ANTIMATTERS: THE CURIOUS CASE OF CONFEDERATE MONUMENTS

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ABSTRACT

Confederate monuments sit at a crossroads of speech frameworks as contested government speech, as concrete edifices of hate speech, and as key protest sites. The interplay of state law and speech doctrines in states like Alabama and Florida has cemented monuments as physical representations of government speech that municipal governments cannot speak on. To understand the confounding ways that doctrinal principles take on inverse implications, this Article draws on the concept of antimatter in physics—matter that has the same mass and properties of ordinary matter but with the opposite charge—to analyze doctrinal intersections of constitutional law that are made to appear doctrinally neutral or generally applicable but are contextually charged with the full force of white supremacy.

Physicists refer to the observable material that makes up the known universe as matter but have theorized and identified corresponding material that has the same mass but the opposite properties, known as antimatter. Although physicists are certain that antimatter exists, its nature makes its presence difficult to articulate, and represents an asymmetry in the visible universe due to our limitations in perceiving the phenomena. Thus, a limited perception prevents people from understanding antimatters, and, theoretically, may be due to antimatter having a different relationship to time itself—antimatter travels backwards, or at least in a different direction in time than the known, observable universe.

Framing the practical contradictions created by the doctrinal intersections, I argue that state legislation has turned Confederate monuments into

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antimatters—all the properties of speech, but obfuscated by state legislation, becoming intangible legal phenomena that are in transit back in time. Governments no longer need to express explicit support of white supremacy. By providing special protection for these Confederate monuments, states demonstrate allegiance to the ideology the statues represent. Theorizing antimatters thus reframes the doctrines of constitutional law by focusing on phenomena rendered intangible by rhetorics of neutrality and objectivity to contextualize the operation of power and belonging in the law—like Confederate monuments that regulate time and place in the name of white supremacy under the protection of neutral, doctrinal applications.

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Quantum physics could never show you the world I was in.
—Kendrick Lamar[1]

INTRODUCTION

In June 2020, the City of Birmingham in Alabama finally removed one of the oldest monuments to the Confederacy in the United States: the Confederate Sailors and Soldiers Monument.[2] The monument started as a fifteen-foot square stone foundation in 1894 but was rededicated in 1905, adding a forty-two-foot-tall marble obelisk, funded by $1,750 from the United Daughters of the Confederacy ("UDC")[3] and maintained exclusively by the City of Birmingham for the next 115 years.[4] Like most monuments to the Confederacy, Birmingham's obelisk was placed adjacent to the city capitol and courthouse,[5] at the Southwest entrance of Birmingham's capitol plaza in a park named after a Confederate leader—Navy Captain Charles Linn.[6] Just two-and-a-half miles away sits the historical marker for the Birmingham City Jail where Martin Luther King, Jr. wrote his famous letter explaining the need for direct action against white supremacy because "freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."[7] However, the removal of

[1] PUSHA T FEATURING KENDRICK LAMAR, *Nosetalgia*, *on* MY NAME IS MY NAME (GOOD Music & Def Jam Recordings 2013).

[2] *See* Colin Dwyer, *Confederate Monument Being Removed After Birmingham Mayor Vows To 'Finish the Job,'* NPR (June 2, 2020, 1:38 PM), https://www.npr.org/2020/06/02/867659459/confederate-monument-removed-after-birmingham-mayors-vow-to-finish-the-job [https://perma.cc/E6L3-VWA8]; Erik Ortiz, *'I Chose My City': Birmingham, Alabama, Removes Confederate Monument, Faces State Lawsuit*, NBC NEWS (June 3, 2020, 1:32 PM), https://www.nbcnews.com/news/us-news/i-chose-my-city-birmingham-alabama-removes-confederate-monument-faces-n1223511 [https://perma.cc/C93P-9P4N]; Malique Rankin, *One Year Later: Birmingham Riots, Confederate Monument Removed from Linn Park*, CBS42 (June 1, 2021, 10:08 PM), https://www.cbs42.com/news/one-year-later-birmingham-riots-confederate-monument-removed-from-linn-park [https://perma.cc/6RUS-CS8D].

[3] Annie Kendrick Walker, *Birmingham Daughters Accept Design for the Confederate Monument*, BIRMINGHAM AGE-HERALD, Oct. 20, 1904, at 6, https://chronicling america.loc.gov/lccn/sn85038485/1904-10-20/ed-1/seq-6/ [https://perma.cc/C8Z7-HCDH].

[4] *See* State v. City of Birmingham, 299 So. 3d 220, 223 (Ala. 2019).

[5] *See* KAREN L. COX, NO COMMON GROUND: CONFEDERATE MONUMENTS AND THE ONGOING FIGHT FOR RACIAL JUSTICE 20-21 (2021) [hereinafter COX, NO COMMON GROUND] (noting most Confederate monuments were built on grounds of local courthouses and state capitol buildings); SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (10th anniversary ed. 2018) (exploring importance of lynchings, Confederate monuments, and other overt acts of white supremacy on courthouse lawns, plazas, and spaces adjacent to city government buildings).

[6] The park was originally named Capitol Park, then Woodrow Wilson Park in 1918, and finally Linn Park in 1988. Drew Taylor, *Birmingham's Charles Linn and His Linn Park Statue*, CBS42 (June 1, 2020, 3:26 PM), https://www.cbs42.com/news/local/birminghams-charles-linn-and-his-fallen-statue/ [https://perma.cc/2BZU-LTHF].

[7] Letter from Martin Luther King, Jr., to C.C.J. Carpenter, Bishop, Joseph A. Durick, Bishop, Milton L. Grafman, Rabbi, Nolan B. Harmon, Bishop, George H. Murray, Reverend,

the Confederate Sailors and Soldiers Monument was not due to a gradual change in laws, hearts, and minds by the state of Alabama but rather the direct action and justified law-breaking explained by Dr. King.[8]

Like many other cities and states,[9] the City of Birmingham first attempted to remove the monument in 2015, when the City's Park and Recreation Board unanimously approved a resolution to remove the monument[10] in response to the murder of nine Black churchgoers at Emanuel African Methodist Episcopal Church in Charleston, South Carolina.[11] The monument remained up while the City considered options for its removal, but the state of Alabama would soon pass the Alabama Memorial Preservation Act ("AMPA")[12] in May 2017, countermanding Birmingham and other cities' efforts to remove Confederate monuments. AMPA prohibits changes to any "statue, portrait, or marker intended at the time of dedication to be a permanent memorial to an event, a person, a group, a movement, or military service that is part of the history of the people or geography now comprising the State of Alabama."[13] Thus, Confederate monuments like the Sailors and Soldiers Monument gained protection under AMPA because they have "been so situated for 40 or more years" and, therefore, could not be "relocated, removed, altered, renamed, or otherwise disturbed."[14]

A few months later in 2017, the "Unite the Right" rally spotlighted the ongoing relationship between monuments and white supremacist violence when tiki-torch-bearing white supremacists rallied around the statue of Thomas

Edward V. Ramage, Reverend, and Earl Stallings, Reverend (Apr. 16, 1963) (Letter from Birmingham Jail).

[8] *See id.*

[9] *See* S. POVERTY L. CTR., WHOSE HERITAGE?: PUBLIC SYMBOLS OF THE CONFEDERACY 8 (3d ed. 2022), https://www.splcenter.org/sites/default/files/whose-heritage-report-third-edition.pdf [https://perma.cc/HN62-X9XL] (noting mass removals of Confederate monuments following Dylann Roof's murder of nine churchgoers at Emanuel African Methodist Episcopal Church in 2015, following Charlottesville Unite the Right rally and murder of Heather Heyer in 2017, and following police murder of George Floyd in Minnesota in 2020); *see also* COX, NO COMMON GROUND, *supra* note 5, at 122-28 (describing initiation of removal proceedings in southern states and UDC's response).

[10] Joseph D. Bryant, *Birmingham City Officials Take Steps To Remove Confederate Monument at Linn Park*, AL.COM (July 1, 2015, 3:23 PM), https://www.al.com/news/birmingham/2015/07/finding_another_place_birmingh.html [https://perma.cc/UG8G-GMKX].

[11] Barnett Wright, *Activist Frank Matthews: Remove the 'Racist' Confederate Monument from Birmingham*, AL.COM (June 23, 2015, 2:27 PM), https://www.al.com/news/birmingham/2015/06/activist_frank_matthews_remove.html [https://perma.cc/D8YY-K2SP].

[12] ALA. CODE § 41-9-230 (2022).

[13] *Id.* § 41-9-231.

[14] *Id.* § 41-9-232(a).

Jefferson at the University of Virginia[15] and then organized the next morning to protest the potential removal of the Charlottesville monument to Confederate General Robert E. Lee, culminating in violence and the murder of Heather Heyer.[16] In Birmingham, this meant the City Council unanimously voted to remove Confederate monuments within the city, even though AMPA would prevent it.[17] Birmingham Mayor William Bell attempted to circumvent AMPA by constructing a twelve-foot high plywood barrier around the monument, obstructing the plaques and writing but not relocating, removing, altering, renaming, or otherwise disturbing the monument.[18] The Supreme Court of Alabama disagreed, finding the obstruction "memorializes nothing" and thus violates the AMPA.[19] While the First Amendment does not restrict a government's ability to select which types of speech to endorse, the City has no substantive free speech right to assert against the State.[20] Thus, the government speech of the City was overruled by the State's speech via AMPA, but the City was only subject to a single $25,000 fine.[21]

Just as the City was moved to act by protests in 2015 and 2017, the protests after the murder of George Floyd in Minnesota spurred a decisive action by the City of Birmingham. In May 2020, protesters across the United States gathered to agitate for rights and recognition, and struck against edifices of white supremacy, vandalizing and toppling monuments to the Confederacy across the United States.[22] In Birmingham, protesters took down the barriers and

[15] Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html.

[16] Kamala Kelkar, *Three Dead After White Nationalist Rally in Charlottesville*, PBS (Aug. 12, 2017, 1:17 PM), https://www.pbs.org/newshour/nation/state-emergency-charlottesville-va-fights-erupt-white-nationalist-rally [https://perma.cc/CYZ5-HK59]; *Unrest in Virginia: Clases over a Show of White Nationalism in Charlottesville Turn Deadly*, TIME, https://time.com/charlottesville-white-nationalist-rally-clashes/ [https://perma.cc/4TXC-GUT9] (last visited Jan. 18, 2023).

[17] Erin Edgemon, *Birmingham Covers Confederate Monument as City Considers Removal*, AL.COM (Aug. 15, 2017, 4:20 PM), https://www.al.com/news/birmingham/2017/08/defy_state_law_and_remove_conf.html [https://perma.cc/XQ85-WKNL].

[18] State v. City of Birmingham, 299 So. 3d 220, 223 (Ala. 2019).

[19] *Id.* at 227.

[20] *Id.* at 234 (finding City of Birmingham has no free speech right under First Amendment or under Alabama Constitution because it is merely political subdivision of state).

[21] *Id.* at 237. Alabama sought a fine of $25,000 per day that the fence obstructed the monument, but the Court opted to interpret the statute's "per-violation" language as based on the obstruction, with Justice Michael Bolin of the Supreme Court of Alabama concurring separately that such a fine is a "minute deterrence for the same or similar future conduct." *Id.* at 238 (Bolin, J., concurring).

[22] COX, NO COMMON GROUND, *supra* note 5, at 169-70; *see also* Jennifer Henderson, *Protesters Tear Down Statues from Confederate Monuments in DC and North Carolina*, CNN (June 20, 2020, 5:40 AM), https://www.cnn.com/2020/06/20/us/north-carolina-confederate-monument/index.html [https://perma.cc/X38S-Y8US]; *Confederate and Columbus Statues*

vandalized the marble obelisk, defacing the Confederate Soldiers and Sailors Monument, spurring the new mayor, Randall Woodfin, to remove the monument and pay the fine, arguing, "[I]t's probably better for this city to pay this civil fine than to have more civil unrest."[23] Thus, after 115 years, protests, vandalism, and two fines of $25,000 paid by the City, the Confederate Soldiers and Sailors Monument was finally removed.

Confederate monuments are state-sanctioned manifestations of white supremacy that cities have attempted to remove with mixed success. As demonstrated in Birmingham, sometimes it takes a nongovernmental action to spur the government to act.[24] Confederate monuments remain fixtures in conversations on power because they speak with the authority of the government. The Court has recognized that such monuments occupy a special place in First Amendment doctrine known as government speech, whereby "the government speaks for itself" and must be allowed to "'promote a program' or 'espouse a policy' in order to function."[25] States, therefore, do not need to provide an open forum for all views but may discriminate and select messages that express the views of the government.[26] Accordingly, government speech depends on the state's ability to control the meaning of the statue—either in selecting or restricting the displayed messages—and the state's choice to align with that meaning exempts it from the censorship, content, or viewpoint discrimination analyses typically applied to public forums.[27] In this way, monuments, often privately funded or privately owned, are given the protection of the state.[28]

Confederate monuments are constant reminders of commitments to white supremacy in the United States. These markers of the Lost Cause mythos valorize white generals, soldiers, and officers.[29] Confederate monuments

Toppled by US Protesters, BBC: NEWS (June 11, 2020), https://www.bbc.com/news/world-us-canada-53005243 [https://perma.cc/KD2T-A2GH].

[23] Ortiz, *supra* note 2.

[24] *See id.*

[25] Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022) (quoting Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015)) (discussing Boston's program of raising flags of private groups outside of City Hall).

[26] *See id.*; *see also Walker*, 576 U.S. at 208 (holding specialty license plate designs are government speech); Pleasant Grove City v. Summum, 555 U.S. 460, 460 (2009) (holding selection of monuments within city park is government speech). *But see* Matal v. Tam, 582 U.S. 218, 239 (2017) (holding regulation of trademarks is not government speech).

[27] *See Summum*, 555 U.S. at 472-73.

[28] *See id.* at 481.

[29] Coined by Edward Pollard's book *The Lost Cause: A New Southern History of the War of the Confederates*, this myth reimagines the defeat of the South in the Civil War as a white supremacist romanticism of an independent South, leaning on Confederate symbols to reaffirm white southern identity as distinct. *See generally* EDWARD ALFRED POLLARD, THE LOST CAUSE: A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES (CreateSpace Independent Publishing Platform 2014) (1866); *see also generally* ADAM H. DOMBY, THE FALSE CAUSE: FRAUD, FABRICATION, AND WHITE SUPREMACY IN CONFEDERATE MEMORY

emerged immediately after the end of the Civil War and were created in droves after the end of Reconstruction, growing in numbers in direct response to movements for racial justice and civil rights in the twentieth century.[30] Whether in the form of statues, plaques, or place names, these monuments are largely found in common areas and in front of state courthouses and capitols to "claim[] the public square for southern whites, spaces that for more than a century have been not simply white-controlled but also shaped by segregation."[31]

At least 200 Confederate memorials have been removed, renamed, or relocated by protesters, cities, and states since 2018,[32] but state legislatures moved quickly to stop protesters and municipalities alike.[33] Alabama has disallowed any memorial or monument that "is located on public property and has been so situated for 40 or more years" from being "relocated, removed, altered, renamed, or otherwise disturbed."[34] Florida enacted an omnibus bill after the protests during the summer of 2020, broadly criminalizing political gatherings with a special section creating an additional second degree felony for

(2020); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880, at 721 (1935) [hereinafter DU BOIS, BLACK RECONSTRUCTION] (describing efforts of Pollard and other white historians post-Reconstruction as "classic example[s] of historical propaganda" to valorize white slave owners, elites, and Confederates at expense of Black and white workers); GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH 1865 TO 1913 (1987) (describing growth of Lost Cause mythos as rallying symbol of white defiance in post-Civil War south); CHARLES REAGAN WILSON, BAPTIZED IN BLOOD: THE RELIGION OF THE LOST CAUSE, 1865-1920 (1980) (describing glorification of Confederacy as part of white southern identity, tied specifically to southern civil society and religion).

[30] S. POVERTY L. CTR., *supra* note 9, at 33-34.

[31] COX, NO COMMON GROUND, *supra* note 5, at 20-21.

[32] S. POVERTY L. CTR., *supra* note 9, at 10; *see also* COX, NO COMMON GROUND, *supra* note 5, at 6-7; Jasmine Aguilera, *Confederate Statues Are Being Removed amid Protests over George Floyd's Death. Here's What To Know*, TIME (June 24, 2020, 1:58 PM), https://time.com/5849184/confederate-statues-removed/; Debbie Elliott, *Protests Are Bringing Down Confederate Monuments Around The South*, NPR (June 8, 2020, 9:28 PM), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/08/872659015/protests-are-bringing-down-confederate-monuments-around-the-south [https://perma.cc/2FHR-QYXW].

[33] As of this writing, Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia have enacted statutory protections for Confederate monuments. *See* Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes*,*"* 91 TEMP. L. REV. 1, 8-10 (2018) (describing features of state statutes and potential loopholes for removal or recontextualization of Confederate monuments); Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 631-32 (2019) [hereinafter Phelps & Owley, *Etched in Stone*] (discussing federal, state, and local historical preservation laws as impediments to action on Confederate monuments); Helen Holmes, *'Maliciously' Taking Down a Confederate Monument in Florida Is a Second-Degree Felony*, OBSERVER (Apr. 21, 2021, 12:58 PM), https://observer.com/2021/04/confederate-monuments-florida-felony/ [https://perma.cc/ZHY6-Z69T].

[34] ALA. CODE § 41-9-232(a) (2022).

destruction or removal of any "memorial or historic property, unless authorized by the owner of the memorial or historic property."[35]

Confederate monuments exemplify how the state insulates white supremacy through doctrinal paradoxes: they are public yet private;[36] they are speech at the discretion of the government, yet ungovernable by the localities in which they sit.[37] This Article focuses on Confederate monuments because they make apparent governmental and legal commitments to white supremacy—in power and practice, even if not explicitly in name. Confederate monuments exist because white supremacy simultaneously reifies and inverts doctrines of juridical power.

Yet, because the law treats such exercises of racial power as business as usual, this Article looks to physics to help make apparent the ways in which white supremacy inverts assumptions of doctrine to insulate white racial power. Physics refers to the observable material that makes up the known universe as matter but has theorized and identified corresponding material that has the same mass but the opposite properties, known as antimatter.[38] Electrons, by definition, are negatively charged particles; yet, physics has observed positrons, particles with the same properties but positively charged.[39] "Antimatter is a weird topsy-turvy shadow of matter."[40] Although physicists are certain that antimatter exists, its nature makes it difficult to observe.[41] However, antimatter is understood to

[35] 2021 Fla. Sess. Law Serv. ch. 2021-6 (West) (codified at FLA. STAT. ANN. § 806.135 (West 2022)).

[36] KAREN L. COX, DIXIE'S DAUGHTERS: THE UNITED DAUGHTERS OF THE CONFEDERACY AND THE PRESERVATION OF CONFEDERATE CULTURE 70 (first paperback with new preface prtg. 2019) [hereinafter COX, DIXIE'S DAUGHTERS]; COX, NO COMMON GROUND, *supra* note 5, at 20-21 (describing private fundraising conducted by UDC in addition to state funding for monuments); SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 89-90 (1998) (noting many monuments received public funding and, in many cases, private funding as well).

[37] Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 370 (2019) (arguing for First Amendment protections for city speech against state suppression of municipal decisions like removal of monuments); Bray, *supra* note 33, at 45-46 (noting when state attorneys general's broad interpretations of statue statutes are adopted by courts, local governments have limited opportunities to modify or remove monuments); Aneil Kovvali, *Confederate Statue Removal*, 70 STAN. L. REV. ONLINE 82, 88 (2017) (arguing state statutes "suppress the speech of cities" and remove municipal, local control "out of the hands of the voters who actually have to live with the monuments"); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1167 (2018) (exploring roots of "constitutional anti-urbanism" as feature of federalism, permitting rural populations to subordinate city interests under state and federal constitutional schemes).

[38] *See* FRANK CLOSE, ANTIMATTER 2 (2009).

[39] *See id.* at 82-83.

[40] *Id.* at 2.

[41] *See* Laurent Canetti, Marco Drewes & Mikhail Shaposhnikov, *Matter and Antimatter in the Universe*, NEW J. PHYSICS, Sept. 2012, at 1, 4.

have formed with the universe and the basic structures of matter.[42] Antimatter "follows the same strict laws as do conventional particles,"[43] but their inverted charge acts differently in the grand scheme of the universe, allowing scientists to theorize and identify structures and forces of power in nature.[44]

Similarly, Confederate monuments represent the doctrinal phenomena I call "antimatters." State legislation on Confederate monuments create doctrinal paradoxes in government speech, hate speech, and symbolic speech that insulate white supremacy and ensure governance that runs counter to the democratic, representative, or community-based theoretical assumptions of speech doctrines.[45] Confederate monuments fit the doctrinal requirements of government speech as the voice of the government, but under state legislation, local governments are prohibited from speaking by removing or altering monuments that cities must maintain.[46] They are symbolic representations of the Confederacy, a white supremacist government created with the purpose of maintaining slavery.[47] Local governments that now find monuments distasteful, offensive, or contrary to their purpose are restricted from removing them by state actors.[48] Citizens who contest monuments through ordinary processes of government are thus silenced by state laws—creating a compelled-speech superintendence between state and local governments.[49] If anyone were to take matters into their own hands and remove the statues on their own as a form of symbolic speech against the white supremacy these statues represent, they would be subject to criminal offenses that have become exponentially more dangerous than those for any ordinary act of vandalism.[50] The special protection for Confederate monuments allows us to take another note from physics and use powers of indirect observation to understand these antimatters. The government is not declaring its support of white supremacy, but by providing special protection for these Confederate monuments, state governments demonstrate allegiance to the ideology the statues represent.

Confederate monuments are thus part of the narratives of power and history in the United States, manifesting a revisionist history to support the perpetuation

[42] CHANDA PRESCOD-WEINSTEIN, THE DISORDERED COSMOS: A JOURNEY INTO DARK MATTER, SPACETIME, AND DREAMS DEFERRED 1 (2021) (noting physicists "are still not super sure" as to why matter and antimatter have formed and continue to form under certain conditions).

[43] CLOSE, *supra* note 38, at 17.

[44] *Id.* at 67 (describing physicists' fascination with strong and weak forces); *see also* PRESCOD-WEINSTEN, *supra* note 42, at 1-2 (explaining process by which matter and antimatter formed and how this process led to formation of structures, then stars, and then supernovae, creating elements that became basis of life on Earth).

[45] *See infra* Part III.

[46] *See* Blank, *supra* note 37, at 368-69.

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See infra* Part III.

of white nationalism. This Article proceeds in three parts, providing three connected frames to discuss Confederate monuments: theory, history, and doctrine. Part I provides the theoretical framework I call "antimatters" by building on the works of legal realists and critical race scholars to frame Confederate monuments as antimatters—manifestations of white supremacist governance that are protected by doctrinal facades of neutrality or nondiscrimination yet serve an explicitly discriminatory purpose that invert stated assumptions and purposes of speech doctrines.

In Part II, I provide historical context to Confederate monuments to frame their origins and contentious meaning in social life in the United States. My focus is not on one single monument, but the genre of monuments to the Confederacy. These are statues that commemorate the dead in name only, distinct from gravesites or markers of battles from the Civil War. Confederate monuments at public parks, courthouses, and state capitols memorialize white supremacy and are distinct in purpose, kind, and function from posthumous remembrances of individuals.

Finally, Part III provides a doctrinal framework by triangulating the three key doctrines of law that would ordinarily apply to Confederate monuments: government speech, hate speech, and symbolic speech. This Part collects the intersections of speech doctrines to interrogate the ways the Court defines purpose, process, and perception of monuments as speech under the First Amendment. Considered under speech doctrine, there is an underlying assumption that Confederate monuments are part of a conversation, part of the "mythological marketplace of ideas,"[51] that can be countered, discussed, or removed through ordinary speech and actions. However, I argue that monuments are not ordinary matters before the Court, but rather antimatters. Confederate monuments sit in an apparent paradox of speech doctrines but reframing these monuments as antimatters clarifies how these paradoxes are acts of governance preserving white supremacy under the rhetorics of democracy, neutrality, and federalism.

I. FRAMING ANTIMATTERS

Monuments are a narrative of governance. Public monuments are stories of power—*with* power—because they are told by governments, naming histories, places, peoples, and events as significant to the state, city, or nation. Governments also participate in shaping memory and identity through law. Fred O. Smith, Jr. eloquently explains that the treatment of the dead—the bodies, wishes, and sites of deceased persons—intergenerationally shapes collective memory through law: "[W]hen a group is subordinated through acts of mass horror, later generations can become complicit in that horror by exploiting and

[51] Cedric Merlin Powell, *The Mythological Marketplace of Ideas:* R.A.V.*,* Mitchell*, and Beyond*, 12 HARV. BLACKLETTER L.J. 1, 5 (1995).

dishonoring the subjugated peoples' memory."[52] Similarly, the valorization of those who inflict subordination and harm on others perpetuates harm: "[P]owerful actors in previous generations intentionally disrupted America's collective memory about this nation's mass human rights abuses. Monuments honoring colonizers and Confederates outnumber memorials to the colonized, the captured, and the controlled by orders of magnitude. *Past subordination shapes our present memory*."[53]

Confederate monuments commemorate past subordination, not as markers of history—it is a matter of law and fact that slavery happened—but as pylons of falsehood, fueling discourse of an idyllic southern past and Lost Cause that only reinforce white supremacy. Stuart Hall explains that discourse is more than

> textual pyrotechnics but rather an overall view of human conduct as always meaningful. . . . [D]iscourse should be understood as that which gives human practice and institutions meaning, that which enables us to make sense of the world, and hence that which makes human practices meaningful practices that belong to history precisely because they signify in the way they mark out human differences.[54]

Part of the discourse of the Lost Cause is that "the function of Confederate monuments is to shape memory."[55] Confederate monuments are part of a larger racial project—reproducing structures of domination based on racial signifiers.[56] Past subordination shapes present memory. Confederate monuments transmit a false narrative to reshape memory and ensure past, present, and future subordination. They are portals through time and space, governing place.

Statues like Birmingham's former Confederate Soldiers and Sailors Monument are science fiction: a blend of fact and speculation to tell a story that imagines different peoples, places, and things that speak to current conditions. These monuments have a factual basis in history but spin a new narrative to serve a discourse of white racial power. Science fiction also has a long history of contesting and disturbing racial power through storytelling, particularly in the

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[52] Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 MICH. L. REV. 195, 203 (2021). Smith theorizes posthumous harms inflicted through law based on historical subordination and lineal alienation, suggesting reforms to laws to prevent disturbance, disinterment, and desecration of slave cemeteries and suggesting additional monuments to "counter the corrupted memories about America's past." *Id.* at 252.

[53] *Id.* at 203 (emphasis added) (footnote omitted).

[54] STUART HALL, THE FATEFUL TRIANGLE: RACE, ETHNICITY, NATION 31-32 (Kobena Mercer ed., 2017) (edited from series of lectures delivered by Hall at Harvard University in 1994).

[55] ROGER C. HARTLEY, MONUMENTAL HARM: RECKONING WITH JIM CROW ERA CONFEDERATE MONUMENTS 3 (2021) (discussing at length histories of Confederate monuments and relationship to Lost Cause); *see also* COX, DIXIE'S DAUGHTERS, *supra* note 36, at 34 (providing complete history of UDC in reinforcing narrative of Lost Cause).

[56] *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 128 (3d ed. 2015).

law through critical race theory ("CRT").[57] Whatever the motivations of the storyteller—inscribing racial power in monuments or challenging it by imagining alternative futures—science fiction takes something grounded in observations of the world (science)[58] and adapts it into a new story. Therefore, to frame and theorize the discourses of Confederate monuments within the law, I turn to science in the next two Sections to consider how antimatter and laws of physics can help frame analysis of legal doctrine. I then ground my legal theory of antimatters in storytelling and CRT.

A. *From Physics to Law*

Science fiction can bring scientific concepts to public imagination. Mr. DNA told me about the building blocks of life before I learned about deoxyribonucleic acid.[59] Doc Brown told me about a gigawatt before I learned that power is energy over time.[60] And, my personal favorite, Lt. Commander Geordi LaForge taught me that matter and antimatter create a powerful reaction before I knew anything about physics.[61] In science fiction, antimatter is casually dropped in the science speak of whatever resident expert is explaining a warp core,[62] a positronic neural

[57] Derrick Bell's works frequently use storytelling, particularly science fiction storytelling, as parables for the law's historical treatment of Black and other marginalized peoples. *See generally, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) [hereinafter BELL, FACES]. As a founding scholar of CRT, his storytelling and interest in science fiction continues a long tradition of science fiction writers talking about race and race scholars writing science fiction. *See generally, e.g.*, W.E.B. DU BOIS, *The Comet*, *in* DARKWATER: VOICES FROM WITHIN THE VEIL (1920). For an excellent discussion of Black writers taking up science fiction and its implications for legal scholarship, see generally I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019) (using afrofuturism and CRT to consider potential futures of United States for policing, rights, technology, and criminal law, given projected racial demographic shifts in 2044).

[58] I use science here in a broad sense to describe systems and ways of knowing, which includes everything from the physics I discuss in Section II.A to sociology to Indigenous knowledge systems that have historically been marginalized. I am deeply influenced by Katherine McKittrick's work, which discusses relations between science and "black livingness and ways of knowing" to consider "where and how black thinkers imagine and practice liberation as they are weighed down by what I can only describe as biocentrically induced accumulation by dispossession." KATHERINE MCKITTRICK, DEAR SCIENCE AND OTHER STORIES 3 (2021).

[59] JURASSIC PARK (Universal Pictures & Amblin Entertainment 1993).

[60] BACK TO THE FUTURE (Amblin Entertainment 1985).

[61] *Star Trek: The Next Generation* (Paramount Domestic Television 1987-1994).

[62] *See Star Trek: The Next Generation: Timescape* (Paramount Domestic Television broadcast June 14, 1993).

network,[63] or sometimes the more dramatic weaponized potential to destroy cities and planets.[64]

Antimatter in physics is recognized for its destructive potential but is more mystery than anything else. Physicists understand that matter—the ordinary stuff that makes up everything in the observable universe down to the atoms in the paper or screen you are using to read these words—and antimatter are created from baryogenesis, a formative scientific process theorized as part of the Big Bang that created all of existence as we know it.[65] But as astrophysicist Chanda Prescod-Weinstein describes, with absolute scientific sincerity, "[W]e are still not super sure about that."[66] What physicists are fairly certain of is that antimatter particles are created by extrinsic forces acting on matter[67] and that there is an asymmetry in the explored universe with more matter than antimatter.[68] Antimatter particles are extremely difficult to observe because direct contact with corresponding matter particles destroys them due to their matched but inverse properties.[69] Antimatter's behavior, when occasionally observed and theorized, is so inverse that antimatter appears to travel back in time, but not in the *Avengers: Endgame*, *Bill and Ted*, or [insert your favorite time travel science fiction story here] sense.[70] Antimatter is matter's parallel opposite. Their mechanics are theoretically "identical . . . when viewed in a mirror and played in reverse."[71] Opposites in every sense, antimatter has an opposite appearance and relationship to everything, despite having the identical properties of something familiar. However, even in the scientific surety of physics, it is still largely unknown how or why there is so little observable antimatter.[72]

[63] *See Star Trek: The Next Generation: Datalore* (Paramount Domestic Television broadcast Jan. 18, 1988).

[64] *See Star Trek: The Next Generation: The Arsenal of Freedom* (Paramount Domestic Television broadcast Apr. 11, 1988). The list of science fiction that has used antimatter would create a footnote long enough to make even the most avid reader of legal scholarship blush. My personal favorites are, of course, *Star Trek* and the powers of Dr. Adam Brashear, also known as the Blue Marvel, a human antimatter reactor. *See* AL EWING & KENNETH ROCAFORT, ULTIMATES (Marvel Comics 2015-2016). Another favorite is the Anti-Life Equation of Darkseid, the villainous ruler of Apokolips and enemy of the New Gods. *See generally* JACK KIRBY, THE FOURTH WORLD OMNIBUS (new prtg. 2021).

[65] PRESCOD-WEINSTEIN, *supra* note 42, at 1.

[66] *Id.* at 1.

[67] CLOSE, *supra* note 38, at 117.

[68] *Id.* at 118.

[69] *Id.* at 2.

[70] AVENGERS: ENDGAME (Marvel Studios 2019) (portraying superheroes traveling back in time to reverse villain's destruction); BILL & TED'S EXCELLENT ADVENTURE (Interscope Communications & Nelson Entertainment 1989) (portraying high school students time-traveling to find historical figures).

[71] CLOSE, *supra* note 38, at 104.

[72] *Id.* at 120-21.

In law, matter has a similar meaning to physics: it is an observable known feature, with properties understood by a court. A "matter" is "[a] subject under consideration, . . . [s]omething that is to be tried or proved," or "[a]ny physical or tangible expression of a thought."[73] A matter may be tried before a court, so long as the court has subject-matter jurisdiction. Antimatter in the law, then, would be the identical but opposite: a tangible expression of a thought that may not be brought before a court. Something that may not be tried or proven in a court, even though it might involve rights, a dispute, or litigation. Extending the metaphor from physics, there is an asymmetry of legal matters and legal antimatters—most rights may be asserted before the court and challenged in an ordinary fashion, as the law or doctrine dictates. In a rare instance, a disputed issue or fact before the court may have inverse results or properties to the ordinary matters of the same type or category, hence antimatter. The rarity mirrors the matter/antimatter asymmetry of physics and is difficult to observe because distinguishing between similar items in ordinary practice before the Court. Where a matter becomes antimatter is when extrinsic forces have changed the properties and nonlegal effects of a matter that would ordinarily be treated by the court. The legal expectation or assumptions to the properties of matter thus become inverse, and potentially explosive when a legal matter and legal antimatter come in conflict. And, importantly, antimatter would also have an inverse relationship to time.

B. *Antimatters and Race*

Framing Confederate monuments within a legal theory of antimatters provides a way of theorizing and illustrating the relationships among race, law, and governance in the United States. Confederate monuments look and appear as all other monuments but are charged with a white supremacist discourse that alters doctrinal assumptions underlying monuments.[74] And they are similarly in transit back in time, promoting a false-Confederate past, not the stuff of alternative-history time-travel science fiction,[75] but instead a romanticized narrative of the Lost Cause that valorizes white nationalism under neutral terms like "liberty" and "states' rights."[76] Rather than actual time travel, Confederate monuments as antimatters represent more of *The Curious Case of Benjamin Button*, a story about a man who is born old and ages in reverse, dying an

[73] *Matter*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[74] *See infra* Part III.

[75] Not surprisingly, the Civil War has been part of alternative history science fiction. I know of two works that feature white supremacists sending weapons to the Confederacy in an attempt to ensure its victory. *See, e.g.*, HARRY TURTLEDOVE, THE GUNS OF THE SOUTH (1992) (telling fictional story of apartheid white South Africans from twenty-first century who travel back in time to aid South with late twentieth-century weapons); HARRY HARRISON, A REBEL IN TIME (1983) (telling fictional story of racist military officer who steals submachine gun to travel back to South and support Confederacy).

[76] *See* COX, NO COMMON GROUND, *supra* note 5, at 2-3.

infant.[77] Confederate monuments are another curious case of time traveling in reverse as they emerged after the death of the Confederacy and have grown entrenched the further they get from the beginning. Confederate monuments are the afterlife of the Confederacy, carrying out its white nationalist cause through regressive, false collective memories long after its death, haunting cities, and towns where the monuments sit.

Monuments are representative of value systems and structures that are encoded with dominant narratives, like white supremacy and the Lost Cause, and are then decoded by observers and consumers as part of what Stuart Hall referred to "as a 'complex structure in dominance', sustained through the articulation of connected practices."[78] This "dominant meaning" is then reinforced through interpreted events, but it is subject to counterhegemonic decoding of the symbol and the connected structures of power.[79] Confederate monuments thereby symbolize the Lost Cause narrative of white supremacy, but as they are decoded by those in power, form a part of the state apparatus that maintains that inequality.[80]

Of course, race is often raised in legal matters, like antidiscrimination law, to challenge existing structures of inequality that are maintained by law and ideology. As Kimberlé Crenshaw explains when discussing the origins of CRT, "No sophisticated theory is needed to see law operating to constitute and insulate racial hierarchies in American society" because the law's asserted neutrality and rhetorics of the "rule of law" contrasted with its "apparent intimacy with the prevailing racial order presented a unique" opportunity for contestation through critiques of litigation, rights, and even concepts of neutrality and knowledge production.[81] Law is a space for rigorous critique because the creation of legal "matters" often involves a flattening of persons, identities, and ideologies to a

[77] THE CURIOUS CASE OF BENJAMIN BUTTON (Paramount Pictures, Warner Bros. Pictures & The Kennedy/Marshall Company 2008).

[78] Stuart Hall, *Encoding/Decoding*, *in* CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, 1972-79, at 128, 128 (Stuart Hall, Dorothy Hobson, Andrew Lowe & Paul Willis eds., 1980).

[79] *Id.*; *see also* Christine N. Buzinde & Carla Almeida Santos, *Interpreting Slavery Tourism*, 36 ANNALS TOURISM RSCH. 439, 440 (2009) (describing symbiotic relationship between tourists and use of plantations as slave heritage sites).

[80] *See, e.g.*, LOUIS ALTHUSSER, ON THE REPRODUCTION OF CAPITALISM 169 (G.M. Goshgarian trans., Verso 2014) (1995) (arguing law functions as part of ideological state apparatus, "ensur[ing] the functioning of capitalist relations of production," establishing structures of power that are ahistorical, and guaranteeing subordination through relations of production and power that self-reproduce in the form of ideology); ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 12 (11th prtg. 1992) (describing operation of social hegemony and political government in tandem as "'spontaneous' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group").

[81] Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1308-10 (2011) [hereinafter, Crenshaw, *Twenty Years*].

"single-axis framework" that limits the inquiry to the narrow frame prescribed by case law or legislation.[82]

Antimatters is far from the first time that scientific language, even the language of particle physics, has been imported into analyses of racial power. Some have used the concept of "dark matter" from physics to analogize legal/racial[83] relationships in the United States.[84] Dark matter is another form of matter that is a known unknown to physics, an invisible force that makes up much of the universe that is difficult to understand.[85] What is known about dark matter, and dark anti-matter, is derived from the observable effect on gravity, but dark matter's relationship to the known universe is so prevalent, yet simultaneously theoretical and illusive, that it was given the name "dark" matter because it "doesn't fit certain understandings of how the universe works."[86] Matthew Fletcher compares dark matter to the under-defined "duty of protection" in Federal Indian Law.[87] Treaties and agreements with Indigenous nations expressly and implicitly create a duty of protection, yet the duty is not

[82] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40; *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-46 (1991).

[83] I use "legal/racial" here to both recognize and distinguish that discussions of Federal Indian Law necessarily involve unpacking the racialization of Indigenous peoples and histories of racism against Indigenous nations throughout the Supreme Court's Federal Indian Law jurisprudence. *See, e.g.*, Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 600-01 (2009) (describing racialization of Indigenous peoples in Federal Indian Law as part of projects of assimilation). Race and Indigeneity are foundational to Federal Indian Law and every other doctrinal category—particularly property. *See generally* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022) (analyzing conquest—legal justifications for taking of land and peoples—and slavery—racialized holding of Black peoples as property—as foundational to property law concepts, obfuscated by doctrinal constructions of property law in casebooks). Race features prominently in Federal Indian Law, but it is critical to acknowledge how the court's anticlassification race jurisprudence has been weaponized against Indigenous peoples, harming Indigenous rights and sovereignty by conflating indigeneity with an unconstitutional ancestry-classification. *See* Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2722-23 (2022) (discussing how recent challenges to Indigenous rights use *Rice v. Cayetano*, 528 U.S. 495 (2000), as part of a strategy to "juridically erase" Indigenous peoples through false equivocation).

[84] *See generally* Howard Winant, *The Dark Matter: Race and Racism in the 21st Century*, 41 CRITICAL SOCIO. 313 (2015).

[85] *See* Glenn Roberts Jr., *3 Knowns and 3 Unknowns About Dark Matter*, BERKELEY LAB (May 24, 2016), https://newscenter.lbl.gov/2016/05/24/3-knowns-3-unknowns-dark-matter/ [https://perma.cc/XP4Y-MYE5].

[86] Joe Lindsey, *Filling the Void: What Is Dark Matter?*, POPULAR MECHS. (Mar. 23, 2022), https://www.popularmechanics.com/space/deep-space/a27560790/what-is-dark-matter/.

[87] Matthew L.M. Fletcher, The Dark Matter of Federal Indian Law: The Duty of Protection 4 (Dec. 9, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298325 [https://perma.cc/D96T-GATW].

expressly or specifically outlined by treaty, statute, or regulations. Fletcher keenly observes that, like dark matter, the duty of protection may be observed by its effects on Indigenous nations, but may be made real and enforceable through application of historical analysis, international law, and custom.[88] Howard Winant argues race is similarly "the often invisible substance that in many ways structures the universe of modernity" that nonetheless "still exert[s] an immense gravitational pull."[89]

Analogizing race to dark matter is tempting given the ways in which discourses of colorblindness and postracialism relegate issues of racism to unseen forces beyond the ordinary matters of law. Discourses like postracialism obfuscate the ongoing structural dimensions of racism but have a tangible ideological function.[90] Dark matter, on the other hand, lacks visibility simply because the instruments and ways of knowing about it are still growing and changing. As Prescod-Weinstein explains, "We know almost nothing about dark matter, but we know a lot about Black people."[91] Racism may be obfuscated in the processes and systems of legal matters, but that does not make it unseen in the same ways as dark matter. Race is a central construct in social, cultural, and legal institutions in the United States, so much that even those who are blind—those who do not perceive the visible spectrum—perceive race.[92]

Antimatters assist in observing legal phenomena at the intersections of doctrines to see the insulation of white supremacy, borrowing from physics in the language of observations about the natural world, but applied to social constructs. Prescod-Weinstein similarly analogizes the use of gravitational lensing to systemic racism, observing the bends and distortions in the appearance

[88] *Id.* Fletcher's dark matter duty of protection also raises questions about the dark antimatter, the inverse of obligations created by treaty rights and international customary law. Perhaps the duty of protection's antimatter opposite is conquest and the concomitant paternalism that masks the abridgment and outright termination of tribal sovereignty as benevolence. This manifests Justice Brett Kavanaugh's majority opinion in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), which imposes state jurisdiction in a brutal assault on tribal sovereignty under a state's "sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims." *Id.* at 2501-02. Justice Kavanaugh invokes this ephemeral conquest-paternalism to conclude that the recognition of tribal sovereignty "would require this Court to treat Indian victims as second-class citizens. We decline to do so." *Id.* at 2502. The duty of protection of Indigenous nations is thus butchered into a false promise of protection for Indigenous individuals. Dark matter (the duty of protection) and dark antimatters (conquest-paternalism) collide, leaving nothing for Indigenous peoples and nations.

[89] Winant, *supra* note 84, at 322.

[90] Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1591 (2009) (explaining common threads of postracialism ideology in retreat from discussions of race to delegitimize struggles for racial justice).

[91] PRESCOD-WEINSTEIN, *supra* note 42, at 116.

[92] *See* OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND 3 (2014) (challenging language of colorblindness or race blindness by discussing race with blind peoples, finding that race is understood using terms of visibility and with similar understandings of salience and social significance).

of the galaxy where "light takes unusual paths[,] . . . effectively, what happens when matter tells spacetime how to move and the movement and shape of spacetime sets out the possible pathways for everything that exists inside of it, including light."[93] Strong gravitational lensing is so massive it becomes obvious. Weak gravitational lensing is more difficult to observe directly and requires background context and understanding to see the connections. As Prescod-Weinstein explains:

> I tend to think of [weak gravitational lensing] as being a lot like systemic racism. You look at any one incident, say when someone comments on my hair and asks me if it's real, and some person who hasn't experienced racism might say, "Oh, that's not racism. That person was just curious." The hair incident, which happened to me while I was grabbing lunch at an eatery primarily frequented by fellow employees at NASA's Goddard Space Flight Center, is a classic example of an individual manifestation of systemic racism. But in order to understand it as such, one has to have an awareness of systemic racism or a lifetime of experience with its various patterns. If you're experienced, it's easy to identify.[94]

An individual case or even doctrine of constitutional law might look like a neutral position, or a reasonable extrapolation of the circumstances. One Confederate monument in isolation to an inexperienced observer might look like a town honoring its local history. But "[i]f you're experienced, it's easy to identify" the network of connections that reveal white nationalism at play.[95] Confederate monuments, taken together, sit at sites of government to connect symbols of white supremacy to the ongoing relations of power. Antimatters frame Confederate monuments collectively as sites of racial power that affect legal and political relations in the United States, beyond one court case or one piece of legislation.

Unlike analogies to dark matter, antimatters frame how considerations under the law can take opposite function or meaning—a matter becomes antimatter when acted on by an extrinsic source like white supremacy. Confederate monuments symbolize antimatters at sites of government, courts, and civil society. A Confederate cemetery or marker at a battleground fits more clearly within established laws for the dead, honoring the remains or wishes of deceased persons.[96] Confederate monuments at sites of government memorialize a deceased state but perpetuate a system of power by centering white supremacy. Antimatters' transformative nature and relationship to matter make it a useful framing analogy for monuments and other operations of racism within the law—avoiding simply distinguishing or discerning these paradoxes as outliers. The paradoxes are the purpose and function of power—white racial power turns

[93] PRESCOD-WEINSTEIN, *supra* note 42, at 119.

[94] *Id.* at 119-20.

[95] *Id.* at 120.

[96] *See* Smith, *supra* note 52, at 213-25 (discussing "traditional principles of posthumous interests," which govern treatment of sites, bodies, and wishes of dead under American law).

monuments to the dead into nongovernmental sites of governance by taking privately donated statues into the public square.

Antimatters thus offer a way of framing how racial power changes assumptions of public matters. Anthony Ryan Hatch has recently also analogized antimatter to race in discussing data, theorizing that "racial antimatter" forms when "statistical data (like data on COVID health disparities) are represented in spectacular racial terms because that spectacle enables the forgetting and weaponization of statistical data about racialized populations."[97] Hatch argues that racial antimatter in data accounts for the "quantum duplicity of counting" where data takes on simultaneous, opposing meanings: "Counting and not being counted, being remembered and being forgotten, mattering and not mattering at all are bound together in the same quantum state."[98] Hatch uses the racial disparities demonstrated in COVID-19 as an example of how the increase in data showing disproportionate negative effects of COVID-19 on Black people made pandemic response less politically viable.[99] Rather than force a reckoning with racialized health disparities, available demographic data showing disparate impact increased as the Trump Administration "withdrew meaningful federal public health infrastructure that would have mitigated the loss of Black lives."[100] Thus, rather than shift public perception, the data turned to racial antimatters—a loss of support rather than a gain.

Antimatters, as a way of thinking about law and society, function similar to Hatch's racial antimatters of data, emphasizing how racial power can transform material and structural processes to enact subordination under the guise of neutrality. Legal antimatters may rely on racial antimatters of data and similarly emphasize social and ideological conditions that transform matters to antimatters. Hence, thinking about Confederate monuments becomes important in antimatters to emphasize how racial power transforms law and governance in service of white supremacy. Confederate monuments demonstrate how the state and civil society coordinate in state apparatuses to "clothe [structures] with the illusion of necessity" through hegemony.[101] Hegemony makes subordination appear as a natural, essential process that legitimates state constructs like law and other ideological state apparatuses.[102] Antimatters is a recognition that paradoxes and contradictions are part of the function of governance in a state

[97] Anthony Ryan Hatch, *The Date Will Not Save Us: Afropessimism and Racial Antimatter in the COVID-19 Pandemic*, BIG DATA & SOC'Y, Jan.-June 2022, at 1, 6, https://doi.org/10.1177/20539517211067948 [https://perma.cc/93PB-U9L2].

[98] *Id.* at 7.

[99] *Id.* at 8.

[100] *Id.*

[101] Kimblerlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1351 (1988) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*].

[102] *See* ALTHUSSER, *supra* note 80, at 169; GRAMSCI, *supra* note 80, at 12-13.

premised on rhetorics of freedom and reliant on slavery, conquest, and domination.[103]

C. *Antimatters and Critical Race Theory*

Confederate monuments again present a familiar paradox of racism in the United States identified by CRT: they are constructs of white supremacy, protected by the law, but made to appear as part of the natural landscape of cities and towns so as to become imposing and unassuming at the same time. For example, Stone Mountain is the home of the largest Confederate monument in the United States,[104] on the largest exposed mass of granite in the world.[105] Stone Mountain is on the homelands of the Muscogee (Creek) and Cherokee Nations, taken by treaty in 1821[106] and sold to various private interests before becoming a Confederate monument under the fundraising and direction of the UDC in the early twentieth century.[107] It is also the site of the second resurgence of the Ku Klux Klan ("KKK" or "Klan") in 1915[108] and it is designed by Gutzon Borglum, who would later craft Mount Rushmore.[109] Mired in funding issues until the mid-twentieth century, Stone Mountain was purchased by the Georgia Legislature in 1958 and turned into a state park to complete the monument by 1972, using about $2 million in public funds.[110] The new state park would be dedicated to a white southern past, constructed in direct response to *Brown v. Board of Education*[111] "as part of an effort to ground the white southern present in images

[103] Charles Mills explains it clearly:

> At the most basic level, liberalism is a political theory about the equitable treatment of individuals conceptualized as morally equal, whose basic rights and freedoms should be respected. The problem is that these individuals were conceived of as white, and justifiably positioned above people of color. Thus the apparatus has been shaped from the start by these relations of domination, a shaping which has affected both the mapping of the polity and the normative orientation toward determining justice in the polity.

See Charles Mills, *Liberalism and the Racial State*, *in* STATE OF WHITE SUPREMACY: RACISM, GOVERNANCE, AND THE UNITED STATES 27, 45 (Moon-Kie Jung, João H. Costa Vargas & Eduardo Bonilla-Silva eds., 2011).

[104] Rich McKay, *The World's Largest Confederate Monument Faces Renewed Calls for Removal*, REUTERS (July 3, 2020, 7:08 AM), https://www.reuters.com/article/us-global-race-usa-stone-mountain/the-worlds-largest-confederate-monument-faces-renewed-calls-for-removal-idUSKBN2441C7.

[105] DAVID B. FREEMAN, CARVED IN STONE: THE HISTORY OF STONE MOUNTAIN 1 (1997) (chronicling history of Stone Mountain back to colonization).

[106] *Id.* at 13-20.

[107] COX, DIXIE'S DAUGHTERS, *supra* note 36, at 15.

[108] HARTLEY, *supra* note 55, at 13; Grace Elizabeth Hale, *Granite Stopped Time: The Stone Mountain Memorial and the Representation of White Southern Identity*, 82 GA. HIST. Q. 22, 23 (1998).

[109] Hale, *supra* note 108, at 25, 38.

[110] COX, NO COMMON GROUND, *supra* note 5, at 107.

[111] 347 U.S. 483 (1954).

of the southern past."[112] The completed sculpture features Confederate leaders Jefferson Davis, Robert E. Lee, and Thomas Johnathan "Stonewall" Jackson on horseback, looming over the state park.[113] Inscribed into the natural landscape, the hegemony of Confederate monuments becomes more apparent as the Confederacy is now engraved in the natural scenery of Georgia, appearing ancient as the stones even though the monument itself was only completed within the last sixty years.

If the purchase price and the state park surrounding the monument were not enough to demonstrate the state's commitment to Confederate memory, Georgia state law completes the monument's status as antimatter:

> Any other provision of law notwithstanding, the memorial to the heroes of the Confederate States of America graven upon the face of Stone Mountain shall never be altered, removed, concealed, or obscured in any fashion and shall be preserved and protected for all time as a tribute to the bravery and heroism of the citizens of this state who suffered and died in their cause.[114]

This provision of Georgia law, adopted in 2001,[115] completed the nearly 100-year mission of the UDC through state law, transforming the Confederate monument at Stone Mountain into antimatter. It protects the monument and the narrative of the Lost Cause in one broad statement of law. And, crucially, it honors the "bravery and heroism" of Georgia citizens who "suffered and died" in the cause of the Confederacy, omitting those Georgia citizens who suffered and died because of the Confederacy and the institution of slavery it sought to defend.[116] The government protects a vision of Confederate, white supremacist governance through state law.

An antimatters framework thus identifies the ideological and social narratives underlying the law, building on the important work of CRT in considering narrative. Like the original legal realists who decried the decontextualization of the law and abstract formalism as "transcendental nonsense,"[117] antimatters operate within CRT to reveal how the doctrinal paradox of government speech is in fact a form of governance and a means of contesting governmentality. Antimatters is another way of framing issues consistently raised by those critiquing the structures, functions, and ideologies of legal power. It therefore

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[112] Hale, *supra* note 108, at 40-41.

[113] COX, DIXIE'S DAUGHTERS, *supra* note 36, at 15.

[114] GA. CODE ANN. § 50-3-1(c) (2022).

[115] Darren Summerville, *STATE GOVERNMENT: New State Flag: Change Design and Description of State Flag; Change Design and Description of State Seal; Provide for the Preservation and Protection of Certain Public Monuments and Memorials; Require Agencies Eligible for Receipt of State Funds To Display State Flag; Limit State Appropriations for Agencies Failing To Comply with Provisions; Provide for Enforcement*, 18 GA. ST. U. L. REV. 305, 305 (2001).

[116] GA. CODE ANN. § 50-3-1(c).

[117] *See generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

owes a deep debt to the foundational work of critical race theorists in mapping the marginalization of peoples through the law.

Long before it was a bad-faith boogeyman used to legislate for white supremacy,[118] CRT began as a critique of courts and legal academia, urging for "radical assessment" of race in United States law and culture.[119] Though not tied to a strict set of tenets,[120] CRT "uncovers the ongoing dynamics of racialized power, and its embeddedness in practices and values which have been shorn of

[118] *See generally* Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723 (2022) (discussing rise of anti-CRT laws to silence discussions of race in education, and how these "backlash bills" brought CRT to mainstream consideration).

[119] Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 893 (describing CRT scholarship rooted in antisubordination, experience, storytelling, and critiques of law to reimagine law and identify transformative strategies of resistance from margins).

[120] Importantly, CRT requires no checklist or affiliation of membership and connects various threads of scholarship, primarily from Black, Latinx, Asian, Native, and other outsider scholars who center the experiences of marginalized peoples within the law. Numerous scholars have summarized the common themes among the many strands of scholarship that have not only critiqued race, but its intersections with sex, sexual orientation, gender identity, immigration status, national origin, age, class, (dis)ability, and other social identities affected by the power of law. In 2014, pathbreaking CRT scholars Devon Carbado and Daria Roithmayr identified

> ten empirical arguments that represent CRT commitments . . . on which there is general consensus among practitioners in the United States.
>
> 1. Racial inequality is hardwired into the fabric of our social and economic landscape.
> 2. Because racism exists at both the subconscious and conscious levels, the elimination of intentional racism would not eliminate racial inequality.
> 3. Racism intersects with other forms of inequality, such as classism, sexism, and homophobia.
> 4. Our racial past exerts contemporary effects.
> 5. Racial change occurs when the interests of white elites converge with the interests of the racially disempowered.
> 6. Race is a social construction whose meanings and effects are contingent and change over time.
> 7. The concept of color blindness in law and social policy and the argument for ostensibly race-neutral practices often serve to undermine the interest of people of color.
> 8. Immigration laws that restrict Asian and Mexican entry into the United States regulate the racial makeup of the nation and perpetuate the view that people of Asian and Latino descent are foreigners.
> 9. Racial stereotypes are ubiquitous in society and limit the opportunities of people of color.
> 10. The success of various policy initiatives often depends on whether the perceived beneficiaries are people of color.

Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 151 (2014).

any explicit, formal manifestations of racism."[121] Importantly, CRT's critiques of law and racial power are guided by antisubordination principles[122] in relation to social movements "not merely to understand the vexed bond between law and racial power but to change it."[123] Critical race scholars thus seek to "develop a broader project, one that interrogates the limitations of contemporary race discourse both in terms of its popular embodiment and its epistemic foundations."[124] CRT helps to make apparent how Confederate monuments are not merely historical artifacts, but are part of larger frameworks of racial power, in proximity to governance, in the control of space and place, and as physical manifestations of white supremacy.[125]

CRT is part of a larger body of scholarship that recognizes race as a social construct and a manifestation of power that might rely on physical traits or biology, but without a fixed, inherent meaning.[126] Race is a construct, but racism and white supremacy are tied to social conditions and lived experiences. Law may co-construct race and racism, but law alone cannot eliminate racism through legislation or victories at the Supreme Court.[127] Importantly, CRT represents an interdisciplinary approach to consider race through culture and storytelling

[121] KIMBERLÉ CRENSHAW, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxix (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRENSHAW, CRITICAL RACE THEORY].

[122] *See* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2163 (1992) (describing CRT's antisubordination work as blend of cultural critique and social organization: "On one hand, we challenge the forms of domination that structure not only culture's production but also its reception. On the other hand, we try to identify and clarify progressive social changes whose needs arise from the symbolic world of culture and whose realization lies in political self-organization and action."); Capers, *supra* note 57, at 23 (describing "broad goals, and perhaps broader intent, of CRT" in contesting white supremacy and related hierarchies of power through radical emancipation and radical critique).

[123] CRENSHAW, CRITICAL RACE THEORY, *supra* note 121, at xiii.

[124] Crenshaw, *Twenty Years*, *supra* note 81, at 1352.

[125] William Stoll, *The Problem with Confederate Monuments: State Laws as Barriers for Removal and Methods Available to Localities*, 26 SOC. JUST. L. REV. 91, 114-19 (2022).

[126] *See, e.g.*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM & RACIAL INEQUALITY IN CONTEMPORARY AMERICA 8 (3d ed. 2010); OMI & WINANT, *supra* note 56, at 3 (describing development, evolution, and change of definitions of race and racial categories in United States as connected set of racial projects "shaped by a centuries-long conflict between white domination and resistance by people of color"); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences: Rethinking Racial Projects*, *in* RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 139, 139 (Daniel Martinez HoSang, Oneka LaBennett & Laura Pulido eds., 2012) (describing race as "technology that links social and political struggle to different human bodies—bodies whose racial meanings are constructed and constantly under pressure and transformation").

[127] BELL, FACES, *supra* note 57, at 92 (1992) (recognizing racism as a permanent part of United States society that "cannot be vanquished by the enactment and vigorous enforcement of strong civil rights laws" and arguing that permanence "enable[s] us to recognize the potential for effecting reform in even what appear to be setbacks").

beyond the confines of traditional legal scholarship to challenge racial power.[128] In this way, CRT is a means of reframing racial power through outsider jurisprudence[129] and engages in what Kathrine McKittrick terms "method-making": "Reading across a range of texts and ideas and narratives—academic and nonacademic—encourages multifarious ways of thinking through the possibilities of liberation and provides clues about living through the unmet promises of modernity; method-making undercuts the profitable standardization of racial authenticities and disciplining practices."[130] Law may have its own definitions of race,[131] but CRT emphasizes that the law deploys rhetorics of neutrality under liberalism to entrench racial hierarchies that preserve white supremacy.[132]

Racism is more than intentional, individual acts of meanness, but exists at institutional, social, and structural levels.[133] Narrow views of race that only consider directed, intentional acts ignore unconscious racism and implicit biases, which operate in tandem with the ideological power of law to facilitate racial subordination[134] and the systemic function of racism in structures and institutions that expressly or implicitly create racial subordination.[135] A law need not be intentionally or purposefully designed to functionally exclude marginalized peoples or create feelings of inferiority.

As the Court has repeatedly established, monuments are unique signals of governmental power and culture because of their permanence.[136] Derrick Bell's

[128] For an example of how CRT incorporates storytelling, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) (using personal narrative from law school and litigation to challenge racism within law and legal theory).

[129] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989).

[130] MCKITTRICK, *supra* note 58, at 48.

[131] *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7-14 (10th anniversary ed. 2006).

[132] *See, e.g.*, Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 75-93 (2019).

[133] *See, e.g.*, BONILLA-SILVA, *supra* note 126, at 8; OMI & WINANT, *supra* note 56, at 7.

[134] *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 941-42 (2008).

[135] *See, e.g.*, Jeremiah Chin, *Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Loop*, 47 J. MARSHALL L. REV. 1227, 1253-56 (2014); Cho, *supra* note 90, at 1616-21. *See generally* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (discussing how intent requirement of equal protection claims under Fourteenth Amendment ignores persistence of racial discrimination).

[136] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084-85 (2019); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 232-33 (2015) (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting); Pleasant Grove City v. Summum, 555 U.S. 460, 470-73 (2009).

recognition of the permanence of racism is therefore particularly prescient,[137] given that monuments are designed to be permanent manifestations of ideologies like white supremacy. Monuments may be purposefully designed to foster belonging, represent a place, or manifest an ideology that alienates peoples from the places in which they live.[138] Whiteness itself is a form of status-property,[139] and Confederate monuments are a form of property that reinforce whiteness as a status by shaping space[140]—claiming courthouses and city halls that are meant to represent democratic governance from the people as white spaces[141] that govern Black lives.

Confederate monuments are a physical form of storytelling, manifestations of legal and social narratives told by those in power. Richard Delgado explains that dominant groups use narrative to "remind [the ingroup] of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural."[142] Gerald Torres and Kathryn Milun note that storytelling is part of the special work of courts in legal matters, particularly stories of colonization and romanticization of conquest violence by colonizers against indigenous peoples.[143] Legal framing of history, "like all stories, is replete with meanings, and as with most narratives, its very telling is an expression of power."[144] Critical race theorists have long used storytelling or counterstorytelling as a rhetorical device to combat the hegemonic power of dominant narrative and disturb assumptions about law and society.[145]

However, Confederate monuments confound these critical framings of storytelling as antimatters. They are narratives that support a dominant vision of history and white supremacist control, reinforcing the discourse of the Lost Cause at centers of government. Confederate monuments are stories of domination that may no longer be the dominant story of the sites in which they sit. Returning to Birmingham's Confederate Soldiers and Sailors monument: the monument represents a Lost Cause narrative that is no longer the dominant

[137] *See generally* BELL, FACES, *supra* note 57 (analyzing persistence of racism in America).

[138] *See, e.g.*, Bryan McKinley Jones Brayboy & Jeremiah Chin, *"On the Development of Terrortory*,*"* CONTEXTS, Summer 2020, at 22, 27.

[139] *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1761 (1993).

[140] *See generally* CRITICAL RACE SPATIAL ANALYSIS: MAPPING TO UNDERSTAND AND ADDRESS EDUCATIONAL INEQUITY (Deb Morrison, Subini Ancy Annamma & Darrell D. Jackson eds., 2017).

[141] *See* WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 31-32 (2007).

[142] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) (discussing role of narrative and counternarrative in legal storytelling).

[143] Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 628 ("Law . . . has a curious way of recording a culture's practices of telling and listening to its stories. Such stories enter legal discourse in an illustrative, even exemplary, fashion.").

[144] *Id.* at 627.

[145] Delgado, *supra* note 142, at 2414.

narrative of the government that was forced to maintain the monument. It is a story of the racial domination in the past, and present, when state law attempted to prevent the removal of the monument through a fine. But it is not the accepted narrative of the city that surrounds and houses the monument. A dominant narrative is countered by the storytelling of the city, but the city's counterstory is unacceptable. Antimatters thus highlights this paradox of narrative, laws that force maintenance of monuments that are neither dominant, accepted by the locale, or even factually true.

Narratives gain power not just from retelling, but from the sites and institutions doing the telling. Legal institutions in particular are sites of storytelling that often reify existing relations of power, especially racial power, in order to maintain continuity of the state through direct assertions of power (a ruling in a legal matter) and legal ideology (the concept of the rule of law).[146] Centering the narrative of the Confederacy through monuments at the sites of government tells a story of power through control, demonstrating a continuity of governmentality[147] that reinscribes the Lost Cause—a continuous narrative of state power by linking the governing institutions from European colonization and the American revolution through the Confederacy "as heroic defenders of American principles"[148] rather than traitors to the United States.

Antimatters thus build on CRT and doctrinal intersectionality[149] as a structural critique of law and governance by coordinating the apparent contradictions between different threads of legal analysis to understand how these constructed paradoxes rely on abstractions and rhetorics of neutrality to reinforce white supremacy. These contradictions may not be intentional in this sense of a planned and coordinated purpose, but they are certainly telling of the ways in which racial power operates through social processes and institutional norms.[150] Legal doctrine easily serves the problems created by institutional racism by

[146] ALTHUSSER, *supra* note 80, at 68 (noting that while law "does indeed take up the notions of freedom, equality and obligation, it inscribes them, *outside the law* and thus outside the system of the rules of law and their limits, in an ideological *discourse* that is structured by completely different notions").

[147] Governmentality is defined by French philosopher Michel Foucault as the "ensemble formed by the institutions, procedures, analyses, and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge, political economy, and as its essential technical means apparatuses of security." THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 102 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991).

[148] DOMBY, *supra* note 29, at 4; *see also infra* Part II.

[149] *See generally* Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027 (2019) (discussing intersections of Justice Anthony Kennedy's opinions on sexual orientation, immigration, and national security issues to form holistic perspective of Justice Kennedy's jurisprudence reinforcing discrimination and subordination).

[150] *See generally* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (exploring how judicial conduct harms people of color, even where judges lack discriminatory intent, because of institutionalized practices).

dividing lines of analysis into silos that are not considered as part of larger narratives about the law and power, thereby perpetuating white supremacy.[151] The Constitution and doctrines that interpret it are not colorblind but are instead part of ideologies about race and society[152] enforced through state mechanisms like courts and legislatures[153] that affect people's lived experiences.

Monuments serve as icons of white supremacy and their proximity to governance defines the power of the state so as to support ideologies of white nationalism, "the belief that white people, especially white men, should remain at the center of national identity and hold a disproportionate amount of political and economic power."[154] Russell Robinson explains that white nationalism is a white supremacist "nostalgic project of building and preserving the United States by looking to the past."[155] In any of the intersecting doctrines of speech in Part III, the Court does not expressly deal with white supremacy, merely the type of speech at issue, even when that speech contains white supremacy.[156] Robinson reminds us that "aiding and abetting white nationalism is itself a form of white nationalism."[157] Again, continuing the project of CRT, applying doctrinal intersectionality to the strands of First Amendment jurisprudence considers how neutral doctrines about speech either proactively enforce white supremacy or abet white nationalism in insulating white supremacy at the center of governance. A rigid reading of doctrine would take the "fact-bound totality-of-the-circumstances inquiry"[158] to consider each monument in isolation. Context matters, and always informs the substantive inquiry, but failing to consider the intersections, interrelations, and ideologies that apply misses the forest for the trees. One Confederate monument may have a particular local meaning, but this cannot be divorced from the understanding that Confederate monuments are a racial project of white nationalism at the intersection of speech doctrines. At these overlaps we find paradoxes—government speech is spoken and cannot be unspoken. Confederate monuments create a public forum that is grounded in one perspective (the Lost Cause), but is also a site of contestation. Julian Bonder offers that memorials should

> be aware, to mind and remind, to warn, advise, and call for action. We think of these as "working memorials" that invite collective engagement. They are not projects for silent and symbolic sites of memory but agents for

[151] Robinson, *supra* note 149, at 1030-31.

[152] *See generally* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (arguing Court's use of colorblind constitutionalism fosters white supremacy); Haney-López, *supra* note 135.

[153] *See* ALTHUSSER, *supra* note 80, at 168-70; GRAMSCI, *supra* note 80, at 12-13.

[154] Robinson, *supra* note 149, at 1031.

[155] *Id.* at 1032.

[156] *See infra* Part III.

[157] Robinson, *supra* note 149, at 1035.

[158] Shurtleff v. City of Boston, 142 S. Ct. 1583, 1596 (2022) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring).

> active dialogue. Their premise is that a memorial that truly speaks to traumatic memories—not only of the past, but of today—should come to exist through a process of engagement with the communities who share a vital interest in it.[159]

Antimatters reveal how these monuments do not engage but rather insulate white supremacy and a particular narrative of history that resists legal engagement. Yet, the public has nonetheless engaged and resisted.

Confederate monuments are built to last as a permanent narrative of power. While racism as an ideology may be permanent in the United States,[160] Confederate monuments are also a reminder of racial realism: the permanence of racism does not mean it is immortal and undefeatable, but rather requires constant adaptation and struggle to match the new, shifting forms of racism.[161] Confederate monuments are markers of white supremacy designed to be permanent, though they are not indestructible, and social movements have found a variety of ways to remove them. Some, in places where the law allows, through legislative action, and in many other places, through vandalism and toppling—forcing the state to speak again to return the monument to its pedestal and reify its commitment to white supremacy.[162]

Returning to the warp cores and science fiction that sparked my understanding of antimatter, protests could be an alternative power source. Combining a legal matter—a constitutionally protected protest, a court case, or even an illegal act of vandalism—comes into conflict with antimatter—a Confederate monument, a representation of white supremacist power at the heart of government that a government is prohibited from removing. That reaction is explosive and powerful.[163] This conflict of matter and antimatter might be the movement oriented generator of energy like we saw in 2020, when activists used monuments as gathering sites of protest, projected images to rebuke white nationalism, and occasionally destroyed the monuments as a show of protest.[164] In the following Part, I provide a general layout of Confederate monuments in historical context, framing monuments through their contested history rather than the false narrative they present. As shown below, monuments have always been contested and resisted, but the doctrines discussed in Part III make that

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[159] Julian Bonder, *On Memory, Trauma, Public Space, Monuments, and Memorials*, 21 PLACES 62, 67 (2009).

[160] *See, e.g.*, Cho, *supra* note 90, at 1629 (describing criticisms of CRT scholars' prioritization of race in analysis); Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 101, at 1336 (arguing racism is central underlying ideology in American society); Robinson, *supra* note 149, at 1033 (noting Trump-era white nationalism is product of longstanding white supremacy).

[161] *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364 (1992).

[162] *How Statues Are Falling Around the World*, N.Y. TIMES (Sept. 12, 2020), https://www.nytimes.com/2020/06/24/us/confederate-statues-photos.html.

[163] *See* CLOSE, *supra* note 38, at 2 (describing phenomenon of antimatter's ability to destroy its matter counterpart upon meeting).

[164] COX, NO COMMON GROUND, *supra* note 5, at 169-71.

resistance all the more important as these antimatters are protected by constitutional doctrines.

II. CONFEDERATE MONUMENTS IN CONTEXT

As of January 20, 2022, the Southern Poverty Law Center ("SPLC") has catalogued 723 Confederate monuments throughout the United States.[165] Funded by private organizations dedicated to romanticizing the Confederacy through the Lost Cause mythos of white supremacy,[166] Confederate monuments began in cemeteries to honor the Confederate dead and within twenty years of the end of the Civil War quickly expanded to "the grounds of local courthouses and state capitols . . . [to] claim[] the public square for southern whites."[167] Monuments to the Confederacy are not built in local- or artist-specific contexts, but are rather a mass-produced means of asserting power of white supremacy through racial violence and terror.[168] The American Historical Association explains in its official statement on Confederate monuments:

> Memorials to the Confederacy were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African Americans politically and isolate them from the mainstream of public life. A reprise of commemoration during the mid-20th century coincided with the Civil Rights Movement and included a wave of renaming and the popularization of the Confederate flag as a political symbol. . . . To remove a monument, or to change the name of a school or street, is not to erase history.[169]

Instead of focusing on one particular monument, pedestal, statue, or plaque, monuments are best contextualized as an ongoing project of white supremacy, and thus I address them categorically in this Article, with some specific references and examples.

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[165] S. POVERTY L. CTR., *supra* note 9, at 9. The SPLC classifies these as "live" monuments, meaning structures, plaques, or other physical memorials that are dedicated to honoring the Confederacy and are currently on display. In addition, there are 741 roadways, 201 schools, 104 counties and municipalities, 38 parks, 51 buildings, 22 holidays, ten military bases, 7 commemorative license plates, 6 bodies of water, and 6 bridges. *Id.* at 9. Most are located in the former Confederate states, but these monuments exist throughout the Union states and even in those states that did not exist at the time of the Civil War. *Id.* at 32.

[166] *See, e.g.*, COX, DIXIE'S DAUGHTERS, *supra* note 36, at 70-72 (describing UDC's fundraising efforts for monuments); DOMBY, *supra* note 29, at 37, 48 (describing various groups' efforts to reframe narrative on Confederacy).

[167] COX, NO COMMON GROUND, *supra* note 5, at 20; *see also* ANDREW DENSON, MONUMENTS TO ABSENCE: CHEROKEE REMOVAL AND THE CONTEST OVER SOUTHERN MEMORY 8 (2017); LEVINSON, *supra* note 36, at 38.

[168] *See* COX, NO COMMON GROUND, *supra* note 5, at 23; S. POVERTY L. CTR., *supra* note 9, at 16.

[169] *AHA Statement on Confederate Monuments*, PERSPS. ON HIST. (Oct. 1, 2017), https://www.historians.org/research-and-publications/perspectives-on-history/october-2017/aha-statement-on-Confederate-monuments [https://perma.cc/FV7J-NV2T].

Often, these monuments even lack a local connection, as most of the catalogued monuments display a generic Confederate soldier or broad reference to the Confederacy, with specific monuments honoring Confederate generals Robert E. Lee or Stonewall Jackson, or Confederate president Jefferson Davis.[170] Confederate monuments thus stand as a call to arms for the established white south to police public spaces of government, to reify the mythmaking of the Lost Cause, and to "paint the South as a martyr to an inescapable fate"[171] in response to actual or perceived gains in civil rights or political power for Black residents.[172] In the first wave of monuments, Black contemporaries like W.E.B. Du Bois[173] and Frederick Douglass[174] called out the lies and myths of white supremacy at the foundations of these monuments. Black resistance to monuments has existed as long as the monuments themselves, whether through direct (though secretive) acts of vandalism and removal, or indirectly by events celebrating emancipation and the downfall of the Confederacy in these same public areas.[175]

Organizations like the UDC or the Sons of Confederate Veterans ("SCV") have been so effective in placing monuments at the center of the public spaces across the South that monuments have been at the center of protests even when monuments are not the object of the protest.[176] Monuments are statements of power that shape cultural memory by transforming a space,[177] attempting to curate southern identity by catering to white supremacy to "honor and normalize the actions of their forebears to validate their heritage."[178] Confederate monuments thus are a part of white supremacist cultural production, delineating

[170] S. POVERTY L. CTR., *supra* note 9, at 10.

[171] DU BOIS, BLACK RECONSTRUCTION, *supra* note 29, at 723.

[172] COX, NO COMMON GROUND, *supra* note 5, at 23; DENSON, *supra* note 167, at 5.

[173] DU BOIS, BLACK RECONSTRUCTION, *supra* note 29, at 715-16 ("Of all historic facts there can be none clearer than that for four long and fearful years the South fought to perpetuate human slavery; and that the nation which 'rose so bright and fair and died so pure of stain' was one that had a perfect right to be ashamed of its birth and glad of its death. Yet one monument in North Carolina achieves the impossible by recording of Confederate soldiers: 'They died fighting for liberty!'").

[174] Douglass, maybe overly optimistically, referred to Confederate monuments as "monuments of folly." Frederick Douglass, *Monuments of Folly*, NEW NAT'L ERA, Dec. 1, 1870, at 3, 3, https://www.loc.gov/resource/sn84026753/1870-12-01/ed-1/ [https://perma.cc/D7TR-B7PX] ("The virtues of the fallen may be remembered by friends, but all efforts to canonize rebels will react against those who make the attempt. Monuments to the 'lost cause' will prove monuments of folly.").

[175] COX, NO COMMON GROUND, *supra* note 5, at 67; DOMBY, *supra* note 29, at 12; W. Fitzhugh Brundage, *Exclusion, Inclusion, and the Politics of Confederate Commemoration in the American South*, 6 POL. GRPS. & IDENTITIES 324, 326-27 (2018).

[176] COX, NO COMMON GROUND, *supra* note 5, at 80-81.

[177] *See* Steven Hoelscher, *Making Place, Making Race: Performances of Whiteness in the Jim Crow South*, 93 ANNALS ASS'N AM. GEOGRAPHERS 657, 661 (2003).

[178] William Sturkey, *The Future Belongs to Us*, S. CULTURES, Summer 2019, at 6, 10.

an authentic southernness as militaristic, white, male and "true inheritors" of the cause of liberty in the American Revolution.[179]

For even those monuments that do not explicitly name the Lost Cause mythos, "commemorators used the dedication ceremonies for memorials to unambiguously yoke their memory work to the ideology of white supremacy."[180] For example, at the dedication of the infamous "Silent Sam" Confederate memorial at the University of North Carolina at Chapel Hill ("UNC Chapel Hill"), Confederate veteran and industrialist Julian Shakespeare Carr spoke of the monument as a reminder of Confederate soldiers whose "courage and steadfastness saved the very life of the Anglo Saxon race in the South . . . and to-day, as a consequence, the purest strain of the Anglo Saxon is to be found in the 13 Southern States—Praise God."[181] This emblem of "the purest strain" of white supremacy stood on UNC Chapel Hill's campus until it was toppled by protesters in 2018.[182] Rather than replace the statue, UNC Chapel Hill planted a tree in its place and agreed to give the statue to the SCV, along with a $2.5 million trust for maintenance—until more protests drew attention to the settlement that would give the statue and an endowment to white supremacists to perpetuate a white supremacist icon, and the settlement was voided.[183]

Regardless of which Confederate icon or symbol a monument portrays, the encoding of Confederate monuments as part of white supremacy empirically maps onto ongoing racialized economic inequality. Heather O'Connell mapped the presence of Confederate monuments, Black-white poverty inequality, and historical concentration of enslaved persons through an ordinary least squares regression[184] and found "Confederate monuments are connected to processes

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[179] *See* COX, NO COMMON GROUND, *supra* note 5, at 37; DOMBY, *supra* note 29, at 165.

[180] Brundage, *supra* note 175, at 326.

[181] Julian Shakespeare Carr, Unveiling of Confederate Monument at University 9b-9c (June 2, 1913), https://guides.lib.unc.edu/documenting-student-activism/1#s-lg-box-20102154 [https://perma.cc/8KCU-Y36Z]. If Carr's commitment to white supremacy was in any doubt, he reaffirmed it with a "rather personal" story of whipping a Black woman on UNC Chapel Hill's campus:

> I horse-whipped [her] until her skirts hung in shreds, because upon the streets of this quiet village she had publicly insulted and maligned a Southern lady, and then rushed for protection to these University buildings where was stationed a garrison of 100 Federal soldiers. I performed the pleasing duty in the immediate presence of the entire garrison, and for thirty nights afterwards slept with a double-barrel shot gun under my head.

Id. Carr's speech is a reminder of not only the anti-Black violence that continued after the Civil War but also the complicity of the Federal military in white supremacist violence, even during Reconstruction.

[182] *See* Michael Levenson, *Toppled but Not Gone: U.N.C. Grapples Anew with the Fate of Silent Sam*, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/us/unc-silent-sam-statue-settlement.html.

[183] *See id.*

[184] Also known as linear regression, this statistical analysis measures relationships between different variables by using standard coefficients to measure the relative effects by holding one variable constant. O'Connell's analysis uses a spatial data analysis to measure

that result in higher than expected levels of black-white poverty inequality—particularly through lower white poverty rates . . . —but that inequality falls short of what is observed in association with the highest historical concentrations of slaves."[185] In this sense, Confederate monuments and legacies of slavery are not additive processes, but, measured by current levels of economic inequality, are closely intertwined with Black subordination.[186]

This empirical data supplements the historical analyses on the adoption of Confederate monuments, the majority of which were built after the end of Reconstruction and during the Civil Rights Movement of the mid-twentieth century (the second Reconstruction).[187] These major phases of monument construction were tied to both gains in civil rights and retrenchment of previous state action against racism.[188]

Historically, the monuments are representative of the failure of the United States to divest white supremacists from both the economic and political accumulated from years of slavery, which they then reinvested into both law and monuments after the Civil War and the end of Reconstruction.[189] Because most of the Confederate monuments were, at least initially, constructed without full political participation of Black voters, these monuments emphasize the attempts of white legislatures to assert control over the democratic process.[190]

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the differences across counties in the former Confederate states, using the percent of the population employed in agriculture as the reference variable, allowing her analysis to show the relative differences across different counties across the former Confederate states. *See* Heather A. O'Connell, *Monuments Outlive History: Confederate Monuments, the Legacy of Slavery, and Black-White Inequality*, 43 ETHNIC & RACIAL STUD. 460, 463-68 (2020).

[185] *Id.* at 463-68, 472 (building on SPLC database to classify monuments by region and by inscription, excluding plaques, signs, and other historical markers, classifying ninety-two percent of monuments as part of Lost Cause, which glorifies Confederate soldiers as "patriots" and "heroes" and otherwise romanticizes white supremacy).

[186] *See id.* at 472-73.

[187] *See* S. POVERTY L. CTR., *supra* note 9, at 8, 40 n.8; *see also* COX, DIXIE'S DAUGHTERS, *supra* note 36, at 162 n.33.

[188] *See, e.g.*, Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 101, at 1361 (describing role of racism and white supremacy in legal ideology, particularly end or substantial reduction of reforms that counteract formal structures of racism, i.e., retrenchment). *See generally* NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE (2010) (describing these eras as "enlargements" of whiteness that expanded status-properties of white supremacy over new nationalities, first immediately prior to Civil War, second following Reconstruction, third during civil rights movement of mid twenty-century, and fourth in modern twenty-first century).

[189] *See* COX, NO COMMON GROUND, *supra* note 5, at 107 (noting Georgia purchased Stone Mountain monument from Confederates for two million dollars, providing capital to pay for further monuments); DU BOIS, BLACK RECONSTRUCTION, *supra* note 29, at 722-23. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) (describing attempts at constitutional Reconstruction and failure to unseat established status of white landowners following Reconstruction).

[190] *See* Richard C. Schragger, *What Is "Government" "Speech"? The Case of Confederate Monuments*, 108 KY. L.J. 665, 693 (2019) [hereinafter Schragger, *What Is "Government"*

A Confederate monument is a permanent fixture to represent the Confederacy, voted in by all-white legislatures and situated in public spaces in cities that are predominantly Black;[191] it gains the momentum of history simply by existing, eventually earning protection under federal law. Jess Phelps and Jessica Owley explain that, unlike the state protections that specifically consider Confederate monuments,[192] broad historical preservation laws like the National Historic Preservation Act and National Environmental Policy Act "rarely contain flexible mechanisms for change or reinterpretation of historical meaning."[193] However, the meaning of Confederate monuments has not changed since their inception; the dedication ceremonies proclaim devotion to the Lost Cause mythos and white supremacy.[194] Even the National Trust for Historic Preservation, an organization whose entire purpose is to help preserve historically significant sites, supports the removal of Confederate monuments "from our public spaces when they continue to serve the purposes for which many were built—to glorify, promote, and reinforce white supremacy, overtly or implicitly."[195] Federal agencies charged with historical preservation could facilitate the removal of Confederate monuments by delisting[196] or de-designating[197] these monuments as a moral statement against white supremacy. Historic and cultural property laws are understandably focused on preservation, but often fail to facilitate the removal and destruction of historical sites and

"Speech"?] (noting Confederate monuments constructed during Jim Crow "were erected when African-Americans were disenfranchised, in places that purposefully segregated them from the political, economic, and social life of the community"); *see also* Jason Zenor, *Viewpoint Endorsement Equals Viewpoint Neutrality? The Circular Logic of Government Speech Doctrine*, 46 CAP. U. L. REV. 1, 2-3 (2018) (arguing government speech protection distorts democratic process and marketplace of ideas in public exchange).

[191] *See* COX, NO COMMON GROUND, *supra* note 5, at 13; S. POVERTY L. CTR., *supra* note 9, at 33.

[192] *See* Bray, *supra* note 33, at 7 (describing state statutes that restrict local governments' power to alter monuments).

[193] Phelps & Owley, *Etched in Stone*, *supra* note 33, at 631 ("[O]nce a monument is designated as historic under a federal or local preservation law or protected with a preservation easement, few mechanisms allow for reevaluation of either the decision to preserve the monument or the preservation rationale for its designation.").

[194] COX, DIXIE'S DAUGHTERS, *supra* note 36, at 77; DOMBY, *supra* note 29, at 48; Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1403 (2020) [hereinafter Owley & Phelps, *Life and Death*].

[195] Owley & Phelps, *Life and Death*, *supra* note 194, at 1474 n.403 (quoting *National Trust for Historic Preservation Statement on Confederate Monuments*, NAT'L TR. FOR HISTORIC PRES. (June 18, 2020), https://savingplaces.org/press-center/media-resources/national-trust-statement-on-Confederate-memorials#.YzXFC3bMK5c [https://perma.cc/MC3N-KX8Z]).

[196] Leah Deskins, *Delisting the Dishonorable*, 28 VA. J. SOC. POL'Y & L. 50, 55, 68 (2021) (arguing for removal of Confederate monuments from National Register of Historic Places, noting "[f]ederal law recognizes that the United States need not hold all art in high regard and allows the federal government to avoid promoting and supporting art that endorses values antithetical to those of American society").

[197] Phelps & Owley, *Etched in Stone*, *supra* note 33, at 686.

monuments that symbolize genocide or human rights violations, like Confederate monuments.[198] In spite of these compelling arguments for national action, efforts to remove monuments have remained largely local, like the monuments themselves.[199]

Confederate monuments ground the discussion of this Article, but my aim is not to argue a specific plan of action for specific monuments. I think the ground has been well considered by academics[200] and activists[201] alike. Categorically, Confederate monuments represent white supremacy and, I believe, should all be removed and repurposed.[202] They not only symbolize the Lost Cause but also

[198] *See* E. Perot Bissell V, *Monuments to the Confederacy and the Right To Destroy in Cultural-Property Law*, 128 YALE L.J. 1130 (2019) (explaining need for cultural preservation laws to recognize value of destruction).

[199] *See* Deskins, *supra* note 196, at 51. With limited exceptions, there has been no attempt to legislate or issue executive orders against Confederate monuments beyond narrow measures like the appointment of a naming commission for military bases to remove Confederate designations from the United States military within three years. Introduced by Senator Elizabeth Warren as an addendum to the annual military spending act, the law was passed, vetoed by then-President Donald Trump, and overridden by the Senate. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 370, 134 Stat. 3388, 3553 ("Not later than three years after the date of the enactment of this Act, the Secretary of Defense shall implement the plan submitted by the commission described in paragraph (b) and remove all names, symbols, displays, monuments, and paraphernalia that honor or commemorate the Confederate States of America (commonly referred to as the 'Confederacy') or any person who served voluntarily with the Confederate States of America from all assets of the Department of Defense."). The established commission met for extensive deliberations at the start of May 2022 and selected the final names using criteria detailed in the final report to Congress. *See Name Recommendations*, NAMING COMM'N, https://www.thenamingcommission.gov/names [https://perma.cc/26K8-6NZ7] (last visited Jan. 18, 2023).

[200] *See* Bray, *supra* note 33, at 12; Zachary Bray, *We Are All Growing Old Together: Making Sense of America's Monument-Protection Laws*, 61 WM. & MARY L. REV. 1259, 1313-28 (2020) (outlining procedural and substantive reforms of Antiquities Act to reconsider cultural significance of Confederate monuments and facilitate their removal); Phelps & Owley, *Etched in Stone*, *supra* note 33, at 686-87; Schragger, *What Is "Government" "Speech"?*, *supra* note 190, at 693; Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 KY. L.J. 695, 699 (2019) (arguing municipalities can fight to remove Confederate monuments under Thirteenth Amendment's prohibition against badges or incidents of servitude).

[201] *See, e.g.*, COX, NO COMMON GROUND, *supra* note 5, at 4; S. POVERTY L. CTR., *supra* note 9, at 15; Rachel Scully & James Bikales, *A List of the Statues Across the US Toppled, Vandalized or Officially Removed Amid Protests*, HILL (June 12, 2020, 4:24 PM), https://thehill.com/homenews/state-watch/502492-list-statues-toppled-vandalized-removed-protests/ [https://perma.cc/Q9DW-Z693]. *See generally* ERIN L. THOMPSON, SMASHING STATUES: THE RISE AND FALL OF AMERICA'S PUBLIC MONUMENTS (2022) (discussing Confederate statues and communities and protesters who have destroyed monuments in protest).

[202] I say repurposed rather than destroyed, perhaps in part from my upbringing encouraging recycling and my generalized anxiety around ever looming climate change. Whether the city

serve what Du Bois referred to as the "propaganda of history" that rewrites the past to fit the power structure and narrative of white supremacy.[203]

This propagandist context of Confederate monuments is most evident in those monuments outside the Confederacy, like the collection of Confederate monuments in Arizona. Although Arizona was not a state or participant in the Civil War,[204] after achieving statehood in 1912, it was one of the few non-Confederate states to legally mandate racial segregation.[205] Thanks to funding from the SCV and UDC, Arizona has been home to multiple Confederate monuments.[206] During segregation, the UDC gifted and dedicated the Confederate Troops Memorial at the state capitol complex: a stone foundation with rocks roughly arranged in a metal frame shaped as the state of Arizona, a small stone inscription noting the UDC's dedication to "Arizona's Confederate Troops," and a large stone inscription on the foundation, reading, without irony, "[A] nation that forgets its past has no future."[207] This vision of memory runs throughout Confederate monuments, fantasizing and romanticizing white supremacy as an aspiration—a future horizon that valorizes the Confederacy at the center of state government so that its memory persists. The Confederate monument received state protection and maintenance until it was removed overnight in 2020 and returned to the UDC indefinitely "for repairs" after frequent vandalism.[208]

Placing a marker of white supremacy and revisionist history at the heart of the state capitol is not just a visible marker of the space, but a significant emblem of the alignment of the state government with white supremacy. The marker

destroys the monument outright or melts it down for parts, I advocate for Confederate monument removal.

[203] *See* DU BOIS, BLACK RECONSTRUCTION, *supra* note 29, at 711-28.

[204] White colonists in the Arizona Territory petitioned to join the Confederacy but were denied for lack of general support in the territory, and the lone battalion of Arizona Confederate troops that seized Tucson, Arizona, in a short-lived secession was promptly ousted by Union Troops. William Stoutamire, *From North to South, Out West: Civil War Memory in Arizona*, 51 J. ARIZ. HIST. 197, 201-203, 209-11 (2010). Arizona gained an interest in its Confederate history in a sudden resurgence in the 1950s once the SCV and UDC established campaigns in the state, leading to the dedication of Arizona's first Confederate monument. *Id.*

[205] *See generally* Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood*, 24 BERKELEY LA RAZA L.J. 1 (2014) (comprehensively describing Arizona's flirtation with Confederacy and systematic exclusion of Black, Native, and Latinx populations by law).

[206] *See* Christopher M. Bradley, *Not Set in Stone: Civil War Memorialization at Picacho Pass and the Emergence of a Confederate Fantasy Heritage in Arizona*, 62 J. ARIZ. HIST. 141, 142, 144-45, 150-53, 166-70 (2021).

[207] *See id.* at 160.

[208] *See* Grace Oldham, *Confederate Monuments in Arizona: How Many Are Left?*, AZCENTRAL. (July 25, 2020, 8:36 AM), https://www.azcentral.com/story/news/local/arizona/2020/07/25/at-least-3-Confederate-monuments-believed-standing-arizona/5495100002/ [https://perma.cc/C5SF-ZYXY].

itself is a symbol that speaks volumes about the state's valorization of the Confederacy, but the vandalism is also symbolic speech challenging the government's white supremacy. However, these removals by law or by vandalism become more complicated by state legislation prohibiting the removal of monuments, as the state speaks through monuments and silences any who might call monuments hateful or symbolically act against them to promote their removal. Confederate monuments thus sit at a nexus of doctrines that identify different properties of speech around governmental actions, and the next Part identifies the role of law in insulating these monuments, framing the antimatters through First Amendment doctrine.

> *Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.*
>
> —Justice Anthony Kennedy[209]

> *I bomb atomically, Socrates' philosophies and hypotheses can't define how I be droppin' these mockeries.*
>
> —Inspectah Deck[210]

III. FIRST AMENDMENT ANTIMATTERS

Building on the classification of Confederate monuments as white supremacist markers in social and historical context in Part II, and the theorizing of antimatters in Part I, this Part considers the classification of Confederate monuments under doctrines of constitutional law. As iconography adopted and maintained by governments, Confederate monuments most clearly fit the category of government speech. However, because they are symbols of white supremacy that are frequently contested through protests and vandalism, it is important to consider the implications of hate speech and symbolic speech doctrines in complicating the function of Confederate monuments in public space. Considering Confederate monuments under government, hate, and symbolic speech doctrines in turn builds on Russell Robinson's conceptualization of "doctrinal intersectionality" by "juxtaposing doctrinal domains that are often thought of as distinct in search of new insights and frameworks" in order "to see how law may simultaneously construct gender roles, shape race, and sculpt nation-building."[211] Just as Crenshaw's

[209] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[210] WU-TANG CLAN, *Triumph*, *on* WU-TANG FOREVER (Loud Records, LLC & RCA Records 1997).

[211] Robinson, *supra* note 149, at 1030, 1046 (building on Crenshaw's germinal conceptualization of intersectionality as structural failure to recognize connections between group identities in plaintiffs, Robinson extends analysis to consideration of Justice Kennedy's

foundational work on intersectionality critiques the failures of single-axis framework antidiscrimination law, Robinson's doctrinal intersectionality urges scholars to be careful when "assigning cases to different silos like 'sexual orientation' or 'immigration'" as scholars "might miss how these cases converge or clash."[212] Engaging Confederate monuments at the intersection of speech doctrines thus illuminates antimatters—legal matters with an inverse relationship to legal assumptions through a rhetoric of neutrality to further white nationalism.

Coordinating the intersections of government speech, hate speech, and symbolic speech thus considers three key features that cross the doctrines: the purpose of the speech, the processes by which the speech is transmitted to others, and the perceptions created by that speech. However, because Confederate monuments fit so squarely within the doctrinal analysis of government speech, mostly because the entire doctrine is built around government acceptance of monuments, I first take a detour from the intersections of doctrine to explain the origins of the government speech doctrine and consider why an intersectional engagement with monuments and antimatters is necessary to fill some gaps in the assumptions of government speech.

A. *Up from Government Speech*

Although the Court did not formally articulate the doctrine of government speech until the twenty-first century,[213] the Court laid the foundations in the late-twentieth century considerations of the expressive acts of governments through legislative and executive power.[214] Between 1990 and 2000, the Rehnquist Court considered several cases questioning the government's ability to control messaging of governmental programs funding antiabortion rhetoric,[215]

rhetorics of discrimination and nation-building in cases considering sexual orientation and immigration).

[212] Robinson, *supra* note 149, at 1030.

[213] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009).

[214] For a robust history of the doctrine, see generally HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION (Alexander Tsesis ed., 2019) (theorizing transparency and motivation as key controlling principles to governmental speech, enabling people to hold government accountable for hostility, harms, or denials of rights through litigation or democratic process). Early analyses of the theory of government speech focus on general expressive powers of legislation, or government speakers, and the potential to overwhelm private speakers. *See, e.g.*, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 38 (1983) (weighing role of government speakers in marketplace of ideas and potential for unbalancing public discourse under First Amendment); Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 961-62 (1984) (discussing coercive power of government in secrecy and agenda-setting to distort public discourse on nuclear weapons and disarmament).

[215] Rust v. Sullivan, 500 U.S. 173, 203 (1991) (deciding government could create conditional grants through regulatory agencies that restrict ability of healthcare providers to speak on healthcare issues like abortion).

pamphlets endorsing Christianity,[216] and student organizations at public universities[217] without explicitly classifying such activities as government speech. Instead, the Court relied on more traditional First Amendment doctrines considering content or viewpoint discrimination in regulating private speech.[218] For example, in *Board of Regents of the University of Wisconsin System v. Southworth*,[219] Justice Kennedy's opinion for the Court expressly noted that "when the government speaks," a different, yet-to-be articulated standard would apply because "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[220] Thus, the Court was content to rely on political and democratic accountability to check government speech and did not require explicit doctrinal or constitutional protection under the First Amendment.[221]

Yet, these Rehnquist Court cases considered governmental taxing and spending programs under the direct control of administrative agencies or state universities. By 2009, Chief Justice John Roberts presided over the Court, which included, importantly, Justice Samuel Alito. Justice Alito's opinions and dissents would form a dialogue with Justice Stephen Breyer's opinions and concurrences to define the boundaries of the modern government speech doctrine. Helen Norton explains that in a government speech case, the Court considers two critical questions: (1) whether the government is, in fact, the

[216] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845-46 (1995) (finding University of Virginia unconstitutionally discriminated against student's viewpoints by failing to provide university funding to student who sought to publish pamphlet promoting Christianity).

[217] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235-36 (2000) (holding general student fees required of all students were not violations of First Amendment because school collected activity fees in question from all students and distributed funds to all approved extracurricular student organizations, and therefore practice was viewpoint neutral).

[218] *See, e.g.*, *id.* at 233-34 ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.").

[219] *Southworth*, 529 U.S. 217.

[220] *Id.* at 235.

[221] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 565-67 (2005). Justice Antonin Scalia's majority opinion expressly set up the development of the government speech doctrine in years to come, noting "We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns." *Id.* at 559.

speaker, and (2) whether such speech would otherwise violate the Constitution.[222]

Richard Schragger's engagement with Confederate monuments considers the ways government speech doctrine frames the government acts at issue. Government speech, as conceived by the Court, "is not a fact but a doctrinal tool, and it is used mainly to constrain constitutional review of certain kinds of expressive acts."[223] This means that there is a narrow ground to contest government speech because most ordinary citizens lack injury beyond "mere offense."[224] Therefore, governments may act outside traditional First Amendment requirements of neutrality and engage in viewpoint discrimination, effectively requiring citizens to pay for private speech in the purchase of monuments, like Georgia's purchase and maintenance of Stone Mountain.[225] Schragger concludes that government speech doctrine "hides the distinctions on which it is constructed" by obfuscating the "deeply flawed political process" on which it is based.[226] Theoretically, government speech is permissible because it relays the voice of the people represented by elected officials. However, as Schragger points out, many Confederate monuments were adopted while Black citizens were disenfranchised:

> To enjoy the immunities that the 'government speech' label provides to government speakers, that speech has to be representative. To require majority black cities like Memphis or Birmingham to keep their monuments—or Charlottesville, where the statues are a constant reminder of the violence done to the community—seems a violation of this basic political principle.[227]

Schragger later argues that this problem of representation must be challenged directly by the Court, and if the Court wishes to narrow the circumstances under which government speech is legally actionable, the Court should instead consider the "democratic legitimacy of that speech."[228] The three "paramount" concerns before the Court should be dangers of "*entrenchment*, *favoritism*, and *domination*."[229] As Confederate monuments are "speech of the dead . . . [and] the result of an oppressive political process, . . . they have no claim to legitimacy, whatever their current meaning."[230] Confederate monuments have little (current) democratic legitimacy; they entrench exclusionary, segregationist

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[222] *See* NORTON, *supra* note 214, at 5.

[223] Schragger, *What Is "Government" "Speech"?*, *supra* note 190, at 670.

[224] *Id.* at 671.

[225] *See id.*

[226] *Id.* at 693.

[227] *Id.* at 684.

[228] Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 50 (2021) [hereinafter Schragger, *Of Crosses and Confederate Monuments*].

[229] *Id.*

[230] *Id.* at 93.

regimes of the past, favoring white supremacist conceptions of speech. Schragger concludes that these Confederate monuments are coerced political domination: "Government speech needs to be tied to some identifiable polity and to specific elected officials. When the state prevents those to whom the speech is attributed from disavowing it, the political accountability mechanisms that the Court relies on to police government speech are undermined."[231] Thus, Schragger argues that Confederate monuments undermine "the basic legitimacy condition for government speech: that it be representative of the community that reasonable observers would assume is doing the speaking."[232] Thus, an equal protection argument would frame Confederate monuments properly based on the "legitimacy condition of the majoritarian public square," promoting an essentially antisubordination argument that these monuments inflict stigmatic harms and undermine the dignity of a local population by their associations with government speech.[233]

While this broad engagement with speech doctrine in the context of Confederate monuments highlights the constitutional problems that Confederate monuments raise, these problems of democratic legitimacy are the purpose and function of Confederate monuments themselves. Hence, antimatters as a framework helps explain that the government speech doctrine is permissive of such speech because it serves to continue the ideological function and maintenance of the state apparatus of white supremacy. As Adam Serwer puts it: "[T]he cruelty is the point."[234] Confederate monuments are created to *entrench* white nationalist power, *favor* white supremacy in defiance of democratic ideals, and *etch* domination into the landscape of governance in perpetuity.

The first wave of Confederate monuments erected during and after Reconstruction was no coincidence. Proponents hailed Confederate monuments as markers of both democracy and white supremacy. For example, the equestrian statue of John Brown Gordon at Georgia's State Capitol was unveiled in 1907, a year after a white supremacist mob engaged in mass murder of Black Atlantans in the 1906 Atlanta Race Riot.[235] The bronze figure clad in Confederate General regalia sits atop a bronze horse on a cement pedestal at the center of the Georgia Capitol complex.[236] The inscription simply reads, "Governor—Patriot—Senator," leaving out both Gordon's seditious military service and role in the

[231] *Id.* at 96-97.

[232] *Id.* at 99.

[233] *Id.* at 101.

[234] Adam Serwer, *The Cruelty Is the Point*, ATLANTIC (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/.

[235] *See* Chris Joyner, *Georgia Capitol Heavy with Confederate Symbols*, ATLANTA J.-CONST. (Sept. 5, 2015), https://www.ajc.com/news/state--regional-govt--politics/georgia-capitol-heavy-with-confederate-symbols/z051suEoa7bqO5cWhXlZnJ/ [https://perma.cc/T377-KSW3].

[236] *See John Brown Gordon*, HIST. MARKER DATABASE, https://www.hmdb.org/m.asp?m=86837 [https://perma.cc/HUF2-P8MY] (last updated June 16, 2016).

Klu Klux Klan.[237] A contemporaneous local newspaper regarded the 1907 dedication as a reminder that "Gordon led Georgia out of the uncertain perils of reconstruction and into Saxon supremacy and the safety of a restored democracy."[238] Placing a representative symbol of the KKK at the center of governance under the asserted role as Governor of Georgia entrenches an exclusionary idealized democracy, camouflaging[239] white supremacy under a veil of democratic legitimacy—the statue truthfully represents post-Reconstruction Georgia, repackaging exclusion and suppression as democratic legitimacy.

As each successive wave of monument construction and protection responds directly to assertions of Black personhood, rights, and citizenship, Confederate monuments are the vanguards of retrenchment against antisubordination and the redemption of white supremacy. Schragger notes that Confederate monuments lack democratic legitimacy because the citizens harmed by the monuments, Black residents of states and cities where these monuments sit, were excluded from the democratic process that established the monuments in the first place.[240]

In the following Sections, I use antimatters to examine the intersections of First Amendment speech doctrines to explain why this white supremacist, antidemocratic tendency of Confederate monuments is a feature not a bug. The logic of government speech doctrine relies on the purpose, process, and perception of monuments to mark them as exceptions to First Amendment considerations of neutrality—governments purposefully select monuments to communicate messages to the public that represent peoples and relationships to place. Confederate monuments receive protection as government speech in perpetuity. Thus, they become antimatters as doctrinal assumptions of purpose,

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[237] *Id.*; *see also* Ralph Lowell Eckert, John Brown Gordon: Soldier, Southerner, American Volume I, at 132, 183 (1983) (Ph.D. dissertation, Louisiana State University and Agricultural and Mechanical College), https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=4880&context=gradschool_disstheses [https://perma.cc/A7EX-HEQX].

[238] *Gordon and His Place*, ATLANTA GEORGIAN & NEWS, May 27, 1907, at 8, https://gahistoricnewspapers-files.galileo.usg.edu/lccn/sn89053728/1907-05-27/ed-1/seq-8.pdf [https://perma.cc/YH6K-97A8].

[239] Robert L. Heath and Damion Waymer explain the term:

> As camouflage, communicators strategically use textual net/cover to conceal what they do not want to reveal or wish to be examined. Vital to cultural issues battles to regain social efficacy, members of defeated institutions predictably work to constitutively re-narrate identity, identification and place through subtle textuality. Camouflage is an ideal strategy because its encoding presents different messages to different decoders; it conceals as it reveals.

Robert L. Heath & Damion Waymer, *Standing Their Ground: Southern White Hegemonic Defense of Place Through Camouflaged Narrative Continuity*, PUB. RELS. REV., Dec. 2022, at 1, 3. Heath and Waymer argue that symbols of the Confederacy are ideologies of place to ensure narratives of a white supremacist South under the guise of history and the Lost Cause. *See id.* at 2.

[240] *See* Schragger, *Of Crosses and Confederate Monuments*, *supra* note 228, at 99.

process, and perception—inverted by the Confederate monuments' disruption of people's relationships to place.

B. *Purpose*

1. Origins of Government Speech in *Pleasant Grove City v. Summum*

The foundation of government speech doctrine is the purpose of the speech: expressing governmental attitudes, ideals, or affiliation through public works. Justice Alito originated this articulation of government speech in *Pleasant Grove City v. Summum*.[241] Summum is a religious organization based in Salt Lake City, Utah, that attempted for years to propose placing a monument displaying the tenets of the Summum religious organization "similar in size and nature to the [City's] Ten Commandments monument" in the City's Pioneer Park.[242] Summum filed suit, arguing the City's rejection violated First Amendment free speech doctrines.[243] Justice Alito, writing for a unanimous Court,[244] rejected Summum's arguments, finding that the First Amendment did not apply because the City's decision about which monuments to place in the park constituted government speech.[245] The park itself was a public forum for public use controlled by the First Amendment, but the monuments contained within are prototypical government speech and therefore exempt from such considerations. Justice Alito explains:

> A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. . . . Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land.[246]

Monuments are expressions of government affiliation with ideas, organizations, or histories. Governments are not bound by doctrines of neutrality when exercising government speech and may be selective based on the content or viewpoint expressed in the monuments, given that the placement of a monument reflects the government's adoption of the message conveyed. "The monuments

[241] 555 U.S. 460 (2009).

[242] *Id.* at 465.

[243] *Id.* at 466.

[244] Justice John Paul Stevens (joined by Justice Ruth Bader Ginsburg), Justice Scalia (joined by Justice Clarence Thomas), and Justice Breyer joined the opinion in full and wrote separate concurrences. Justice David Souter concurred in the judgment and substantively agreed with Justice Alito's articulation of government speech but had "qualms . . . about accepting the position that public monuments are government speech categorically." *See id.* at 485 (Souter, J., concurring).

[245] *Id.* at 467-68 (majority opinion).

[246] *Id.* at 470-71.

that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and thus they constitute government speech."[247]

Importantly, Justice Breyer's concurrence agreed with Justice Alito's definition of government speech but rejected the categorical approach of the majority. Rather, Justice Breyer writes, "[T]he 'government speech' doctrine is a rule of thumb, not a rigid category," that must be applied contextually, "with an eye towards [its] purposes—lest we turn 'free speech' doctrine into a jurisprudence of labels."[248] On balance, the permanence of the monument and the fact that the park remained open to the public, "[did] not disproportionately restrict Summum's freedom of expression."[249]

Summum thus establishes government speech as a separate doctrinal consideration under the First Amendment, creating exceptions when the government creates or adopts expressive displays like monuments. As the germinal case on government speech doctrine, the Court considered the threshold question: What power does the state have to decide which messages it will adopt as its own at the point of construction? The *Summum* government speech distinction is therefore helpful for cities crafting policies and procedures for how to select monuments but leaves open the question about removing existing monuments. The challenge to government policy is the rejection of a monument espousing the tenets of Summum, not a request to remove the Ten Commandments monument in violation of the Establishment Clause.[250] Such a violation is distinct from the government speech doctrine, though the Court would later consider the Establishment Clause and government speech doctrines in combination.[251] This question of removal is key for evaluating Confederate monuments, given that, under *Summum*, the Court's reasoning would associate the message of the monument with the government.

Thus, the key doctrinal consideration for government speech is a highly deferential analysis evaluating whether a city purposefully selected the monument. The meaning of the monument is left to the government to decide and the government gets a First-Amendment-free decision whether to align with that meaning, whatever it may be.

In an institutional sense, purpose resembles individual-based notions of intent or motive. Yet unlike criminal or tort law, which heavily consider the

[247] *Id.* at 472.

[248] *Id.* at 484 (Breyer, J., concurring).

[249] *Id.*

[250] A challenge to Texas's Ten Commandments monument on its capitol grounds was rejected a few years earlier in *Van Orden v. Perry*, 545 U.S. 677 (2005), when the Court found that the monument served a mix of governmental and religious significance but did not violate the Establishment Clause. *Id.* at 692. There, the Court considered the monument's effects on passers-by. *Id.* at 691-92. Importantly, the Court had not developed and thus did not consider the doctrine of government speech and only considered the Establishment Clause question.

[251] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (2019) (finding cross placed on public land as memorial to deceased soldiers did not violate Establishment Clause).

intentionality of individual actors, government speech doctrine recognizes government intentionality and instead leaves it alone. As Schragger points out, this permits favoritism and entrenched government power to take precedence over the democratic values that those governments are supposed to represent.[252] No antisubordination principle guides the government in selecting speech, and the Court does not consider the harms that that speech might have on outsiders.[253]

2. Hate Speech and *R.A.V. v. City of St. Paul*

Compare the deference given to the state in government speech with the scrutinizing of intent of the government in cases where state and local governments attempted to police hate speech. In both situations, there is a similar consideration of purpose, intent, and harm of the speech itself, yet the Court inverts its treatment of the government, focusing on the primacy of individual speech under the First Amendment rather than on the harm or effect of the speech.

In *R.A.V. v. City of St. Paul*,[254] a white suburban teen burned a makeshift cross on his Black neighbors' lawn, and the City of St. Paul, Minnesota, chose to prosecute him under the Bias-Motivated Crime Ordinance.[255] That ordinance expressly criminalized cross burning:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[256]

The Court unanimously agreed the city ordinance violated the First Amendment but fractured on the reasoning. In the majority's view, authored by Justice Antonin Scalia, the ordinance was facially unconstitutional because it was overbroad: "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[257] Thus, the Court interpreted the statute as a content- or viewpoint-based regulation of otherwise protected speech because "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[258] Justice Scalia reasoned that the ordinance unconstitutionally favors one target, or subject, of speech over others:

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[252] Schragger, *Of Crosses and Confederate Monuments*, *supra* note 228, at 93.

[253] Although, even in individual cases, this is highly problematic because the courts have ignored formal legal responses to noncriminal, hateful speech. *See* Matsuda, *supra* note 129, at 2380-81.

[254] 505 U.S. 377 (1992).

[255] *Id.* at 379-80; ST. PAUL, MINN., LEGIS. CODE § 292.02 (2023).

[256] *R.A.V.*, 505 U.S. at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02).

[257] *Id.* at 381.

[258] *Id.* at 386.

"St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[259] Thus, Justice Scalia reasoned the ordinance is unconstitutional because it prohibited particular subjects, rather than "a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."[260] A city may therefore not prohibit ideas to be communicated based on their effects or intended audience, but only those means of communication that are invalid such as vandalism or violence.

The Court's concerns that such a statute would prohibit expression, even expression of offensive ideas, thus superseded the City's attempt to regulate the intentional conduct of burning a cross. Focusing on the "mythological marketplace of ideas" and assuming that all speech and speakers have equal value and position in society is entirely ahistorical and acontextual.[261] Rather than squarely address the meaning underlying the cross burning at issue, Justice Scalia's majority focused on the idea that categorically banning harmful expression towards particular groups would be unfair. By this logic, the statute was problematic because it would prohibit a KKK member from declaring their hatred of Black people but allow a Black person to declare their hatred of the Klan. This type of content-neutral balancing decontextualizes acts of oppression and creates false equivalence between protest and oppression under an abstracted free speech doctrine of neutrality. The law could instead focus on the person harmed out of concern for safety or as a source of knowledge for contextualizing the offensive speech.[262] The Court would be faced with the difficult, though not at all impossible, task of accounting for how hate speech injures both individuals and society *because of* rather than *in spite of* the identity of the injured—"apply[ing] the Constitution with eyes open to the unfortunate effects of centuries of discrimination."[263] Instead the Court sees a real problem

[259] *Id.* at 392.

[260] *Id.* at 393.

[261] Powell, *supra* note 51, at 2.

[262] This kind of outsider jurisprudence has long been suggested by critical race scholars but never adopted by the Court. *See, e.g.*, Matsuda, *supra* note 129, at 2380 (suggesting outsider jurisprudence—whereby experiences of subordination are used to offer phenomenology of race and law—as framework for legal redress for racial harm).

[263] Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., joined by Ginsburg, J., dissenting). Justice Sonia Sotomayor's dissent rebuts Chief Justice Roberts's maxim from years earlier that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007). In her dissent, Justice Sotomayor argues for a color conscious constitutionalism:

> In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away,

in focusing on the identity of the injured rather than the nature of the injury. Thus, removing Confederate monuments due to finding them harmful to Black residents would be improper under *R.A.V.* because this action would name the population targeted by the offense. Instead, under *R.A.V.*, the city would have to remove all monuments, or any monument that causes harm to anyone, regulating the mode of expression (monuments) rather than the content (white supremacy). Even Justice Alito's discussion of "purpose" under government speech doctrine[264] considered the social and historical context that Justice Scalia conveniently sidestepped. The meaning, purpose, and intent communicated by overt symbols of racism like Confederate monuments or burning crosses seem clear, yet the Court relies on abstract principles rather than context clues in making its decisions regarding freedom of speech.

3. Condoning Explicit Racism in *Virginia v. Black*

More than a decade after *R.A.V.*, the Court, in *Virginia v. Black*,[265] heard a First Amendment challenge to Virginia's cross-burning statute that made it "unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."[266]

The Court described the history of the Ku Klux Klan and the use of cross burnings to "communicate both threats of violence and messages of shared ideology," and noted that the burning of crosses to signal Klan membership began in Stone Mountain, Georgia.[267] While the Court unanimously acknowledged that cross burnings are symbols of hate, the majority and several concurrences in judgment took issue with the construction of Virginia law that presumed the burning of a cross as indicating an intent to intimidate, noting at times it is an expression of "ideology, a symbol of group solidarity."[268] The Court therefore found a state may prohibit cross burning as a mode of expression, but the Virginia prima facie evidence provision that presumed cross burnings are intended to intimidate was unconstitutional on its face.[269] Justice

> rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.

Schuette, 572 U.S. at 381 (Sotomayor, J., joined by Ginsburg, J., dissenting).

[264] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 473-74 (2009).

[265] 538 U.S. 343 (2003).

[266] *Id.* at 348 (quoting VA. CODE ANN. § 18.2-423 (1996)).

[267] *Id.* at 354.

[268] *Id.* at 354, 365-66.

[269] *See id.* at 367; *see also id.* at 368-79 (Scalia, J., joined in relevant part by Thomas, J., concurring in part and dissenting in part) (concurring with conclusion that Virginia may prohibit cross burnings, but offering alternative interpretation that would allow presumption of intent in cross burnings to remain); *id.* at 380-87 (Souter, J., joined by Kennedy & Ginsburg, JJ., concurring in part and dissenting in part) (concurring only in overturning of defendant Black's conviction, arguing that law's presumption of intent is unnecessary, given

Clarence Thomas, in his dissent, saw no expression in a cross burning and would not apply a First Amendment analysis, but even if there were an expression, the inference of intent to intimidate would still be still rebuttable.[270] While the plurality hypothesized there could be a possible scenario where cross burning would be carried out without the intent to intimidate, Justice Thomas's dissent focused on the harm caused: "That cross burning subjects its targets, and, sometimes, an unintended audience, to extreme emotional distress, and is virtually never viewed merely as 'unwanted communication,' but rather, as a physical threat, is of no concern to the plurality."[271]

While the Court splits a few different ways in considering the legal outcome for the Virginia statute, all the justices seemed to agree that cross burnings are tools of power and intimidation associated with white supremacy meant to inflict harm. Their opinions differ, however, on whether a law can presume that intent, and potentially stifle expression because of it.[272] Unlike the city ordinance in *R.A.V.*, the Virginia law required no explicit statutory audience, instead regulating the mode of expression itself: cross burning.[273]

Importantly, the Klan rose in its original and modern incarnations parallel to the development of Confederate monuments: Stone Mountain, the birthplace of cross burning, is also home to the largest Confederate monument in the United States.[274] A Confederate monument and a cross burning are both modes of expression with a plain intent to intimidate, but under *Black*, the fact that Confederate monuments are also symbols of "group solidarity" under white supremacy means they cannot be categorically banned.[275]

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Symbols can be interpreted in a multitude of ways, and their interpretation often depends on the observer. With government speech, the Court may rely on the meaning at the time of the adoption of a monument or consider present-day meaning.[276] However, the Court provides no clear doctrinal guide on how to interpret the meaning of Confederate symbols that clearly indicate white

history of cross burnings, but that law is still content-based prohibition that could be accomplished by "content-neutral statute banning intimidation").

[270] *See id.* at 388 (Thomas, J., dissenting).

[271] *Id.* at 400 (citations omitted).

[272] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding "ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses").

[273] *See Black*, 538 U.S. at 348.

[274] *See* COX, NO COMMON GROUND, *supra* note 5, at 106-07.

[275] *See Black*, 538 U.S. at 365-66.

[276] *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015); Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

supremacy but are wallpapered with Lost Cause romanticism.[277] In *Summum*, the Court barely interrogated the contextual meaning of the monument, only focusing on the purpose of monuments generally.[278] It did not matter to the Court what the monument expressed, just that the government had a purpose in selecting one monument over another.[279] Institutional intent, or the expression of purpose, is entirely permissive—so long as there is a governmental decision to adopt a monument, the expression falls under government speech and eludes interrogation of any invidious motive. Regarding hate speech, the Court has been more united about the meaning of cross burnings as individualized symbols of intimidation and hate. However, the statutes in *R.A.V.* and *Black* required individual motivations, and the Court held that symbolic expression cannot be categorically regulated by the state without leaving room for particular, context-specific questions of intent and audience. If legislation is another form of speech by which the state identifies activities that are unacceptable, *R.A.V.* and *Black* make clear that the state cannot declare private expressions unacceptable. The Court's treatment of government speech takes the opposite approach, allowing a government to favor private expressions.[280] The contrast between government speech and hate speech doctrines reveals that, while a government cannot prohibit expression outright, it may provide a space for expressions it prefers.

Monuments convey messages, but those messages vary. The Court is evasive in *Summum*,[281] *R.A.V.*,[282] and *Black*[283] in matching intent to message to audience when the government is involved. While the state may reject temporary markers of white supremacy, at least when the state can prove an intent to intimidate, the permanence of a Confederate monument allows white supremacist intimidation to endure, simply because it has existed for a long time. The permanence of a monument additionally complicates the identification of its message or intent. As Justice Alito declared in *Summum*, "The 'message' conveyed by a monument

[277] *See* DOMBY, *supra* note 29, at 16; S. POVERTY L. CTR., *supra* note 9, at 8 (describing monuments' role in Lost Cause propaganda).

[278] *See Summum*, 555 U.S. at 473.

[279] *See id.*

[280] *See id.* at 467-68 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

[281] *See id.* at 474-75 ("Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.").

[282] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 393-94 (1992) ("[St. Paul] has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.").

[283] *See* Virginia v. Black, 538 U.S. 343, 357 (2003) ("In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.").

may change over time,"[284] but the monument itself does not. A Confederate monument memorializes a white supremacist government and conveys a similar message of white supremacist governance *because* the monument remains at the center of a government plaza—no matter who occupies the seat of government currently. Confederate monuments establish a continuity of message that defies intent, tainting[285] representative and democratic legitimacy by forced association with racial discrimination and white supremacy.

At the intersections of hate speech and government speech doctrines, we see that the threshold consideration is intent or purpose, but with very limited consideration of effects. Mari Matsuda's antisubordination outsider jurisprudence highlights how the Court's failure to consider potential harms beyond the purpose or intent grounds of racist speech presents problematic absence of law.[286] Following Matsuda's call to outsider jurisprudence, antimatters reframe Confederate monuments' purpose as intimately linked to their placement and function. The government's selection of a monument not only aligns with whatever speech the monument represents, it prioritizes the monument as part of the governance of peoples in those places. The government is not only speaking but also governing as an expressive act and showing the allegiances of governmental actors. With Confederate monuments, this means aligning with white supremacy. This was the purpose of many states, cities, and towns in adopting Confederate monuments.[287] A bare government speech analysis would only look at whether that choice was purposeful, not whether that purpose was multifarious or rooted in subordination.[288] Similarly, the Court's hate speech jurisprudence would flatten intent through false equivocation—the purpose is not in the context of history, but only in the context of the legislation and the act itself. *Summum*, *R.A.V.*, and *Black* thus reflect the antimatter of Confederate monuments by facilitating the paradox of antidemocratic government as a "government purpose" with explicit intentions, not drawn from the monument's effects.

C. *Process*

As discussed in the previous Section, the Court established the ground rules for government speech, explaining that when the government purposefully adopts a monument as its own, it also takes on the underlying message and meaning. Such purpose is similar to intent, but in any governmental entity at any

[284] *See Summum*, 555 U.S. at 477.

[285] For a robust analysis of the discriminatory taint, see generally W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190 (2021). Murray proposes an insightful approach to discerning how discrimination persists through policy changes. *See id. at* 1218-24. Similarly, the feature and function of monuments is the persistence of discrimination at inception, which is usually quite explicit.

[286] Matsuda, *supra* note 129, at 2322.

[287] *See* Owley & Phelps, *Life and Death*, *supra* note 194, at 634.

[288] *See, e.g.*, *Summum*, 555 U.S. at 477.

level, there is rarely a single decision maker selecting the monuments associated with the government. Those decisions are typically run through governmental bureaucracy, with its own rules and procedures for selecting monuments.[289] The government speech doctrine considers those processes at length, and the Court uses the procedures to distinguish when the government is speaking or merely providing a forum for others to speak.

Once a monument is selected, the initial purpose for adoption binds future governments. Such a perpetual restriction on governmental expression seems contrary to the democratic nature of government itself. Laws are designed to bind future governmental actors to decisions of the past—constitutions, statutes, regulations, and even court decisions are clear expressions of governance meant to endure over time. Yet laws may also change; there are procedures for amendment or revocation. Courts do not reverse previous decisions lightly and often spend significant space attempting to legitimize a shift in perspective. Procedure refines the intent of government speech—obliging any future governmental entity to take steps to make any change. Unlike an individual speaker, government speech is thus defined by its governing processes that refine the speech and its purpose over time.

1. Justice Alito's Whataboutism[290] in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*

One of the major organizations responsible for the construction and maintenance of Confederate monuments sought to push its Lost Cause iconography into another government space: license plate agencies.[291] In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[292] the Texas Department of Motor Vehicles ("DMV") denied an application for a specialty license plate designed by the Texas branch of the SCV because of its use of the Confederate battle flag in the background of the design, noting "public comments ha[d] shown that many members of the general public find the design offensive" and that "such comments are reasonable."[293] Justice Breyer, now writing for a majority of the Court, found that such a denial was simply government speech because license plates communicate messages from the states in the same manner as monuments.[294] The purpose in seeking a specialty plate, Justice Breyer reasoned, is to "convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in

[289] *See, e.g.*, N.Y. GEN. MUN. LAW § 72 (McKinney 2023) (outlining restrictions to monument selection and building for governing board).

[290] A colloquial way of saying false equivalence, presenting an alternative scenario disingenuously to distract from the context at issue, rather than supplement the analysis.

[291] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 206 (2015).

[292] *Walker*, 576 U.S. 200.

[293] *Id.* at 206. The SCV applied twice, once in 2009 and again in 2010. The design was denied by the Texas DMV both times, but the reasoning was only quoted by the Court in the second denial.

[294] *See id.* at 210-11.

larger letters on a bumper sticker right next to the plate."[295] While license plates are not permanent like monuments, they are regulated by governmental procedures and are not a traditional space for public expression.[296] Thus, the State, through the DMV, is not required to associate with the messages of the SCV on its license plates.[297] The government speech doctrine permits the state to discriminate and dissociate with messages it finds—or at least believes the general public finds—distasteful or unreasonable, like the Confederate battle flag.[298]

Justice Alito's dissent shows he was not enthused with Justice Breyer's adaptation of his articulation of government speech doctrine in *Summum*.[299] License plates, he argues, are not like monuments, but "little mobile billboards on which motorists can display their own messages."[300] Justice Alito goes on to note that the State had allowed other specialty plates over public objections about offensiveness, specifically citing the Buffalo Soldiers plate design, which was adopted by the Texas DMV in spite of protests by Indigenous peoples.[301] The Black cavalry regiment known as Buffalo Soldiers are part of a legacy of Black military service to the United States and are notable for their deployment in colonization and genocide of Indigenous peoples in the North American West.[302] While Justice Alito correctly cites the history and controversy over Buffalo Soldiers, the comparison appears more out of convenience than concern.[303] An obvious answer to Justice Alito's proposition would be to deny

[295] *Id.* at 212.

[296] *See id.* at 216.

[297] *See id.* at 219.

[298] *See id.*

[299] *See id.* at 221 (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting).

[300] *Id.* at 223. Ironically, Justice Alito expressed profound concern that the state's regulation of these "little billboards" would promote a doctrine that permits the state to unconstitutionally regulate "big, stationary billboards" particularly electronic billboards. *Id.* In early 2022, he concurred in the judgment in part and dissented in part on a case involving such big, stationary billboards in which the Court found that the City of Austin's (Texas again, naturally) on-/off-premises sign regulations were facially content-neutral and remanded for further consideration of the regulations under the First Amendment. *See* City of Austin v. Reagan Nat.'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1475-76 (2022). Justice Alito in his concurrence agreed that such a regulation was not facially unconstitutional but argued that on remand lower courts should consider whether the "provisions are unconstitutional as applied to each of the Billboard's at issue." *Id.* at 1479-80 (Alito, J., concurring in part and dissenting in part).

[301] *See Walker*, 576 U.S. at 227 (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting).

[302] *See id.*

[303] Critically, this might also be the first time he expressed concern about the history of state-sponsored genocide against Indigenous peoples, considering he authored *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655-56 (2013), just two years earlier. There, Justice Alito diminished the vital role the Indian Child Welfare Act plays in recognizing Indigenous Nations' efforts to resist the ongoing effects of federally sponsored genocide and the continued taking of Indigenous children, spending most of his opinion criticizing different

both license plates on the same grounds that they endorse racialized violence. But Justice Alito does not carry his point to its logical conclusion, instead he leaves the issue dangling as bait. Such disingenuous concern is typical of Justice Alito's use of racialized groups to counteract calls for racial justice.[304]

Justice Alito emphasizes that monuments' unique features make them government speech under *Summum* because of their long history of use by governments, their permanence, and their spatial limitations.[305] Thus, Justice Alito doubles down on the formalism that Justice Breyer warned against in *Summum*.[306] In his *Walker* dissent, Justice Alito attempts to draw a line between the application of government speech based as much on the type of expression—a monument versus a license plate—as the government's ability to control the message and decision to associate with the speech presented.[307] Although license plates have a governmental function and are regulated by the government with explicit governmental affiliation, the program is not as permanent, spatially limited, or historically significant as the monuments in *Summum*.[308] Instead, in Justice Alito's view, the state took a stance on a "controversial symbol," the Confederate battle flag, and excluded legitimate private speech from a limited public forum: "pure viewpoint discrimination."[309]

After *Walker*, government speech depends on three central questions: (1) whether the government uses the medium for expression (monuments in *Summum*, license plates in *Walker*), (2) whether an observer associates the expression with the government, and (3) whether the government maintains

Tribes' recognition practices and speculating on the race of a child who is a citizen of the Cherokee Nation, under a rhetoric of colorblindness. *See generally* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295 (2015).

[304] *See, e.g.*, Jeremiah Chin, Marginalized Significance: Race and Scientific Evidence in the United States Supreme Court 204-17 (May 2017) (Ph.D. dissertation, Arizona State University), https://keep.lib.asu.edu/_flysystem/fedora/c7/178761/Chin_asu_0010E_16819.pdf [https://perma.cc/3ZJ6-FJ7A] (discussing Justice Alito's use of Asian American students to argue against University of Texas's use of affirmative action in his dissent in *Fisher v. University of Texas*, 579 U.S. 365, 389-426 (2016)). *See generally* Robert S. Chang & Neil Gotanda, *Afterward: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012 (2007) (discussing racial triangulation and positioning of different racialized groups as temporarily co-opted by issue-specific alignment with white supremacy in order to destabilize broader claims for racial justice); Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE. L. REV. 947 (2013) (discussing racial triangulation and use of model minority myth in positioning Asian Americans to disparage other racialized groups and reinforce white supremacy).

[305] *See Walker*, 576 U.S. at 228 (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting).

[306] *See id.*; Pleasant Grove City v. Summum, 555 U.S. 460, 484 (Breyer, J., concurring).

[307] *See Walker*, 576 U.S. at 229-34 (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting).

[308] *Id.*

[309] *Id.* at 234.

"direct control over the messages conveyed."[310] Weighing these considerations, Justice Breyer and the majority found that license plates are government speech, and, therefore, the state may reject association with the Confederate battle flag.[311] Justice Alito and the dissenters would require Texas to associate with the Confederate battle flag on any plate purchased by the SCV, otherwise it would be viewpoint discrimination.[312] By reclassifying the license plate as private speech, rather than government speech,[313] Justice Alito skirts around concerns about the DMV not wanting to associate itself with the SCV or the Confederate battle flag. In either case, and at this point in the development of the government speech doctrine, the central concern is whether the state may choose which speech to associate with, or dissociate from, rather than the meaning of the speech itself.

In *Walker*, the DMV denying the special SCV plate does not say that those who support white supremacy cannot express that through the Confederate battle flag, but that the state does not align with that message.[314] Interestingly, Justice Thomas joined the majority in *Walker* and dissented in *Black*,[315] despite both being cases dependent on the message conveyed by symbols central to white supremacy following the Civil War: cross burnings and Confederate monuments. These explicit markers of white supremacy share the purpose of intimidation and control of space. Cross burnings are more violent but temporary markers of intimidation, while monuments are designed for permanence.

Government speech exists outside the First Amendment; the government is allowed to speak and is not bound to the viewpoint-neutrality requirements ordinarily imposed by the First Amendment.[316] The Court would return to the question of whether the government is speaking or merely providing a forum or registration system thanks to a provocatively named northwestern dance-rock band in *Matal v. Tam*.[317]

2. Too Much Speech: *Matal v. Tam*

After disagreeing on the application of government speech doctrine in *Summum* and *Walker*, Justice Breyer joined Justice Alito's majority opinion in *Tam*, deciding that the Patent and Trademark Office ("PTO") is not involved in government speech in the approval of trademarks.[318] An Asian American dance-

[310] *Id.* at 210-13 (majority opinion).

[311] *See id.* at 216.

[312] *See id.* at 223.

[313] *See id.* at 221-23.

[314] *See id.* at 213.

[315] *See* Virginia v. Black, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting).

[316] *See Walker*, 576 U.S. at 208.

[317] 582 U.S. 218 (2017).

[318] *Id.* at 233-39. The section of the opinion that applied the government speech doctrine was authored by Justice Alito and joined by all other justices except Justice Neil Gorsuch, who did not participate in the case. *Id.* While other areas of the opinion in the application of

rock band from Portland, Oregon, that uses a racial slur against Asians as its band name, sought to trademark the slur "The Slants."[319] The PTO denied the registration under the disparagement clause of trademark law, arguing in part that a trademark is government speech because the state is choosing whether to associate with a particular mark and its meaning.[320] The Court unanimously disagreed, finding that trademarks are simply a registry of private speech, and not government speech: "If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently."[321]

Government speech is an exception to the requirements of the First Amendment, not a general rule for any governmental action.[322] The Court explains that the doctrine recognizes the importance of governmental decision-making that "necessarily takes a particular viewpoint and rejects others."[323] Again, the Court returns to the fact that monuments are special: used traditionally by governments to speak to the public, adopted selectively, with finite space.[324] Trademarks, on the other hand, have no finite quality, do not convey any association with the government unlike monuments or license plates, and are not subject to the direct control of the government.[325]

Importantly, the Court warns of the dangers of extending the government speech doctrine to any association between the government and private speech:

> [W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of

viewpoint-neutrality requirements of the First Amendment are splintered among the Court, the government speech section of the opinion is unanimous. *Id.*

[319] *See id.* at 223. Confederate monuments and racial slurs as trademarks certainly overlap in the government's insulation of racially disparaging symbols, but for purposes of this Article, I focus only on the government speech analysis in *Tam*, rather than engage in the Court's larger discussion of viewpoint neutrality and intellectual property. Thankfully, that work is being done in remarkable ways by other scholars with insights into the intersections of race and intellectual property. *See* ANJALI VATS, THE COLOR OF CREATORSHIP 13 (2020) (developing theory of Critical Race Intellectual Property by contextualizing intellectual property law and racialization in United States). *See generally* Anjali Vats, *Temporality in a Time of* Tam*, or Towards a Racial Chronopolitics of Intellectual Property Law*, 61 IDEA 673 (2021) (discussing role of *Tam*, intellectual property, and time in normalizing racial capitalism and colonization under protection of free speech).

[320] *See Tam*, 582 U.S. at 228.

[321] *Id.* at 236.

[322] *See id.*

[323] *Id.* at 234.

[324] *Id.* at 237-38.

[325] *Id.* at 238.

> disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.[326]

Government adopts private speech as its own in limited circumstances, which the Court does not comprehensively articulate. However, the one circumstance the Court has continuously reaffirmed the adoption of private speech for is public monuments. The three factors of *Summum* are reiterated, and Justice Alito's reasoning in the government speech part of the opinion even extends the majority's reasoning in *Walker*, which he previously rejected.[327] The determinative factor of government speech is not selection through a registry or other process but rather the mode of speech (a monument or license plate) that clearly associates such speech with governmental protection.[328] In *Tam*, the Court spent little time debating or discussing the meaning of the speech in question; it simply accepted that it was meaningful and offensive before it focused on the considerations of viewpoint discrimination and neutrality by the PTO.[329]

Unlike the slur at issue in *Tam*, there is no question that Confederate monuments fit in the realm of government speech because they are all taking up finite space, subject to the approval of local and state authorities, clearly associating the state with the monument. The tension in the most recent government speech cases revolves around the government's ability to control the meaning of the speech it adopts.

3. Trust the Process: *Shurtleff v. City of Boston*

The Court returned to an explicit government speech analysis in 2022 in *Shurtleff v. City of Boston*[330] when it considered the City of Boston's practice of allowing groups to hold flag-raising ceremonies in its City Hall Plaza.[331] Boston permitted groups to raise a flag on the pole reserved for the City's flag but without a written policy on what flags were permissible.[332] In 2017, Boston rejected Harold Shurtleff's request to hold a flag-raising event for the "Christian flag," a white rectangular field with a dark-blue square in the upper-left corner and a large blood-red Latin cross in the center of the dark-blue square.[333] At the Supreme Court, the justices unanimously held that the City of Boston

[326] *Id.* at 235.

[327] *Id.* at 235-36.

[328] *Id.* Furthermore, the Court distinguishes the funding and subsidy precedents that lead to the government speech doctrine, solidifying government speech as a distinct doctrinal analysis, even as related to the cases that formed the foundation of the doctrine. *Id.* at 240-42 (first citing Rust v. Sullivan, 500 U.S. 173 (1991); and then citing Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998)).

[329] *See id.* at 231.

[330] 142 S. Ct. 1583 (2022).

[331] *Id.* at 1589-90.

[332] *Id.* at 1587.

[333] *See id.* at 1588.

unconstitutionally engaged in viewpoint discrimination but disagreed on the use of the government speech doctrine.[334]

Writing for the majority, Justice Breyer applied the three-part inquiry derived from *Summum* and *Walker*: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."[335] In contrasting the government's direct control of the selection in *Summum* and *Walker* with the robust registry of *Tam*, the Court emphasized that the central issue of government speech is the amount of control the government exercises over the content of the speech.[336] On balance, the Court held that, while flags convey governmental messages and the City exercised little-to-no control in selecting which flags to display, "the city's lack of meaningful involvement in the selection of flags or the crafting of their messages [led the Court] to classify the flag raising as private, not government, speech—though nothing prevents Boston from changing its policies going forward."[337] Thus, government speech is not only dependent on the means of expression but also on the ability of the government to control meaning even in a selection process. With no selectivity, Boston was not speaking but rather using a means of expression traditionally associated with government as a public space in which any group could participate.

Justice Alito's dissent argued that this is merely the threshold for a government speech analysis. "Government control over speech is relevant to speaker identity" in the government adopting private speech as its own, but control can also be a sign of unconstitutional censorship or viewpoint discrimination.[338] Justice Alito revised his own analysis from *Summum*, which he refers to as a "fact-bound totality-of-the-circumstances inquiry,"[339] to a two-part test that requires the government to show two things:

> First, it must show that the challenged activity constitutes government speech in the literal sense—purposeful communication of a governmentally determined message by a person acting within the scope of a power to speak for the government. Second, the government must

[334] *See id.* at 1593.

[335] *Id.* at 1589-90.

[336] *Id.* at 1592.

[337] *Id.*

[338] *Id.* at 1596 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring). Joined by Justices Thomas and Gorsuch, Justice Alito's dissent is the only one of the three dissenting opinions to actually address the government speech issue. Justice Kavanaugh makes a brief statement implying the City of Boston would "treat religious persons, religious organizations, or religious speech as second-class." *Id.* at 1595 (Kavanaugh, J., concurring). Meanwhile, Justice Gorsuch attempts to clear up the mess of the Court's Establishment Clause jurisprudence since *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See Shurtleff*, 142 S. Ct. at 1603-04 (Gorsuch, J., joined by Thomas, J., concurring).

[339] *Shurtleff*, 142 S. Ct. at 1596 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring).

> establish it did not rely on a means that abridges the speech of persons acting in a private capacity.[340]

Monuments, Justice Alito explains, become government speech because the government adopts the medium of expression "to intentionally express a government message," like in *Summum* where the City took ownership and maintenance of monuments on permanent display in a public area.[341] Consistent with his dissent in *Walker* and opinion in *Tam*, Alito again reaffirms that privately created and donated monuments adopted by a city are the apex of government speech.[342] Without any policy restricting access to the flag-raising ceremony, there could be no purposeful adoption of a message conveyed by private parties, only unconstitutional restriction of a public forum.[343]

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The modern development of government speech doctrine would therefore serve to insulate the white supremacist messaging of Confederate monuments, despite the offensive nature of the speech. Not because a city declared such speech worthy of protection, or expressly agreed with the message (at least recently), but because they are old. Justice Alito's affection for monuments grounds the entire conversation in a presumption of constitutionality simply because the monuments were once selected using government procedure and have continued to exist on government property.[344] For Justice Alito, their permanence not only grants the presumption of constitutionality but also leans in favor of finding government speech because the medium of expression must be installed and maintained by the state, which illustrates a larger degree of control over the speech.[345] Because this government speech is exempt from First Amendment requirements of viewpoint neutrality, the government may adopt the messages in monuments as its own—even when those messages are racist. While determining the original meaning of a monument may be difficult

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[340] *Id.* at 1599.

[341] *Id.* at 1600.

[342] *See* Matal v. Tam, 582 U.S. 218, 237-38 (2017); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 228-29 (2015) (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting).

[343] *Shurtleff*, 142 S. Ct. at 1602-03 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring).

[344] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2083 (2019) ("Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment."); Pleasant Grove City v. Summum, 555 U.S. 460, 473 (2009) ("The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.").

[345] *See Shurtleff*, 142 S. Ct. at 1596-97 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring).

according to Justice Alito,[346] a city's adoption of a monument also adopts the messages the monument conveys.

Yet, because government speech doctrine cases only address the decision to take possession or control of a message,[347] a city's rejection of the message after the monument has stood for a significant period of time has gone completely unaddressed by the Court. Cities and states have few, if any, formal processes for the removal of a monument, and thus, *Shurtleff* creates a procedural hurdle. All cities need is a purpose for adopting a monument and some process for application. Without a process for removal where the city could express reasons why certain monuments are rejected, monuments remain. Confederate monuments tap into what Richard Delgado termed as "procedural racism," which "puts racial-justice claims on the back burner and makes sure they stay there. There is change from one era to another, but the net quantum of racism remains exactly the same, obeying a melancholy Law of Racial Thermodynamics: Racism is neither created nor destroyed."[348] Antimatters follow Delgado's rules of racial thermodynamics, but Confederate monuments highlight how the procedural racism shifts to accommodate white supremacy. The process for adopting Confederate monuments, as Schragger clearly articulates, was plainly antidemocratic.[349] Yet, under *Shurtleff*, a government must have procedures for selecting which monuments to remove and reasons for removal that are democratic in nature.

Modern city governments could clarify their speech, either affirming or removing the monuments that convey messages of white supremacy. This would match both Justice Alito's formalistic framing of the doctrine and Justice Breyer's more flexible contextual analysis. The city would therefore be able to clearly say whether it agrees with the offensive speech or rejects it, either of which are clearly governmental in nature. Yet state laws have taken this form of speech away from cities, often expressly related to Confederate monuments.[350] Cities asserting control of their property when removing the monuments thus run into problems when government speech is not a unified concept. Each case in the government speech doctrine assumes that the government is speaking as an entity, based on the unit of analysis in each case: the city in *Summum* and *Shurtleff*, the state in *Walker*, and the federal government in *Tam*. Yet, when two governments speak, and take contrary messages, the government speech doctrine becomes an inadequate representation of the clear white supremacist meaning of the Confederate monuments derived from their history, dedications, and present-day interpretations.[351] Government speech might provide standing

[346] *Am. Legion*, 139 S. Ct. at 2089.

[347] *See Tam*, 582 U.S. at 239; *Walker*, 576 U.S. at 201; *Summum*, 555 U.S. at 468.

[348] Richard Delgado, *When Is a Story Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 106 (1990).

[349] Schragger, *What Is "Government" "Speech"?*, *supra* note 190, at 693.

[350] *See* Blank, *supra* note 37, at 453; Bray, *supra* note 33, at 7.

[351] COX, NO COMMON GROUND, *supra* note 5, at 15.

for a city to become the party deciding when, where, and how to speak, but it does not guarantee that city may speak freely. After all, the government speech doctrine operates outside the confines of the First Amendment and does not apply the same free speech rules.[352]

D. *Perception*

Government speech doctrine allows the state to select and align with different private expressions if the government purposefully considers the meaning of that expression and has some process of selecting what speech it aligns with. As the hate-speech cases demonstrate, even when the meaning is clear, a government may not categorically regulate expression without allowing context-specific showings of intent and audience.[353] The effect of the speech on the audience is the final important consideration in our doctrinal analysis of antimatters. Confederate monuments are symbols of white supremacy, but their presence, dedication, and removal (by state or municipal action or by independent protesters) are forms of symbolic speech—conduct that conveys a message. How does the Court consider and contextualize competing forms of speech, or perceived meaning?

1. Meaning of the Cross in *American Legion v. American Humanist Association*

After considering license plates and trademarks, the Court returned to considering the meaning of public monuments in *American Legion v. American Humanist Association*,[354] a dispute involving a ninety-four-year-old, thirty-two-foot tall Latin cross on a pedestal on state land in Prince George County, Maryland.[355] The Bladensburg Cross monument was originally dedicated in 1925 to honor those who died in the first World War, listing the names of the Prince George County residents killed on a small plaque at the base.[356] In 2012, the American Humanist Association filed suit, claiming that the maintenance of the cross on public land violated the Establishment Clause of the First Amendment and arguing that the towering monument in the shape of a Latin cross established a religious association with state government because the state maintenance of the monument would favor religion.[357]

Justice Alito—again writing for the majority and again joined by Justice Breyer—does not go to any length to describe the Bladensburg Cross as government speech but presumes the constitutionality "of longstanding

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[352] *See* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589 (2022); *Summum*, 555 U.S. at 467.

[353] *See* Virginia v. Black, 538 U.S. 343, 366-67 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377, 393-94 (1992).

[354] 139 S. Ct. 2067 (2019).

[355] *Id.* at 2077.

[356] *Id.*

[357] *Id.* at 2078.

monuments, symbols, and practices."[358] The Court explains such deference is owed because determining the meaning of the monument at construction is difficult. A monument may have multiple meanings that change over time, but the removal of a religious monument may not be viewed as neutral.[359] Rather than apply government speech factors the Court had previously applied at the adoption or denial of a monument,[360] Justice Alito begins with the presumption of constitutionality and gives no indication of what would upset that presumption. Instead, Justice Alito is concerned that even when monuments are not neutral, removing the monument "may no longer appear neutral, especially to the local community for which it has taken on a particular meaning."[361] Although the large Latin cross is undoubtedly a religious symbol, the Court presumes such a monument is constitutional and considers the different meanings the Bladensburg Cross could convey: "A monument may express many purposes and convey many different messages, both secular and religious. Thus, a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront."[362] The Court renders monuments physically and legally immobile, simply because of the passage of time.

While the majority opinion spends most of its discussion of the meaning of the Bladensburg Cross defending the use of a Christian symbol to represent all World War I soldiers, there is no clear standard on how to determine meaning. The majority stresses that determining meaning at the creation of a monument is difficult and may change over time, but then proceeds to explain why the thirty-two-foot-tall cross clearly did not carry a purely Christian meaning at its construction.[363] The majority, however, did not explain how the cross became a secular symbol over time, or what messages the cross currently conveys.

In a mirror of *Summum*, the *American Legion* Court focused on why a monument should stay rather than why a government might have the authority to reject it. In fact, *American Legion* has little to do with government action at all because the suit was filed by an offended observer,[364] as opposed to *Summum*, *Walker*, and *Tam*, which all arose after the state acted to deny the plaintiff's desired course of action. The question of whether Prince George County could remove the cross was not fully considered; there were only strong implications from Justice Alito's majority opinion that such a removal would express a

[358] *Id.* at 2082.

[359] *See id.* at 2082-85.

[360] Pleasant Grove City v. Summum, 555 U.S. 460, 472-73 (2009).

[361] *Am. Legion*, 139 S. Ct. at 2084.

[362] *Id.* at 2087 (citation omitted).

[363] *Id.* at 2085-87.

[364] Justice Gorsuch raised standing concerns in his concurrence, arguing the case should have been dismissed because the American Humanist Association was suing simply based on the offense of the presence of the monument, which they did not view as a concrete or particularized injury. *Id.* at 2098-101 (Gorsuch, J., joined by Thomas, J., concurring).

viewpoint.[365] *American Legion* thus raises serious concerns about any monument because the blanket presumption of constitutionality covers anything the government touches simply because of the passage of time.

Concerns over the meaning of monuments are left to Justice Breyer's concurrence and Justice Ruth Bader Ginsburg's dissent, which take different views of the monument. In his concurrence, Justice Breyer, joined by Justice Elena Kagan, focuses on the fact that the Latin cross has a unique relationship to World War I and has garnered no local controversy "until this lawsuit was filed."[366] If the cross was recently erected or created with the purpose of disrespecting other faiths, the case is different.[367] Justice Ginsburg's dissent understands the significance of the cross to World War I, but that significance is religious.[368] The cross only marked the graves of Christian soldiers in World War I, as Jewish soldiers were memorialized with the Star of David, and others memorialized with a headstone of their choice.[369] Even then, the use of religious iconography in a cemetery is distinctly different from a public monument.[370] Furthermore, a court-ordered removal would not be so destructive as other opinions imply, given that the remedy would be context specific to the town, memorial, and time.[371]

Rather than deal with the Bladensburg Cross as government speech, the Court in *American Legion* reversed the analysis: first considering the meaning of the monument then considering whether a governmental association was necessary. Again, perhaps the Court avoided the government speech question because the local government did not fully speak—the American Legion quickly intervened and became the named party. But what we are left with for Confederate monuments is a number of concerns: the presumptive constitutionality of monuments simply because they are old, doubts about the ability of a court to determine the meaning of a monument at dedication, and deference to *any* interpretation of the monument rather than Justice Breyer and Justice Ginsburg's decision to look for the meaning to those communities who might be harmed or most affected by the monument itself.

2. Burning Speech: *United States v. O'Brien*

In a symbolic act of protest against the Vietnam war, David Paul O'Brien burned his selective service registration card on the steps of a courthouse.[372] He was promptly arrested and at trial did not contest that he burned the card but emphasized that his act was to encourage others to "reevaluate their positions

[365] *Id.* at 2086-87 (majority opinion).

[366] *Id.* at 2091 (Breyer, J., joined by Kagan, J., concurring).

[367] *Id.*

[368] *Id.* at 2104 (Ginsburg, J., joined by Sotomayor, J., dissenting).

[369] *Id.* at 2110.

[370] *Id.* at 2111-12.

[371] *Id.*

[372] United States v. O'Brien, 391 U.S. 367, 369 (1968).

with Selective Service, with the armed forces, and reevaluate their place in the culture of today."[373] After conviction, O'Brien challenged the provision of the Military Selective Service Act that criminalized the "knowing" destruction or mutilation of a draft card as a purposeful suppression of symbolic speech in violation of the First Amendment.[374] The majority in *United States v. O'Brien*[375] seemed to acknowledge that symbolic speech is a valid means of expression, but with the caveat that government still retains an interest in regulating the "nonspeech" element of the conduct:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[376]

The Court therefore found that the regulation of the treatment of Selective Service certificates furthers the substantial government interest in the "smooth and proper functioning" of systems Congress has put in place to effectuate the "vital" interest in raising and supporting armies.[377] Because Congress did not create the regulation with the purpose of suppressing speech but rather furthering that substantial interest in Selective Service, the Court upheld O'Brien's conviction.[378]

While the Court makes no express ruling on symbolic speech, the consideration of "speech" and "nonspeech" elements as distinct should raise some considerations from the previously considered government and hate speech doctrines. In *O'Brien*, the Court accepts the proposed meaning and purpose of the expression at face value, even accentuating the purpose of O'Brien's protest by focusing exclusively on the power of Congress to raise armies and create an orderly process of conscripting cisgendered men when it deems necessary.[379] O'Brien's message is clearly sent and received. The Court's concern is whether the state may counteract that speech with criminal consequences, wielding governmental power with criminal penalties.[380] Like Justice Scalia's opinion in *R.A.V.*, the law restricting the speech at issue is more concerned with the mode of expression rather than its content or meaning. If the regulation only prohibited burning draft cards in protest of the government, the Court would likely find a First Amendment issue.

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[373] *Id.* at 369-70.

[374] *Id.* at 374-76 (citing Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 622 (amended 1965)).

[375] *O'Brien*, 391 U.S. 367.

[376] *Id.* at 376-77.

[377] *Id.* at 381.

[378] *Id.* at 385-86.

[379] *Id.*

[380] *Id.* at 381-82.

Like many Confederate monuments, O'Brien's symbolic expression took place on the steps of a courthouse, creating a pointed message about law and governance.[381] But again we run into a problem when the doctrines at issue in Confederate monuments overlap. The acceptance of a monument is government speech,[382] and the removal of a longstanding monument is also government speech—or at least a means of showing that the meaning or purpose of a monument is no longer supported by the government.[383] States expressly prohibiting a mode of expression,[384] like the removal of Confederate monuments, creates conflict under *O'Brien* because the state must only show a "substantial" purpose unrelated to the suppression of free expression.[385] Yet, the same recognition that removal of monuments is an expression also recognizes that the lengthy life of monuments may create different meanings and an additional interest in preserving history—either the history that the monument speaks to, or the history that the monument itself has become.[386] But what of protesters who vandalize monuments into oblivion, either by toppling them or defacing them so repeatedly that the state decides to remove them indefinitely, like with Arizona's Confederate monuments?[387] Destruction, though extreme, is still a form of expression.

3. Embers of Symbolic Speech: *Texas v. Johnson*

In a symbolic act of protest against the Republican National Convention, Gregory Lee Johnson burned an American flag on the steps of the City Hall in Dallas, Texas.[388] Johnson was later convicted under a Texas statute prohibiting "desecration of a venerated object."[389] On appeal, the Supreme Court found in *Texas v. Johnson*[390] that Johnson's speech was expressive conduct protected by the First Amendment.[391] First, the Court recognized that the burning of a flag is a constitutionally protected form of expression because Johnson burned the flag as part of a political protest, and, thus, he communicated a message through his conduct.[392] To determine whether to apply the substantial interest consideration of *O'Brien*, the Court considered and rejected the state's arguments for preventing breaches of the peace and preserving the flag as a "symbol of

[381] *Id.* at 369.
[382] Pleasant Grove City v. Summum, 555 U.S. 460, 472-73 (2009).
[383] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084-85 (2019).
[384] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).
[385] *O'Brien*, 391 U.S. at 377.
[386] *Am. Legion*, 139 S. Ct. at 2084.
[387] *See* Oldham, *supra* note 208.
[388] Texas v. Johnson, 491 U.S. 397, 399 (1989).
[389] *Id.* at 400 (citing TEX. PENAL CODE ANN. § 42.09(a)(3) (West 1988)).
[390] *Johnson*, 491 U.S. 397.
[391] *Id.* at 420.
[392] *Id.* at 406.

nationhood and unity."[393] While the symbolism of the flag is a significant interest, the Court viewed this as enhancing rather than defeating Johnson's First Amendment claim: "Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."[394] Thus, the meaning of the destroyed object enhanced the expressive nature of the conduct, squarely placing the flag burning within the First Amendment, and highlighted that the Texas antidesecration statute "is designed instead to protect [the flag] only against impairments that would cause serious offense to others."[395] While shielding observers from offensive displays and defense of the flag as a symbol of national pride may be noble, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[396]

Symbolic speech therefore not only refers to iconography but also conduct that expressly conveys a message. The state's interests in regulating that conduct must be related to a substantial interest as in *O'Brien*, but general understandings of national unity or heritage are not sufficient to suppress the expressive destruction of a flag. Expressive destruction of Confederate monuments would theoretically fall within the same type of speech as *Johnson*: protesters remove monuments to Columbus and the Confederacy to rebuke the racial injustice, white supremacy, and colonization that the statues represent.[397] The expressive act of destruction gains meaning from the purpose and message of the item destroyed. Burning a flag expresses dissatisfaction with the government; destroying a Confederate monument expresses dissatisfaction with white supremacist government. Destruction can refer to either the city's orderly removal of a monument, which destroys its place in government speech, or to the protesters toppling and vandalizing monuments. Unfortunately, *Johnson* does not grant a blanket immunity for protests that topple monuments to white supremacy.[398] The state would likely still bring charges of vandalism or destruction of government property, with fines to follow. However, the act of removing the monument itself is a form of symbolic speech that fits within the First Amendment.

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To bring the doctrinal discussion full circle, accepting a monument is government speech,[399] and the symbolic removal of a monument may also be

[393] *Id.* at 406-10.
[394] *Id.* at 411.
[395] *Id.*
[396] *Id.* at 414.
[397] COX, NO COMMON GROUND, *supra* note 5, at 8-9.
[398] *Johnson*, 491 U.S. at 414.
[399] Pleasant Grove City v. Summum, 555 U.S. 460, 470-71 (2009).

government speech,[400] but the removal of a symbol of hatred by a municipality can then be denied by state laws protecting monuments as government speech.[401] In states where local government speaks to favor a Confederate monument and later chooses to disfavor by removal, state statutes prevent that local expression by marking Confederate monuments with historical protections, making it exempt from even the symbolic speech act of removal, and allowing criminalizing the symbolic act of destruction as per se unconstitutional.[402] Confederate monuments provoke more than just "mere offense,"[403] their protection as government speech and the adoption of the expression of solidarity with the Confederacy goes to the nature of democratic governance. Placement at the center of city and state government parks and courthouses become part of the landscape, an ambiance of white supremacy pervading the institutions that are theoretically designed to represent all persons, not just white persons honored by the Confederacy.[404] Confederate monuments are not just about the ill feelings and unease of seeing a general or unnamed soldier that would rather see Black people enslaved. These symbols represent a defeated government that sought to preserve slavery and have now been symbolically adopted by the current government.[405] Confederate monuments are not just speech, but a form of governance.

Confederate monuments become focus points for protests for racial justice because they sit at the center of government and represent part of this routine disparagement of Black life. Thus, when demonstrations against police violence begin, Confederate monuments are obvious targets for expressions of cultural trauma because they mirror the regularity of state violence. Ordinarily, sociologists theorize that cultural trauma is born from a disruption of settled expectations. Yet, Angela Onwuachi-Willig's insightful application of cultural trauma theory explains that Black cultural trauma also emerges from the reification of the routine

> within systems that regularly and disproportionately subjugate and devalue certain groups, much like the criminal justice system does with African Americans, the reliability and predictability of routine norms do not bring a sense of comfort and security for the denigrated group; rather, they bring greater stress, a stronger sense of exclusion, and the immense anxiety

[400] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084-85 (2019).

[401] Virginia v. Black, 538 U.S. 343, 366-68 (2003); Blank, *supra* note 37, at 395-96; Bray, *supra* note 33, at 17.

[402] Bray, *supra* note 33, at 17.

[403] Schragger, *What Is "Government" "Speech"?*, *supra* note 190, at 675 (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

[404] COX, NO COMMON GROUND, *supra* note 5, at 22.

[405] *See* Bray, *supra* note 33, at 14.

> associated with the group's not feeling protected under the law or any other governmental system.[406]

Confederate monuments are government speech that symbolizes the expectation of harm, the routine denigration of Black denizens in spaces where they have always belonged but have not always been permitted. Emily Behzadi cleverly argues that cultural trauma is also grounds for challenging Confederate monuments as a public nuisance because "[n]ot only do they risk the public's health and safety, they also create a sense of exclusion for an entire class of citizens."[407] Removal could be a step towards remedying the routine trauma, but because the Court is so ephemeral in the purpose and perception of the monuments, this layer of process is more slippery in states like Alabama where cities are subject to the will of the legislature and where the state has enacted facially neutral, protective measures.

In *American Legion*, Justice Alito's majority opinion expresses concerns over the potential message that removal may convey. There, the removal of a monument was through a court proceeding, not a legislative or executive action, which are the usual forms of government speech that adopt monuments.[408] Forcing a state to perpetuate a message it disagrees with would go against the principles of government speech that require the government to exercise control or purposefully adopt the message conveyed by a monument.[409] Particularly in the case of Confederate monuments—which were largely adopted when Black voters were legally and forcefully excluded from the democratic process—Confederate monuments form a type of government speech that is presumptively constitutional but also presumptively antidemocratic.[410]

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[406] Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 347 (2016).

[407] Emily Behzadi, *Statues of Fraud: Confederate Monuments as Public Nuisances*, 18 STAN. J. C.R. & C.L. 1, 48 (2022).

[408] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

[409] *Compare* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1593 (2022) (holding Boston's lack of meaningful involvement in flag selection while refusing to hoist Christian flag violated First Amendment), *with id.* at 1599-1600 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring) (arguing adopted speech is only government speech if control is alienated to government and is intentionally expressed by government).

[410] *See* Schragger, *Of Crosses and Confederate Monuments*, *supra* note 228, at 100-01 (noting Confederate monuments were largely adopted under systems of racial apartheid lacking democratic accountability that is at core of theory of government speech); Schragger, *What Is "Government" "Speech"?*, *supra* note 190, at 693 ("The Confederate monuments erected during the Jim Crow era, however, are the very antithesis of representative. They were erected when African-Americans were disenfranchised, in places that purposefully segregated them from the political, economic, and social life of the community. So too, it is anti-democratic when one political community forces another one to continue speaking in that same anti-democratic register, as states are doing when they force local governments to keep their monuments. Doing so constitutes a form of political and symbolic domination and it

Curiouser and curiouser, the intersections of speech doctrines go down the rabbit hole into a hall of mirrors, confounding when and how a government may speak about a monument it no longer desires. When combined with state and federal statutes that categorically preserve monuments' historical significance, monuments that intimidate by invoking a history of oppression for intimidation[411] are now protected as historically significant. The state's interest in preserving history runs contrary to the actual function of Confederate monuments: enshrining the historical lie that the South fought valiantly for a purpose other than white supremacy and the maintenance of Black peoples as property.[412] At the intersections of speech doctrines, the Lost Cause finds new purpose, and Confederate monuments endure as antimatters.

> *No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." In this rare circumstance, that means our duty is to say "this is not law."*
>
> —Chief Justice Roberts[413]

> *The South got somethin' to say.*
>
> —Outkast[414]

CONCLUSION

Monuments are not just government speech; they represent governance itself. Monument removal became a viable position once Black political power came to fruition in the twentieth century, thus state retrenchment sought to ensure that local Black power did not resist state-wide white supremacy. Confederate monuments, as symbols of white supremacy, entrench white governance.[415] Yet,

arguably violates the minimal representativeness requirement for legitimate government speech." (citations omitted)).

411 COX, NO COMMON GROUND, *supra* note 5, at 22-23.

412 *Id.* at 15-18.

413 Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

414 Sanford Gardner, *"The South Got Something To Say,"* MEDIUM (May 3, 2021), https://medium.com/christ-school/the-south-got-something-to-say-402d898685ce [https://perma.cc/WF6A-3HGE]; *see also* REGINA N. BRADLEY, CHRONICLING STANKONIA: THE RISE OF THE HIP-HOP SOUTH 30 (2021) (referring to moment as rallying cry that imagines South as recognition of varied phenomena that make up distinctly southern experiences and not monolithic assumption of white supremacy often imposed on South).

415 Importantly, there are gendered dynamics to the adoption of monuments as white women curated the legacy of the Confederacy, and white men adopted such monuments as government speech. *See* COX, DIXIE'S DAUGHTERS, *supra* note 36, at 55.

as antimatters illuminate, Confederate monuments are protected as government speech, but their removal is placed outside the law by the same doctrines defining purpose, processes, and procedures underlying monuments. Courts create typologies to define what government speech is, but once Confederate monuments are so categorized, the expressive, white supremacist content is now "not law" and often untouchable by later governments who wish to reject such affirmations of the Confederacy, like the City of Birmingham, Alabama. However, just as Outkast's declaration about the South sent a message in 1990's hip-hop that there were voices outside the traditional arenas of East and West, the South has declared there are more voices than white supremacy and white nationalism in agitating against Confederate monuments.[416]

Protesters turn the private, government speech into a public forum and contest the existing power structure. Rather than litigate the meaning of the monument before the Court, protesters contest that meaning and change the monument and space through a nonlitigation process. Just as monuments signal empire,[417] public demonstrations against government challenge empire.[418] That speech

[416] COX, NO COMMON GROUND, *supra* note 5, at 63.

[417] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) ("Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power.").

[418] The destruction of monuments as a challenge to the status quo and as a symbol of regime change is not a modern trend. In the United States, destruction of monuments was a rallying cry in the Revolutionary Era, when insurgents in New York City famously tore down the equestrian statue of King George III and melted down the scrap into bullets. *See* Wendy Bellion, *A Toppled Statue of George III Illuminates the Ongoing Debate over America's Monuments*, SMITHSONIAN MAG. (Jan. 28, 2022), https://www.smithsonianmag.com/history/a-toppled-statue-of-george-iii-epitomizes-the-ongoing-debate-over-americas-monuments-180979463/ [https://perma.cc/PD85-YH3D]. During the counterculture movement in the twentieth century, activists bombed a Chicago monument of police officers who violently broke up a labor rally in 1886. *See* John Kifner, *Explosion in Chicago Rips Statue of a Policeman*, N.Y. TIMES (Oct. 6, 1970), https://www.nytimes.com/1970/10/06/archives/explosion-in-chicago-rips-statue-of-a-policeman-haymarket-monument.html. The vandalism and destruction of the Confederate monuments in Birmingham, Alabama, and Arizona continue this venerable American tradition, albeit on a less explosive scale. *See* Oldham, *supra* note 208; *see also* Ortiz, *supra*, note 2. Internationally, the destruction of monuments occurred in many contexts, notably during the French Revolution, when revolutionaries tore down statues of former monarchs; in postindependence Ireland, when an Irish nationalist dynamited a pillar commemorating Admiral Nelson in Dublin; and most famously in 2003, when Iraqis tore down the statue of Saddam Hussein in Baghdad following the successful U.S. invasion. Frédérique Baumgartner, *Rethinking Revolutionary Vandalism: Destruction and Creation in a Drawing by Hubert Robert*, TRANSACTIONS AM. PHIL. SOC'Y, 2021, at 105, 106-07; Diarmaid Fleming, *The Man Who Blew Up Nelson*, BBC: NEWS (Mar. 12, 2016), https://www.bbc.com/news/magazine-35787116 [https://perma.cc/SF44-K2CE]; Jane Arraf, *Iraqi Who Toppled Saddam Hussein Statue 15 Years Ago Regrets His Action*, NPR (Apr. 9, 2018, 5:06 AM), https://www.npr.org/2018/04/09/600761800/iraqi-who-toppled-saddam-hussein-statue-15-years-ago-regrets-his-action [https://perma.cc/659U-4KJF].

should, ironically, be protected by the public forum analysis.[419] Drawing attention to the convergence of Confederate monuments and governance can serve to reframe and recontextualize the protest. Sometimes a change in monuments can happen quickly, like in Virginia when the state removed the statue of Robert E. Lee at the center of controversy.[420] The Unite the Right rally and the subsequent counterprotests created an untenable situation for a statue in the heart of the Confederacy.[421] Public forum created contested space, and the government acted in response. A removal is government speech just as the statue's adoption is government speech. The matter of government expression and antimatter of Confederate monuments come into conflict extinguishing both—a political bonus for states that hope to extinguish tension by removing monuments. State laws prohibiting removal entrench the antimatters of Confederate monuments, by adding an additional gloss of neutrality to the government speech doctrine, restraining cities from acting. However, as the symbolic speech doctrine and the frequency of monument topplings demonstrate, this does not prohibit the space from being contested.

Public demonstrations, such as vandalism or forced destruction, are another type of matter used to contest the antimatters of Confederate monuments. The inciting governmental action leads to demonstration against the sites and symbols of governance; cities that could not remove the Confederate monuments under ordinary procedures bring protesters into a direct confrontation. Matters and antimatters collide in a destructive force that annihilates the monument itself. As Frantz Fanon explains, this type of anticolonial violence becomes "a cleansing force. . . . The praxis which pitched them into a [hand-to-hand] struggle has given the masses a ravenous taste for the tangible."[422] A government's removal of Confederate monuments may be an attempt to pacify an insurgent crowd contesting the legitimacy of government, but when Confederate monuments sit at the centers of government power, the tearing down of the monument stokes insurgency to contest the monument, the government, and the systems of domination they represent.

Antimatters thus identify power of governance through law and policy.[423] Just as antimatter in physics has an explosive reaction when interacting with its

[419] *See, e.g.*, *Summum*, 555 U.S. at 469-71 (distinguishing government speech from ordinary public forum in surrounding areas).

[420] Ben Paviour, *Charlottesville Removes Robert E. Lee Statue That Sparked a Deadly Rally*, NPR (July 10, 2021, 1:15 PM), https://www.npr.org/2021/07/10/1014926659/charlottesville-removes-robert-e-lee-statue-that-sparked-a-deadly-rally [https://perma.cc/6C7L-2LME].

[421] *See id.*

[422] FRANTZ FANON, THE WRETCHED OF THE EARTH 47 (Richard Philcox trans., Grove Press 2021) (1961).

[423] While Confederate monuments are certainly a distinct application of government speech and the law, they are not the only antimatters possible for discussion. The "shadow docket" process similarly reifies and defies the procedures of judicial decision-making, obfuscating state power. Rather than follow ordinary processes for review of cases through

matter counterpart, Confederate monuments signal an explosive interaction between legal matters of ordinary speech doctrine and monument removal, demonstrated by the response of protesters to Confederate monuments. Although state legislation would prohibit the removal of Confederate monuments via "statue statutes,"[424] protesters' reactions have turned Confederate monuments into the power source used in science fiction, harnessing the reaction between matters and antimatters to contest the white supremacy these statues represent. Government speech is explosive when exposed to nongovernment speech in the protected statues and extralegal protests. Thus, antimatters also contemplates the reaction that forms when that "nonpublic forum" is turned into a public referendum on governance itself. The trick for the future will be harnessing that reaction into a sustainable source of power, rather than a flash explosion.

Confederate monuments memorialize the dead to police the living; they speak of governance—by violence and fear through white supremacy.[425] Yet, antimatters render the legal remedies inert. Governmental actions speak louder than government speech in Alabama, where demands for change at a local level cannot be translated into action by operation of law.[426] Antimatters and matters collide in protests when monuments are vandalized or toppled. Destruction of monuments does not threaten to disturb or rewrite history because no history is present in the monuments—they are edifices to a white supremacist narrative of memory that is tethered to historical fact by dental floss.

Confederate monuments as antimatters also remind us that counter-monuments and reeducation plaques are more likely to serve as false equivalences. A memorial to Martin Luther King, Jr.'s contributions to the city of Memphis is not proportional to a Memphis monument to Robert E. Lee or Stonewall Jackson. Rather, it reaffirms the Lost Cause narrative that the struggle of Confederate generals was some noble purpose, on par with civil rights. It legitimizes antidemocratic white supremacy at the center of government by equating it with collective activism to establish democratic voice and

certiorari, the judiciary has increasingly wielded its power through established procedure but outside the ordinary mechanisms since the rapid expansion of emergency rulings beginning in 2017—a legal matter inverted. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (forthcoming May 2023). Future works on antimatters should also consider different methodologies deployed by the Court, the recent implementation of jurisprudence like originalism requires a critical reframing of both the ordinary assumed powers of decision-making and historiography while deploying juridical powers.

[424] Bray, *supra* note 33, at 7.

[425] Brayboy & Chin, *supra* note 138, at 26.

[426] There is much more to be said about the spatial relations that monuments themselves reveal, beyond doctrine and into the social and historical relations mentioned in Part II. *See also id.* at 26-27. *See generally* RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY (Sherene H. Razack ed., 2002); Brooke Neely & Michelle Samura, *Social Geographies of Race: Connecting Race and Space*, 34 ETHNIC & RACIAL STUDS. 1933, 1944 (2011).

representation in government. King was assassinated seeking fair wages and dignity for Black sanitation workers; Lee was defeated while defending slavery. These monuments play into "the very serious function of racism, which is distraction."[427] The answer may be in refusal,[428] such as Birmingham accepting the fines and costs of removing its Confederate monument, in spite of the state statute prohibiting otherwise.[429] Refusal by protesters leads to their indefinite removal from the public eye for repairs.[430] Like O'Brien's act of protest,[431] the vocal contestation of the statue solidifies the cities' citizens' commitment to racial justice, far louder than cities' administrative removals of monuments at night. Refusal asserts a sense of self-determination outside the confines of externally imposed paradigms—a collective action that defies colonial norms of place and belonging.[432] Toppling a monument refuses governance by terror, refuses the denial of expression—even after all procedures for removal are followed, all governments speech requirements are met, all doctrines are satisfied. Refusal fills the void left by the collision of matters and antimatters to continue the story of a place, the void left by the monument and the reasons why it can no longer remain.

There is no single answer for the question of what to do with each Confederate monument. A mass removal would be a statement of solidarity and a rebuke of

[427] Toni Morrison, Primus St. John, John Callahan, Susan Callahan & Lloyd Baker, Black Studies Center Public Dialogue, Part 2 (May 30, 1975), *in* PORTLAND STATE UNIV., SPECIAL COLLECTIONS: OREGON PUB. SPEAKERS (2020) ("It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being. Somebody says you have no language, so you spend twenty years proving that you do. Somebody says your head isn't shaped properly, so you have scientists working on the fact that it is. Somebody says you have no art, so you dredge that up. Somebody says you have no kingdoms, so you dredge that up.").

[428] Audra Simpson writes eloquently of refusal in ethnography as a way of asserting sovereignty by Indigenous peoples. Refusal manifests

> in the discursive, material and moral territory that was simultaneously historical and contemporary (this "national" space) and the ways in which *Kahnawakero:non*, the "people of Kahnawake," had *refused* the authority of the state at almost every turn. The ways in which their formation of the initial membership code . . . was refused; the ways in which their interactions with border guards at the international boundary line were predicated upon a refusal; how refusal worked in everyday encounters to enunciate repeatedly to ourselves and to outsiders that "this is who we are, this is who you are, these are my rights."

Audra Simpson, *On Ethnographic Refusal: Indigeneity, 'Voice' and Colonial Citizenship*, JUNCTURES, Dec. 2007, at 67, 73.

[429] Rankin, *supra* note 2.

[430] *See Attorney General Steve Marshall Files New Lawsuit Against Birmingham over Removal of Confederate Monument*, 6WBRC (June 2, 2020, 6:45 PM), https://www.wbrc.com/2020/06/02/attorney-general-steve-marshall-files-new-lawsuit-against-birmingham-over-removal-confederate-monument/ [https://perma.cc/C5PH-R8VU]; *Memorial to Arizona Confederate Troops*, HIST. MARKER DATABASE (Feb. 11, 2010), https://www.hmdb.org/m.asp?m=27400 [https://perma.cc/BR9P-EDTP].

[431] United States v. O'Brien, 391 U.S. 367, 369 (1968).

[432] *See* Simpson, *supra* note 428, at 73.

the Confederacy that would be deeply meaningful but politically untenable considering the rampant violence of white supremacists.[433] The ultimate choice should rest in the hands of the locality where the monument sits—allowing the remedy to be decided by those who have suffered harm at the hands of the monument and the lingering of white supremacy. Du Bois makes clear that the Confederacy, and the failure to follow through on Reconstruction in the South, left harms in the community for Black and white residents.[434] However, what is normatively clear is that state governments have protected these monuments, and therefore white supremacy, and that this special nexus of protection, antimatters, must be reckoned with and abolished. Removing a Confederate monument unfortunately does not remove white supremacy, but it is part of a struggle for racial justice. An abolition democracy is possible,[435] but it must come from the people and it must confront white supremacy in its varied forms, from the laws to the monuments, in a collision of matters and antimatters.

[433] Notably, the January 6th attack on the U.S. Capitol has so many features of demonstration and protest and could even be seen as a refusal of government—not in the Audra Simpson sense I use above, but a refusal to accept the government is not acting *exactly* as they expected. That insurrection not only takes up white supremacy as a rallying cry but attempts to interrupt government processes to ensure that a type of governance continues. This is not a challenge to existing power, but a challenge to any who might question or consider altering the power that existed at the time of insurgency. It is not a protest of government, but a whining that government is not so clearly, squarely within control of the insurgent white supremacist few. The consequences and outcomes of the January 6th insurrection are ongoing, developing through the Congressional investigation, with the report having been recently published on December 22, 2022. *See* H.R. REP. NO. 117-663 (2022).

[434] *See* DU BOIS, BLACK RECONSTRUCTION, *supra* note 29, at 721.

[435] Roberts, *supra* note 132, at 8.