

HOW TO ESTABLISH FLYING THE CONFEDERATE FLAG WITH THE STATE AS SPONSOR VIOLATES THE EQUAL PROTECTION CLAUSE

by

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*“Who would have thought that America would start the third millennium with the Confederate battle flag as an issue in the presidential campaign? . . . Now I hope and pray that the South I love can move on, can prove William Faulkner wrong when he said, ‘In the South the past is never dead. It’s not even the past.’”*¹

I. INTRODUCTION

The issue to be addressed is whether it is constitutionally permissible under the Equal Protection Clause² for a state to fly a Confederate flag over its state capitol dome or other public property.³

Like many of the South’s ghosts of the past slavery, racial discrimination, and race relations in general, the battle over the Confederate flag continues to impact national politics and rages on about the state of South Carolina.⁴ South Carolina is again the catalyst for a conflict about Southern Confederate values.⁵ South Carolina, the first state to secede from the Union and the only state where the Confederate flag still flies above its capitol, has created a flag

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¹ Elaine H. Owens, Editorial, *This Proud Southerner Says Strike The Flag; Its Symbolism has been lost to Racism*, ROANOKE TIMES & WORLD NEWS, Mar. 6, 2000, at A7. Elaine Owens is a white high school English teacher. *Id.* Owens describes herself as “a Southern Woman, proud to be Southern, with family roots that stretch back to the 1600s in Virginia and North Carolina. Still, I will never display the Confederate battle flag, nor will I condone others doing so I do not approach this issue as an ‘outsider’. I have 10 ancestors in my direct family line who fought for the Confederacy” *Id.*

² U.S. CONST. amend. XIV provides that no person shall be denied the equal protection of the laws.

³ Dahleen Glanton, *A Vivid Reminder Across South, Rebel Flag Breeds Pride, Contempt*, CHI. TRIB., Aug. 7, 1999, at 1.

⁴ *Id.*

⁵ *Id.*

controversy. The controversy has pitted blacks against whites, Republicans against Democrats, and conservatives against liberals, just as the Civil War did more than a century ago.⁶ An emotional national controversy concerning South Carolina's flying of the Confederate battle flag, with its state flag and the United States flag over its state capitol, entered the 2000 presidential campaign.⁷ There was not any protest about South Carolina flying the United States and state flag. On Monday, January 17, 2000, tens of thousands of Americans marched to protest South Carolina's practice of flying the Confederate flag over its state capitol.⁸ On Wednesday, April 12, 2000, Serena Williams, U.S. Open champion, withdrew from the Family Circle Cup tennis tournament at Hilton Head Island to protest South Carolina's flying of the Confederate flag.⁹ I believe that a state's removal of the flag from its state capitol will not defeat a constitutional challenge to a state sponsorship of the Confederate flag anywhere as a symbol for systematic racist speech and conduct.¹⁰

In Mississippi, the state flag has bars of red, white, and blue in one corner, and the Confederate battle flag in another corner.¹¹ Mississippi's flag dates back to 1894.¹² In May of 1999, the Mississippi Supreme Court revived a six-year-old challenge by the NAACP to the Confederate design of the state flag.¹³ The Mississippi State Supreme Court will be asked to examine constitutional implications of flying the state flag.¹⁴

⁶ *Id.*

⁷ *Voice of the Times*, ANCHORAGE DAILY NEWS, Jan. 27, 2000, at 9B.

⁸ *Flags Much in the News, and Much Abused as Metaphors; From Congress to South Carolina to Waldo County, Banners Become Controversial*, PORTLAND PRESS HERALD, Jan. 21, 2000, at 13A.

⁹ *S. Williams Joins S.C. Flag Boycott*, USA TODAY, Apr. 13, 2000, at 1C ("Wednesday evening, the Senate voted 36-37, with Republicans dissenting to remove the flag. The bill moves to the Democrat-controlled full Senate today [Thursday].").

¹⁰ Charles Lawrence believes racial segregation was about speech as well as conduct. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-44.

¹¹ Steve Kraske, et al., *Ashcroft, Bond Rebut Allegations of Racism*, KAN. CITY STAR, Oct. 23, 1999, at A1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

During the presidential campaign, candidates Governor Bush and Senator McCain were accused of falling short of persuasively projecting moral leadership when it appeared that they were attempting to remain neutral or silent on the Confederate flag issue.¹⁵ Bruce Fein stated, “[w]hat is needed is more courage and less profile from Republican presidential aspirants George W. Bush and John McCain who have cravenly professed agnosticism on the question”¹⁶ of whether South Carolina should fly the Confederate flag over its state capitol. Fein said for presidential candidates to avoid their obligation to take a position on the South Carolina Confederate flag issue, like Bush and McCain have under the feeble banner of states’ rights, is an uncourageous evasion.¹⁷ Fein took the position that both Bush and McCain should deliver sermons against South Carolina because displaying the flag is a race-based insult to many Americans because the state’s conduct demonstrates tacit complacency with racial discrimination.¹⁸ Fein believes presidents, for good or ill, are moral leaders. Fein thinks Bush and McCain would have demonstrated presidential moral leadership concerning race relations by denouncing South Carolina’s flying of the Confederate flag as an ill-conceived idea.¹⁹

John McCain was accused of being both opportunistic and cowardly because of his ever-changing positions on the Confederate flag.²⁰ Republican presidential hopeful Governor George

¹⁵ Bruce Fein, Commentary, *More Courage, Less Profile*, WASH. TIMES, Mar. 7, 2000, at A13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (“Presidential moral leadership regarding race relations today is even more urgent. James Byrd, Abner Louima, Abidou Diallo, O.J. Simpson, Rodney King and race profiling generally are emblematic. The Confederate flag issue fits on that troublesome tapestry.”).

²⁰ Gerald Warner, *Rallying to Today’s Dull Colours Fails to Fire the Imagination*, SCOT. ON SUNDAY, Jan. 16, 2000, at 16. Mr. Warner has noted that:

The flag is an issue because McCain made it so. Last Sunday, speaking on a current affairs program, McCain said that the Confederate flag was a ‘symbol of racism and slavery’ and he described it as offensive. These remarks were prompted by a campaign by the National Association for the Advancement of Coloured People to stop the Confederate flag being flown over the state government building in South Carolina.

Id.

Bush says he is contemplating the NAACP's request to remove the image of the Confederate battle flag from the Texas Supreme Court building.²¹

Democrats Vice-President Al Gore and Senator Bill Bradley were critics of South Carolina's flying of the Confederate flag during the course of the presidential campaign.²²

There is no doubt that the Confederate flag issue has received a great deal of recent media coverage because of South Carolina. The new attention given to the Confederate flag issue as part of our national political debate requires federal and state courts to recognize that state sponsorship of the Confederate flag violates the Equal Protection Clause of the Fourteenth Amendment.²³ The Confederate flag violates equal protection because intentional state sponsorship of it burdens all Americans – including insular and discrete minorities – with race-based conduct.²⁴

In 1990, a federal appellate court held that the state of Alabama did not violate the United States Constitution by flying the Confederate flag over the state's capitol.²⁵ The Eleventh Circuit concluded that the plaintiffs in *Hunt* were not denied equal protection because all citizens were exposed to the flag and citizens of all races were offended by this position.²⁶

The state of South Carolina's act of flying the flag is properly viewed as a race-based symbol directed at everyone including discrete and insular minorities, and is subject to a more

²¹ Greg Pierce, *Inside Politics*, WASH. TIMES, Mar. 8, 2000, at A5; see also Paul Duggan, *Texas Removes Confederate Symbols from Court*, WASH. POST, June 13, 2000, at A21.

²² Mike Downey, *Let There be no Wavering over not Waving this Flag*, L.A. TIMES, Jan. 26, 2000, at A3.

²³ The Fourteenth Amendment provides:

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

U.S. CONST. amend. XIV, § 1.

²⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

²⁵ *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

²⁶ *Id.* at 1562.

exacting judicial scrutiny under an Equal Protection Clause analysis.²⁷ South Carolina’s policy of flying the Confederate flag violates the Equal Protection Clause because it is a racial classification that burdens insular and discrete minorities and race-neutral advocates with the race-based pro slavery symbol in the state’s ordinary political processes.²⁸ In 1993, Alabama’s Governor, Jim Folsom, ordered that the Confederate battle flag no longer fly over the state capitol dome.²⁹ Folsom raised the United States and state flags and ordered that the battle flag be flown across the street at the first White House of the Confederacy.³⁰ It may be permissible under the Equal Protection Clause to use the flag at the first White House of the Confederacy if it qualifies as an historic exhibit. However, the state should not be allowed to sponsor the flag as symbolic racially discriminatory political speech. It is clear from prior Supreme Court decisions that conduct may be utilized as a method of communicating ideas because “the medium can be the message.”³¹ In *West Virginia State Board of Education v. Barnette*, the Court concluded that the flag as a symbol is a primitive, but effective way of communicating ideas.³² The Supreme Court recognized, almost 60 years ago, that a flag could symbolize a system as a shortcut from mind to mind.³³ The message of the Confederate flag as a symbol on state property sends a message that the state endorses the separate-but-equal doctrine of *Plessy v. Ferguson*,³⁴ and sends a message of white supremacy in the political process and halls of government. This article disagrees with

²⁷ *Id.* at 1555.

²⁸ *Id.* In *Carolene Products*, Justice Stone asked “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.” *Carolene Prods.*, 304 U.S. at 153 n.4. Some constitutional scholars believe that Justice Stone provided one of the most important footnotes in Constitutional Law in *Carolene Products* by suggesting that the courts had a duty to keep the political process open to insular and discrete minorities. JEROME A. BARRON, ET AL., CONSTITUTIONAL LAW, PRINCIPLES AND POLICY: CASES AND MATERIALS 590 (5th ed. 1996).

²⁹ *Confederate Flag Removed in Alabama*, WASH. POST, Apr. 30, 1993, at A47.

³⁰ *Id.*

³¹ BARRON, *supra* note 28, at 956.

³² See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

³³ *Id.*

³⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

the position taken by the *Hunt* Court.³⁵ I agree very strongly with the position taken by James Forman, Jr., that a state flying a Confederate flag over its state capitol violates the Equal Protection Clause because of the discriminatory intent.³⁶

Part I of this article provides a brief introduction to the flying of the Confederate flag controversy. Part II reviews how the discriminatory intent analysis impacts the Confederate flag flying over a state capitol or other public facilities. Part III concedes that footnote four in *Carolene Products* serves as a basis for judicial intervention under the Equal Protection Clause to ensure that South Carolina's political marketplace does not continue to malfunction against its racial minorities by flying the Confederate flag over the state capitol.³⁷ However, Part III emphasizes the rationale of *Adarand Constructors v. Pena*,³⁸ in which the Court made it clear that the Equal Protection Clause is designed to protect individuals regardless of their group status. Part IV analyzes the implications of *Adarand*³⁹ on the rationale articulated in *Coleman v. Miller*⁴⁰ and the Confederate flag legacy. Part V suggests that courts should hold that state sponsorship of the Confederate flag violates equal protection because, in actual practice, the flag is a race-based symbol. Finally, this article concludes that the Confederate flag appeals to a prurient interest in race relations.

³⁵ See *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

³⁶ James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 *YALE L.J.* 505 (1991).

³⁷ Barron noted that:

Professor Ely has employed the *Carolene Products* footnote as a predicate for justifying judicial intervention under the Equal Protection Clause to ensure that the political processes whereby values are identified and accommodated are not unduly restricted because of prejudice. However, the mere fact that a group loses in the political marketplace does not mean the representative system of government is malfunctioning.

Barron, *supra* note 28, at 591.

³⁸ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995).

³⁹ *Id.*

⁴⁰ *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011 (1998).

II. THE CONFEDERATE FLAG AND THE ISSUE OF DISCRIMINATORY INTENT

A person living in South Carolina wanting to challenge the state's ability to fly the Confederate flag over the state capitol must first demonstrate that the flying of the flag constitutes discriminatory intent on the basis of race.⁴¹ The Supreme Court made it explicitly clear that discriminatory impact alone would not serve as a basis for a violation of equal protection of the laws.⁴² Forman correctly writes that a court properly applying the discriminatory intent standard will have little doubt in concluding that racial slavery and discrimination are significant original factors in a former Confederate state's decision to sponsor the Confederate flag.⁴³

In December of 1999, Armstrong Williams stated that the flag of the illegal Confederate State of America currently waves over South Carolina's state capitol.⁴⁴ The message of the Confederate flag is not that of the Star-Spangled Banner American flag.⁴⁵ The state sponsorship of a waving Confederate flag evokes images of the act of treason committed at Fort Sumter,

⁴¹ *Washington v. Davis*, 426 U.S. 229, 238-42 (1976). In *Washington*, the Court decided that, in order to hold the government liable for racial discrimination under either the Fifth or Fourteenth Amendments, the plaintiff had to show discriminatory intent. *Id.*

⁴² *Id.*

⁴³ Forman, *supra* note 36, at 507. Mr. Forman noted that:

A plaintiff challenging government policy under the Equal Protection Clause bears the burden of demonstrating, by a preponderance of the evidence, that racial discrimination was a substantial or motivating factor in the adoption of the policy. Since determining the "motivation behind official action is often a problematic undertaking," courts must look to the context in which actions were taken in order to evaluate the discriminatory intent claim. Accordingly, "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Such an inquiry might include: (1) evidence of disparate impact; (2) "the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (3) "the specific sequence of events leading up to the challenged decision"; and (4) legislative or administrative history, especially contemporaneous statements of decisionmakers about their reasons.

Under this discriminatory intent standard, there can be little doubt that racial discrimination was a motivating factor in the Southern States' decisions to hoist Confederate flags. Examining the "sequence of events" in Alabama, for example, shows that the Confederate flag was raised as a symbol of white defiance to court-ordered integration.

Id. (citations omitted).

⁴⁴ Armstrong Williams, Commentary, *Refolding Rite for the Confederate Flag*, WASH. TIMES, Dec. 19, 1999, at B4.

⁴⁵ *Id.*

South Carolina, in April of 1861.⁴⁶ People who support the Confederate flag flying over South Carolina's state capitol are victims of revisionist history.⁴⁷ The revisionist have it wrong, the Confederate States of America was not established to defend the constitutional rights of Southerners.⁴⁸ Preservation of race-based slavery was the overwhelming motivation for secession by South Carolina and for others joining the Confederate States of America.⁴⁹ The twentieth century should end with the truth about the purpose of the Confederacy by taking the Confederate flag off of the state capitol.⁵⁰ A state's sponsorship of the Confederate flag communicates a disgraceful justification for enslaving an entire race.⁵¹ A primary goal of the Equal Protection Clause is to prevent intentional governmental conduct that discriminates on the basis of race.⁵² In its discriminatory intent analysis, the Court in *Washington v. Davis* stated that an invidious discriminatory purpose is inferable from the totality of relevant facts.⁵³ According to Justice Stevens, the best probative evidence of intentional discrimination is objective evidence of what actually happened, rather than evidence of the subjective state of mind of the state as an actor.⁵⁴

In his superior note, Forman does an excellent job of identifying objective probative evidence that states use the Confederate flag as a symbol of white supremacy.⁵⁵ The flag's force as a symbol of racial oppression comes from its history.⁵⁶ The first symbolic role for the flag was

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Williams, *supra* note 44.

⁵¹ *Id.*

⁵² Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) (quoting Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 264-65 (1977)).

⁵³ Washington v. Davis, 426 U.S. 229, 242 (1976).

⁵⁴ *Id.* at 253 (Stevens, J., concurring).

⁵⁵ Forman, *supra* note 36, at 513.

⁵⁶ *Id.*

to motivate Confederate troops headed into battle to fight.⁵⁷ The rebels in the Confederate army were fighting for slavery.⁵⁸ The South fought to protect a lifestyle of reducing African-Americans to chattel, without any basic human rights.⁵⁹ For African-Americans, the Southern way of life meant being forced to work and live in the inhuman conditions created by Southern slave masters.⁶⁰ History clearly reveals that the symbolic Confederate flag glorifies and memorializes this immoral slavery and shameful system of racial exploitation.⁶¹

Forman correctly points out that the Confederate flag represents more than the Civil War and is an official endorsement of slavery.⁶² The flag also stands for a history of vocal resistance to racial and political equality for African-Americans and other minorities.⁶³ The Ku Klux Klan, skinheads, and other white supremacists opposed to racial justice under the Constitution used the Confederate flag on a regular basis throughout the twentieth century.⁶⁴ Government officials

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Forman, *supra* note 36, at 513.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* One commentator noted that “[e]xamples of the Confederate flag as a symbol of white supremacists are legion. Tom Metzger, the former Grand Dragon of the Ku Klux Klan and leader of the White Aryan Resistance, who was recently ordered to pay \$12.5 million in damages for his role in the killing of a black man in Oregon, flew the flag above his home.” John M. Glionna, *Unfavorite Son*, L.A. TIMES, Oct. 30, 1990, at E1. Ku Klux Klan and neo-Nazi protestors demonstrating outside the national headquarters of the NAACP carried a Confederate flag along with signs saying “Nuke the NAACP.” Paul W. Valentine, *Police Boost Security at NAACP*, WASH. POST, Jan. 5, 1990, at C1. Two hundred members of the neo-Nazi, Aryan Nations organization carrying Confederate flags and wearing Klan robes and Nazi uniforms commemorated Confederate war hero Sam Davis’ birthday in Pulaski, Tennessee, the birthplace of the Klan. *Town Closes Shops to Protest Neo-Nazi March*, L.A. TIMES, Oct. 8, 1989, at A28. A group of Los Angeles skinheads, wearing Confederate flag tattoos, attacked a Middle Eastern couple and baby in a supermarket parking lot. 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 50 white racists and skinheads celebrated an “Aryan Woodstock”; many of them wore the Confederate flag, as well as other racist and anti-Semitic symbols. Dan Morain & Robert Chow, *Rain Dampens Event as Foes Outnumber “Skinheads” at Rally*, L.A. TIMES, Mar. 5, 1989, at A3. The Imperial Wizard of the Invisible Empire of the Knights of the Ku Klux Klan, J. W. Farrands, sporting a Confederate flag button on his lapel, flew from his home in Connecticut to California to protest Martin Luther King’s birthday. Louis Sahagun, *Marchers in Fontana Fete King, Draw Klan Taunts*, L.A. TIMES, Jan. 18, 1988, at A3. Members of the Ku Klux Klan have marched from the Washington Monument to the Capitol carrying a Confederate flag and chanting, “We are the KKK.” Mary Jordan & Linda Wheeler, *14 Hurt as Anti-Klan Protestors Clash with Police*, WASH. POST, Oct. 29, 1990, at A1; *see also* Forman, *supra* note 36, at 513 n.57.

promoting black subordination adopted the Confederate flag.⁶⁵ In 1963, Alabama’s Governor George Wallace’s “Segregation Forever” campaign included raising the Confederate flag.⁶⁶

It is more than clear that objective evidence established a pattern of state actors using the flag for racially discriminatory purposes. The Supreme Court’s discriminatory-purpose requirement has the practical effect of denying African-Americans and other discrete and insular minorities strict scrutiny protection under an Equal Protection analysis: “The Supreme Court requires a showing of impermissible purpose as a precondition for more stringent judicial review.”⁶⁷ This discriminatory intent requirement has been under attack. According to David Strauss, discriminatory intent raises some serious questions, “[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.”⁶⁸ There is nothing ostensibly racially neutral about South Carolina’s use of the Confederate flag. In 1956, South Carolina Senator John D. Long, an avowed race-based segregationist, introduced the resolution that convinced the all-white Senate to hang a Confederate battle flag in its chambers.⁶⁹ Earlier, in 1938, while serving as a Democrat in the South Carolina House of Representatives, Long persuaded members of that body to raise the Confederate flag in its House.⁷⁰ The South Carolina Senate and House journals do not contain any record of a debate when the flag went up over the state capitol.⁷¹ However, the South Carolina journals provide many clues about Long’s

⁶⁵ Forman, *supra* note 36, at 513-14. Officials redesigned the Georgia state flag to resemble the Confederate flag after the Supreme Court’s ruling in *Brown v. Board. of Education*, 347 U.S. 483 (1954), outlawing racial segregation in public schools. “At approximately the same time, South Carolina raised the flag above the state capitol.” *Id.* at 514 n.58.

⁶⁶ Forman, *supra* note 36, at 514.

⁶⁷ BARRON, *supra* note 28, at 599.

⁶⁸ David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 948 (1989).

⁶⁹ Tim Smith, *Banner Traced to One Man, Work of Single Racially Motivated Lawmaker Brought Rise of Confederate Flag to Chambers*, AUGUSTA CHRON., Jan. 30, 2000, at B2.

⁷⁰ *Id.*

⁷¹ *Id.*

motives for flying the flag in South Carolina's House and Senate chambers.⁷² Long's motives for raising the flag included his fierce opposition to the federal effort to enforce civil rights for African-Americans.⁷³

In a 1960 speech celebrating the secession centennial, Long told members of the South Carolina Senate that the original Ku Klux Klan should be praised and remembered for the sacrifices it has made for our country.⁷⁴ Long gave a speech to the South Carolina Senate about Ku Klux Klan members: "We honor them and we are proud of them. We will defend them from defamation to the death."⁷⁵ During the same speech, Long challenged 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."⁷⁶

Long opposed with vigor people and governmental entities involved in desegregating public schools.⁷⁷ In 1960, he also introduced a measure to ask Congress to convene a Constitutional Convention for the purpose of repealing the Fourteenth Amendment and its Equal Protection Clause which made public school segregation illegal.⁷⁸ Long criticized the United States Supreme Court for rejecting the separate-but-equal doctrine and requiring school desegregation.⁷⁹ He introduced a resolution asking Congress to impeach members of the Supreme Court for outlawing segregation in public schools.⁸⁰ In 1959, Long said South Carolina

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Smith, *supra* note 69.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

plans to continue segregation in public schools regardless of the Supreme Court ruling outlawing school segregation.⁸¹

It is important to know the historical context of South Carolina's and Senator Long's motivation for using the Confederate flag because such a contextual inquiry clearly demonstrates evidence of discriminatory intent under *Hunter v. Underwood*.⁸² Alabama law denied two state citizens, one African-American and one white, the right to vote because each was convicted of presenting a worthless check, a crime involving moral turpitude in the state.⁸³ The Supreme Court held the Alabama law – which, on its face and in a race-neutral manner disenfranchised all voters – to be unconstitutional because the law had a disproportionately adverse impact on African-Americans and was motivated by a racially discriminatory purpose when it was enacted.⁸⁴ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court stated that discovering whether invidious discriminatory governmental purpose exists requires a sensitive inquiry into any available circumstantial and direct evidence.⁸⁵ The direct evidence of Senator Long's purpose for flying the flag in the state's capitol is ostensibly race-based.⁸⁶ The objective, circumstantial evidence clearly suggests beyond a reasonable doubt that South Carolina's legislature supported Long's historically and constitutionally significant race-based motives for sponsoring the Confederate flag on state property.⁸⁷ A court's careful inquiry into South Carolina's legislative history and the contemporaneous statements of Senator Long about using the Confederate flag as a symbol of resistance to racial equality for African-

⁸¹ Smith, *supra* note 69.

⁸² *Hunter v. Underwood*, 471 U.S. 222, 268 (1985).

⁸³ *Id.* at 223.

⁸⁴ *Id.* at 222.

⁸⁵ *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

⁸⁶ Smith, *supra* note 69.

⁸⁷ *Id.*

Americans will establish an intent to discriminate.⁸⁸ The Supreme Court in *Hunter* approved the use of testimony of historians to establish that, in 1901, the Alabama Constitutional Convention had the discriminatory purpose of denying African-Americans the right to vote.⁸⁹ Although *Hunter* involved discriminatory intent under a state's enacted law, it is still controlling in situations where the state chooses to fly the Confederate flag over its public buildings under the rationale articulated by the Eleventh Circuit in *Hunt*.⁹⁰ In *Hunt*, the Court stated that state action could exist by tradition even though there was no state statute authorizing the flying of the Confederate flag in Alabama.⁹¹ The court in *Hunt* correctly concluded that a Confederate flag flown on the state capitol dome is flown under the color of state law.⁹²

III. INDIVIDUAL ENTITLEMENT TO EQUAL PROTECTION OF THE LAW UNDER *ADARAND*

In 1938, Justice Stone coined the phrase “discrete and insular minorities” in footnote four of the *Carolene Products* opinion.⁹³ Justice Stone's footnote four is now regarded as the basis for strict scrutiny judicial review.⁹⁴ This footnote has been used as a justification for judicial intervention to protect discrete and insular minorities from flaws in the democratic political

⁸⁸ *Id.*

⁸⁹ *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

⁹⁰ *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

⁹¹ *Id.* Alabama raised the Confederate flag in 1961 to celebrate the 100th anniversary of the Civil War. *Id.* at 1557-58. On April 25, 1963, the day United States Attorney General Robert Kennedy came to Montgomery, Alabama, to discuss with Governor George Wallace the governor's announced intention to block the admission of the first African-Americans to the University of Alabama, the Confederate flag was raised again and flown continuously for many years. *Id.* at 1558.

⁹² *Id.* at 1562. In order to prove a cause of action under Section 1983, a plaintiff must prove: (1) that the Confederate flag is flown by individuals acting under the cloak authority; *id.* (citing *Monroe v. Pape*, 365 U.S. 167, 184-87 (1961)), and (2) the plaintiff must show that flying the flag deprives her of some right, privilege, or immunity secured by the constitution or by law. *Id.* (citing 42 U.S.C. § 1983).

⁹³ Lewis F. Powell Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982); *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁹⁴ Powell, *supra* note 93.

process.⁹⁵ The theory for judicial intervention has been that the political process cannot be trusted to protect certain minority groups in the same way that it protects others.⁹⁶ Membership in a discrete and insular minority class is not necessary to challenge a state's racially discriminatory practice of flying the Confederate flag because, under *Adarand*, any individual, without regard to her racial group history, may challenge the state's explicit race-based conduct as unconstitutional under the Equal Protection Clause.⁹⁷ It is good public policy to have the Supreme Court treat all race-based governmental decisions as inherently suspect because any competent lawyer can make a plausible argument that a certain group is a discrete and insular minority.⁹⁸ By not limiting suspect racial classifications to insular and discrete minorities, the Supreme Court avoids the battle of the minorities while granting people of all races strict scrutiny equal protection under *Adarand*.⁹⁹ A Confederate flag flying over public buildings in South Carolina serves as a symbol of continued commitment to the race-based views of Senator Long and violates the Equal Protection Clause because it continues to send to every person the message that race matters in the political community.¹⁰⁰ The flying of the Confederate flag as a race-based act may affect people's hearts and minds on a personal and individual level in a way unlikely to be undone because the flag unnecessarily taints governmental conduct with racism.¹⁰¹ A state flying the Confederate flag over its public buildings creates state sponsorship of either a feeling of racial superiority or racial inferiority in individuals on a personal basis in a public area

⁹⁵ *Id.* at 1088.

⁹⁶ *Id.*

⁹⁷ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 211-23 (1973).

⁹⁸ *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist J., dissenting) ("Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road.").

⁹⁹ *Adarand*, 515 U.S. at 211-23.

¹⁰⁰ *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

¹⁰¹ *Id.*

where the state should be race neutral.¹⁰² It is clear that if a state displays a flag with the bold message “[t]his state government is for white supremacy because of our Southern heritage, but we are not prejudiced,” its flag violates the Equal Protection Clause.¹⁰³ According to Professor Burcham, the intentional conduct of displaying this explicit racist message would associate the government directly with values totally antithetical to core constitutional values by delivering a potent message of government endorsement of race-based values.¹⁰⁴ I agree with Professor Burcham’s thoughtful analysis that a state’s design of a school curriculum inculcating the value of white supremacy violates the Speech Clause of the First Amendment.¹⁰⁵ I assert that such a message also violates the Equal Protection Clause; I do not address the First Amendment issues in this article.¹⁰⁶ A message of white supremacy endorsed by the state on its capitol dome or any other state property, whether stated in words or by the well-understood symbolism of the Confederate flag, violates the Equal Protection Clause. It communicates a stigmatic message¹⁰⁷ to an individual that he or she is inherently unequal in the community because of racial preference given to supporters of the flag, rather than a position of race neutrality by not

¹⁰² *Id.*

¹⁰³ David W. Burcham, *School Desegregation and the First Amendment*, 59 ALB. L. REV. 213 (1995).

¹⁰⁴ *Id.* at 241.

¹⁰⁵ *Id.*

¹⁰⁶ As Professor Burcham stated:

Were a school to construct a curriculum, as hypothesized at the beginning of this Article, designed to inculcate the "value" of white supremacy, the conduct would assuredly run afoul of the students' Speech Clause right. The purposeful conduct would associate the government directly with values totally antithetical to core constitutional values, delivering a potent message of government endorsement of the racist values. Similarly, a school that displayed the Confederate flag, other than in textbooks or other curricular materials for the purpose of history lessons, would probably violate the Speech Clause right. Speech Clause analysis of such conduct would require inquiry into the message school officials intended to convey by purposefully displaying the flag. However, regardless of the phrasing of the message (i.e., "recognition of the South's historical traditions," "remembrance of those who died in the Civil War," "long live Dixie," or some other formulation) the association of the school with the symbolism of the flag would probably evince intentional inculcation of racist values.

Id. (citations omitted).

¹⁰⁷ *Brown v. Board of Educ.* 347, U.S. 483, 495 (1954).

sponsoring the flag.¹⁰⁸ Although the Court in *Adarand* was careful to point out that it applied strict scrutiny to federal governmental conduct using race as an explicit classification,¹⁰⁹ it is clear that facially race-neutral governmental conduct motivated by a discriminatory purpose must also meet the strict scrutiny standard of judicial review. This ensures consistency with the *Croson* standard that the Equal Protection Clause requires strict scrutiny of all race-based action by state and local government.¹¹⁰ *Adarand* does not preclude granting group protection under the insular and discrete minority group rationale, but the group-rights theory must yield to the individual right to be protected against race-based state conduct in the absence of a compelling state interest.¹¹¹ Today, at a minimum, the equal protection of the law for all intentional governmental conduct, which burdens a single person with the race-based state action of flying the Confederate flag, is immediately suspect and courts are obligated to subject the conduct to the most rigid scrutiny.¹¹²

Any person, regardless of racial group identity such as African-American, white, Hispanic, or Asian-American, is entitled to the equal protection of the law on an individual basis rather than based on his or her group status.¹¹³ In *Hunt*, the court committed a fundamental error

¹⁰⁸ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995). “We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose.” *Id.* at 213 (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 297 (1977); *Washington v. Davis*, 426 U.S. 229 (1976)).

¹⁰⁹ *See Adarand*, 515 U.S. at 213.

¹¹⁰ *Id.* at 222; *see also Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹¹¹ *See Adarand*, 515 U.S. at 227.

¹¹² *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (approving race-based exclusion of people of Japanese ancestry under its strict scrutiny standard).

¹¹³ As stated in the syllabus of *Adarand*:

Most federal agency contracts require a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged people and requires the contractor to presume that such people include minorities or any other person found to be disadvantaged by the Small Business Administration (SBA). The prime contractor under a federal highway construction contract containing such a clause awarded a subcontract to a company that was certified as a small disadvantaged business. The record does not reveal how the company obtained its certification, but it could have been by any one of three methods: under one of two SBA programs – known as

by suggesting that Alabama’s flying the Confederate flag over its state capitol did not violate the Equal Protection Clause because the flag offends members of all racial groups equally.¹¹⁴ It is the *Hunt* Court’s suggestion that if only African-Americans were offended by the race-based message of the Confederate flag it might violate the Equal Protection Clause.¹¹⁵ The level of offense necessary to violate the Equal Protection Clause should not change depending upon whether or not the governmental conduct also offends “a group that has not been subject to governmental discrimination.”¹¹⁶ Under *Adarand*, if only one member of any racial group is offended by the state’s race-based conduct of displaying the flag as a symbol, it violates the equal protection of the law.¹¹⁷ The rationale used by the *Hunt* Court involving the equal racial offensiveness to both blacks and whites of the Confederate flag as a basis for justifying race-based conduct by the state was used before this country made a compelling commitment to racial

the 8(a) and 8(d) programs – or by a state agency under relevant Department of Transportation regulations. *Adarand Constructors, Inc.*, which submitted the low bid on the subcontract but was not a certified business, filed suit against federal officials, claiming that the race-based presumptions used in subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause.

Adarand, 515 U.S. at 200.

¹¹⁴ NAACP v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990).

¹¹⁵ *Id.*

¹¹⁶ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) The issue in *Wygant* was whether a school board could adopt a race-based preference in determining governmental policy against a group that has not been historically subject to governmental discrimination. The Court held that such a policy violated the Equal Protection Clause. *Id.* at 267. The court recognized “that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.” *Id.* at 273.

¹¹⁷ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995). It is a basic principle of law that the “Fifth and Fourteenth Amendments to the Constitution protect persons, not groups.” *Id.* The Court stated that:

[i]t follows from that principle that all governmental action based on race – a group classification long recognized as “in most circumstances irrelevant and therefore prohibited,” should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding “benign” state and federal racial classifications to different standards does not square with them. “[a] free people whose institutions are founded upon the doctrine of equality,” should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

equality.¹¹⁸ Tony Pace, an African-American male, and Mary Cox, a white woman, each received a two-year sentence for having a sexual relationship while living together.¹¹⁹ In 1883, the Supreme Court rejected Pace’s argument that the Alabama law violated the Equal Protection Clause because integrated sexual relationships suffered harsher penalties than same-race sexual relationships. The Court upheld the Alabama law because Pace, an African-American male and Cox, a white female, could suffer the same penalties.¹²⁰ In a 1964 opinion involving a Florida law that made it unlawful for racially integrated couples to live together, the Supreme Court overruled *Pace* and held such a race-based restriction violated the Equal Protection Clause.¹²¹ The Supreme Court properly overruled *Pace* because “*Pace* represents a limited view of the Equal Protection Clause . . . [and] has not withstood analysis in the subsequent decisions of this court.”¹²²

Like *Pace*, the *Hunt* decision represents a narrow view of the Equal Protection Clause and cannot withstand strict scrutiny analysis because South Carolina’s decision to sponsor the flag is race-based and could not properly be characterized as a narrowly tailored remedial governmental action.¹²³ South Carolina began its official celebration of the Confederate flag in 1962 during a time when many white Southerners were resisting the end of Jim Crow Laws with police dogs and much worse.¹²⁴ Traditionally, governments fly flags to endorse or approve what is symbolized, and not to provide history lessons.¹²⁵ Symbols may communicate many meanings

Id. (citations omitted).

¹¹⁸ *Pace v. Alabama*, 106 U.S. 583, 584 (1883), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 585.

¹²¹ *See* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

¹²² *Id.* at 188.

¹²³ *See* *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 220 (1995); *see also* *Fullilove v. Klutznick*, 448 U.S. 448, 541 (1980) (Stevens, J., dissenting).

¹²⁴ Fein, *supra* note 15, at A13.

¹²⁵ *Id.*

in a diverse American society.¹²⁶ The primary message communicated to blacks and whites in their individual lives by the state's sponsorship of the Confederate flag is an ideological homage to slavery or racial inferiority, similar to the insult to Roman Catholics conveyed by a portrait of the Virgin Mary with elephant dung on her breast.¹²⁷ In *Croson*, the Supreme Court held that the Fourteenth Amendment requires strict scrutiny of all race-based actions by state and local governments.¹²⁸

In *Croson*, the Court established three basic principles of skepticism, consistency, and congruence concerning governmental race-based classifications.¹²⁹ Under skepticism, the Court requires preferences based on racial or ethnic criteria to be inherently suspect under the strict scrutiny test.¹³⁰ The Court should be skeptical of a state's sponsorship of the Confederate flag because it has become a widely used symbol for white supremacy.¹³¹ According to Robert J. Bein, a government's display of the Confederate flag will have profound equal protection implications under the Fourteenth Amendment.¹³² When a symbol such as the Confederate flag represents a message of exclusion based on race, it creates a healthy degree of skepticism about the excluded member's participation in public life.¹³³ Under the Court's skepticism rationale, any state action such as the sponsorship of a Confederate flag, which intentionally impacts a person differently in public life because of his race, is inherently suspect.¹³⁴ Those who argue that the

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Adarand*, 515 U.S. at 222; *see also* *Richmond v. Croson Co.*, 488 U.S. 469 (1989).

¹²⁹ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 223-24 (1995).

¹³⁰ *Id.* at 223; *see also* *Wygant v. Board of Educ.*, 476 U.S. 267, 273 (1986) (Powell, J., plurality opinion).

¹³¹ Glanton, *supra* note 3, at 1. Glanton has noted that:

In the 134 years since the Confederate battle flag fell in defeat, it has served as one of the most contentious symbols of the Old South, still dividing those who believe in the values it stood for and those who do not. While it been used throughout history to observe the sacrifices made in support of the Confederacy, it also has become a widely used symbol of white supremacy.

Id.

¹³² Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 900 (1998).

¹³³ *Id.* at 913.

¹³⁴ *Adarand*, 515 U.S. at 223; *see also* *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

confederate flag represents white Southern pride must remember that under the Court's skepticism approach distinctions based on ancestry are constitutionally suspect.¹³⁵

It is common knowledge that, between 1877 and the 1960s, the Confederate battle flag served as a symbol of the Ku Klux Klan, the White Citizens Councils, as well as a symbol of the "Lost Cause."¹³⁶ The Court should view with skepticism any race-neutral southern pride justification for state sponsorship of the Confederate flag.¹³⁷ Suspect skepticism is appropriate because old news reels show Ku Klux Klan figures carrying the flag as well as people waving that flag while screaming obscenities in front of Central High School in Little Rock to protest school desegregation.¹³⁸ There are some people today who revere the Confederate battle flag because it tells the world that they are proud racists.¹³⁹ These racists have usurped any legitimate use of the flag as a symbol of the respect that white southerners have for their ancestors and the suffering they endured.¹⁴⁰ A proud southern white woman from Virginia wishes she could look at the Confederate battle flag and not see a racist symbol, but she cannot.¹⁴¹ The forces of racism have turned the Confederate flag into a symbol of blatant hate.¹⁴²

Some people apparently believe that Southern heritage and the Confederate flag are ethnic symbols for whites only and that others should tolerate under the pretense that these symbols are race-neutral.¹⁴³ The Confederate flag "is a symbol for people who want to proclaim

¹³⁵ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 223-24; *see also Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

¹³⁶ *Owens*, *supra* note 1, at A7.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Owens*, *supra* note 1, at A7.

¹⁴³ *Glanton*, *supra* note 3, at 1 ("What we have is an ethnic cleansing of Confederate symbols in America," according to Kirk Lyons, an attorney for the Southern Legal Resource Center in Black Mountain, N.C. "There's a problem when the government tries to pick and choose what our symbols can and cannot be.").

their Southern heritage.”¹⁴⁴ An African-American born and reared in Mississippi also has the right to proclaim, “I too am a Southerner.” African-Americans have a Southern heritage and legacy in Southern states. Attorney Kirk Lyons asks all people to be tolerant of the Confederate flag as a celebration of Southern heritage.¹⁴⁵ The Confederate flag cannot symbolize a love of heritage because there is too much racial baggage attached to it.¹⁴⁶ Owens believes that the Confederate flag should be tolerated “inside of museums, the meeting rooms of Sons of Confederate Veterans . . . and . . . [at] re-enactment battlefields.”¹⁴⁷ It is one thing to tolerate an individual’s unwise private display of the Confederate flag as a symbol of white supremacy, but it is another thing to tolerate a state flying a Confederate flag that represents white supremacy.¹⁴⁸ Under the Supreme Court’s skepticism approach to race-inspired governmental conduct articulated in *Adarand*, a Confederate flag flying over public property based on the ethnic criteria of white Southern pride is illegal as a violation of the Equal Protection Clause strict judicial scrutiny requirement.¹⁴⁹

Race-based governmental conduct must meet the consistency prong of *Croson* in order to survive an equal protection challenge.¹⁵⁰ Under the consistency test, the standard of review under the Equal Protection Clause does not depend on those burdened or benefited by the state’s

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* According to Kirk Lyons, who refers to Southern Legal Resource Center as the ACLU for the Confederate flag:

This is a symbol for people who want to proclaim their Southern heritage. If some people are offended by that, they have a right to be. But they also have to show toleration for the symbol and respect the rights of those who want to display it. That’s what living in a free and diverse society is all about.”

Id.

¹⁴⁶ Owens, *supra* note 1, at A7.

¹⁴⁷ *Id.*

¹⁴⁸ *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (holding that the Equal Protection Clause did not apply to private race-based discrimination by a private lodge).

¹⁴⁹ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 223-24 (1995).

¹⁵⁰ *Id.* at 224.

conduct.¹⁵¹ A state cannot fly its race-based Confederate flag over public buildings without meeting the strict scrutiny test, regardless of whether the act was designed to benefit or burden a particular group.¹⁵² As a race-based symbol for the benefit of those who wish to proudly observe the past legacy of their exclusive white Southern heritage, the state's sponsorship of the Confederate flag violates the Equal Protection Clause if it cannot survive strict scrutiny.¹⁵³ In defense of South Carolina's flying the Confederate flag over its state capitol, Jane Murray Wells, the President General of the 27,000-member United Daughters of the Confederacy, said, "We live in the past here [in South Carolina], and we like it that way."¹⁵⁴ "We still use our dishes, china, and silverware from the Confederacy days. We don't want anything taken from us."¹⁵⁵ According to Earl Shinhoster, the former Southeast regional director and national director of the NAACP, when the Confederate battle flag flies, it gives sustenance as a symbol of defiance, a symbol of secession and all that characterized the war between the states.¹⁵⁶ In order to benefit those who like to live in past days of the Confederacy and of slavery, South Carolina flies the Confederate flag under the color of state law, while violating the requirement of consistency under the Equal Protection Clause.¹⁵⁷

The principle of consistency is implicated when the government treats a person unequally because of her race; that person has suffered injury under both the language and spirit of the equal protection guarantee.¹⁵⁸ Consistency recognizes that any individual suffers an injury when

¹⁵¹ *Id.*; see also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978).

¹⁵² See *Adarand*, 515 U.S. at 246.

¹⁵³ *Id.*

¹⁵⁴ Glanton, *supra* note 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 223 (1995). All race-based conduct of governmental actors must be strictly scrutinized. *Id.*

¹⁵⁸ *Id.* at 230.

she is disadvantaged because of the government's race-based conduct.¹⁵⁹ The Confederate flag causes injury because it is a race-based symbol which sends a message of race-based exclusion rather than inclusion.¹⁶⁰ The race-based message of exclusion will give an individual "a sense of physical vulnerability, alienation, and displacement"¹⁶¹ because of the state's race-based display of the Confederate flag. A person suffers a constitutional injury when the state, as a representative of all the people, displays a race-based Confederate flag as a public symbol that treats an individual unequally because it is not administered evenhandedly and because it excludes any notion of race-neutrality.¹⁶² The principle of consistency requires public symbols to be race-neutral unless there is a compelling governmental interest that justifies the infliction of a racially motivated injury.¹⁶³ Any hope that the passage of time would allow the Confederate battle flag to be a symbol of a heritage, instead of a sign of racism, was lost in the period after the Compromise of 1877.¹⁶⁴ Under the Compromise, federal troops were removed from the South and tacit approval was given to the second enslavement of African-Americans through Jim Crow laws, the loss of voting privileges, race-based segregation, and economic subjugation.¹⁶⁵ The Confederate flag was lost forever as a race-neutral symbol when the forces of racism used it for so many years to continue the violence and intimidation what could not be won on the Civil

¹⁵⁹ *Id.*

¹⁶⁰ Bein, *supra* note 132, at 913.

¹⁶¹ *Id.* at 916. (citing LAUREN BERLANT, *THE ANATOMY OF NATIONAL FANTASY: HAWTHORNE, UTOPIA, AND EVERYDAY LIFE* 24 (1991)).

¹⁶² *Id.* at 916. Bein notes that:

State display of a public symbol sets up a complex interrelationship of state, symbol, and citizen. The identity of each, and its past relationship with the others, will powerfully influence the interplay among the three. In a nation based on the principle that the citizens are – at a fundamental level – the state, public symbols must function in an evenhanded and inclusive manner if they are to treat all citizens equally.

Id.

¹⁶³ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 230 (1995).

¹⁶⁴ Owens, *supra* note 1, at A7.

¹⁶⁵ *Id.*

War battlefield.¹⁶⁶ “Certain flags teach, and teach powerfully. That is why Germany prohibits the display of the Nazi flag, which its leaders reasonably fear would foster neo-Nazism. The Confederate flag is no less an incendiary teacher.”¹⁶⁷ Understanding the Confederate flag’s power as a lesson of racial inferiority and slavery is neither whimsical nor paranoid.¹⁶⁸ The historical record fails to support the contention that the Confederacy was about states’ rights rather than slavery.¹⁶⁹ Slave states that seceded wanted more federal muscle to enforce the Fugitive Slave Act and to exclude abolitionist literature in the mails.¹⁷⁰ President Lincoln was elected on a platform based on respecting a state’s right to decide for itself the issue of slavery, but Lincoln opposed extending slavery to the territories of the United States.¹⁷¹ The primary complaint of the Confederate States of America was the federal government’s failure to guarantee an indefinite preservation of slave power.¹⁷² The slave power of the Confederacy was beginning to erode through condemning moral sentiment and the probable admission of new non-slaves as the United States expanded across the North American continent.¹⁷³ At the end of the day, to conclude that South Carolina’s official flying of the Confederate flag communicates to ordinary Americans sympathy with slavery, Jim Crow Laws, or the African-American subservience is inescapable.¹⁷⁴ South Carolina’s flying of the flag fosters a climate of racism.¹⁷⁵ South Carolina’s flying of the Confederate flag violates the Equal Protection Clause because creating a climate of racism is race-based governmental conduct that cannot be justified under

¹⁶⁶ *Id.*

¹⁶⁷ Fein, *supra* note 15, at A13.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Fein, *supra* note 15, at A13.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

the strict scrutiny test articulated in *Croson*.¹⁷⁶ At an absolute minimum, a state flying the Confederate flag over its public buildings has created an unconstitutional presumption that there is a preference given to the descendants of white slave owners at the expense of race-neutral governmental conduct.¹⁷⁷ In *Adarand*, the Supreme Court held that state-sponsored, race-based presumptions are unconstitutional if they fail the strict scrutiny test.¹⁷⁸ State-sponsored race-based presumptions and classifications are constitutional only if the state action is narrowly tailored to further a compelling governmental interest.¹⁷⁹

Under the Supreme Court's congruence standard announced in *Adarand*, the equal protection obligations imposed on the federal government by the Fifth Amendment and on the states via the Fourteenth Amendment are indistinguishable.¹⁸⁰ If the federal government were to fly the Confederate flag over the nation's capitol, it would have to meet the strict scrutiny test.¹⁸¹ A Confederate flag flying over the nation's capitol would create "a climate of racism, every bit as much as President Wilson's premier viewing of the racist film, 'Birth of a Nation,' in the White House."¹⁸²

IV. HOW THE ANALYSIS OF THE CONFEDERATE FLAG IN *COLEMAN V. MILLER* FAILS THE *ADARAND* STANDARD

In *Coleman v. Miller*,¹⁸³ James Coleman, an African-American man, sued to enjoin the flying of the Georgia state flag over public office buildings.¹⁸⁴ Coleman alleged that that the

¹⁷⁶ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). In *Croson*, the Supreme Court held that the Fourteenth Amendment requires strict scrutiny of race-based governmental action. *Id.*

¹⁷⁷ See *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995).

¹⁷⁸ *Id.* at 227.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 217.

¹⁸¹ *Id.*

¹⁸² Fein, *supra* note 15, at A13.

¹⁸³ *Coleman v. Miller*, 117 F.3d 527, 528 (11th Cir. 1997).

¹⁸⁴ *Id.* The Court, discussing the history of the Georgia flag, noted that:

flying of the Georgia flag, which incorporates the Confederate battle flag emblem, violates his constitutional rights under the Equal Protection Clause.¹⁸⁵ The current official flag of the state of Georgia was designed in 1956 during a historical period when public leaders were implementing a large campaign of resistance to Supreme Court decisions approving school desegregation.¹⁸⁶ After many of Georgia's politicians openly resisted the United States Supreme Court's desegregation rulings, many white Southerners demonstrated their Confederate heritage with open hostility to the Supreme Court's pro-desegregation civil rights rulings.¹⁸⁷ In 1956, in an environment of racial hostility toward African-Americans and other racial minorities, the Georgia General Assembly chose as an official state symbol an emblem that had historically been associated with white supremacy and resistance to federal desegregation authority.¹⁸⁸ From a historical perspective, Professor Dan Carter, a professor of Southern History at Emory University, said, "by the mid-1950s, the Confederate battle flag had become the single most important symbol of white supremacy and defiant opposition to federally mandated laws on non-

In 1879, Georgia adopted as its first official flag a variation of the Confederate national flag consisting of three horizontal red and white stripes and one blue vertical band. The General Assembly added the state seal to this flag in 1902, and this combination of the Confederate national flag emblem and the Georgia state seal remained the official flag of Georgia until the current flag design was adopted in 1956. The 1956 flag statute replaced the Confederate national flag emblem with the Confederate battle flag emblem, which is commonly referred to as the St. Andrew's Cross. The red and blue St. Andrew's Cross, which the Confederate troops carried during the Civil War, now covers two-thirds of the Georgia flag, and the state seal containing the words "Wisdom, Justice and Moderation" covers the remaining third.

Id. (citation omitted) Before 1879, Georgia militia units carried an unofficial state flag that consisted of the state seal emblazoned in the center of a blue background. *Id.* at 528 n.1.

¹⁸⁵ *Id.* at 528.

¹⁸⁶ *Id.* The court also noted that:

In the 1956 state of the State address, then-Governor Marvin Griffin declared that "there will be no mixing of the races in public schools, in college classrooms in Georgia as long as I am Governor." Later, while addressing the States' Rights Council of Georgia at the beginning of the 1956 legislative session, Governor Griffin announced that "the rest of the nation is looking to Georgia for the lead in segregation." The 1956 General Assembly passed several bills and resolutions as part of its resistance package, including the Interposition Resolution declaring the Supreme Court's school desegregation rulings in *Brown I* and *Brown II* null and void. Introduced as the General Assembly was considering the flag bill, the Interposition Resolution passed both houses over a single dissent.

Id.
¹⁸⁷ *Id.*

discrimination.”¹⁸⁹ Professor Carter believes that the Georgia General Assembly incorporated the Confederate battle flag design into its official flag as a symbolic bolster to the morale of those Georgians struggling to maintain white supremacy.¹⁹⁰ The federal appellate court erred in concluding that the Confederate flag adopted by Georgia in 1956 was a facially neutral symbol.¹⁹¹ The Confederate flag was adopted because it was understood by white Southerners in Georgia and elsewhere to be a symbol of white supremacy for those who had not given up on the lost cause of discriminating against African-Americans.¹⁹² Because Coleman conceded that the Confederate flag was a neutral symbol on its face, the appellate court required him to satisfy a two-prong test.¹⁹³ Coleman first had to demonstrate that flying of the Georgia flag produced disproportionate effects along racial lines and, second, that racial discrimination was a substantial or motivating factor behind the legislature’s adoption of the flag as a symbol.¹⁹⁴

The federal appellate court affirmed the district court’s decision because Coleman failed to produce sufficient evidence to establish his claim of disproportionate racial impact on African-Americans as a group.¹⁹⁵ In order to prove disproportionate impact on a particular racial group, a plaintiff must present specific factual evidence to demonstrate that a state’s current sponsorship of the Confederate flag presently imposes on African-Americans as a group a measurable

¹⁸⁸ *Id.*

¹⁸⁹ *Coleman v. Miller*, 117 F.3d 527, 529 n.5 (11th Cir. 1997).

¹⁹⁰ *Id.* at 529.

¹⁹¹ *Id.*

¹⁹² *Id.* According to one commentator:

Some maintain that South Carolina's official devotion to the Confederate flag, at least in the year 2000, honors the heroism, courage, and suffering of many Confederate soldiers and their families. That may be true, but it does not disprove that an equally if not more potent companion message is white supremacy, which is what the soldiers were fighting for. No doubt, countless soldiers in Hitler's Waffen SS likewise displayed bravery and sacrifice in World War II, but that did not make President Ronald Reagan's ill-starred visit to their burial sites at Bitburg any less offensive to Jews.

Fein, *supra* note 15, at A13.

¹⁹³ *Coleman*, 117 F.3d at 529.

¹⁹⁴ *Id.*

¹⁹⁵ *Coleman v. Miller*, 117 F.3d 527, 529 (11th Cir. 1997).

burden, or that it denies them an identifiable benefit.¹⁹⁶ The significant ghost and spirit of *Adarand* is the bold and unflagging declaration that the equal protection of the law applies to individuals and not to groups.¹⁹⁷ Any person who is offended by the state's sponsorship of the explicitly race-based symbolism of the Confederate flag does not have to seek equal protection relief under a disparate-effect theory because of *Adarand's* personal right theory of equal protection where discriminatory intent exists.¹⁹⁸ The Court in *Coleman* should have analyzed the Confederate flag issue according to a discriminatory intent theory rather than according to a discriminatory impact theory because of the holding in *Adarand*.¹⁹⁹ Professor Carter's testimony presented evidence of discriminatory intent when the Georgia legislature incorporated the Confederate battle flag into its state flag as a race-based symbol of resistance to the Supreme Court's civil rights rulings expanding the civil rights of African-Americans.²⁰⁰ James MacKay, a member of the 1956 Georgia legislature that incorporated the Confederate battle flag into the state flag, testified that there was a movement in Georgia and across the South to adopt the Confederate battle flag as a symbol of resistance to the law of the land requiring integration.²⁰¹ Because the equal protection of the law is a personal right, and not a group right, it is improper for a court to grant a motion for summary judgment without considering the personal impact of intentional racial discrimination on a single plaintiff.²⁰² Evidence that race was a motivating factor in the state's decision to sponsor the Confederate flag and that the decision impacted a single individual makes it improper to dismiss a suit for lack of reasonable facts to conclude that

¹⁹⁶ *Id.* at 530.

¹⁹⁷ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Coleman*, 117 F.3d at 529 n.5.

²⁰¹ *Coleman v. Miller*, 117 F.3d 527, 529 n.4 (11th Cir. 1997).

²⁰² *Adarand*, 515 U.S. at 227.

the state has violated that individual's personal equal protection rights.²⁰³ Because an African-American plaintiff failed to demonstrate that the Georgia flag presently imposes a group-based disparate racial impact, the Court did not use the rationale of *Adarand* because it refused to consider whether there was evidence that race was a motivating factor in the passage of Georgia's Confederate flag legislation.²⁰⁴ Under *Adarand's* personal equal protection rationale, a court should consider evidence of discriminatory intent regardless of whether the race-based governmental decision impacts a discrete and insular minority group or a single person.²⁰⁵

In a post-*Adarand* era, the disparate-impact remedy utilized in *Hunter* in 1985, ten years before the Supreme Court's decision in *Adarand*, is not the proper theory of the case when any individual shows discriminatory intent and harm caused by a state's decision to sponsor the Confederate battle flag.²⁰⁶

The lower federal court in *Coleman v. Miller* may have reached a different result in analyzing the appellant's evidence of discriminatory treatment under the personalized discriminatory intent required under the equal protection standards outlined in *Adarand*.²⁰⁷ It is conceded that appellant Coleman's testimony was not adequate to demonstrate a disproportionate racial effect.²⁰⁸ Coleman "testified that the Confederate symbol in Georgia 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 litigate a traffic ticket."²⁰⁹ After carefully reviewing the record and drawing all inferences in the light most

²⁰³ *Coleman*, 117 F.3d at 530.

²⁰⁴ *Id.* at 530 n.8.

²⁰⁵ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995).

²⁰⁶ *Coleman*, 117 F.3d at 530 ("In order to demonstrate disproportionate impact along racial lines, appellant must present specific factual evidence to demonstrate that the Georgia flag presently imposes on African-Americans as a group a measurable burden or denies them an identifiable benefit.").

²⁰⁷ *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997); *see also Adarand*, 515 U.S. at 227.

²⁰⁸ *Coleman*, 117 F.3d at 530.

²⁰⁹ *Id.*

favorable to Coleman, his testimony reveals evidence of injury caused by the state's use of an explicitly race-based symbol in the Georgia flag under *Adarand's* personal equal protection remedy.²¹⁰ Based on the decision in *Adarand*, a court cannot force a person who complains of the personal and harmful impact of intentional race-based discrimination into the disparate-impact group remedy utilized in *Hunter*.²¹¹ A court applying the *Adarand* rule, that equal protection is for the benefit of individuals rather than groups, would refuse to grant the state a motion for summary judgment after reviewing the evidence in *Coleman*.²¹² The motion for summary judgment should be denied because there are genuine issues of material fact concerning discriminatory intent and personal injury under the *Adarand* rationale that preclude judgment as a matter of law for the state as the moving party.²¹³

The court in *Coleman* concluded that the failure to demonstrate that the Georgia flag presently imposes a group based racial discriminatory effect relieves it of the burden to decide whether racial discrimination against African-Americans was a motivating factor in the flag decision and is inconsistent with protecting individuals under the Equal Protection Clause.²¹⁴ To the extent that *Palmer v. Thompson*²¹⁵ is understood as standing for the proposition that race-motivated legislation only violates the Constitution when it affects blacks and whites differently as a group, that proposition has been seriously undermined by *Adarand's* proposition that the Equal Protection Clause protects individuals and not groups.²¹⁶ Under *Adarand*, whenever race is a factor in a governmental decision, the proper inquiry is whether there was an intent to

²¹⁰ *Id.*; see also *Adarand*, 515 U.S. at 227.

²¹¹ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995); see also *Hunter v. Underwood*, 471 U.S. 222, 227 (1985).

²¹² *Coleman*, 117 F.3d at 530. The Court stated that “[a]fter carefully reviewing the record, and drawing all inferences in the light most favorable to appellant [Coleman], we find no evidence of a similar discriminatory impact imposed by the Georgia flag.” *Id.*

²¹³ *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997); see also *Adarand*, 515 U.S. at 227.

²¹⁴ *Coleman*, 117 F.3d at 531 n.8.

²¹⁵ *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

discriminate. When intentional discrimination exists, the next question becomes whether the discrimination is narrowly tailored enough to survive strict scrutiny.²¹⁷ As Justice Stewart stated in the *Fullilove* decision, under our Constitution, any official action that treats a person differently on account of his race is inherently suspect and presumed to be invalid under the Fourteenth Amendment.²¹⁸ There is nothing new about the notion that states may treat people differently because of their race only for compelling reasons.²¹⁹ In *Coleman*, there were genuine issues of material fact concerning whether Georgia incorporated the Confederate battle flag into its state flag because of its desire to treat individuals differently based on their individual racial status, regardless of their group status.²²⁰ People of color with visible Afrocentric traits, regardless of their national origin group status, would have been discriminated against by the historical supporters of the Georgia flag because of their individual racial status regardless of whether they were Jewish, Greek, or British. The *Coleman* Court's grant of summary judgment to the state because an African-American showed individualized racial harm rather than group harm lacks support in Supreme Court precedent and undermines the fundamental principle of equal protection as a personal right.²²¹ If the *Coleman* Court had not boxed the appellant into an all-or-nothing group equal protection remedy, it would have recognized that there were material issues of fact as to whether the legislature's adoption of the Georgia flag was intended to encourage private discrimination against any individual.²²² The Court concluded that there was no evidence in the record that connects the Georgia flag to private discrimination or racial

²¹⁶ See *Adarand*, 515 U.S. at 227.

²¹⁷ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 234 (1995).

²¹⁸ *Id.* (citing *Fullilove v. Klutznick*, 448 U.S. 448, 523 n.1 (1980)).

²¹⁹ *Id.* at 235.

²²⁰ *Coleman v. Miller*, 117 F.3d 527, 529 (11th Cir. 1997).

²²¹ *Adarand*, 515 U.S. at 235.

²²² *Coleman*, 117 F.3d at 530 n.6. The Court noted that “[w]e recognize that a government may in some instances violate the Constitution because it encourages private discrimination.” *Id.*; see also *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967).

violence that would satisfy its disproportionate racial group effect requirement.²²³ There was sufficient evidence in the record from Professor Carter’s testimony to create a material issue of fact as to whether Georgia incorporated the Confederate battle flag to help the morale of those Georgians struggling to maintain white supremacy against individuals rather than groups.²²⁴

V. STATE SPONSORSHIP OF THE CONFEDERATE FLAG VIOLATES EQUAL PROTECTION PRINCIPLES

The judges in *Coleman* expressed regret that the Georgia legislature chose to and continues to display, as an official symbol, a Confederate battle flag that represents division rather than unity.²²⁵ But the Court stated that, “[a]s judges, however, we are entrusted only to examine the controversies and facts put before us.”²²⁶ When a judge considers the racial implications of a state sponsorship of the Confederate flag, she may find insightful Professor Laurence Tribe’s comments about the ability of federal courts to award relief in contexts in which there is an operational challenge to the actual practice of a governmental policy.²²⁷ Even if the Georgia law incorporating the Confederate battle flag could not be shown to be either invalid on its face or invalid as applied to the appellant challenging it, the law may operate in actual practice in an unconstitutional manner.²²⁸ The constitutional vice or constitutional evil in an actual operative practice theory inheres not in any one law either on its face or as applied, but in a constellation of laws or governmental policies that work in concert to deprive people of their

²²³ *Coleman*, 117 F.3d at 530.

²²⁴ *Id.* at 529 n.5.

²²⁵ *Id.* at 530.

²²⁶ *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997).

²²⁷ 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-31, at 609-10 (3d ed. 2000).

²²⁸ *Id.* at 612. (citing *Bowen v. Kendrick*, 487 U.S. 589, 622 (1988) (O’Connor, J., concurring)) (“This litigation raises somewhat unusual questions involving a facially valid statute that appears to have been administered in a way that led to violations of the Establishment Clause.”).

individual rights.²²⁹ When the constitutional objection is of that character, it is inexcusably arbitrary for the federal courts to shut their eyes to a litigant's challenge.²³⁰ It is arbitrary for federal courts to shut their doors to requests for suitable relief because the constitutional challenge fails to fit standard pigeonholes for attacks on the facial validity of a law and for attacks on the validity of a law as applied to the litigant's situation.²³¹ The Confederate battle flag violates the Equal Protection Clause because, when it is sponsored by the state, it operates in actual practice as a race-based symbol to support a constellation of laws, governmental policies, and private practices that conspire to deny people their personal constitutional rights, which violates the Court's holding in *Adarand*.²³²

One commentator believes that the law's ignorance of its actual impact may serve as a severe threat to the basic civil liberties of all Americans.²³³ When justice is blind to the operative racial use of the Confederate flag, such as in Georgia and South Carolina, the rule of law runs the risk of being divorced from the real world.²³⁴ It is a self-evident truth that the standards of constitutionality should be informed by empirical data.²³⁵ The Confederate battle flag is not a symbol that is racially neutral on its face. A state flag law that appears neutral on its face warrants strict scrutiny under the Equal Protection Clause if it can be proved that the law incorporating the Confederate flag was motivated by a racial purpose, or if it is unexplainable on grounds other than race.²³⁶ In situations where there is a genuine issue of material fact relating to

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 235 (1995).

²³³ Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 656-57 (1988).

²³⁴ *Id.* at 657.

²³⁵ *Id.*

²³⁶ *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Strict scrutiny applies to a law neutral on its face motivated by a racial purpose or object. *Miller v. Johnson*, 515 U.S. 900, 913 (1995). Strict scrutiny is required when a plaintiff challenges a facially neutral law that is unexplainable on grounds other than race. *Shaw v. Reno*, 509 U.S. 630, 644 (1993).

whether a state legislature drew a congressional redistricting plan based on impermissible racial motives, a court is precluded from granting a summary judgment on the claim that the plan violates the Equal Protection Clause.²³⁷ In *Coleman*, there were issues of material fact relating to the nature of the appellant’s personal equal protection injury, as recognized by the court in *Adarand*.²³⁸ There were also issues of material fact in *Coleman* as to the legislature’s motivation in adopting the flag law.²³⁹ Under the *Shaw v. Reno* rationale, there was also an issue of fact in *Coleman* about whether Georgia’s use of the Confederate flag can be explained on grounds other than race.²⁴⁰

The Confederate battle flag is a provocative symbol that appeals to a prurient interest in race relations because, taken as a whole, the flag portrays racial issues in a patently offensive way.²⁴¹ Although one may not be able to objectively define such an offensive symbol, “[b]ut [we] know it when [we] see it.”²⁴² The spirit of *Adarand* clearly suggests that a state’s sponsorship of a flag, which appeals to a prurient interest in race relations, violates the equal protection of the law if a member of a minority class can show that she has suffered an injury regardless of her group status.²⁴³ Because of its appeal to a prurient interest in race relations, the Confederate flag is “the most inflammatory symbol that the South has.”²⁴⁴ When a plaque bearing the Confederate battle flag was removed from the Texas Supreme Court building on Friday June 9, 2000, it generated predictable words of passion.²⁴⁵ The removal of this plaque has

²³⁷ *Hunt*, 526 U.S. at 549.

²³⁸ *See Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997).

²³⁹ *See id.*

²⁴⁰ *See id. See generally Shaw*, 509 U.S. at 644.

²⁴¹ *Miller v. California*, 413 U.S. 15 (1973). *Miller* is an obscenity case in which the Court holds that a state may prohibit materials which, taken as a whole, appeal to the prurient interest in sex. *Id.*

²⁴² *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

²⁴³ *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 235 (1995).

²⁴⁴ Bein, *supra* note 132, at 921 (quoting Kevin Sack, *Symbols of the Old South Divides the New South*, N.Y. TIMES, Jan. 21, 1996, at 5).

²⁴⁵ Duggan, *supra* note 21, at A21. Mr. Duggan has noted that:

won Governor Bush praise from the Texas NAACP, but it has angered groups that are dedicated to preserving the Confederate heritage.²⁴⁶ Texas NAACP president Gary Bledsoe was heartened by the news that the Confederate battle flag symbol, which he describes as a hate symbol, was removed from the Texas Supreme Court.²⁴⁷ Kirk Lyons of the Southern Legal Resource Center accused Governor Bush of waging war on the Confederate community because of the removal of

Responding to complaints from civil rights advocates, Texas Governor George W. Bush's administration has removed two Confederate memorial plaques from the state Supreme Court building here, winning praise from the Texas NAACP but angering groups dedicated to preserving Southern heritage.

The bronze, square-foot plaques – including one bearing an image of the controversial Confederate battle flag – had adorned the Supreme Court lobby since 1955, after the building was constructed with money once set aside in a Confederate widows' pension fund. The state agency that manages the building said it decided to take down the plaques last Friday after receiving "extensive input from the governor's office."

"The plaques were replaced with two others, one commemorating the source of the building's financing and one extolling the principle of equal justice for all citizens 'regardless of race, creed or color.'"

"These replacement plaques will help assure all Texans that our courts provide fair and impartial justice while explaining the role Confederate family contributions played in constructing the building," Bush spokesman Mike Jones said in a statement today.

Bush, the presumptive GOP presidential nominee, tried to steer clear of a much larger controversy over the Confederate battle flag flying over the South Carolina Statehouse, which is due to be removed July 1. Asked repeatedly before that state's primary in February whether he sides with Confederate heritage groups or South Carolinians who are offended by the symbol, Bush ducked by calling it a local issue best decided by the people of South Carolina.

But the plaques in the Supreme Court lobby here were just a short stroll from Bush's office in the Texas Capitol. After the Texas NAACP began pressing for their removal in January, Bush said they should remain, albeit with a new plaque explaining that the building was paid for with money from the Confederate pension fund. The law that allowed for that financing required the building to be "designated as a memorial" to Texans who fought for the South in the Civil War.

The explanatory plaque went up—but the others came down. One bore a rendering of the battle flag and a quote from General Robert E. Lee, praising Texas troops under his command, and the other was a plaque of the Great Seal of the Confederacy.

"We are heartened by the news that the hate symbols have been removed," said Texas NAACP president Gary Bledsoe, calling the plaques "an unnecessary stain on our judiciary."

But among some groups, there was anger.

"If the governor wants to wage war on the Confederate community, that's his choice, but it's not going to help him electorally," said lawyer Kirk Lyons of the South Carolina-based Southern Legal Resource Center. Seeking to retain the plaques, Lyons filed a lawsuit in state court on behalf of Denne A. Sweeny, commander of the Texas Division of the Sons of the Confederacy.

Lyons and Sweeny said the financing law that required the building to be dedicated to Confederate veterans also required a commemorative display."

"I thought it was a pretty rotten thing to do," Sweeny said of the state General Services Commission's decision to remove the plaques Friday night. The agency said it chose that time so the work would not disrupt the court.

Id.
²⁴⁶ *Id.*

the symbol.²⁴⁸ It was indeed good news that the Confederate battle flag flying over the South Carolina capitol was scheduled to come down on July 1, 2000.²⁴⁹

VI. CONCLUSION

A state violates the equal protection of the law when it endorses a Confederate battle flag symbol that conveys an ideological message that appeals to a prurient interest in race relations. It is a reality that political concerns may have influenced a state's decision to do the right thing and stop sponsoring Confederate symbols. Regardless of the political climate, one's personal right to be free of race-based symbolic flags is so precious that the judiciary must protect it when there is evidence of discriminatory state action that accommodates a private, prurient interest in race relations.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*