encyclopediavirginia.org/massive\\_resistance#start\\_entry](https://www.encyclopediavirginia.org/massive_resistance#start_entry) [https://perma.cc/S-942-M48S] (“Massive Resistance was a policy adopted in 1956 by Virginia’s state government to block the desegregation of public schools . . .”).

<sup>105</sup> See *Whose Heritage?*, *supra* note 4, at 11.

<sup>106</sup> Jody L. Allen, *Roses in December: Black Life in Hanover County, Virginia During the Era of Disfranchisement 305–06* (August 2007) (unpublished Ph.D. dissertation, College of William and Mary) (on file with the College of William and Mary) (quoting 11 Hanover County Board of Supervisors, Supervisor’s Record 81 (Aug. 27, 1954) (internal quotation marks omitted)).

<sup>107</sup> Rebecca Bray & Lloyd Jones, *A History of Education in Hanover County, Virginia: 1778–2008*, at 138 (2010).

<sup>108</sup> *Id.* at 139.

<sup>109</sup> *Id.*



schools did not fully integrate until the 1969–70 school year,<sup>110</sup> after the Supreme Court struck down the “freedom-of-choice” plan in neighboring New Kent County, in which not a single white child had chosen to attend a formerly all-black school and eighty-five percent of black children still attended that school after three years.<sup>111</sup> In July of 1968, Judge Merhige, a federal district court judge sitting in Richmond, directed Hanover County to form a desegregation plan that would comply with the New Kent case.<sup>112</sup> Judge Merhige rejected the first version of this plan but approved the second.<sup>113</sup>

The controversy surrounding the names is almost as old as the names themselves. In 1970, just after the school fully integrated, the Hanover NAACP unsuccessfully petitioned the school board to change the name of the Lee-Davis High School football team, since the team was integrated and the name was offensive to the black members of the student body, the school’s black faculty members, and the black residents of Hanover county.<sup>114</sup> Other student-led efforts to change the name in the 1970s were unsuccessful.<sup>115</sup>

In short, a plaintiff challenging the school’s name has an abundance of circumstantial evidence tending to show that the adoption of the school’s name and mascot was motivated by discriminatory intent during Massive Resistance, and likely more evidence could be found by litigators seeking to challenge the names. Should a court choose to look past that evidence, it would do so only by blinding itself to the forces at play when the name and mascot were selected by an all-white student body and a school board determined to preserve segregated schools.

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<sup>110</sup> Dan Sherrier, *The History of Lee-Davis and Patrick Henry: Part X*, *Herald-Progress*, Dec. 11, 2008, at A-3.

<sup>111</sup> *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 441 (1968). Note that at least one version of Hanover County’s “freedom-of-choice” plan had been rejected by a district court prior to the *New Kent* case. *Thompson v. Cty. School Bd. of Hanover Cty.*, 252 F. Supp. 546, 551–52 (E.D. Va. 1966).

<sup>112</sup> *Allen*, *supra* note 106, at 324.

<sup>113</sup> *Id.* at 324–25; see also Sherrier, *supra* note 110 (noting that Judge Merhige simultaneously found the desegregation plans of ten other counties to be unacceptable).

<sup>114</sup> *Confederate Naming Lee-Davis Decision*, *Herald-Progress*, Dec. 3, 1970, § 1, at 8.

<sup>115</sup> *L-D Votes to Retain ‘Confederate,’ Herald-Progress*, Apr. 8, 1971, § 1 at 2.

*B. Conceptualizing Harms of Racially Discriminatory Government Speech*

The next important step in this kind of Equal Protection Clause challenge is recognizing the harms of racially discriminatory government speech. In its “recently minted”<sup>116</sup> government speech doctrine, the Supreme Court has held that government speech is neither constrained nor protected by the First Amendment.<sup>117</sup> The Court held that “the Free Speech Clause does not constrain the government’s expression, interpreting the First Amendment to include a ‘government speech’ defense to free speech claims by private parties who seek to alter or enjoin a state actor’s delivery of its own views.”<sup>118</sup> While the Establishment Clause constrains *religiously* discriminatory government speech, the Court’s current doctrine does not address whether the Equal Protection Clause constrains *racially* discriminatory government speech.<sup>119</sup>

Professor Helen Norton argues that such speech can run afoul of the Equal Protection Clause under two theories of harm: a behavioral harm approach and an expressive meaning analysis.<sup>120</sup> Under the behavioral harm approach, Professor Norton argues that in some circumstances, a government’s “racist, homophobic, or similarly hateful speech may

<sup>116</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

<sup>117</sup> See, e.g., *id.* (holding that by allowing placement of donated permanent monuments in a public park, the city was exercising a form of government speech that was not subject to scrutiny under the Free Speech Clause of the First Amendment); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.”); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression.”); see also Helen Norton, *The Equal Protection Implications of Government’s Hateful Speech*, 54 *Wm. & Mary L. Rev.* 159, 162–63 (2012) (noting that whether and when racist government speech violates the Equal Protection Clause remains unclear under the Court’s current doctrine).

<sup>118</sup> Norton, *supra* note 117, at 162.

<sup>119</sup> *Id.* at 162–63. The Court’s young government speech doctrine has only once encountered Confederate symbolism, though in a very different posture. In *Walker v. Sons of Confederate Veterans*, the Supreme Court held that Texas specialty license plate designs were government speech, and thus the Texas Department of Motor Vehicles did not violate the Sons of Confederate Veterans’ free speech rights by denying its application for a license plate design with a Confederate flag. 135 S. Ct. 2239, 2253 (2015). Similar cases were litigated in the Western District of Virginia. Though originally denying the State’s ability to limit such novelty license plates, the court reversed its prior decision after the Supreme Court’s decision in *Walker*. See *Sons of Confederate Veterans v. Holcomb*, 129 F. Supp. 2d 941, 949–50 (W.D. Va. 2001), *reconsidered in Sons of Confederate Veterans v. Holcomb*, No. 7:99-cv-00530, 2015 WL 4662435 (W.D. Va. Aug. 6, 2015).

<sup>120</sup> Norton, *supra* note 117, at 174–83.

sufficiently command or otherwise coerce its listeners' behavior in ways that impose . . . concrete effects" and, therefore, "fall within the ambit of the Equal Protection Clause."<sup>121</sup> She argues that the Supreme Court's holding in *Lombard v. Louisiana*<sup>122</sup> is an example of the Court finding that a government actor's racially discriminatory speech violates the Constitution.<sup>123</sup> In that case, the Court held that New Orleans city officials' statements commanding continued segregation by private restaurants was sufficiently coercive to constitute state action: "[T]he State cannot achieve the same result [of perpetuating segregated service in restaurants] by an official command which has at least as much coercive effect as an ordinance."<sup>124</sup> Lower courts have reached similar conclusions when considering the use of Confederate symbolism during desegregation. In *Smith v. St. Tammany Parish School Board*, the Fifth Circuit upheld a lower court's order "banning [the Confederate battle flag] or indicia expressing the school board's or its employees' desire to maintain segregated schools and requiring that they 'shall be removed from the schools and shall not be officially displayed.'"<sup>125</sup> The court's holding, discussed in greater detail below, indicates specifically that Confederate symbolism, when used by the government, can have an expressive meaning that violates the Constitution.<sup>126</sup> In particular, these opinions demonstrate a sort of coercion analysis in equal protection doctrine. When expressions have a coercive force on the listeners, they do not escape constitutional review.

Professor Norton also unpacks how racially discriminatory government speech "may inflict behavioral harm on its targets by facilitating private parties' discrimination against them,"<sup>127</sup> pointing to state and federal statutes prohibiting both public and private actors from posting discriminatory advertisements for employment, housing, or credit applicants,<sup>128</sup> as well as the Supreme Court's holding in *Anderson v. Martin*.<sup>129</sup> In that case, the Court struck down a Louisiana law that required political candidates to be identified by their race on all nomination papers and ballots, recognizing that the practice "furnishe[d] a vehicle by which racial

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<sup>121</sup> *Id.* at 175.

<sup>122</sup> 373 U.S. 267 (1963).

<sup>123</sup> Norton, *supra* note 117, at 175–76.

<sup>124</sup> *Lombard*, 373 U.S. at 273.

<sup>125</sup> 448 F.2d 414, 415 (5th Cir. 1971) (emphasis omitted).

<sup>126</sup> See *infra* Part III.

<sup>127</sup> Norton, *supra* note 117, at 178.

<sup>128</sup> *Id.* at 178–79.

<sup>129</sup> 375 U.S. 399 (1964).

prejudice may be so aroused as to operate against one group because of race and for another.”<sup>130</sup>

Expressive harms, on the other hand, occur simply when “the government inflicts a constitutional wrong simply by sending a message of inferiority based on class status, regardless of whether listeners suffer emotional distress or experience material harm as a result,”<sup>131</sup> though recent studies tend to show that very serious physical harms can result from racially discriminatory speech,<sup>132</sup> microaggressions,<sup>133</sup> perceived racism,<sup>134</sup> and other racial stressors.<sup>135</sup> Professor Deborah Hellman argues that, under the Equal Protection Clause, state actions should be judged “not by looking at the intent of those who enacted laws nor by looking at the effect a law has in the domain in which it operates,” but instead by “looking at the meaning or expressive content of the law or policy at issue.”<sup>136</sup> Professor Norton’s analysis stretches the scholarship of Professor Hellman and others beyond “hard law”<sup>137</sup> to government speech, arguing that

<sup>130</sup> *Id.* at 401–02.

<sup>131</sup> Norton, *supra* note 117, at 181.

<sup>132</sup> See, e.g., Lisa Feldman Barrett, *When is Speech Violence?*, N.Y. Times (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html> [<https://perma.cc/XB9Q-Z5FB>].

<sup>133</sup> See, e.g., Gina C. Torino, *How Racism and Microaggressions Lead to Worse Health*, Ctr. for Health Journalism Member Blog (Nov. 10, 2017), <https://www.centerforhealthjournalism.org/2017/11/08/how-racism-and-microaggressions-lead-worse-health> [<https://perma.cc/JS7L-74VB>]; Kevin L. Nadal et al., *The Impact of Racial Microaggressions on Mental Health: Counseling Implications for Clients of Color*, 92 *J. Counseling & Dev.* 57 (2014).

<sup>134</sup> See, e.g., Elizabeth Brondolo et al., *Perceived Racism and Blood Pressure: A Review of the Literature and Conceptual and Methodological Critique*, 25 *Annals Behav. Med.* 55 (2003); Marcellus M. Merritt et al., *Perceived Racism and Cardiovascular Reactivity and Recovery to Personally Relevant Stress*, 25 *Health Psychol.* 364 (2006); Zoë Carpenter, *What’s Killing America’s Black Infants?: Racism is Fueling a National Health Crisis*, *The Nation* (Feb. 15, 2017), <https://www.thenation.com/article/whats-killing-americas-black-infants/> [<https://perma.cc/UK85-V7TA>].

<sup>135</sup> See, e.g., Carolyn Y. Fang & Hector F. Myers, *The Effects of Racial Stressors and Hostility on Cardiovascular Reactivity in African American and Caucasian Men*, 20 *Health Psychol.* 64 (2001).

<sup>136</sup> Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 *Minn. L. Rev.* 1, 2 (2000).

<sup>137</sup> For an explanation of the distinction between “hard law” and “soft law,” see Norton, *supra* note 117, at 167–68 (“As an example of ‘hard law,’ consider government-imposed segregation or differential punishment of individuals based on race, gender, or other protected class status, which generally violate the Equal Protection Clause except in those rare situations in which the government’s action survives the rigorous demands of heightened scrutiny. . . . In contrast, some commentators use the term ‘soft law’ to describe government efforts to persuade rather than to coerce.” (footnotes omitted)).

“whether the government delivers that hateful message through ‘hard’ law or ‘soft’ should be immaterial if these scholars are right about the sort of expressive harm that is constitutionally salient for equal protection purposes.”<sup>138</sup> She argues that this sort of expressive harm is both morally offensive and dangerous in contributing to social division.<sup>139</sup> Professor Richard Schragger also argues that courts should be wary of this kind of “coerced government speech”—when one political community forces symbolic speech on another—because of its anti-democratic impacts.<sup>140</sup>

Of course, the question of whether such speech is harmful is separate from whether it is constitutional. But the Court’s holdings in cases like *Lombard v. Louisiana*,<sup>141</sup> *Smith v. St. Tammany Parish School Board*,<sup>142</sup> and *Anderson v. Martin*<sup>143</sup> demonstrate that courts have found that the Constitution may condemn the stigmatic harms flowing from the government’s racially discriminatory expressions. This principle is also demonstrated in *Brown v. Board of Education*, in which the Court emphasized a concern for the emotional well-being of African-American children in segregated public schools or, in other words, the harms of government racial stigmatization.<sup>144</sup> Thus, the proper question is not *whether* racially discriminatory government speech can ever be found unconstitutional, but *when*.

Professor Nelson Tebbe further supports this proposition by arguing that “the Constitution properly imposes a broad principle of government nonendorsement.”<sup>145</sup> Professor Tebbe argues that the nonendorsement principle “cuts across multiple provisions—including equal protection, due process, and free speech itself—and it brings them together to prohibit any endorsement that abridges full and equal citizenship in a free

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<sup>138</sup> *Id.* at 182.

<sup>139</sup> *Id.* at 183.

<sup>140</sup> Richard C. Schragger, *Of Crosses and Confederate Monuments: Considering the Constitutional Limits on Majoritarian Control of the Public Square* (forthcoming) (on file with author).

<sup>141</sup> 373 U.S. 267, 267 (1963).

<sup>142</sup> 448 F.2d 414, 414 (1971).

<sup>143</sup> 375 U.S. 399, 404 (1964).

<sup>144</sup> 347 U.S. 483, 494 (1954) (“Such considerations apply with added force to children in grade and high schools. To separate them 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.”).

<sup>145</sup> Nelson Tebbe, *Government Nonendorsement*, 98 Minn. L. Rev. 648, 650 (2013) (emphasis omitted).

society.”<sup>146</sup> His argument is particularly salient in the context of racialized speech. According to Professor Tebbe, if Congress issued a joint resolution declaring that “America is a white nation”—without that resolution carrying any legal consequences—it could be unconstitutional in two ways.<sup>147</sup> Under an antisubordination theory, the resolution is presumptively unconstitutional because it officially endorses one race over others and renders nonwhites subordinate as citizens.<sup>148</sup> Under an anticlassification theory, the resolution is presumptively unconstitutional because it divides citizens on an impermissible basis.<sup>149</sup> Finally, Professor Tebbe further supports his argument by looking to conceptions of free speech, which allow for the prohibition of racialized hate speech because of its ability to distort democratic deliberation.<sup>150</sup>

What Professor Tebbe’s analysis lacks is a doctrinal mechanism for carrying out the nonendorsement principle. Further recognition of the nonendorsement principle is particularly important now as the Court expands the concept of government speech “with little regard for the constitutional limitations on such expression.”<sup>151</sup> As Professor Tebbe recognizes, social meaning of speech is often disputed.<sup>152</sup> One of the most difficult challenges to his argument is what limits might be imposed on government nonendorsement.<sup>153</sup> While Professor Tebbe declines to consider how such a principle would be administrable in Article III courts,<sup>154</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 651.

<sup>148</sup> *Id.* at 659.

<sup>149</sup> *Id.* at 660–61.

<sup>150</sup> *Id.* at 666.

<sup>151</sup> *Id.* at 650.

<sup>152</sup> *Id.* at 660. Note that Professor Tebbe, along with Professor Micah Schwartzman, have unequivocally argued that some Confederate symbols, like the Robert E. Lee statue in Charlottesville, are plainly unconstitutional under the Equal Protection Clause. Micah Schwartzman & Nelson Tebbe, *Charlottesville’s Monuments are Unconstitutional*, *Slate* (Aug. 25, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/charlottesville\\_s\\_monuments\\_are\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/charlottesville_s_monuments_are_unconstitutional.html) [<https://perma.cc/T9GQ-QU2A>] (“While sometimes it can be difficult to discern the meaning of government symbols, it is not as difficult in this situation. History and context would lead a reasonable and informed observer to conclude that the memorials endorse slavery and subordinate black Americans.”); see also Richard Schragger, *When White Supremacists Invade a City*, 104 *Va. L. Rev. Online* 58, 69–70 (2018) (explaining that government speech denigrating towards religious or racial minorities or motivated by animus may be challenged on constitutional grounds).

<sup>153</sup> Tebbe, *supra* note 145, at 695–96.

<sup>154</sup> *Id.* at 662, 693–96.

I argue that the Establishment Clause tests are the most obvious and readily available tools.

### *C. Using the Coercion Test*

If one accepts the idea that the proper question is not *whether* racially discriminatory government speech can ever be found unconstitutional, but *when*, then the next step is to determine how to answer that question. For Confederate mascots in public schools, I propose the coercion test from Establishment Clause doctrine. The Establishment Clause “offers the only area outside of the Free Speech Clause in which courts have, to date, seriously wrestled with the constitutional implications of government speech,”<sup>155</sup> and provides a useful blueprint for the racially discriminatory government speech considered here.

Employing Establishment Clause doctrine simplifies some questions and complicates others. Notably, it simplifies the standing inquiry. In an Establishment Clause challenge to offensive religious symbols, demonstrating injury-in-fact to gain Article III standing does not require “coercion on specific individuals” or “other particularized harm.”<sup>156</sup> Rather, standing arises under either (1) taxpayer standing for specific congressional appropriations that advantage religion, or (2) non-taxpayer standing for alleged instances where the government has sponsored a religion offending the plaintiff directly and personally.<sup>157</sup> The injury-in-fact rule for nontaxpayer standing to challenge religious displays—a form of government speech—is fairly broad. Courts require a plaintiff to have suffered some sort of personal injury as a consequence of the Establishment

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<sup>155</sup> Norton, *supra* note 117, at 187 (footnote omitted). Still, Professor Norton is careful in her endorsement of Establishment Clause doctrine for the equal protection context. *Id.* at 187–88 (“Please note that I do not suggest that the Court’s Establishment Clause precedent in any way binds courts considering equal protection challenges to government speech. Instead I simply suggest that we can choose to learn from courts’ experience wrestling with whether and when government’s religious speech impermissibly ‘establishes’ religion when confronted with the parallel challenge of determining whether and when government’s hateful speech might deny ‘the equal protection of the laws.’”).

<sup>156</sup> Note, Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test, 123 *Harv. L. Rev.* 1999, 1999 (2010) (citing William P. Marshall & Maripat Flood, Establishment Clause Standing: The Not Very Revolutionary Decision at *Valley Forge*, 11 *Hofstra L. Rev.* 63, 84 (1982)) (internal quotation marks omitted) [hereinafter Nontaxpayer Standing].

<sup>157</sup> *Id.* at 2001–02.

Clause violation, either through direct contact with or deliberate avoidance of a religious display.<sup>158</sup>

But the Court's Establishment Clause doctrine is quite muddled. It has developed four different tests for evaluating government religious speech, without explicitly overruling any: the *Lemon* entanglement test,<sup>159</sup> the endorsement test,<sup>160</sup> the coercion test,<sup>161</sup> and a historical approach used to uphold legislative prayer<sup>162</sup> which a plurality of the Court recently mirrored in *American Legion v. American Humanist Association*.<sup>163</sup> I argue that the *Lemon* and endorsement tests are unlikely approaches, that Confederate monuments should not find protection in the historical approach, and that the coercion test is particularly useful for Confederate mascots in public schools.

Under the *Lemon* test, a governmental practice must: (1) have a secular legislative purpose, (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) there must be no excessive entanglement with religion.<sup>164</sup> Failure to satisfy any one prong is fatal to the government's defense. Using a similar inquiry when evaluating racially discriminatory government speech would require the government to demonstrate: (1) there is a non-discriminatory legislative purpose, (2) the principal or primary effect is one that neither advances nor inhibits a particular race, and (3) there is no excessive entanglement with racial discrimination.<sup>165</sup> Such an inquiry would presumably allow for some limited circumstances where the government's display of a Confederate flag would be constitutionally acceptable, as "[e]ntanglement is a question of

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<sup>158</sup> *Id.* at 1999. Importantly, though the Court held in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, that a "psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to convey such standing, and that a plaintiff needs "to establish that one or more of [them] ha[d] suffered, or [were] threatened with, an injury other than their belief that the transfer violated the Constitution." 454 U.S. 464, 485–86, 487 n. 23 (1982).

<sup>159</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>160</sup> *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989).

<sup>161</sup> *Lee v. Weisman*, 505 U.S. 577, 578 (1992).

<sup>162</sup> *Marsh v. Chambers*, 463 U.S. 783, 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825–26 (2014).

<sup>163</sup> *Am. Legion v. Am. Humanist Ass'n*, Nos. 17–1717 and 18–18, slip. op. at 24–28 (U.S. June 20, 2019) (plurality opinion).

<sup>164</sup> *Lemon*, 403 U.S. at 612–13.

<sup>165</sup> Kathleen Riley, *The Long Shadow of the Confederacy in America's Schools: State-Sponsored Use of Confederate Symbols in the Wake of Brown v. Board*, 10 Wm. & Mary Bill Rts. J. 525, 544 (2002).



kind and degree.”<sup>166</sup> For example, the state of Mississippi’s use of the Confederate battle flag within its own state flag, given the historical context of the flag, excessively entangles the state with racial discrimination, but its placement of the same flag in a state history museum would not entangle the state to the same unconstitutional degree.<sup>167</sup> However, it seems unlikely that a court would apply the waning *Lemon* test after it was all but overruled in *American Humanist Association*.<sup>168</sup>

The Court’s endorsement test is derived from *County of Allegheny v. ACLU*, which held that a government unconstitutionally endorses a religion when it conveys that one religion is “favored” or “preferred” over other beliefs.<sup>169</sup> When evaluating racially discriminatory government speech, a court would inquire into whether a government’s actions favored, preferred, or promoted one race over others. For example, when states celebrate official holidays like Confederate Heroes Day (Texas) or Confederate Memorial Day (Alabama, Mississippi, and South Carolina),<sup>170</sup> plaintiffs could argue that the state sends a message that it prefers its white citizens over citizens of other racial backgrounds in a way that violates the Equal Protection Clause. However, plaintiffs would likely face similar challenges to the plaintiffs in *Lynch v. Donnelly*, in which the city’s use of a nativity scene was upheld.<sup>171</sup> The Court noted that “not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon [religion] is, for that reason alone, constitutionally invalid,”<sup>172</sup> and held that the city’s nativity scene “is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself . . . or the exhibition of literally hundreds of religious paintings in governmentally supported museums.”<sup>173</sup> The endorsement test also waned after Justice O’Connor retired, though at least

<sup>166</sup> *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984).

<sup>167</sup> See *Am. Humanist Ass’n*, Nos. 17–1717 and 18–18, slip. op. at 6 (U.S. June 20, 2019) (Ginsburg, J., dissenting) (describing museums as a neutral setting).

<sup>168</sup> *Id.* at 12–16 (plurality opinion); see also *id.* at 1–4 (Kavanaugh, J., concurring); *id.* at 6–7 (Thomas, J., concurring in the judgment); *id.* at 6–11 (Gorsuch, J., concurring in the judgment).

<sup>169</sup> 492 U.S. 573, 593–94 (1989) (emphasis omitted) (internal quotation marks omitted) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring in judgment)).

<sup>170</sup> *Whose Heritage?*, supra note 4, at 12.

<sup>171</sup> 465 U.S. 668, 668 (1984).

<sup>172</sup> *Id.* at 683 (alteration in original) (quoting *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

<sup>173</sup> *Id.*

Justices Kagan and Ginsburg have continued to stress the importance of expressive harms.<sup>174</sup>

The Court's historical approach previously seemed to be a carve-out specifically for legislative prayer. In *Marsh v. Chambers*, the Court relied on the history of the congressional chaplaincies to show that the Founders "did not consider opening prayers . . . as symbolically placing the government's official seal of approval on one religious view."<sup>175</sup> The Court gave considerable weight to historical practice as relevant in and of itself,<sup>176</sup> and as demonstrative of the Framers' intent.<sup>177</sup>

However, in *American Legion v. American Humanist Association*, a plurality of the Court leans on this analysis and the prayer practice "begun by the First Congress . . . as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans."<sup>178</sup> In doing so, the plurality stated that "[w]here categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional."<sup>179</sup>

Ultimately, the Court's reasoning is unconvincing when applied to Confederate monuments, and has no bearing on coercive Confederate mascots in public schools. A fractured Court held that the Bladensburg Peace Cross, a World War I memorial erected in 1925, did not violate the

<sup>174</sup> See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1843–46 (2014) (Kagan, J., dissenting); *Am. Legion v. Am. Humanist Ass'n*, Nos. 17–1717 and 18–18, slip. op. at 4 (U.S. June 20, 2019) (Ginsburg, J., dissenting).

<sup>175</sup> 463 U.S. 783, 792 (1983) (quoting *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982)) (internal quotation marks omitted).

<sup>176</sup> *Id.* at 790 ("[A]n unbroken practice . . . is not something to be lightly cast aside." (alteration in original) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970))).

<sup>177</sup> *Id.* ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress . . .").

<sup>178</sup> *Am. Legion v. Am. Humanist Ass'n*, Nos. 17–1717 and 18–18, slip. op. at 28 (U.S. June 20, 2019) (plurality opinion).

<sup>179</sup> *Id.* Note that two of the Justices in the *American Humanist Association* majority—Justices Breyer and Kagan—expressed hesitation about broadly expanding use of a historical approach. *Id.* at 2 (Breyer, J., concurring) ("Nor do I understand the Court's opinion today to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land."); *id.* at 1 (Kagan, J., concurring in part) ("I do not join Part II–D out of perhaps an excess of caution. Although I too 'look[] to history for guidance,' I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history's role in Establishment Clause analysis." (alteration in original) (citation omitted)).

Establishment Clause.<sup>180</sup> In doing so, the Court made four arguments about the intent behind religious monuments.<sup>181</sup> First, Justice Alito, writing for the majority, concluded that identifying the original purpose of older monuments may be especially difficult.<sup>182</sup> The Court then stressed that the purposes associated with a monument can multiply over time.<sup>183</sup> Third, Justice Alito made a temporal argument: that “[t]he ‘message’ conveyed [by a monument] . . . may change over time.”<sup>184</sup> He reasoned that “[w]ith sufficient time,” communities may adopt religiously expressive monuments as part of their “landscape and identity” and value them “without necessarily embracing their religious roots.”<sup>185</sup> Finally, Justice Alito’s majority argues that removing religious monuments that have this sort of historical significance “may no longer appear neutral,” but may instead “strike many as aggressively hostile to religion.”<sup>186</sup>

The Court’s reasoning is not applicable to Confederate monuments, and certainly not to the Confederate mascots considered here. First, as Justice Breyer notes in his concurrence, monuments erected in different contexts should be treated differently.<sup>187</sup> This is true even if defenders of such monuments give multiple reasons for their creation. And as Justice Ginsburg argues in dissent, courts should not ignore common sense conveyances; nor should they shrug at circumstantial evidence and “overlook[] . . . reality.”<sup>188</sup> For our purposes, the reality is that a Confederate

<sup>180</sup> Id. at 1–2 (majority opinion).

<sup>181</sup> Id. at 16–21.

<sup>182</sup> Id. at 16–17.

<sup>183</sup> Id. at 17. Justice Alito analogized to the Ten Commandments monument cases—*Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005)—arguing that they have both religious and secular historical significance and those who defended such monuments had different motivations. Id. at 17–18.

<sup>184</sup> Id. at 19 (quoting *Pleasant Grove v. Summum*, 555 U.S. 460, 477 (2009) (internal quotation marks omitted)).

<sup>185</sup> Id.

<sup>186</sup> Id. at 20.

<sup>187</sup> Id. at 2. (Breyer, J., concurring) (“The case would be different, in my view, if there were evidence that the organizers had ‘deliberately disrespected’ members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I. But those are not the circumstances presented to us here, and I see no reason to order this cross torn down simply because other crosses would raise constitutional concerns.” (citations omitted) (emphasis omitted)); see also id. at 1 (Kagan, J., concurring in part) (“Although I too ‘look[] to history for guidance,’ I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history’s role in Establishment Clause analysis.” (alteration in original) (citations omitted)).

<sup>188</sup> Id. at 11 (Ginsburg, J., dissenting).

was never an appropriate mascot for a public school under pressure to integrate. As I will argue below, those symbols are coercive in a way that the Bladensburg Cross is not.

And the Confederate is an even less appropriate mascot today. Justice Alito's second and third arguments in favor of the Bladensburg Peace Cross—that monuments' meanings can be multiple and can change over time—do not apply to Confederate monuments and symbols. On the contrary, these symbols have only become further associated with racism and domestic terrorism, particularly after the Charleston shooting and Charlottesville rally.<sup>189</sup>

In her statement on removing the Confederate flag from the state capitol grounds, former South Carolina Governor Nikki Haley recognized that the Confederate flag had multiple meanings to her constituents, but that it had evolved beyond a place of salvage:

To those outside of our state the flag may be nothing more than a symbol of the worst of America's past. That is not what it is to many South Carolinians. The statehouse belongs to all of us. . . . But we are not going to allow this symbol to divide us any longer. The fact that people are choosing to use it as a sign of hate is something we cannot stand. The fact that it causes pain to so many is enough to move it from the Capitol grounds.<sup>190</sup>

Although for the Bladensburg Cross, “the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation,”<sup>191</sup> the passage of time has not provided reasons for preserving public Confederate symbols.

Likewise, Justice Alito's final argument that removal might be hostile to a fundamental right does not apply here. As Justice Kavanaugh emphasized, the Court's opinion should not be read to “*require* the State to maintain the cross on public land.”<sup>192</sup> Local and state governments may still elect to remove them without conveying hostility towards religion.<sup>193</sup> And the countervailing concern is wholly inapplicable to Confederate

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<sup>189</sup> See *supra* Section II.A.

<sup>190</sup> Transcript: Gov. Nikki Haley of South Carolina on Removing the Confederate Flag, N.Y. Times (June 22, 2015), <https://www.nytimes.com/interactive/2015/06/22/us/Transcript-Gov-Nikki-R-Haley-of-South-Carolina-Addresses-Removing-the-Confederate-Battle-Flag.html> [<https://perma.cc/2ZBW-6LBT>].

<sup>191</sup> *Am. Humanist*, Nos. 17–1717 and 18–18, slip. op. at 22.

<sup>192</sup> *Id.* at 5 (Kavanaugh, J., concurring).

<sup>193</sup> *Id.*

monuments. The First Amendment protects Americans from state establishment of religion *and* state interference in the free exercise of religion.<sup>194</sup> There are no similar protections for those who feel strongly about their Confederate heritage except for the First Amendment's protections of speech, and those protections are not at play when the speaker is the government.<sup>195</sup>

That leaves us with the Court's coercion test, established in *Lee v. Weisman*, which makes unconstitutional instances in which the government directs a formal religious exercise in such a way as to coerce the participation of objectors.<sup>196</sup> Though the Justices appear to agree that some coercion is impermissible under the Establishment Clause, they disagree as to what counts as coercion: either legal coercion involving government taxation or punishment, or more subtle coercive pressures.<sup>197</sup> In the racial discrimination context, such a test would inquire into whether the government directs its formal activities in a way that racially discriminates and coerces the participation of racial minorities into such activities.

Lee-Davis High is best analyzed under the coercion test. When gathering community input about the name and mascot for Lee-Davis High, Hanover County did not ask respondents to identify their race.<sup>198</sup> Thus, it is impossible to tell, statistically, from its survey results whether or not the name and mascot of Lee-Davis High School disparately affects respondents who identify as racial minorities. However, the survey asked respondents if they had "any other information [they] would like to share."<sup>199</sup> The responses to this final question demonstrate the particularized, disparate harm felt by students, alumni, and teachers who identify as minorities. For example, a Lee-Davis employee who identifies as a minority wrote:

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<sup>194</sup> U.S. Const. amend I. ("Congress shall make no law respecting an establishment of religion, *or* prohibiting the free exercise thereof . . . ." (emphasis added)).

<sup>195</sup> See *infra* Section II.C.

<sup>196</sup> 505 U.S. 577, 587 (1992).

<sup>197</sup> Compare *Town of Greece v. Galloway*, 134 S. Ct. 181, 1837 (2014) (Thomas, J., concurring in part and concurring in judgment) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting))), with *id.* 1826–28 (majority opinion) (noting, that unlike in *Lee*, there was no pressure on constituents that "dissuaded [them] from leaving the meeting room during the prayer, arriving late, or even . . . making a later protest").

<sup>198</sup> *Mattingly*, *supra* note 13.

<sup>199</sup> *Id.* (internal quotation marks omitted).

Furthermore, as a minority, I experience a deep feeling of shame and embarrassment when I tell people I work at LDHS. I cannot align myself or feel loyalty to a school who's [sic] name mocks me every time I see it. It is time to correct the poor choices from our community's past.<sup>200</sup>

In another response, a graduate of Lee-Davis described how her black teammate on the cheerleading squad refused to cheer specifically for the Confederates.<sup>201</sup> An "educator of color" in Hanover County described how he personally did not feel that the Stonewall Jackson Middle School name and Rebel mascot impaired his ability to work as a student teacher at the school, but the names and mascots of both schools had caused pain for his family members.<sup>202</sup>

Some may argue that students are not really forced to attend a certain public school and that students may move into the district of another school or be homeschooled. Others may argue that students can simply avoid participating in activities that use a school's Confederate or Rebel mascot, such as sports teams or marching band. Practically, this does not reflect the experience of minority students and their families, as indicated by the survey responses above and in the experience of alumni like Avi Hopkins, who explained to the Richmond Times-Dispatch that he and his fellow African-American football teammates all understood what team they were competing for and its historical significance, but "also understood we didn't have much of a choice."<sup>203</sup> Doctrinally, these arguments also ignore that "[l]aw reaches past formalism."<sup>204</sup> In other words, as the Court held in *Lee v. Weisman*, the law does not pretend that such choices are real in the context of school-age children faced with stark choices between participating in the hallmarks of youth or not.<sup>205</sup>

<sup>200</sup> Id.

<sup>201</sup> Id. ("As a cheerleader at LDHS and having a black teammate her & I both found it hard [to] cheer for the confederates. She refused to say it, while I quietly mouthed it.")

<sup>202</sup> Id.

<sup>203</sup> Michael Paul Williams, Williams: 'The idea of honoring men who were part of the enslavement of my ancestors was really challenging': Lee-Davis Alumnus Reflects on Divide Over Name Change, *Richmond Times-Dispatch* (Jan. 11, 2018), [http://www.richmond.com/news/local/michael-paul-williams/williams-the-idea-of-honoring-men-who-were-part-of/article\\_5c4baa4d-d3d7-5028-a092-41803235a818.html](http://www.richmond.com/news/local/michael-paul-williams/williams-the-idea-of-honoring-men-who-were-part-of/article_5c4baa4d-d3d7-5028-a092-41803235a818.html) [https://perma.cc/JN4A-LY-ED].

<sup>204</sup> *Lee v. Weisman*, 505 U.S. 577, 595 (1992).

<sup>205</sup> Id. ("And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone

Professor Kathleen Riley notes in her analysis of the constitutionality of Confederate school mascots that the coercion test “would not easily translate into a racial establishment situation,” but this perhaps focuses too much on the “formal religious exercise” prong of the coercion test.<sup>206</sup> While a formal government sanctioning of racial bias does not have the same formality as a prayer, perhaps, there is no reason to believe that the Court’s test need limit itself by formality when transplanted into the Equal Protection context. Plaintiffs already bear the burden of demonstrating discriminatory intent behind the government’s speech and, should that burden be met, it seems logical that the government’s actions should be considered a “formal sanctioning of racial bias” analytically similar to a prayer or other formal religious exercise. Rather, as shown by the comments of Lee-Davis High students and teachers, the coercion test is particularly useful in the public school context.<sup>207</sup> When a county school board requires African-American students in a certain area to attend a school named after Confederate leaders or gives athletes no other choice than to compete in their preferred sport under a Confederate or Rebel mascot, the school board coerces these students into participating in racially discriminatory government speech against their own race.

The use of alternative tests is both logical and important in addressing the harms of racially discriminatory government speech. In *Lynch v. Donnelly*, Justice O’Connor, concurring, explained this type of government speech “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.”<sup>208</sup> The Court’s statement in the religion context is just as applicable in the context of racially discriminatory government speech.<sup>209</sup> Still, the

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knows that in our society and in our culture high school graduation is one of life’s most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term ‘voluntary,’ for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.”)

<sup>206</sup> Riley, *supra* note 165, at 545.

<sup>207</sup> See *infra* Part III.

<sup>208</sup> 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

<sup>209</sup> See, e.g., James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 *Yale L.J.* 505, 515 (1991) (“[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.”); *Non-taxpayer Standing*, *supra* note 156, at 2017–18 (“Surely the message that one is an ‘outsider[’,

*Moore* court “offered no rationale, other than supposed textual differences, for the constitutional distinction which forms the linchpin of its opinion”—that the Establishment Clause prohibits the government from endorsing religion and therefore regulates the government’s speech in that regard, but the Equal Protection Clause only protects against differential treatment and not differential messaging.<sup>210</sup>

Using these tests enables the principles of *Brown v. Board of Education*, which was principally concerned with stigmatic harms, to be effectuated in the context of government speech. Symbols like Confederate flags or high school mascots, “do not . . . lend themselves to easy interpretation”<sup>211</sup> and “understanding a symbol’s effect . . . requires consideration of who that citizen is, that citizen’s relationship to the government that adopted the symbol, and the message that the government sought to express through the symbol.”<sup>212</sup> The Establishment Clause tests, and particularly the coercion test in the context of public schools, are readily available and useful tools for assessing such symbols.<sup>213</sup>

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not [a] full member[] of the political community’ because of one’s race is not somehow less injurious than the message that one is an outsider because of one’s religion. For many, race is just as central to self-identity as religion; indeed, race may be more central because it is immutable. Moreover, the scars that remain from our nation’s sad history of excluding racial minorities from full political participation are surely as deep as those that remain from past instances of religious exclusion, and very likely a good deal deeper.” (alteration in original) (emphasis omitted) (footnotes omitted)).

<sup>210</sup> Petition for Writ of Certiorari at 8, *Moore v. Bryant*, 138 S. Ct. 468 (2017) (No. 17-23) [hereinafter Petition for Writ of Certiorari].

<sup>211</sup> Bein, *supra* note 31, at 913.

<sup>212</sup> *Id.* at 916. Bein notes that such a dynamic is at work in the Court’s flag burning cases. *Id.* (“In *Johnson*, the Court recognized context as crucial to the interpretation of communicative acts. The Court went on to reflect that its conclusion that an act of alleged flag desecration in *Spence v. Washington* was protected speech based in large part on the context in which the act occurred . . . . Spence’s act, therefore, can only be fully understood in light of its historical and political context.” (first citing *Texas v. Johnson*, 491 U.S. 397, 405 (1989), and then citing *Spence v. Washington*, 418 U.S. 405, 410 (1974))).

<sup>213</sup> Further, cross-pollination between the two doctrines is not without precedent. Consider the Court’s utilization of the test for discrimination under the Equal Protection Clause in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (“Here, as in equal protection cases, we may determine the city council’s object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object.” (citations omitted)).



*D. Standing and Allen v. Wright*

Finally, courts' reluctance to grant standing to the plaintiffs challenging racially discriminatory government speech can be critiqued in two ways. First, the Supreme Court's holding in *Allen v. Wright* was factually limited and improperly extended by the Fifth Circuit in *Moore* to plaintiffs who allege individual and particularized discrimination based on the government's speech. Second, as explained above, the use of Establishment Clause tests is a more effective way to evaluate Equal Protection Clause challenges to racially discriminatory government speech, and its application conveys standing to plaintiffs like Carlos Moore.

In *Moore*, the court held that *Allen v. Wright* and "its progeny make clear that [Establishment Clause-type] injuries are not a basis for standing under the Equal Protection Clause—this is, exposure to a discriminatory message, without a corresponding denial of equal treatment, is insufficient to plead injury in an equal protection case."<sup>214</sup> However, the Fifth Circuit opinion stretches the *Allen* holding in a way that is neither necessary nor desirable. In *Allen*, the plaintiffs claimed, inter alia, that they were harmed directly by "the mere fact of Government financial aid to discriminatory private schools,"<sup>215</sup> which the plaintiffs never attended nor sought to attend.<sup>216</sup> The case before the *Allen* court did not concern government speech, and yet the Fifth Circuit "ignored the principle articulated in *Allen* that every standing inquiry must turn on the 'particular claims' articulated by the 'particular plaintiff.'"<sup>217</sup> Accordingly, the Fifth Circuit should have considered the particularity with which Moore articulated his claims of harm prior to dismissing the case for standing under *Allen*.

The Fifth Circuit's opinion also stands in contradiction to the Supreme Court's more recent analysis of government speech in *Pleasant Grove City, Utah v. Summum*, in which the Court recognized that there are constitutional limits to government speech, such as—though not exclusively—the Establishment Clause.<sup>218</sup> In his concurring opinion, Justice Stevens explained that, "even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the

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<sup>214</sup> *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017).

<sup>215</sup> *Allen v. Wright*, 468 U.S. 737, 752 (1984).

<sup>216</sup> *Id.* at 746.

<sup>217</sup> Petition for Writ of Certiorari, *supra* note 210, at 9 (emphasis added) (quoting *Allen*, 468 U.S. at 752).

<sup>218</sup> 555 U.S. 460, 468 (2009).

Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."<sup>219</sup> The Fifth Circuit's stretch of *Allen* to bar Moore's claim also seems to contradict the Court's conception of the spirit of the Equal Protection Clause since the *Slaughterhouse Cases*, which advises against undue formalism<sup>220</sup>: "[I]n any fair and just construction . . . of these amendments, it is necessary to look to the . . . pervading spirit of them all, the evil which they were supposed to remedy . . . as far as constitutional law can accomplish it."<sup>221</sup>

The use of a behavioral or expressive harm analysis with Establishment Clause tests eliminates the standing issue in *Moore v. Bryant*. To be sure, standing is not uncontroversial in the Establishment Clause context.<sup>222</sup> As noted by Professor Norton, the issue has split lower courts: "[S]ome require the plaintiffs to allege that the government's religious speech caused them to alter their behavior, while others instead require the plaintiffs simply to allege direct and unwelcome contact with the government's religious message."<sup>223</sup>

Professor Norton helpfully points out that "these divisions repeat those over whether behavior change or expressive harm is required to violate the Establishment Clause itself,"<sup>224</sup> and I have attempted to unpack the real harms caused by racially discriminatory government speech.<sup>225</sup> And when considering government coercion in discriminatory speech, there are no strong objections to standing. Even those opposed to observer

<sup>219</sup> Id. at 482 (Stevens, J., concurring) (emphasis added); see also Petition for Writ of Certiorari, supra note 210, at 15–16.

<sup>220</sup> Petition for Writ of Certiorari, supra note 210, at 13.

<sup>221</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872).

<sup>222</sup> Justice Gorsuch's concurrence in *American Humanist Association* attacks Establishment Clause standing doctrine. Nos. 17–1717 and 18–18, slip. op. at 1–6 (U.S. June 20, 2019) (Gorsuch, J., concurring in the judgment). He discusses both *Allen v. Wright* and *Moore v. Bryant*, and asks pointedly: "An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks that could be the law?" Id. at 4 (emphasis omitted). Justice Gorsuch and I agree on this point, though we reach opposite conclusions. See also Richard C. Schragger, *Of Crosses and Confederate Monuments: Considering the Constitutional Limits on Majoritarian Control of the Public Square* (forthcoming) (on file with author) (criticizing the Court's attempt to treat religious speech differently from other forms of government speech).

<sup>223</sup> Norton, supra note 117, at 203.

<sup>224</sup> Id. at 204.

<sup>225</sup> See supra Sections II.A–C.

standing acknowledge that public school children compelled to recite prayers certainly do not lack standing.<sup>226</sup>

Ultimately, then, neither standard would be insurmountable in the equal protection context. Most potential plaintiffs, such as Carlos Moore and his daughter, “could show direct and unwelcome contact with the government’s message”<sup>227</sup> and some could even show that the message was coercive and altered their behavior, as discussed in the public-school context below.

### III. WHY PUBLIC SCHOOLS WARRANT A HEAVIER HAND

The use of the coercion analysis in equal protection cases involving racially discriminatory government speech is particularly useful in the context of public schools because impressionable students may be particularly harmed by such speech or vulnerable to be indoctrinated into the racist beliefs promulgated by it.<sup>228</sup> Consider for example, the Court’s analysis of a high school girl’s vulnerability to a school’s prayer practice:

But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi’s prayer. That was the very point of the religious exercise. It is of little comfort to the dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a

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<sup>226</sup> *Am. Humanist*, Nos. 17–1717 and 18–18, slip. op. at 9–10 (Gorsuch, J., concurring in the judgment) (citing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224 n.9 (1963)).

<sup>227</sup> Norton, *supra* note 117, at 205.

<sup>228</sup> See also Riley, *supra* note 165, at 543. Indeed, Riley argues that such actions by public schools place a “badge of slavery” or “badge of inferiority” on students and therefore violate the Thirteenth Amendment. *Id.* at 537–38 (“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. 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.” (footnote omitted)).

reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.<sup>229</sup>

Such an analysis follows just as well when religious exercises are replaced with Confederate and Rebel mascots in public schools. If a dissenter of high school age wishes to play a particular sport, does she have a real choice in moving to another school district, not taking part in her high school's sports team so as to avoid competing as a Confederate or Rebel, or going along with the school's racially discriminatory practice?<sup>230</sup> The Court's analysis would seem to follow just as clearly here as in the religion context. Indeed, the sociological research cited by the Court makes no specific reference to religious contexts, but discusses adolescent susceptibility to peer pressure generally.<sup>231</sup>

When sufficiently pleaded, the stigmatic harms analyzed under the Establishment Clause are also clearly within the realm of Equal Protection Clause doctrine. As stated previously, the Court recognized in *Brown v. Board of Education* a concern for the emotional well-being of African-American children in public schools.<sup>232</sup> Prior to the case, separate schools were legally considered to be equal treatment and, therefore, not violative of the Equal Protection Clause. In extending the reach of *Sweatt v. Painter*,<sup>233</sup> which concerned the integration of the law school at the

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<sup>229</sup> *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

<sup>230</sup> See, e.g., the considerations of parents of color at a hypothetical Robert E. Lee High School, who explain the emotional burden placed on them and their children by competing for the school, but also noted importance of sports and school engagement to the college application process. Rachel A. Levy et al., What's in a Name? The Confluence of Confederate Symbolism and the Disparate Experiences of African American Students in a Central Virginia High School, 20 *J. Cases Educ. Leadership* 105, 112 (2017) ("How do you think it makes us feel when African American students—our children—are forced to wear sports uniforms with the word 'Rebels' across their chests? We are reminded of the inhumanity of slavery every time we see that name on the building or hear or read the name of the mascots announced at sports games and in our newspapers. Extracurricular activities such as sports are important to colleges. Our children are forced to choose between representing the enslavers of their ancestors or risk their competitive edge on their college applications if they don't.").

<sup>231</sup> *Lee*, 505 U.S. at 593–94 (first citing *Clay v. Brittain*, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 *Am. Soc. Rev.* 385 (1963); then citing Donna Rae Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 *J. Youth & Adolescence* 451 (1985); and then citing B. Bradford Brown et al., *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 *Developmental Psychol.* 521 (1986)).

<sup>232</sup> 347 U.S. 483, 494 (1954).

<sup>233</sup> 339 U.S. 629, 634 (1950) (finding that a segregated law school for black students could not provide equal education opportunities, given "those qualities which are incapable of objective measurement but which make for greatness in a law school").

University of Texas in Austin, the Court focused on *intangible* harms suffered, in particular, by children:

Such considerations apply with *added force* to children in grade and high schools. To separate them 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.<sup>234</sup>

The Court focused on a finding in the Kansas case on appeal before the court, in which the lower court found that “the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”<sup>235</sup> Since feelings of inferiority affect a child’s motivation to learn, “[s]egregation with the sanction of law . . . has a tendency to [delay] 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.”<sup>236</sup>

The same arguments can be made against racially discriminatory government speech in public schools.<sup>237</sup> Professor Helen Norton’s analysis of behavioral harms caused by racially discriminatory government speech specifically discusses the potential impacts of “government’s monopolistic speech to a captive and vulnerable audience,” like school-age children.<sup>238</sup> Professor Norton argues that in such contexts where a captive audience of young people may not be free to avoid or resist racially discriminatory government speech, “we might understand the government’s hateful speech as creating classifications with constitutionally

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<sup>234</sup> *Brown*, 347 U.S. at 494 (emphasis added).

<sup>235</sup> *Id.* (citation omitted).

<sup>236</sup> *Id.*

<sup>237</sup> See, e.g., Petition for Writ of Certiorari, supra note 210, at 14 (“But in *Brown v. Board of Education* this Court held that the assumption of equal ‘treatment’ in terms of ‘tangible’ elements of public education did not bar an Equal Protection challenge where there was ‘differential messaging.’ It was the state’s insidious message to African-American schoolchildren of their inferiority—not differential ‘treatment’—which was the gravamen of the Equal Protection violation in *Brown*. . . . The [Fifth Circuit’s holding in *Moore*], in immunizing disparate and demeaning ‘messaging’ from Equal Protection scrutiny, cannot be reconciled with *Brown*.” (citation omitted)).

<sup>238</sup> Norton, supra note 117, at 177 (citing Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. Rev. 939, 940–41 (2009) (suggesting “a constitutional right against government-compelled listening, especially in contexts that raise captive audience concerns like state-mandated abortion counseling or diversity training”)).

cognizable effects because of the behavioral harm it inflicts by requiring students to endure such harassment.”<sup>239</sup>

Indeed, federal courts have already curtailed the use of Confederate symbols in public schools in two ways: first in upholding school districts’ policies of banning Confederate apparel worn by students in the face of First Amendment challenges, and second in actually condemning school’s usage of the Confederate flag itself on school grounds. In *Smith v. St. Tammany Parish School Board*, the district court held that “[t]he retention of Confederate flags in a unitary school system is no way to eliminate racial discrimination ‘root and branch’ from the system” and, thus, “[t]he Confederate battle flags must be removed from all schools . . . .”<sup>240</sup> This decision was upheld by the Fifth Circuit.<sup>241</sup> Indeed, the Fifth Circuit reached a similar holding in *Augustus v. School Board*<sup>242</sup> four years later. The lower court and Fifth Circuit court recognized that “most white students identified the symbols only with Escambia High, and not with anti-black sentiments, and that removal of the symbols might not eliminate racial tension,” but ultimately concluded that “the continued presence of the symbols would adversely affect the operation of a unitary system . . . by providing a continuing, visual focal point for racial tensions.”<sup>243</sup> Unlike the district court below, however, the Fifth Circuit remanded the case for a modified judgement that would be less restrictive and invasive on the school system’s day-to-day operations, such as only disallowing “misuse of flags and symbols.”<sup>244</sup>

Modern First Amendment challenges to school restrictions on Confederate apparel demonstrate the continued validity of concerns about their disruption and overall detriment in an educational environment. In *Barr v. Lafon*, the Sixth Circuit upheld a county’s prohibition on wearing clothing depicting the Confederate flag, as the school had reasonably forecast

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<sup>239</sup> Id. at 177–78 (citing, e.g., Martin H. Redish & Kevin Finnerty, What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox, 88 Cornell L. Rev. 62, 97–99 (2002) (noting “free speech concerns with respect to government speech in public schools that seeks to indoctrinate ‘a captive audience of undeveloped and impressionable minds’”).

<sup>240</sup> *Smith v. St. Tammany Par. Sch. Bd.*, 316 F. Supp. 1174, 1176–77 (E.D. La. 1970) (emphasis omitted).

<sup>241</sup> *Smith v. St. Tammany Par. Sch. Bd.*, 448 F.2d 414, 414–15 (5th Cir. 1971).

<sup>242</sup> 507 F.2d 152 (5th Cir. 1975).

<sup>243</sup> Id. at 155.

<sup>244</sup> Id. at 158.

that such clothing would disrupt schoolwork and school discipline.<sup>245</sup> Three other circuits have reached similar conclusions.<sup>246</sup>

Within its Establishment Clause doctrine, the Court has recognized that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”<sup>247</sup> There is no reason this concern should evaporate when the governmental action discriminates on the basis of race rather than religion. As Professor Tebbe argues, “[c]onstitutional law presumptively limits all government speech that deploys social meanings in a way that harms full or equal citizenship in a free society.”<sup>248</sup> Additionally, the availability of judicial remedies in this realm is critical given that public schools have, historically, been left in the domain of local communities, “meaning that local values typically dictate their regulation” and, unfortunately, those values are not always in alignment with the values and rights upheld in the Constitution’s Equal Protection Clause.<sup>249</sup>

#### CONCLUSION

In sum, the Fifth Circuit denial of Moore’s standing is troubling given the values of the Equal Protection Clause, the harms caused by racially discriminatory government speech, and the utility of Establishment Clause tests in providing a framework to right these constitutional wrongs. I attempt to demonstrate this using public schools like Lee-Davis High, in which the harmful effects of Confederate symbolism on children mirror the heightened concerns of religious coercion in similar contexts.

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<sup>245</sup> 538 F.3d 554, 577 (6th Cir. 2008).

<sup>246</sup> *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 735–36 (8th Cir. 2009); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 217 (5th Cir. 2009); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 430 (4th Cir. 2013).

<sup>247</sup> *Lee v. Weisman*, 505 U.S. 577, 592 (1992); see also *id.* at 588 (“The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.” (citation omitted)); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (“The various characteristics of the schools make them ‘a powerful vehicle for transmitting the Catholic faith to the next generation.’ This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly.”); *Engel v. Vitale*, 370 U.S. 421, 442 (1962) (Douglas, J., concurring) (“Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given.”).

<sup>248</sup> Tebbe, *supra* note 145, at 710.

<sup>249</sup> Riley, *supra* note 165, at 548.

Lee-Davis High is particularly interesting because of the clarity with which Confederates are memorialized and the history of the naming process, but also because a challenge to the school's name has arisen within the Fourth Circuit,<sup>250</sup> which has yet to consider the question. Some may argue that decisions about monuments, mascots, and other public symbols should be left to the popularly elected legislature, and that disagreements about memorialization can be decided at the ballot box. These views overlook that it is exactly these kinds of majoritarian acts of discrimination that the Equal Protection Clause seeks to remedy.

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<sup>250</sup> Complaint for Declaratory and Injunctive Relief at 1–2, Hanover Cty. Unit of the NAACP v. Hanover Cty., No. 3:19-cv-00599 (Aug. 16, 2019).