

ARTICLES

THE SOUTH WILL (NOT) RISE AGAIN: THE RELIGION OF THE LOST CAUSE MEETS THE POLITICS OF CONFEDERATE MONUMENT REMOVAL

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ABSTRACT

According to the Supreme Court of the United States' rulings in Pleasant Grove City v. Summum and Walker v. Texas Division, Sons of Confederate Veterans, Inc., there is a fundamental difference between government speech, where a governmental entity expresses its own political views on its property, and private speech on government property wherein the government only facilitates a place for private actors to speak. One key difference is the anticipated duration of the "speech." No matter how long-winded an individual orator might be, at some point, the orator will become fatigued and stop. Thus, even when speaking on government property, such speech is temporary and, by definition, a classic example of the government facilitating private speech. Conversely, however, if the government decides to erect a monument, because the statue's duration is presumably infinite, it becomes government speech with the obvious check of the voting public.

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Prior to passage of the Voting Rights Act of 1965, many municipal governments engaged in political speech by allowing the erection of Confederate monuments on their property in an attempt to lionize the Confederate dead, which is consistent with the religion of the Lost Cause. Since the Voting Rights Act's passage, however, the ability to participate in the political process has expanded to Black Americans and other minorities, who want to tear down Confederate monuments of a bygone era. Inasmuch as there has been a steady interest in Confederate monument removal for decades, the interest received national attention in 2015, after the Mother Emanuel African Methodist Episcopal ("AME") Church shootings in Charleston, South Carolina, as well as in 2017 after the "Unite the Right" rally in Charlottesville, Virginia. Never has the interest been so piqued, however, as during the 2020 #BlackLivesMatter protests after the horrific murder of George Floyd. At the time of this writing, eight state legislatures—Alabama, Georgia, South Carolina, North Carolina, Mississippi, Tennessee, Kentucky, and Virginia—have "heritage protection laws," also known as "statue statutes," which preclude municipalities from removing Confederate monuments. At best, these laws force municipalities to engage in compelled speech. At worst, however, the laws defy the Supreme Court's logic in Pleasant Grove by denying municipalities the right to engage in government speech. This Article calls on those respective legislatures to repeal their "statue statutes."

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INTRODUCTION

Southern whites after the Civil War were overwhelmingly preoccupied with creating a narrative to explain their defeat. Any article about Confederate culture and its evolution following the Civil War, therefore, must begin with understanding how white Southerners came to terms with that defeat, how they justified their failure to create a separate nation, and how they outright rejected the idea that slavery was a primary cause of the Civil War. To do so requires an examination of the evolving post-war narratives about the Old South, the Confederacy, and even Reconstruction: all of which revolve around what Confederates and their descendants called the “Lost Cause.”¹

The central question [for white Southerners] was a theodicy dilemma: how to square the ideas of providential power and white Christians as God’s chosen people with military defeat. Finding Confederate political ambitions foreclosed, the new battle was transposed from the political arena, where disputes were settled with military violence, to the cultural arena.

This new cultural project has become widely recognized by scholars as “the religion of the Lost Cause,” a term derived from an 1866 book with this name by a Richmond editor . . . who called explicitly for a “war of ideas” to sustain southern identity.²

From New Orleans to Durham: My Personal Perspective on Confederate Monuments

In 2017, around the beginning of my doctoral program at Duke University, I had two experiences with remnants of the South’s attempt to lionize the religion of the Lost Cause through government

1. KAREN L. COX, *NO COMMON GROUND: CONFEDERATE MONUMENTS AND THE ONGOING FIGHT FOR RACIAL JUSTICE* 15 (2021).

2. ROBERT P. JONES, *WHITE TOO LONG: THE LEGACY OF WHITE SUPREMACY IN AMERICAN CHRISTIANITY* 89–90 (2020); *see also infra* notes 63–66 and accompanying text.

speech.³ Both incidents dealt with the removal of Confederate monuments⁴—icons of the South’s failures.⁵

The first instance was in May 2017 in my hometown of New Orleans. While serving as the senior pastor of Historic St. James African Methodist Episcopal (“AME”) Church in the city’s downtown area and as general chaplain of Alpha Phi Alpha Fraternity, Inc.,⁶ I led a prayer vigil for the removal of Confederate

3. In *Baptized in Blood*, historian Charles Reagan Wilson describes the South’s cultural sentiment and religious identity after its Civil War defeat by contextualizing a “Southern nationalism” and the *religion* of the Lost Cause. In relevant part, he writes:

[T]he dream of a separate Southern identity did not die in 1865. A Southern political nation was not to be, and the people of Dixie came to accept that; but the dream of a cohesive Southern people with a separate cultural identity replaced the original longing. The cultural dream replaced the political dream: the South’s kingdom was to be of culture, not of politics. Religion was at the heart of this dream, and the history of the attitude known as the Lost Cause was the story of the use of the past as the basis for a Southern religious-moral identity, an identity as a chosen people. The Lost Cause was therefore the story of the linking of two profound human forces, religion and history.

CHARLES REAGAN WILSON, *BAPTIZED IN BLOOD: THE RELIGION OF THE LOST CAUSE, 1865–1920* at 1 (2009 ed.). In further explaining the religious aspects of the Lost Cause narrative, Wilson describes the influence of Southern ministers.

The pro-slavery argument leaned more heavily on the sanction of the Bible than on anything else. Ministers cited biblical examples of the coexistence of Christianity and slavery, quoted Old Testament approvals of slavery, and interpreted a passage from Genesis to mean that [B]lack were descendants of the sinner Ham and destined to be forever bondsmen.

Id. at 4. For a comprehensive interdisciplinary analysis of the so-called “curse of Ham,” attributed to Genesis 9:22–29, see DAVID M. WHITFORD, *THE CURSE OF HAM IN THE EARLY MODERN ERA: THE BIBLE AND THE JUSTIFICATIONS FOR SLAVERY* (2009).

4. According to the Southern Poverty Law Center, at the beginning of 2022, 2,089 Confederate memorials existed in the United States and its territories: 723 monuments, 741 roadways, 201 schools, 104 counties and municipalities, 51 buildings, 38 parks, 22 holidays, 10 military bases, 7 commemorative license plates, 6 bodies of water, and 6 bridges. S. POVERTY L. CTR., *WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY* 6, 9 (3d ed. 2022), <https://www.splcenter.org/sites/default/files/whose-heritage-report-third-edition.pdf> [<https://perma.cc/2MSR-A4NM>]. According to recent legal scholarship, “there were really no [Confederate monument] removals to speak of until the 2015 murders by Dylann Roof.” Jess Phelps & Jessica Owley, *The Afterlife of Confederate Monuments*, 98 *IND. L.J.* 371, 377 (2023) (citing Liz Vinson, *Six Years Later: 170 Confederate Monuments Removed Since Charleston Church Massacre*, S. POVERTY L. CTR. (June 17, 2021), <https://www.splcenter.org/news/2021/06/17/six-years-later-170-confederate-monuments-removed-charleston-church-massacre> [<https://perma.cc/547X-HFYZ>]). For a fuller explanation of the Roof murders, the infamous June 17, 2015 massacre at Mother Emanuel AME Church, in Charleston, South Carolina, see *infra* note 18 and accompanying text.

5. Alexander Tsesis writes, “These [Confederate] monuments memorialize the achievements of military prowess brandished in support of slavery. They are not solely historical markers nor burial obelisks but symbols of racist heritage.” Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 *KY. L.J.* 695, 697 (2020).

6. Founded on December 4, 1906, at Cornell University, Alpha Phi Alpha Fraternity, Inc., is the first intercollegiate fraternity established for African American men. *The Founding of Alpha Phi Alpha*, ALPHA PHI ALPHA FRATERNITY, INC., <https://apa1906.net/our-hist>

iconography in New Orleans,⁷ directly across from a statue of Jefferson Davis, the first and only president of the Confederate States of America.⁸

Unaware of the actual violence that had already occurred and the many looming threats the city's then-mayor, Mitch Landrieu, was navigating,⁹ I gathered with other members of the fraternity and many concerned citizens to openly pray for divine intervention, peaceful protection, and a spirit of reconciliation to heal the many factions that were as real in 2017 as they were in 1865 when the Civil War ended.¹⁰ Our efforts were successful and the Jefferson Davis statue was taken down without incident.¹¹ Moreover, as Landrieu comprehensively recounts, by May 17, 2017, he was ultimately successful in removing the Confederate statues of Jefferson Davis, P.G.T. Beauregard, and Robert E. Lee from public thoroughfares in New Orleans.¹²

In August 2017, the second incident occurred in my adopted home of Durham, North Carolina, on Duke University's campus. Inasmuch as I was a student at the divinity school, I predictably

ory [<https://perma.cc/67S3-2PJE>]. Some of the fraternity's most notable members were prominent leaders in fight for civil rights, including Martin Luther King Jr., Thurgood Marshall, W.E.B. DuBois, Adam Clayton Power Jr., and Edward W. Brooke. *Id.*

7. JONATHAN C. AUGUSTINE, CALLED TO RECONCILIATION: HOW THE CHURCH CAN MODEL JUSTICE, DIVERSITY, AND INCLUSION xv (2022).

8. ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 209 (2016) (discussing the Bible used by Davis in Montgomery, Alabama, on February 18, 1861, when he was sworn in as president of the Confederate States of America); *see also* COX, *supra* note 1, at 49–50 (describing a monument dedication ceremony on April 26, 1886, in Montgomery, marking Confederate Memorial Day in Alabama, near the spot where Davis took his oath as president of the Confederate States of America).

9. *See, e.g.*, MITCH LANDRIEU, IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY 194–96 (2018).

10. Jeff Adelson, *African-American Fraternity Holds Prayer Vigil at Jefferson Davis Statue, Calls for Removal, Reconciliation*, NOLA (May 4, 2017), https://www.nola.com/news/african-american-fraternity-holds-prayer-vigil-at-jefferson-davis-statue-calls-for-removal-reconciliation/article_ca2fe7fc-83dc-5abb-a494-3d23f69b3ecc.html [<https://perma.cc/7SRT-E5TC>]; WWL Staff, *Group Leads Prayer Vigil for Peaceful Removal of Confederate Monuments*, WWLTV (May 4, 2017, 10:39 PM), <https://www.wvlv.com/article/news/local/group-leads-prayer-vigil-for-peaceful-removal-of-confederate-monuments/289-436987765> [<https://perma.cc/MDK2-RV5R>].

11. LANDRIEU, *supra* note 9, at 196.

12. *Id.* at 196–99. Fellow native New Orleanian, Clint Smith, shares that the removal of the Robert E. Lee statue in May 2017 motivated him to know more about how slavery impacted America and to begin the research for his later bestselling book, *How the Word Is Passed*. CLINT SMITH, HOW THE WORD IS PASSED: A RECKONING WITH THE HISTORY OF SLAVERY ACROSS AMERICA 6 (2021).

met with other classmates for prayer in Duke Chapel¹³ before classes began. While standing in awe of the iconic chapel's English Gothic architecture and appreciating the historic stone carvings, I recognized at its entrance Martin Luther, the great Protestant reformer, as well as John Wesley, the founder of Methodism. I also noted a carving of the familiar image of Confederate General Robert E. Lee¹⁴ and my mind raced to Ronald Reagan's infamous presidential campaign speech in Neshoba County, Mississippi—where the civil rights workers James Chaney, Andrew Goodman, and Michael Schwerner were murdered—as he launched his campaign by promising that “the South shall rise again!”¹⁵

As an African American born and raised in New Orleans, I am intimately familiar with the South's past, including the repressive feelings so many Black Americans¹⁶ have been forced to endure because of Confederate iconography. I am also familiar with the majority population's forced attempts to honor those who fought *against* America's Union in the Confederate army, attempts to maintain chattel slavery, and arguments that the Civil War was merely about “states' rights.”¹⁷

13. The Duke Chapel stands at 210 feet tall in the center of Duke's campus, and was designed by the African American architect, Julian Able. “America's first [B]lack architect of renown.” *About the Chapel*, DUKE UNIV. CHAPEL, <https://chapel.duke.edu/about-chapel> [<https://perma.cc/CV8G-EGQ5>].

14. AUGUSTINE, *supra* note 7, at xv.

15. Ian Haney-Lopez, *The Racism at the Heart of the Reagan Presidency: How Ronald Reagan Used Coded Racial Appeals to Galvanize White Voters and Gut the Middle Class*, SALON (Jan. 11, 2014, 7:00 PM), https://www.salon.com/2014/01/11/the_racism_at_the_heart_of_the_reagan_presidency [<https://perma.cc/V98W-LZKX>]; Peniel E. Joseph, *From Ronald Reagan in Philadelphia, Miss., to Donald Trump in Tulsa, a Pattern of Racially Divisive Politics*, WASH. POST (June 19, 2020, 5:31 PM), <https://www.washingtonpost.com/nation/2020/06/19/ronald-reagan-philadelphia-miss-donald-trump-tulsa-pattern-racially-divisive-politics> [<https://perma.cc/6XH6-SK3D>].

16. I join other progressive scholars and intentionally capitalize “Black” as a proper noun. Similar to Asian and Latino, “Black” in its capitalized form denotes a specific cultural group. See, e.g., Jonathan C. Augustine, *The Fiery Furnace, Civil Disobedience, & the Civil Rights Movement: A Biblical Exegesis on Daniel 3 and the Letter from Birmingham Jail*, 21 RICH. PUB. INT. L. REV. 243, 246 n.5 (2018) (citing D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER, RACE & JUST. 405, 405 n.2 (2011); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 4 n.12 (1991)).

17. As Karen L. Cox highlights, in contextualizing the Confederacy's indoctrination, “[i]ntegral to the Lost Cause narrative was the belief that it was the Confederacy, *not the Union*, that had maintained the constitutional legacy of states' rights. Such rhetoric frequently made its way into monument [dedication] speech[es].” COX, *supra* note 1, at 36 (emphasis added). Moreover, famed historian Jon Meacham highlights the South's revisionist history on slavery as part of the Lost Cause's narrative as follows:

Charlottesville's "Unite the Right" 2017 Rally Represents the New Norm: A Transition from Arguments for Southern Heritage and a Move to the Politics of (White) Christian Nationalism

My August 2017 feeling of repression was much different from my childhood memories of going to Mardi Gras parades at Lee Circle in New Orleans, or more recent occurrences of driving by that statue of Jefferson Davis. As an ordained minister serving an AME Church congregation in the South, I was deeply impacted by the white supremacy that led to the June 17, 2015, massacre at Mother Emanuel AME Church in Charleston, South Carolina.¹⁸ My pastoral colleague and fraternity brother, the Reverend Clementa Pinkney, was killed alongside eight members of his midweek Bible study by a deranged white supremacist, who had been photographed with Confederate iconography before the church shooting.¹⁹

At that moment in August 2017 on Duke's campus, not only did I feel more aware of my surroundings, but I also felt more oppressed as an African American. As the next few days unfolded, with news of the now-infamous "Unite the Right" rally in Charlottesville, Virginia, centered on the removal of Confederate

The war had been about the most fundamental of things: slavery and freedom. William H. Seward had called the clash over chattel labor the "irrepressible conflict." As the years passed . . . more and more Southerners sought to diminish the role of slavery in bringing about the clash of arms. In his memoirs, Jefferson Davis said the Confederacy sought to preserve not slavery but "the inalienable right of a people to change their government . . . to withdraw from a Union into which they had, as sovereign communities, voluntarily entered" Though this view was to be echoed in sundry memorial addresses, tracts, sermons, and casual conversations down to the present day, it was unconvincing, not least because of what Southerners had said when the war itself was actually coming about.

JON MEACHAM, *THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS* 54 (2018).

18. Dylann Roof, the white supremacist assassin, left a manifesto after the church shooting and confessed to murdering the nine victims. The manifesto discussed Roof's white supremacist beliefs and indicated he acted in hopes of igniting a race war. In the months leading up to the massacre, Roof traveled throughout South Carolina, drawing inspiration from his visits to Confederate monuments. Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 628–29 (2019). Anthony Thompson, the surviving spouse of one of the nine tragically murdered at Emanuel AME church, provides a comprehensive chronicle of the events that led to the shooting, as well as a psychological profile of Roof, while focusing on the Christian theology of forgiveness. ANTHONY B. THOMPSON, *CALLED TO FORGIVE: THE CHARLESTON CHURCH SHOOTING, A VICTIM'S HUSBAND, AND THE PATH TO HEALING AND PEACE* (2019).

19. Phelps & Owley, *supra* note 18, at 628 (citing Scott Neuman, *Photos of Dylann Roof, Racist Manifesto Surface on Website*, NPR (June 20, 2015, 1:22 PM), <https://www.npr.org/sections/thetwo-way/2015/06/20/416024920/photos-possible-manifesto-of-dylann-roof-surface-on-website> [<https://perma.cc/8S9D-493W>]).

statues,²⁰ I found myself wrestling with the South's past, while ironically studying reconciliation, in hopes of making things better for the South's future.

After tensions in Charlottesville between neo-Nazis and progressive antiracist activists flared, resulting in a fatality, the forty-fifth president of the United States, Donald Trump, stoked America's racial tensions by attributing blame to "both sides."²¹ Only days thereafter, Duke University President Vincent Price, who assumed the university's leadership only one month before, courageously ordered the removal of the Lee statute from the chapel entrance.²² As a private actor, President Price removed a deep-seated icon of division that had arguably become more polarizing in the twenty-first century than when initially erected in the century before.

Framing the Political and Legal Issues This Article Addresses in the Divided States of America

With such deep, well-known divisions, I wondered why some state legislatures passed cultural heritage laws, or "statue statutes,"²³ to prevent municipalities from removing Confederate

20. On August 11, 2017, Unite the Right protesters carried torches and marched through Charlottesville while chanting "Blood and Soil" and "Jews will not replace us." As counter-protestors mobilized, a white supremacist drove his car into demonstrators killing Heather Danielle Heyer and injuring nineteen others. Deborah R. Gerhardt, *Law in the Shadows of Confederate Monuments*, 27 MICH. J. RACE & L. 1, 4 (2021) (footnotes omitted); see also JACK JENKINS, AMERICAN PROPHETS: THE RELIGIOUS ROOTS OF PROGRESSIVE POLITICS AND THE ONGOING FIGHT FOR THE SOUL OF THE COUNTRY 96 (2020); JONATHAN C. AUGUSTINE, WHEN PROPHETS PREACH: LEADERSHIP AND THE POLITICS OF THE PULPIT 39–40 (2023).

21. Katie Reilly, *President Trump Again Blames 'Both Sides' for Charlottesville Violence*, TIME (Aug. 15, 2017, 5:18 PM), <https://time.com/4902129/president-donald-trump-both-sides-charlottesville> [<https://perma.cc/Y8GD-26ZD>]; *Watch: Trump Blames 'Both Sides' for Violence at Charlottesville Rally*, PBS (Aug. 15, 2017, 4:50 PM), <https://www.pbs.org/newshour/politics/trump-blames-sides-violence-charlottesville-rally> [<https://perma.cc/A2DC-U4RK>].

22. AUGUSTINE, *supra* note 7, at xvi; see also Scott Neuman, *Duke University Removes Robert E. Lee Statue from Chapel Entrance*, NPR (Aug. 19, 2017, 10:51 AM), <https://www.npr.org/sections/thetwo-way/2017/08/19/544678037/duke-university-removes-robert-e-lee-statue-from-chapel-entrance> [<https://perma.cc/4PJ5-9LDF>].

23. See Kaeli Subberwal, *Several States Have Erected Laws to Protect Confederate Monuments*, HUFFINGTON POST (Aug. 18, 2017), https://www.huffpost.com/entry/states-confederate-statue-laws_n_5996312be4b0e8cc855cb2ab [<https://perma.cc/65A8-UM9U>]. At the time of this writing, eight states have monument protection laws that were enacted for the protection of war memorials, including Alabama, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and Kentucky. See ALA. CODE § 41-9-231(6) (2017); GA. CODE ANN. § 50-3-1(b) (2023); MISS. CODE ANN. § 55-15-81 (2023); N.C. GEN. STAT. § 100-2.1 (2022); S.C. CODE ANN. § 10-1-165 (2023); TENN. CODE ANN. § 4-1-412 (2018); VA. CODE ANN. § 15.2-1812 (Cum. Supp. 2023); KY. REV. STAT. ANN. § 171.786 (2023).

iconography, as Mayor Landrieu had in New Orleans.²⁴ Because I attended law school well before entering ordained ministry, I also wondered what First Amendment implications of “government speech” were at issue with municipalities attempting to remove Confederate statues but being precluded from doing so by preemptive state laws.²⁵

These [“statue statutes”] vary in form. North Carolina’s “Cultural History Artifact Management and Patriotism Act of 2015” provides that an “object of remembrance located on public property may not be permanently removed” In 2000, South Carolina adopted a measure that protected monuments to the “War Between the States,” among other conflicts, while revealing its focus by honoring the “South Carolina Infantry Battle Flag of the Confederate States of America.”

Alabama’s “Memorial Preservation Act of 2017” similarly prevents the removal of any “statue . . . 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” that has been in place for 40 years or more.²⁶

Such laws are blatant aims at preserving the legacy of white supremacy and preemptive attempts to remove decision-making authority from local governments.²⁷ For the purposes of this Article, however, I am more concerned about two things: (1) their harmful contribution to the growing domestic terrorist threat of Christian

24. Mitch Landrieu, *We Can't Walk Away from This Truth*, ATLANTIC (May 23, 2017), <https://www.theatlantic.com/politics/archive/2017/05/we-cant-walk-away-from-this-truth/527721> [<https://perma.cc/P8FT-M4X2>]. See generally LANDRIEU, *supra* note 9, at 217 (transcript of speech).

25. As Alexander Tsesis writes, “States have thrown up roadblocks against the removal of Confederate monuments in cities such as Atlanta, Georgia; Birmingham, Alabama; and Memphis, Tennessee.” Tsesis, *supra* note 5, at 697 (citing Nicquel Terry Ellis, *Blocked from Taking Confederate Statues Down, Atlanta, Birmingham, Memphis Try Other Ideas*, USA TODAY (Mar. 13, 2019, 5:54 PM), <https://www.usatoday.com/story/news/nation/2019/02/12/confederate-monuments-leaders-cities-removal-alternatives-civil-rights-groups/2525178002> [<https://perma.cc/U2A8-SGFH>]).

26. Aneil Kovvali, *Confederate Statute Removal*, 70 STAN. L. REV. ONLINE 82, 82–83 (2017) (footnotes omitted).

27. Phelps & Owley, *supra* note 18, at 659.

nationalism,²⁸ often also called *white* Christian nationalism,²⁹ and (2) the harmful First Amendment impact they have on the “befuddling area of law”³⁰ that is the government speech doctrine.³¹

28. Christian nationalism is an often-misunderstood form of an American civil religion that contributes to America’s increasing social and political polarization by “reaffirm[ing], among other things, the religious legitimation of the lightest political authority [It] call[s] on Americans individually and collectively to fulfill the obligation of carrying ‘out God’s will on earth.’” ERIC L. MCDANIEL, IFRAN NOORUDDIN & ALLYSON F. SHORTLE, *THE EVERYDAY CRUSADE: CHRISTIAN NATIONALISM IN AMERICAN POLITICS* 25 (2022) (citations omitted). In attempting to contextualize Christian nationalism, sociologists Andrew Whitehead and Samuel Perry write the following:

Though journalists and historians have bandied about the term a good deal in the past decade, we mean “Christian nationalism” to describe an ideology that idealizes and advocates a fusion of American civic life with a particular type of Christian identity and culture. We use “Christian” here in a specific sense. We are not referring to a doctrinal orthodoxy or personal piety. (In fact, we find some Christian nationalists can be quite secular.) Rather, the explicit ideological content of *Christian* nationalism comprises beliefs about historical identity, cultural preeminence, and political influence This includes symbolic boundaries that conceptually blur and conflate religious identity (Christian, preferably Protestant) with race (white), nativity (born in the United States), citizenship (American), and political ideology (social and fiscal conservative). Christian nationalism, then, provides a complex of explicit and implicit ideals, values and myths—what we call a “cultural framework”—through which Americans perceive and navigate their social world.

ANDREW L. WHITEHEAD & SAMUEL L. PERRY, *TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES* ix–x (2020). Further, in *The Flag and the Cross*, the authors write, “We define white Christian nationalism and identify white Christian nationalists using a constellation of beliefs. These are beliefs that, we argue reflect a desire to restore and privilege the myths, values, identity and authority of a particular ethnocultural tribe.” PHILLIP S. GORSKI & SAMUEL L. PERRY, *THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY* 14 (2022). Moreover, in describing that *particular* tribe (white, Anglo-Saxon Protestants) the authors go on to share that the tribe’s political vision privileges it, to the exclusion of others, while putting the other tribes (i.e., immigrants, minorities, and Jews) in their “‘proper’ place.” *Id.* at 4, 14, 105.

29. Anthea Butler describes this phenomenon of Christian nationalism, and specifically *white* Christian nationalism, as: “the belief that America’s founding is based on Christian principles, [that] white [P]rotestant Christianity is the operational religion of the land, and that Christianity should be the foundation of how the nation develops its laws, principles, and policies.” Anthea Butler, *What Is White Christian Nationalism?*, in *CHRISTIAN NATIONALISM AND THE JANUARY 6, 2021 INSURRECTION* 4 (2022), https://bjconline.org/wp-content/uploads/2022/02/Christian_Nationalism_and_the_Jan6_Insurrection-2-9-22.pdf [<https://perma.cc/HHB9-VWQD>]. Butler also goes on to provide:

Understanding this phenomenon requires an understanding of the basic ways white Christian nationalism has worked as a unifying theme for a particular type of narrative about America. That narrative can be summed up as follows:

1. America is a divinely appointed nation by God that is Christian.
2. America’s founders, rather than wanting to disestablish religion as a unifier for the nation, were in fact establishing a nation based on Christian principles, with white men as the leaders.
3. Others (Native Americans, enslaved Africans, and immigrants) would accept and cede to this narrative of America as a Christian nation and accept their leadership.

Although some argue the term *Christian* nationalism is a misnomer in that the identity politics of a “cross and country” conflation has nothing to do with any church-related orthodoxy,³² well-respected scholars recognize it as emanating from a national

4. America has a special place not only in world history, but in biblical Scripture, especially concerning the return of Christ.

5. There is no separation between church and state.

Id. at 4–5.

30. Eric Sundin, Note, *To Alito or Not to Alito: An Analysis of Government Speech in a Post-Walker World*, 8 HOUS. L. REV. 31, 32 (2017).

31. As a result of two Supreme Court cases, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), the government speech doctrine must center on the issue of whether the government actually is the speaker or if the government is simply creating a forum for private speech. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1074–76 (6th ed. 2019). In *Pleasant Grove*, Justice Alito wrote for a unanimous court, upholding a municipality’s decision to disallow a religious monument to the Seven Aphorisms of Summum, to be similar in size and nature with a monument of the Ten Commandments, writing, “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove*, 555 U.S. at 464–65, 467. Accordingly, when the government is the speaker, the First Amendment *does not* provide a basis for challenging government speech. CHEMERINSKY, *supra*, at 1074. Similarly, under *Walker*—a case where Justice Breyer wrote for a five-justice majority, where Associate Justices Ginsburg, Sotomayor, and Kagan were ironically joined by Justice Thomas—the Court held that the Texas Department of Motor Vehicles did not violate the First Amendment by refusing to issue a specialty license plate with a Confederate battle flag that was designed by a nonprofit organization and submitted for approval and issuance by the state government actor. *Walker*, 576 U.S. at 203. The Court held that the state’s denial was constitutional because license plates are government speech and when the government is the speaker, it cannot violate the First Amendment’s speech clause. *Id.* at 207 (citing *Pleasant Grove*, 555 U.S. at 467–68). For *Walker*’s dissenting minority, however, the government *was not* the speaker. Instead, it created a forum for private speech. According to the *Walker* minority—a four-justice opinion, written by Justice Alito and joined by Associate Justices Scalia and Kennedy, as well as Chief Justice Roberts—the First Amendment *does* apply when the governmental actor merely creates a forum for private speech. *Id.* at 234 (Alito, J., dissenting). Fully considering the First Amendment limitations municipalities face because of “statue statutes” requires an exploration of the government speech doctrine’s evolution and how it allows autonomy in speech, as well as immunity from free speech challenges. See generally Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011) (examining the conflicting demands of viewpoint neutrality and government speech); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009) (proposing a three-factor test for identifying government speech); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001) (arguing for a more narrow interpretation of government speech that would negate the need for special immunity for government speech); David L. Hudson, Jr., *Government Speech Doctrine*, FREE SPEECH CTR. (Jan. 1, 2009), <https://www.mtsu.edu/first-amendment/article/962/government-speech-doctrine> [https://perma.cc/MK27-E58N] (providing a brief overview of the legal history of the government speech doctrine).

32. In showing a connection to organized religion, attorney Andrew L. Seidel writes, “Christian nationalism is not solely about religion. It’s an unholy alliance, an incestuous marriage of conservative politics and conservative Christianity.” ANDREW L. SEIDEL, THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN 8 (2021).

theology that regards America as God's "chosen people."³³ Moreover in the eyes of some, any threat to God's original establishment of the hierarchy of America—or, for the purposes of this Article, the racialized hierarchy of the South—is antithetical to God's intention for his chosen people.³⁴

With the *University of Richmond Law Review* deliberately reckoning with the city of Richmond's history as a bastion of Confederate iconography, and thematically hosting its 2024 Symposium on Confederate monuments, I have been given the opportunity to wrestle with my feelings and questions, while also infusing practical political advocacy. The gift of the invitation to write this Article comes after a period of researched reflection: six years after the personal 2017 experiences I described in New Orleans and Durham, respectively, and three years after the horrific May 25, 2020, murder of George Floyd, an unarmed African American man who was brutally slain at the hands of a disgraced white Minneapolis, Minnesota police officer.³⁵ Floyd's death spurred immense public outrage that caused many municipalities to fight against the lionization of the Lost Cause and ultimately remove 200 Confederate monuments from the public eye.³⁶

33. RICHARD T. HUGHES, *MYTHS AMERICA LIVES BY: WHITE SUPREMACY AND THE STORIES THAT GIVE US MEANING* 41 (2d ed. 2018). As part of Christian nationalism's origins in the United States, research also shows that "English Protestants had drawn a parallel between England and ancient Israel," and in the new colonial territory that would become the United States the parallel was made even more compelling. *Id.* at 42. Indeed, just as some believed "God had led the Jews out of Egypt, through the Red Sea, and into the Promised Land . . . God led the Puritans out of England, across the Atlantic Ocean, and into another promised land." *Id.*

34. In framing how religion influenced certain perceptions of the Lost Cause and how the South's efforts were "noble" in the minds of certain people, Charles Reagan Wilson writes:

At the end of the Civil War, Southerners tried to come to terms with defeat, giving rise to the Lost Cause Fearing that crushing defeat might eradicate the identity forged in war, Southerners reasserted that identity with a vengeance The South's religious leaders and laymen defined this identity in terms of morality and religion: in short, Southerners were a virtuous people. Clergymen preached that Southerners were *the chosen people, peculiarly blessed by God*. "In a word . . . many southern whites have regarded their society as *God's most favored*. To a greater degree than any other, theirs approximates the ideals the Almighty has in mind for mankind everywhere."

WILSON, *supra* note 3, at 7 (emphasis added) (citations omitted).

35. See, e.g., AUGUSTINE, *supra* note 20, at 43–45.

36. Phelps & Owley, *supra* note 4, at 373. In describing the horrific events of May 25, 2020, and their consequential impact on reigniting efforts to remove confederate iconography, historian Karen L. Cox writes:

Following this obvious change in political tide, Southern municipalities have begun to rebuke the once widely held sentiment that “the South shall rise again.”³⁷ Now, municipalities are attempting to “speak,” within the meaning of the First Amendment, by removing Confederate statues that were erected by twentieth-century white Southerners to preserve a history *not* rooted in facts, while also ignoring the horrific legacy of chattel slavery.³⁸

Addressing the Issues: This Article’s Organizational Structure

Insofar as this Article is concerned with the *religion* of the Lost Cause, I attempt to connect the government speech doctrine and the Establishment Clause,³⁹ as I urge those eight state legislatures that have enacted “statue statutes”⁴⁰ to pass legislation that will stop the content-based regulation of municipal government speech.⁴¹ Further, to support my central argument that the religion

White police officers arrested Floyd for allegedly paying for cigarettes with a counterfeit twenty-dollar bill, then wrestled him to the ground. After Floyd’s hands were tied behind his back, Officer Derek Chauvin placed his knee on Floyd’s neck and held it there for eight minutes and forty-six seconds, cutting off his ability to breathe and causing his death. George Floyd’s murder, which was videotaped by bystanders, set off a series of massive Black Lives Matter protests across the United States and around the globe. And in the South, those protests took aim at Confederate statues, most notably on Richmond, Virginia’s Monument Avenue.

COX, *supra* note 1, at 6 (footnotes omitted).

37. Haney-Lopez, *supra* note 15.

38. COX, *supra* note 1, at 13; *see also* MEACHAM, *supra* note 17, at 54 (discussing the “Cornerstone Speech” given by Alexander H. Stephens, vice president of the Confederacy, just prior to the South’s secession from the Union). In the speech, Stephens expressly claimed that the Confederacy’s “cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.” Alexander H. Stephens, *Cornerstone Speech*, in ALEXANDER H. STEPHENS IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 717, 721 (Henry Cleveland ed., 1866).

39. In relevant part, the First Amendment provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The term “Religion Clauses” is commonly used to collectively describe the Free Exercise Clause and Establishment Clause. The Free Exercise Clause was first applied to the states, through its incorporation into the Due Process Clause of the Fourteenth Amendment, in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and the Establishment Clause was first found to be incorporated, and applied to the states, in *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947). In specifically addressing the Establishment Clause, Professor Leslie C. Griffin writes, “The Supreme Court has not developed a coherent Establishment Clause jurisprudence; instead, individual justices have developed different tests to determine when an establishment of religion occurs.” LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 45 (4th ed. 2017).

40. *Supra* note 23.

41. Content-based restrictions on *private* speech are presumed unconstitutional and are reviewed under strict scrutiny. GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH* 1003 (5th ed. 2021). Although governments have the

of the Lost Cause from the past underpins the white Christian nationalism of the present⁴²—a form of “Otherism” that is arguably America’s most significant domestic terrorism threat⁴³—this Article is structurally organized in four parts.

After this narrative Introduction, Part I explores the myth of white supremacy, a key phenomenon that undergirds the religion of the Lost Cause, while also highlighting the actions and reactions of the nineteenth and twentieth centuries that led to so much Confederate iconography in the United States. Part I also highlights the nineteenth-century period of Reconstruction (1865–1877) immediately following the Civil War, as a segue to explore the role clergymen played in transforming the myth of the Lost Cause into a religion, as Confederate monuments were strategically placed. Indeed, Professor Cox writes:

The most common site for building Confederate monuments was on the grounds of local courthouses and state capitols [T]hese monuments have claimed the public square for southern whites, spaces that for more than a century have been not simply white-controlled but also shaped by segregation. Inside the courthouse or

right to engage in speech and there is not a valid challenge to government speech, *e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 192, 197, 203 (1991), I argue the same logic should apply, with a strict scrutiny analysis, when state governments regulate the speech of municipal governments, based on content.

42. See WHITEHEAD & PERRY, *supra* note 28, at x–xii.

43. I use the term “Otherism” as a close derivative of xenophobia, in that it is rooted in a fear of the “Other.” Although Otherism acknowledges differences in the social construct of race and social differences, based on sex and/or gender, it should not be confused with either racism or sexism. Otherism is more closely connected with the recently popularized “Great Replacement Theory” or “White Replacement Theory,” whereby whites have voiced more opposition to Jews, minorities, and immigrants, for fear that said groups are replacing them in America’s social hierarchy and general population. See, *e.g.*, Jonathan C. Augustine, *A Theology of Gumbo for the Divided States of America*, WHATWENTWRONG, <https://www.whatwentwrong.us/a-theology-of-gumbo-for-the-divided-states-of-america> [https://perma.cc/6AP3-ARYZ]. The White Replacement Theory arguably represents the sentiment of those Confederate auxiliary groups that worked tirelessly to preserve the white supremacist culture that was being “replaced” after the South’s defeat in the Civil War. Indeed, historian Charles Reagan Wilson addresses this sentiment by highlighting the ritualistic aspects of monument dedication and the centrality of Richmond, Virginia, in the ritual.

The dedication of monuments to the Confederate heroes was a . . . ritualistic expression of the Lost Cause Perhaps the greatest occurred in 1907, when an estimated 200,000 people gathered in Richmond for the dedication of a statute to Jefferson Davis Richmond was the Mecca of the Lost Cause, and Monument Boulevard was the sacred road to it.

WILSON, *supra* note 3, at 29. Further, in recent scholarship, I also highlight the “Otherism” associated with Christian nationalism as a motivating factor for much of America’s polarity and domestic terrorism. Jonathan C. Augustine, *And Who Is My Neighbor?: A Faith-Based Argument for Immigration Policy Reform in Welcoming Undocumented Refugees*, 66 HOW. L.J. 439, 448–50 (2023).

statehouse, white men made laws that served as a cudgel against African American equality⁴⁴

In other words, Reconstruction Confederate monuments were deliberately placed to remind African Americans who was still “in charge,” despite the South’s defeat in the Civil War.

In building upon the foundation of a “separate” Southern culture established in Part I, Part II highlights the movement to remove Confederate monuments from the public domain, before exploring the government speech doctrine. It underscores how changing politics, and changing demographics, have caused cities to think differently about Confederate iconography and how their political speech is being silenced by state statutes that prevent them from removing Confederate monuments.

Insofar as the desire to maintain such monuments is perpetuated by white supremacy, I argue that the South’s religion of the Lost Cause has been conflated with a Christian nationalism, which is rooted in an Otherism, fears America’s demographic changes, and is literally fighting to maintain power. The best example of my argument is the 2016 election of Donald Trump as President of the United States,⁴⁵ and the vigilante version of white Christian nationalism that attempted to upend democracy during the January 6, 2021, insurrection at the United States Capitol. Many insurrectionists were photographed with regalia exclaiming, “Jesus is my Savior, Trump is my President.”⁴⁶ One group even carried life-size replicas of Jesus’s cross.⁴⁷

44. COX, *supra* note 1, at 20–21.

45. On this point, Andrew L. Seidel writes,

Before Trump, Christian nationalism tended toward the corrupt and inept But the 2016 election changed that. Trump won *because of* Christian nationalism

The single most accurate predictor of whether a person voted for Donald Trump in the 2016 election was . . . believing the United States is and should be a Christian nation.

SEIDEL, *supra* note 32, at 5 (emphasis added).

46. See, e.g., Nathan Empsall, Opinion, *Rejecting the January 6 Attack in Christ’s Name*, NEWSWEEK (Jan. 5, 2022, 6:06 PM), <https://www.newsweek.com/rejecting-january-6-attack-christs-name-opinion-1666103> [<https://perma.cc/PTB4-8BXX>]; Gina Ciliberto & Stephanie Russell-Kraft, *They Invaded the Capitol Saying ‘Jesus Is My Savior. Trump Is My President,’* SOJOURNERS (Jan. 7, 2021), <https://sojo.net/articles/they-invaded-capitol-saying-jesus-my-savior-trump-my-president> [<http://perma.cc/MSS3-W4XK>].

47. See, e.g., Philip Gorski, *White Christian Nationalism: The Deep Story Behind the Capitol Insurrection*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (Jan. 22, 2021), <https://berkeleycenter.georgetown.edu/responses/white-christian-nationalism-the-deep-story-behind-the-capitol-insurrection> [<https://perma.cc/HR9C-FQ9J>]; Gregory E. Sterling,

Part II also argues for the repeal of state statues that prohibit municipalities from engaging in government speech, because any such prohibition arguably pits state law against the Supreme Court of the United States' logic in *Pleasant Grove City v. Summum*.⁴⁸ Municipalities must be allowed to "speak" today, and engage in the politics of Confederate monument removal, just as they were allowed to "speak" in years past, when they engaged in the politics of Confederate monument erection. Finally, I provide a synthesizing Conclusion, underscoring the connection between the religion of the Lost Cause and white Christian nationalism by calling for the repeal of so-called state heritage laws that preclude (free) government speech. Repealing these laws would allow other municipalities to follow New Orleans's example and decide for themselves the future of their Confederate monuments.

I. THE MYTH OF WHITE SUPREMACY AND THE SOUTH'S RELIGION OF THE LOST CAUSE: NINETEENTH- AND TWENTIETH-CENTURY ACTIONS AND REACTIONS UNDERScoreD RACIAL DIVISIONS AND LED TO CONFEDERATE MONUMENT ERECTIONS

*"One cannot understand American politics today without knowing something about American religion. And one cannot understand either politics or religion without a sense of history, a sense of how the interplay among religion, politics, and culture has shaped the story of the United States."*⁴⁹

A. *The Myth of White Supremacy Has Been a Part of American History*

The *myth* of white supremacy predates the 1619 institutionalization of enslavement in what would become the United States.⁵⁰

Capitol Rioters Made a Mockery of Christian Values, CNN (Jan. 14, 2021, 6:12 AM), <https://www.cnn.com/2021/01/14/opinions/capitol-rioters-made-mockery-of-christianity-sterling/index.html> [<https://perma.cc/72LG-EP34>].

48. For a brief overview of *Pleasant Grove* and the government speech doctrine, see *supra* note 31.

49. ALLEN D. HERTZKE, LAURA R. OLSON, KEVIN R. DEN DULK & ROBERT BOOTH FOWLER, *RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES* 1 (6th ed. 2019).

50. I deliberately use the term "myth" because the word's etymological origins suggest the narrative of white supremacy was created simply to give meaning and justification to enslavement. As Hughes writes:

The English word *myth* derives from the Greek word *mythos*, which literally means "story." Contrary to colloquial usage, a myth is not a story that is

In *Race: A Theological Account*, Professor J. Kameron Carter argues, “[T]he world was re-created from the colonial conquests from the late fifteenth century forward in the image of white dominance, where ‘white’ signifies not merely pigmentation but a regime of political and economic power for arranging . . . the world.”⁵¹ Indeed, as Professor Ibram X. Kendi chronicles in *Stamped from the Beginning: The Definitive History of Racist Ideas in America*,⁵² as far back as 1453, Gomes Eanes de Zuara wrote “the inaugural defense of African slave-trading, the first European book on Africans in the modern era. *The Chronicle of the Discovery and Conquests of Guinea* begins the recorded history of anti-Black racist ideas.”⁵³ It is therefore apparent that the myth of white supremacy has influenced multiple cultures for multiple centuries.

In colonial and revolutionary America, long before the myth of the Lost Cause was born in the wake of the Civil War, racist

patently untrue. Rather, a myth is a story that, whether true or false, helps us discern the meaning and purpose of our lives and, for that reason, speaks truth to those who embrace it.

HUGHES, *supra* note 33, at 10.

51. J. KAMERON CARTER, *RACE: A THEOLOGICAL ACCOUNT* 35 (2008). “The word *race* first appeared in the Frenchman Jacques de Brézé’s 1481 poem, ‘The Hunt,’ where it referred to hunting dogs. As the term expanded to include humans over the next century, it was used primarily to identify and differentiate and animalize African people.” IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 36 (2016). With that baseline, there are three things that are essential for an understanding of racism: (1) racism classifies “human beings into distinct ‘races’” based on “hereditary physical characteristics”; (2) racism assigns “notions of inferior mental or moral capacit[y],” by drawing a correlation “to those physical characteristics”; and (3) racism also pushes people who are perceived to have those physical characteristics “to the margins of a given social order.” DUKE L. KWON & GREGORY THOMPSON, *REPARATIONS: A CHRISTIAN CALL FOR REPENTANCE AND REPAIR* 14 (2021). In *When Prophets Preach*, I contextualize race by writing, “It’s a historical fact that the term *white* first appeared in colonial law in the late 1600s, setting a socialized foundation for the 1790 census, when people originally claimed their race.” AUGUSTINE, *supra* note 20, at 69. In also contextualizing discrimination, I note the differences between *racial* and *ethnic* discrimination in that, racial discrimination is based on immutable characteristics (e.g., skin color), whereas ethnic discrimination can be based on several factors, including geography and nationality. *Id.* at 68–70.

52. Kendi’s book presents a 600-year account of racism and white supremacy. In specifically referencing Jefferson Davis, one of those leaders lionized by the Lost Cause, Kendi explains the significance of the book’s title, by writing:

The title *Stamped from the Beginning* comes from a speech that Mississippi senator Jefferson Davis gave on the floor of the US Senate on April 12, 1860. This future president of the Confederacy objected to a bill funding Black education in Washington, DC. “This government was not founded by negroes nor for negroes,” but “by white men for white men,” Davis lectured his colleagues. The bill was based on the false notion of racial equality, he declared. The “inequality of the white and black races” was “stamped from the beginning.”

KENDI, *supra* note 51, at 3.

53. *Id.* at 22–23.

theological ideas undergirded the myth of white supremacy to sanction the growth of American slavery by making it acceptable to Christian churches, where clergymen were the chief proponents.⁵⁴ Consequently, because of clergymen's influence, by the end of the seventeenth century, slavery based on the myth of white supremacy was a fundamental part of Southern life.⁵⁵

The myth of white supremacy was based on fabricated legends that became accepted by the white dominant class and exploited of all other racialized classes. In *Myths America Lives By*, Hughes argues:

The stories ranged from tales of inherent [B]lack depravity to claims of [B]lack stupidity These stories rested on other equally malicious narratives—that [B]lack skin signaled a curse from God, or that [B]lack skin would return to its white and normal hues if exposed to colder climates. Each story reinforced the dominant themes—that [B]lacks were fundamentally aberrant and whites were superior to [B]lacks in every conceivable way.⁵⁶

Further, in fully contextualizing the myth of white supremacy that has undergirded much of America's sociopolitical existence and—for the purposes of this Article—the culture that led to Confederate monument construction, Hughes goes on to write:

Each new turn of history's massive wheel cemented those stories ever more firmly into the hearts and minds of whites in Europe and America alike. The layers upon layers of racialized history, stacked upon each other for some 600 years, amplified those stories and turned them into myths—the stories white people lived by, the stories that gave them meaning. And after influential white thinkers from both Europe and America reinforced, repeated, amplified, honed, and fine-tuned those stories for all those years, it would be a miracle had the doctrine of white supremacy not emerged as the dominant, defining, and primal myth in the American nation.⁵⁷

This myth underlaid the Confederacy and the institution of chattel slavery; it was also the primary reason for the Civil War.⁵⁸

54. *Id.* at 6–7.

55. *See id.* at 47–48.

56. HUGHES, *supra* note 33, at 11–12.

57. *Id.* at 12.

58. In February 1861, before Abraham Lincoln assumed the presidency, seven cotton-producing states—South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas—voted for their perceived self-interests and seceded from the Union to form the Confederacy. Their intent was expressly “to create a nation of their own—a slave nation.” WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 97 (2020). As anecdotal evidence that

B. *The Religion of the Lost Cause Developed as a Means of Romanticizing Defeat*

Four years after the Civil War began and only six days before General Robert E. Lee surrendered in defeat in April 1865, the Confederate Army stopped defending Richmond.⁵⁹ In the Civil War's aftermath, so many white, slave-owning Southerners were faced with "a theodicy dilemma: how to square the ideas of providential power and white Christians as God's chosen people" with the reality of the South's defeat.⁶⁰ As Jemar Tisby writes in *The Color of Compromise: The Truth About the American Church's Complicity in Racism*, "[Confederates] surveyed the devastation of the countryside around them, the disappearance of slavery, and the apparent demise of the southern way of life. Many southern eyes looked heavenward for an explanation of their loss and for a way to interpret the Civil War in cosmic and religious terms."⁶¹ This mindset opened the door for the *religion* of the Lost Cause.

Indeed, from its beginning, the Lost Cause was much more than its name might indicate. "To white southerners, it did not imply a fatalistic embrace of defeat. Refracted through the prism of their Christian theology, through 'Amazing Grace,' the lost could be found, and resurrection meant that even physical death was not the final chapter in the story."⁶² In other words, Southern whites only came to grips with defeat by romanticizing the South's cause as noble, thus giving birth to a myth of a Lost Cause, which functioned like a religion.

White Southerners were initially aided in their quests to grasp and rationalize the Confederacy's defeat through the handiwork of

slavery was the reason for the Civil War, Professor Carol Anderson writes, "Mississippi's Article of Secession, for example, while extolling the enormous wealth generated from planting and picking cotton, contended that the environmental conditions were too harsh in the Magnolia State for whi[t]es to actually do that work." CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 26 (2016). The Civil War officially began on April 12, 1861, when Confederates opened fire on troops based at Fort Sumter, an island-based military outpost near Charleston, South Carolina. DARTY & MULLEN, *supra*, at 97.

59. KENDI, *supra* note 51, at 233–34. In chronicling the Civil War's end, John Meacham writes, "On the afternoon of April 9, 1865—Palm Sunday, the beginning of Holy Week—Robert E. Lee, in an impeccable gray dress uniform, surrendered to Ulysses S. Grant at the village of Appomattox Court House in Virginia." MEACHAM, *supra* note 17, at 51.

60. JONES, *supra* note 2, at 89.

61. JEMAR TISBY, *THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH'S COMPLICITY IN RACISM* 93 (2019).

62. JONES, *supra* note 2, at 90.

Edward A. Pollard of Virginia, a wartime journalist for the *Richmond Examiner*.⁶³ In documenting the emergence of the myth of the Lost Cause, Cox writes,

In 1866 Pollard . . . wrote a tome he titled *The Lost Cause: A New Southern History of the War of the Confederates*. A “new” southern history immediately suggested that this was intended as a partisan assessment of the war even as the first histories of the war were just being published.⁶⁴

Cox goes on to document the following, regarding the Lost Cause’s substantive argument and revisionist history:

Pollard laid out a Confederate account of the war as well as a narrative that proved useful to white southerners reeling from defeat and the devastation of their world. Not only did he coin the term “Lost Cause,” but he provided former Confederates with a rhetorical balm to soothe their psychological wounds. In doing so, he helped lay the foundation of a mythology that reassured them that their cause was just and their values worth fighting for even in the face of a thoroughly crushing defeat.⁶⁵

With the mythology of the Lost Cause as Pollard’s victory chorus, he successfully gave “future generations the [necessary] language and arguments to defend white supremacy and dismiss slavery as a cause of war.”⁶⁶

Like the leaders who justified slavery during the American Revolutionary War and colonial period,⁶⁷ Southern clergymen and those most well versed in the Christian language of redemption were chief among those who perpetuated Pollard’s myth.⁶⁸ To find

63. COX, *supra* note 1, at 15–16.

64. *Id.*

65. *Id.* at 16.

66. *Id.* at 17–18.

67. See KENDI, *supra* note 51, at 20 (“These justifiers included one of the most powerful politicians and secular thinkers of the new United States . . . Thomas Jefferson.”).

68. Consider the following, as highlighted by Jones:

Speaking more than thirty years after the war before a Nashville church service connected to the yearly Confederate Veterans’ Reunion in 1897, Presbyterian minister Reverend James I. Vance told those gathered, “Truth is truth, whether it have a conquering army at its back or wear the chains of imprisonment, like Paul in his cell at Rome . . . His enemies could nail Christ to the cross, but they could not quench the ideals he embodied. He seemed to be a lost cause as the darkness fell on the great tragedy at Calvary, but out of what seemed Golgotha’s irretrievable defeat has come the cause whose mission it is to save that lost.”

Reverend Vance and countless other white ministers helped their audiences map Confederate defeat in the Civil War onto the New Testament stories

nobility in defeat, along with the theme of resurrection—*The South Will Rise Again*—one need to look no further than the tenants of Christianity.

Southern clergymen assumed the responsibility for explaining the South's defeat in what they claimed had been a holy war. As with mythology, a theology represents a formulation of a belief system, and the theology of the Lost Cause again showed the close tie between the civil religion and the Christian denominations. The ministers of the Lost Cause elaborated on a traditional Christian interpretation of history in explaining the Confederate failure. The myth of the Crusading Christian Confederates had enacted the Christian drama In the theology of the Lost Cause, one can see that Southerners still hoped the spirit of the suffering and dead Confederacy would one day have, in the words from a Confederate monument, "a joyful resurrection."⁶⁹

This conflation of religion and Southern nationalism birthed a special *Southern* civil religion that was different from the more nationalist version of American exceptionalism.⁷⁰ The *religion* of the Lost Cause was about the South mythically rising again, along with a culture that was rooted in the myth of white supremacy.

Clergymen laced the myth of the Lost Cause with religious underpinnings that connected the South's defeat and anticipated redemption with Jesus's crucifixion and triumphant resurrection.⁷¹

of the wrongful imprisonment of an apostle and even the crucifixion of the Messiah.

JONES, *supra* note 2, at 90–91.

69. WILSON, *supra* note 3, at 58.

70. While the exact phrase "American exceptionalism" probably did not enter common discourse until the twentieth century, the culture undergirding the phrase's meaning is as old as America itself. Religious scholar Kelly Brown Douglas contextualizes American exceptionalism by writing as follows:

While most contemporary understandings associate America's exceptionalism with its form of democratic governing and its mission to spread democratic principles around the world, to understand it as simply about politics and mission does not capture the racial or divine character of America's narrative of exceptionalism America's exceptional identity was grounded in the Anglo-Saxon myth. To reiterate, this myth stressed that it was Anglo-Saxon institutions that best respected individual rights and liberty. Inasmuch as America stayed true to its Anglo-Saxon character when forming its governing institutions, then it would maintain its exceptional identity. This exceptionalism was initially expressed as a chosen identity. With the formation of America's grand narrative, the two key pieces of America's sense of self come together: its Anglo-Saxon charter and its "chosen" nature. Both of these things are fundamental to American identity.

KELLY BROWN DOUGLAS, *STAND YOUR GROUND: BLACK BODIES AND THE JUSTICE OF GOD* 26 (2015).

71. See TISBY, *supra* note 61, at 96 (explaining that, "[i]n many Christian traditions, redemption is a sacred theological principle that undergirds their hope of salvation. Yet, in

“[C]lergyman were the prime celebrants of the religion of the Lost Cause. They were honored figures at the center of the Southern community . . . [who] saw little difference between their religious and cultural values, and they promoted the link by constructing Lost Cause ritualistic forms . . . celebrat[ing] . . . mythological and theological beliefs.”⁷² It was therefore through clergymen that the myth of the Lost Cause morphed into a Southern religion.

C. Actions and Reactions: Reconstruction Led to Redemption and the Religion of the Lost Cause Fueled a Crusade of Confederate Monument Dedications

In describing the emergence of this post-Civil War religion of the Lost Cause, Charles Reagan Wilson shares the following compelling account:

While the whole course of Southern history provided the background, the Southern civil religion actually emerged from Dixie’s Civil War experience. Just as the Revolution of 1776 caused Americans to see their history in transcendent terms, so the Confederate experience led Southerners to a profound self-examination. They understood that the results of the Civil War had clearly given them a history distinct from that of the North. The story of the civil religion included the founding of Virginia in the colonial period, the Southern role in the American Revolution and World War I, and the myths of the Old South and Reconstruction. These aspects were adjuncts to the religion of the Lost Cause, which contained ritualistic, mythological, theological, institutional, educational, and intellectual elements that were simply not present in the other aspects of the civil religion. Without the Lost Cause, no civil religion would ever have existed. The two were virtually the same.⁷³

I argue that this nineteenth-century civil religion and correlated religion of the Lost Cause continues to exist today; it is a twenty-first-century Christian nationalism that is rooted in white supremacy.

Further, just as white Christian nationalism has become more popular today as a reaction to demographic changes and perceived threats to America’s racial hierarchy, the religion of the Lost Cause also emerged as a reaction to the South’s Civil War defeat and the

the hands of white supremacists, a social and political version of redemption justified the racial oppression and violence used to retain white power.”).

72. WILSON, *supra* note 3, at 11.

73. *Id.* at 13.

sociopolitical advancements Black Americans enjoyed during Reconstruction. Insofar as the Lost Cause was about perpetuating a myth of nobility, “[t]he Lost Cause mythologized the white, pre-Civil War South as a virtuous, patriotic group of tight-knit Christian communities. According to the Lost Cause narrative, the South wanted nothing more than to be left alone to preserve its idyllic civilization, but it was attacked by the aggressive, godless North.”⁷⁴ Preservation of this narrative had to be in the form of monuments to the Confederate dead, *the true war heroes*, who gave their lives trying to protect the Southern way of life.

This revisionist thinking, and its refusal to acknowledge the harm done by chattel slavery, continues to plague America. “Even today, the Lost Cause mythology functions as an alternative history that frequently leads to public disputes over monuments, flags, and the memory surrounding the Civil War, the Confederacy, and slavery.”⁷⁵ Moreover, as Smith writes in *How the Word is Passed*, “[t]he Lost Cause was not an accident. It was not a mistake that history stumbled into. It was a deliberate, multifaceted, multi-field effort predicated on both misremembering and obfuscating what the Confederacy stood for, and the role that slavery played in shaping this country.”⁷⁶ For supporters of the Lost Cause, no person was more prominent in their mythology than Robert E. Lee, “a *manly Christian*[] that was equally chivalrous and courageous.”⁷⁷

1. The Action of Reconstruction in the South (1865–1877) Led to the Reaction of Former Confederates in the Period of Redemption, and a Proliferation of Confederate Monuments to Honor the South’s Lost Cause

No other period in American history held as much hope for Black equality as the period of Reconstruction, which effectively ended

74. TISBY, *supra* note 61, at 94.

75. *Id.*

76. SMITH, *supra* note 12, at 147.

77. TISBY, *supra* note 61, at 95 (emphasis added). It also bears noting that recent research has also shown a direct correlation between toxic masculinity and the type of Christian conservatism that opposes, among other things, immigration, civil rights, and gender equality. See KRISTEN KOBES DU MEZ, *JESUS AND JOHN WAYNE: HOW WHITE EVANGELICALS CORRUPTED A FAITH AND FRACTURED A NATION* (2021) (arguing white evangelicalism values toxic masculinity, how it enables a pattern of abuse in evangelical communities, and how it is in tension with compassionate figures such as Jesus or John Wayne that are held in high regard by the same community).

when federal troops were withdrawn from the South in 1877.⁷⁸ Without question, part of the optimism associated with Reconstruction was the great increase in Black political participation:

Hiram Revels became the first [B]lack US Senator in the nation's history representing a state as notorious for racism as Mississippi, and P.B.S. Pinchback served for a brief time as the governor of Louisiana, the first [B]lack person ever to serve in the highest political office of a state. Fourteen [B]lack men served in the US House of Representatives at one time. During Reconstruction, 800 [B]lack men gained office in state legislatures, and at one point, [B]lack men became the majority in the South Carolina House. Countless other [B]lack men took on roles in government like postmasters, assessors, and customs officials.⁷⁹

Although there were some very significant political reforms during this time, powerful forces united around the Lost Cause to promote white supremacy and reestablish the South's pre-emancipation racial hierarchy.

After Reconstruction's unprecedented period of political prosperity for African Americans,⁸⁰ the myth of the Lost Cause, and the white supremacy that undergirded it, led to the period of Redemption,⁸¹ a time wherein former Confederates attempted, with violence and mob rule, to "redeem" themselves and their sociopolitical

78. In noting the shifting political tide after the Civil War's end, Cox writes:

Reconstruction, the twelve-year period that followed the Civil War when it ended in 1865, sought to reunify the nation but also assist newly emancipated men and women with the transition from slavery to citizenship. It required the existence of federal troops and officials in the states of the former Confederacy to ensure that former Confederates complied with the changes to laws, including constitutional amendments that abolished slavery, made freedmen citizens, and gave [B]lack men the right to vote. Reconstruction also resulted in the creation of the Freedman's Bureau, run by federal officials, to support African Americans as they adapted to their freed status.

COX, *supra* note 1, at 18–19.

79. TISBY, *supra* note 61, at 90.

80. See, e.g., WILLIAM J. BARBER II & JONATHAN WILSON-HARTGROVE, *THE THIRD RECONSTRUCTION: MORAL MONDAYS, FUSION POLITICS, AND THE RISE OF A NEW JUSTICE MOVEMENT* 56 (2016).

81. The Compromise of 1877 effectively ended Reconstruction, as Democrats agreed to award the presidency to Republican Rutherford B. Hayes, instead of Democrat Samuel Tilden, after the highly contested presidential election of 1876—provided Hayes allow "home rule" in the South by withdrawing the federal troops that protected Black Americans from lynchings and mob violence. MEACHAM, *supra* note 17, at 67–68; TISBY, *supra* note 61, at 97–98. As Cox writes, "White southerners never fully accepted former slaves as citizens, and once federal troops had completely withdrawn from the region in 1877, southern state legislatures immediately sought ways to reverse the rights Reconstruction had given them." COX, *supra* note 1, at 19.

status in the South. Some argue that “Redeemers” found an ally in President Andrew Johnson, a fellow Southerner, from Tennessee:

White Southerners, it was obvious, had unleashed a reign of terror and anti-[B]lack violence that had reached “staggering proportions.” Many urged [President Johnson] to strengthen the federal presence in the South. Johnson refused

Like a hydra, white supremacist regimes sprang out of Mississippi, Alabama, Georgia, and the other states of a newly resurgent South They praised their newfound ally on Pennsylvania Avenue who saw things, it seemed, much as they did.⁸²

In other words, the reaction to Black prosperity during Reconstruction was a backlash of white mob rule during the period of Redemption.

William J. Barber II describes the fusion of coalitions that led to so much success during Reconstruction, by contrasting it with the horrors of Redemption, as follows:

But fusion politics in the South was met with a violent backlash. As these coalitions began to emerge, extremists who called themselves Redeemers started a campaign to “redeem” America from the influence of [B]lack political power and progress. Exploiting religious language, this “Redemption” movement’s aim was to “redeem” the South from Reconstruction, and it launched a frontal attack on immoral deconstruction.⁸³

Part of this deconstruction meant institutionalizing Confederate monuments as visible reminders of (the myth of) white supremacy.⁸⁴

Further, in noting the violent nature of the post-Reconstruction period of Redemption—a time when Confederate monuments began to appear more and more frequently—it is important to understand what was at stake for the racial and social hierarchy that Redeemers sought to restore and forever preserve.

82. ANDERSON, *supra* note 58, at 17–18 (2016).

83. BARBER & WILSON-HARTGROVE, *supra* note 80, at 116.

84. Clint Smith discusses this phenomenon in *How the Word Is Passed*, where he writes: Social and political backlash to Reconstruction-era attempts to build an integrated society was the backdrop against which the first monuments arose. These monuments served as physical embodiments of the terror campaign directed at Black communities. Another spike in construction of these statues came in the 1950s and 1960s, coinciding not coincidentally, with the civil rights movement.

SMITH, *supra* note 12, at 144.

The creation of the Lost Cause narrative furthered political battles to restore some semblance of the antebellum racial pyramid. Southerners had witnessed the destruction of their towns and the surrounding land as well as the abolition of the slavery-dependent lifestyle they had always known. If anything, the Civil War and the Reconstruction eras increased the animosity that some whites held toward [B]lack people. Supported by most whites in the South, several groups initiated a sustained and violent effort to reclaim the South from white northerners and freed [B]lack people. They saw their efforts as a divine mandate for the white man to take his rightful place atop the social hierarchy. They referred to this period as “redemption.”⁸⁵

In the minds of Redeemers, there was arguably no better way to redeem the South’s myth of the Lost Cause than to lionize the Confederate dead with permanent monuments.

2. Erecting Confederate Monuments Was Not Only to Reconstruct the Past; It Was Also to Indoctrinate Generations in the Future

Southern women played a very significant role in memorializing the South’s Civil War losses and portraying them in a positive light, while also engaging in fundraising for, lobbying for, and erecting Confederate monuments and memorials. In noting the significance of organizations like the United Daughters of the Confederacy (“UDC”) in monument erections, Cox documents:

The earliest monuments were built in cemeteries as a means of honoring the Confederate dead who were buried there. That effort was begun by women who formed ladies’ memorial associations after the war. Their work continued and expanded after Reconstruction as statues started to appear outside of cemeteries and, in the 1890s, began to reshape the public landscape. The most famous example of this change was in Richmond, Virginia, where an enormous equestrian statue of Robert E. Lee was unveiled in May 1890. Lesser known monuments were also built throughout the South in parks and along boulevards and main streets.⁸⁶

Confederate women’s organizations were significant leaders in preserving the myth of the Lost Cause. “Founded in the 1890s, the [UDC] viewed the raising of monuments as a core objective of their organization, and by all accounts, they and several other

85. TISBY, *supra* note 61, at 96.

86. COX, *supra* note 1, at 20.

organizations proved successful.”⁸⁷ Their success is unquestionable, and their work was deliberately intended for long-term influence.

Indeed, Confederate monuments were erected for purposes other than simply honoring the past. Their erection was also about the future:

By the time the UDC had taken the lead in monument building in the early twentieth century, the statues had become instructional tools for schoolchildren. The Daughters, some of whom were public schoolteachers, recognized monuments’ import for informing children about the past, so they involved children in the annual rituals of Confederate Memorial Day or took students to their local monument for history lessons, reinforcing the classroom lessons of Confederate heroes and the Lost Cause.⁸⁸

The UDC was forward thinking, with a thoughtfulness that birthed a continued white nationalistic separatism—a Southern civil religion—in the late nineteenth century.

I respectfully argue that the regional civil religion, associated with the myth of the Lost Cause, has developed into the white Christian nationalism deeply embedded in America. Although the most visible act of recent Christian nationalism is the January 6th insurrection, the basis of its origins run deep in America’s social fabric,⁸⁹ whereby certain whites have viewed themselves as

87. TISBY, *supra* note 61, at 95. In describing the UDC’s effectiveness, Smith highlights: The UDC alone is responsible for erecting more than seven hundred memorials and monuments across the country . . . over four hundred of which are on public grounds. And while the vast majority of these monuments are in the former states of the Confederacy, testaments to the Lost Cause can be found all across the country, including . . . in California, Washington State, South Dakota, Delaware, New York, and Massachusetts.

SMITH, *supra* note 12, at 144.

88. COX, *supra* note 1, at 22–23.

89. The Puritans, a group of late sixteenth- and seventeenth-century English Protestants, regarded the English Reformation as incomplete and came to the American colonies seeking to “purify” the Church of England and society itself. In noting their cultural influence, consider the following:

To the Puritans, the new land was not just a place where they could freely exercise their religion. It was literally the New Israel, the Promised Land on which the faithful could build a holy commonwealth unencumbered by Old World corruption. The Puritans called their mission an “Errand in the Wilderness” and saw it as divinely ordained. To use the celebrated Puritan phrase, America was to be a “city upon a hill,” a light to all nations. This sense of the nation’s providential destiny has infused many aspects of American politics, from the “manifest destiny” of westward expansion to various initiatives by presidents.

“chosen” and therefore different from others.⁹⁰ This is completely consistent with former Confederates’ view of themselves and the social hierarchy they established that embraced chattel slavery.⁹¹

3. Periods of Mass Monument Erection Have Been a Direct Reaction to Periods of Non-white Sociopolitical Progress and in Line with the Political Framework of (White) Christian Nationalism

The 1890s was not only the peak period of Confederate monument building—that time also saw a rise in violence against Black Americans.⁹² During this booming monument-building period, as Confederate veterans and their wives were dying off, there was even more of an impetus to perpetuate the myth of the Lost Cause through monument erection and dedications.⁹³ “Members sought to demonstrate devotion to their Confederate forebears and did so as part of a broader agenda to shape the culture of the South, which was focused not only on the past but on the future.”⁹⁴

In noting the significance of monument erection, especially in the public places where they were so often erected, Cox argues:

The practical uses of these monuments, especially those alongside courthouses, both reveal and reinforce their true meaning. These statues have often been the site of gatherings during racial unrest, precisely because they stand on government landscapes, in the center of

HERTZKE ET AL., *supra* note 49, at 2. In *The Flag and the Cross*, the authors also argue that although white Christian nationalism’s roots run deep, it was largely obscured until the January 6 insurrection. In discussing the forces Trump was able to tap into in sparking the insurrection, they write, “White Christian nationalism is a ‘deep story’ about America’s past and a vision of its future. It includes cherished assumptions about what America was and is, but also about what it *should* be.” GORSKI & PERRY, *supra* note 28, at 3–4. The authors explain this “should be” as a place opposite of the America where politicians like Barack Obama and Hillary Clinton help immigrants, minorities, and “other people who haven’t paid their dues” jump to the front of the line, while these whites patiently wait in line and work toward the American dream. *Id.*

90. Historically, Protestants in England drew a parallel between England and ancient Israel; in the new colonial territory that would become the United States, the parallel became more compelling. Just as some believed God led the Israelites out of Egypt, in crossing the Red Sea and into the Promised Land, some drew a connection to the Puritans journey out of England and across the Atlantic Ocean, into another promised land. HUGHES, *supra* note 33, at 41–42.

91. See MEACHAM, *supra* note 17, at 54.

92. See HUGHES, *supra* note 33, at 184.

93. See SMITH, *supra* note 12, at 143–44 (“The erection of Confederate monuments in the early twentieth century came at a moment when many Confederate veterans were beginning to die off in large numbers.”).

94. Cox, *supra* note 1, at 23–24.

towns, counties, or parishes. The truth is that the same white citizens who gathered to watch a [B]lack man get lynched in their town were often the same white citizens who gathered for the unveiling of a Confederate monument. A community complicit in racial violence was often the same community that raised a monument honoring the Confederacy and the values it represented, several decades removed from secession.

Those values are historically tied to slavery, and still monument defenders continue to argue that Confederates went to war to defend states' rights, leaving out the fact that states' rights meant the right to perpetuate slavery.⁹⁵

Inasmuch as Confederate monuments are a perpetual reminder of the South's painful past,⁹⁶ seeing iconography of Jefferson Davis in New Orleans and Robert E. Lee in Durham is exactly why I had such pause back in 2017.⁹⁷

Although the 1890s were a peak monument-erection time, there have also been monument erection booms during other periods.

There was a significant spike in monument construction from 1900 to the 1920s and a second explosion of Confederate flags and iconography from the 1950s to the 1960s. These periods coincided with intense seasons of racial conflict in the Jim Crow era. . . . "The installation of the 1,000-plus memorials across the US was the result of the orchestrated efforts of white Southerners and a few Northerners with clear political objectives: They tended to be erected at times when the South was fighting to resist political rights for [B]lack citizens." These monuments not only memorialized Confederate soldiers, but they also inscribed white supremacy into the landscape of public spaces across the North and the South.⁹⁸

In other words, Confederate iconography has deliberately been used to remind non-whites of the narrative of white supremacy that has been a part of America since the country's inception. This is indeed a core tenant of the framework associated with white Christian nationalism.

The South saw the erection of thirty-five *new* monuments in the most recent surge in Confederate monument building since 2000, despite being several generations removed from the religion of the

95. *Id.* at 22.

96. In documenting Confederate monument erection in specific areas, Tisby writes, "To date, North Carolina has over 140 Confederate monuments scattered in various public spaces. Texas has nearly 180 such pieces, and there are hundreds of others found in both northern and southern states. Tellingly, most of these monuments were erected several *decades* after the Civil War." TISBY, *supra* note 61, at 95.

97. See *supra* text accompanying notes 13–18.

98. TISBY, *supra* note 61, at 95 (footnotes omitted).

Lost Cause's original development, immediately after the Civil War.⁹⁹ This movement is about preserving a revisionist history. Cox documents that "[t]he group responsible for this latest spate has been the Sons of Confederate Veterans" ("SCV").¹⁰⁰

In explaining this phenomenon, Cox writes, "The Civil War ses- quicentennial took place between 2011 and 2015, yet other societal changes have been in play as well."¹⁰¹ Most importantly—and de- bunking any argument about historical nostalgia—Cox writes, "White anxiety about racial progress served as the backdrop to ear- lier periods of monument expansion, and the same has been true since 2000."¹⁰² History therefore shows that Confederate statues have been erected to preserve the myth of white supremacy, and the most recent monument erections are consistent with this rule.

Cox also offers a comprehensive analysis of the post-2000 phase of Confederate monument erections by pointing to the 2017 Unite the Right rally in Charlottesville as "Exhibit A," demonstrating this Article's thesis that the religion of the Lost Cause has now morphed into white Christian nationalism. She writes the follow- ing:

Several reasons have figured into the continued memorialization of the Confederacy over the last two decades. First, in a complete re- versal from the history of a century ago, UDC members have ceded this responsibility to their white male counterparts in the SCV. [SCV's] numbers have grown, and many may also hold membership in the League of the South, [which was] formed in 1994. The League of the South is an explicitly racist group dedicated to the creation of an "Anglo-Celtic" Christian state that would politically dominate [B]lack people and other minorities, and it often employs Confederate icono- graphy. Second, there has been a steady rise in anti-immigrant senti- ment since 9/11, as well as a backlash to the perceived racial progress of electing the United States' first [B]lack president, Barack Obama. Third, over the last decade, hate groups with ties to white nationalism have rapidly expanded, many of which welcomed the presidency of Donald Trump. In fact, Richard B. Spencer, the white nationalist leader who helped organize the Charlottesville Unite the Right rally in 2017, claimed that "there is no question that [the rally in] Char- lottesville wouldn't have happened without Trump."¹⁰³

99. COX, *supra* note 1, at 24.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 24–25.

In other words, the defense of Confederate monuments that was the impetus for the Charlottesville Unite the Right rally is directly linked to the same white Southern heritage that undergirded the religion of the Lost Cause and that has also produced a twenty-first-century white Christian nationalism. The prime example is the January 6, 2021, insurrection at the United States Capitol.¹⁰⁴

D. *The Politics of Fear: The January 6, 2021, Insurrection Was About Maintaining Power amid Changing American Demographics*

In the aftermath of the November 2020 national elections—where more people voted than anytime in American history¹⁰⁵—violent and vigilante MAGA loyalists stormed the United States Capitol Building seeking to prevent certification of the presidential election results.¹⁰⁶ Their common ground was a passion fueled by Trump’s unfounded allegations that the election was stolen.¹⁰⁷

104. See *supra* notes 45–47 and accompanying text.

105. Kevin Schaul et al., *2020 Turnout Is the Highest in Over a Century*, WASH. POST (Dec. 28, 2020, 4:29 PM), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/> [<https://perma.cc/2E9A-HCRQ>].

106. While serving as Vice President of the United States during the Trump administration, Mike Pence presided over the January 6, 2021, certification of Electoral College ballots, as mandated by the Twelfth Amendment. “The President of the Senate *shall*, in the presence of the Senate and House of Representatives, open all the certificates and the votes *shall* then be counted” U.S. CONST. amend. XII (emphasis added). Then-President Trump pressured Pence to reject the election results, calling him a vulgar obscenity that suggested Pence lacked the courage to do something that wasn’t within his discretion in the first place. Peter Baker, Maggie Haberman & Annie Karni, *Pence Reached His Limit with Trump. It Wasn’t Pretty.*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html> [<https://perma.cc/2LEL-TWPL>]. Without apparently reading the Constitution, capitol insurrectionists were rallied by Trump’s baseless election fraud claims and attempted to “take back” the country and “take out” the Vice President while they were at it. Dan Barry, Mike McIntire & Matthew Rosenberg, *‘Our President Wants Us Here’: The Mob That Stormed the Capitol*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/98TV-T86K>].

107. The 2020 Democratic ticket of Joe Biden, former vice president of Barack Obama, and Kamala Harris, then serving as a United States senator from California, won several states that Trump carried four years earlier in 2016. One such state was Georgia, a state Democrats had not carried since Bill Clinton and Al Gore defeated George H.W. Bush and Dan Quayle in 1992. See, e.g., *1992 Presidential Election, 270TOWIN*, https://www.270towin.com/1992_Election [<https://perma.cc/Z7UQ-QK9L>]; Kate Brumback, *Biden Wins Georgia, Ending Long Losing Streak for Democrats*, AP NEWS (Nov. 19, 2020, 9:25 PM), <https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-bb997641ca36805c0f53f406a3529d87> [<https://perma.cc/WTY4-PX4C>]. Although Trump alleged Georgia was one of the states that was stolen because of election fraud, Georgia’s Republican Secretary of State definitively rebuked Trump’s allegation as baseless. Quinn Scanlan, *‘We’ve Never Found Systemic Fraud, Not Enough to Overturn the Election’: Georgia Secretary of State Raffensperger Says*, ABC NEWS (Dec. 6, 2020, 12:29 PM), <https://abcnews.go.com/Politics/weve>

Because several of the insurrectionists expressly called out Jesus's name, connecting "cross and country,"¹⁰⁸ the insurrectionists displayed dual allegiances and a conflated ideology, causing sociologists to categorize such people as white Christian nationalists. In the eyes of some, any threat to God's "original" establishment of the hierarchy of America—including the inclusion of non-Christians, immigrants, and *minorities* as part of America's sociopolitical order—is antithetical to God's intention for God's "chosen nation."¹⁰⁹

For example, in *The Flag and the Cross*, authors Phillip S. Gorski and Samuel L. Perry explain the fear that dominates and sometimes fuels Christian nationalism, particularly as it relates to democratic structures in the United States and especially as minorities become the majority. Gorski and Perry argue that these demographic changes are a key fear factor in the rejection of America's traditional majority-rule democracy:

As white Christians approach minority status, white Christian nationalists are starting to turn against American democracy. After all, the basic principle of democratic government is majority rule. So long as white Christians were in the majority and could call the shots, they were willing to tolerate a certain amount of pluralism, provided that "minorities" did not insist too much on equality. Now faced with the prospect of minority status themselves, some members of the old white majority are embracing authoritarian policies as a means of protecting their "freedom."¹¹⁰

Just as the fear of demographic changes undergirds white Christian nationalism today in the twenty-first century, a very similar

found-systemic-fraud-overtake-election-georgia-secretary/story?id=74560956 [https://perma.cc/L47Q-W4B3].

108. See John Blake, *An 'Imposter Christianity' Is Threatening American Democracy*, CNN (July 24, 2022, 12:46 PM), <https://www.cnn.com/2022/07/24/us/white-christian-nationalism-blake-cec/index.html> [https://perma.cc/T9V6-87HV]; Peter Manseau, *Some Capitol Rioters Believed They Answered God's Call, Not Just Trump's*, WASH. POST (Feb. 11, 2021, 11:40 AM), <https://www.washingtonpost.com/outlook/2021/02/11/christian-religion-insurrection-capitol-trump/> [https://perma.cc/F45F-K9HP]; see also Jack Jenkins, *The Insurrectionists' Senate Floor Prayer Highlights a Curious Trumpian Ecumenism*, RELIGION NEWS SERV. (Feb. 25, 2021), <https://religionnews.com/2021/02/25/the-insurrectionists-senate-floor-prayer-highlights-a-curious-trumpian-ecumenism/> [https://perma.cc/ZNU2-MJ5M].

109. See Butler, *supra* note 29, at 4–5.

110. GORSKI & PERRY, *supra* note 28, at 8; see also ROLAND S. MARTIN & LEAH LAKINS, WHITE FEAR: HOW THE BROWNING OF AMERICA IS MAKING WHITE FOLKS LOSE THEIR MINDS 1 (2022) ("[A] 2018 Pew Research Study showed that almost half (49 percent) of post-millennials (ages six to twenty-one) are Hispanic, African American, and Asian. By 2043, these growth trends among people of color will continue, and it is expected that less than 47 percent of the country will be White Americans.").

fear undergirded white supremacist violence during the period of Redemption with a continued romanization of the Lost Cause narrative that led to so many Confederate monument erections.

Having provided a foundational understanding of how the myth of white supremacy and the religion of the Lost Cause conflated in American politics and culture to undergird contemporary white Christian nationalism, I now turn to the issue of government speech as municipalities attempt to remove monuments that no longer represent their citizens' political views because of continually changing demographics.

II. THE SOUTH WILL NOT RISE AGAIN IF MUNICIPALITIES ARE ALLOWED TO "SPEAK!": THE GOVERNMENT SPEECH DOCTRINE DEMANDS THE REPEAL OF "STATUE STATUTES"

Between 1980 and 2015, public debates over the meaning and value of Confederate symbols waxed and waned. Southern branches of the NAACP initiated protests against the Confederate flags that flew over state capitols and were incorporated into state flags. That effort gained enough momentum to create change while also drawing attention to the existence of Confederate monuments on government property. It was during this period that discussions about removing monuments first began.¹¹¹

If the religion of the Lost Cause demonstrates nothing else, it concretely shows that organizations like the UDC and the SCV committed to perpetuate the myth of the Lost Cause's narrative. In describing the early twentieth century, Clint Smith mentions two reasons why, both of which have everything to do with demographics. He writes:

A new generation of white Southerners who had no memory of the war had come of age, and the United Daughters of the Confederacy had raised enough money to build memorials to these [Confederate soldiers]. The goal, in part, was to teach the younger generations of white Southerners who these men had been and that the cause they had fought for was an honorable one. But there is another reason, not wholly disconnected from the first. These monuments were also built in an effort to reinforce white supremacy at a time when Black communities were being terrorized and Black social and political mobility impeded.¹¹²

111. COX, *supra* note 1, at 122–23.

112. SMITH, *supra* note 12, at 144.

They led efforts for monument erection in public spaces as forms of political speech,¹¹³ deliberately attempting to preserve a revisionist history in the name of “southern culture.”¹¹⁴

Because those monuments were erected prior to the Voting Rights Act of 1965,¹¹⁵ they represented the political speech of their communities at the time. Since the Voting Rights Act’s enactment, however, the political speech of many municipalities has changed alongside changes in demographics. Confederate monuments, therefore, no longer represent many municipalities’ political speech. Instead, they compel municipalities to speak in ways that are inconsistent with their politics and muzzle government speech.

A. *The 1980s to 2015: Demographic Changes Led to Demands for Confederate Monument Removal*

Beginning in the 1980s, the South’s political landscape had some significant demographic and political changes resulting from the Voting Rights Act, which is legislation I regard as the Civil Rights Movement’s most significant victory.¹¹⁶ Indeed, the law amassed more power for Black Americans who became emboldened to voice their outrage about Confederate iconography. “As one [B]lack Shreveport [Louisiana] native commented, ‘Any [B]lack person

113. As previously discussed, under the government speech doctrine’s current framing, the key issue is whether the government actually is the speaker or whether the government has merely created a forum for private speech. See *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 464 (2009).

114. See WILSON, *supra* note 3, at 79–82.

115. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–14, 10501–08, 10701–02). The Voting Rights Act withstood constitutional challenge almost immediately after it was enacted. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966). In more recent years, however, the law was significantly undermined in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 201 (2009), and reduced to almost nominal status in *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). I provided commentary on the impact of *Northwest Austin* and *Shelby County* by writing, “The Voting Rights Act . . . no longer has any teeth. *Shelby County* reduced it to watchdog legislation, allowing it to bark but eliminating its bite.” AUGUSTINE, *supra* note 7, at 80.

116. See Jonathan C. Augustine & John K. Pierre, *The Substance of Things Hoped for: Faith, Social Action and Passage of The Voting Rights Act of 1965*, 46 CUMB. L. REV. 425, 459–60 (2016); Jonathan C. Augustine, *The Theology of Civil Disobedience: The First Amendment, Freedom Riders, and Passage of the Voting Rights Act*, 21 S. CAL. INTERDISC. L.J. 255, 293–95 (2012); Jonathan C. Augustine & Hon. Ulysses Gene Thibodeaux, *Forty Years Later: Chronicling the Voting Rights Act of 1965 and Its Impact on Louisiana’s Judiciary*, 66 LA. L. REV. 453, 454, 457 (2006).

knows what that flag means. It is a symbol of white supremacy. It is to [B]lack people what the swastika is to Jews.”¹¹⁷

In the 1980s, Black Southerners used their political power to push back against Confederate iconography in response to President Reagan’s politics and the rise of the New Right. “While monuments and flags were often debated locally, in 1987 the Southeast Regional Conference of the NAACP made the issue a region-wide battle by passing a resolution calling for the removal of Confederate flags above the statehouses in South Carolina and Alabama.”¹¹⁸ Moreover, in the same spirit of political pushback, “[t]he resolution also demanded that the state flags of Georgia and Mississippi, which incorporated the Confederate battle flag, be changed.”¹¹⁹ As power dynamics began to change with demands for political speech from governmental entities, those who held on to the narrative of the Lost Cause were not comfortable with the change.

By the 1990s, as demographic changes continued and there was a rise in Black voting power, conservative Southern politicians regularly used language that defended Southern heritage and Confederate symbols as rallying cries for the Lost Cause.¹²⁰ Moreover, by 1992, in response to Black political mobilization against Confederate iconography, white supremacists organized a rally in Birmingham, Alabama, to “draw attention to the fact that Alabama had been ‘designated as a white homeland.’”¹²¹ To honor this ignoble designation and rally white supremacists, as a foreshadowing of the horrific Unite the Right rally that occurred in Charlottesville in 2017, “[a]round sixty white separatist skinheads and Klansmen also participated in the march that coalesced around . . . Confederate monument[s] . . . The men carried both Nazi and Confederate battle flags, shouted ‘Seig heil!’ and received police protection.”¹²²

By 1994, two years after the incorrigible Birmingham march and the same year the House Republicans came to power to begin their “Contract with America,” the League of the South (“LOS”) emerged as a new protector of Confederate heritage.¹²³

117. COX, *supra* note 1, at 126–27.

118. *Id.* at 123.

119. *Id.*

120. *Id.* at 129–30.

121. *Id.* at 130.

122. *Id.*

123. *Id.*

Founded in Alabama in 1994, the LOS swiftly became an influential leader of the neo-Confederate movement. While the SCV and UDC were largely focused on history and heritage, the LOS sought to define southern identity based on its own interpretation of the past and to reverse what it regarded as the “emasculat[i]on of southern heritage.”¹²⁴

Stated otherwise, the South was attempting to “rise again” with a new form of civil religion that was different from the Lost Cause. This was *white* Christian nationalism.

The back-and-forth of political rhetoric continued as white Christian nationalism spread throughout the United States. Governmental change would not occur until a tragic event on June 17, 2015: the Charleston church massacre perpetrated by white supremacist Dylann Roof. The shooting represented a full narrative arc; because of the 2015 massacre,¹²⁵ on July 10, 2015, the Confederate flag above the South Carolina statehouse finally came down,¹²⁶ finally answering the NAACP’s 1987 resolution.

B. *Make America Great Again and George Floyd Led to a Renewed Emphasis on Confederate Monument Removal as a Form of Government Speech*

In 2016, after eight years of the progressive politics of Barack Obama, America’s first Black president, the political pendulum took a hard swing to the ideological right as presidential candidate Donald Trump promised to “Make America Great Again.”¹²⁷ As a

124. *Id.* at 130–31.

125. *See supra* note 18 and accompanying text (discussing the Charleston massacre perpetrated by the white supremacist, Dylann Roof).

126. Richard Fausset & Alan Blinder, *Era Ends as South Carolina Lowers Confederate Flag*, N.Y. TIMES (July 10, 2015), <https://www.nytimes.com/2015/07/11/us/south-carolina-confederate-flag.html> [https://perma.cc/XS27-J5F5]; *see also* Nathaniel Cary, *South Carolina Takes Down Confederate Flag*, USA TODAY, <https://www.usatoday.com/story/news/nation/2015/07/10/south-carolina-confederate-flag/29952953> [https://perma.cc/4UTT-ZFRH] (July 10, 2015, 2:52 PM); THOMPSON, *supra* note 18, at 223.

127. Although the “Make America Great Again” (“MAGA”) narrative is widely associated with the 2016 and 2020 presidential campaigns of Donald Trump, my use of the term is by no means limited to any individual or particular political campaign. Instead, my usage describes a socially regressive brand of politics often characterized by discrimination against immigrants, minorities, and Jews, with roots in Christian nationalism. *See, e.g.*, OBERY M. HENDRICKS, JR., *CHRISTIANS AGAINST CHRISTIANITY: HOW RIGHT-WING EVANGELICALS ARE DESTROYING OUR NATION AND OUR FAITH* (2021). In specifically identifying the brand of identity politics I describe as Christian nationalism, how it is has been coopted by evangelical Christians, and how the same is deeply interwoven within the MAGA political narrative, Hendricks writes:

darling of Christian nationalists,¹²⁸ Trump's 2016 campaign rhetoric vilified Mexicans as "criminals, drug dealers, rapists, etc.,"¹²⁹ and his later presidential administration separated migrant children from their families at the U.S.-Mexico border.¹³⁰

Trump also promised to build a border wall as a central part of his 2016 campaign: a promise that spoke to a specific segment of the American demographic. "[A]s Americans more closely connect Christian identity with American civic belonging, they become more likely to believe that immigrants undermine American culture and increase crime rates. Unsurprisingly, they are also all the

Christian nationalism not only purveys the myth that America was founded as a Christian nation but also that it should be governed according to the biblical precepts that Christian nationalists themselves identify as germane Thus, Christian nationalism is best understood as a political ideology that holds that America's government is not legitimate, nor can it be, until its laws and policies are thoroughly consistent with the Christian nationalists' narrow, sometimes idiosyncratic, and at times convoluted readings of the biblical text. Thus, while the tenants of evangelicalism essentially comprise right-wing evangelicals' religious beliefs, Christian nationalism is the political ideology that guides and motivates the pursuit of their social and political interests in the world. The spectacle we see in the public square today is right-wing evangelicals' Christian nationalist convictions taking precedence over their religious beliefs. This is fully reflected in right-wing evangelicals' voter turnout for Donald Trump Indeed, despite his well-earned reputation for racism and moral indecency, those who most enthusiastically supported his candidacy are numbered among the most ardent evangelical believers.

Id. at 4. Further, in addressing MAGA's political significance, and the specific demographic it empowers, I also write:

"Make America Great Again," Trump's 2016 campaign slogan, was aimed squarely at the bloc of voters who viewed the last half century's post-Civil Rights Movement changes as negative. . . . Trump promised to turn back the clock to a time when members of the white working class enjoyed greater influence and respect. Moreover, although racial divisions in the United States are anything but new, Trump's incendiary campaign rhetoric capitalized on the racial enmity that was simmering during the Obama presidency.

AUGUSTINE, *supra* note 7, at 73 (footnotes omitted).

128. See, e.g., SEIDEL, *supra* note 32, at 5.

129. See, e.g., Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime> [<https://perma.cc/892J-TYCR>].

130. While exploring some of the Trump administration's policies and its MAGA governance, the popular evangelical author Jim Wallis writes, regarding the separation of migrant children from their families at the U.S.-Mexico border:

This inhumane practice was directly and admittedly part of the new administration's "zero tolerance" immigration policy designed to deter immigrant families from coming to America, and to systemically decrease immigration to the United States—not just undocumented immigrants but legal immigration too—especially from nations of color. All this derived from their overall white nationalist agenda, which appeals to their select political base

JIM WALLIS, *CHRIST IN CRISIS: WHY WE NEED TO RECLAIM JESUS* 34 (2019).

more eager to reduce immigration into the United States.”¹³¹ Indeed, in addressing MAGA’s impact on white evangelical Christians, Kristen Kobes Du Mez writes, “White evangelicals are more opposed to immigration reform and have more negative views of immigrants than any other religious demographic; two-thirds support[ed] Trump’s border wall.”¹³²

In *When Prophets Preach*, I elaborate on the overall theme of how white Christian nationalism has become so prominent in America by describing some of the (un)welcome immigrants have experienced, certainly because of Trump, but more importantly because of the Christian nationalism that is so heavily interwoven into Trump’s MAGA politics:

Trump’s campaign promised to build a border wall to prevent (illegal) immigration and ultimately stop the continued growth of the United States’ immigrant population, which spoke to the worst impulses of a specific American demographic that longed for a return for the “white rule” of yesteryear. Indeed, such rhetoric emboldens those white nationalists who embrace the so-called replacement theory, a fear that immigrants, minorities, and Jews are replacing white Protestants in America’s social hierarchy. With a foundation supported by beliefs in the United States’ “manifest destiny,” such language of *unwelcome* goes hand in hand with the rise of white Christian nationalism in the United States.¹³³

This is the type of rhetoric that goes to the heart of group polarity, as it capitalizes on fear to drive wedges of division between racial and ethnic groups in America.

During Trump’s first year in office, after his August 2017 off-putting remarks regarding the Unite the Right rally in Charlottesville,¹³⁴ the government announced its intent to wind down the Deferred Action for Childhood Arrivals Program, popularly known as “DACA.”¹³⁵ Even more polarizing, however, was before the administration’s six-month mark in June 2017, when Trump looked at a list of how many immigrants had received visas to enter the United States in 2017, after his outspoken campaign promises

131. WHITEHEAD & PERRY, *supra* note 28, at 89–93.

132. KOBES DU MEZ, *supra* note 77, at 4.

133. AUGUSTINE, *supra* note 20, at 90.

134. *Supra* note 21 and accompanying text.

135. Vanessa Romo, Martina Stewart & Brian Naylor, *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017, 3:57 PM), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act> [https://perma.cc/T62H-D6WU]; AUGUSTINE, *supra* note 20, at 92.

to limit immigration. Trump argued that immigrants from Nigeria would never “go back to their huts,” only to be followed by a discussion on protections for immigrants from Haiti, El Salvador, and Africa, wherein Trump questioned, “Why are we having all of these people from shithole countries come here?”¹³⁶

An August 2019 issue of *The New York Times* also highlights how Trump’s immigration policies were disproportionately targeted at Mexican nationals.¹³⁷ Considering that the longest government shutdown in American history resulted from Trump’s demand for \$5.7 billion to build a U.S.-Mexico border wall, it is safe to say that immigration was one of his administration’s most controversial matters.¹³⁸ Most notably, the shutdown had little to do with national security. It was instead a consequence of Trump’s race-based 2016 campaign rhetoric that was targeted at Mexican nationals and Muslims. The tone had been set. This vile and exclusionary perspective, from the highest office in the land, helped fuel the rise of an antisemitic, anti-immigrant, and antiminority *white* Christian nationalism that led to the tragic events of 2020, the final year of the Trump presidency.

By 2020 a *renewed* Black Lives Matter movement emerged¹³⁹ in a response to the horrific May 25, 2020, death of George Floyd.¹⁴⁰

136. JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, *IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA* 201 (2018); Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html> [<https://perma.cc/9MZV-USSQ>].

137. Michael D. Shear, Miriam Jordan & Caitlin Dickerson, *Trump’s Policy Could Alter the Face of the American Immigrant*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/immigration-public-charge-welfare.html> [<https://perma.cc/VT9G-M6SP>]; see also Claire Klobucista, Amelia Cheatham & Diana Roy, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS. (June 6, 2023, 1:35 PM), <https://www.cfr.org/backgrounder/us-immigration-debate-0> [<https://perma.cc/CGE2-32PW>].

138. Tessa Berenson, *Here Are the White House’s Latest Demands to End the Shutdown*, TIME (Jan. 7, 2019, 5:09 PM), <https://time.com/5496179/mike-pence-donald-trump-border-wall-proposal-shutdown-democrats> [<https://perma.cc/WHS6-E4L8>] (“The White House is holding firm in its request for \$5.7 billion for a border wall to end the shutdown, while also demanding billions of dollars more to address other priorities at the southern border, according to a proposal it gave Congressional Democrats”); Kevill Schaal & Kevin Uhrmacher, *The Shortest and Longest Government Shutdowns in History*, WASH. POST (Sept. 21, 2023, 6:30 AM), <https://www.washingtonpost.com/politics/2023/longest-government-shutdown/> [<https://perma.cc/JL3B-BCXB>].

139. I have written about the systemic marginalization of Black Americans that necessitated the “original” Black Lives Matter Movement in 2013. Regrettably, by 2020, there was a renewed movement because of the tragic deaths of Breonna Taylor, Ahmaud Arbery, and George Floyd, among others. AUGUSTINE, *supra* note 7, at 2.

140. See *supra* note 36 (describing the circumstances of Floyd’s death).

Although police killings of Black men have regularly sparked outrage—during both the original and renewed Black Lives Matter Movements—there was something different about the outrage resulting from Floyd’s murder that included a more sweeping response.¹⁴¹

Indeed, although the response to Floyd’s murder provoked a call for overall social justice reforms in America, there was a specific response in the form of protests aimed at tearing down Confederate monuments. Almost predictably so, “[n]owhere was the effect of these protests more intense than in Richmond, Virginia, home to Monument Avenue.”¹⁴² Cox highlights Richmond by sharing the following:

Beginning on the evening of May 31, 2020, protesters targeted the monuments to Stonewall Jackson and Jefferson Davis and especially the large equestrian statue of Robert E. Lee. The statue of Davis, part of a memorial that also included a sixty-five-foot Doric column along with a semicircle of thirteen columns representing each Confederate state, was ripped off of its pedestal. Along with the equestrian statue of Stonewall Jackson, the remains of the Davis memorial were spray-painted with slogans of protest. Yet it was Lee’s statute that stood out.¹⁴³

The question must be: why? What was it about the Lee statute that made it stand out from all the others in proximity?

As Cox’s account continues, she describes what must have been the reasoning for the images used on the cover of her book, *No Common Ground*. In describing the Black Lives Matter protestors in Richmond, she writes:

Locals had reinterpreted the Lee monument through protest art and it swiftly became a tourist destination, a place to take photos and to see a new kind of history in action. On June 8, 2020, locals projected an image of George Floyd onto the monument along with the slogans “No Justice, No Peace” and “BLM.” Over the course of the summer, images of [B]lack leaders like Frederick Douglass, Harriett Tubman, W.E.B. DuBois, and Georgia congressman John Lewis were projected onto the statue’s pedestal, as were other victims of police violence, including Breonna Taylor. For many, it was the historical context that those Confederate icons long deserved.¹⁴⁴

141. COX, *supra* note 1, at 169.

142. *Id.* at 170.

143. *Id.* at 169–70 (footnotes omitted).

144. *Id.* at 170 (footnotes omitted).

If there is any firm takeaway from the reaction to Floyd's murder, it is that Richmond's politics had changed, as had the political perspectives of so many other citizens and their municipal governments.

In specifically noting this relatively recent move by municipalities to engage in "government speech" and have their say by *removing* Confederate monuments, *How the Word Is Passed* details a few important events that have served as inflection points in modern American history. Smith writes:

After years of Black people being killed by police and having their deaths broadcast in videos streamed across the world, after a white supremacist went into a Black church in Charleston, South Carolina, and killed nine people as they prayed, after neo-Nazis marched in Charlottesville, Virginia, to protect a Confederate statue and reclaim a history born of a lie, after George Floyd was killed by a police officer's knee on his neck, cities across the country have begun to more fully reckon with the history that made such moments possible—a history that many had previously been unwilling to acknowledge . . . Only recently, after decades of pushing by activists, amid the larger groundswell of national pressure, have city officials begun to listen, or perhaps feel like they finally have the political capital to act.¹⁴⁵

The politics of Confederate monument removal is the opposite side of the political coin that allowed municipalities to engage in Confederate monument erection. Those politics are the subject of the government speech doctrine that was at the heart of the Supreme Court's 2009 opinion in *Pleasant Grove City v. Summum*.¹⁴⁶ Based on my analysis of the government speech doctrine below, I believe "statue statutes" should be repealed for failing to allow government speech today as the doctrine presumably did years ago.

C. *The Issue of Government Speech: Statue Statutes Compel Municipal Governments to Speak in Ways that Are Inconsistent with Their Politics*

Pleasant Grove was clear in distinguishing between *private* speech on government property, where the government only facilitates a forum for private communication, and actual *government* speech, where the governmental entity expresses its own political

145. SMITH, *supra* note 12, at 4–5.

146. 555 U.S. 460 (2009).

views.¹⁴⁷ *Pleasant Grove* is therefore helpful in looking at the compelled or forced speech municipalities give when they are precluded from removing Confederate monuments. Assuming such permanent markers no longer represent the municipality's political will and contemporary government speech, "statue statutes" provide a baseline for arguing that the eight state heritage laws at issue are unconstitutional under *Pleasant Grove* because they prohibit government speech.¹⁴⁸

Pleasant Grove's logic also sets forth compelling reasons why "statue statutes" should be repealed: to allow local governments the power to exercise free speech *now*—instead of a compelled speech that no longer represents the citizens' political will—just as they were allowed to freely speak at the times they chose to erect permanent Confederate monuments¹⁴⁹ typically in response to periods of Black Americans' sociopolitical progress.¹⁵⁰

147. *Supra* note 31 and accompanying text (discussing the *Pleasant Grove* and *Walker* opinions, distinguishing between whether the government actually *is* the speaker or simply facilitates a forum for private speech).

148. Insofar as there is an inherent tension between municipal government actions and state laws prohibiting them, I understand the well-settled police power states enjoy in enforcing laws within their domains. *See* U.S. CONST. amend. X. In this instance, however, my focus is not so much on the tension between (attempted) municipal action and state law. As detailed below, my focus is instead on the fact that the eight states with laws prohibiting municipalities from engaging in government speech are technically in violation of federal law, or at least the logic undergirding the Supreme Court's decision in *Pleasant Grove*.

149. The *Pleasant Grove* opinion is not without criticism. It can arguably be seen as a gateway to conflation of the government speech doctrine and the Establishment Clause analyses, as a way to allow the imposition of religious iconography on secularists in the public domain. *See* Ian Bartrum, *Pleasant Grove v. Summum: Losing the Battle to Win the War*, 95 VA. L. REV. ONLINE 43, 43–44 (2009). As a staple of Establishment Clause jurisprudence, such claims were long evaluated under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), an opinion that promulgated a three-part inquiry, often called the "*Lemon* test." To withstand constitutional scrutiny under the *Lemon* test, the statute (governmental action) must (1) have a secular/non-religious purpose, (2) be neutral or must not inhibit or advance religion, and (3) not foster excessive governmental entanglement. *Id.* at 612. Argument can easily be made that, based on a series of relatively recent Supreme Court decisions, *Lemon* now exists in name only. *See, e.g.,* *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) ("While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."). Moreover, in a separate concurrence, Associate Justice Kavanaugh went a step further than the Alito majority in questioning *Lemon's* continued relevance. He wrote, "As this case again demonstrates, this Court no longer applies the old test articulated in *Lemon v. Kurtzman . . .*" *Id.* at 2092 (Kavanaugh, J., concurring). It is therefore understandable that, to the extent *Pleasant Grove* creates a conflation that will result in further blurring the lines between church and state, the opinion will have its critics.

150. *See* SMITH, *supra* note 12, at 144.

1. *Pleasant Grove* Emphasizes the Inherently Political Nature of Government Speech

Pleasant Grove City is a municipality in the state of Utah that includes Pioneer Park, a 2.5-acre municipally owned facility containing fifteen permanent displays, where at least eleven of the displays were donated by private groups or individuals.¹⁵¹ Among them is a monument of the Ten Commandments that was donated in 1971 by the Fraternal Order of Eagles.¹⁵²

“Summum is a religious organization [that was] founded in 1975 and [is] headquartered in Salt Lake City, Utah.”¹⁵³ Summum’s president wrote to the local government of Pleasant Grove City, seeking permission to erect a permanent stone monument that “would contain the ‘Seven Aphorisms of SUMMUM,’ and be similar in size and nature to” Pioneer Park’s permanent monument of the Ten Commandments.¹⁵⁴ The city denied the request and subsequently passed a resolution putting its reasons for denial in writing.¹⁵⁵ Summum predictably filed suit, alleging the city’s denial of its request violated the Free Speech Clause by allowing the Ten Commandments Monument whilst rejecting its proposed monument.¹⁵⁶

As an initial matter, in recognizing the distinction between *private* speech on government property as being distinct from actual *government* speech, the Court highlighted that if the city was engaging in its own expressive conduct, the First Amendment would not apply. Indeed, the Court specifically noted that “[t]he Free Speech Clause restricts government regulation of private speech; it *does not* regulate government speech.”¹⁵⁷ Moreover, to emphasize this distinction, the Court went on to add:

Indeed, it is not easy to imagine how government could function if it lacked this freedom. “If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”

151. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

152. *Id.* at 465.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 466.

157. *Id.* at 467 (emphasis added).

A government entity may exercise the same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.

This does not mean that there are no restraints on government speech. . . . The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately “accountable to the electorate and the political process for its advocacy.”¹⁵⁸

As an initial matter, therefore, the Court expressly stated two things: (1) government speech on political matters is expected; and (2) the political process, or rather the electorate, is a regulator of government speech. This is exactly what happened in times past when local governments either erected Confederate monuments or did so with the assistance of or a donation from organizations like the UDC.¹⁵⁹

2. When Municipalities Opted for the Politics of Confederate Monument Erection, They Engaged in Government Speech; Therefore, Preventing Them from Engaging on the Politics of Confederate Monument Removal Is an Unconstitutional Violation of (Free) Government Speech

As a second major takeaway from *Pleasant Grove*, in addition to the Court highlighting the inherent political check on municipal governments being able to speak on behalf of their citizens through the political process, the opinion also notes the distinction between actual government speech, with the erection or placement of *permanent* structures, like monuments, and times when the government merely facilitates a space for private speech, as when a thing or a speaker is temporary. In relevant part, the Court held the following: “[s]peakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however,

158. *Id.* at 468 (citations omitted). Presumably, the same logic undergirding the government speech doctrine as applied to elected municipal actors, like city councils, does not apply to elected jurists. In *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003), the Eleventh Circuit affirmed a ruling from the Middle District of Alabama finding the Alabama Supreme Court’s Chief Justice, Roy Moore, violated the Establishment Clause by having a 5280-pound granite monument of the Ten Commandments in the rotunda of Alabama’s state courthouse.

159. *See, e.g., supra* notes 86–88 and accompanying text (noting the role of the United Daughters of the Confederacy, as a private organization, in erecting Confederate moments that were largely placed on public grounds, as obviously representing the respective governmental entities’ free speech).

endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space.”¹⁶⁰

In further elaborating on the key distinction between permanent and temporary, the Court also provided, “A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group”¹⁶¹ Again, this logic squarely applies to municipalities’ previous erections of Confederate monuments.

Municipalities lawfully engaged in government speech as they chose to convey a particular political message. My counter argument rests on the same logic: since municipal demographics have obviously changed and since municipalities are *again* engaging in government speech, conveying the *opposite* political message by attempting to tear Confederate monuments down, “statue statutes” prohibit governments from speaking in a way that violates the Supreme Court’s logic.

Further, in emphasizing how permanent monuments permissibly convey government speech and are distinct from temporary occasions, wherein the government merely creates a private forum, the *Pleasant Grove* Court’s logic completely supports my advocacy for state legislatures to repeal any laws that prevent municipal governments from engaging in the type of political speech as clearly envisioned by the Supreme Court. In relevant part, the unanimous *Pleasant Grove* Court provided:

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case *does not* present such a situation. *Permanent* monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statutes of themselves to remind their subjects of their authority and power [M]onuments have been built to commemorate military victories and sacrifices and other events of civic importance. *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*

160. *Pleasant Grove*, 555 U.S. at 479.

161. *Id.*

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.¹⁶²

The Court's logic and ultimate holding could not be more applicable to the quagmire created by "statue statutes" that prevent municipalities from lawfully engaging in government speech. Because state heritage laws prevent municipalities from "speaking," they violate the government speech doctrine and the basis upon which the Court ruled in *Pleasant Grove*.¹⁶³

3. *Pleasant Grove's* Logic Also Supports the Repeal of "Statue Statutes" so Municipal Governments Can Exercise the Same Right to Political Speech Today as When They Erected Confederate Monuments in the Past

In following *Pleasant Grove's* logic and applying the same to the history of the Lost Cause detailed herein,¹⁶⁴ although the Confederacy was not victorious, the politics of its revisionist history in lauding Confederate soldiers fits well within the unanimous Supreme Court's framework of monument erection as the government entity "wish[ing] to convey some thought or instill some feeling."¹⁶⁵ Indeed, although the intended thoughts and feelings were in furtherance of the myth of white supremacy, furthering such an

162. *Id.* at 470–71 (emphasis added).

163. Although my argument is supported by the Supreme Court of the United States' rulings in *Pleasant Grove* and *Walker*, see *supra* note 31, in *State v. City of Birmingham*, 299 So.3d 220, 222, 225, 234–35 (Ala. 2019), the Alabama Supreme Court reversed a state circuit court decision that held in favor of the City of Birmingham because it found the government speech doctrine allowed the city to place plywood around a Confederate monument that was erected in 1894. The city's more recent act, covering the statue in August 2017, was in response to the Unite the Right rally in Charlottesville. See *Alabama Sues Birmingham for Covering Up Confederate Monument*, AP NEWS (Aug. 16, 2017, 8:00 PM), <https://apnews.com/article/f148588ada0d456ea24306b9516c9d25> [<https://perma.cc/Q7M3-SJD3>]. Clearly that act was the government's more recent attempt to "speak" and express the political will of its citizens. Although the Alabama Supreme Court ruled against the City of Birmingham, finding its action was not consistent with the government speech doctrine, *City of Birmingham*, 299 So.3d at 234–35, I argue it is indeed consistent with the Court's logic in *Pleasant Grove* and the Court's affirmance of that logic in *Walker*. The U.S. Supreme Court has yet to clarify this ambiguity.

164. For a discussion of the Lost Cause, see *supra* notes 60–77 and accompanying text.

165. *Pleasant Grove*, 555 U.S. at 470.

ideology was within the bounds of the government's political agenda that "spoke" by erecting Confederate monuments on public lands.

In following the same logic, given changes in both municipal demographics, especially considering who can now vote because of the Voting Rights Act of 1965 and the political speech municipal governments are attempting to convey, "statue statues" run afoul of the government speech doctrine and are unconstitutional under *Pleasant Grove*.

CONCLUSION

My experiences were not unique. At a time when so many in the United States were wrestling with Confederate monument removal, in 2017, I was directly a part of one statue's removal in New Orleans and indirectly a part of another's removal in Durham. Although Mayor Landrieu was ultimately successful in representing his constituents' political wishes by removing a series of Confederate monuments in New Orleans, other mayors in other states have not been as successful.

According to the Supreme Court's opinion in *Pleasant Grove City v. Sumnum*, the government speech doctrine pivots on whether the governmental body is the speaker or whether the government is simply providing a forum that facilitates private speech. When the government is the speaker—like when it has chosen to erect permanent monuments—the government's speech is expected to be "political," in that the government's action represents its citizens' voices, through the political process. In following that logic, when municipalities chose to erect Confederate monuments, they acted in accordance with their citizens' political interests. Demographics have changed.

In more recent years, the political sentiments of municipalities is obviously different. Just as periods of monument erection were typically in response to perceptions of Black progress, incidents when municipal actors attempted to takedown Confederate monuments have largely been in response to acts of white supremacy, none more so inflammatory than the May 25, 2020, murder of George Floyd.

If the government speech doctrine justifiably allowed municipalities to erect Confederate monuments as expressions of their

political will, when state heritage laws, or “statue statutes,” preclude municipalities from removing Confederate monuments, those prohibitory laws stifle government speech, at best. More accurately described, at worst, they compel government speech that is inconsistent with the government’s political will.

Although municipalities are political subdivisions of the states where they are located, “statue statutes” run afoul of the Supreme Court’s logic in *Pleasant Grove* and the Court’s affirmance of that logic in the more recent *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, because of the government speech doctrine. Stated otherwise, state laws prohibiting Confederate monument removal are arguably unconstitutional. I call on those eight states that have enacted “statue statutes” to repeal those laws and allow municipal actors to vote on how they intended to “speak” with respect to Confederate monument removal under the government speech doctrine.