They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society - Freedom: Political

Sanford Levinson
THEY WHISPER:* REFLECTIONS ON FLAGS, MONUMENTS, AND STATE HOLIDAYS, AND THE CONSTRUCTION OF SOCIAL MEANING IN A MULTICULTURAL SOCIETY**

SANFORD LEVINSON***

You might ask shockingly: "A flag? What's that? A stick with a rag on it?" No sir, a flag is much more. With a flag you lead men, for a flag, men live and die. In fact, it is the only thing for which they are ready to die in masses, if you train them for it. Believe me, the politics of an entire people... can be manipulated only through the imponderables that float in the air.1

Their monument sticks like a fishbone in the city's throat.2

*I borrow this title from Robert Olen Butler's extraordinarily rich novel of the same name. What are whispering in that novel are the intense memories of past loves and sexual encounters. Only the politically naive can doubt, though, that similarly intense remembrances of times and events past can structure the political life of a culture. We are constituted by the particular whisperings that most hold sway over our psyches.

** I am grateful to Robert Meister and Wendy Brown for their invitation to participate at the Santa Cruz conference at which the original version of this paper was presented. One of the delights of that conference was the fact that my co-panelists were Akhil Reed Amar and James Forman, both of whose work is discussed below.

I have also benefited from the opportunity to present revised versions to a faculty colloquium at the University of Minnesota Law School on Feb. 3, 1995; at Loyola Law School in New Orleans at a colloquium on March 9, 1995. In Minneapolis, Jim Chen offered particularly interesting comments both at the colloquium and in discussion afterward. My visit to New Orleans was immeasurably helped by the kindness of Jim Viator in taking me down to the Liberty Place and Lee monuments discussed in the text and for arranging a dinner with Clancy Dubos, who is wonderfully expert on the contemporary politics surrounding the liberty place monument. I also received very helpful information from Judith K. Schafer, the expert on the history of the Battle of Liberty Place. As has been so often the case, Jack Balkin has offered very helpful advice, as have Doug Laycock, Robert Post, and Fred Schauer. I am grateful to Travis Vickery for research assistance and, especially, to Marlyn Robinson of the Tarlton Law Library at the University of Texas Law School for her immense help in extracting from the information highway the various newspaper accounts cited below. Professor John Paul Jones of the University of Richmond provided invaluable help in regard to the proposed Arthur Ashe monument in Richmond, Virginia.


2. Robert Lowell, For the Union Dead, in For the Union Dead 71 (1965). I owe this reference to Rosa Eberly. The poem was originally published in 1959 under the title Colonel Shaw and the Massachusetts 54th. See The Norton Anthology of Modern Poetry 939 n.4 (Richard Ellman & Robert O'Clair eds., 1973). The monument referred to commemorates Robert Gould Shaw, the (white) commander of the first black regiment organized in a free state, and the members of that regiment. Shaw was, with many of his comrades, killed in the assault they
I. INTRODUCTION

What follows was originally presented as part of a conference on "The Constitution and Survivor Stories" at the University of California at Santa Cruz. The particular panel at which I presented it was entitled "The Culture and Reenactment of Abuse." The conference was co-sponsored by the Getty Museum of Art as part of a series of conferences treating the general subject of culture and censorship. Finally, by happy accident, the conference organizers had invited as well my close friend Akhil Reed Amar, and James Forman, a former student of Amar's at the Yale Law School. I had first met Amar in 1986 on the occasion of his first visit to Austin, Texas, and on a tour of the city I took him to see the extremely impressive Texas state Capitol, an unusually splendid example of the genre, as well as the monument in front of it commemorating the Confederate war dead. We proceeded to stand in front of the monument for some hour-and-a-half discussing (and arguing about) it, and a deep friendship was instantly born.

This concatenation of circumstances—ranging from the titles of the programs to sponsorship to the identity of the other participants—led me to think that I might address some of the issues of cultural formation, and potential censorship, by looking at some of the ways that we as a society integrate the memory of the great American epic: the great war of 1861-65. Not only did one of every fifty Americans die during that struggle; there were also far more millions of survivors who would struggle forever after to establish the meaning of those great events. Did they, for example, signal a "new birth of freedom," as Lincoln so unforgettably suggested in the Gettysburg Address, or, rather, the ruthless suppression of a region's yearning for the freedom of self-determination? Who were the victims—and the victimizers—of the war, who the abusers or the abused? Whose stories have, as an historical matter, been privileged within our cultural narratives, and whose stories ought to be at stage center? Or, perhaps, ought there be multiple stages with contending stories and no resolution, so that, as
with a novel like John Fowle's *The French Lieutenant's Woman*, the reader is presented with alternative endings that one may presumably select according to one's own predilections?

It seems clear, even 130 years after Appomattox, that there is no genuine agreement on the answers to these questions. The meaning of the events of the time—and, even more certainly, of the aftermath—are essentially contested aspects of American culture. One manifestation of this contest concerns the control of what might well be called "sacred space" within the social order. The "space" can be quite tangible, as exemplified by state capital grounds, the National Mall in Washington, or other ground that is treated as "sacred" within the structure of the civil religion that helps to constitute a given social order. Or the space can be more obviously metaphorical, as with the design of flags or the declaration of public holidays.

One of the principal uses of sacred grounds is to serve as a venue for public art, including, of course, monuments to social heroes. Yet it is a (sometimes bitter) truth about life within truly multicultural societies that there is often deep disagreement over the proper use of public space. One aspect of multiculturalism, after all, is precisely that different cultures are likely to have disparate—and even conflicting—notions of who counts as heroes or villains. Consider a recent decision in Connecticut to move "an imposing statue of Capt. John Mason" because of protests by American Indians that, far from being a heroic English Settler, he was in fact better described as one who had massacred the Pequot Indians in 1637. As the writer for *The Hartford Courant* noted, the discussion about the fate of the statue is part not only of "a wider historical debate over whether American history, much of it written decades ago by European descendants, accurately reflected the role of Native Americans," but also a reflection of "the re-emergence of the Pequot tribe as a powerful regional influence" in the Connecticut of 1995. I take it as a given of American society that we are, in significant ways, multicultural, and how one produces unum

4. I certainly claim no originality in my use of this term. See, e.g., Edward T. Linenthal, *Sacred Ground: Americans and Their Battlefields* 3 (1991). "Battlefields [are] prime examples of a sacred patriotic space where memories of the transformative power of war and the sacrificial heroism of the warrior are preserved." *Id.* There is, of course, no reason to limit the notion of "sacred patriotic space" to battlefields, however specially evocative they may be.


6. Edmund Mahony, *Statue of Colonial captain who killed Pequots to be moved,* *The Hartford Courant*, Apr. 29, 1995, at 1. I am grateful to Professor Francis Mootz for bringing this story to my attention.

7. *Id.*
out of the *pluribus* of American society is one of the greatest challenges facing our culture as we move toward the twenty-first century.  

Part II below offers some reflections on the role of public art within the social order, with specific reference to memorialization of the events of 1861-1865. Part III goes on to ask if constitutional analysis, particularly of the Fourteenth Amendment, offers any genuine guidance as to how we ought, as a legal matter, to resolve any of the disputes about the use of sacred public space. My answer is that, by and large, we ought not look to the Constitution for such resolutions. But society does not live by law alone, and Part IV goes on to discuss how we ought to respond to certain complaints even if the law properly does not compel a given resolution.

II. **Public Art and the Constitution of Social Meaning**

Art has many functions, only some of which can be reduced to learning to appreciate standard aesthetic criteria of beauty and form. Art is, among other things, both the terrain of, and often a weapon in, the culture wars that often course through societies. This is, of course, especially true of public art—the art chosen self-consciously by public institutions to symbolize the public order and to inculcate in its viewers appropriate attitudes toward that order. Museum curators may believe themselves devoted to "art for its own sake." I think it is fair to say, however, that this concept makes no sense to anyone concerned with the art that is found in those spaces that are most truly "public" in a political sense, such as the space surrounding capitol buildings, city halls, national cemeteries, and the like. Art within those spaces is always motivated by some instrumental purpose "outside" the domain of pure aesthetics, and one's analysis (or response) to such art will inevitably be influenced by knowledge about its topical subject and the political resonance that surrounds it. One might, I suppose, deny the honorific "art" to such creations, but I am not sure what purpose that denial would serve, especially given that great museums all over the world are filled with objects whose original purpose was to serve political ends and whose formal aesthetic merits are questionable.

Let me offer some general examples of the kind of art I have in mind. The first is suggested by my one visit to Moscow, in 1989 (which seems far more than half-a-decade ago). One of the most enduring memories of that visit is the public statuary, posters, and flags

that almost literally dominated the urban landscape. My family identified the location of our hotel, for example, by reference to a giant statue of Lenin that hovered over the square. Many of the persons I spoke to about the great changes then sweeping what was still called the Soviet Union found it almost impossible to envision that these statues would ever disappear. *That* would signify changes even more portentous than those coursing through Gorbachev’s Soviet Union. Even less, of course, was it imaginable that the flag displaying the hammer-and-sickle would disappear. Almost literally my last memory of the Soviet Union is the statue of Lenin in front of the Finland Station in what was then called Leningrad. Given that Lenin had made his fateful return to Russia in 1917 at that very station, *that* statue in *that* venue generated a special resonance and helped to constitute the psychic reality that was the Union of Soviet Socialist Republics.

Almost all great cities are, to some extent, constituted—and sometimes synecdochically identified⁹—by public monuments. Think only of London and Nelson’s column, and Paris and the Arc de Triomphe; both of these examples, of course, involve the celebration of military triumphs. Nor is the role of public monuments less important in our own country. John Bodnar devotes much of a chapter in his book *Remaking America: Public Memory, Commemoration, and Patriotism in the Twentieth Century* to the 1902 Soldiers and Sailors Monument in Indianapolis that, like Nelson’s column, soars far above a great public square,¹⁰ and Grand Army Plaza, in Brooklyn, continues to impress even the casual driver. Whether or not, as Randolph Bourne once balefully suggested, “War is the health of the State,”¹¹ it is surely the health of the monument industry! Not all grand monuments are necessarily indirect tributes to Mars; consider the way that New York City is importantly defined by the Statue of Liberty (though it is also home to Columbus Circle and Grant’s Tomb).

⁹. Fred Schauer has suggested that one might ask who is doing the identifying. That is, do “natives” identify their own cities with these symbols or only “outsiders”?⁰ ¹⁰. *See John Bodnar, Remaking America: Public Memory, Commemoration, and Patriotism in the Twentieth Century* 79-93 (1992).
An entire book could easily be written on this general subject, but I want to focus on some distinctively American public artifacts within some of our own capital cities. I begin with Richmond, Virginia, and its aptly named Monument Avenue, one of its principal thoroughfares.\(^2\) It gains its name from the fact that over many blocks one will see impressive statues of Confederate leaders, including Jefferson Davis, the President of the Confederate States of America, and three of his most prominent generals, J.E.B. Stuart, Stonewall Jackson, and, of course, Robert E. Lee. A final statue memorializes Matthew Fontaine Maury.\(^3\) It perhaps goes without saying that there is no memorial to Abraham Lincoln or to Ulysses S. Grant on Monument Avenue or, so far as I know, elsewhere in Richmond. Michael Kammen laconically notes that a 1902 effort by some Confederate veterans to erect a memorial to Grant in Richmond foundered after receiving only sixteen dollars!\(^4\) And a 1908 proposal to erect statues of Lincoln in the South evoked this outraged response from President Lyon G. Tyler of William and Mary:

To ask the South to put a monument to Lincoln, who represents Northern invasion of the homes and firesides of the South, would be as absurd as if I were to ask the North to put up a monument to Jefferson Davis .... I do not care to force [Davis's] memory upon a people with whom he is not identified. In the same way, I am sure that the South can never be brought to regard Mr. Lincoln in any other political light than that in which Mr. Davis is regarded by the North—as the champion of a section.\(^5\)

12. On Monument Avenue, see Savage, supra note 2, at 132-33.
13. Commodore Matthew Fontaine Maury, the senior officer of the Confederate Navy. An e-mail message from Professor John Paul Jones described him as follows:

Once a very promising young officer of the United States Navy, he was crippled in a coach accident on the way to assuming his first command. After a lengthy convalescence, he was permitted to return to duties, but only on a limited basis, and refused permission to go again to sea. Instead, he performed duties ashore, eventually establishing from the reports of ships logs and a network of international sea-going pen pals a "data base" of ocean current and prevailing wind information that, after his death, earned him the sobriquet "father of modern oceanography." When the southern states seceded, Maury resigned his commission and went south, assuming command of the fledgling Confederacy's ragtag navy. It was Maury ashore who robbed Peter to pay Paul, manipulating scarce marine stores, insufficient numbers of blue water sailors, and limited batteries of unreliable guns to supply the Confederacy with coastal defense, blockade runners, commerce raiders, and ironclads. His statue sits now on Monument Avenue, with the globe mounted behind his chair, looking southeast to the sea, and to the lower James where the naval engagements associated with the siege of Richmond took place. Whether he sits in perpetual reminder of his disability, or to distinguish him from the rebel army heroes (always heroically astride a horse) and rebel politicians (always standing boldly orating as if on the Senate floor), I don't know.

15. Id. at 127.
It is only fair, I suppose, to note my colleague Scot Powe's surmise that Lee and Davis are unmemorialized in any Northern city, though a monument to Lee was erected at the Gettysburg battlefield in 1917, upon the initial sponsorship of Virginia and Pennsylvania in 1903,16 just as a monument to the Confederate dead had been unveiled at Arlington National Cemetery in 1914.17 However, the Grand Army of the Republic successfully blocked Virginia's attempt to place Lee in the Statuary Hall of the United States Capitol.18

The most notable tribute to Lincoln is that found some 120 miles north of Richmond, in Washington, D.C. There, I think it is fair to say, the Lincoln Memorial is the central temple of the American civil religion, though smaller memorials to the sixteenth President dot especially the Northern and Mid-Western landscape.19 And even Grant's Tomb in New York, however much it now languishes in decrepitude and obscurity, was once a major place of pilgrimage.20

One can, of course, find jointly shared heroes of the two cultures, the most obvious one being George Washington, venerated in Richmond and the city that bears his name alike. Consider, though, the fact that the great obelisk called the Washington Monument is literally surrounded by American flags. It is, altogether clearly, Washington the national liberator, the founding father of a new Union, who is being honored, not Washington the Virginian, as is less unambiguously the case in Richmond, which might well want us to believe that Washington, like Robert E. Lee, would have given priority to his Virginia identity over his national one had the two ever emerged sharply in conflict.

Moving further South, to Columbia and then Montgomery, one could see not only civil statuary reminiscent of Richmond's (though

16. Id. at 115. See generally the invaluable chapter on the Gettysburg battlefield in Linenthal, supra note 4, at 89-126. Linenthal points out that earlier attempts to place Confederate monuments at Gettysburg met with heated opposition. In 1887, for example, "the national encampment of [Grand Army of the Republic] posts voted that no local post should support 'erection of monuments in honor of men who distinguished themselves by their services in the cause of treason and rebellion.'" Id. at 123 n.47. (citing Wallace Evans Davies, Patriotism on Parade: The Story of Veterans' and Hereditary Organizations in America, 1783-1900, at 256 (1955)).

17. See Gaines M. Foster, Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South 1865 to 1913, at 271 n.3 (1987). Apparently, Confederates had been honored in a Chicago monument as early as 1895. See Savage, supra note 2, at 147 n.10.


20. John Tierney notes that Grant's "150-foot-high domed marble hall... was once a tourist attraction more popular than even the Statue of Liberty," though today it "averages fewer than 200 visitors a day." John Tierney, Grant Us Peace, N.Y. Times, May 8, 1995 (Magazine), at 42.
nowhere so grandly displayed as on Monument Avenue), but also, waving over the state capitols (though under the American flag), the battle flag of the Confederate States of America—the "Southern Cross," commonly (though incorrectly, as a matter of historical accuracy) identified as the "stars and bars"—to which South Carolina and Alabama, like Virginia, belonged (or, depending on one's theory, attempted to belong) between 1861-1865. And the state flags of Georgia and Mississippi explicitly incorporate the battle flag of the Confederacy into their current state flags.

There are, of course, many differences among the examples that I offer. Two are especially noteworthy for purposes of this discussion: the destruction that has been visited upon the communist statuary and the elimination of the hammer-and-sickle as the national flag of Russia. Although I have not observed the scene myself, I am under the distinct impression that the statues of Lenin that were at center stage within Moscow and Leningrad are now absent, taken down and, in many cases, destroyed, just as Leningrad as a titular symbol of a particular kind of imagined community is itself no more, having been replaced by a signification of a very different community, St. Petersburg. One of the defining moments of the overthrow of the Soviet empire, signified by the placement of a photograph on page one of our paper of record, the _New York Times_, was the tearing down by a crowd of a monument in front of the K.G.B. headquarters in Moscow to Felix Dzerzhinsky, the founder of the Soviet secret police.

Similar destruction of public statuary has occurred throughout the former Communist empire, as newly empowered anti-communists are eager to efface the landscape of the most visible reminders of the former regimes. Like the Berlin Wall, the marble that helped to signify the

21. The "Stars and Bars" properly refer to the "official" flag of the Confederate States of America, which consisted of three stripes—two red separated by a white—and a circle of seven stars in the upper corner. In addition to the "Battle Flag," also commonly used at the time was the "White Man's Flag" that consisted of an entirely white field and the Southern Cross in the upper corner. See Boleslaw & Marie-Louise D'Orange Mastai, _The Stars and the Stripes: The American Flag as Art and as History from the Birth of the Republic to the Present_ 137 (1973). See generally Devereaux D. Cannon, Jr., _The Flags of the Confederacy: An Illustrated History_ (1988).


Communist regime has been torn down. Though one presumes that few of the Easterners have read modern French philosophers, they are, nonetheless, intuitive masters of the semiotics of public space and want to erase, in the most literal sense, the particular kind of instantiation of the former regimes represented by heroic monuments. Even the "former Communists" increasingly being returned to office in Eastern Europe will, I am confident, refrain from rebuilding the tributes to Soviet liberators or other tribunes of Marxist-Leninism.

That is most definitely not the case with the statues on Monument Avenue (and elsewhere throughout the South), which remain for all to see (and learn from). Since 1884 visitors to New Orleans have been able to see a statue of Robert E. Lee rising high above the landscape, and even the buildings of modern New Orleans have not entirely diminished its power at the center of Lee Circle.

Monument commemorating the Battle of Liberty Place.

25. Gaines Foster notes that 15,000 people attended the ceremonies; oddly enough, the date chosen for the public unveiling was February 22, which is, of course, Washington's birthday. A thunderstorm that disrupted the ceremonies was deemed to be "the salvos of Heaven's Artillery" honoring Lee rather than a sign of divine displeasure. See Foster, supra note 17, at 91.
Even more startling to a contemporary consciousness is another New Orleans monument, this one erected in 1891 commemorating the so-called Battle of Liberty Place, an 1874 encounter in downtown New Orleans between members of the aptly named White League "against Republicans, black and white, who controlled the city following the Civil War." A plaque added to the monument in 1932 noted that "... the national election in November, 1876 recognized white supremacy and gave us our state." Although at least two African-American mayors of New Orleans have tried to remove this monument from civic space, they have been, to make a very bad pun, monumentally unsuccessful, in part, ironically enough, because it is apparently covered by federal historic preservation laws. However, the monument has been moved to a quite isolated space between a parking lot and railroad tracks. A visitor must consciously seek out the monument, which is currently overshadowed by construction projects. More importantly, the plaque and message of "white supremacy" have been removed, to be replaced with a new one "IN HONOR OF THOSE AMERICANS ON BOTH SIDES OF THE CONFLICT WHO DIED IN THE BATTLE OF LIBERTY PLACE. A CONFLICT OF THE PAST THAT SHOULD TEACH US LESSONS FOR THE FUTURE." No effort is made, however, to inform the uneducated viewer what precisely the conflict was about, why one would wish to honor the Americans on each side, and what precise lessons the City of New Orleans believes should be learned. Indeed, one might well ask if the new message

26. See Christina Cheakalos, Monumental Debate Divides New Orleans, ATLANTA CONST., Dec. 15, 1992, at A3. The White League is briefly described in John S. Kendall, 7 Dictionary of Am. Hist. 292 (1976). See generally Judith K. Schafer, The Battle of Liberty Place, 5 LA. Cultural Vistas 8, 8-17 (1994). In an e-mail message, Schafer noted that of the eleven members of the Metropolitan Police who died fighting the White League, seven were white, and none of these was native born. All were either born in Ireland or Germany, except for one Russian. Interestingly enough, the local perception in the New Orleans African-American community is apparently that everyone killed by the White League in the battle was black, though this was obviously not the case.


28. See Shubert v. Kemp, No. 91-4446, 1993 U.S. Dist. LEXIS 4841 (E.D. La. Apr. 8, 1993). The opinion dealt with the award of attorneys' fees in litigation that eventuated in a consent order on September 22, 1992, "ordering the re-erection of the Monument." Id. at *6. This opinion notes that "the federal government, through the Advisory Council on Historic Preservation, repeatedly attempted to coax the City into action, but has no legal duty or authority to force a result." Id. at *5. The consent agreement was entered into between the City and the State Historic Preservation Officer, though it was concurred in by the Advisory Council. Id. at *6 n.1.

29. I was reminded of this new inscription when reading the conclusion to John Lahr's memoir of the late comedian Peter Cook: "As one of [Cook's] characters, the restauranteur Sir Arthur Strebe-Greebling, owner of the Frog and Peach puts it, 'Oh yes, I've learned from my mistakes and I'm sure I could repeat them exactly.'" John Lahr, Bedazzled, THE NEW YORKER,
"honor[ing] those Americans on both sides of the conflict" is really much better than the old offensive message? If contemporary New Orleans really does wish to honor the denizens of the White League, isn’t that the logical equivalent of honoring “white supremacy”?

Similarly, the Confederate flag continues to fly over some official buildings after the hammer-and-sickle has become but a memory (or, at least, been reduced to an object of flag-waving protest by private individuals dismayed by the seachange that has occurred since 1991). The flag in particular continues to be a volatile political issue in contemporary American politics, as illustrated by Oliver North’s vehement support of its display during his unsuccessful race in 1994 for the United States Senate. Georgia’s popular Governor Zell Miller was unable to prevail in his efforts to change the flag back to the pre-1956 Georgia emblem, which, ironically, is different from the current flag only insofar as the earlier emblem was apparently modeled after the official Confederate flag—the historic “Stars and Bars”—rather than the crossed lines of stars of the battle flag. And the newly elected Republican Attorney General of South Carolina reversed the policy of his Democratic predecessor by announcing that he would oppose a lawsuit challenging the right of the state to continue flying the Confederate battle flag atop the South Carolina Statehouse.

What ought we think of these comparisons between, on the one hand, symbols of the Old Confederacy or, as in New Orleans, of the revolt against the Reconstruction of the society that was ostensibly

Jan. 23, 1995, at 85. A more serious citation is Edward T. Linenthal, Preserving Memory: The Struggle to Create America’s Holocaust Museum 217 (1995), which notes the fallacy of believing “that memory itself is instructive and redemptive.” The Holocaust Museum in Washington was dedicated precisely at the instant that American policy-makers were choosing basically to ignore Serbian genocide in Bosnia. As Linenthal writes, “Holocaust memory was to be taken seriously when it was convenient to do so, and ignored when other priorities intruded.” Id. at 263. Linenthal’s book is essential reading for anyone interested in the themes of the present article.

31. See supra note 21 and accompanying text.
32. See Georgia Flag’s Rebel Emblem, supra note 22. “Black Georgians are, in essence, supporting—and the Sons of the Confederacy resisting—a return to the true flag of the Confederate states.” Id.
33. New Position on Rebel Flag in S. Carolina, N.Y. TIMES, Feb. 19, 1995 (N.Y. City edition), at 34 [hereinafter New Position on Rebel Flag in S. Carolina]. The story notes that South Carolina is the only state that continues to fly the battle flag above its capitol. A suit has been brought by various “businesses and civic leaders, including Mayor Bob Coble of Columbia, who say the flag hurts the city and state’s economic growth and is an inappropriate reminder of slavery.” Id. The former Attorney General, Travis Medlock, “ruled in October that there was no legal authority to fly the flag” and thus refused to defend the lawsuit. Id. It was this policy that the new Attorney General, Charlie Condon, reversed.
defeated in 1865 and, on the other hand, those symbols of the now defunct Communist hegemony? Does it count against Eastern Euro-
pean and Russian officialdom that they have destroyed many public artifacts and no longer display their former flags? Or does it count against Southern Americans that they have not?

Austin monument commemorating the Confederate dead.

Although I will certainly return to consideration of the Confederate flag, I want first to focus very closely on one particular piece of public sculpture that can, not at all coincidentally, be found in front of the Texas state capitol in what is now my home town of Austin. Indeed, it is literally the first thing the visitor entering the capitol grounds will see, even before the monument celebrating the defenders of the Alamo. It is a monument, about twenty feet high, erected in 1903 by their “surviving comrades” in the John B. Hood Camp, United Confederate Veterans, commemorating those who died fighting for the Confederacy between 1861-1865. On a pedestal stand seven-foot statues “representing the four branches of Confederate service—an artilleryman, a cavalryman, an infantryman, and a sailor. In the center of the monument and rising to a still greater height” is a
seven-and-one-half foot statue of Jefferson Davis. According to the contemporary state librarian who compiled a breathless history of the monument, the viewer "will instinctively look up at the commanding, heroic form above him, a personification of the Genius of the Confederacy, its faith, its intelligence, its enlightened appreciation and love of liberty, its lofty purpose, its dauntless courage, and its inflexible iron will." On the side of the top pedestal is a listing of each of the Confederate States (plus, counter-factually Missouri and Kentucky). Lower down, on three of the monument's sides, are carved the names of every battle fought during the four-year long carnage. On the fourth side appears the official "message" of the monument:

DIED FOR STATE RIGHTS GUARANTEED UNDER THE CONSTITUTION

THE PEOPLE OF THE SOUTH, ANIMATED BY THE SPIRIT OF 1776, TO PRESERVE THEIR RIGHTS, WITHDREW FROM THE FEDERAL COMPACT IN 1861. THE NORTH RESORTED TO COERCION. THE SOUTH, AGAINST OVERWHELMING NUMBERS AND RESOURCES, FOUGHT UNTIL EXHAUSTED.  

34. History and Description of the Monument in the Capitol Grounds to the Confederate Dead, in 11 YEAR BOOK FOR TEXAS 80-82 (C.E. Raines ed., 1903). The monument itself gives the date of 1901, though it appears not to have been completed until 1903, when it was formally unveiled and dedicated on April 16. The spirit of the dedication is suggested by Raines's description of the speech of former Governor Lubbock, who had been an aide to Davis and who was "delighted to see the grand work of perpetuating the Confederacy.... He declared one thing which grates on his ear is to hear someone say that 'we fought for what we considered was right.' We fought for what we 'know was right,' declared the speaker." Id. at 85. Governor Lanham also spoke, including "point[ing] directly at the statue of President Davis, and eloquently exclaim[ing], 'I salute thee!'" and then saluting the statues of the four soldiers. According to the Austin Daily Statesman, this "brought forth a mighty shout of applause from those present," as did the Governor's declaration "that, if he ever heard any one abusing President Davis or the noble cause he championed, he would first remonstrate with him, and if that did not suffice, he would feel sorely tempted to strike the offenders with a shillalah." Id.

Davis reappears in Austin on the campus of the University of Texas, the result of a $250,000 bequest left to the University by Major George W. Littlefield for the purpose of constructing a suitable Confederate Memorial. The memorial has been described as "occup[y]ing the most conspicuous place on the campus. ... On the two sides of this little plaza are impressive bronze statues of Jefferson Davis, Robert E. Lee, Albert Sidney Johnston, John H. Regan, James Hogg and Woodrow Wilson. At the foot of the plaza and between it and the street is a magnificent bronze fountain group upon which play colored lights at night." Confederate Memorial on Campus of University of Texas, UNITED DAUGHTERS CONFEDERACY MAG., Sept. 1946, at 18. (I am extremely grateful to Samy Khalil, whose diligent research assistance uncovered the materials relating to the capitol monument and Littlefield plaza.).

It is, incidentally, not at all coincidental that a current issue at the University is the putting up (and paying for) of a statue of Martin Luther King. See Eliza Selig, MLK Statue Fee Clears Legislature, DAILY TEXAN, June 7, 1995, at 1. Discussion of the campus of a state university as a "sacred space" must await another article.

I have been fascinated by the monument ever since discovering it shortly after moving to Austin. I include its "message" in the casebook, *Processes of Constitutional Decisionmaking*, that I edit with Paul Brest, and I usually devote a class to assessing its constitutional interpretation. As earlier noted, my friendship with Akhil Amar began in argument about the plausibility of its statement as an understanding of the Constitution. *Can* one describe "the people of the South" as simply engaging in their right of self-determination, as set out in the Declaration of Independence and, perhaps, implicitly guaranteed by the Tenth Amendment to the United States Constitution as a reserved right to revert to their sovereign power to secede from the United States and forge a new path in a different political setting? *Is* it, concomitantly, truly thinkable that one might describe Abraham Lincoln, the cult figure of our national civil religion, as an illegitimate "coercer," perhaps similar to George III (not to mention more ominous twentieth-century analogues of fervent nationalists who have refused to let dissident, regionally-organized, minorities go in peace)?
I certainly do not want to argue that the monument's view is the only legitimate view, but I had no hesitation in 1986, and little more now, in defending the legitimacy of secession from the perspective of normative political theory and the plausibility of a view of the Constitution, obviously contrary to Lincoln's own, that legitimizes secession even within the United States, at least if carried out with full republican deliberation. So we debated, back and forth, the persuasiveness of Lincoln's (and Amar's) rejection of the constitutional legitimacy of secession and the merits of John Marshall's invocation of national popular sovereignty in *McCulloch v. Maryland* as against my invocation of a more fragmented (and fragmentable) national identity and polity.

It is, of course, impossible to maintain a stance of academic abstraction in discussing the legitimacy of the secessionist movements of 1860-1861. One reason, obviously, is that we are talking about our very own country, whose identity has been profoundly shaped precisely by the national decision, purchased by the blood of one of every fifty Americans, to reject the possibility of secession. It is a bit like trying to imagine wishing that our own parents had never met, perhaps because they were in fact unsuited to each other. The one thing we know for sure about any such possibility, whatever consequences it might have had for our parents, is that we would not exist with the specific identity that constitutes whatever individuality we possess. Similarly, it is, I think, truly impossible to imagine what our political identity would be like had the separations of 1861 stuck, and for those of us who take politics—and identity—seriously, that is an important consideration.

But these musings are much too abstract, an almost obvious attempt to evade what for most of us is the overwhelming reality of the events of 1861-1865. Along with discussion of the high theory of sovereignty, popular and otherwise, Amar and I necessarily got into a discussion of the possibility of understanding the arguments of 1861 without reference to the reality of the chattel slavery that certainly exemplified the greatest difference between North and South and explained much of the impetus for national dissolution. The reality of slavery provides, I believe, the only justification for the suppression of the Southern effort to gain political independence.

In avoiding the issue of slavery, those who designed the Texas statue and its inscription were conforming to what might be termed

the "official" line of Confederate memorializers, who insisted that the Southern cause had been just and legal, with "Confederate armies [having] fought not for slavery but for constitutional rights, the principle of secession, and the preservation of their homeland."37 The Texans were also altogether typical in ascribing the loss to the result of the "overwhelming numbers" of Northern troops rather than, for example, to Confederate shortcomings. The spirit of the statue is aptly captured in the early twentieth-century remark of an ex-Confederate soldier upon the occasion of a reunion at Gettysburg that was addressed by the first Southern president elected since 1848, Woodrow Wilson. Southern veterans presented "no apology, no explanation, no expression of regret, no humiliation, no retraction, no recanting."38

Whatever one's views on the theoretical merits of secession and self-determination, they must always be tempered by recognition of the particular context within which a secessionist argument is being made, whether in South Carolina in 1861 or in Bosnia in 1995. And that context, so far as the United States is concerned, includes, perhaps overwhelmingly, slavery and state political systems devoted to maintaining what was euphemistically called our "peculiar institution." Thus one must always ask whether a monument to the Confederate dead—and the articulation of secessionist constitutional theory—is equivalent to memorializing those who fought to maintain chattel slavery and the abuse of African Americans. And, if so, does this mean, like medieval suicides, that those who died in that fight should be denied the consecrated burial that is symbolized by the monument?

Consider the German cemetery at Bitburg, with its graves and, more importantly, memorial tombstones to members of the SS. For many of us, the lowest symbolic point of the Reagan Presidency was his capitulation to Chancellor Kohl’s desire that the President of the United States in effect offer these Nazi war criminals the symbolic absolution of his charismatic presence at their gravesites. Ian Buruma, in his recent book *Wages of Guilt*, about the German and Japanese cultural responses to World War II, notes that there were, after World War I, many *Denkmale*, war memorials celebrating the sacrifices of German soldiers. Unsurprisingly, this did not occur following 1945; instead one can apparently see *Mahnmale*, memorials to the victims of Hitlerian Germany. "The warning monuments and memorial places

37. Foster, supra note 17, at 125.
38. Id. at 194.
(Gedenkstätte) are mostly products of the reaction, which set in during the 1960s, propelled by the postwar generation, as eager to warn and remember as their parents were to forget." 39 Bitburg was a manifestation, if not of a desire to forget, at least of a desire in some ways to "normalize" the experience of fighting on behalf of the German state between 1939-1945. 40

To the extent that we credit even the slightest equivalence in regard to these comparisons, then what ought we do today in regard to statues like the one in Austin, not to mention those that line Monument Avenue or the streets of New Orleans? Do the newly empowered citizens of Moscow and St. Petersburg provide role models of how to respond to offensive public sculpture that owes its genesis to the attempt of a specific socio-political regime to reinforce its dominion and promote a particular kind of political consciousness? After all, as Kirk Savage reminds us, "[p]ublic monuments do not arise as if by natural law to celebrate the deserving; they are built by people with sufficient power to marshal (or impose) public consent for their erection." 41 A "public monument represents a kind of collective recognition—in short, legitimacy—for the memory deposited there." 42

Ought at least some sculpture, whatever its aesthetic merits or utility as an example of how material artifacts are used to constitute a culture, properly face destruction as the penalty for its association with a

---

39. IAN BURUMA, THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN 204 (1994). It may not be irrelevant to note as well that "Germans were forbidden to build military cemeteries until the 1950s; and many of their old memorials were pulled down by the occupying allies, who preferred that Germans forget the Prussian tradition." John Gillis, MEMORY AND IDENTITY: THE HISTORY OF A RELATIONSHIP, IN COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY 12 (1994).

40. The controversy has recently resurfaced following a speech in Berlin by French President François Mitterrand on the occasion of the 50th anniversary of the end of World War II. According to a reporter, Mr. Mitterrand startled some of his listeners by appearing to administer an act of absolution to the Germans. Said Mitterrand:

I have not come to underline the defeat [of Germany] because I knew how much strength there was in the German people, its qualities, its courage, never mind what uniform it wore or even what motivated the soldiers who were about to die in such great numbers. They were courageous. They were prepared to die. For a bad cause, but what they did had nothing to do with that. They loved their country.

Craig R. Whitney, MITTERRAND CRITICIZED FOR WORDS ON GERMAN WAR DEAD, N.Y. TIMES, May 12, 1995, at A8. One might well hear echoes in Mitterrand of Justice Holmes's (in)famous speech "The Soldier's Faith," with its statement that "the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he has no notion, under tactics of which he does not see the use." RICHARD A. POSNER, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 89 (1992). Whether we have a common cultural definition of what is "adorable" is, basically, the topic of this article.

41. Savage, supra note 2, at 135.

42. Id. at 135-36.
hated political regime? Or is this just the kind of destruction of historical memory that bespeaks the totalitarian impulse and should be resisted? Perhaps the solution is to cart such statuary off the public square and remove it to institutions like the Getty Museum, where it can be placed in a properly distanced historicist and aesthetic perspective that removes at least some of the sting of seeing it occupying public space. But this may simply place the onus on museum curators to defend the public display of hateful monumental art.

And what about the flag? Does anyone believe that the hammer-and-sickle ought to have been maintained as the national symbol of Russia, or that the swastika should have been kept as a part of the German flag? Does anyone find morally innocent the waving of the swastika by contemporary skinheads in Germany or other countries? Does our reaction to these flags suggest anything at all in regard to the Confederate flag and its distinctive set of associations?

A new book, The Southern Tradition: The Achievement and Limitations of an American Conservatism, recently published by one of our leading analysts of American slavery and of Southern culture, Eugene D. Genovese, underscores exactly how complicated such questions are. Anyone who knows his work knows that he is not only a brilliant historian, but also a formidable dialectician. Genovese confesses at the outset that part of his interest in the specifically conservative aspects of the Southern tradition comes from his dismay at the "'modernization' that is transforming the South" in which he now lives.43 While recognizing the beneficial aspects of such changes, including "long overdue if incomplete justice for black people," he is also concerned at the "price" accompanying modernization, which, he says, "includes a neglect of, or contempt for, the history of southern whites, without which some of the more distinct and noble features of American national life must remain incomprehensible."44 Indeed, argues Genovese, "The northern victory in 1865 silenced a discretely southern interpretation of American history and national identity, and it promoted a contemptuous dismissal of all things southern as nasty, racist, immoral, and intellectually inferior."45 The language shortly escalates into the assertion that "[w]e are witnessing" nothing less than "a cultural and political atrocity—an increasingly successful campaign by the media and an academic elite to strip young white southerners,

44. Id.
45. Id.
and arguably black southerners as well, of their heritage, and therefore, their identity." In a brilliant rhetorical move, Genovese completes his preface by quoting from W.E.B. DuBois's essay on Atlanta, in which that most radical of all African-American historians, who has introduced all of us to the multiple consciousnesses contained within the deceptive term "American," nonetheless reminded his readers "that with all the Bad that fell" with the defeat of the Old South, "something was vanquished that deserved to live. . . ." 47

Given a cultural atmosphere where many worry about the "silencing" of those who have been the victims of various political movements, it is especially worth noting Genovese's appropriation of the language of silencing and his lament for the concomitant negation of the political and cultural identities of some of our fellow Americans. Instead, he calls for the recognition, in the fullest Hegelian sense, of the dignity of those who have been silenced and who should, therefore, be allowed to speak their own tongue, however potentially grating the sounds. Can one take such claims seriously in the context of those who speak on behalf of the white survivors of the great war of 1861-1865 and of the culture formed in part to limit the consequences of the defeat at Appomattox?

Ultimately we must ask if it is plausible to label everyone unequivocally either a "survivor" or a "victimizer," 48 with presumably appropriate responses to their respective stories to follow. Perhaps we must accept the overwhelming likelihood that these statuses are mixed in the actual complexity of social life, with all of the difficulties accompanying any such mixtures.

III. The Fourteenth Amendment, State Speech, and Public Symbols

There are a number of ways to approach such questions. One of them, of obvious import to those of us associated with the law, is through the pathways provided by legal analysis insofar as display of the Confederate flag or erection of Confederate monuments may raise explicitly legal questions to which disciplined legal analysis can provide persuasive answers.

46. Id. at xii.
47. Id. at xiii (quoting W.E.B. Du Bois, Of the Wings of Atalanta, in The Souls of Black Folk).
One legal question is perhaps obvious: Is the display of the monument or the flag, at least by a state, a violation of the United States Constitution? Could a resident of Texas make a non-frivolous claim that the presence of the statue in front of the Capitol is not only personally offensive, which might well be the case, but also a violation of his or her constitutional rights? Could a similar claim be asserted by a resident of Georgia in regard to the Georgia state flag, which was redesigned by the Georgia Legislature only in 1956, in order, according to one reporter, "to thumb its nose at federal court desegregation rulings" such as Brown v. Board of Education.\(^4\) It therefore incorporated the Confederate battle flag into the flag so that it covers roughly two-thirds the area of the flag, while the state seal of Georgia covers the remaining third.\(^5\) What arguments for their illegality, at least as explicitly public symbols, might be made? More importantly, should they be accepted?

It must be noted that, whatever else may be said about flags atop state capitols (and about most public art), there is no need to dispute their being an action of the state and thus subject to constitutional constraint. Many of the debates about the Confederate flag in particular have concerned its display by private persons and their rights under the First Amendment to be protected against state interference in the expression of their views, however obnoxious the form of that expression might be.\(^5\) I confess my own sympathy for such protection, largely because I do not trust the state to make refined judgments as to whose symbols are sufficiently obnoxious to merit criminal punishment. But public entities have no rights to free speech as such, and even less are we talking of "criminalizing" the speech of the reified State.

A moment's reflection should make clear that certain speech that is close to absolutely protected when uttered by ordinary individuals—e.g., "You ought to accept Jesus Christ as your Lord and Savior"—is clearly unconstitutional when presented by state officials as official public policy. But why would that expression be unconstitutional? The answer is almost certainly not because it gives offense to non-Christians or exemplifies a Christian hegemony that has often had the most deleterious consequences for non-Christians, however

\(^{49}\) Georgia Flag's Rebel Emblem, supra note 22.

\(^{50}\) See Curtis Wilkie, Rebel Flag Stirs Passion in the South, BOSTON GLOBE, Mar. 7, 1994, at 3.

important those facts are as a practical matter. Rather, the invalidity, at least under conventional legal analysis, is the consequence of the meaning given a patch of constitutional text that explicitly bans the establishment of religion, which is correctly interpreted to mean, among other things, the "endorsement" of specific theological views.

The question is whether the Confederate flag should be included within the ban placed on certain kinds of speech. Does the Fourteenth Amendment, like the Establishment Clause of the First, limit the state's freedom to assert whatever it wishes to?

The leading analysis of such questions was presented by James Forman, Jr., who argues that at least Alabama was violating the Constitution in flying the Confederate flag on its state capitol (which it did until Governor Jim Folsom banned it on April 29, 1993). Forman takes off from a 1990 case, *NAACP v. Hunt*, which involved a challenge to the flying of the Confederate flag atop the Alabama capitol in Montgomery, where it flew immediately below the United States and Alabama state flags. The flag was first placed there in 1961, during a commemoration of the centennial of the Civil War. Apparently it was taken down shortly thereafter, for the opinion informs us that "[t]he flag was raised again on the morning of April 25, 1963, the day that United States Attorney General Robert F. Kennedy travelled to Montgomery to discuss with then-Governor George Wallace the governor's announced intention to block the admission of the first black students to the University of Alabama." It flew for almost thirty years, until Governor Folsom ordered its removal. Interestingly enough, Folsom apparently "ordered [that] the Confederate battle flag be flown across the street from the Capitol at the First White House of the Confederacy," so it was not truly removed from public view even though it lost the special imprimatur provided by its place above the capitol dome.

Litigation challenging the flag had been undertaken as far back as 1975, and a second suit was filed in 1988. The NAACP's effort to use the Constitution to force Alabama to lower the Confederate flag gained no judicial support. "It is unfortunate," said the Eleventh

53. 891 F.2d 1555 (11th Cir. 1990).
54. Id. at 1558.
55. *Confederate Flag Banned in Alabama*, supra note 52, at 3.
56. Though Alabama state circuit judge William Gordon ruled on January 4, 1993, that flying the flag violated an 1895 law allowing only the U.S. and state flags to be flown over the
Circuit Court of Appeals, "that the State of Alabama chooses to utilize its property in a manner that offends a large proportion of its population, but that is a political matter which is not within our province to decide." Apparently, appeal lies to the voting box and not the judiciary. It is worth noting that the author of this opinion was Judge Frank Johnson, who as a district judge in Alabama was often a lonely beacon of commitment to civil rights. From the perspective of most white Alabamans, Judge Johnson was always ready to invalidate majority decisions whenever they conflicted with constitutional values of racial equality. His refusal to find that such values required lowering the Confederate flag, even as he freely admitted that many Alabamans were "offended" by its display over the capitol, thus has a special resonance.

James Forman disagrees with the court: He argues that "removing the Confederate flag is constitutionally required." For him there is nothing innocent about the flag as a political symbol, for it is the semiotic signifier of an entire system of racial oppression:

The flag’s force as a symbol stems from its history. The flag was initially designed as a rallying symbol for Confederate troops heading into battle. The rebels were fighting for territory, for economic control, and—it goes without saying—for slavery. . . . The Confederate flag glorifies and memorializes this brutal regime [of chattel slavery].

But the Confederate flag symbolizes more than the Civil War and the slavery era. It also stands for a history of resistance to change in the twentieth century . . . [T]he flag has been adopted knowingly and consciously by government officials seeking to assert their commitment to black subordination.

Thus when a state government chooses to fly the flag above its capitol’s dome it "sends a message . . . glorifying and memorializing slavery, Jim Crow, and subsequent resistance to change." Not only does the Confederate flag not serve as a symbol of "one [united] nation," as does, presumably, the American flag; it more properly is a marker for a herrenvolk democracy in which the members of one spe-

capitol dome, then-Governor Guy Hunt announced that he would appeal the decision. See Judge Bars Rebel Flag From Alabama Capitol, S.F. CHRON., Jan. 5, 1993, at A6. Upon Jim Folsom’s becoming Governor later that spring, he dropped the appeal and banned the flag. See Confederate Flag Banned in Alabama, supra note 52 at 3.

57. Hunt, 891 F.2d at 1566.
58. Forman, supra note 52, at 506.
59. Id. at 513-14.
60. Id. at 514.
61. Though consider the reactions of an American Indian to the flag. Would we necessarily expect him to accept it as his flag?
cific nation, Southern whites, exercised hegemony over another, Southern African Americans. Forman quotes a telling comment by Amar: "Confederate symbols—flags, monuments, and so on—all too easily exclude large numbers of citizens, most notably blacks."62

These are, of course, general statements that would presumably refer to any and all displays of the flag. But key to Forman's analysis is the fact that the flag was ultimately given its place of honor atop the capitol as one aspect of Alabama's attempt to resist desegregation of its public institutions. Thus he quite plausibly reads the raising of the flag in 1963 as "part of [George Wallace's] continuing effort to maintain white supremacy,"63 intended as such and, therefore, under standard readings of the Fourteenth Amendment, proscribable as part of a remedial system designed to overcome the legacy of unconstitutional oppression. To be sure, Alabama offers a contrary historical analysis, claiming that it flew the flag in order to promote tourism and to preserve "historical value," as well as to symbolize "accomplishment, development, and progress towards racial equality."64 The reader, however, is surely entitled to take this with an especially large grain of salt.

Given Alabama's lack of any affirmative protection by the First Amendment, Forman argues that Alabama must defend the "legitimate government function" served by flying a symbol of such oppression. "It will take a creative legal mind to explain the utility of flying Dixie."65 "Utility" is an odd word in this context, for of course one explanation of the flag's presence is simply the presumptive pleasure gained by the majority of the voting population from seeing the flag waving over the capitol. Certainly one plausible theory of democratic governance is that government can legitimately honor the preferences of the majority, especially if that majority can plausibly deny that its pleasure is simply a function of the displeasure caused their fellow citizens who are African-American.

Consider in this context the heart-felt comments of Willie Morris, the brilliant Mississippi-born former editor of Harpers, author of a wonderful memoir called North Toward Home, who in fact ended up returning to Mississippi:

63. Forman, supra note 52, at 508.
64. Id. at 509 (quoting Brief for Appellee at 5, Hunt, 891 F.2d 1555 (11th Cir. 1990) (No. 89-7245).
65. Id. at 519.
In modern-day America, there is too much fashionable tampering with authentic tradition. At the peril which such contentions evoke, I argue that this juggling with expressions of the past is reminiscent of the way the communists are eternally rewriting history, obliterating symbols with each new guard. Finally, one could make a strong case that Dixie and the flag and the names “ole Miss” and “Rebels,” deriving from old suffering and apartness and the urge to remember, are expressions of a mutual communal heritage, white and black, springing from the very land itself and its awesome strengths and shortcomings. As a historian friend of mine once remarked, “There’s nothing wrong with the Confederate flag. The Civil War was fought over more than slavery.”

It is at this point, incidentally, that the issues raised by contemporary post-structuralism become so relevant, for one of the issues hovering over this entire debate is the hermeneutics of culture and the presence of sufficient interpretive clarity to say with confidence that the flag-signifier refers to a unique signified (i.e., the system of chattel slavery). If, though, multiple interpretations are genuinely possible, if the flag is truly polysemous, then how precisely can a federal court (or anyone else) justify in effect negating all other interpretive possibilities save the particular one that it chooses to privilege? One answer to this question is that theoretical polysemy is really quite different from the actual circumstances of a specific context. “Meet me at the bank” is fatally ambiguous unless we know whether the speaker is interested in money or swimming. Once we do know that, then, as a matter of pragmatics, most of us would be fairly confident about the likely meaning of the otherwise “indeterminate” sentence. Similarly, as Charles Black unforgettably argued some thirty-five years ago, only the most obtuse could fail to “read” the meaning of segregated schools in the South as inextricably linked with the centuries-long practice of racial subordination and humiliation. Most of us, regardless of our theoretical commitments, have little trouble accepting Black’s analysis.

Still, Forman’s argument depends on just such a privileging of one particular interpretation and on the authority of one particular institution to offer authoritative interpretations of cultural artifacts. And it is hard to see how anyone who has been touched (some would say

67. This was suggested to me by Jack Balkin in conversation.
"infected") by one or another variety of post-modernist theory can be entirely comfortable endorsing Forman's argument. At the very least it requires dismissing arguments like Morris's. For me, at least, Morris's argument, perhaps because of the very identity of the person making it, is considerably harder to dismiss than similar arguments when made by the egregious Colonel North or the New Orleans attorney who defends the Liberty Place monument on the ground that the battle it commemorates "had nothing to do with race. It had everything to do with an angry people trying to take their rightful government back from an ignorant and corrupt Administration."69 These latter arguments I am willing to dismiss as further evidence of the racism that so infects our society.

As already suggested, an especially effective part of Forman's argument is his emphasis on the specific context of Alabama's 1963 decision to add the flag to its capitol dome—George Wallace's defiance of federally court-ordered desegregation. Forman might well have offered a similar analysis of the 1962 decision by the South Carolina legislature to place the flag atop its Statehouse,70 or, indeed, of Georgia's 1956 redesign of its flag, in which one is confident that the desire to send a political message totally dominated any aesthetic concerns about flag design or desire to build a more truly united Georgia community. For Forman, incorporating the Confederate battle flag in the state flag is the equivalent of a decision by the Georgia legislature to add the words "white supremacy" or "keep blacks in their place"71 to the state seal that is also featured on the state banner. Would it be any more legitimate to add those words than to add the words "Jesus saves"? If one agrees that the First Amendment prohibits the latter, then is it not equally thinkable that an amendment associated with a "new birth of freedom" would prohibit the state from articulating on its flag a message of white hegemony and African-American subordination? And if one can accept this latter premise, then would it extend to what some regard as a symbolic, if not "literal" utterance of the same sentiment?

As a careful lawyer, Forman frames his analysis within current legal doctrine, which requires, among other things, that government be shown to have intended the discriminatory consequences of its acts. To quote a term made (in)famous by Justice Powell, government must

69. American Album, supra note 27.
70. See New Position on Rebel Flag in S. Carolina, supra note 33.
71. Though "blacks" is clearly euphemistic in this context.
be shown to have acted "because of, rather than in spite of," any negative consequences visited upon minority groups. But it is notoriously difficult to prove malevolent intent, for reasons similar to those that plague the problem of interpretation in general.

Still, I do not embrace a universal skepticism. In fact, Forman is grimly "lucky" to have what lawyers call "good" facts, at least in regard to Georgia and Alabama. It is almost impossible to view those states, at least as of 1956 and 1963, as motivated by anything other than "the annoyance or oppression of a particular class" that even the Supreme Court of Plessy v. Ferguson pronounced itself ready to restrain. But, in their own way, these facts are almost "too good." And, even in regard to these facts, it is not entirely clear how much events in 1963 should control our responses to a significantly different Alabama in 1995, nor is it clear how an analysis based on these 1963 facts would apply to decisions made under different circumstances.

Consider, for example, two high schools, one outside Chicago, the other outside Cleveland, Ohio, both named "South" highs. The Thornton (Illinois) Fractional High School was divided in 1958 into North and South High Schools. "At the time," wrote a reporter for the Chicago Tribune, "when the school was entirely white, it seemed clever and historical to connect South High School with Rebels [the name of the athletic team] and a Confederate flag." Similarly, the Willoughby [Ohio] South High School, when established around 1960, chose to call its teams "the Rebels [a]nd the Confederate flag gradually became part of the school's athletic traditions." As it happens, both schools chose to "take down" the flag when African-American (and other) students protested. Would Forman require such elimination, as a matter of law, even though the initial choice betrays a dreadful ignorance about American history and political symbolism rather than any conscious desire to make a political statement?

Imagine also a possible decision by the state of Texas to fly on its capitol grounds the five flags (besides the American flag) that have, at one point or another in its history, represented the political territory now called Texas. Those are the flags of France, Spain, Mexico, the Lone Star Republic, and the Confederate States of America. Indeed,
at least one state office building has these flags etched on its walls. Would Forman argue that only the first four should be unfurled or that the Confederate flag should be sandblasted away from state buildings on which it now appears? It is surely not even the case that slavery was protected only within the Confederacy, for example. Why single its flag out for unique opprobrium?

Is it not clear that the Confederate flag is demonized precisely in order to avoid coming to terms with the potential negativity of the American flag? Is that pennant necessarily evocative of "one nation, indivisible, with liberty and justice for all," or is it simply a means by which the state attempts to impose a certain narrative that blinds us to the extent that the nation symbolized by the flag most certainly has not achieved such universal liberty and justice even for its own citizenry, even after the formal abolition of slavery that was otherwise part of American legal reality from its founding until 1865?

These issues are all present in a distinctly non-hypothetical episode in which a Virginia judge ordered the removal of the Confederate flag from a courthouse exhibit on Virginia history, in Stafford, Virginia, which included all of the emblems, including the British Union Jack, that had flown in the town of Stafford since the seventeenth century. The county's only African-American judge, complaining that it was "not a symbol for equal justice for all," described the county law library, where the exhibit appeared, as an improper venue for historical education. "This is not a museum. This is a courthouse." A circuit judge ordered the removal of the Confederate flags, at which time the historians who arranged the exhibit removed all flags save for the Virginia and United States flags. "If you're going to take [the Confederate flag] down, take them all down," a historian was quoted. "You have to tell the history, warts and all."76 This last statement seems to me clearly correct.77 I think (though the italicization indicates some ambivalence on the point) that I would have the same reaction to the flying of the swastika as part of a similar exhibit


77. Somewhat more complicated was the removal of the Confederate flag from its accustomed position outside the Danville, Virginia, Museum of Fine Arts and History. "A black city councilwoman had questioned whether the flag should be flown at the public museum. It was removed, but a compromise later allowed the flag to fly on Confederate holidays and for certain educational purposes." See Michael P. Williams, Stars and Bars Issue Is More Than a PC Tiff, RICHMOND TIMES-DISPATCH, Sept. 26, 1994, at B1. Among other things, of course, this raises the entire issue of public celebration of "Confederate holidays." See infra text accompanying notes 84-86.
in a German city devoted to careful acknowledgement of all facets of its past.

But it is hard to deny the power of Forman’s arguments in regard to the specifics of the Alabama decision to fly the Confederate flag or the Georgia decision to redesign the state flag. Still, even there, my inclination is to agree with the Hunt court, even though I certainly believe that a well-trained lawyer could accept Forman’s analysis. Part of the reason is that, whatever the value of courts—and constitutions—in limiting tangible oppression, I think it is necessarily limited when what is at stake is the politics of cultural meaning. Here, more than in any other area, the courts are likely to prove what Gerald Rosenberg has called a “hollow hope,” and I think it unwise, as a general matter, to invoke judicial intervention in circumstances where the consequences are unlikely genuinely to advance one’s overall social or political agenda.

Return for a moment to the example of religion and the Establishment Clause. I happen to believe that the placement of “in God we trust” on the coinage is unconstitutional governmental speech, and I confess a temptation to force a number of the states whose state mottoes include reference to God to find more secular mottoes.\textsuperscript{78} That being said, I do not really believe that courts should involve themselves in such issues. Not everything that is arguably unconstitutional should be enjoined by the judiciary. A certain amount of prudence must necessarily determine what role courts play in resolving social disputes. To be frank, the costs to the areligious (or simply to constitutional purists) of having to handle the tainted coinage are not sufficiently high to justify the political costs of judicial intervention in circumstances that would very clearly generate a firestorm of protest and, potentially, lead to much greater political mobilization by those opposed to such a decision than by those who support it.

Lest this sound too purely prudential, I also invoke the ideas of Robert Burt, who emphasizes in his work the value of courts as initiators of conversations and the undesirability of the judiciary’s foreclosing such conversations by a too-quick readiness to use their coercive powers to declare that one conversational partner must simply capitу-

\textsuperscript{78} See the mottoes of Arizona (“Diat Deus,” God Enriches); Connecticut (“Qui transtulit sustinet,” He who transplanted still sustains); Florida (“In God we trust”); Maine (“Dirigo,” I direct); Ohio (“With God, all things are possible”); South Dakota (“Under God, the people rule”), as well as American Samoa (“Samoa Muamua le Atua,” In Samoa, God is first). \textbf{The New York Public Library Desk Reference} 694-96 (1989).
late to the other. Force of law is often little better than force of arms in genuinely bringing about a political community in which people of radically different cultures and political views can live in truly mutual respect and equal citizenship. That being said, I must also recognize that I am not at all clear about what will bring about such respect in a self-consciously multicultural society like our own.

For all of these reasons, then, I tend to believe that the Hunt court wisely chose not to invest its inevitably scarce political capital in a decision that would most likely have generated similar firestorms without either making the lives of Southern African Americans noticeably better off in tangible terms or truly generating the kind of political community built on mutual respect and affection that a democracy needs. Forman might well remind us that we do not live by bread alone; Justice Holmes reminded us long ago, after all, that "we live by symbols," and foolish indeed is the person who underestimates their importance. Symbols are an important part of the cultural exchange system that, among other things, establishes relationships of hierarchy and domination. The result of a court's staying its hand may not be the initiation of conversation but, rather, the maintenance of an unacceptable status quo of domination and oppression. But one must still ask what it is that courts can best do and when they should stay their hand, and I remain inclined to believe that the judges were properly cautious in Hunt. I do not know the specific circumstances of the decision by an Alabama state judge to order the removal of the flag from the capitol under an 1895 state law. Suffice it to say that I find it far preferable that such a decision be made by a local judge applying Alabama's own law instead of a federal court invoking constitutional norms.

My caution concerning legal invalidation of the Confederate flag is heightened in regard to the monument for the war dead, which, if anything, presents even more wrenching semiotic issues than does the flag. Recall that its self-presentation had literally nothing to do with slavery and everything to do with basic American notions of self-determination by the constituent states of the union. To be sure, as Amar eloquently argues, those notions have lost out over time to Marshallian conceptions of a single constituent entity called the people of the United States, with states playing no fundamental constitu-

80. Oliver W. Holmes, Collected Legal Papers 270 (1920).
tive role. But does this mean that we should, like Trotsky, consign these losing ideas to the dust-bin of history, or might they be worth memorializing—and reflecting upon—as worthy alternatives to the road actually taken?

Consider also the date of the construction of the Texas monument: 1901. Michael Kammen informs us that “the decades between 1870 and 1910 comprised the most notable period in all of American history for erecting monuments in honor of mighty warriors, groups of unsung heroes, and great deeds.” The great period of monument building in the South was the first decade of the twentieth century, in part because it took so long to emerge from the poverty generated by the War. In addition to economic considerations, though, one can assume that by 1901 most “surviving comrades” of the battles of 1861-1865 were well into their own 50s, if not older, and it would be strange indeed if they had no intimations of their own mortality. For many of these men, service in the war was presumably the most meaningful act of their lives.

One can well understand the desire to memorialize that service in a suitable monument, as well as the state’s decision to accept the monument for display before what was then the relatively new capitol, where it would join other monuments, including one to the heroes of the Alamo. It is, I think, implausible to view the memorial as a latter-day attempt to vindicate slavery as such even if one necessarily recognizes the intimate linkage between slavery and secession (and even if one wishes to condemn the monument builders for ignoring that linkage). Indeed, one might well interpret the almost desperate insistence to avoid slavery as implicitly recognizing its illegitimacy. After all, the text of the United States Constitution itself maintains a studied silence in regard to the nomenclature of slavery, and many have used this silence as evidence of the tacit opposition of the framers to the

81. I may be overestimating the extent of Marshall’s victory. See, for example, Justice Thomas’s remarkable dissenting opinion, joined by Chief Justice Rehnquist and Justices O’Connor and Scalia, in Term Limits v. Thornton, 115 S. Ct. 1842 (1995), which appears to adopt in all essential respects the state compact view of constitutional ontology articulated by Jefferson and Madison in the Kentucky and Virginia Resolutions and, therefore, to reject Marshall’s more nationalist ontology. One wonders if Thomas would have any trouble with the constitutional theory articulated on the Confederate monument.

82. Kammen, supra note 14, at 115.

83. Id. at 117.

84. Consider in this context Justice Holmes’s own emphasis on his war experiences, including three injuries, throughout his entire life even though he obviously enjoyed a career of great fame and accomplishment.
institution, whatever their pragmatic decision to collaborate in its maintenance.

But how important is the nomenclature? Imagine that the monument lacked the inscription set out above and said only "in memory of those who gave their lives fighting for the Confederacy." Would that be any more acceptable? Or is all commemoration of Confederate soldiers ruled out? Does the Constitution indeed require the state to remain abjectly silent rather than honor the losers in the great American epic of 1861-1865?

Whatever one's answer to this last question, one should certainly consider its implications for a particular form of governmental speech called the public holiday. In Virginia, for example, Martin Luther King's birthday is the very same day as the equally official Lee-Jackson Day. Texas offers an interesting variant: It (ought I say "we," merely because I am legally "a Texan"?) officially celebrates Confederate Heroes Day, which happens to occur during the same week as Martin Luther King's Birthday, also celebrated as an official holiday in Texas.

On King's birthday all state offices are closed; on Confederate Heroes Day, however, state offices remain open with "skeleton crews" and other employees who receive their supervisors' permission to come in and work. Many persons, therefore, can, in effect, refuse to honor the Confederate Heroes. But consider those who do not receive authorization to come in and work; they are forced to take a vacation day on behalf of the Confederates. Some would argue, though, that even those who do not in fact honor Dr. King are equally coerced, as is even more clearly the case with non-Christians who are forced to observe Christmas but who must purchase leave on non-Christian holidays out of their scarce allotment of personal vacation leave. Ought the Constitution be read to control the declaration of such holidays and the public subsidy, through vacations, of celebrants? Under some circumstances, I would certainly say yes in regard to religious holidays. Yet for the reasons given above, I am dubious about extending such analysis to what might be termed "civil religious" holidays. There is, among other things, no establishment clause in regard to civil religion, though perhaps one ought to view state-

85. I do not deny that one reason for the difference in my response has to do with my greater personal experience with the costs of Christian hegemony than with the ravages of racial hegemony symbolized by the monuments, flags, and holidays discussed above. I leave open the possibility that my own status as a white leaves me at least partly insensitive to the depth of the feelings generated by the Confederate flag or by Confederate Heroes Day.
mandated vacations "in honor" of particular cult figures as sufficiently coercive to come under the analysis of *West Virginia Board of Education v. Barnette.*

IV. BEYOND LAW: WHAT DOES POLITICAL DECENCY REQUIRE?

It should be obvious that *legal* analysis is only one way to approach the subject. That courts ought not strike down some practice does not in the least suggest that the practice is in fact commendable and ought not be changed, voluntarily, by decent people. And ordinary individuals might well encourage those in power to mend their ways, whether by writing letters to the editor or marching in demonstrations. So more important, in many ways, than the question of what *courts* ought to do, or even of what the Constitution, properly interpreted, is best understood to mean, is what we as ordinary citizens should do when claims such as Forman's are laid before us. He concludes his article with a heart-rending reminiscence of his school-days as a senior at the Franklin Delano Roosevelt High School in Atlanta and the discomfort, physical as well as emotional, caused by:

> the incongruity of having black children, in a largely black city, watch a black man raise the symbol of the Confederacy for us all to honor. I tell myself to laugh, hoping that this will keep me from crying. But I cannot laugh, and I dare not cry, so I close my eyes and try to forget. If I could just forget... [O]vercoming the flag has taken a piece of me—a piece that I will not easily recover.

Decent people should, I think, be repelled by a political system that leads to such consequences. Thus, in regard to the specific example of the Confederate flag, I think the answer is easy. Although I would, as a matter of civil liberties, defend the right of a private individual to wave the flag, and, as already noted, I would not have the courts prohibit a state from flying the flag, that does not in the least entail my *supporting* any such behavior. The Confederate flag should be lowered from the state flagpoles on which it now flies, and I commend the Georgia governor for his fruitless attempt to change the design of that flag.

86. 319 U.S. 624 (1943).
87. Indeed, as suggested earlier, the failure of a court to act does not even warrant a belief that the practice is necessarily constitutional. That is, a conscientious legislator may be bound to change the practice even if a court, for prudential reasons, would leave it undisturbed.
88. One of the things that ordinary citizens can do is to interpret the Constitution for themselves, and I leave open the possibility that "we the people" might well decide that the Eleventh Circuit was simply wrong in failing to recognize the unconstitutionality of Alabama's flying the flag. But I am primarily interested in this section in explicitly political judgments rather than in constitutional analysis.
89. Forman, *supra* note 52, at 526.
state's flag insofar as it currently incorporates the Confederacy's battle flag. Indeed, my only disagreement with him would be his choice to return to the 1905 flag, which was itself based on the official Confederate flag, rather than to the 1799 flag, which featured the state seal, depicting wisdom, justice, and moderation, standing on a blue background representing loyalty.90

Even if one can believe that the Confederate flag symbolizes something other than the brutal regime of chattel slavery, it seems insensitive, to put it mildly, for a state to persist in adopting as its official emblem something that so easily and legitimately can be given a thoroughly negative meaning. Still, even in regard to the flag, I would support its display in the "flags over Texas" exhibit hypothesized earlier or, for example, over some historic building that is strongly associated with the Confederacy or, even more strongly, within a cemetery for Confederate soldiers. It is also clear, I think, that the flag could be displayed within a museum setting. Indeed, the chair of the Alabama House of Representatives Black Caucus did not oppose the flag's flying over the Confederate White House across the street from the Capitol. "We have maintained all along," said Representative George Perdue, that "the Confederate battle flag should be relegated to some kind of historical display or museum."91 Perhaps the Confederate flag should be "put in its place," but I cannot believe that it has no place in any conceivable public setting. To say that the State cannot speak strongly through the medium of the flag does not mean that the State must on all occasions erase it from its lexicon.92

Monuments present altogether more difficult issues. Consider, for example, the fact that Dr. Clifton Johnson, director of the Amistad Research Center in New Orleans, one of the largest archival centers for research in African-American history in the United States, defends preserving the Liberty Place monument on the ground that "Racism is part of our history." The monument, he says, is a symbol of "racism's shame" and a reminder, especially to youngsters "of the courage of the whole civil rights movement."93 Similar analyses could presumably be offered of statues to Jefferson Davis, even though it is obvious that partisans of such statues would resent bitterly the "defense," if that is the proper word, offered by Dr. Johnson.

90. Georgia Flag's Rebel Emblem, supra note 22.
91. Confederate Flag Banned in Alabama, supra note 52.
Let me conclude by offering a detailed menu of possibilities in regard to the Austin monument to the Confederate dead. Consider the following alternatives:

1) Leave it precisely as it is at present, doing nothing at all.
2) Erect, by the monument, a sign saying (something like) “The State of Texas takes no position on the views expressed on this monument.”
3) Erect, by the monument, a sign saying (something like) “The views expressed on this monument do not represent the views of the State of Texas.” Lest one think, incidentally, that this is wholly fanciful, I note that the City of New Orleans in the 1970s added a bronze plaque at the Liberty Place monument stating that “the sentiments in favor of white supremacy expressed thereon are contrary to the philosophy and belief of present-day New Orleans.”
4) Erect, by the monument, a sign saying (something like) “These views were once held by a lot of people, but we now know that this is a false view of the United States Constitution, and Texas in fact committed constitutional treason in attempting to secede” or, “Although these views represent a plausible constitutional theory, it is essential to recognize that what precipitated secession was the desire to maintain an immoral regime of racially-based chattel slavery. The failure of the white South to recognize the claim to equality and self-determination of black slaves thus invalidates the appeal to the principles of the Declaration of Independence that might well, in another context, have justified secession and defense against Union efforts to prevent it.”
5) Erect an adjoining monument to the Union dead, with (or without) some suitable Lincolnian statement about the inadmissibility of secession and the necessity to preserve the Union.
6) Erect additional monuments, among which the following are possible:
   a) A monument to those enslaved by Texans and by other denizens of the Confederacy. This would, obviously, be similar to the Mahnmal in Germany.
   b) A monument to those blacks who in fact fought for the Confederacy. This was actually suggested very recently by one Virginian in regard to a debate now taking place in Richmond about the meaning of Monument Avenue. The Richmond Times-Dispatch responded,

“Well, why not dedicate a memorial somewhere to African-Americans who fought bravely for both sides?”

c) Erect a memorial to some appropriate African American. In Detroit, for example, one can find the deliciously multisemic sculpture of a large fist, a memorial to the great boxer—and, in the language of my youth, “credit to his race”—Joe Louis. More recently a campaign has begun in Richmond, Virginia, led by former Governor Douglas Wilder, to raise $400,000 to cast and place a 24-foot statue of Arthur Ashe, who was originally from that city. What is most interesting, from the perspective of this essay, is the debate on precisely where to place the statue. Governor Wilder, for example, “feel[s] it needs to be on Monument Avenue. It will send a transcending message.” A columnist for the Richmond Times-Dispatch agreed:

The avenue is an undeniable source of pride among many city and state residents. But the bronze Confederates who sit astride their steeds produce no small amount of ambivalence among the state’s African-Americans. Monument is the city’s showcase boulevard. Let’s make it a place where blacks and whites can share a sense of pride, in a spirit of reconciliation.

Interestingly enough, the Richmond Times-Dispatch, though warmly supporting the monument, disagreed as to the site:

Enshrining the tennis star among Confederate War heroes on Monument Avenue would strip Ashe’s memory of context and deprive it of meaning. Further, many of those pressing for that site admit their chief motivation is to settle a racial score. Ashe deserves better than to be used as a political pawn by those who refract all perceptions through the prism of race.

If Ashe is to be honored for who he was and what he accomplished, then [a local park that includes tennis courts] makes a fitting site. What could offer more poetic justice than enshrining there a man once barred by segregation laws from playing on its courts?

96. I owe this information to Fred Schauer.
98. Id. See generally On Street Where Confederates Reign, Arthur Ashe May, Too, N.Y. Times, June 18, 1995, at 8.
99. And not among many of its whites as well?
101. In Steel and Stone (editorial), Richmond Times-Dispatch, Dec. 15, 1994, at A28. Jim Chen has suggested that Ashe himself, who disliked being made use of as a racial or political symbol, might well have preferred his statue being placed in the park rather than so obviously used “to make a statement” by being put on Monument Avenue. This raises additional questions of how persons become appropriated by their culture for use as symbols independent of any wishes of their own on the matter. However, it appears that the Ashe family has agreed to
Someone has suggested that the better addition to Monument Avenue would be a memorial to one of "the 200,000 men of African descent who fought for freedom and the Union in our nation's bloodiest conflict—men like Richmond-born Powhatan Beaty," a First Sergeant who was awarded the Congressional Medal of Honor for his courage in the battle of New Market Heights, where he led a charge on entrenched Confederate despite his severe injuries. Would this monument garner unanimous support? 

A final burst of intense public debate was triggered by the June 19, 1995, decision of the Richmond Planning Commission to place the monument on Monument Avenue, which led a local reporter to write that "Arthur Ashe's statue will penetrate the Confederacy's second line of defense after all." The matter was ultimately resolved on July 17, 1995, when the Richmond City Council, after listening to more than 100 speakers, unanimously agreed with that decision. It will become the new end point of the blocks-long string of statues, a block away from Matthew Fontaine Maury. Jeb Stuart will continue to anchor the other end.

the Monument Avenue placement, Gordon Hickey, City OKs Monument Site for Ashe, RICHMOND TIMES-DISPATCH, June 20, 1995, at A1, A5 [hereinafter Hickey, City OKs Monument Site], though, of course, this may only be evidence for the proposition that Ashe would not have been actively opposed to that placement. See Mike Allen, Ashe Family has Diverse Views on Statue, RICHMOND TIMES-DISPATCH, June 29, 1995, at 1. However, Johnnie Ashe, Arthur's brother, was described as having said that "the entire family favors the site at Monument Avenue." See Gordon Hickey, Ashe Statue will go on Monument, RICHMOND TIMES-DISPATCH, July 18, 1995, at 1.


103. The actual answer is, almost certainly, no. See, e.g., Samuel Francis, The Second Civil War comes to Richmond, WASH. TIMES, Dec. 27, 1994, at A17, which attacks the proposed placement of the Ashe statue on Monument Avenue. The "purpose" of Monument Avenue, according to Francis, is explicitly to honor Virginians who led the Confederacy, and whatever the future of the state, the region or the nation, the Confederacy remains a real and central part of their real past. . . . [I]f Virginians are going to preserve their real past and the real culture the past informs, they'll have to show at least as much solidarity in its defense as the Afro-racists [sic] do for their cause. If they don't or won't, maybe the Confederate statues ought to take a hike to some other place where their heritage still means something. Id. It scarcely seems likely that Williams would be more accepting of a memorial to 1st Sgt. Beaty than one to Arthur Ashe.


106. A map of Monument Avenue was printed on page one of the June 20 Richmond Times-Dispatch.
As for contemporary Texas, I have no doubt that it would be easy to gather support for placing on the Capitol lawn a statue of former Representative Barbara Jordan, the first African American to be elected to Congress from Texas and, thereafter, a powerful voice in American politics. But where, precisely, should it go? Should it be placed in explicit juxtaposition to the edifice to the Confederate war dead or should it receive an entirely separate (and equal?) setting somewhere else on the expanse of grass surrounding the Capitol?

7) Remove the monument to the museum of Texas history, where it would be placed in some suitable context involving Texas history between 1865-1901.

8) Sandblast the presumptively problematic narrative of the War off the monument and either leave that side blank or replace it with some more acceptable statement, as was done by New Orleans in regard to the Liberty Place Monument.

9) Destroy the monument.

It is probably easiest to begin with the last one, for I find it only slightly less hard to support destruction of the monument than to imagine an actual decision by the State of Texas to do so. At the very least, advocacy of its destruction involves embracing the politics of kulturkampf—cultural warfare—to the ultimate degree. Hundreds of thousands of Southerners lost their lives in the misguided attempt at secession and maintenance of slavery. Is it really impossible to convey a certain amount of public honor to those dead, the overwhelming majority of them decidedly ordinary people who responded to primordial notions of loyalty and service on behalf of what they viewed as their country? If the obnoxiousness of the "Lost Cause" prevents any public memorialization, then why do many of us find so immensely moving the Vietnam War Memorial in Washington even if (or perhaps especially if) we believe, as I continue to do, that that War was little, if any, more defensible than that fought by the Confederacy? Perhaps one would emphasize that the Vietnam Memorial, very importantly, does not include any writing specifying the "correct" political message of the black granite and the 50,000 names. But this can't be the whole truth either. For I would cavil at memorializing the SS at Bitburg even if the only "message" contained on a monument was "Rest in Peace." Is the reason that respect never be accorded anyone who fought in any capacity on behalf of the Nazi regime? Or is the point that SS members were not ordinary soldiers-citizens like those commemorated by the Vietnam Memorial (or the Confederate monuments)? Or is the point ultimately that, whatever my opposition to
United States involvement in Vietnam, I just do not view it as so truly evil as the genocidal aggression of the Nazis, so that even its architects, such as Robert McNamara, for example, are entitled to a kind of moral generosity that one ought *never* give, under any circumstances, to Hitler and his minions?

The other alternatives are obviously more complex, even though, practically speaking, one doubts that Texas would adopt any of them besides the first, which is to do nothing at all. The seventh alternative represents the full historicization linked with the museum itself as a cultural phenomenon. But historicization is itself obviously a complex phenomenon, for one always wonders whether the message is that “this was once, but can—ought—never be again” or, instead “this was once and can, with imaginative effort and physical courage, be repeated in our own lifetime.” I suspect that museum curators themselves, especially if the museums themselves are “public” entities, would be faced with genuinely difficult choices concerning the presentation of the material.107

Would building a monument to the Union dead, accompanied by Lincolnian denunciation of secession and slavery, suffice? Or does it simply create a semiotic jumble satisfying to enough political constituencies to bring civil peace in its wake? Civil peace is no small matter, and great political theory has been written in behalf of its centrality. “We are all Federalists, We are all Republicans,” said Thomas Jefferson. Can one imagine Texas proclaiming “We are all Unionists, we are all Confederates”? Perhaps the correct answer to this question is an all too easy yes. Edward Linenthal, for example, has noted that Gettysburg became a jointly shared vehicle for the reconciliation of

107. Consider, for example, the fiasco in the spring of 1995 concerning the proposed exhibit at the Smithsonian Institution’s National Air and Space Museum of the Enola Gay, the plane from which the first atomic bomb was dropped on Hiroshima on August 6, 1945. Outraged (and, in my opinion, outrageous) protest from veterans’ groups and others made it impossible to mount a professionally competent exhibition regarding the controversy surrounding the use of the bomb. The exhibition was cancelled, and Dr. Martin Harwit, director of the Museum, resigned. See *Official Resigns Over Exhibit of Enola Gay*, N.Y. Times, May 3, 1995, at A19.

An editorial in the *Washington Post* noted that the “much-abridged version of the Enola Gay exhibit,” consisting apparently of the bare fuselage of the plane, would be, in the words of the Museum itself, “commemorative rather than interpretive,” thus avoiding any confrontation with the issues of historical interpretation that doomed the original project. *Smithsonian: After the Shouting*, WASH. POST, May 7, 1995, at C06. The editorial further describes officials of the Smithsonian, including its Secretary, former Berkeley law professor Ira Michael Heyman, as conceding that “mixing 50-year commemorative anniversary ceremonies with hotly contested revisionist analysis is a bad idea generally.” *Id.* The *Post* gives no indication that it disagrees, which is dismaying in its implications for the ability of our society genuinely to confront its past, warts and all, rather than to settle for almost literally mindless celebration and the complacent maintenance of unexamined assumptions about the events in question. *See id.*
North and South precisely by the glorification of martial courage and such and the subordination of any emphasis on the issue of slavery—and the quality of the freedom that followed 1865.108 This subordination, of course, underlay the Compromise of 1877 that reconciled Southern and Northern whites by ending Reconstruction and accepting the return of the South—and its millions of former slaves—to the rule of white Democrats. So perhaps more to the point is whether anyone disinclined to accept the Compromise and its devastating consequences for racial justice would offer such a proclamation.109

Several alternatives involve overt state speech, in which those who control the contemporary state apparatus comment on the views of their ancestors. One of the alternatives does involve Texas articulating an official view of the War that negates the message. The problem with this alternative (again putting political practicality to one side) is that, as suggested earlier, there is no very good reason to accept the Marshall-Lincoln-Chase-Amar view of “an indivisible Union of indestructible States,” articulated, appropriately enough, in a case called Texas v. White,110 as the undoubtedly correct view of the Constitution. My own view is much closer to that sketched out earlier, which emphasizes at once the plausibility of secession as a constitutional argument and the betrayal of any claim to support for secession in the actual case because of the reality of chattel slavery. I would personally favor that alternative, though it leaves the original 1901 monument untouched and still able to work its own power on an onlooker who does not read the sign or chooses to dismiss it as an especially egregious example of contemporary “political correctness.”

The second alternative, in which Texas simply disclaims adherence to the message without offering one of its own, is analogous to those seen in many airports in regard to solicitors engaging in their

108. See Edward T. Linenthal, supra note 4, at 91. The same general point is made in Paul M. Buck, The Road to Reunion 257-70 (1939), though less critically than is the case with Linenthal, who approvingly quotes Frederick Douglass’s 1894 remark, “I am not indifferent to the claims of a generous forgetfulness, but whatever else I may forget, I shall never forget the difference between those who fought to save the Republic and those who fought to destroy it.” Id. (Presumably, Douglass equates “the Republic” with antislavery.)

109. See Michelle Aronowitz, Confederate Symbols: Pride or Prejudice? (1993) (unpublished paper written for Professor Robert Gordon at the Stanford Law School). I am grateful to Ms. Aronowitz for giving me a copy of her most interesting paper, which focuses on a topic that is obviously relevant to the instant essay, the successful fight led in the United States Senate by Senator Carol Moseley Braun of Illinois to prevent congressional renewal of the design patent of the United Daughters of the Confederacy. The patent included a laurel wreath encircling the Stars and Bars often identified with the Confederacy, though never officially adopted as the national flag. See id. at 6 n.16.

110. 74 U.S. 700 (1868).
own constitutionally protected speech. But, of course, what makes airport disclaimers persuasive is precisely the fact that the speakers are private citizens exercising their own constitutional rights without any real cooperation from the state beyond recognition that they cannot be removed from public property. It is altogether plausible to believe that the administrators of the O'Hare airport are indifferent, and quite possibly hostile, to the ideas that they are required to tolerate. But Texas is scarcely in that position, at least in regard to the monument. Even if it did not commission the statue, it nonetheless accepted it on behalf of the state. As of 1901, at least, one presumes that the message of the statue was altogether compatible with the views of dominant political elites. It is certainly crystal clear that there is no "right" to place on the grounds in front of the capitol any statuary one wishes, any more than one could claim that the presence of the Washington, Lincoln, and Vietnam Memorials on the national Mall in Washington would entitle one to construct, even without governmental funds, a monument, say, to the Native-American victims of American aggression or to the Japanese victims of atomic warfare. Government does indeed speak when it offers "sacred space" even for privately-commissioned entities like the new Holocaust Museum in Washington. 111 One could not, therefore, credit a simple disclaimer of support by Texas, especially so long as Texas continues to include Confederate Heroes Day in its official calendar.

V. CONCLUSION

We do indeed live by symbols, whether the tangible colored pieces of cloth and marble depictions of those the culture wishes to honor, or the more intangible messages generated by days of commemoration and celebration. To the extent that we are indeed a multi-cultural society, as we undoubtedly are, it can occasion no surprise that these symbols have become, in the language of contemporary philosophy, "essentially contested," with significant political energy put into achieving one or another resolution of such contests. We must, of course, try to clarify our own responses to these symbols, but it is naive in the extreme to believe that we can achieve any genuine consensus as to their place in the public realm. That would require the existence of a singular public, whereas the reality of our society is its composition by various publics who are constituted at least in part by their relationship to conflicting symbologies. And,

111. See LINENTHAL, supra note 29, at 61-72.
needless to say, all of these publics seek the particular validation that comes from their symbols occupying some place of respect within the general public realm. It is, therefore, no small matter whether these publics can indeed agree on some common civil rites and symbols or whether we are indeed doomed to an ever-more-fractionated discourse about the most basic use of public space and construction of a public psyche.
FREEDOM: CONSTITUTIONAL LAW