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Flags

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Flags

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INTRODUCTION

During my fifth year as an Assistant U.S. Attorney in the Southern District of New York, I transferred from the Violent Gangs Unit to the Securities and Commodities Fraud Unit. Even within the U.S. Attorney's Office, which already had the rarefied air of an exclusive country club,[1] the Securities and Commodities Fraud Unit had a reputation for being an even more exclusive "boy's club." I mention this to provide some context, but also to explain—or is it to excuse—my inaction. Acquiescence. Silence.

The other part of the context is this: Nearly a third of my of my unit, including the chief of the unit at the time, were attending a three-day Securities Fraud course at the National Advocacy Center (NAC)—the training center for federal prosecutors[2]—in South Caro-

 Assistant U.S. Attorney, Southern District of New York 1995-2004, and Adjunct Professor of Law, Brooklyn Law School. J.D. Columbia Law School, 1991. I am indebted to many people for their suggestions and encouragement, including Darren Lenard Hutchinson, Peggy C. Davis, Seth Michael Forman, Astrid Gloade, Michael Dorf, The Honorable Deborah A. Batts, Jasper Johns, Randolph Ross, and Vanessa Merton. Finally, I must extend a special thanks to Derrick Bell and Patricia Williams, whose pioneering work served as an inspiration throughout this project.

1. As I write this, the U.S. Attorney's Office for the Southern District of New York is comprised of approximately 241 attorneys, of which only 4 are African American. This is a drop from the usual number of African American prosecutors, which is 7. Indeed, known by African American prosecutors and defense lawyers around the country for never having more than 7 African American prosecutors at a time, the U.S. Attorney's Office for the Southern District of New York has much in common with the fictitious law school in DERRICK BELL, *Chronicle of the DeVine Gift, in* AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 140-61 (1987). This homogeneity is by no means limited to the Southern District of New York, but rather extends throughout the Department of Justice, as evidenced by a recent, but unsuccessful, diversity initiative. *See* Tom Brune, *Justice Diversity Drive Opens Door to White Men*, NEWSDAY, Oct. 17, 2003, at A20. The findings of an internal report of diversity within the Department of Justice were so dismal that the Department declined to post the full report on its website, and instead posted a version with half of its 186 pages, including the summary, blacked out. David Johnston & Eric Lichtblau, *A Critical Study, Minus Criticism*, N.Y. TIMES, Oct. 31, 2003, at A19.

2. NAC is operated by the Department of Justice, and provides training programs for federal government personnel through the Office of Legal Education of the Executive Office for

lina, which just so happens to be my home state. This was in 2000, the year that the NAACP and other organizations were calling for a boycott of South Carolina because of its prominent display of the Confederate flag atop of its capitol building.[3]

That the Justice Department continued to send its attorneys to South Carolina was, to my mind, an issue in itself. Although there had been a few isolated and whispered grumblings among minority employees about the Justice Department's practice, lacking a critical mass, our grumblings remained whispers, or were met with the response that the South Carolina Legislature had already offered a compromise by lowering the flag from its position on top of the capitol building.[4]

Indeed, I employ the term "critical mass" in the hope of contextualizing its meaning, which apparently still remains a subject of debate. During oral argument in the affirmative action case *Grutter v. Bollinger*,[5] for example, Justice Antonin Scalia demanded a numerical definition.

> Justice Scalia: Is [two] percent a critical mass, Ms. Mahoney?
> Ms. Mahoney (University of Michigan): I don't think so, Your Honor.
> Justice Scalia: OK. Four percent?
> Ms. Mahoney: No, Your Honor. What you . . .
> Justice Scalia: You have to pick some number, don't you?
> Ms. Mahoney: Well, actually what the . . .
> Justice Scalia: Like [eight]? Is [eight] percent?
> Ms. Mahoney: Your Honor, the . . .[6]

In fact, critical mass is not solely numerical. Rather, a critical mass implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group.

U.S. Attorneys. For an example of training for state and local prosecutors that the NAC provides, see http://www.usadoj.gov/usao/eousa/ole (describing the NAC).

3. *See, e.g.*, Rick Freeman, *South Carolina's Allegiance to the Flag; State Is a Sports Outcast Because of Confederate Link*, WASH. POST, May 20, 2000, at D1; *NAACP Votes to Boycott South Carolina over Flag*, WALL ST. J., Oct. 18, 1999, at A43; Sue Anne Pressley, *Boycott Aims to Bring Flag Down; NAACP Targets South Carolina Tourism to Rid Capitol of 'Symbol of Slavery,'* WASH. POST, Aug. 2, 1999, at A3.

4. *See* S.C. CODE ANN. § 1-10-10 (2000) (authorizing removal of Confederate flag from atop the dome of the State House, and the installation of a Confederate flag on the grounds of the Capitol Complex, effective July 1, 2000).

5. 539 U.S. 306 (2003).

6. *Morning Edition: Profile: Supreme Court Hears Affirmative Action Cases* (NPR radio broadcast, Apr. 2, 2003), *available at* 2003 WL 4857011.

It also implies a climate where one can speak freely, where one not only has a voice, but a voice that will be heard. In the Justice Department, a critical mass was what we lacked.

Our concerns remained whispers; trivialized; disregarded. It seemed of no import that, having removed the Confederate flag from atop of the capitol, the legislature immediately reinstalled it in front of the capitol where, if anything, the flag was even more visible.[7] No import at all. In fact, during my time at the NAC, where I and a few other African Americans were like flies in buttermilk really, there was no mention of the flag, at least not in my presence, and had things proceeded in this uneventful manner, I probably would not be writing this Article. On either our second or last night in Columbia, however, it occurred to those of us from my office that we had not tried any of the barbeque that seemed the local staple, and we asked one of the administrators at the NAC if she would recommend a good barbeque joint.

I remember that the administrator reminded me of the actress Betty White in the television show *Golden Girls*,[8] or better yet her role in the movie *Bringing Down the House*.[9] I also remember that as she looked at the group of us, she seemed hesitant. "Well," she began, "the absolute best barbeque place is Maurice's BBQ." "That's where we want to go," the chief of my unit said. "The thing is"—was it here that I sensed she was avoiding eye contact with me?—"the owner has a lot of Confederate flags up. Some of you might be put off by that. There are other places though."

The chief looked at me and at another member of our group, an Asian American. I have no doubt he was sincere in not wanting the two of us to feel uncomfortable. "It's really up to you," he said. The others in our group waited patiently, though a few looked away. "Do you want us to go someplace else?" the chief asked. I have no doubt that he thought he was being solicitous. "If it bothers the two of you, it's no problem."

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7. Pamela Hamilton, *Confederate Flag Remains Hot Issue, Despite Relocation; NAACP, Not Happy with Compromise, Is Still Pushing for Boycott*, CHARLOTTE OBSERVER, July 20, 2003, at 10Y.

8. *Golden Girls* (NBC television broadcast 1985-1992); *see also* Ultimate Golden Girls Cite, *at* http://www.geocities.com/SouthBeach/Strand/5836/goldengirls.htm (last visited Sept. 19, 2004).

9. BRINGING DOWN THE HOUSE (Touchstone Pictures 1993); *see also* Earth's Biggest Movie Database, Bringing Down the House, *at* http://www.imdb.com/title/tt0305669/ (last visited Sept. 29, 2004).

Of course I would rather have gone someplace else, but again, lacking a critical mass, I felt powerless even to voice an objection. To borrow from W.E.B. DuBois, in the intersection of large ideas and every day experience, I, as an African American, was a "problem."[10]

So we went. I convinced myself that, if nothing more, it would at least be an adventure. Something I could later joke about with my better half back in New York. Inside the restaurant, the Confederate flag was everywhere. The owner had even set up a gift shop of sorts, where one could purchase replicas of the Confederate flag, battle flag socks, Tenth Amendment Heritage Protector t-shirts, Confederate flag beach towels, and, most American of all, Confederate flag baseball caps. For a donation—to what, I did not want to know—customers could also receive pamphlets reminiscent of W.D. Griffith's "true" story of the South in *Birth of a Nation*,[11] pamphlets such as *Honest Abe Wasn't Honest*, and *The Truth About the Confederate Flag*.[12]

Until that point, I had followed the news articles about the public controversy surrounding state displays of the Confederate flag with some remove. While I was personally offended by the choice, in the scheme of things, or so I thought, there were far more pressing issues to address.[13] It was just a flag, after all, a rectangle of cloth on a pole, a minor matter. Sitting in this restaurant, however, I began to realize that this wasn't just about a flag. Rather, the flag was, in a way, inextricably tied to numerous other issues involving race and privilege.

This was about South Carolina's state-supported military college the Citadel, founded to quell a slave uprising,[14] which ten years ago

10. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 1-2 (First Vintage Books 1990) (1986).

11. BIRTH OF A NATION (Epoch Pictures 1915). W.D. Griffith's film purports to portray the deleterious effects of emancipation on a South Carolina family of slave owners. The film opens with images of field slaves contentedly picking cotton, and house slaves blithely waiting on their beneficent masters.

12. Additional curios and books, such as MYTHS & REALITIES OF AMERICAN SLAVERY, THE CONFEDERATE COOKBOOK, and ARGUING THE CASE FOR SOUTHERN SECESSION, can be purchased online through Maurice Bessinger's "Truth Store;" see http://www.mauricesbbq.com for more details.

13. State Representative Joe Neal, former chairman of the Legislative Black Caucus in South Carolina, recently echoed this sentiment. *See* Hamilton, *supra* note 7 (quoting Representative Neal as stating, "[w]e don't have the luxury of just dealing with the flag. There are so many other issues that have been pressing").

14. In June 1822, 2,500 armed Whites patrolled the streets of Charleston in response to information that enslaved Blacks were planning a revolt to obtain their freedom. Ultimately, over 131 [B]lacks were arrested, and 35, including the leader of the revolt Denmark Vesey, were sentenced to death. The city freed the slave who revealed the planned uprising to his master, and transferred the discipline of other "problem" slaves to the public sphere:

> At the workhouse, a treadmill was installed. Now plantation owners—for a fee—could bring recalcitrant slaves to be lashed to an overhead pole and forced to run along a

fought the admission of women,[15] and where until recently *Dixie* was

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turning wheel while "drivers" whipped and pushed them on. So long as a man or woman kept the pace, the pain was not so bad. But once a person's legs gave out, those wooden steps slapped hard into bare flesh while strips of cowhide tore and snapped.

CATHERINE S. MANEGOLD, IN GLORY'S SHADOW: SHANNON FAULKNER, THE CITADEL, AND A CHANGING AMERICA 35 (1999).

Finally, to protect Whites from any future uprising, the city created a corp of cadets, reinvented as a school in 1842. In return for keeping free [B]lacks and slaves "completely subordinate," as local ordinances required, cadets, initially comprised of impoverished Whites, received a free education. *Id.* at 37-38.

15. Throughout most of its 160-year history, the Citadel, which until recently boasted a Confederate flag on the water tower high over its campus, was exclusively White, and exclusively male. Even after the first Black male student was admitted, the sole Black cadet in the class of 1970, the school continued to maintain a policy excluding women from its Corps of Cadets, and racism persisted. *See generally* Ellan Yan, *Battles Won Before Shannon*, NEWSDAY, Sept. 2, 1996, at A19; *Profile: Black Female Cadets Graduating From the Citadel* (NPR radio broadcast, May 10, 2002), *available at* 2002 WL 3188070. For example, a 1977 college yearbook shows cadets outfitted in white robes and hoods pointing a gun at a Black cadet with a noose around his neck. *See* MANEGOLD, *supra* note 14, at 136. Nearly a decade later, on October 23, 1986, several White cadets, again dressed in the garb of the Ku Klux Klan, burst into a Black freshman's room brandishing a burnt cross and shouting obscenities. The Black cadet quit the Citadel shortly after the incident, and brought a lawsuit. The White cadets—Steven Webb, Jeffery Plumley, Paul Koss, Jimmy Biggerstaff and Maurice Bostic, Jr.—eventually settled out of court for approximately $880,000, but not before graduating from the Citadel. *See* Paul Leavitt, *Nationline*, USA TODAY, Jan. 24, 1989, at A3. The Justice Department declined to seek criminal charges against the perpetrators. Bruce Smith, *Official Says No Federal Criminal Prosecution in Citadel Hazing*, ASSOCIATED PRESS, Oct. 13, 1987, *available at* 1987 WL 3183141.

In 1993, a female high school student, Shannon Faulkner, launched an attack on the Citadel's male-only policy by gaining admission for matriculation, and only then declaring her gender. Upon learning Faulkner was female, the Citadel promptly revoked her admission, and Faulkner promptly brought a § 1983 action alleging an Equal Protection violation. Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994). Although the district court found, after a two-week bench trial, that the Citadel's male-only admissions policy violated the Equal Protection Clause and ordered the Citadel to admit Faulkner to the Corps of Cadets beginning in the fall of 1994, the 4th Circuit modified the remedial order. Following its holding in *United States v. Virginia*, (*VMI I*) 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 508 U.S. 946 (1993), in which it held that Virginia's violation of the Equal Protection Clause through its maintenance of a male-only admissions policy at Virginia Military Institute could be remedied if Virginia established a parallel institution for women, the Fourth Circuit in *Faulkner* ordered that the Citadel should first be permitted a reasonable time to do the same. Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995), *cert. denied*, 516 U.S. 938 (1995). In response to this decision, the Citadel filed a proposed plan to create a parallel program at a pre-existing women's college. In the midst of challenges to the adequacy of this plan, the Supreme Court granted a writ of certiorari in *VMI I*, and in June 1996 issued a decision that parallel programs are not an adequate to remedy equal protection violations. United States v. Virginia, 518 U.S. 515 (1996). Two days after the Supreme Court announced its decision, the Citadel's Board of Visitors voted to end the male-only admissions policy and to admit women to the Citadel's Corps of Cadet. Throughout the legal and social battle, Faulkner was vilified, and targeted for harassment and ridicule. Playing on the Citadel mascot, the bulldog, alumni sold t-shirts proclaiming "1952 Bulldogs and One Bitch"; graffiti in Citadel bathrooms included the sentiment, "Let her in – then fuck her to death"; and in fact, she received death threats. SUSAN FALUDI, STIFFED: THE BETRAYAL OF THE AMERICAN MAN 119 (1999); Rupert Cornwell, *Knives Sharpen for Haircut of the Century*, INDEPENDENT (London), Aug. 12, 1994, at 9. Four women entered the Corps of Cadets in August 1996. In May 2002, the Citadel graduated its first Black female cadets. *Citadel Graduates First Black Female Cadets*, ASSOCIATED PRESS, May 9, 2002.

sung at football games.[16] It was about Susan Smith, who claimed that she had been carjacked by a Black man who had driven off with her two children, and was believed, when in fact she herself had drowned them in a lake.[17] It was about Denny's Restaurant, headquartered in

16. The Citadel finally discontinued its practice of singing *Dixie* at football games in 1992, around the same time that *Sports Illustrated* devoted an article to the racism and hazing suffered by [B]lacks at the Citadel. Geraldine Baum, *Storming the Citadel for 151 Years, the State College Has Been All Male. That Tradition May Fall if Shannon Faulkner Gets Her Way. Among Her Big-Name Foes: South Carolina*, L.A. TIMES, Feb. 13, 1994, at 1. The song, credited to Daniel Decatur Emmett, a member of a group of minstrels who sang in blackface, was adopted by Confederates and depicts Blacks as longing for a return to plantation life. Although contemporary versions of the song omit the dialect, Emmett penned the song in "[B]lack dialect." Here is an excerpt:

I wish I was in land ob cotton,
Old times dar am not forgotten,
Look away! Look away! Look away! Dixie Land.
In Dixie Land whar' I was born in,
Early on one frosty mornin',
Look away! Look away! Look away! Dixie Land.
CHORUS:
Den I wish I was in Dixie, Hoo-ray! Hoo-ray!
In Dixie land, I'll take my stand to lib and die in Dixie;
Away, away, away down south in Dixie,
Away, away, away down south in Dixie.

C.A. BROWNE, THE STORY OF OUR NATIONAL BALLADS 120-21 (1960). Although the Citadel acknowledged the offensiveness of *Dixie* and discontinued singing the song at its football games in 1992, Chief Justice William H. Rehnquist apparently did not receive the memo. In 1999, Chief Justice Rehnquist led a sing-along of *Dixie* at the fourth Circuit Judicial Conference, a gathering of hundreds of federal judges from Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Craig Timberg, *Rehnquist's Inclusion of 'Dixie' Strikes a Sour Note*, WASH. POST, July 22, 1999, at B1.

17. On October 25, 1994, police nationwide were asked to look for a car with South Carolina tag GBK 167, after Susan Smith tearfully claimed that a [B]lack man in his 20s to early 30s jumped into the front passenger seat of her car, brandished the barrel of a gun, and said, "Shut up and drive or I'll kill you." The carjacker later forced her out, and drove off with her two toddlers, Michael Daniel Smith and Alexander Tyler Smith, while Smith stood in the middle of the road and screamed, "I love you all." Robert Davis, *Prayers Lifted up for Abducted Boys, Tots Whisked off in S.C. Carjacking*, USA TODAY, Oct. 27, 1994, at 10A. While Smith spent hours helping a police artist compose a sketch of the [B]lack man, and helicopters and planes searched the back roads and woods of South Carolina, the boys' maternal grandfather urged people to "lift up the names [of the boys] to the Lord." *Id.* An FBI Supervisor described the kidnapping as "the nation's nightmare," and vowed that the FBI was "amassing all the resources we have nationwide." Robert Davis, *Little to Go on but Hope in S.C.'s Tots' Kidnapping*, USA TODAY, Oct. 28, 1994, at 3A. Black residents in Union, South Carolina were questioned as the police went door to door looking for information, and several [B]lacks were detained. Gary Lee, *Black Residents Angered by Reaction to False Story: 'No One Has Rushed Forward to Apologize,'* WASH. POST, Nov. 7, 1994, at A10. Once found, the carjacker potentially faced the death penalty.

In the end, the nation learned that Smith's carjacking claim was nothing more than a fabrication. On November 3, 1994, Smith confessed to sending her toddlers, alive and strapped in their car seats, into the waters of a lake to drown. As Professor Charles P. Ewing later noted, Smith was able to fool the nation precisely because her story played to the "fears of the public and the racism that fuels fear of crime in this country." Elizabeth Kastor, *The Worst Fears, the Worse Reality; for Parents, Murder Case Strikes at Heart of Darkness*, WASH. POST, Nov. 5, 1994, at A1; *see also* Eric Harrison, *S. Carolina Case of Deceptions Also a Case of Perceptions Crime: A Mother's Tale of a Carjacker Is Now Seen as Another Example of Vilifying Black Men. But in*

Spartanburg, South Carolina, which, after settling a Justice Department lawsuit[18] and then two 1994 class action suits[19] alleging race discrimination,[20] now makes amends by contributing "[twenty] cents from the sale of every All-American Slam® (at participating restaurants) to the King Center,"[21] the National Civil Rights Museum in Memphis, Tennessee. It was about the prohibition against interracial dating at Bob Jones University in Greenville, South Carolina, where President George W. Bush kicked off his 2000 presidential campaign.[22] It was about the grade schools in South Carolina, not to men-

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the Tight-Knit Town, Cries of Racism are Tempered, L.A. TIMES, Nov. 8, 1994, at A27. At trial, the jurors spared Smith the death penalty that her "fictitious" carjacker could have received. Tamara Jones, *Susan Smith Gets Life in Jail for Killing Sons, Death Penalty Wouldn't Serve Justice: Juror*, CHI. SUN-TIMES, July 29, 1995, at 1.

18. Benjamin A. Holden, *Parent of Denny's Restaurants Signs Bias-Case Decree*, WALL ST. J., Mar. 26, 1993, at A5; Amy Stevens, *Denny's Agrees to Alter Practices in Bias Settlement*, WALL ST. J., Mar. 29, 1993, at A9 ("According to the Government, Denny's employees required [B]lack patrons to show identification before being allowed to enter the restaurants; employees removed some [B]lack patrons from restaurants without good cause . . . [and] [B]lacks—but not [W]hites—were required to prepay for meals and to pay cover charges."). Just hours before a federal court signed over the consent decree, patrons at a Denny's restaurant in Annapolis faced discrimination. The patrons, six Black Secret Service agents preparing for a U.S. Naval Academy visit from President Clinton, ordered breakfast but were not served for more than an hour, while a group of [W]hite Secret Service agents sitting at another table were served without delay. The Black Secret Service agents left after an unsuccessful attempt to get an explanation from management. Denny's employees then attempted to hide the fact that the six Secret Service agents had complained. Peter Hermann, *U.S. Agents Accuse Annapolis Restaurant of Racism – Six Plan to File Suit Against Denny's*, BALT. SUN, May 23, 1993, at 1A.

19. *See* Dyson v. Flagstar Corp., C.A. No. 93 1503 (D. Md. 1994); Ridgeway v. Flagstar Corp., Civ. No. 93-20202, 1994 WL 525553 (N.D. Cal. 1994); *see also All Things Considered: Denny's Tries to Clean up Image After Racial Bias Suits* (NPR radio broadcast, Sept. 22, 1994), *available at* 1994 WL 8680234.

20. *See* McCoo v. Denny's, Inc., No. COV.A.98-2458RDR, 2000 WL 156824, at *1 (D. Kan. 2000); Savage v. Denny's Inc., No. Civ. A. 97-882, 1997 WL 169377, at *2 (E.D. Pa. 1997); Ron Ruggless, *2000 Year in Review*, 34 NATION'S RESTAURANT NEWS 51 (2000); Chris Winston, *Advantica President Steps Down*, SPARTANBURG HERALD (South Carolina), Jan. 5, 2001, at A1 ("[T]he 1,756 unit Denny's chain, a division of Advantica Restaurant Group, agreed to retrain managers at company locations after facing U.S. Justice Department charges of discriminatory hiring practices"). Denny's history of discrimination is so well known that it was recently commented upon by the Sixth Circuit in reversing and remanding a district court's grant of summary judgment in favor of Denny's. *See* Logan v. Denny's, Inc., 259 F.3d 558, 577 (6th Cir. 2001) ("Denny's past history of discriminatory conduct, both to its minority patrons and employees alike, is well known in the jurisprudence and public forums.").

21. For more detail, see http://www.dennys.com/en/Page.asp?PID=5&ID=33#B1.

22. Following public criticism over President Bush's visit, Bob Jones University modified its blanket ban on interracial dating, and agreed to permit interracial dating so long as the student first obtain written approval from his or her parents. *Bob Jones U. Hasn't Changed*, HARTFORD COURANT, Mar. 16, 2000, at A18. Bob Jones University honorary degree recipients include Attorney General John Ashcroft; upon accepting the degree in May 1999, Ashcroft reminded graduating students that, "We have no king but Jesus," and "thank[ed] God" for the institution. Libby Quaid, *Liberals Examine Ashcroft Speech*, CHI. SUN-TIMES, Jan. 13, 2001, at 14.

Bob Jones University also has an interesting history with respect to the American flag and Dr. King:

tion the churches and the cemeteries, still being segregated by race.[23] It was about South Carolina refusing, until the flag controversy erupted, to honor Dr. Martin Luther King, Jr.'s contribution to civil rights with an official holiday.[24] It was about the shame White South Carolinians felt upon learning that Senator Strom Thurmond, who had once declared that "all the bayonets of the Army cannot force the Negro into our homes," had fathered a Black daughter.[25] It was about housing subdivisions being named, to this day, wistfully, after plantations.[26]

Thinking along these lines, and the unsuccessful grassroots and legislative efforts of the NAACP to remove the flag, I began to wonder about legal challenges to State displays of the flag,[27] both through the Equal Protection Clause of the Fourteenth Amendment, and

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> In April of 1968 we had had a Bible conference that included Ian Paisley, the militant northern Irishman, and at the end of a Saturday night, Bob Jones, Jr., got to the podium and said "Martin Luther King, Jr. has just been shot in Memphis, Tennessee. The President has asked us to fly the flag at half-mast. We will not fly the flag at half-mast for an apostate," at which time the audience clapped and cheered. I had never witnessed such a racist act.

CAROLYN MARVIN & DAVID W. INGLE, BLOOD SACRIFICE AND THE NATION: TOTEM RITUALS AND THE AMERICAN FLAG 56-62 (1999) (quoting interview of Denis MacDonald, *in The Glory and the Power: Fundamentalism Observed* (WHYY television broadcast, June 1962)).

23. *See, e.g.*, Cal Harrison, *Herald Chronicles Century Of Racial Tension*, HERALD (Rock Hill, SC), Apr. 17, 1997, at 52D; Jennifer Talhelm, *Race Line May Blur If Fort Mill Adds Cemetery*, CHARLOTTE OBSERVER, Nov. 18, 2001, at 12B.

24. B. Drummond Jr. Ayres, *Campaign Briefing*, N.Y. TIMES, May 2, 2000, at 24; *S.C. to Mark King Holiday*, NEWSDAY, May 2, 2000, at A19. The bill recognizing Dr. King with a holiday also honored Confederate soldiers who fought to retain slavery by creating Confederate Memorial Day.

25. The late Senator's niece, Mary T. Thompkins Freeman, has described the public announcement that Strom Thurmond fathered a child with a Black maid as "a blight on the family." Ms. Freeman added, "I went to a church meeting the other day and all these people came up to me and you could tell they didn't know what to say. For the first time in my life, I felt shame." Ms. Freeman noted that had Thurmond secretly fathered a [W]hite child, "it would be a whole other situation." Other family members questioned the daughter's motives for coming forward, especially publicly, and feared that the existence of a Black relative would affect not only Thurmond's legacy, but the political prospects of his descendants. Jeffrey Gettleman, *Thurmond Family Struggles with Difficult Truth*, N.Y. TIMES, Dec. 19, 2003, at A1.

26. Derrick Bell, through his alter ego Geneva Crenshaw, notes that "minor matters" should not be disregarded precisely because they

> convey unintended signals to [B]lacks and [W]hites about how the Court weighs the relative interests of the two races. The Court's inclination to avoid upsetting [W]hites any more than is necessary, combined with its use of a standard of review that encourages government officials to create "neutral" rules that everyone knows will disadvantage [B]lacks, in effect creates a property right in [W]hiteness and the consequent loss of some cases that we should by all rights win.

BELL, *supra* note 1, at 172.

27. My interest is limited to state displays of the Confederate flag. While I may personally be offended by private persons who display the flag, I recognize, and respect, their right to do so. Indeed, such private displays actually benefit me, in that they signify to me whom I should avoid and not extend certain courtesies to, and permits me to redirect my business, and dollars and cents—indeed, make that sense—elsewhere.

through the Thirteen Amendment.[28] My interest was limited to State displays of the Confederate flag. While I may be personally offended by private persons who display the flag, I recognize and respect their right to do so. Indeed, such private displays actually benefit me, in that they signify to me whom I should avoid and not extend certain courtesies to, and permits me to redirect my business, and dollars and cents—indeed, make that sense—elsewhere.

I quickly learned that there had been challenges elsewhere—in Alabama in *NAACP v. Hunt*,[29] and in Georgia in *Coleman v. Miller*,[30] as well as numerous challenges to the removal of Confederate symbols in public schools,[31] universities,[32] and cemeteries[33]—and that these challenges had failed. The more I examined these cases and the scholarly responses to them,[34] however, the more I became convinced

28. There have also been challenges to state displays of the Confederate flag on First Amendment grounds, most recently in *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003). There, the court held that such displays neither violate the Establishment Clause under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), nor contravene the First Amendment's right to free speech. *See, e.g., Briggs*, 331 F.3d at 505-08.

29. 891 F.2d 1555 (11th Cir. 1990).

30. 912 F. Supp. 522 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997) (*Coleman I*).

31. In general, where there has been a showing of past disruption resulting from the display of Confederate flags, courts have found school bans constitutional under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). *See, e.g.*, Scott v. Sch. Bd., 324 F.3d 1246, 1248-49 (11th Cir. 2003); West v. Derby Unified Sch. Dist. 260, 206 F.3d 1358, 1365-1367 (10th Cir. 2000); Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972); Phillips v. Anderson County Sch. Dist. 5, 987 F. Supp. 488, 492 (D.S.C. 1997). In the absence of evidence of past disruption, courts have generally concluded that school authorities have failed to establish a sufficient likelihood of disruption to support banning the flag. *See, e.g.*, Castorina v. Madison County Sch. Bd., 246 F.3d 536, 542-43 (6th Cir. 2001) (reversing summary judgment for school officials where there was no showing of disruption); Denno v. Sch. Bd. of Volusia County, 182 F.3d 780, 785 (11th Cir. 1999), *vacated, and decided on separate grounds*, 218 F.3d 1267 (11th Cir. 2000) ("noting the absence of any facts . . . that would suggest a reasonable fear of disruption").

32. The University of Mississippi, for example, has been a locus of controversy. The school's mascot, Colonel Rebel, is a personification of an Old South plantation owner; *Dixie*, until recently, was sung at football games; the University's nickname, Ole Miss, is the slave term for the [W]hite female head of a plantation. Until 1983, the University distributed Confederate flags to fans at football games, and cheerleaders carried Confederate flags down the field. *See* Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Corrections: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411, 1413-16 (1992).

33. *See, e.g.*, Griffin v. Dep't of Veterans Affairs, 274 F.3d 818, 824 (4th Cir. 2001) (declaring Department of Veteran's Affairs's decision to limit the display of the Confederate flag at National Cemetery reasonable and viewpoint neutral under the First Amendment).

34. *See, e.g.*, Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897 (1998) (applying reception theory to argue that State displays of Confederate flag have a discriminatory effect); James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991) (arguing that state displays violate First and Fourteenth Amendments); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002) (arguing that the Thirteenth Amendment empowers the federal government to prohibit the states from flying Confederate flags).

that something was missing from the analysis. Although the cases cursorily addressed the historiography surrounding the display of the flag, the decisions were silent when it came to any analysis of the power associated with this display.

Replicating my own heuristic approach to this issue, in Part I, I review the Equal Protection challenges to state displays of the Confederate flag that have been mounted to date, paying particular attention to the cursory manner in which federal courts have addressed the plurality of meanings behind the flag itself. In Part II, I offer a rereading of the cases by, among other means, examining them in light of current juridical approaches to analyzing Equal Protection claims, and I argue that the cases, by effect if not design, perpetuate social inequality.

Returning to the plurality of meanings[35] in the Confederate flag, in Part III, I attempt to "thicken" the analysis by mapping out not only what the Confederate flag denotes, but also what the Confederate flag connotes. Though perhaps unconventional, I consider the Confederate flag against the backdrop of flags in general. In doing so, I consider the Confederate flag as an iconic metaphor, as conveying messages implicating protection, allegiance, and stasis. I attempt to concretize my analysis by imagining other flags that could be displayed by States and how challenges to those flags would likely fare. In Part IV, I offer a retelling of Derrick Bell's *Chronicle of the Space Traders*, and explore how the Confederate flag functions as an assurance of how any proposal that pits the interests of the minority against interests of the majority will be resolved. Finally, in Part V, I explore how the view of the Confederate flag as a signifier of protection, allegiance, and stasis could strengthen future challenges to the government-sponsored display of the Confederate flag.[36]

35. I am not suggesting here that there is any meaning immanent in the Confederate flag, or in any other flag for that matter. In semiotic terms, flags, like words, are simply signifiers, and the various meanings associated with them are signifieds that otherwise bear no relation to what they signify. *See generally* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally et al. eds., Open Court Publ'g Co. 1986) (1916). Nor am I suggesting that the signifieds or meanings, associated with any particular flag are fixed. As the literary theorist Mikhail Bakhtin has emphasized, signs are inherently "dialogic," modified and transformed in meaning by differing social tones, valuations, and connotations assigned to them by a heterogeneous society composed of conflicting interests and views. M. M. BAKHTIN & P.N. MEDVEDEV, THE FORMAL METHOD IN LITERARY SCHOLARSHIP: A CRITICAL INTRODUCTION TO SOCIOLOGICAL POETICS (Albert J. Wehrle trans., 1928). What I am suggesting is that flags, because they are so imbricated with history, social convention, and mythology, are particularly polysemic.

36. This is not to suggest that the removal of the Confederate flag would have an immediate transformative effect on states such as South Carolina. History suggests that judicial decisions

I. FLAGS: THE EQUAL PROTECTION CASES

To date, two federal appellate courts have considered Equal Protection challenges to State displays of the Confederate flag.

A. *NAACP v. Hunt*

In 1988, the NAACP and several of its Alabama members filed suit in the Middle District of Alabama against Governor Guy Hunt and other state officials (the "State"), seeking declaratory judgment that the flying of the Confederate flag atop the Alabama capitol dome violated the Equal Protection Clause of the Fourteenth Amendment, as well as the First and Thirteenth Amendments. The District Court dismissed the case on procedural grounds,[37] and on appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed. The Eleventh Circuit, however, elected not to rest its dismissal solely on procedural grounds, noting instead that because of the "controversial concerns," it was "important that all issues be laid to rest on the merits."[38]

Turning to the merits, the Eleventh Circuit concluded that while the NAACP had satisfied the first prong for stating a cause of action under 42 U.S.C. § 1983 by establishing that the Confederate flag was flown by individuals acting under the cloak of State authority,[39] the NAACP could not satisfy the second prong, which required a deprivation of some right, privilege, or immunity secured by the Constitution or by law.[40] Relying on *Hunter v. Underwood*,[41] in which the Supreme Court held that facially neutral state action will violate the Equal Pro-

rarely result in social change. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 56-62 (1977); R. SHEP MELNICK, REGULATION AND THE COURT: THE CASE OF THE CLEAN AIR ACT 110-12 (1983). As Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 765 (1991) has pointed out, *Brown v. Board of Education* may be the "most conspicuous confirmation of the point." Despite the Supreme Court's mandate that states desegregate public schools "with all deliberate speed," ten years after the decision, only about two percent of Black children in the South attended desegregated schools. *Id.*; *see also* G. STONE ET AL., CONSTITUTIONAL LAW 474 (1986). That being said, I am suggesting that removal of the flag can catalyze change.

37. Specifically, the district court dismissed the NAACP's claims as precluded by *res judicata*. NAACP v. Hunt, 891 F.2d 1555, at 1561 (11th Cir. 1990). The dismissal was based on the fact that several years earlier, in 1975, one of the *Hunt* plaintiffs, Alabama State Legislator Alvin Holmes, had filed a nearly identical action in *Holmes v. Wallace*, 407 F. Supp. 493 (M.D. Ala. 1976), *aff'd without published opinion*, 540 F.2d 1083 (5th Cir. 1976). There, the district court had dismissed Holmes's claims based on the Thirteenth and Fourteenth Amendments, finding that while a "[s]tate sponsored display of the Confederate flag may offend *sensitive descendants* of former slaves," Holmes's "embarrassment and humiliation in the absence of some recognized right to liberty or property" was insufficient to allow recovery. *Holmes*, 407 F. Supp. at 497-98 (emphasis added).

38. *Hunt*, 891 F.2d at 1561-62.

39. *Id.* at 1562 (citing Monroe v. Pape, 365 U.S. 167, 184-87 (1961)).

40. *Id.* at 1562-63 (citing 42 U.S.C. § 1983).

tection Clause only if: (1) the state action was motivated, at least in part, by racial animus; and (2) the state action produced a disproportionate effect along racial lines, the Eleventh Circuit concluded that the plaintiff had failed to demonstrate racial animus. Noting that the record revealed "two accounts of why Alabama flies the flag," only one of which suggested animus,[42] the Eleventh Circuit declined to find that the flag was hoisted for racially discriminatory reasons. The Eleventh Circuit then summarily dismissed the NAACP's claim that "the flag was 'tantamount to holding public property for racially discriminatory purposes' and that it denied its members their rights to equal education, equal economic opportunity, and equal protection."[43] Instead, the Eleventh Circuit concluded "there is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position."[44]

Finally, in what can be described as an *ad hominem* attack, the Eleventh Circuit noted that the NAACP had been advancing discrimination suits in federal and state courts "over the [twenty-five] years since the flag was raised," and had never before requested that it be brought down.[45]

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41. 471 U.S. 222 (1985). *Underwood* involved a challenge to an Alabama law disenfranchising persons convicted of "any crime . . . involving moral turpitude." *Id.* at 223 (quoting ALA. CONST. art. VIII, § 182). Historical evidence indicated that the law was enacted to disenfranchise Blacks, and in fact accomplished its goal. As such, the Court concluded that it deprived Blacks of equal protection. *Id.* at 225.

42. *Hunt*, 891 F.2d at 1562. Here, the Eleventh Circuit was clearly attempting to transform what it had earlier identified as the "two occasions" that Alabama had raised the flag into "two accounts" for raising the flag. *Id.* at 1558. The two occasions were as follows: Alabama raised the flag in 1961 ostensibly for the purpose of commemorating the one-hundreth anniversary of the Civil War. *Id.* The second time Alabama raised the flag was in 1963 in response to efforts to desegregate the University of Alabama. Governor George Wallace had threatened to physically block the admission of newly matriculated Black students to the University. On the morning of April 25, 1963, the day that U.S. Attorney General Robert F. Kennedy traveled to Alabama to confront Wallace, Alabama hoisted the flag in a show of defiance. *Id.*

43. *Id.* at 1562.

44. *Id.*

45. The Eleventh Circuit also rejected the NAACP's remaining claims. The Eleventh Circuit noted that while the Thirteenth Amendment grants Congress the authority to enact legislation to eradicate badges and incidents of slavery, Congress had not used this authority to pass legislation forbidding the flying of the Confederate flag, precluding the NAACP's Thirteenth Amendment claim. *Id.* at 1564.

The Eleventh Circuit also rejected as meritless the NAACP's contention that, given the Ku Klux Klan's use of the flag "as part of their religious rituals," Alabama's flying of the Confederate flag amounted to excessive entanglement with religion. Applying the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), which held that a state practice is valid under the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion, the Eleventh Circuit concluded:

Having elected to lay "to rest on the merits" the claims raised by the NAACP, the Eleventh Circuit concluded by electing to insulate itself from accountability by passing the buck:

> It is unfortunate 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. The remedy for such a grievance lies within the democratic processes of the State of Alabama and the voting rights of all its citizens, "the restraints on which the people must often rely solely, in all representative governments."[46]

B. *Coleman v. Miller*

Seven years after the Eleventh Circuit claimed to lay to rest the "controversial concerns"[47] raised in the NAACP's challenge to Alabama's display of the Confederate flag, it was presented with another challenge, this time to the constitutionality of the state flag of Georgia.[48] At the time, Georgia's state flag consisted of the Georgia state seal, which covered approximately a third of the flag, and the Confederate battle flag emblem, which covered the remaining two-thirds.[49] In a civil rights action filed in the Northern District of Georgia under 42 U.S.C. § 1983, James Coleman, an African American resident of Georgia, had challenged the legislation establishing the flag and the flag's design on several grounds, including the ground that it violated his constitutional rights to equal protection under the Fourteenth Amendment.[50]

> It is clear that whether the flag was hoisted to decry integration or to recognize history, the purpose in its hoisting was secular. It is also clear that the primary effect of the flag is not to promote religion; rather, it is to remind citizens, albeit offensively to some, of a controversial era in American history . . . . Finally, the NAACP has produced no evidence that the flag constitutes excessive entanglement with religion . . . . Without meaningful evidence of purpose, effect, and entanglement, the Establishment Clause claim must fail.

Hunt, 891 F.2d at 1564-65. Finally, the Eleventh Circuit rejected the NAACP's claim that Alabama's display of the Confederate flag either interfered with the NAACP's free speech, or amounted to improper "government speech" or "'monopolization of the marketplace of ideas.'" *Id.* at 1565-66.

46. *Hunt*, 891 F.2d at 1566 (quoting Gibbons v. Ogden, 22 U.S. 1 (1824)).

47. *Id.* at 1561.

48. Coleman v. Miller, 117 F.3d 527 (11th Cir. 1997) (*Coleman II*). Coleman, an African American resident of Georgia, brought his civil right action challenging the flag, and seeking an injunction ordering the immediate removal of the Georgia flag from all state office buildings in Georgia, in 1994. *Id.* at 524-25.

49. *Id.* at 528.

50. *Id.* Coleman also claimed that Georgia's incorporation of the Confederate battle flag compelled him "to be the courier of an ideological message to which he objects," in violation of his rights to freedom of expression and association under the First Amendment; deprived "him

At an evidentiary hearing before the District Court, Coleman presented evidence detailing the "historical incidents leading to the . . . flag's enactment,"[51] which included the following:

> In [May] 1954, the [U.S.] Supreme Court decided *Brown v. Board of Education*, holding that racial segregation in public schools violated the Equal Protection Clause. Later that year, Georgia voters [reacting to *Brown I*] ratified a constitutional amendment allowing parents to withdraw their children from public schools and [permitting the state legislature to] divert[ ] public money to nonsectarian, segregated schools.
>
> . . . .
>
> In April 1955, John Sammons Bell, counsel to the County Commissioners Association of Georgia and Chairman of the State Democratic Party, [proposed modifying Georgia's state flag]. . . . to incorporate the Confederate battle flag . . . .
>
> In May 1955, the Supreme Court decided [*Brown II*, requiring] states to desegregate public schools "with all deliberate speed." [*Brown II*] fomented great controversy and deep emotion in Georgia. Politicians, including Governor Marvin Griffin, advanced a policy of massive resistance to desegregation in response.
>
> [In August 1955, in a further response to *Brown I* and *Brown II*,] the Georgia School Board ordered all teachers belonging to the [NAACP] to resign from the organization or have their teaching licenses revoked.
>
> [In August 1955 Georgia's] State Attorney General . . . advocat[ed] the doctrine of interposition, . . . maintain[ing] that states may *interpose* themselves to block the enforcement of unconstitutional mandates such as *Brown*. . . .
>
> . . . .
>
> In December 1955, ... Georgia['s] . . . Board of Regents . . . passed a resolution . . . [prohibiting Georgia Tech's football team from] play[ing] . . . intrastate games against teams with [B]lack players.
>
> [In January 1956,] . . . . [i]n his . . . state of the State address, Governor Griffin . . . [promised, among other things, the following:]

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of his fundamental privacy interest in intimate associations with Caucasians free from Government intrusion," in violation of his Due Process rights under the Fourteenth Amendment, and intimidated him and other African Americans "into refraining from exercising their right to vote" in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1971. Coleman v. Miller, 912 F. Supp. 522, 530-32 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997) (*Coleman I*). The District Court rejected each of these claims as meritless, and only the Equal Protection and Freedom of Expression claims were addressed on appeal. *See id.*

51. *Coleman I*, 912 F. Supp. at 525.

> "[T]here will be no mixing of the races in public schools, in college classrooms in Georgia as long as I am the governor. I campaigned with segregation as the number one plank in my platform. We must not desert future generations of Georgians. We must never surrender. All attempts to mix the races, whether they be in the classrooms, on the playgrounds, in public conveyances, or in any other close personal contact on terms of equality harrow the mores of the South."
>
> In . . . February 1956, [State] Senator Willis Harden sponsored a bill to adopt . . . [a] new design for the state flag. . . .
>
> The bill passed 107 to 32, to 61 abstentions.[52]

Having accepted this factual history, the district court nonetheless bypassed the racial animus prong of *Hunter*[53] and granted Georgia's motion for summary judgment on the second prong of *Hunter*, namely, that Coleman had failed to show that Georgia's display of the flag had resulted in a "concrete, present-day discriminatory impact on African[ ]Americans."[54] Although Coleman argued that he suffered certain intangible harms,[55] and that under *Brown* disparate harm need "not be specifically identifiable but may amount to feelings of inferiority such that they cause harm to the African[ ]American community,"[56] the district court rejected this claim and distinguished *Brown* on the ground that the statute at issue there was not facially neutral, but explicitly classified children on the basis of race.[57]

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52. *Coleman I*, 912 F. Supp. at 526-28. The district court noted that nothing in the legislative record of the bill, which is codified at O.C.G.A. § 50-3-1, revealed any discussion of segregation or White supremacy. *Id.* at 528. A likely explanation for this omission, however, is that segregation and White supremacy were taken as a given. The district court did acknowledge that segregation was a focus of the remainder of the 1956 session of the General Assembly. The District Court noted:

> Of the 150 acts passed in the session, ten bills and two resolutions dealt with massive resistance to desegregation. One such law passed after the flag bill, the Interposition Resolution, declared the *Brown* cases and all similar decisions to be null and void. Finding that the Supreme Court had usurped powers reserved to the states in *Brown*, it repudiated the Court's right to declare state laws unconstitutional. It also asserted that Georgia had the right to decide for itself how to educate its children in keeping with the State's segregated social structure. The resolution passed with twenty-five abstentions and only one dissent.

Id.

53. *Coleman I*, 912 F. Supp. at 530.

54. *Id.* at 529.

55. In an attempt to satisfy the disparate impact prong of *Hunter*, Coleman claimed that the flag's existence called upon Georgia citizens to adopt the "symbolic state policy of discrimination" and resulted in his devaluing himself as a person. *Coleman I*, 912 F. Supp. at 529-30. The district court found neither of these contentions persuasive. *Id.*

56. *Id.* at 530 n.8 (quoting Coleman's brief in opposition to the summary judgment motion).

57. *Id.*

On appeal, the Eleventh Circuit affirmed the district court's grant of summary judgment to the State of Georgia, concluding that Coleman had failed to satisfy *Hunter* by presenting "specific factual evidence to demonstrate that the Georgia flag presently imposes on African[ ]Americans, as a group, a measurable burden or denies them an identifiable benefit."[58]

> Appellant relies on his own testimony to demonstrate a disproportionate racial effect. He testified that the Confederate symbol in the Georgia flag places him in imminent fear of lawlessness and violence and that an African[ ]American friend of his, upon seeing the Georgia flag in a courtroom, decided to plead guilty rather than litigate a traffic ticket. This anecdotal evidence of intangible harm to two individuals, without any evidence regarding the impact upon other African[ ]American citizens or the comparative effect of the flag on [W]hite citizens, is insufficient to establish "disproportionate effects along racial lines."[59]

The Eleventh Circuit concluded that Coleman faced the same, presumably insurmountable, hurdle as the plaintiff had in *NAACP v. Hunt*: "'[T]here is no unequal application of state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position.'"[60]

Finally, as it had done before in *Hunt*, the Eleventh Circuit attempted to insulate itself from criticism by expressing its disagreement with Georgia's decision to fly the flag, while simultaneously disclaiming any authority to order the removal of the flag:

> We recognize that the Georgia flag conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression. But because the Confederate battle

58. *Coleman II*, 117 F.3d at 530.

59. *Id.* (quoting *Hunter*, 471 U.S. at 227). Coleman's fear of "lawlessness and violence" is not entirely farfetched. The Confederate flag has been embraced not only by members of the Ku Klux Klan and neo-Nazis, but by other supremacists groups as well. *See* Forman, Jr., *supra* note 34, at 526 n.57 (citing examples of various supremacists invoking the Confederate flag); L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521, 553 n.64 (2001). More recently, federal agents who searched serial bombing suspect Eric Robert Rudolph's storage unit in 1998 found "guns, ammunition . . . and Confederate flags." Rudolph was subsequently arrested on May 31, 2003, after a much publicized, five-year manhunt, and is awaiting capital trial in federal court in Alabama in connection with the 1998 bombing of an abortion clinic there. Rudolf also faces charges in Georgia, in connection with three bombings there, including one at the 1996 Olympics. Don Plummer, *Rudolph Caches Revealed Items Seized Expand Portrait of Bomb Suspect*, ATLANTA J. CONST., July 1, 2003, at A5.

60. *Coleman II*, 117 F.3d at 530 (quoting NAACP v. Hunt, 891 F.2d 1555, 1561 (11th Cir. 1990)).

> flag emblem offends many Georgians, it has, in our view, no place in the official state flag. We regret that the Georgia legislature has chosen, and continues to display, as an official state symbol a battle flag emblem that divides rather than unifies the citizens of Georgia. As judges, however, we are entrusted only to examine the controversies and facts put before us.[61]

II. FLAGS: THE JURIDICAL PERPETUATION OF SOCIAL INEQUALITY

That the Eleventh Circuit decisions in *Hunt* and *Coleman* are assailable on a number of grounds perhaps goes without saying. That some greater showing of harm—a "concrete, present-day discriminatory impact on African[ ]Americans"[62]—must be proved where a statute is facially neutral, as opposed to discriminatory on its face, is far from apodictic. One need only look at the district court's "facially neutral" recitation of the "facts" adduced at the evidentiary hearings to see how easily race can be alluded to without being stated. Throughout the district court's recitation, racial identification is ubiquitous, a given, and yet at the same time absent. Thus, the district court was able to note the "public outcry to desegregation," [63] "voters ratif[ying] a constitutional amendment allowing parents to withdraw their children from public schools,"[64] and "[p]oliticians advanc[ing] a policy of massive resistance to desegregation,"[65] without once needing to identify the race of the actors.[66] Indeed, during the Civil Rights Era, states routinely responded to judicial invalidations of racially explicit legislation by purposefully enacting facially neutral, yet discrimi-

61. *Id.* at 530. One effect of this assertion of the court's "view" is that it provides support for the court's earlier claim, not based on any evidence in the record, that "all races are offended by" Georgia's display of the flag. The judges on the three-member panels that decided *NAACP v. Hunt* and *Coleman v. Miller* were all White men. Notwithstanding the fact that African Americans comprise approximately twenty percent of the Eleventh Circuit, there has never been more than one African American judge at a time on the Eleventh Circuit. *See generally* Report on Presidential Appointments of African American Article III Judges, *available at* www.jtbf.org (last visited Oct. 4, 2004).

62. *Coleman I*, 912 F. Supp. at 529.

63. *Id.* at 526.

64. *Id.*

65. *Id.* at 527.

66. *Id.* Race is similarly a given in Governor Griffin's 1956 state of the State Address, as the following rewrite demonstrates: "I campaigned with segregation as the number one plank in my platform. We [Whites] must not desert future generations of [White] Georgians. We [Whites] must never surrender." *Id.*

natory, laws.[67] Given the fact that it is relatively easy to cloak racially motivated legislation in facially neutral language,[68] there seems little basis for imposing a more stringent standard in challenges to facially neutral statutes.[69] Indeed, as Darren Lenard Hutchinson has convincingly argued, requiring proof of racial animus departs from the spirit of the Equal Protection Clause, as explicated by law's most famous footnote,[70] and contributes to what Hutchinson identifies as the "inversion of privilege and subordination in Equal Protection jurisprudence."[71] Put differently, under Hutchinson's theory, *Hunt* and *Coleman* can be read as belonging to a growing body of cases in which courts, having extended solicitude to the discrimination claims brought by members of privileged classes in "reverse discrimination" cases, find claims of discrimination deficient when brought by mem-

67. *See, e.g.*, Bd. of Educ. v. Swann, 402 U.S. 43 (1971) (prohibiting busing enacted to thwart integration); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (excluding all but four Black voters from the city); *see also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (zoning decision); Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337-38 (1988) (discussing the *de jure* manifestation of subordination that existed prior to the Civil Rights movement).

68. As the Supreme Court has noted:

> It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Palmer v. Thompson, 403 U.S. 217, 225 (1971).

69. *See, e.g.*, Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Seth F. Kreimer, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 948 (1989) (arguing that "[i]f explicit racial classifications are unlawful, it makes little sense to allow a government that is subtle enough to use an ostensibly neutral surrogate for race to get away with maintaining the Jim Crow regime").

70. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The footnote reads, in relevant part:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id.

71. Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003).

bers of historically vulnerable classes—the very persons that the Equal Protection Clause was drafted to protect.[72]

Similarly, one could quarrel with the Eleventh Circuit's adoption of an Equal Protection test based on anti-differentiation, rather than anti-subordination or equal citizenship.[73] Under the anti-differentiation standard, exemplified by *Washington v. Davis*,[74] courts invalidate only those government actions that make explicit and purposeful distinctions between similarly situated groups.[75] By contrast, under an anti-subordination approach, exemplified in *Brown I*,[76] the constitutionality of a law is not determined by simply examining whether it differentiates among similarly situated classes; rather, a law unlawfully discriminates if it reinforces the marginalized social, economic, or political status of historically disadvantaged classes.[77] In the alternative, the Eleventh Circuit could have adopted the equal citizenship approach advocated by scholars such as Kenneth Karst,[78] and exempli-

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72. *Id.* at 671.

73. For a general discussion of the various meanings of equality that scholars and jurists have advanced in the context of equal protection analysis, see *id.* at 619-27.

74. 426 U.S. 229 (1976). In *Washington v. Davis*, plaintiffs challenged on equal protection grounds the requirement of an aptitude test to gain employment with the Washington, District of Columbia police department. Finding that the test was applied equally to all applicants, and rejecting statistical evidence of disproportionate pass/failure rates, the Court found the test constitutional.

75. *See generally* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986) (describing the anti-differentiation approach as precluding only different treatment on the basis of a particular normative view about race or sex); *see also* Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 228 (1997).

76. 347 U.S. at 483 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); *see also* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 76 (1998) (noting that *Brown* "has been most persuasively defended as the Court's recognition that, as actually practiced, American segregation was a crucial piece of a system of racial subordination").

77. *See* Colker, *supra* note 76; Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994); Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 71 (1990) (advocating an "anti-subordination model, which targets legislation that substantially contributes to the subordination of one group by another").

78. *See, e.g.*, Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-6 (1977) [hereinafter Karst, *Equal Citizenship*].

> The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy off respect, one who "belongs." Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant. Accordingly, the principle guards against degradation or the imposition of stigma.

Id. at 6. *See generally* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION (1993).

fied by *Lawrence v. Texas*[79] and even more recently in the Massachusetts Supreme Court's decision *Goodridge v. Dept. of Public Health*.[80] Under Karst's theory, the Equal Protection Clause authorizes courts to invalidate laws that reduce groups to "second-class citizenship." Karst argues:

> The essence of equal citizenship is the dignity of full membership in the society. Thus, the principle not only demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a social fact — namely, one's rank on a scale defined by degrees of deference or regard. The principle embodies "an ethic of mutual respect and self-esteem;" it often bears its fruit in those regions where symbol becomes substance.[81]

Thus, by applying a test based on anti-differentiation, rather than anti-subordination or equal citizenship, the Eleventh Circuit was able to ensure a result that was all but predetermined to sustain social and racial hierarchy.

One could also take issue with the Eleventh Circuit's application of the discriminatory impact prong of *Hunter*, and its statement, first made in *Hunt* and reiterated in *Coleman*, that citizens of all races are offended by the Confederate flag, and the implicit suggestion that such citizens are offended equally. The Eleventh Circuit offered no empirical support for this supposition; and indeed, their conclusion runs contrary to polls reflecting the public's responses to the flag.[82] Moreover, as demonstrated by Justice Clarence Thomas's statements during oral argument in *Virginia v. Black*,[83] which involved a First Amendment challenge to a Virginia statute criminalizing cross burning, the targets of symbols of supremacy justifiably feel offended to a greater degree than even their most liberal sympathizers.[84] For exam-

79. 539 U.S. 558 (2003) (invalidating Texas's anti-sodomy law as infringing on the right to liberty under the Due Process Clause).

80. 798 N.E.2d 941, 948 (Mass. 2003) (reading the Massachusetts Constitution's guarantees of equality before the law as "forbid[ding] the creation of second-class citizens," and thus precluding the denial of the civil marriage benefits to same-sex couples); *see also In re* Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

81. Karst, *Equal Citizenship*, *supra* note 78, at 5-6.

82. *Cf. infra* note 88.

83. 538 U.S. 343 (2003).

84. As one commentator described it:

> [N]early midway through the hour-long hearing, Justice Clarence Thomas transformed the debate with his booming and rarely heard voice, cautioning government lawyers against "understating the effects of burning crosses." Cross burning was part and parcel of "100 years of lynching in the South," Thomas said, adding that "this was a reign of terror." Burning a cross, he said, is "intended to have a virulent effect. It is unlike any other symbol."

Tony Mauro, *Remarks by Thomas Alter Argument*, LEGAL TIMES, Dec. 16, 2002, at 7.

ple, it would be irrational for a non-minority to fear physical assault from an approaching group waving Confederate flags. By contrast, given the history of violence associated with the Confederate flag,[85] it would be entirely rational for a member of a historically oppressed class, in the face of the same approaching group, to fear for his safety.

This is not to suggest that the plaintiffs in *Hunt* and *Coleman* mounted the strongest cases imaginable. Ultimately, the Eleventh Circuit was able to point to the plaintiffs' failure to present "specific factual evidence" to refute the court's assessment that the Confederate flag imposes no disproportionate effect along racial lines. Rather than relying on empirical data or expert testimony and reports from sociologists, as the NAACP had done to great effect in *Brown*,[86] the plaintiffs in *Hunt* and *Coleman* instead relied on personal, anecdotal evidence. One could argue that the failure on the part of the plaintiffs to present data supporting their claim of disparate impact was fatal, though whether the Eleventh Circuit would have been receptive to, or persuaded by, such data is questionable.[87]

One could also argue that by deferring to the state legislature, which by definition is majoritarian, the Eleventh Circuit abdicated its function of protecting "discrete and insular minorities."[88] Stated dif-

85. Several violent White supremacist groups have adopted the Confederate battle flag as their symbol. *See, e.g.*, Ashley Dunn & Jeffrey Miller, *'I Had to Stop it,' Says Guard Who Held off Alleged "Skinheads,"* L.A. TIMES, June 1, 1989, at B1 (A group of Los Angeles skinheads wearing Confederate battle flag tattoos attacked a Middle Eastern couple and baby in a supermarket parking lot.); John M. Glionna, *Unfavorite Son*, L.A. TIMES, Oct. 30, 1990, at E1 (Tom Metzger, former Grand Dragon of the KKK and leader of the White Aryan Resistance, who was ordered to pay $12.5 million in damages for his role in the killing of a Black man in Oregon, flew the Confederate battle flag above his home.); Peggy O'Hare, *Task Force Reveals Arrests of Four After Infiltration of Bandidos Gang*, HOUSTON CHRON., Oct. 11, 2000, at 21A (gang displayed swastikas and Confederate flag); Paul W. Valentine, *Police Boost Security at NAACP; White Supremacists Picket Headquarters*, WASH. POST, Jan. 5, 1990, at C1 (KKK and neo-Nazi protestors demonstrating outside the national headquarters of the NAACP carried a Confederate battle flag along with signs saying "Nuke the NAACP.").

86. *See generally* MARK TUSHNET, *BROWN V. BOARD OF EDUCATION*: THE BATTLE FOR INTEGRATION (1995); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

87. For example, the Supreme Court found unpersuasive statistical data evidencing a racial pattern in the imposition of the death penalty in Georgia. McCleskey v. Kemp, 481 U.S. 279 (1987). For a general discussion of the Supreme Court's rejection of discriminatory impact statistics in Equal Protection actions, see Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1144-61 (1998).

88. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (invoking footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), to explicate a process-based theory of judicial review to protect disadvantaged minorities, who by definition are subject to the will of the majority in a majoritarian legislative process); *see also* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 716 n. 5 (1985); Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087 (1982).

ferently, *Hunt* and *Coleman* can be read as a failure of countermajoritism. Instead of protecting the interests of "insular minorities" from the majoritarianism of representative government, as envisioned under the late John Hart Ely's model of judicial review, the Eleventh Circuit instead protected the preferences of the majority. Indeed, scholars such as Charles Lawrence and Girardeau A. Spann would argue that the failure of counter-majoritarianism is all but inevitable in such cases, given that judges, through the nomination and confirmation process, usually arrive at the bench already "inculcated with majoritarian values."[89]

Specifically, Spann persuasively argues that Supreme Court Justices are, by necessity, majoritarian, in the sense that they have been socialized by the dominant culture. His argument has equal force when applied to other federal judges:

> [Judges] have internalized the basic values and assumptions of [the] culture, including the beliefs and predispositions that can cause the majority to discount minority interests. Indeed, a justice's sympathy toward majoritarian values is thoroughly tested by the appointment and confirmation process, which is specifically designed to eliminate any candidate whose political inclinations are not sufficiently centrist for the majoritarian branches to feel comfortable with that candidate's likely judicial performance. As a statistical matter, therefore, a [federal judge] is more likely to share the majority's views about proper resolution of a given social issue than to possess any other view on that issue. Moreover, to the extent that the justice has been socialized to share majoritarian prejudices, he . . . may not even be consciously aware of the nature of those prejudices, or the degree to which they influence the exercise of the [judge's] discretion. Whatever factors cause majority undervaluation of minority interests, [judges] socialized by the dominant culture will have been influenced by them too. Accordingly, justices will come to the task of protecting minority interests possessed by the very same dispositions that they are asked to guard against.[90]

Finally, one could argue that the Eleventh Circuit was either naïve or disingenuous in urging the plaintiffs to seek recourse in the legislative arena. The simple fact is that efforts by minorities to obtain relief in the legislatures have proved unavailing, and will in all likeli-

89. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1982 (1990) [hereinafter Spann, *Pure Politics*]; *see also* GIRARDEAU A. SPANN, RACE AGAINST THE COURT (1983); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

90. Spann, *Pure Politics*, *supra* note 89, at 1982-83.

hood continue to prove unavailing.[91] As Reinhold Niebuhr noted, insular minorities cannot expect "complete emancipation from the menial social and economic position into which the [W]hite man has forced him, merely by trusting in the moral sense of the [W]hite race."[92]

On another level, however, *Hunt* and *Coleman* suffer from a failure of context. After all, how can one decide whether the state display of the Confederate flag violates the Equal Protection Clause, without first considering what it means for the State to display a flag?

III. FLAGS: THE POLEMICAL FLAG

> "You might ask mockingly: '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 thin air."[93]

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.[94]

> I am what you make me; nothing more. I swing before your eyes as a bright gleam of color, a symbol of yourself.[95]

In the collection of the Staten Island Historical Society, there is a thirty-four-star American flag that has an interesting, if apocryphal, history. According to legend, during the period of the Civil War, a Confederate sympathizer made the mistake of hanging a Confederate flag from the window of the Staten Island boarding house where he was staying. An angry mob quickly gathered, forcibly removed the Confederate flag, and threatened to burn the house to embers unless

91. For example, in 2001, a referendum was put to the voters in Mississippi on removing the Confederate emblem from the state flag. The removal was easily defeated, with only thirty-five percent of voters supporting the removal. At the time, Mississippi was thirty-six percent Black. Nicholas Dawidoff, *Mr. Washington Goes to Mississippi*, N.Y. TIMES, Oct. 19, 2003, at 48.

92. REINHOLD NIEBURH, MORAL MAN AND IMMORAL SOCIETY, A STUDY IN ETHICS AND POLITICS 252 (1932).

93. Theodore Herzl, regarded as the founder of modern Zionism, wrote these words to a German friend who had questioned the significance of flags. ROBERT JUSTIN GOLDSTEIN, SAVING "OLD GLORY": THE HISTORY OF THE AMERICAN FLAG DESECRATION CONTROVERSY ix (1995) (omission in original) [hereinafter GOLDSTEIN, FLAG DESECRATION].

94. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (Justice Jackson holding unconstitutional compulsory flag salutes in public schools).

95. Richard Lowe, *Are We Flagging?* BRISTOL EVENING POST, Apr. 19, 2003, at 3 (quoting Franklin L. Kane, Secretary of the Interior, on Flag Day, 1914).

its occupants raised a Union flag in its place before nightfall. Having no Union flag on hand to raise, the landlord and tenants hurriedly began to sew one, using whatever cloth they could find. Their efforts paid off. Just as night was falling, they draped a Union flag from the window. The mob, satisfied, moved on, and the boarding house was spared.[96]

What was striking about this story was its similarity to the Biblical story of Passover. The Union flag, in the story, becomes the functional equivalent of lamb's blood smeared on a door, a sign of allegiance, something that permits safe passage, and at the same time signifies to whatever pestilence, plague, or mob that happens to be about to move on, to pass over.[97]

Examples of the American flag having this almost talismanic effect are legion. Not surprisingly, however, these examples begin with the Civil War. Although not commonly known, the public's adoption of the flag as iconic did not begin on June 14, 1777, when the Continental Congress approved the stars-and-stripes design for the American flag,[98] but eighty-five years later, when the Civil War began.[99]

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96. *History Detectives* (PBS television broadcast, Aug. 2003); *see also Historic Flag*, STATEN ISLAND REG., Aug. 26 - Sept. 1, 2003, *available at* http://www.siregister.com/news_story.php?nid=221&edition=55 (last visited Sept. 13, 2004).

97. *See generally Exodus* 12:1-51 (describing how the Israelites smeared lamb's blood on their doors as a sign to the Lord to pass over their houses when He smote the first born of the Egyptians).

98. The resolution passed by Congress read simply: "RESOLVED: That the Flag of the United States be thirteen stripes, alternate red and white: that the Union be thirteen stars, white in a blue field, representing a new constellation" J. CONT. CONG. VIII, 464; ROBERT PHILLIPS, THE AMERICAN FLAG: ITS USES AND ABUSES 35 (1930) [hereinafter PHILLIPS, USES AND ABUSES]. From the legislative record, it does not appear that Congress made any provision for the making of new flags for its militia, or notified the militia of its action. FREDERICK C. HICKS, THE FLAG OF THE UNITED STATES 100-03 (2d. ed. 1926). [hereinafter HICKS, FLAG OF THE U.S.]; *see generally* PHILLIPS, USES AND ABUSES, *supra*, at 40-42.

The year prior to its adoption of the "Stars and Stripes" design, Congress passed a resolution adopting as the official flag what is commonly known as the Grand Union flag. Although the Grand Union flag also bore thirteen stripes, the canton displayed the Union Jack—from the flag of England—rather than a constellation of stars. Indeed, that meaning is not immanent in a flag is evidenced by the reaction of British and Loyalist soldiers upon first seeing the Grand Union flag in Charlestowne, Massachusetts in 1776. Seeing that the flag incorporated the Union Jack, the British and Loyalist soldiers interpreted the flag as a sign of surrender. WILLIS FLETCHER JOHNSON, THE NATIONAL FLAG: A HISTORY 19-27 (1930) [hereinafter JOHNSON, THE NATIONAL FLAG]. As George Washington wrote to his friend Colonel Joseph Reed:

> "[F]arcical enough, we gave great Joy to them (the Red Coats I mean) without knowing or intending it, for on that day . . . we had hoisted the Union flag in compliment to the United Colonies, but behold! It was received in Boston as a token of the deep Impression [the King's warning] had made upon us, and as a signal of Submission—so we learn by a person out of Boston last night—by this time I presume they begin to think it strange that we have not made a formal surrender of our Lines."

ALFRED MORTON CUTLER, THE CONTINENTAL "GREAT UNION" FLAG 9 (1929) (quoting Washington's letters).

Indeed, between 1777 and the outbreak of the Civil War, the flag was displayed almost exclusively on federal government buildings, naval ships, and forts, and as flag historian Robert Philipps has noted, regarded as "peculiarly governmental property."[100] The flag was neither unfurled over schools, nor displayed outside homes. As one of the directors of the Betsy Ross house in Philadelphia stated, "it would have been unthinkable to fly an American flag at a private home. It simply was not done."[101] Similarly, cultural historian Wilbur Zelinsky has noted: "During its early career, the national flag was remarkably unimportant to the citizenry at large."[102]

The change in attitude about the American flag, rather, and its metamorphosis into a totemic symbol, was the result of the outbreak of the Civil War; specifically, by Confederate troops firing on the American flag-bedecked Fort Sumter, in South Carolina.[103] As Robert Justin Goldstein noted, "'all at once the people of the Northern States and the Union discovered that there was an American Flag and towns and villages, cities and county hamlets blossomed full-bloom with a most gorgeous display of the Red, White and Blue.'"[104] As another flag historian noted:

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99. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 3-4. This is not to suggest that the American flag did not enjoy brief periods of popularity prior to the Civil War. For example, following England's unsuccessful attack on Baltimore, Maryland on September 13, 1814, Francis Scott Key wrote the *Star-Spangled Banner*, which in turn sparked public interest and pride in the flag. After the close of the war, however, the song lost its popularity, as did the flag. Both the song and the flag regained their popularity following the outbreak of the Civil War. JOHNSON, THE NATIONAL FLAG, *supra* note 98, at 75-77.

100. PHILLIPS, USES AND ABUSES, *supra* note 98, at 58.

101. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 4. Just as America's idolatry of the flag can be traced to the Civil War, so can the story of the flag's creation by Betsy Ross. The idea of Ross as "the mother of our country" began with her grandson William J. Canby who, in an address before the Pennsylvania Historical Society in 1870, claimed that that when he was a child, his grandmother informed him that she had created the first flag after being visited by George Washington. Scholars have since questioned this claim, given the absence of any mention of her in connection with the flag in Congressional records, Washington's diary, or any other Revolutionary documents. For a discussion generally of this creation myth, see HICKS, FLAG OF THE U.S., *supra* note 98, at 16-17; JOHNSON, THE NATIONAL FLAG, *supra* note 98, at 38-42.

102. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 4. Along these lines, it is interesting to contrast the painter Gilbert Stuart's pre-Civil War portraits *George Washington* (1795-96), *John Adams* (1800-15), *James Madison* (1805), *James Monroe* (1818), *Thomas Jefferson* (1805-07), *Paul Revere* (1813) and *Chief Justice John Jay* (1794), in which flags are absent, with Emanuel Leutze's famous painting *Washington Crossing the Delaware* (1851) depicting Washington leading the attack on Hessians at Trenton on December 25, 1776. In Leutze's painting, an anachronistic American flag figures prominently.

103. LLOYD BALDERSTON, THE EVOLUTION OF THE AMERICAN FLAG, FROM MATERIALS COLLECTED BY THE LATE GEORGE CANBY 93-95 (1909).

104. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 5 (quoting an 1896 Connecticut Sons of the American Revolution report).

> The fall of Sumter created great enthusiasm throughout the loyal states, for the flag had come to have a new and strange significance . . . One cry was raised, drowning all other voices—"War! war to restore the Union! war to avenge the flag! . . ."
>
> When the stars and stripes went down at Sumter, they went up in every town and county in the loyal states. Every city, town and village suddenly blossomed with banners. On forts and ships, from church-spires and flag-staffs, from colleges, hotels, store-fronts, and private balconies, from public edifices, everywhere the old flag was flung out . . . .
>
> The demand for flags was so great that the manufacturers could not furnish them fast enough. Bunting was exhausted and recourse was had to all sorts of substitutes. In New York, the demand for flags raised the price of bunting from [$4.75] a piece to [$28.00].[105]

The flag, following the outbreak of war, thus became a symbol around which loyalists rallied.

At a flag raising ceremony that attracted 100,000 people at Union Square in New York City on April 20, 1861, the tattered remnants of the Fort Sumter flag were placed in the hands of a statute of George Washington; throughout the war, this relic was used as a fund-raising device, and upon the recapture of Sumter in 1865, the flag was retuned and rededicated in an elaborate ceremony.[106]

It was during this period that the removal of one flag, namely the Confederate flag, and the raising of another flag, the Union flag, resulted in the boarding house on Staten Island being spared.[107] The protection that could be secured by displaying the American flag continued through World Wars I and II. For example, in 1918, a New

105. 2 GEORGE HENRY PREBLE, ORIGIN AND HISTORY OF THE AMERICAN FLAG 453 (1917).

106. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 6.

107. Far from being an isolated incident, vigilantes in Philadelphia, Pennsylvania, Trenton, New Jersey and other cities also demanded, under threat of violence, that various businesses and newspapers display the Union flag. *Id.* at 7.

Of course, there are other nineteenth-century examples of flags providing protection. During the height of a contested presidential election in Mexico, for example, a mob converged on the U.S. embassy in search of Spaniards seeking sanctuary there, and shots were fired. The U.S. Minister to Mexico, Joel R. Poinsett, then ordered that an American flag be unfurled from the balcony. According to legend, as Poinsett stood below the flag and proclaimed its protection for all in his household, the shouting ceased, guns were lowered, and the mob retreated. 1 GEORGE HENRY PREBLE, HISTORY OF THE FLAG OF THE UNITED STATES 351-52 (1880). There is also a children's story from the nineteenth century in which:

> [T]he flag mysteriously saves a boy named Joe trapped in a burning house on the Fourth of July—the flagpole bends over to him when he finds himself cut off on the second story; he takes hold of the banner, pulls himself out of the blazes, and shimmies down to safety.

SCOT M. GUENTER, THE AMERICAN FLAG 1777-1924 111 (1990); *see also* J. William Fosdick, *The Studlefunk's Bonfire*, *in* ST. NICHOLAS 23 (1986).

York woman was arrested for removing an American flag that a neighbor had placed in her window and replacing it with a German flag while declaring, "To hell with the American flag. I want my own flag."[108] Similarly, in 1930, a mob of 700 local residents and Ku Klux Klan ("KKK") members confronted two women who ran a Communist children's camp in Van Etten, New York, and demanded that they hoist an American flag. When the women refused, the mob seized them and brought them before a judge, and flag desecration charges were filed. Following trial, the judge sentenced the two women to ninety days in prison each, declaring that their sentences were intended "as a warning to Communists all over the United States that they could not trifle with the American flag or teach un-Christian doctrines."[109]

That having the correct flag was essential to protection is perhaps best demonstrated when one considers the trade unions and striking workers that sought recourse in the American flag during the early part of the twentieth century. Strikers during this period routinely carried or marched behind American flags to show their bona fides as patriotic Americans and to ward off physical attacks by those who perceived striking as un-American.[110] During this same period, being without a flag often led to ostracism and violence. Hundreds of Jehovah's Witnesses were expelled from school for refusing to salute the flag because their refusal, on religious grounds, was viewed as evidence of insufficient patriotism,[111] expulsions which the Supreme Court initially deemed constitutional, on "national security" grounds,

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108. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 81.

109. *Id.* at 90.

110. Although strikers during this period routinely carried or marched behind flags to show their bona fides as patriotic Americans and ward off physical attacks by those who perceived them as un-American, the flag did not insulate them completely in this regard.

> [D]uring a bitterly fought coal strike in Colorado in 1914, strikers carried a flag when they greeted the well-known labor agitator "Mother" Jones at a railroad station in January. After she was arbitrarily jailed strikers marched behind a flag to demand her freedom, only to be attacked by mounted troops with guns and sabers drawn, an event that led to headlines in the labor press such as, "Woman carrying American flag knocked down with butt of gun and flag torn from her hands by militiamen." During a textile strike in Passaic, New Jersey, which erupted amidst the Red Scare of 1919, strikers held a mammoth parade on March 17, led by army veterans holding American flags. And according to a standard history of the labor movement in Colorado, striking miners who were shot at by state police in 1927, with the result that five men were killed and another critically wounded, had marched "with the front rank carrying American flags, as was customary."

GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 88.

111. *Id.* at 93-94; *see also* DAVID R. MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY (1962) 56, 70-78; LEONARD A. STEVENS, SALUTE! THE CASE OF THE BIBLE VS. THE FLAG 9-10 (1973).

in *Minersville School District v. Gobitis*.[112] It is far from an exaggeration to note that the Supreme Court's decision sanctioned the continued expulsion of students, and implicitly fostered the harassment and mob attacks of Jehovah's Witnesses,[113] which continued unabated until 1943, when the Supreme Court reversed itself and struck down compulsory flag salute laws in *West Virginia Board of Education v. Barnette*.[114] That the flag signified protection is also evident in popular culture during this period. In December 1940, Marvel Comics created Captain America.[115] A year later, a month before the bombing of Pearl Harbor, DC Comics created Wonder Woman.[116] Both superheroes, it can be argued, are anthropomorphisms of the American flag.[117] Their costumes are reconstructed flags. Their charge: To protect America from its enemies.

The flag as a protector continued during the Vietnam era, when citizens used flags to align themselves with the Government and police, and separate themselves from anti-war activists.[118] During this

112. 310 U.S. 586, 595-96 (1940).

113. For example, in 1940, police officials in Richwood, West Virginia "forced a group of [Jehovah's] Witnesses to swallow large doses of castor oil [and] paraded them roped together before a large crowd . . . [which] attempted unsuccessfully to force them to plead allegiance to the flag." GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 94.

114. 319 U.S. 624, 641-42 (1943).

115. Marvel Characters, Inc. v. Simon, 310 F.3d 280 (2d Cir. 2002).

116. Hank Stuever, *Keeping Wonder Woman in Shape*, L.A. TIMES, May 23, 2001, at E4.

117. By contrast, the artist Rene Cox, in her *Raje* series (1998), photographs herself as a Black superhero battling urban blight and villains. Cox also costumes herself in the colors of a flag, but chooses the red, yellow and green colors of the Black solidarity flag. In a similar vein, a South Carolina rap group has incorporated into its act what it calls the "New South" flag—the Confederate flag redone in Black solidarity colors. *See* Mike Smith, *Banner Combines Confederate Flag, Colors of Black Liberation*, ATLANTA J. CONST., Apr. 22, 1994, at A4.

118. By contrast, many in the Civil Rights movement read the flag as reinforcing the racial hegemony I argue the Confederate flag now communicates. The American flag, during this period, symbolized to many African Americans a lapse in protection. Thus, during a civil rights demonstration in Cordele, Georgia, in March 1966, protesters ripped down an American flag from the Cordele courthouse, prompting Governor Carl Sanders to order state police to protect the flag and prompting the KKK to hold a counter demonstration during which the Grand Dragon admonished White Georgians, "If you can't protect this flag we will bring enough Klansmen to do it for you." GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 157.

The following year Sidney Street, a forty-seven-year-old African American bus driver who had been awarded a Bronze Star for his heroism during World War II, committed an equally political act. While listening to the radio in his Brooklyn apartment, Street heard a report that James Meredith, a civil rights leader, had been shot by a sniper in Mississippi. Saying to himself, "They didn't protect him," Street "took from his drawer a neatly folded, [forty-eight]-star American flag which he formerly had displayed on national holidays," took it to a street corner, and publicly burned it, exclaiming that if "they let that happen to Meredith, we don't need an American flag." Street v. New York, 394 U.S. 576, 578 (1969). The Supreme Court overturned his conviction for violating New York's flag desecration law (which also outlawed contemptuous remarks about the flag) upon the ground that the trial record did not preclude the possibility that his conviction was based solely on his remarks, rather than the flag burning. *Id.* at 594.

period, hundreds of thousands of Americans pasted flag decals on their windows, and flag stickers on their car bumpers; for example, in 1969 and 1970, over 70 million flag decals were distributed, including as part of commercial promotions through magazines, gas stations, banks, and civil organizations.[119] The necessity of displaying the flag was even noted by a cartoon in the October 24, 1970 issue of the *New Yorker*. The cartoon depicted an executive telling an employee, "'Naturally, X, the company doesn't care whether its employees have little flags on their desks or not. It's purely a voluntary thing. We just wondered why you happened to be the only person who hasn't got one.'"[120] The idea of the flag as protector has only continued since then. We have seen it most obviously, since September 11, 2001 in Arab-Americans literally cloaking themselves in the American flag[121] to ward against everything from job discrimination,[122] to racial profiling,[123] to harassment,[124] to violence.[125]

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119. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 157.

120. *Id.* (quoting a cartoon from NEW YORKER, Oct. 24, 1970, at 56).

121. *See, e.g.*, Francis X. Donnelly, *Metro Arabs, Muslims Suffer Harassment, Hatred*, DETROIT NEWS, Nov. 4, 2003, at 1 (Arabs and Muslims have "wrap[ped] themselves in the American flag, hoping that its presence in their homes and workplaces send the message that they are not terrorists"); Beth J. Harpaz, *Times Are Tense for Arab Americans Even in New York a City of Immigrants, Sees Incidents of Backlash*, CHARLOTTE OBSERVER, Sept. 23, 2001, at 3A (profiling a Muslim woman who "wears an American flag pin—partly to show solidarity, but partly as a defensive measure"); David A. Markiewicz, *The Year That Changed America: Dearborn, Michigan, Arab Enclave Wrestles with Identity*, ATLANTA J., Dec. 30, 2001, at A18 (in "Arab-American neighborhoods, American flags and patriotic messages adorn shop windows, front lawns and automobiles" in a public assurance of patriotism); Thane Peterson, *The Gift of Diversity, the Need for Tolerance*, BUSINESSWEEK ONLINE, Sept. 18, 2001 ("Arab-American store owners are threatened with vandalism if they don't display American flags"), *at* http://www.businessweek.com; Emily Sweeney, *Backlash Felt Far from Ground Zero, Anti-Muslim Bias Focus of Discussion*, BOSTON GLOBE, June 16, 2002, at 4 (Muslim responded to harassment by taping "American flags up in the windows of his store.").

122. *See generally* AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH 7 (reporting over 800 cases of employment discrimination against Arab-Americans following September 11, 2001, a four-fold increase over previous annual rates), *available at* www.adc.org (last visited Oct. 6, 2004).

123. *Id.* (reporting over eighty cases of discriminatory removal of Arab-American and Muslim passengers from aircrafts after boarding, but before takeoff, following September 11, 2001); *see also* Donnelly, *supra* note 121 ("Arab-Americans have a name for the offense they seem to be punished for: Flying While Brown.").

124. Foreward to FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2001, *available at* http://www.fbi.gov/ucr/01hate.pdf, reports 481 Islamic bias incidents in 2001, an increase of more than 1600% over the previous year, during which 28 such incidents occurred, FED. BUREAU OF INVESTIGATION & U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2000, HATE CRIME 60 (2000), *available at* http://www.fbi.gov/ucr/cius_00/contents.pdf (last visited Sept. 26, 2004); *see also* Donnelly, *supra* note 121 (Complaints received by Council on American-Islamic Relations tripled after September 11, 2001, and survey of 945 Muslims found that 48% believed the quality of their lives had declined since September 11, 2001.).

In addition to signifying protection, the flag also marks territory, asserts power and control, extends and delineates borders. Think of Robert Peary planting the American flag at the North Pole,[126] or Neil Armstrong planting a waving flag[127] on the moon. Think of the Joe Rosenthahl photograph of soldiers raising the flag on Mt. Suribachi during the battle for Iwo Jima in February 1945, marking the first Japanese soil captured by the Americans, which photograph was recently replicated after the fall of the World Trade Center towers, quite literally to reclaim control and power over the site. For a more recent example, think of the debacle that resulted in April 2003, when American soldiers in Baghdad, before toppling a statue of Saddam Hussein, first draped his head in the American flag. The American flag was quickly removed, and replaced with an Iraqi flag, but sparked worldwide controversy and condemnation nonetheless, and prompted the Army to subsequently issue a statement barring any display of the American flag on vehicles, buildings, statues, or command posts.[128] The controversy was the result of the flag being such a universal symbol of occupation, imperialism, [129] colonization,[130] and control.[131]

125. Executive Summary to AM-ARAB ANTI-DISCRIMINATION COMM, *supra* note 122, *available at* http://server.traffic.northwestern.edu/events/rps/shora.pdf (last visited Oct. 5, 2004) (section entitled *Physical and Psychological Attacks*) (reporting over 700 violent incidents targeting Arab Americans, or those perceived to be Arab Americans, Arabs and Muslims in the first nine weeks following the attacks, and approximately 165 violent incidents from January 1, 2002 to October 11, 2002).

126. Although Peary is generally credited with being the first explorer to reach the North Pole, recent scholarship suggests that in fact his companion, Matthew Henson, an African American, reached the North Pole forty-five minutes ahead of Peary. When Peary finally caught up with Henson, Henson greeted him by saying, "I think I'm the first man to sit on top of the world." Henson recalled that this angered Peary, who responded by "fasten[ing] a flag to a staff and plant[ing] it firmly on top of his igloo. Anna Brendle, *Profile: African-American North Pole Explorer Matthew Henson*, NAT'L GEOGRAPHIC NEWS, Jan. 15, 2003, *available at* http://news.nationalgeographic.com/news/2003/01/0110_030113_henson.html (last visited Oct. 5, 2004).

127. In fact, the planting of a "waving" flag on the moon was a constructed illusion. Because the atmosphere on the moon is airless, a specially designed brace was created to give the impression that the flag was blowing in the wind. HARRY HURT III, FOR ALL MANKIND 180-81 (1988).

128. Bernard Weinraub, *After Euphoria, U.S. Flag Goes into Hiding in Iraq*, INT'L HERALD TRIB., Apr. 11, 2003, at 5.

129. The language flag historian Willis Johnson uses in describing the flag at new frontiers is telling. For example, Johnson describes Commodore Matthew Calbraith Perry's carrying the flag into the harbor of Yeddo, Japan as symbolically opening "that hermit empire to rational intercourse with the civilized world." JOHNSON, THE NATIONAL FLAG, *supra* note 98, at 88. Johnson also becomes effusive in describing Henry Morton Stanley's carrying of the flag into the "torrid jungles of Equatorial Africa . . . the heart of the dark continent" to "rescue" the explorer David Livingston:

> There have been few more interesting scenes than that of the meeting of two [W]hite men, amid a multitude of Black natives in the African wilderness, when Stanley, carrying the Stars and Stripes in one hand and raising his hat with the other inquired: "Doctor Livingston, I presume?" Three years later, Stanley went to Africa again, and made his way from the East Coast to the Great Lakes, thence to the upper reaches of the

Perhaps, the only flag that suggests the absence of control is the white flag of surrender, the flag wiped clean, its colors erased.

The flag can also be read as signifying a utopian idea of the status quo. As the art history scholar John Yau notes in an essay on Jasper Johns' seminal *Flag* painting:

> [A] flag is a symbol that helps citizens believe they stand outside time and change. It sums up a moment of resolution in a collective history, as if that moment is neither mythically narrative nor subject to disruption or revision. Like most flags the American flag represents both a belief in unity of purpose and the existence of a common social reality. It is a palpable symbol which proposes that the world will go on being the same, and that its existence within the world as a meaningful object is guaranteed.[132]

In this sense, the American flag can be read as an assurance of stability, as a promise to ensure an "American way of life." Stated differently, in protecting, the flag also preserves—although what it preserves may be an idealized version of what exists. Instead of cinema verite, the American flag promises *Leave It To Beaver*[133] and

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> Congo, and so down that mighty river to its mouth. Thus, the Stars and Stripes was the first flag ever to be borne down from the Indian Ocean to the Atlantic; the first to follow the thitherto unknown course of the Congo, and the pioneer in opening the way for the Congo Free State.

Id. at 89.

130. That America was colonized with a flag, at least in our collective mythology, perhaps goes without saying. As described by Christopher Columbus's son:

> Columbus dressed in scarlet first stepped on shore from the little boat which bore him from his vessels, bearing the royal standard of Spain emblazoned with the arms of Castile and Leon in his own hand, followed by the Pinzons in their own boats each bearing a banner of the expedition, viz: a white flag with a green cross, having on each side the letters F and Y surmounted by golden crowns.

GEORGE HENRY PREBLE, OUR FLAG. ORIGINS AND PROGRESS OF THE FLAG OF THE UNITED STATES 110-11 (1872)

131. One could argue that it was the fear of control, or at least symbolic control, that prompted laws forbidding the display of red flags during the Red Scare of the early twentieth century. *See generally* Elmer M. Million, *Red Flags and the Flag*, ROCKY MOUNTAIN L. REV. 1940-1941, at 13, 47-60. The Supreme Court was called upon to address the constitutionality of these laws in *Stromberg v. California*, 283 U.S. 359 (1931), which involved the conviction of nineteen-year old summer camp counselor who, in addition to teaching the children history and economics, taught "class consciousness" and "the solidarity of the workers," and routinely led the students in a pledge of allegiance 'to the worker's red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class." *Id.* at 362. Concluding that the law was unconstitutional under the First Amendment, the Court reversed Stromberg's conviction. *Id.* at 369-70.

132. JOHN YAU, THE UNITED STATES OF JASPER JOHNS 8 (1996).

133. *Leave It To Beaver* (CBS television broadcast 1957-1959, NBC television broadcast 1959-1963); *see also* Peter Orlick, *Leave it to Beaver*, *at* http://www.museum.tv/archives/etv/L/htmlL/leaveittob/leaveittob.htm (last visited Sept. 26, 2004).

Happy Days.[134] Instead of Edward Hopper, the flag promises Norman Rockwell.[135]

It is this idea of the flag exemplifying protection, and power, and stasis that perhaps explains the visceral reaction many Americans have not just to the burning or mutilation of the flag, but to the disregard of the flag. Examples include the rash of flag burnings during the Vietnam era, including a highly public and publicized flag burning in Central Park in April 1967, which prompted Congress to pass the first federal flag desecration law in 1968; the outrage that erupted following an art exhibit by "Dred" Scott Tyler, which included a flag on the floor and an invitation to patrons to step on it;[136] and Republican Presidential candidate George H.W. Bush's use of the flag during the 1988 campaign to portray himself as patriotic, and to impugn the patriotism of his democratic rival Michael Dukakis. During his campaign, Bush led his audiences in recitals of the pledge, surrounded his campaign stops with flags, and conducted campaign stops in Flag City, U.S.A. and at a flag factory.[137] At the same time, citing Dukakis's veto as Governor of Massachusetts against a law requiring daily recitation of the Pledge of Allegiance to the flag, and ignoring the Supreme Court's decision in *Barnette*, Bush portrayed Dukakis as unpatriotic.[138] Bush invoked the flag so often that *Time* magazine noted:

> Five weeks after the Republican convention, the public can be certain of [only] two things about George Bush: he loves the flag, and he believes in pledging allegiance to it every morning. But some voters may wonder what he would do with the rest of his day if he became president.[139]

A firestorm of protest also erupted after the Supreme Court reversed the conviction of Gregory Lee Johnson in *Texas v. Johnson*.[140] Johnson was convicted for violating Texas's flag desecration law by burning a flag outside the 1984 Republican National Convention as

134. *Happy Days* (ABC television Broadcast 1974-1984); *see also* Happy Days, *at* http://www.geocities.com/~maxraby/tv/happy/ (last visited Sept. 27, 2004).

135. Indeed, it is this sanitized version of America that another artist, Faith Ringgold, critiques in her quilted version of the American flag, *Flag for the Moon: Die Nigger 1967-69*, in which the word "DIE" can be seen dimly against the stars, and the silver stripes spell out the word "nigger."

136. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 201-02.

137. Whitney Smith, *The American Flag in the 1988 Presidential Campaign*, FLAG BULL. 128 (1988).

138. *Id.*

139. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 201.

140. 491 U.S. 397 (1989).

part of a larger protest by hundreds of demonstrators. On appeal, the Supreme Court overturned his conviction, finding Texas's flag desecration law, and by implication flag desecration laws in general, unconstitutional under the First Amendment. The protest that followed the Supreme Court's decision was immediate. Within a week of the decision, President Bush proposed a constitutional amendment to overturn the decision, and thirty-nine separate resolutions were sponsored in the House and Senate calling for such an amendment.[141] Polls showed that seventy-one percent of Americans favored a constitutional amendment, and within months of the decision, 1.5 million Americans had signed a petition in support of an amendment.[142] In the end, Congress responded by passing the Flag Protection Act of 1989 (FPA),[143] rather than seeking a constitutional amendment.[144] Instead of putting an end to the flag debate, however, the FPA spurred the largest wave of flag burning incidents in American history, and a flurry of arrests.[145] On March 13, 1990, U.S. Solicitor General Kenneth Starr invoked the mandatory and expedited review provision of the FPA to seek Supreme Court review, which the Supreme Court accepted in cases consolidated and known as *United States v. Eichman*.[146] Notwithstanding the FPA's allegedly neutral content, the Su-

141. The response to the Supreme Court's decision in *Texas v. Johnson* was, for the most part, not only emotional, but highly vitriolic, as Goldstein has noted.

> Representative Ron Marlenee of Montana termed the decision "treasonous" and, referring to the six marines depicted in the Iwo Jima Memorial, declared, "These six brave soldiers were symbolically shot in the back by five men in [B]lack robes." The Chairman of the South Carolina Joint Veterans Council called on Americans to write to their elected officials to demand that "this crap" be stopped, while conservative columnist Patrick Buchanan termed the decision an "atrocity" and the Court a "renegade tribunal" to which the American people should respond by putting "a fist in their face." The *New York Daily News* termed the *Johnson* decision "dumb" and declared it put the Court in "naked contempt" of the American people and displayed "pompous insensitivity to the most beloved symbol of the most benevolent form of government ever to appear on this Earth"; it also published a cartoon showing a figure resembling President Bush pouring gas on a pile of law books forming a pyre below five bound judges who were bearing copies of the "flag case," with the caption, "Anybody got a match."

GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 206. Determined not to be outflagged, Democrats joined in the "fusillade of pro-flag rhetoric," matching the Republicans "word for word." Robin Toner, *Democrats, in a Flurry of Bills, Seek to Recapture the Flag Issue from the Foe*, N.Y. TIMES, June 26, 1989, at B6; *see also* GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 208.

142. *Legislators Support Flag Move*, N.Y. TIMES, July 4, 1989, at 6.

143. The Flag Protection Act was viewed as neutral since it provided penalties of up to one year for anyone who "knowingly mutilates, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States," without regard to the actor's intent. Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. § 700).

144. GOLDSTEIN, FLAG DESECRATION, *supra* note 93, at 208.

145. *Id.* at 208.

146. 496 U.S. 310 (1990).

preme Court struck down the FPA as a clear violation of the First Amendment.[147]

That flags signify protection, power, and stasis is at the heart of other recent controversies over displays of the flag. The controversy surrounding the display of the rainbow flag of lesbian and gay pride is one example. In Columbus, Ohio, a battle between long-term residents, mostly Black and working class, and newer residents, mostly White and gay and attempting to gentrify the neighborhood, was exemplified by flag wars. Young gay men and women, after moving to the neighborhood, began to hang rainbow flags. Many Black residents, in response, began to hang Black solidarity flags.

This battle for control and power was thus replicated in a battle of flags, a battle documented in the film "Flag Wars," recently shown on the PBS Network.[148] More recently, when Orlando, Florida hung rainbow flags, just temporarily, to celebrate Gay Pride Month, Pat Robinson claimed that Orlando was bringing about "the destruction of your nation. It'll bring about terrorist bombs; it'll bring earthquakes, tornadoes and possibly a meteor."[149] In response to the controversy, Orlando officials banned the future display of any flags.[150]

More recently, the KKK elected to stage a rally at the City Hall in Cleveland, Ohio because the city had flown a rainbow flag there, again temporarily, for the Gay Pride Month in June. Apparently hoping to kill two birds with the same stone, the KKK also elected to stage the rally on a Saturday, to protest Rosh Hashana. Prior to the rally, the KKK publicly announced that it planned to burn both the rainbow flag and an Israeli flag.[151]

As another example, think back to the protests that erupted a few years ago when, on the penultimate episode of *Seinfeld*, Kramer accidentally set a Puerto Rican flag on fire, and then attempted to put out

147. *Id* at 319. Championing flag desecration laws remains a way to appeal to segments of the population. General Wesley K. Clark, in campaigning for the Democratic nomination for president this past year, told a crowd on Veteran's Day that he supported a constitutional amendment that would make it illegal to desecrate the American flag, drawing applause from the crowd. Edward Wyatt, *Clark Tells Veterans He Backs Amendment on Flag Desecration*, N.Y. TIMES, Nov. 12, 2003, at A18.

148. *POV: Flag Wars* (PBS television broadcast, June 17, 2003).

149. Thomas B. Edsall, *Forecasting Havoc for Orlando; on TV, Robertson Says Display of Gays' Flags Invites Disaster*, WASH. POST, June 10, 1998, at A11.

150. Sherri M. Owens, *New Flag Question Is About Flying Old Glory*, ORLANDO SENTINEL, June 24, 1998, at D1.

151. Mathew Marx, *Police Prepare for KKK Rally, Counter Rally on Busy Sunday*, COLUMBUS DISPATCH, Sept. 10, 1999, at 3B.

the fire by stomping on the flag.[152] Even more recently, a school district's flying of the purple-and-white flag of the Iroquois Confederacy, in recognition of the members of the five tribes who comprised twenty-three percent of the student body, was met with protests and petitions from other students and parents, who viewed the flying of the Iroquois flag as a ceding of control.[153] Of course there is the controversy surrounding state displays of the Confederate flag.[154]

The typical debate about state displays of the Confederate flag turns on two readings of the flag. On the one side, there are those who see the flag as an emblem of Southern pride, as recognition of the many young men who fought and died as Confederates during the Civil War, as a recognition of tradition.[155] On the other side, there are those who see the flag as a reminder of slavery, or as a wistful reminder of the good old days when cotton was king.[156] Framed in this manner, one is either a "survivor" or a "victimizer."[157]

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152. The episode sparked a fury of protests, including condemnation from Governor Pedro Rossello of Puerto Rico, and resulted in NBC issuing a formal apology and withdrawing the episode from future syndication. Herb Boyd, *'Seinfeld' Inflames Group of Puerto Rican Protesters*, N.Y. AMSTERDAM NEWS, May 27, 1998, at 10; Lloyd Grove & Blaine Harden, 'Seinfeld' *Parade Steps on Some Toes*, WASH. POST, May 9, 1998, at D1. Miguel Perez, *Seinfeld's Ethnic Insult*, RECORD (Northern, N.J.), May 13, 1998, at A3; *Puerto Rico Blasts Seinfeld*, TORONTO STAR, May 12, 1998, at E6.

153. Michelle York, *School's New Iroquois Flag Stirs Protests*, N.Y. TIMES, Nov. 17, 2003, at B10.

154. For example, former Vermont Governor Howard Dean, in campaigning for the Democratic nomination of president, was recently excoriated by rivals for suggesting that the Democrats regain disaffected Southern voters by speaking to "guys with Confederate flags in their pickup trucks." *See, e.g.*, Jodi Wilgoren, *In a 'Jam,' Dean Apologizes for Remarks on Rebel Flag*, N.Y. Times, Nov. 6, 2003, at A26. As Dean later conceded, his statement set off a "huge contretemps," notwithstanding the context. Ultimately, Dean was forced to issue an apology. Richard L. Berke, *What You Say Can't Hurt You Until It Can*, N.Y. TIMES, Nov. 9, 2003, at Wk.3.

155. A former, Mississippi-born editor of *Harpers* magazine put it this way:

> 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, [W]hite and [B]lack, 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."

WILLIE MORRIS, TERRAINS OF THE HEART AND OTHER ESSAYS ON HOME 258 (1981) (emphasis in original).

156. *See, e.g.*, Forman, Jr., *supra* note 34, at 513 (arguing that the Confederate flag "glorifies and memorializes [the] brutal regime [of chattel slavery]").

157. *See* J.M. Balkin, *Transcendental Deconstruction, Transcendental Justice*, 92 MICH. L. REV. 1131 (1994).

A more contextualized approach, however, reveals the State display of the flag as a sign of protection, of control, of allegiance, of stasis.[158] Put differently, the Confederate flag, when displayed by the Government, declares the state as belonging, primarily, to a particular group,[159] and declares recognition of a duty to protect that group.[160] Its message need never be articulated, but its meaning is evident.

Indeed, if one has any doubt of the message the state display of the Confederate flag sends, one need only imagine the message that would be communicated by a state or local authority displaying, in addition to the American flag, a flag depicting a Swastika.[161] Although a swastika is an extreme example, the display of less incendiary flags also makes the point. Were Staten Island, New York to raise, in addition to the American flag, an Italian flag, for example, it would send not only a message of Italian pride, but also the message that Staten Island is Italian, belongs to the Italians, and is for Italians. It would thus suggest a hierarchical positioning of Italians at the top of its various constituents. Similarly, were the Bronx to raise, say, a

158. For example, in his book on southern tradition, the historian Eugene D. Genovese laments the "'modernization' that is transforming the South" and has resulted in what he perceives to be the "neglect of, or contempt for, the history of southern [W]hites, without which some of the more distinct and noble features of American national life must remain incomprehensible." EUGENE D. GENOVESE, THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM x-xi (1994). The Confederate flag functions as a rearguard against such modernization. *See also* Forman, *supra* note 34, at 506 (noting that the Confederate flag "also stands for a history of resistance to change in the twentieth century").

159. Akhil Reed Amar, *Civil Religion and its Discontents*, 67 TEXAS L. REV. 1153, 1166 n.76 (1989) (reviewing SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988)) has noted, Confederate flags "all too easily exclude large numbers of citizens, most notably [B]lacks."

160. Indeed, one can read the state display of the Confederate flag as a silent ratification of the principles articulated in the Confederate Constitution. For a discussion of the Confederate Constitution and its explicit guarantee to maintain the underclass status of Blacks, see MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM 1-5 (1991) (summarizing creation and extirpation of Confederate Constitution); WILLIAM L. MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 21 (1996); Martin D. Carcieri, *The South Carolina Secession Statement of 1860 and the One Florida Initiative: The Limits of a Historical Analogy and the Possibility of Racial Reconciliation*, 13 ST. THOMAS L. REV. 577, 584 (2001); Ralph Michael Stein, *The South Won't Rise Again but It's Time to Study the Defunct Confederacy's Constitution*, 21 PACE L. REV. 395 (2001); Tsesis, *supra* note 34, at 596-98. The Confederate Constitution, which was adopted in 1861, is reprinted in EMORY M. THOMAS, THE CONFEDERATE NATION 1861-1865 307-22 (1979).

161. Indeed, the swastika is considered such an incendiary symbol that its display, and the display of other Third Reich symbols, are banned under Germany's Constitution, with exceptions for artistic purposes. *See* GRUDGESETZ [GG] [Constitution] art. 5(2) (F.R.G.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 106 (1994); *see also* Jonathan Kaufman, *As Neo-Nazis Riot, Germany Still Outlaws the Swastika*, BOSTON GLOBE, Feb. 4, 1993, at 1; David E. Weiss, Note, *Striking a Difficult Balance: Combating the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899, 928 (1994).

Black Power flag, it would communicate both Black pride and Black precedence. It is perhaps by imagining other flags being displayed by the Government that one begins to appreciate how a State's display of the Confederate flag reifies an antiquated racial order, renders Blacks, and Jews, and gays, and other minorities second-class citizens.

This analysis, I hope, makes transparent the violence[162] inherent in the Eleventh Circuit's decisions in *Hunt* and *Coleman*. Peggy Davis uses the term "microagression "to refer to the 'subtle, stunning, automatic, and non-verbal exchanges which are 'put downs' of Blacks by offenders.'"[163] She, in turn, borrows the term from psychiatry, which defines "microagressions" this way:

> "Microagressions simultaneously sustain defensive deferential thinking and erode[ ] self confidence in Blacks . . . . [B]y monopolizing . . . perception and action through regularly irregular disruption, they contribute[ ] to relative paralysis of action, planning, and self-esteem. They seem to be principle foundation for the verification of Black inferiority for both [W]hites and Blacks."[164]

Here, the Eleventh Circuit decisions, and the state display of the Confederate flag, are more than microaggressions. Given its messages, the state display of the Confederate flag is more like "spirit-murder," the term coined by Patricia Williams to refer simultaneously to acts of racism, and the rupture of self and invisible lacerations suffered by victims of racism. As Patricia Williams has noted:

> Society is only beginning to recognize that racism is as devastating, as costly, and as psychically obliterating as robbery or assault; indeed they are often the same. Racism resembles other offenses against humanity whose structures are so deeply embedded in culture as to prove extremely resistant to being recognized as forms of oppression. It can be as difficult to prove as child abuse or rape, where the victim is forced to convince others that he or she was not at fault, or that the perpetrator was not just "playing around." As in rape cases, victims of racism must prove that they did not distort the circumstances, misunderstand the intent, or even enjoy it.[165]

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162. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986).

163. Peggy C. Davis, *Law as Microagression*, 98 YALE L.J. 1559, 1565 (1989) (quoting Pierce, *Psychiatric Problems of the Black Minority*, *in* AMERICA HANDBOOK OF PSYCHIATRY 512, 515 (1974)).

164. *Id.* at 1566-67 (quoting C. PIERCE, UNITY IN DIVERSITY: 33 YEARS OF STRESS 17) (unpublished manuscript 1986) (omissions and alterations in original).

165. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129-30 (1987).

This is what the state display of the Confederate flag is. Nothing less.

IV. FLAGS: A FABLE

In *The Chronicle of the Space Traders*,[166] Derrick Bell weaves a metaphorical tale to explore the limits of the Equal Protection Clause when the inequality of a few is pitted against what I refer to as the superequality[167] of the majority. The story he tells is at once familiar and disturbing: The arrival of 1,000 space ships on the first day of a new year; the welcoming delegation of government officials and members of the media; the alien crew, cloaked in invisibility, sounding "like the former President Ronald Reagan whose recorded voice, in fact, they had dubbed into their computerized language translation system;" and the visitors' proffer of various bounty: "gold to bail out the almost bankrupt federal, state, and local governments; special chemicals that would sanitize the almost uninhabitable environment; and a totally safe nuclear engine with fuel to relieve the nation's swiftly diminishing fuel resources."[168] The rub is in what the space travelers seek in return, and in the country's response:

> The visitors wanted to take back to their home star all African Americans [defined as all citizens whose birth certificates listed them as [B]lack]. The proposition instantly reduced the welcoming delegation to a bumbling disarray. The visitors seemed to expect this reaction. After emphasizing that acceptance of their offer was entirely voluntary and would not be coerced, they withdrew to their ships. The Traders promised to give the nation a period of sixteen days to respond. The decision would be due on January 17, the national holiday commemorating Dr. Martin Luther King, Jr.'s birthday.[169]

The proposed trade, in Bell's narrative, proves to be a temptation not easily resisted. Congress is called into special session; state legislatures are convened; negotiations are begun:

166. Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 3 (Richard Delgado ed., 1995). I first heard this tale when Derrick Bell spoke at Columbia Law School while I was a student there. That I remembered it almost word-for-word in subsequent years is a testament to its polemical resonance.

167. By superequality, I am referring to the type of equality advanced by Orwell's Napoleon: "All animals are equal, but some animals are more equal than others." GEORGE ORWELL, ANIMAL FARM 112 (1946).

168. Bell, *supra* note 166, at 3.

169. *Id.* at 3-4.

> [U.S.] officials tried in secret negotiations to get the Space Traders to exchange only those [B]lacks locked in the inner-cities, but the visitors made it clear that this was an all or nothing offer. During these talks, the Space Traders warned that they would withdraw their proposition unless the United States halted the flight of the growing numbers of [B]lacks who—fearing the worst—were fleeing the country. In response, executive orders were issued and implemented, barring [B]lacks from leaving the country until the Space Traders' proposition was fully debated and resolved. "It is your patriotic duty," [B]lacks were told, "to allow this great issue to be resolved through the democratic process and in accordance with the rule of law."[170]

Legal challenges to the process itself are dismissed as "political questions," and those in favor of acceptance the Space Traders' offer dispel claims that acceptance would violate the Constitution's most basic protections by drafting legislation to induct all [B]lacks into special service of transportation under the terms of the Space Traders' offer, and convening a constitutional convention to draft a constitutional amendment to validate the legislation. The proposed amendment declares: "Every Citizen is subject at the call of Congress to selection for special service for periods necessary to protect domestic interests and international needs."[171] Although many Americans work hard to defeat the amendment, "given the usual fate of minority rights when subjected to referenda or initiatives," the outcome is all but predetermined.

> By a vote of seventy percent in favor—thirty percent opposed—Americans accepted the Space Traders' proposition. Expecting this result, the government agencies had secretly made preparations to facilitate the transfer. Some [B]lacks escaped, and many thousands lost their lives in futile efforts to resist the joint federal and state police teams responsible for the roundup, cataloguing, and transportation of [B]lacks to the coast.
>
> The dawn of the last Martin Luther King holiday that the nation would ever observe illuminated an extraordinary sight. The Space Traders had drawn their strange ships right up to the beaches, discharged their cargoes of gold, minerals, and machinery, and began loading long lines of silent [B]lack people. At the Traders' direction, the inductees were stripped of all but a single

170. *Id.* at 4.
171. *Id.* at 5.

> undergarment. Heads bowed, arms linked by chains, [B]lack people left the new world as their forebears had arrived.[172]

I repeat Professor Bell's Space Traders narrative here for two reasons: First, it illustrates, in a manner that only narrative can, the limits of Equal Protection when the interests of the majority are at stake. Second, it dovetails with my argument about the messages communicated by the Confederate flag. With the Confederate flag flying in front of the South Carolina Capitol building, and incorporated in the Georgia flag, those states make clear where they would stand should the Space Traders in fact land. In truth though, there is no need to imagine such a fantastic scenario. Each day, Southern states make good on the promises inherent in their display of the Confederate flag by according certain benefits to its majority citizens, and imposing certain burdens on its minority citizens.[173] It is evident in how public services are distributed and school budgets are apportioned.[174] It is evident in how justice is administered.[175] It is even evident in where dumps are placed.[176]

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172. *Id.*

173. The subordination message carried in the Confederate flag was recently replayed in the gubernatorial race in Mississippi. In campaigning, the Republican candidate, former head of the Republican National Committee Haley Barbour, wore a lapel pin bearing the United States and Mississippi flags, the latter of which features the Confederate battle emblem, to "encourage a strong [W]hite turnout." David E. Rosenbaum, *Mississippi Incumbent Surprises His G.O.P. Opponent*, N.Y. TIMES, Oct. 17, 2003, at A16. The candidate's display of the flag, it can be argued, functioned as a promise to put the concerns of White Mississippians first. *See also* Dawidoff, *supra* note 91 (noting Barbour's appeal to Whites, and his appearance at a function organized by the White segregationist organization Council of Conservative Citizens to raise funds for private academy school buses).

174. Cases challenging school financing disparity based on district wealth, which in general correlates to racial composition, have not fared well for the most part. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981) (dismissing school finance lawsuit in deference to Georgia legislature); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988) (rejecting claim that system for financing public schools based on district wealth violates state constitutional requirements for free public schools or for equal protection). On school financing inequality in general and the racial implications, see Kenneth Fox, *The Suspectness of Wealth: Another Look at State Constitutional Adjudication of School Finance Inequalities*, 26 CONN. L. REV. 1139 (1994); Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99 (2001).

175. *See generally* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1411-13 (1988) (noting the continuing pervasiveness of racism in the administration of criminal justice in the South).

176. U.S. GEN. ACCOUNTING OFFICE, SITINGS OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH THE RACIAL AND SOCIAL-ECONOMIC STATUS OF SURROUNDING COMMUNITIES (GAO/RCED-83-168, June 1983) (examining four communities near hazardous waste landfills in the Southeast and finding that Blacks were the majority population in three of the four communities); *see also* Edward Patrick Boyle, Note, *It's Not Easy Being Green, The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993); Paul Mohai & Bunyan Bryant, *Environmental*

V. FLAGS: FROM THEORY TO PRAXIS

On March 4, 1861, the same day that Abraham Lincoln became President, the Convention of the Confederate States of America, meeting in Montgomery, Alabama, adopted a Confederate flag as a demonstration of their intent to preserve the sovereignty of the South.[177] This first Confederate flag, which retained the colors of the Stars and Stripes, but displayed only seven stars, was roundly criticized for sharing too great a resemblance to the Stars and Stripes. Indeed, the resemblance was so great that following the outbreak of the Civil War, one flag was often mistaken for the other in battle.[178] To reduce confusion, Confederate soldiers began to carry an alternative flag designed by William Porcher Miles in its stead. This alternative flag, first used by General Pierre G.T. Beauregard, consisted of a red field spanned by a blue Saint Andrew's cross edged with white and bearing along its arms thirteen white stars, and became known as "Beauregard's Battle Flag," the "Battle Flag of the Confederacy," and the "Southern Cross."[179] It was this unofficial flag that enjoyed currency among [W]hite secessionists.

On May 1, 1863, to address the concerns about the official Confederate flag, the Confederate Congress at Richmond adopted a second flag, which consisted of a canton of the Southern Cross set against a plain white field. Advocates of this flag, commenting on its white field, or perhaps articulating meaning, and its exclusion, christened this flag the "White Man's Flag."[180]

Although this "White Man's Flag" also had its flaws – its dimensions proved cumbersome, and the white field suggested truce – it remained the official flag of the Confederacy until February 4, 1865, when the Confederate Congress adopted its third official flag. This third flag altered the dimensions of the second flag and added a red bar to the white field. Before this third flag could enter circulation, however, General Lee surrendered at Appomattox, Virginia, effectively bringing the war to an end. Interestingly, it was not under any of the official Confederate flags that Lee surrendered, but rather

Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards, 63 U. COLO. L. REV. 921 (1992).

177. JOHNSON, THE NATIONAL FLAG, *supra* note 98, at 91.

178. *Id.* at 92; *see also* MILO M. QUAIFE ET AL., THE HISTORY OF THE UNITED STATES FLAG 143-45 (1961).

179. JOHNSON, THE NATIONAL FLAG, *supra* note 98, at 91-92.

180. *Id.*

under the unofficial flag General Beauregard championed, the "Battle Flag of the Confederacy," or as others called it, the "Southern Cross."[181] Similarly, it was this unofficial flag, rather than any of the official flags, that came to stand for the ensign of the Confederacy. Later, a group of former Confederate soldiers and their followers would adopt this unofficial flag as their own.[182] Donning white robes and hoods to conjure the ghosts of the Confederate dead,[183] they would transform the southern cross of the flag into hundreds of wooden crosses, easy to bear, easy to plant, easy to burn. They would carry out a reign of terror so debilitating, so demoralizing, so dehumanizing, that even a stoic like Justice Thomas would get it.

Almost 100 years later, in 1956, the same year that Georgia, in response to *Brown I* and *Brown II*, adopted a new design for its state flag to incorporate this unofficial, but now iconic, Confederate battle flag, South Carolina Senator John D. Long successfully introduced a resolution urging the Senate, at the time all White, to hang a Confederate battle flag in its chambers.[184] Although the South Carolina Senate and House journals are silent as to any debate when the Confederate flag was raised over the state capitol, historical context, as well as Senator Long's sentiments with regard to the KKK, render the intent transparent. For example, in a speech on the floor of the South Carolina Senate, Senator Long praised the KKK, saying, "We honor them and we are proud of them. We will defend them from defamation to the death." During the same speech, Senator Long urged his fellow senators to "dismiss from your consideration any little-sister sob stories about the South's brutality to the slave and its inhuman treatment of captive and fugitive slaves."[185] These were the sentiments Senator Long expressed. Later, a lake in South Carolina

181. *Id.*

182. WYN WADE, THE FIREY CROSS: THE KU KLUX KLAN IN AMERICA 33-35 (1998). As one Klansman put it in a letter to the editor of a southern newspaper:

> The soldiers of the South who fought for that flag, their officers and civilian leaders believed in the establishment of a separate [s]outhern republic; so does this Klan. They believed in [W]hite supremacy; so does this Klan.
>
> So, we maintain that the Confederate battle flag was bequeathed to us, the Ku Klux Klan, by our Confederate ancestors. We honor it by standing for the same things now as they did then. Our use of the flag is legitimate and honorable.
>
> Southern apologists, knee-jerk liberal New South politicians, pansy pants preachers, pinko professors and whoever else will not stand with us in what our flag stands for can wrap themselves in the Yankee flag and leave ours alone.

Marcus Blanton, *Confederate Battle Flag Was Bequeathed to Klan*, CLARION-LEDGER (Jackson, Miss.), June 6, 1991, at 18A (letter to the editor).

183. WADE, *supra* note 182, at 33-35.

184. Tim Smith, *Banner Traced to One Man*, AUGUSTA CHRON., Jan. 30, 2000, at B2.

185. *Id.*

would be named after him, John D. Long Lake, and a woman named Susan Smith, in an act of infanticide—make that two acts of infanticide—would quietly strap her two toddlers, Michael Daniel Smith and Alexander Tyler Smith, into their car seats, and then just as quietly push her car into the lake. Invoking the collective prejudices of a country, and the implied promises of her state, she would nearly get away with murder.

CONCLUSION

Clearly, any future Equal Protection challenge to South Carolina's display of the Confederate flag in front of its capitol building should lay bare this historiography to satisfy the intent prong of *Hunter*. Similarly, any future challenge should also present evidence to refute the suggestion that all races are equally offended by the Confederate flag. Specifically, empirical data and expert testimony should be introduced to demonstrate that minorities read and experience the Confederate flag differently, that minority groups are disparately impacted, thus satisfying the second prong of *Hunter*. Just as the NAACP submitted Kenneth and Mamie Clark's "doll" study in *Brown* to support their challenge to *de jure* school desegregation,[186] statistical evidence could be gathered to demonstrate that members of minority groups, in contrast to members of the majority, view the flag not only as a badge of inferiority, but as communicating messages of exclusion, of powerlessness, of lacking protection by the state, of being second-class citizens. Such analysis could demonstrate that these feelings are more than visceral; indeed, they are amply supported by evidence of discriminatory treatment and services. This analysis could also demonstrate the impact state displays of the flag have on the day-to-day lives of various citizens: That for Whites, they buttress feelings of superiority, privilege, and entitlement, and conversely for minority

186. In their 1940 study, the Clarks found that children presented with identical Black and White dolls thought of the White doll as "nice" and the Black doll as the one "that looks bad." Kenneth B. Clark & Mamie Clark, *Racial Identification and Preference in Negro Children, in* READINGS IN SOCIAL PSYCHOLOGY 169-78 (Theodore M. Newcomb et al. eds., 1947). The *Brown* Court relied in part on this study to conclude that segregation of African American children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *See* Brown v. Bd. of Educ., 347 U.S. 483, 494-95 & n.11 (1954). For more on the NAACP's decision to use social science data in *Brown*, see JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 197-205 (1998).

citizens, convey feelings of inferiority which circumscribe, shape, and inform their daily lives.[187]

In addition to presenting evidence of intent and harm, however, any future challenge could only be strengthened by including an analysis of the symbolic power of flags. Such a contextual approach will not only impress upon the court messages communicated by the state display of the Confederate flag, but may also motivate a court to consider the Equal Protection challenge through the more inclusive lens of anti-subordination or equal citizenship, rather than anti-differentiation. I hope such an approach proves fruitful.

I began this discussion by talking about my interest in exploring whether the state display of the Confederate flag violates the Equal Protection Clause of the Fourteenth Amendment. I can only conclude by positing that the state display of the flag violates the Equal Protection Clause, and more. In the end, the state display of the Confederate flag itself functions as a pledge, a pledge of allegiance, to protect one class of citizens over another, to mark an entire state and its resources as belonging, in the first instance, to one class of citizens over another, and to preserve a hegemony that accords one class of citizens a higher status than another.

187. Since *Brown*, the Supreme Court has relied on social science data in a number of cases, including cases involving obscenity, segregation by gender, jury size, and capital punishment, although in *McCleskey v. Kemp*, the Court seemed to retreat from its willingness to find social science persuasive. *See supra* note 87. On the use of social science in Equal Protection jurisprudence generally, see David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to Law as Science and Policy*, 38 EMORY L.J. 1005 (1989); Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts,"* 35 RUTGERS L. J. 103 (2003).