

IF CONFEDERATE STATUES COULD TALK: DURHAM'S MONUMENTS AND GOVERNMENT SPEECH

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Confederate monuments are coming down across the American South, but hundreds remain, and several states have laws that prohibit their removal. Monument opponents have become increasingly interested in whether remaining monuments, and the laws that protect them, could be challenged in court. Some scholars have suggested that Confederate monuments might constitute racist government speech and thus violate the Fourteenth Amendment's Equal Protection Clause. The Supreme Court's doctrine on government speech is murky, but it would likely require litigants to discuss the historical context of the monument being challenged. This Article uses the histories of Durham's two most prominent Civil War monuments, the Bennett Place "Unity Monument" and the recently toppled Durham County Courthouse monument, as case studies for the sort of analysis that would be required for a constitutional challenge. The disparate motivations behind the construction of these memorials show that—while the connection between white supremacy and Confederate monuments is undeniable—a legal challenge against individual monuments might be more difficult than this fact would initially suggest.

I. INTRODUCTION

On August 14, 2017, Durham, North Carolina made history by becoming the first city where a Confederate monument was toppled by protestors.¹ It would not be the last. In 2018, “Silent Sam,” a Confederate monument in the neighboring city of Chapel Hill, was also toppled.² And in the summer of 2020, monuments were toppled, vandalized, and removed across the United States, and indeed the world, in the aftermath of the brutal murder of George Floyd.³

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¹ See THOMAS J. BROWN, CIVIL WAR MONUMENTS AND THE MILITARIZATION OF AMERICA 292–93 (2019); Maggie Astor, *Protestors in Durham Topple Confederate Monument*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/protesters-in-durham-topple-a-confederate-monument.html?searchResultPosition=1>; Warren Christian & Jack Christian, *The Monuments Must Go: Reflecting on Opportunities for Campus Conversations*, 50 SOUTH: A SCHOLARLY J. 47, 49 (2017) (providing a firsthand account of the protest and subsequent toppling).

² See generally Jesse James Deconto & Alan Blinder, *‘Silent Sam’ Confederate Statue Is Toppled at University of North Carolina*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/unc-silent-sam-monument-toppled.html>.

³ For Confederate monuments destroyed or vandalized by protestors, see e.g., Michael Levenson, *Protestors Topple Statue of Jefferson Davis on Richmond’s Monument Avenue* <https://www.nytimes.com/2020/06/11/us/jefferson-davis-statue-richmond.html>; Ana Ley, et al., *Portsmouth Confederate Statues Beheaded, Partially Pulled Down by Protestors*, VIRGINIAN-PILOT (June 10, 2020), <https://www.pilotonline.com/news/vp-nw-portsmouth-confederate-monument-20200610-65p7wr3nkvcrneatwycjygcqu-story.html>. For monuments removed by government action, see, e.g., Scott Calvert & Cameron McWhirter, *Virginia to Take Down Confederate Statue After George Floyd Protests*, WALL STREET J. (June 3, 2020), <https://www.wsj.com/articles/virginia-to-take-down-confederate-statue-after-george-floyd-protests-11591222749?mod=searchresults&page=1&pos=4>; Emily Wagster Pettus, *Confederate Statue to be Moved from Central Spot at Ole Miss*, WASH. POST (June 18, 2020), https://www.washingtonpost.com/national/confederate-statue-to-be-moved-from-central-spot-at-ole-miss/2020/06/18/ad6442ea-b16e-11ea-98b5-279a6479a1e4_story.html. Protests went far beyond Confederate monuments. Union statues were also toppled and vandalized. See, e.g., Marty Johnson, *Protesters Tear Down Statues of Union General Ulysses S. Grant, National Anthem Lyricist Francis Scott Key*, THE HILL (June 20, 2020), <https://thehill.com/homenews/state-watch/503685-protesters-tear-down-statues-of-union-general-ulysses-s-grant-national>; Steve Annear, *Monuments on Boston Common, in Public Garden Defaced with Graffiti*, BOSTON GLOBE (June 1, 2020), <https://www.bostonglobe.com/2020/06/01/metro/monuments-boston-common-public-garden-defaced-with-graffiti-following-protests/> (noting that post-Civil War monuments to the 54th Massachusetts and the Massachusetts war dead

This escalating trend of monument destruction is part of what historian Thomas J. Brown has called, “the most important season of American iconoclasm since the destruction of the equestrian statue of George III in 1776.”⁴ Debate over Confederate monuments is not entirely new: statues like the one in Durham have been controversial—sometimes in surprising ways—since their inception.⁵ The 1990s in particular saw an uptick in the debate over Confederate memory.⁶ But after a lull during the early 2000s, the debate was reignited by three events.⁷ The first was the controversial killing of Trayvon Martin in 2012; subsequent protests often included the defacing of Confederate memorials, leading to public debate about their removal.⁸ Next was the massacre of twelve black parishioners in a Charleston church in July

were vandalized). And controversial non-Confederate historical figures were targeted as well. See generally, Olga R. Rodriguez & Jeffrey Collins, *Statues Toppled Throughout US in Protests Against Racism*, S.F. AP (June 20, 2020), <https://apnews.com/article/9a01ee49102df70f10ce54ae04a46fa6> (discussing the toppling of Francis Scott Key and Father Junipero Serra statues); Joseph Guzman, *George Washington Statue Toppled, American Flag Burned by Portland Protestors*, THE HILL: CHANGING AM. (June 19, 2020), <https://thehill.com/changing-america/respect/equality/503559-george-washington-statue-vandalized-and-toppled-by> (discussing also the toppling of a Thomas Jefferson statue). For international examples, see *‘I Can’t Breathe’: Leopold II Statue Defaced in Ghent*, BRUSSELS TIMES (June 3, 2020), <https://www.brusselstimes.com/all-news/belgium-all-news/115013/i-cant-breathe-leopold-ii-statue-defaced-in-ghen>; *Britons cheer toppling of Slave Trader Statue but are Divided over Tagging of Winston Churchill as Racist*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/world/europe/churchill-statue-racism-british-black-lives-matter-protests/2020/06/08/33f68146-a991-11ea-9063-e69bd6520940_story.html (discussing the toppling of one statue and the vandalism of another).

⁴ See BROWN, *supra* note 1, at 283 (describing the wave of monument removal from 2017-2018).

⁵ See, e.g., Catherine W. Bishir, “A Strong Force of Ladies:” *Women, Politics, and Confederate Memorial Associations in Nineteenth-Century Raleigh*, 77 N.C. HIST. REV., 455, 477 (2000) (describing public division over Raleigh’s planned Confederate monument in 1895); Letter from Robert E. Lee to Thomas L. Rosser, December 13, 1866 (*available at* <https://leefamilyarchive.org/papers/letters/transcripts-UVA/v076.html>) (suggesting that the construction of Confederate monuments would “have the effect of retarding, instead of accelerating [the South’s] accomplishments”).

⁶ The Confederate flag was the focal point of debate in the 1990s, but monuments were also at issue. See generally SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 50–53 (1998); BROWN, *supra*, note 1 at 288–89.

⁷ Debate over Confederate monuments died down enough in the early 2000s for President Barack Obama to continue the presidential tradition of providing a wreath for the Confederate Monument in Arlington on Memorial Day with comparatively little, though still some, criticism. See Sheryl Stolberg, *‘They Answered a Call,’ Obama Says of Veterans*, N.Y. TIMES (May 25, 2009), <https://www.nytimes.com/2009/05/26/us/politics/26wreath.html> (“Mr. Obama continued the Confederate monument wreath tradition.”).

⁸ See BROWN, *supra* note 1, at 289–90.

2015 by a white supremacist, an event that sparked the removal of the Confederate battle flag from the grounds of the South Carolina State House and from public land across the former Confederacy.⁹ Many Confederate monuments, including the Durham courthouse monument, were vandalized in the days after the Charleston shooting.¹⁰ In response, North Carolina passed the “Heritage Protection Act” to prevent municipalities from removing Confederate monuments without state-level approval.¹¹ Then, in August 2017, the proposed removal of a Charlottesville, Virginia statue of Robert E. Lee led to the “Unite the Right” white supremacist rally that resulted in the tragic death of Heather Heyer, a counter-protestor.¹² This incident acted as the catalyst behind the Durham protests that ended with the toppling of a courthouse monument.¹³ From the death of Trayvon Martin to 2019, at least thirty-three outdoor Confederate monuments were removed from public spaces.¹⁴ This pace has accelerated dramatically during the George Floyd protests, which are still ongoing at the time of writing.¹⁵

⁹ For the link between the Mother Emanuel massacre and Confederate monuments see, e.g., Kevin McGill, *Did the Emanuel AME Church Massacre Push New Orleans to Remove Confederate Monuments?*, CHARLESTON POST & COURIER (May 14, 2017), https://www.postandcourier.com/news/analysis-did-the-emanuel-ame-church-massacre-push-new-orleans/article_25c9b8b8-38e7-11e7-b401-8b4b0e2321e8.html.

¹⁰ See Ron Gallagher, *Police Seek Two Suspects Who Spray-Painted Confederate Monument in Raleigh*, NEWS & OBSERVER (July 21, 2015), <https://www.newsobserver.com/news/local/counties/wake-county/article27996628.html> (noting that Durham’s monument had been spray painted with the slogan “Black Lives Matter” during the same period).

¹¹ See Cultural History Artifact Management and Patriotism Act of 2015, ch. 170, 2015 N.C. Sess. Laws 435, 435–36 (codified as amended at N.C. GEN. STAT. §§ 100-2, 100-2.1, 144-5, 144-9, 147-36, 160A-400.13 (2015)); see also Kasi E. Wahlers, *North Carolina’s Heritage Protection Act: Cementing Confederate Memory*, 94 N.C. L. REV. 2176, 2180 (2016) (linking the passage of North Carolina’s heritage protection act to widespread monument vandalization in July 2015); Eric Muller, *The Confederacy Lives in NC Law. Why Respect That?*, NEWS & OBSERVER December 13, 2018, at 9A.

¹² See Jacey Fortin, *The Statue at the Center of Charlottesville’s Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html> (noting that city leaders began to discuss removing the Lee statue after the 2015 massacre); Sheryl Stolberg, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html> (describing the rally and death of Heyer).

¹³ See David A. Graham, *How the Activists Who Tore Down Durham’s Confederate Statue Got Away with It*, ATLANTIC (Feb. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/02/durham-confederate-monument-charges-dismissed/553808> (describing how the Charlottesville incident galvanized the Durham protestors).

¹⁴ See BROWN, *supra* note 1, at 292–93.

¹⁵ See, e.g., the various monuments discussed in *supra* note 3.

Despite this, hundreds of Confederate monuments remain standing, many protected by state laws.¹⁶

While the toppling of monuments has made for eye-grabbing headlines, the story of Confederate monument removal has been mostly one of democracy in action, with cities, counties, and state governments responding to the demands of their constituents.¹⁷ Municipalities in some states, however—including North Carolina—have felt unable to take action against their monuments due to state laws prohibiting their removal without state-level government approval.¹⁸ Because of these laws, activists have increasingly pondered whether Confederate monuments, and the laws that protect them, could be challenged in court.¹⁹ This Article will tell the story of Durham’s Confederate monuments, and use them as case studies to test one of the most common legal theories for their removal: that Confederate monuments are unconstitutional government hate speech prohibited by the Constitution’s Equal Protection Clause. Part II posits the general theory that Confederate monuments could violate the Fourteenth Amendment and shows why individual monument case studies must play an important role in resolving this question. Part III examines the history of two of Durham’s Civil War monuments as they relate to this legal question. The Article concludes by noting that the complexity of individual monument histories—vital in a Fourteenth Amendment challenge—would make an Equal Protection argument difficult to win

¹⁶ See *Whose Heritage? Public Symbols of The Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>.

¹⁷ See *generally Confederate Monuments Are Coming Down Across the United States. Here’s a List*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html> (noting individual cities and states that have chosen to remove Confederate monuments).

¹⁸ See Wahlers, *supra* note 11, at 2180–81 (discussing the various state “heritage protection acts” in North Carolina, South Carolina, Georgia, Mississippi, and Tennessee). Virginia recently repealed a similar law protecting its Confederate monuments. See Ned Oliver, *‘A Huge Step’: General Assembly Says Local Governments Can Remove Confederate Monuments*, VA. MERCURY (Mar. 8, 2020), <https://www.virginiamercury.com/2020/03/08/a-huge-step-general-assembly-says-local-governments-can-vote-to-remove-confederate-monuments/>. How North Carolina’s law applies to monuments removed by protestors, rather than by governments under the aegis of the statute, is undefined. See Eric Muller, *No, the Law Doesn’t Require Silent Sam to be Returned to Pedestal in 90 Days*, NEWS & OBSERVER, Aug. 28, 2018, at 8A.

¹⁹ See, e.g., Micah Schwartzman & Nelson Tebbe, *Charlottesville’s Monuments are Unconstitutional*, SLATE (Aug. 25, 2017), <https://slate.com/news-and-politics/2017/08/charlottesvilles-monuments-are-unconstitutional.html>; see also *State v. City of Birmingham*, 299 So.3d 220, 237 (Ala. 2019) (reversing a lower court decision holding that Alabama’s Heritage Protection Act was unconstitutional).

in many cases. To be clear, this Article *does not* endorse Confederate statues and memorials in any way; most, if not all, Confederate monuments should be moved from places of public prominence, as they are offensive symbols to people of color.²⁰ This Article merely concludes that Supreme Court precedent, and the nuanced history of some Confederate monuments, would make this particular legal strategy more problematic than many commentators have asserted.

II. THE LEGAL USE OF MONUMENT CASE STUDIES

The Fourteenth Amendment's Equal Protection Clause declares that no state may "deny to any person within its jurisdiction the equal protection of the laws."²¹ Scholars and at least one group of litigants have suggested that this clause may render Confederate monuments unconstitutional.²² The Supreme Court has held that monuments are government speech.²³ And while the Court has held that government speech is "exempt from First Amendment scrutiny,"²⁴ other parts of the Constitution limit what governments can say.²⁵ The Equal Protection Clause is thought to be one of these parts.²⁶ But, Supreme Court doctrine about government speech is relatively new, and has focused almost

²⁰ See *infra* note 277 for more on this point. See also Caroline Randall Williams, *You Want a Confederate Monument, My Body is a Confederate Monument*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/opinion/confederate-monuments-racism.html> (for a powerful example of how people of color interact with Confederate monuments).

²¹ U.S. CONST. amend. XIV, § 1.

²² See generally LEVINSON, *supra* note 6, at 75–139 (1998); see also James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 506–16 (1991); Schwartzman & Tebbe, *supra* note 19; Richard C. Schragger, *What is 'Government' 'Speech'? The Case of Confederate Monuments* VA PUB. L. & LEGAL THEORY RES. PAPER No. 2020-34 (April 13, 2020), <https://ssrn.com/abstract=3574712>. Charlottesville's city council invoked the Equal Protection Clause in a lawsuit over whether its proposed removal of two Confederate statues was lawful. See Defendant's Brief in Opposition to Plaintiff's Motions for Partial Summary Judgement and to Strike Equal Protection Affirmative Action Defense, *Payne v. City of Charlottesville*, No. CL 17-145 (Va. Cir. Ct. Jan. 11, 2019). The judge dismissed this argument after the plaintiff motioned for summary judgement on the issue; *Payne v. City of Charlottesville*, No. CL 17-145, 2019 Va. Cir. LEXIS 1174 (Va. Cir. Oct. 15, 2019).

²³ See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) ("Permanent monuments displayed on public property typically represent government speech.").

²⁴ See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005).

²⁵ See *Summum*, 555 U.S. at 482 (Stevens, J., concurring) ("For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.").

²⁶ *Id.*

entirely on the Establishment Clause.²⁷ The Court has not yet taken a case to resolve how the Fourteenth Amendment might relate to government speech.²⁸ But it is widely thought that the Equal Protection Clause prohibits federal, state, and local governments from engaging in racist expression.²⁹ For example, if a city were to declare that its motto was “White Supremacy Forever,” this would almost certainly be struck down under the Equal Protection Clause.³⁰ According to a theory proposed by Sanford Levinson and other scholars, government use of Confederate symbols might be analogous to such a motto.³¹

To successfully make this claim, litigants would have to use history in at least two ways. First, a monument’s historical background would be an important part of determining discriminatory intent. Most Confederate monuments would likely be considered “facially neutral” for Fourteenth Amendment purposes.³² This is because monuments do not generally draw a distinction between people based on racial categories, though examples with explicitly racial language do exist.³³

²⁷ See Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696, 710 (2011) (noting that “[g]overnment speech doctrine is young” and that the Establishment Clause provides the only “clear example” of a type of constitutionally prohibited government speech); Helen Norton, *The Equal Protection Implications of Government’s Hateful Speech*, 54 WM. & MARY L. REV. 159, 187 (2012) (“The Establishment Clause context offers the only area outside of the Free Speech Clause in which courts have, to date, seriously wrestled with the constitutional implications of government speech.”).

²⁸ See Norton, *supra* note 27, at 162-63 (“Whether and when the government’s racist or otherwise hateful speech—that is, its speech that intentionally communicates hatred, hostility, or animus on the basis of class status—violates the Equal Protection Clause thus remains unclear under the Court’s current doctrine.”).

²⁹ See Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 658-64 (2013) (arguing that the Equal Protection clause prohibits racist government speech).

³⁰ See Norton, *supra* note 27, at 164. Note that *private* racist speech is protected by the Constitution. See *R.A.V. v. City of St. Paul Minn.*, 505 U.S. 377, 396 (1992) (striking down an ordinance that prohibited the display of a symbol that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

³¹ See *supra* note 22 and accompanying text.

³² Confederate monuments do not fit into any of the standard categories of government acts that are considered facially discriminatory. They are not a race-specific classification that disadvantages a racial minority. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). They are not a race classification that burdens minorities and whites alike. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). And they do not require the separation of races. See, e.g., *Brown v. Board of Education*, 347 U.S. 483; *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Gayle v. Browder*, 352 U.S. 903 (1956).

³³ While not technically a Confederate monument, the recently removed “Battle of Liberty Place” obelisk in New Orleans is an example of a monument that might be considered facially discriminatory. It included an inscription celebrating how the 1876 presidential election “*recognized white supremacy* in the South and gave us our state.” See Kevin M. Levin, *Confederate Monuments Will Come Down in New Orleans*, ATLANTIC

To mount a successful Equal Protection claim against a garden-variety Confederate statue without such language, however, a litigant would need to prove both discriminatory impact and intent.³⁴ The question of *impact* is outside the scope of this Article, though the few lower court decisions that have addressed Equal Protection claims about Confederate symbolism (flags rather than monuments) have mostly focused on this element.³⁵ Determining a monument's impact is mostly a question of how people interact with it in the *present*.³⁶ This paper is focused on *history*, which is integral to the second element: discriminatory intent.³⁷ To determine whether such intent exists, the Court has stated that "historical background . . . [t]he specific sequence of events leading up to the challenged decision . . . [and] legislative or administrative history" are all relevant to the analysis.³⁸ Proving intent has traditionally been difficult for litigants.³⁹ The Court has said in some Equal Protection cases that a government must have taken action "because of, rather than in spite of" its discriminatory impact on minorities for the action to be unconstitutional.⁴⁰

Second, history would play a role in determining what *message* a particular monument communicates. What a monument communicates can sometimes be quite tricky to pin down. Nelson's Column in London, for example, is a monument to Admiral Nelson certainly, but it is also a monument to the entire Royal Navy, to the Battle of Trafalgar, and to the

(Dec. 17, 2015), <https://www.theatlantic.com/politics/archive/2015/12/new-orleans-remove-confederate-monuments/421059/> (emphasis added).

³⁴ See *Palmer v. Thompson*, 403 U.S. 217, 224–225 (1971) (suggesting that both discriminatory purpose and effect are needed to show a law is impermissible under the Equal Protection Clause).

³⁵ See *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017); *Coleman v. Miller*, 117 F.3d 527, 529–30 (11th Cir. 1997) (per curiam). Some scholars argue that monuments do cause real harm to minorities. See, e.g., Schragger, *supra* note 22, at 13; Forman, *supra* note 22, at 513–16.

³⁶ See Schragger, *supra* note 22, at 13 (discussing psychological harms to someone observing a Confederate monument); Forman, *supra* note 22, at 515 (discussing the feelings of inferiority that affects a citizen whose government is flying a Confederate flag).

³⁷ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (establishing the requirement to show discriminatory intent); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (discussing the importance of history in determining discriminatory intent).

³⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977).

³⁹ See LEVINSON, *supra* note 6, at 100.

⁴⁰ See *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *McClesky v. Kemp*, 481 U.S. 279, 297–98 (1987); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); LEVINSON, *supra* note **Error! Bookmark not defined.**, at 100.

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moment England was saved from a potential French invasion.⁴¹ Additionally, there is no clear Supreme Court doctrine on how to determine what the government is saying in cases concerning government speech, though it is clear that context is important.⁴² Establishment Clause cases are a useful guide here. Since this has been the only area where the constitutionality of government speech has been litigated extensively, its doctrine could provide a model for future cases on government hate speech.⁴³ In the Court's various Establishment Clause cases, no one rule has emerged for the constitutionality of government religious displays such as nativity creches or the Ten Commandments.⁴⁴ Instead, the Court has looked at government speech on a case-by-case basis.⁴⁵

In a recent case concerning a monument, *American Legion v. American Humanist Association*,⁴⁶ "history and tradition" were a major part of the Court's analysis.⁴⁷ The case concerned a World War I memorial in the shape of a Latin cross erected by the city of Bladensburg, Maryland in 1925.⁴⁸ Both sides of the dispute used the cross's historical context in their arguments.⁴⁹ The plaintiffs sought to connect the cross to wider historical trends, noting that it was dedicated at a time when the Latin cross was often connected to anti-Semitism.⁵⁰

⁴¹ For a panel of historians discussing the various messages Nelson's Column was meant to communicate, see *History Hack: #HistoryMatters* (June 17, 2020) (downloaded using Apple Podcasts).

⁴² See generally Blocher, *supra* note 27.

⁴³ Norton, *supra* note 27, at 187–88 (discussing how Establishment Clause cases might serve as a model for an Equal Protection government speech case); Schragger, *supra* note 22, at 56 (noting that a trial judge might apply *American Legion*, an Establishment Clause case, when faced with Confederate monument litigation).

⁴⁴ See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (holding that a different Ten Commandments monument did not violate the Establishment Clause); *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (holding that a monument featuring the Ten Commandments had a "predominantly religious purpose"); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 598 (1989) (holding that a different nativity creche violated the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (holding that that the context of a nativity creche detracted from its religious message).

⁴⁵ See *supra* note 44 and accompanying text.

⁴⁶ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

⁴⁷ *Id.*; see Andrée Blumstein, *Symposium: A Monumental Decision?*, SCOTUSBLOG (Jun. 21, 2019, 1:07 PM), <https://www.scotusblog.com/2019/06/symposium-a-monumental-decision/>.

⁴⁸ *Am. Legion*, 139 S. Ct. at 2074.

⁴⁹ See generally Brief of Appellants at 8–13, *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. (2019) (No. 15-2597), 2016 WL 791299 at *8–*19; Brief of Appellees, 6–20, *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067 (2019) (No. 15-2597) 2016 WL 1388050 at *6–*21.

⁵⁰ Brief of Appellants, *supra* note 49, at *12.

They also noted that the Bladensburg cross had once been a gathering place for the Ku Klux Klan.⁵¹ The majority opinion did not deny the cross's broader historical context, but noted:

[T]here is no evidence that the names of any area Jewish soldiers were either intentionally left off the memorial's list or included against the wishes of their families. The AHA tries to connect the Cross and the American Legion with anti-Semitism and the Ku Klux Klan, but the monument, which was dedicated during a period of heightened racial and religious animosity, includes the names of both Black and White soldiers; and both Catholic and Baptist clergy participated in the dedication.⁵²

In other words, while the cross may have been erected during a period of heightened anti-Semitism, the Court upheld it in part because of a lack of specific facts demonstrating that the government intended it to have a *discriminatory message* at the time of its construction and dedication.⁵³ In response, the dissent invoked specific facts from the monument's history, such as Christian rhetoric at the cross's dedication ceremony, to reach the opposite conclusion.⁵⁴

Therefore, while the legal doctrine around government speech is somewhat muddled, it seems likely that any litigation challenging a Confederate monument would require a narrowly tailored historical investigation. As Richard Schragger recently stated, "[a] trial judge, applying *American Legion*, might demand unique and overwhelming evidence that the monuments conveyed and still convey *only one message*: white racial supremacy."⁵⁵ When Sanford Levinson explored the historical background of Confederate symbolism in the 1990s, he found, to his mind, clear evidence of discriminatory intent behind state governments' decisions to fly Confederate flags.⁵⁶ Alabama's battle flag, for example, was hoisted over the state capital on segregationist

⁵¹ Brief of Appellants, *supra* note 49, at *12.

⁵² *Am. Legion*, 139 S.Ct. at 2089.

⁵³ *See id.*

⁵⁴ *Id.* at 2109 (Ginsburg, J., dissenting).

⁵⁵ *See* Richard Schragger, *Unconstitutional Government Speech*, VA. PUB. L. & LEGAL THEORY RES. PAPER No. 2019-56, 56 (2019), <https://ssrn.com/abstract=3468469>. Schragger continues by noting, "One might think that erecting a monument to a Confederate general in a whites-only park in the active presence of the KKK would be sufficient to prove animus. But the plaintiffs might point to other messages conveyed: Southern pride, the importance of honor, or remembrance of the war dead. A court might credit those as well." *Id.* (emphasis added).

⁵⁶ *See* LEVINSON, *supra* note 6, at 100 ("It is almost impossible to view [Georgia, South Carolina, and Alabama] as motivated by anything other than the desire to engage in 'the annoyance or oppression of a particular class'").

Governor George C. Wallace's orders on the same day he met with U.S. Attorney General Robert F. Kennedy to discuss segregation.⁵⁷ Levinson was unsure, however, whether Confederate *monuments*—specifically those “to the war dead”—would provide the same “good facts” for litigation.⁵⁸ He argued that the motivations behind such monuments appear to be more nuanced than those for Wallace's flag, thus making them harder to challenge.⁵⁹

More recent opponents of Confederate monuments have not shared Levinson's hesitation.⁶⁰ In fact, law professor Scott Holmes applied the Fourteenth Amendment theory for their removal directly to the courthouse monument in Durham, North Carolina, in a presentation to the Durham City-County Committee on Confederate Monuments and Memorials.⁶¹ Holmes argued that the monument represented racist government speech prohibited by the Fourteenth Amendment and a comparable provision of North Carolina's State Constitution.⁶² In his response to a committee-member who asked whether monuments to the war dead might be legally distinguishable from other types of Confederate monuments—a question echoing Levinson's concerns—Holmes replied:

[T]hese are the kinds of questions that will come up in depositions—these are the kinds of things we will create a record about in order to decide what was the meaning of this monument then, what do the records show, what people said when it was erected, and what they were celebrating? *And I can tell you what the record of that is—they were celebrating*

⁵⁷ See Forman, *supra* note 22, at 507–08.

⁵⁸ LEVINSON, *supra* note **Error! Bookmark not defined.**, at 100, 107 (“My caution concerning legal invalidation of the Confederate flag is heightened in regard to the monument for the war dead, which, if anything, presents even more wrenching semiotic issues than does the flag.”).

⁵⁹ LEVINSON, *supra* note 6, at 100, 107.

⁶⁰ See, e.g. Schwartzman & Tebbe, *supra* note 19.

⁶¹ See CityofDurhamNC, *City County Committee on Confederate Monuments & Memorials*, YOUTUBE (Oct. 11, 2018), <https://youtu.be/IOBGTm-txBc>.

⁶² *Id.* Holmes also raised an additional point, arguing that the North Carolina Constitution also forbids speech that promotes treason. This is a fascinating question mostly outside the bounds of this paper, because it involves the legal question of whether Confederate soldiers were guilty of treason, something never completely tested in court. See generally CYNTHIA NICOLETTI, *SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS* 21–38, 308 (2017) (noting that legality of secession was not settled before the Civil War, and federal prosecutors ended up not trying Jefferson Davis for treason out of fear that they might lose); see also LEVINSON, *supra* note 6, at 55–59 (“I do not think it is impossible to interpret the Constitution as allowing secession even within the United States, at least if carried out with the full deliberation and consent of those doing the seceding.”).

*new Jim Crow laws and white supremacy when [the monuments] were erected.*⁶³

In other words, the question of whether a monument is racist government speech is—at least in part—a *historical* question.⁶⁴ Protesters against monuments have already made use of historical research; archival work had a large role in the toppling of “Silent Sam” in particular.⁶⁵ A history graduate student at UNC-Chapel Hill found a mostly forgotten speech given by Julian Shakespeare Carr at the monument’s dedication ceremony where he explicitly linked the monument to white supremacy.⁶⁶ The explicitness of Carr’s racial rhetoric motivated opposition more successfully than the monument’s connection to the Confederacy alone.⁶⁷

Holmes’ assertion that he could tell the Committee what the record of the Durham courthouse monument’s dedication contained before doing any specific litigation research about the monument was based on his intuition that *all* Confederate monuments were put up with explicit discriminatory intent.⁶⁸ This categorical approach to Confederate monuments has become an increasingly common stance by Confederate monument opponents.⁶⁹

⁶³ CityofDurhamNC, *supra* note 61.

⁶⁴ See Forman, *supra* note 22, at 506–09 (stating that a plaintiff challenging the Confederate flag under the Equal Protection Clause could need to address the “historical background” of their government’s decision to fly it).

⁶⁵ See ADAM DOMBY, *THE FALSE CAUSE: FRAUD, FABRICATION, AND WHITE SUPREMACY IN CONFEDERATE MEMORY 2* (2020).

⁶⁶ *Id.* at 2, 179 fn.7 (stating that previous scholarship on the speech had either ignored Carr’s racist comments or used them merely to point out that Carr had once committed assault).

⁶⁷ *Id.* at 2 (discussing how the movement to remove the monument gained steam because of the rediscovery of Carr’s speech).

⁶⁸ See Scott Holmes, *Do Public Confederate Monuments Constitute Racist Government Speech Violating the Equal Protection Clause?*, 41 N.C. CENT. L. REV. 1, 5 (arguing that all “the Confederate Monuments were erected with the explicit governmental intent to endorse racial inequality.”).

⁶⁹ See, e.g., AM. HIST. ASS’N, STATEMENT ON CONFEDERATE MONUMENTS (2017); Holmes, *supra* note 68; Karen L. Cox, *Why Confederate Monuments Must Fall*, N.Y. TIMES, Aug. 15, 2017, <https://www.nytimes.com/2017/08/15/opinion/confederate-monuments-white-supremacy-charlottesville.html> (“Confederate monuments have always been symbols of white supremacy. The heyday of monument building, between 1890 and 1920, was also a time of extreme racial violence . . .”); *Whose Heritage?*, *supra* note 16 (linking spikes in Confederate monument building to various moments of racial crisis); Karen L. Cox, *The Whole Point of Confederate Monuments is to Celebrate White Supremacy*, WASH. POST, Aug. 16, 2016, <https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-confederate-monuments-is-to-celebrate-white-supremacy/>; German Lopez, *The Battle Over Confederate Statues, Explained*, VOX, Aug. 23, 2017, <https://www.vox.com/identities/2017/8/16/16151252/confederate-statues-white-supremacists> (“Confederate

Just as the plaintiffs in *American Legion* sought to link the Bladensburg Cross to anti-Semitism, commentators often point to the correlation between the peak of Confederate monument building in the 1910s, and racial tensions in the South during this period.⁷⁰ But attempting to generalize the history of Confederate monuments in this way could be problematic in an Equal Protection litigation context. Monument defenders could point out that the 1910s was also a decade that included the 50th anniversary of the Civil War, and thus the moment where commemoration of the war would have been at its height.⁷¹ Northern monument building likely peaked in the 1910s as well—often nearly identical Union and Confederate statues could be purchased from the same manufacturer.⁷² The peak in Confederate monument construction also overlapped with a general “monument movement” in the United States; American Revolution monument building, for example, peaked in the 1910s as well.⁷³ This period also

statutes have always been about white supremacy.”); Holland Cotter, *We Don't Have to Like Them. We Just Need to Understand Them*, N.Y. TIMES, June 24, 2020, <https://www.nytimes.com/2020/06/24/arts/design/theodore-roosevelt-statue.html?searchResultPosition=7> (“[S]ome [monuments] are complex, with questions to ask and lessons to teach, while others—so-called ‘Lost Cause’ Confederate monuments, created long after the Civil War to reassert white power during the era of integration—are, and were intended to be, racist assault weapons, plain and simple.”).

⁷⁰ Compare Cox, *Why Confederate Monuments Must Fall*, *supra* note 69; with Brief of Appellants, *supra* note 49, at *12.

⁷¹ See, e.g., BROWN, *supra* note 1, at 125 (discussing how Silent Sam “emerged from commencement plans for the fiftieth anniversary of the outbreak of the war, when the university would award degrees to students who had entered the Confederate army”).

⁷² Since Union monuments have traditionally been less controversial, less work has been done to study the wider pattern of their construction. But generally, it seems that Northern monuments and Southern monuments operated in a parallel way, with the exception that Northern monument building began earlier. See Ernest Everett Blevins, *Forever in Mourning: Union and Confederate Monuments, 1860-1920*, 39 NINETEENTH CENTURY 19, 25 (comparing Union and Confederate monument construction patterns); BROWN, *supra* note 1, at 64–65 (discussing how both Union and Confederate monument-building ballooned in the late nineteenth century as veterans’ organizations were founded and idealization of the “common-soldier” became the norm); March Fisher, *Why Those Confederate Soldier Statues Look a Lot Like Their Union Counterparts*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/politics/why-those-confederate-soldier-statues-look-a-lot-like-their-union-counterparts/2017/08/18/cefcc1bc-8394-11e7-ab27-1a21a8e006ab_story.html (discussing Union and Confederate statue manufacturers).

⁷³ See MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 115 (noting that “the decades between 1870 and 1910” was the height of monument building in the United States, and that it was not limited to Civil War commemoration); Kieran J. O’Keefe, *Monuments to the American Revolution*, J. OF THE AMER. REV. BLOG (Sept. 17, 2019), <https://allthingsliberty.com/2019/09/monuments-to-the-american-revolution/> (including a graph showing that the peak in American Revolution monument building occurred in 1910); see also LEVINSON, *supra* note **Error! Bookmark not defined.**, at 107–108 (observing that the fact that Confederate

saw veterans dying in great numbers.⁷⁴ The company that manufactured Durham's monument explicitly promoted memorial-building as a somewhat morbid race against time: "Why not buy [a monument] now and have it erected before the old veterans have answered the final roll call."⁷⁵

This is not to deny the—often quite explicit—racial component to Southern (and indeed some Northern) Civil War monument building,⁷⁶ but it might be a mistake to think about "Confederate monuments" as a single category for the purposes of litigation.⁷⁷ One might be able to meaningfully distinguish, for example, between a statue of Robert E. Lee erected in Baltimore in 1948 and a memorial to a small town's "Confederate dead" erected within living memory of the Civil War.⁷⁸ Even monuments to the war dead might differ in their historical context. While Carr's now infamous speech at the dedication of Silent Sam might have provided "good facts" had a litigant chosen to challenge it under the Fourteenth Amendment, this might not always be true of similar memorials. There are also bizarre outlier cases, such as that of Augusta's Confederate monument, which features Lost Cause poetry on its base, but also a statue of Sgt. Berry Benson, a repentant Confederate soldier who fought for black equality during Reconstruction.⁷⁹

monuments went up as part of a general American monument craze might make their "legal invalidation" more difficult).

⁷⁴ See BROWN, *supra* note 1, at 232–33 ("[The 1910s boom in monument building] could not continue indefinitely. . . . The passage of time was rapidly thinning the ranks of the veterans whom recent monuments most honored.")

⁷⁵ See DOUGLAS J. BUTLER, NORTH CAROLINA CIVIL WAR MONUMENTS: AN ILLUSTRATED HISTORY 143 (2013).

⁷⁶ See, e.g., BROWN, *supra* note 1, at 120–21, 125–27 (discussing how Civil Monuments monument dedication speakers in the North and the South often described the statues as depicting ideal, "Anglo-Saxon" Americans); *supra* notes 65–66 and accompanying text (discussing Julian Carr's racist speech during the unveiling of "Silent Sam" at the University of North Carolina).

⁷⁷ See Schragger, *supra* note 22, at 57–58 (discussing the need for "unique" evidence of racial animus behind Confederate monuments in an Equal Protection context).

⁷⁸ See Jane Dailey, *Baltimore's Confederate Monument Was Never About 'History and Culture'*, HUFFINGTON POST BLOG (Aug. 17, 2017), https://www.huffpost.com/entry/confederate-monuments-history-trump-baltimore_b_5995a3a6e4b0d0d2cc84c952 (arguing that Baltimore's monument was erected as a challenge to President's Truman's civil rights agenda); BROWN, *supra* note 1, at 294 ("Even more extraordinary [than the removal of monuments to Confederate leaders] was the removal of fourteen common-soldier monuments This iconoclasm indicated that ordinary Americans who sacrificed their lives at the call of the state were nonetheless morally wrong.")

⁷⁹ See Steve Oney, *The Only Confederate Monument Worth Saving*, THE BITTER SOUTHERNER, <https://bittersoutherner.com/from-the-southern-perspective/politics/the-only-confederate-monument-worth-saving-steve-oney>.

Researching the history of individual monuments will therefore be a necessary tool for any successful Fourteenth Amendment litigation. Durham's two Civil War memorials provide useful case studies on how the Equal Protection Clause might relate to Confederate monuments, and how determining the "historical background" and "specific sequence of events" behind individual monuments might look if they became subject to litigation.⁸⁰

III. DURHAM'S MONUMENTS

A. *The Bennett Place "Unity Monument"*

The Unity Monument at Bennett Place—the site of the Civil War's largest surrender—has not witnessed any of the modern controversies found at other Confederate sites; there have been no protests or acts of vandalism as of the time of writing.⁸¹ The City-County Committee saw the Unity Monument as the "good cop" to the toppled courthouse monument's "bad cop," even considering it as a potential model for a new memorial to replace the damaged statue.⁸² The *Carolina Times*, Durham's black newspaper, has frequently advertised the site as a tourist attraction.⁸³ The paper's staff even praised the Bennett Place Centennial ceremony in 1965, despite their strong opposition to other Civil War centennial activities.⁸⁴ In its coverage, the paper favorably

⁸⁰ This paper does not address the many other compelling arguments against Confederate monuments, such as the moral ambiguity of honoring soldiers who fought for slavery or the additional legal questions surrounding monuments and the state laws that prohibit their removal. For an argument that these statutes might constitute speech suppression see generally Aneil Kovvali, *Confederate Statue Removal*, STANFORD L. REV. ONLINE (2017), <https://www.stanfordlawreview.org/online/confederate-statute-removal/>. For the argument that Durham's monuments might constitute treasonous speech under the N.C. Constitution see *supra* note 61.

⁸¹ See e-mail from Diane M. Smith, Site Manager, Bennett Place, to Aaron D. Sanders, J.D. candidate, Duke University School of Law (Mar. 30, 2020) (on file with author) ("In the 10 years I've been here there have been no protests or vandalism of the site.").

⁸² See REPORT OF THE CITY-COUNTY COMMITTEE ON CONFEDERATE MONUMENTS AND MEMORIALS, 7-8, app. 8 (2019) [hereinafter CITY-COUNTY REPORT] (favorably discussing Bennett place and including an appendix with three emails from the public to the Committee suggesting the monument be moved to Bennett Place).

⁸³ See, e.g., *Holiday Decorations Events Planned at Historic Sites*, CAROLINA TIMES (Durham), Dec. 1, 1979, at 14; *Let's Go Durham*, CAROLINA TIMES (Durham), Mar. 14, 1981, at 22.

⁸⁴ *Compare The Bennett Place Centennial*, CAROLINA TIMES (Durham), May 1, 1965, at A2 ("We salute the promoters of the Bennett Place Centennial programs . . .") with *The Civil War Centennial Celebration*, CAROLINA TIMES (Durham), Mar. 25, 1961, at A2 (calling Civil War Centennial celebrations "pro-South propaganda" and "celebrating what many have labeled the blackest chapter history has written about the United States."); *Historian Says Centennial Used to 'Brainwash' Country*, CAROLINA TIMES (Durham), Feb. 9, 1963, at B1.

compared the ceremony with a contemporary Ku Klux Klan rally, the implication being that these were two very different ways of memorializing the Civil War.⁸⁵

The lack of controversy around the Unity Monument today is partly for practical reasons. For one thing, it is located in a relatively out-of-the-way state park, unlike the more prominently placed courthouse monument.⁸⁶ Additionally, the fact that it is on a historic site may make it less controversial than a monument set up in a modern civic space.⁸⁷ But perhaps the memorial's main advantage is that it is ostensibly not a *Confederate* monument at all, but a *peace* monument. As the City-County Committee's report put it, the "site is a memorial to peace and unity, not an army or political view."⁸⁸ The history of the Unity Monument, however, shows that while it was certainly intended in part to be a monument to peace and unity, its origins share many of the same

⁸⁵ See *Civil War Centennial Celebration*, *supra* note 84 ("The Bennett Place Centennial celebration held here last Sunday . . . represented quite a contrast to the visit of the Ku Klux Klan the previous day.").

⁸⁶ Though one expects this would not deter determined protestors. See, e.g., Ben Leonard, *Confederate Monument in Durham Cemetery Minutes from Campus is Vandalized*, DUKE CHRON. (Apr. 9, 2019), <https://www.dukechronicle.com/article/2019/04/confederate-monument-in-durham-cemetery-is-vandalized-maplewood-april-2019> (reporting that Durham's Maplewood cemetery Confederate plaque was vandalized).

⁸⁷ That being said, protestors have vandalized monuments at battlefield locations as well. See, e.g., Mark Price, *Activists Damage War Monument Where 58 Dead NC Soldiers Were Thrown into Well*, CHARLOTTE OBSERVER (Mar. 6, 2018), <https://www.charlotteobserver.com/news/local/article203707029.html>; Ray Brown & Jenny Anzelmo-Sarles, *Stonewall Jackson Monument Vandalized at Manassas National Battlefield Park*, NAT'L PARK SERV. (Oct. 4, 2017), <https://www.nps.gov/mana/learn/news/stonewall-jackson-monument-vandalized-at-manassas-national-battlefield-park.htm>.

⁸⁸ See CITY-COUNTY REPORT, *supra* note 82 at 8. It should be noted, though, that once uncontroversial monuments, honoring figures like abolitionists and concepts like emancipation and women's suffrage, were targeted by protestors in the aftermath of George Floyd's murder. See, e.g., Ted Mann, *Lincoln Statue with Kneeling Black Man Becomes Target of Protests*, WALL ST. J. (June 25, 2020 10:13 PM), <https://www.wsj.com/articles/protesters-take-aim-at-statue-of-lincoln-with-kneeling-ex-slave-11593090836>; Amy Reid, *UW-Madison Students Call for Removal of Lincoln Statue, "Just Because He was Anti-Slavery doesn't Mean He was Pro-Black"*, CHANNEL3000 (June 25, 2020 7:47 PM), <https://www.channel3000.com/uw-madison-students-call-for-removal-of-lincoln-statue-just-because-he-was-anti-slavery-doesn-t-mean-he-was-pro-black/>; Lawrence Andrea, *Hans Christian Heg Was an Abolitionist Who Died Trying to End Slavery. What to Know About the Man Whose Statute was Toppled in Madison*, MILWAUKEE J. SENTINEL (June 24, 2020 9:17 PM), <https://www.jsonline.com/story/news/local/wisconsin/2020/06/24/hans-christian-hegs-abolitionist-statue-toppled-madison-what-know/3248692001/>. As this paper will demonstrate, the motivations behind Bennett Place's Unity Monument were probably more problematic than any of these threatened monuments, so its *prima facie* lack of controversy may not protect it against criticism for much longer.

problems as Confederate monuments. The organizers who erected the Unity Monument would have disagreed with the City-County Committee's description; they took great pains to show that it was a monument to the Confederacy and to the "Lost Cause."

The Bennett Place farm was abandoned not long after the war, but the site remained well-known as a local landmark.⁸⁹ It was depicted on novelty spoons and postcards, and souvenirs from the site became part of the tradition of Confederate "relics."⁹⁰ Durham's relative paucity of antebellum buildings probably made the site even more important as the growing city developed an identity.⁹¹ In the late nineteenth century, some Civil War era landmarks—including the McClean House, the Bennett Place's Appomattox counterpart—were purchased by speculators to be dismantled and sold.⁹² Brodie Duke, the most troubled scion of Durham's famous Duke family, purchased the site as just such an investment, intending to sell it at the World Columbian Exhibition in Chicago.⁹³ His plan was unsuccessful, and he evidently never chose to disassemble the site's buildings.⁹⁴ In 1908, Samuel T. Morgan, a former Confederate soldier and successful fertilizer manufacturer in Durham, purchased the site from Duke, hoping to build a monument there.⁹⁵ But, Morgan died in 1920 before his plans could be carried out.⁹⁶ His widow began to work with Durham's chamber of commerce and elected

⁸⁹ See, e.g., Notice, DURHAM GLOBE, July 20, 1893, at 4 ("Bennett Place now famous in history"); Report, DURHAM SUN, Apr. 26, 1897, at 4 (locating the place of a bicycle accident by its proximity to "Bennett Place"); *Visited Bennett Place*, DURHAM SUN, July 26, 1902, pg. 1 (discussing how two tourists visited Bennett Place).

⁹⁰ See Postcard, *The Old Bennett Place, (An Old Landmark), Durham, N.C.*, (on file at the University of Chapel Hill library) (depicting the Bennett Place cabins before they were destroyed in the fire); *Souvenir Spoons*, DURHAM SUN July 15, 1902, at 1 (announcing souvenir spoons with the Bennett House engraved on them); *In Confederate Museum*, DURHAM SUN, Nov. 23, 1901, at 1 (announcing that a gavel was made from a cherry tree on the Bennett Place and given it to the Durham Chief of Police). For more on Confederate "relics" see TONY HORWITZ, CONFEDERATES IN THE ATTIC 55–56, 76–77 (1998).

⁹¹ See *infra* notes 104–106 and accompanying text (describing how the Unity Monument was originally supposed to represent a decaying plantation house with grand columns; no such house was in Durham to begin with).

⁹² See HORWITZ *supra* note 90, at 219, 267 (describing how speculators dismantled the engine house at Harper's Ferry and the McClean House where Lee surrendered to Grant).

⁹³ See JEAN BRADLEY ANDERSON, DURHAM COUNTY: A HISTORY OF DURHAM COUNTY, NORTH CAROLINA 126 (1990).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

officials to fulfil her late husband's dream.⁹⁷ The long-neglected cabins on the site burned down in 1921.⁹⁸

Like Brodie Duke, the chamber of commerce had long seen the Bennett Place site as an economic opportunity, but rather than selling it in pieces to an investor, they hoped that building a monument there would encourage passing motorists to stop off in Durham as tourists.⁹⁹ Since Durham lacked many Civil War-related sites—the city was not incorporated until after the war and no battles happened in its vicinity—some of its leading citizens no doubt felt left-out of the national trend of Civil War commemoration.¹⁰⁰

There had been calls for government commemoration at the site for tourism purposes as early as 1904, but it was not until after Morgan's death that any serious effort was made.¹⁰¹ In 1921, the chamber of commerce established a committee to design and build a monument at the site.¹⁰² Durham's United Daughters of the Confederacy (UDC) chapter also established a committee for the same purpose.¹⁰³ The UDC began to raise money in various ways, including a "benefit bridge tea" held at their president's home.¹⁰⁴

The two committees began working together on the monument's design; Trinity College professor Frank C. Brown suggested the idea of four columns to represent the ruins of a grand antebellum plantation destroyed by the war.¹⁰⁵ As the *Durham Morning Herald* reported it:

⁹⁷ *Id.*

⁹⁸ *Id.* at 326.

⁹⁹ See Report, DURHAM MORNING HERALD June 10, 1921, at 9 (discussing the possibility that a new highway might bypass Durham, and considering that Bennett Place might be a way to prevent this); Report, DURHAM MORNING HERALD, Aug. 20, 1922, at 9 (recounting how the chamber of commerce wanted a Bennett Place memorial to attract the attention of "passerby").

¹⁰⁰ Cf. *Plan Memorial of Historic Occasion*, NEWS & OBSERVER (Raleigh, NC), Aug. 22, 1922, at 4 ("Durham is without a great number of Civil War relics. They are numerous in neighboring counties . . . Due to this shortage of relics it is the desire of the chamber of commerce that some permanent memorial be erected on the Bennett place site.")

¹⁰¹ See, e.g., R.W. Winston, *A Plea for a Larger State Pride*, in LITERARY AND HISTORICAL ACTIVITIES IN NORTH CAROLINA, 1900–1905 125, 132 (1907) (chastising the people of North Carolina for their lack of historical markers and noting that "[i]f [Bennett Place] was in Ohio it would be a National Park"); *Chamber of Commerce Meeting Last Night*, DURHAM SUN, Aug. 16, 1904, at 1 (discussing the possibility of Durham's Chamber of Commerce making Bennett Place a park); *To Erect a Monument*, DURHAM RECORDER, Mar. 31, 1910, at 1 (describing an apparently abandoned Woodsmen of the World plan to erect a monument on the site).

¹⁰² *Bennett Place Memorial*, DURHAM MORNING HERALD, July 9, 1922 at 3.

¹⁰³ *Memorial Planned for Bennett Place*, DURHAM MORNING HERALD, Nov. 25, 1922, at 5.

¹⁰⁴ *Benefit Bridge Tea*, DURHAM MORNING HERALD, Dec. 10, 1922, at 6 (the article also mentions "a series of local affairs that the local daughters have planned").

¹⁰⁵ See *Architects Now Preparing Plans*, DURHAM MORNING HERALD, Aug. 20, 1922, at 9.

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[His] suggestion contemplates the erection of a series of columns of the type made familiar by their use on the porticoes of the old Southern mansions. These columns would be covered with ivy and, standing alone, would fittingly typify the old south. The sentiment would be that the old south has gone but we have retained from it that which is most lasting and beautiful.¹⁰⁶

Another reporter specifically identified that the columns were meant to be “pillars of some destroyed home of old southern architecture”—probably intending to invoke Sherman and his march to the sea.¹⁰⁷ Broken columns as a symbol of Sherman’s barbarism were popularized across the south by Mary Boykin Chesnut’s widely read *Diary from Dixie*, which included a photograph of a ruined plantation called Millwood in Columbia, South Carolina.¹⁰⁸ All that remained of Millwood in the photograph was “a row of tall, fluted columns, overgrown with weeds.”¹⁰⁹ These initial plans to make the Bennett Place monument into an implicit memorial to Yankee savagery probably pleased the UDC.¹¹⁰

The project was stalled when Durham’s county commissioners found that they did not have authority to appropriate funds for the project.¹¹¹ But, a bill was introduced in the North Carolina legislature to allow Durham County to raise the requisite funds.¹¹² The bill also established a governor-appointed commission to oversee the memorial’s planning.¹¹³ From this point forward, this commission seemed to have taken over from the chamber of commerce committee. But the UDC remained involved insofar as their president was the chair

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*; *see also Memorial Plans Are Expected Soon*, DURHAM MORNING HERALD, Oct. 17, 1922, at 7 (describing the memorial as “stone pillars . . . typifying the ruins of a typical southern house of the civil war days”).

¹⁰⁸ *See* THOMAS J. BROWN, CIVIL WAR CANON: SITES OF CONFEDERATE MEMORY IN SOUTH CAROLINA 156 (2015) (noting also that pictures of Millwood “circulated widely in the early twentieth century through the new medium of postcards”).

¹⁰⁹ *Id.*

¹¹⁰ The UDC was obsessed with the narrative of a South ruined by the Civil War and Reconstruction. *See generally* Caroline E. Janney, *War Over a Shrine of Peace: The Appomattox Peace Monument and Retreat from Reconciliation*, 77 J. OF SOUTH. HIST. 91, 91 (2011) (recounting how a UDC president criticized the construction of an Appomattox peace monument, suggesting instead a monument to the burning of Columbia and Atlanta).

¹¹¹ *County Unable to Erect a Memorial: Attorney Ruled that Necessary Funds Cannot Be Appropriated*, DURHAM MORNING HERALD, Jun. 9, 1921, at 3.

¹¹² *See* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA 1923 137 (1923).

¹¹³ *Id.*

of an auxiliary ladies' committee formed to assist the governor's commission with their work.¹¹⁴

R.O. Everett, a prominent Durham attorney and one of the state representatives who sponsored the bill, was one of the men appointed to the commission.¹¹⁵ While not technically in charge—that honor went to Carr and another prominent local veteran, Bennehan Cameron—Everett seems to have been the most active member on the committee, and managed the monument's design process and dedication ceremony.¹¹⁶ This effort ended up involving many of Durham's elite institutions and families: parties involved included Mrs. Benjamin Duke, the Mayor of Durham, professors from Trinity College and the University of North Carolina, and the president of Durham's UDC Chapter, Mrs. J.H. Erwin.¹¹⁷ The correspondence between Everett and the other members of the committee provide a relatively unguarded window into the motivations behind the monument's creation.¹¹⁸

From the beginning, Everett had three arguments in support of a monument at Bennett Place; he emphasized different arguments for the memorial depending on his audience. His first was that the monument would commemorate Johnson's surrender as a simple matter of historical preservation, in the same way that he supported non-Civil War related projects in Hillsborough and Raleigh.¹¹⁹ The second

¹¹⁴ See Letter from R.O. Everett to Mrs. B.N. Duke (Sept. 19, 1923) (on file with the UNC Chapel Hill Library) (discussing the ladies' auxiliary committee).

¹¹⁵ See Letter from R.O. Everett to Hon. R.M. Hughes (Sept. 19, 1923) (on file with the UNC Chapel Hill Library) (listing the members of the Bennett Place Memorial Commission).

¹¹⁶ See *generally* Subseries 6.1 Bennett Place, 1923-1977 and undated in Kathrine R. Everett and R. O. Everett Papers, 1851-1993 (showing the sheer amount of correspondence from and directed to Mr. Everett about Bennett Place in the runup to the ceremony).

¹¹⁷ Mrs. Erwin was, besides being president of the UDC, also a member of Durham's local elite. She had married into Durham's prominent Erwin family; her brother-in-law was William Erwin, the co-founder—with the Dukes—of Erwin Mills. Like the Everetts, the Erwin family had been part of North Carolina's antebellum planter class. See 4 HISTORY OF NORTH CAROLINA, 196 (William K Boyd et al, eds., 1919) (stating that Jesse Harper Erwin's father was a prominent planter); 2 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 172 (William Powell, ed., 2000) (describing Reuben Everett's family and plantation childhood).

¹¹⁸ *Arlington Heights* mentions that "contemporary statements by members of the decision-making body, minutes of its meetings, or reports" like these "may be highly relevant" to the Equal Protection analysis. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

¹¹⁹ See, e.g., Letter from R.O. Everett to Mrs. W.A. Renyolds, June 14, 1923, ("Durham is taking on to the matter very rapidly, and is anxious now not only to make it an historic event, in view of its connection to the Civil War, but a matter of local interest, as it was the beginning point of Durham."); Letter to the Editor of the Durham Morning Herald from R.O. Everett, Sept. 14, 1923, ("Nothing will have such educative value, in my

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argument was that the monument would celebrate national reconciliation.¹²⁰ The third argument was that the monument would commemorate “state’s rights.”¹²¹ In keeping with his first and second arguments, Everett wanted statues of both General Johnston and General Sherman to grace the site (though he wanted the federal government to pay for Sherman).¹²² Everett argued that Sherman’s magnanimous conduct toward the defeated Johnston made Sherman worthy of a statue at the site.¹²³ But Everett dropped this plan at some point in the planning process because of UDC opposition, though he tried again in 1934.¹²⁴ A later interviewer of Everett recounted the story:

Mr. Everett came forward with the suggestion that a statue of General Sherman be put up. BANG! The explosion came from the U.D.C. Those sterling ladies jumped on Mr. Everett with all the force and vigor at their command . . . Mr. Everett stills smiles somewhat sheepishly when the subject is brought up.¹²⁵

Nationally, the UDC had always been less prone to reconciliation than Confederate veterans.¹²⁶ Civil War memory at the turn of the twentieth century had been marked by public reconciliation—the United Confederate Veterans (UCV) and Grand Army of the Republic (GAR) units had often held joint meetings.¹²⁷ As the number of veterans dwindled in the 1910s and 1920s, however, these ceremonial reconciliations became less common, in large part due to the influence of the UDC.¹²⁸ The UDC’s opposition to Everett’s statue idea was just the beginning of his trouble with them.

opinion, and tend to the inculcation of high ideals as the proper preservation of historic spots like Bennett Place.”).

¹²⁰ See R.O. Everett, Unaddressed and Undated Statement (on file with the UNC Chapel Hill Library) (discussing the construction of a combined Union and Confederate memorial at Bennet Place).

¹²¹ See, e.g., *To Preserve House Where Gen. Johnson Surrendered*, NEWS & OBSERVER (Feb. 18, 1923), at 27.

¹²² See *supra* note 119.

¹²³ *Id.* See R.O. Everett, Unaddressed and Undated Statement (on file with the UNC Chapel Hill Library) (discussing the construction of a combined Union and Confederate memorial at Bennet Place).

¹²⁴ See *id.*; see also Carl Goerch, *Durham County*, vol. 9, no. 9 ST.: A WEEKLY SURVEY OF N.C., 3, 3-4 (1941), <https://digital.ncdcr.gov/digital/collection/p16062coll18/id/39920/rec/83>.

¹²⁵ See Goerch, *supra* note 124, at 4.

¹²⁶ See generally Janney, *supra* note 110.

¹²⁷ See generally Janney, *supra* note 110.

¹²⁸ See generally Janney, *supra* note 110.

Because of later events, it seems likely that the UDC's president, Mrs. Erwin, also did not like the changes the governor's commission made to Frank C. Brown's original design. Over the course of the commission's discussions, the monument's design shrank from four columns to one,¹²⁹ then grew again to two columns.¹³⁰ Eventually, the stated reason for the columns changed as well. Instead of memorializing antebellum plantation culture, the monument message shifted to an idea more directly related to postwar unity—the two columns were meant to represent the North and South, and the word “Unity” itself was to be carved on the monument's entablature above the columns.¹³¹ The final design was also much less ruin-like; the columns and the entablature were to be complete, as opposed to broken and ivy-covered.¹³²

Particularly as the monument's design changed, some of the people involved began to fear that it would be interpreted as a celebration of Northern victory in the Civil War.¹³³ Everett took great pains to argue to would-be supporters that far from a monument to defeat, it was meant to be a monument to Southern *victory*—the South's political views, according to Everett, had been vindicated in the end.¹³⁴ The notion of Bennett Place as a monument to “state's rights” had been present since at least Everett's 1922 bill which attempted to cast the Confederate support of “local self government or state rights” as part of “the continued expansion and development of Anglo Saxon institutions which began to take form in the great charter of 1215 [the Magna Carta].”¹³⁵ Everett told Samuel Morgan's widow in March that: “[t]he war . . . will soon be regarded entirely as a struggle for the establishment of certain principles of government, the necessity for the maintenance

¹²⁹ See Letter from Julian S. Carr to R.O. Everett (June 2, 1923) (on file with the UNC Chapel Hill Library) (“[T]he suggestion was made that we adopt the single column”); Letter from Wm. Henry Deacy to Mr. J.C. Thorne (July 13, 1923) at 1 (on file with the UNC Chapel Hill Library) (“a tall Corinthian column about thirty feet in height”).

¹³⁰ See UNITY MONUMENT AT BENNETT PLACE HISTORICAL SITE, DURHAM, <https://docsouth.unc.edu/commland/monument/44/> (last visited Nov. 15, 2020) (depicting the final design of the Unity Monument).

¹³¹ See *id.*

¹³² See *id.*

¹³³ See Letter from R.O. Everett to Sallie F. Morgan (Mar. 15, 1923) (on file with the UNC Chapel Hill Library). (130)

¹³⁴ See, e.g., Letter from R.O. Everett to Sallie F. Morgan (Mar. 15, 1923), at 1 (on file with the UNC Chapel Hill Library); Letter from R.O. Everett to Frank Hampton, Secretary to Senator F.M. Simmons (June 14, 1923) (on file with the UNC Chapel Hill Library).

¹³⁵ *To Preserve House Where Gen. Johnson Surrendered*, supra note 121.

of which both the North and South now recognize.”¹³⁶ In another letter, Everett was even more direct:

We propose to make the event one of great significance *in undertaking to place an interpretation upon the event as the last stand of the Confederacy for states’ rights*, the principles now universally accepted in lieu of the heretofore prevailing idea of the surrender in a lost cause. We believe the idea of states’ rights is more regnant to-day than at any other time since the Civil War, and that the South’s stand in the constitutional development of our country has been thoroughly vindicated.¹³⁷

“Lost Cause” rhetoric came up again during discussions about what the monument’s plaque should say. Carr was initially miffed that Morgan was going to be described as an “excellent soldier” by the plaque’s text, and demanded to see evidence of his supposed military prowess.¹³⁸ Everett responded that “[w]e are fast coming to the point . . . when we believe to have been a Confederate soldier was to have been a great soldier.”¹³⁹ The final plaque ended up removing references to Morgan’s military service, but did include (after a general recounting of Bennett Place’s history) a few lines specifically evoking Everett’s states’ rights interpretation of the war:

This monument thus marks the spot where the military force of the United States of America finally triumphed and established as inviolate the *principle of an indissoluble union*. It marks also the spot of the last stand of the Confederacy in *maintaining its ideal of indestructible states*—an ideal which preserved to the American union by virtue of the heroic fight grows in strength from year to year.¹⁴⁰

The monument’s inscription and design continued to be debated well into autumn—discussions over the type of foundation to be used

¹³⁶ See Letter from R.O. Everett to Sallie F. Morgan, *supra* note 134

¹³⁷ Letter from R.O. Everett to Frank Hampton, *supra* note 134 (emphasis added).

¹³⁸ Letter from Julian S. Carr to R.O. Everett (Aug. 7, 1923) (on file with the UNC Chapel Hill Library). Coming from Carr, this concern seems particularly pedantic; he signed all his letters to Everett with “General Carr” (his UCV title) despite having served in the war as a mere private. See Dobby, *supra* note 65, at 18.

¹³⁹ Letter from R.O. Everett to Julian S. Carr (Aug. 7, 1923) at 1 (on file with the UNC Chapel Hill Library).

¹⁴⁰ See UNITY MONUMENT, *supra* note 130 (emphasis added).

were especially heated¹⁴¹—but by late summer 1923, Everett had begun devoting most of his letters to planning the dedication ceremony.¹⁴²

Everett and the commission wanted their event to be of national importance, and this meant having speakers from the federal government. Much of the summer was spent trying to convince the president to attend. President Harding and—after Harding’s sudden death in August—President Coolidge both expressed some interest, but Coolidge ultimately declined to attend.¹⁴³ The Committee got their second choice though: Secretary of War John W. Weeks.¹⁴⁴ Secretary Weeks agreed to give a speech to represent the North, and a nephew of General Johnston was asked to represent the South.¹⁴⁵ Eventually, a descendent of General Sherman was also asked to give remarks.¹⁴⁶

Shortly before Secretary Weeks officially accepted, however, Everett suddenly found that he had “run into a squall” in his ceremony planning.¹⁴⁷ The earlier tension with the UDC over the Sherman statue erupted again, with the UDC now taking aim against the entire Unity Monument project.¹⁴⁸ Mrs. Erwin released a statement on September 13 on behalf of the UDC chapter withdrawing support for the Bennett Place project.¹⁴⁹ She abruptly resigned from the ladies’ committee; after

¹⁴¹ Letter from W. Henry Deacy to R.O. Everett (Oct. 13, 1923) (on file with the UNC Chapel Hill Library) (“[I]t is very annoying to find that Dr. Brown has again succeeded in making a change [to the foundation] which I am quite confident is not for the better.”).

¹⁴² See generally KATHRINE R. EVERETT AND R. O. EVERETT PAPERS, UNIVERSITY OF NORTH CAROLINA LIBRARIES, <https://finding-aids.lib.unc.edu/04735/> (last visited November 14, 2020) (depicting numerous letters written in 1923).

¹⁴³ See Letter from Frank H. Hampton, Secretary to Senator Simons, to R.O. Everett (June 15, 1923) (on file with the UNC Chapel Hill Library) (“[T]he President will be very glad to see your Committee after his return from Alaska”); Letter from R.O. Everett to Wm. Henry Deacy (Aug. 24, 1923) (on file with the UNC Chapel Hill Library) (“[The President] talked as though he might accept the invitation.”); Letter from R.O. Everett to Wm. Henry Deacy (Sept. 25, 1923) at 2 (on file with the UNC Chapel Hill Library) (“The President, as you know, could not attend . . .”).

¹⁴⁴ Telegram from Benehan Cameron to R.O. Everett (Sept. 28, 1923) (on file with the UNC Chapel Hill Library) (“the Secretary accepts”).

¹⁴⁵ See Letter from R.O. Everett to Mrs. W.A. Reynolds (Sept. 28, 1923) (on file with the UNC Chapel Hill Library).

¹⁴⁶ See Anderson, *supra* note 93, at 535 n. 95.

¹⁴⁷ See Letter from R.O. Everett to Mrs. B.N. Duke (Sept. 15, 1923) (on file with the UNC Chapel Hill Library).

¹⁴⁸ The chapter’s actions against the monument were reported in newspapers all over the state. See, e.g., *North Carolina Events*, CHATHAM RECORD Sept. 20, 1923, at 7; *Daughters Name State Officers*, DAILY ADVANCE (Elizabeth City, NC), Oct. 8, 1923, at 2.

¹⁴⁹ Letter from Senator Lyon to R.O. Everett (Sept. 13, 1923) (on file with the UNC Chapel Hill Library) (referencing the editorial). There was a similar controversy almost a decade later at the site of Lee’s surrender at Appomattox. A plan to build a monument, with statues of Lee and Grant, was thwarted by enraged UDC members, who argued that it was designed “to humiliate and insult the South.” See Janney, *supra* note 110 at 113.

this “unpleasant incident,” Everett asked Mrs. Duke (then grieving over the death of her son Angier Buchanan in a boating accident on September 3) to take her place on an enlarged ladies’ committee.¹⁵⁰ Mrs. Erwin then “led [a] crusade against the whole scheme.”¹⁵¹ Her statement argued that the original UDC plan was to erect a monument “quietly as befits the occasion” but that “the marking of the Bennett place was taken out of the hands of the local chapter . . . and an entirely different view point is held by those having it in charge.”¹⁵² She believed that the commission’s plans were nothing short of a “celebration of surrender.”¹⁵³ The controversy was reported in newspapers across North Carolina.¹⁵⁴

Everett believed that Mrs. Erwin’s sudden betrayal was, at least in part, motivated by her belief that she was being ignored while on the ladies committee (possibly referring to the monument’s design change). Whatever her reasons, Mrs. Erwin also appealed to Durham’s veterans to oppose the monument.¹⁵⁵ The veterans who attended her meeting were apparently rather divided on the issue, leading to a “row.”¹⁵⁶ After these incidents, Everett and the rest of the commission swiftly engaged in damage control.¹⁵⁷ Bennehan Cameron argued that the memorial was not a “celebration” of defeat, but just an effort to “mark in a suitable way the site of a great historical event.”¹⁵⁸ Carr went further than this though, arguing that the memorial was not just a historical marker, but a celebration of the Lost Cause.¹⁵⁹ Carr specifically pointed to the last paragraph of the memorial, saying it proclaimed “that the principles and

¹⁵⁰ See Letter from R.O. Everett to Mrs. B.N. Duke (Sept. 19, 1923) (on file with the UNC Chapel Hill Library).

¹⁵¹ Letter from R.O. Everett to Mrs. Blanche Reynolds (Sept. 29, 1923) at 2 (on file with the UNC Chapel Hill Library).

¹⁵² *U.D.C. Withdraw from Movement, Julian S. Carr Chapter Does Not Approve of Bennett Place Celebration*, NEWS & OBSERVER (Raleigh, NC), Sept. 13, 1923, at 2.

¹⁵³ *Id.*

¹⁵⁴ See, e.g., *Fuss at Durham on Celebration*, GREENSBORO DAILY RECORD, Sept. 14, 1923 at 9.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Letter from R.O. Everett to Mrs. Blanche Reynolds (Sept. 28, 1923) (on file with the UNC Chapel Hill Library) (assuring Mrs. Reynolds that the difficulties around the monument were purely the result of “local jealousies” and that they had “done nothing more than to create interest in the occasion”); Everett, *supra* note 151 (assuring her further that the “public sentiment . . . gives a most cordial endorsement of the plans”).

¹⁵⁸ See Untitled and Undated Statement of Bennehan Cameron (on file with the UNC Chapel Hill Library).

¹⁵⁹ Letter from Julian S. Carr to the Editor of the Durham Morning Herald (Sept. 13, 1923) (on file with the UNC Chapel Hill Library); see also Letter from Senator Lyon to R.O. Everett, *supra* note 149 (stating that after reading the inscription “[a]s a Confederate soldier I can see no objection to [the Unity Monument]”).

ideals for which we fought and died are now triumphant.”¹⁶⁰ Meanwhile, the UDC’s state convention discussed the issue and voted in support of Durham’s chapter, saying that their actions were “fitting in not rejoicing over the surrender.”¹⁶¹ They refused to take part in the ceremony.¹⁶² State UDC members were so impressed by Mrs. Erwin’s attack on Bennett Place that they elected her the statewide vice-president on October 7.¹⁶³ On October 23, Carr sent Everett a letter that stated, with his characteristic flair for the dramatic: “This is strictly confidential. I am afraid we have lost the Secretary of War. Too much propaganda and all of it has reached the secretary. The enemy are busy”¹⁶⁴ Apparently, someone had sent Secretary Weeks “certain clippings” about the UDC controversy, and he no longer felt comfortable being involved.¹⁶⁵ Carr sent Weeks a pleading letter to get him to reconsider, and Everett rushed to Washington to meet with both Weeks and President Coolidge to try to assuage their concerns about political backlash.¹⁶⁶ After returning from Washington, Everett asked John Sprunt Hill to organize a “mass meeting” of Durham’s leading citizens at the courthouse.¹⁶⁷ Durham’s major papers supported the meeting and its outcome.¹⁶⁸ On October 22, this “representative gathering of the city and community” passed a unanimous resolution supporting the commission and inviting Secretary Weeks again on behalf of the city.¹⁶⁹

¹⁶⁰ *Id.*

¹⁶¹ *Daughters Name State Officers*, *supra* note 148 (“[Convention] backed the stand of the Durham chapter”).

¹⁶² *Mrs. Erwin Gets a High Office in A Recent Meeting*, DURHAM MORNING HERALD, October 7, 1923, at 20.

¹⁶³ *Id.*

¹⁶⁴ Letter from Julian S. Carr to R.O. Everett, (Oct. 12, 1923) (on file with the UNC Chapel Hill Library).

¹⁶⁵ See Letter from R.O. Everett to Mrs. Blanche Reynolds (Oct. 23, 1923) (on file with the UNC Chapel Hill Library) (“[Secretary Weeks] expressed determination not to visit Durham unless the President said so in view of certain clippings he had received.”).

¹⁶⁶ See Letter from Julian S. Carr to John W. Weeks, Secretary of War (Oct. 17, 1923) (on file with the UNC Chapel Hill Library) (“It will greatly mar the success of the occasion of you should fail us.”); Telegram from John W. Martyn, Secretary to the Secretary of War, to R.O. Everett (Oct. 18, 1923) (on file with the UNC Chapel Hill Library) (“Secretary of War will be glad to see you tomorrow morning”); Telegram from R.O. Everett to John W. Weeks, Secretary of War (Oct. 24, 1923) (on file with the UNC Chapel Hill Library) (mentioning that he went to talk to Present Coolidge after his conversation with Secretary Weeks).

¹⁶⁷ Letter from R.O. Everett to Mrs. Blanche Reynolds, *supra* note 165.

¹⁶⁸ See Telegram from Julian S. Carr to R.O. Everett (Oct. 23, 1923) (on file with the UNC Chapel Hill Library); Letter from R.O. Everett, *supra* note 143 (“the papers endorsed the move”) (on file with the UNC Chapel Hill Library).

¹⁶⁹ See Telegram from R.O. Everett to John W. Weeks, Secretary of War (Oct. 23, 1923) (on file with the UNC Chapel Hill Library).

Hill and other citizens sent this result by telegram to Secretary Weeks.¹⁷⁰ Everett urged Weeks to reconsider in a final telegram, citing the mass meeting and saying that his refusal would “accentuate I fear any remaining sectional differences.”¹⁷¹ But despite all of these frenzied efforts, Weeks refused to budge from his decision.¹⁷² Now only a month out from the dedication ceremony, the commission had to look elsewhere. They quickly accepted an offer from Senator Burton K. Wheeler of Montana to give a talk on behalf of the Union.¹⁷³ Carr also planned to deliver a speech, despite the UDC’s “insistent demand to withdraw from participation in the ceremony.”¹⁷⁴

On November 8, 1923, the big day finally arrived. The *Durham Morning Herald* framed the event as a moment when “north and south joined hands . . . in marking and dedicating the spot whereon the Civil War was finally and definitely brought to a close.”¹⁷⁵ Surviving photographs of the dedication ceremony show a large crowd, including some old soldiers in uniform.¹⁷⁶ The event was popular, despite the UDC’s efforts; the *Trinity Chronicle* described the crowd of people walking down Hillsboro (now Hillsborough) road as so large it looked like an “army in retreat.”¹⁷⁷ Numerous Trinity College students attended, many hitchhiking to do so.¹⁷⁸ The college also lent its band for

¹⁷⁰ See Telegram from John Sprunt Hill, et al, to John W. Weeks, Secretary of War (Oct. 23, 1923) (on file with the UNC Chapel Hill Library).

¹⁷¹ See Telegram from R.O. Everett to John W. Weeks, Secretary of War (Oct. 23, 1923) (on file with the UNC Chapel Hill Library).

¹⁷² See Telegram from John W. Weeks, Secretary of War to R.O. Everett, *supra* note 169.

¹⁷³ Edward E. Britton, Telegram to R.O. Everett (Oct. 26, 1923) (on file with the UNC Chapel Hill Library) (“Think I can get Senator Wheeler of Montana progressive democrat”); R.O. Everett, Telegram to Mr. E.E. Britton (Oct. 29, 1923) (on file with the UNC Chapel Hill Library) (announcing committee approval of Wheeler). While a Senator from Montana may seem like an odd choice for a Civil War ceremony, Wheeler was the running mate of Robert M. La Follette for the Progressive Party in the 1924 presidential election, and thus was a figure of some national prominence. MARC C. JOHNSON, *POLITICAL HELL-RAISER: THE LIFE AND TIMES OF SENATOR BURTON K. WHEELER OF MONTANA* 97 (2019) (describing Wheeler’s time in the “national limelight”).

¹⁷⁴ See Josephus Daniels, *General Carr: Friendly Neighbor*, in GENERAL JULIAN S. CARR: GREATHEARTED CITIZEN 23–41, 29 (C. Sylvester Green, ed., 1946).

¹⁷⁵ *Bennett Memorial Unveiled Thursday Afternoon with a Number of Notables Present*, *Durham Morning Herald*, Nov. 9, 1923, at 1 [hereinafter *Number of Notables Present*].

¹⁷⁶ See *Bennett Place*, OPEN DURHAM, <https://www.opendurham.org/buildings/bennett-place>, (showing several pictures from the ceremony) (last visited 19 Oct. 2020).

¹⁷⁷ *Many Trinity Students Attend the Exercises at the Bennett Place*, *TRINITY CHRONICLE*, Nov. 14, 1923, at 1.

¹⁷⁸ *Id.*

the event's music, along with some of its bleachers.¹⁷⁹ All in all, the *Herald* estimated that the event was attended by 3,000 people.¹⁸⁰ Along with the guests of honor, former Secretary of the Navy Josephus Daniels, a native of Raleigh, was in attendance.¹⁸¹ No other national political figures were present; the UDC succeeded in at least that respect.¹⁸²

One extant photograph shows an elderly black man on the event's platform. His presence was noted by the *Herald* with the use of a disparaging racial epithet; the article said his attendance was "significant in that the event which transpired on the spot close by and for which the exercises were held meant the final freedom of the black race from slavery."¹⁸³ The anonymous *Herald* author left it ambiguous as to whether he or she thought this freedom was a good thing.¹⁸⁴ It is unclear whether or not any other black Durhamites attended the event, but since this one man's presence was unique enough to merit a mention in the *Herald's* coverage, it seems unlikely.¹⁸⁵

The dedication ceremony must have been quite lengthy, as it featured remarks by no fewer than nine speakers.¹⁸⁶ The ceremonies began with an invocation by Mordecai Ham, a popular Baptist evangelist who was well known in North Carolina due to a series of revivals he hosted in the state.¹⁸⁷ He was also a well-known racist and anti-Semite, though there is no evidence that he engaged in that sort of rhetoric during this particular prayer.¹⁸⁸ The numerous speeches given at the dedication ceremony were a strange grab-bag of historical narratives, Lost Cause symbolism, and progressive political sloganeering. Colonel

¹⁷⁹ *Id.*

¹⁸⁰ *Number of Notables Present*, supra note 175.

¹⁸¹ *Number of Notables Present*, supra note 175.

¹⁸² Secretary of War Weeks did send General A.J. Bowley of Fort Bragg as his representative.

¹⁸³ *Number of Notables Present*, supra note 175.

¹⁸⁴ *Number of Notables Present*, supra note 175.

¹⁸⁵ See *Number of Notables Present*, supra note 175.

¹⁸⁶ See *id.* at 2 (mentioning an invocation by Mordecai Ham, remarks by Bennehan Cameron, Julian Carr, General A.J. Bowley, Col. W.S. Fitch, Senator Wheeler, Professor D.H. Hill, NC Governor Cameron Morrison, and a closing prayer by A.D. Wilcox).

¹⁸⁷ See Anderson, supra note 93, at 535 n. 95; WILLARD B. GATEWOOD, PREACHERS, PEDAGOGUES, AND POLITICIANS: THE EVOLUTION CONTROVERSY IN NORTH CAROLINA 43 1920-1927. One of the men Ham converted at a North Carolina revival (10 years after the Bennett Place dedication) was a young Billy Graham. See ROGER BRUNS, BILLY GRAHAM: A BIOGRAPHY 8 (2004).

¹⁸⁸ At the time of the speech, Ham was engaged in a well-publicized feud with Elizabeth City, N.C. reporter William O. Saunders. Saunders launched a series of editorials exposing Ham as a fraud after the latter claimed that the Jewish founder of Sears-Roebuck was exploiting white women in an interracial prostitution ring. See GATEWOOD, supra note 187, at 43.

Cameron went first, and his speech echoed his previous emphasis on the site's historical importance saying it was to "mark the spot where an event of great national importance took place in the spring of 1865, by which the great internecine struggle was finally closed, and a reunited country began its progressive strides in wonderful development throughout the whole United States . . ." ¹⁸⁹ Julian Carr's speech came next and was, unsurprisingly, a Lost Cause *tour de force*. One of Carr's letters seems to indicate that Everett may have had a hand in drafting the speech. ¹⁹⁰ Whether Everett participated in drafting or not, Carr's speech tracked Everett's states' rights vision of the monument almost precisely. Carr began by directly addressing those who thought the monument a "celebration" of surrender. ¹⁹¹ He then included an extended rumination on how the event was a "national celebration" over the end of a bitter war, and of the present unity of the North and South. ¹⁹² But the bulk of the speech was given over to praising Confederate valor and the justness of the Southern cause: "I do not purpose to ask pardon for, or make apology to, any one for the Confederate soldier." ¹⁹³ Carr makes it clear that the cause those soldiers fought for was the "right of the state to withdraw from the Union." ¹⁹⁴ In one particularly florid passage Carr made his only reference to slavery:

No people of any age covered themselves with greater glory than did the people of the Confederacy in this, the most heroic conflict ever waged in all the history of man. *We fought in the face of adverse public sentiment abroad engendered by the insidious propaganda that we were fighting to perpetuate human slavery.* . . . [Fate] crowned the "Lost Cause" with a halo of romance and glory whose effulgence shall never be dimmed as long as there is passage through the halls of time. . . . [The South] offers no apologies for the past. She fought for what she believed to be her rights and has yet to discover doubt as to the justice of her cause. ¹⁹⁵

Carr's Bennett House memorial unveiling speech lacked as direct a racial component as his Silent Sam speech but shared the Silent Sam

¹⁸⁹ See *Number of Notables Present*, supra note 175, at 2.

¹⁹⁰ Letter from Julian S. Carr to R.O. Everett (Oct. 20, 1923) (on file with the UNC Chapel Hill Library) ("Please send me at once what you have already promised 3 times . . . the outline of what I ought to say on that occasion. Do it now. Not tomorrow. NOW. Just a few ideas.").

¹⁹¹ See JULIAN S. CARR, PEACE WITH HONOR 5-6.

¹⁹² *Id.* at 6.

¹⁹³ *Id.* at 16.

¹⁹⁴ *Id.* at 17.

¹⁹⁵ *Id.* at 9-10.

speech's panegyric tone towards the Confederacy and its soldiers.¹⁹⁶ Some of the Unity Monument's initial critics were pleased with Carr's speech. One Raleigh woman sent Carr a letter afterwards noting that while "[m]any had previously felt that such a celebration was a misnomer [his speech was] entirely correct and *most loyal to the lost cause*, and put the affair in a light that made every patriotic Southerner present feel manly and contented . . ."¹⁹⁷ Years later, during a celebration of the centennial of Carr's birth, one speaker remembered the oration as showing Carr's "devotion to the Southern Cause."¹⁹⁸

The "very brief" acceptance speech by North Carolina's Governor Morrison followed.¹⁹⁹ Based on his rather unenthusiastic endorsement of the monument it seems clear that the governor feared political backlash for his participation.²⁰⁰ Morrison reiterated twice that he was just there to help preserve history, ending his speech with the following: "I am not here to join in celebrating the surrender of my father and his comrades in the Confederate Army . . . but to help participate in helping North Carolina assume responsibility for the care and preservation of this historic spot."²⁰¹ His remarks were followed by those of General Sherman's grandson, W.S. Fitch, who focused on reconciliation, focusing particularly on the postwar friendship of his grandfather and General Johnson.²⁰²

D. H. Hill spoke as a last-minute replacement for General Johnson's relative who could not attend. His speech focused on the history of sectional tension between North and South. While mostly a pro-Southern interpretation that glorified Confederate heroism, his speech did partially contradict Carr's speech by admitting that the "slavery question" was part of what led to the war.²⁰³ After Hill, General A.J. Bowley, commander of Fort Bragg, spoke as the representative of the conspicuously absent Secretary Weeks.²⁰⁴ Perhaps realizing the crowd was growing weary of all the orations, the general commended North

¹⁹⁶ Compare *id.* at 5-6, with Julian S. Carr, Speech at the Dedication of Silent Sam (June 2, 1913) (transcript available at <https://hgreen.people.ua.edu/transcription-carr-speech.html>) (stating, among other things, that the Confederate soldier "saved the very life of the Anglo Saxon race" and including a horrific personal story of how Carr "horse-whipped" a freedwoman in 1865).

¹⁹⁷ See Letter (unsigned) to Julian S. Carr (Nov. 10, 1923) (on file with the UNC Chapel Hill Library) (emphasis added).

¹⁹⁸ See Daniels, *supra* note 174, at 30.

¹⁹⁹ See *Number of Notables Present*, *supra* note 175, at 2.

²⁰⁰ See *Number of Notables Present*, *supra* note 175, at 2.

²⁰¹ See *Number of Notables Present*, *supra* note 175, at 2.

²⁰² See *Number of Notables Present*, *supra* note 175, at 2.

²⁰³ See *Number of Notables Present*, *supra* note 175, at 2.

²⁰⁴ See *Number of Notables Present*, *supra* note 175, at 2.

Carolínians for their “Americanism” in one brisk sentence and sat back down.²⁰⁵

Last, except for a closing prayer, came the keynote speech from Senator Wheeler. Wheeler was from Massachusetts, and the vice-presidential candidate for Robert La Follette’s Progressive Party presidential run in 1924.²⁰⁶ His speech, printed in the *Herald*, began with the standard discussion of national unity, talking about Northerners and Southerners fighting side by side against the Spanish and the Germans.²⁰⁷ This quickly transitioned into an only thinly veiled Progressive Party stump speech, which included a section that celebrated North Carolina’s “Americanism” where he commended them for the fact that only 7,272 people in the state were “foreign-born.”²⁰⁸ The Progressive Party opposed immigration as a threat to American labor unions. But Wheeler’s speech also had the closest thing to a direct condemnation of slavery of any of the speeches: “[h]ere on this spot marks the surrender of chattel slavery, and following it was written into our fundamental law a prohibition against it. . . . But, my friends there are other forms of slavery rampant in America today, whose iniquitous influences are proving almost as great a curse.” He then listed child labor, predatory lending, and “machine politics” as modern forms of slavery that needed to be combatted. Bennett Place was for Wheeler, “the spot . . . where chattel slavery surrendered”—a symbol that could be used to inspire new progressive projects.²⁰⁹

Though there is some indication that Durhamites avoided Bennett Place and the Unity Monument for a number of years after the controversy, this may have just been wishful-thinking on behalf of the UDC.²¹⁰ By 1946, the UDC had come to terms with the site enough to make “a pilgrimage” there after their annual meeting.²¹¹ Contemporary newspaper accounts seem to indicate broad support for the Unity Monument, as does the result of the “mass meeting” initiated by Everett.²¹² A little over a year after the ceremony, the *Durham Sun*

²⁰⁵ See *Number of Notables Present*, supra note 175, at 2.

²⁰⁶ See *Number of Notables Present*, supra note 175, at 2.

²⁰⁷ See *Number of Notables Present*, supra note 175, at 2.

²⁰⁸ See *Number of Notables Present*, supra note 175, at 2.

²⁰⁹ See *Number of Notables Present*, supra note 175, at 2.

²¹⁰ See Anderson, supra note 93, at 327 (remarking that Bennett Place was rarely visited due to “public apathy”).

²¹¹ See Daniels, supra note 174, at 29.

²¹² See, e.g., *Many Trinity Students Attend the Exercises at the Bennett Place*, supra note 177 (noting the “large number” of students that attended); Annie Sills Brooks, *Unity*, DURHAM SUN, May 31, 1925, at 9 (positively discussing the Unity Monument a little over a year after the ceremony); letter from Reuben Everett to Mrs. Blanche Reynolds, supra note 151 (suggesting that Durham’s population generally supported the monument).

published a fictional story about Bennett Place that provided a thinly-veiled allegory of the whole affair.²¹³ In the story, an aged Confederate veteran's son tells him about the monument's construction at Bennett Place.²¹⁴ His response parallels the UDC's: "A monument to what? We Southerners don't want no monument to Yankees on our ground, and I ain't ever heard of any folks wanting a monument to show where they was defeated."²¹⁵ The son—meant to be the voice of reason in the story—tells his father that the monument is only meant to "mark the spot as one of the great historical places of the country" and "won't be a monument to either side, but just a marker for both sides."²¹⁶ There is no mention of the "states' rights" defense used by Everett and Carr. The veteran attends secret meetings with other veterans, and helps the UDC oppose the monument.²¹⁷ Because of their efforts, the dedication ceremony happens "on a slightly modified scale."²¹⁸ The veteran, thwarted in his efforts to stop the monument from being erected, decides to destroy the newly dedicated monument with an axe.²¹⁹ When he arrives to perform the deed, he meets another angry veteran—a Union soldier who lost his arm in a skirmish with Johnston's army, and who has stopped at the monument on the way to Florida.²²⁰ The Northerner is equally angry about the memorial, which he views as a "Rebel Monument."²²¹ The two men compare their various scars and remember the friends they lost in the war, and eventually the Durham veteran says, "I never thought much about what the war cost you Yankees . . . I guess I better let it stand . . . [t]hat word 'Unity' ain't so bad if it unites me to folks like you."²²² Clearly at least some people in the Durham community saw the monument in essentially the same way as the modern City-County Committee saw it, as a monument to peace and the healing of sectional tension.

The prospect of litigation against Bennett Place seems rather unlikely. Its lack of obvious Confederate imagery probably prevents it from causing much harm, at least to anyone not dedicated enough to read all the way to the end of its bronze plaque. Its history does not reveal one overwhelming motivation for its construction; Bennett

²¹³ See Brooks, *supra* note 212.

²¹⁴ See Brooks, *supra* note 212.

²¹⁵ See Brooks, *supra* note 212.

²¹⁶ See Brooks, *supra* note 212.

²¹⁷ See Brooks, *supra* note 212.

²¹⁸ See Brooks, *supra* note 212.

²¹⁹ See Brooks, *supra* note 212.

²²⁰ See Brooks, *supra* note 212.

²²¹ See Brooks, *supra* note 212.

²²² See Brooks, *supra* note 212.

Place's status as a memorial ostensibly for both sides of the Civil War probably complicates its story relative to a standard Confederate soldier monument.²²³ For many of Durham's elites at the time, the monument was mostly seen as a potential economic boon, and a way to raise the growing city's profile on the national stage. For others, it was a matter of "historical consideration," merely a way of marking an important event in the region's past.²²⁴

But potential litigants would also have a lot of evidence to link the monument to the Lost Cause and its legacy of white supremacy. From the memorial's original plantation-focused design, to the final bronze inscription discussing states' rights, it is clear many of the monument's supporters intended for it to be a monument to a glorious Confederate past. The bill establishing the monument referenced the Confederacy's place in the history of "Anglo Saxon institutions."²²⁵ The monument's dedication ceremony was a mixed bag of Lost Cause and progressive rhetoric.

Still, as the short story in the *Durham Sun* and even some of Everett's remarks indicate, the monument was also meant to commemorate an important historical event and to celebrate national reconciliation after a terrible war. Additionally, much of the pro-Confederate rhetoric used by Everett and Carr was a tactical move to win over hard-liners because, on its face, the final monument really does look like a celebration of national unity—the "Unity" inscription is much more noticeable on the design than the reference to states' rights. And, as the UDC so strenuously pointed out, it marks a spot of Confederate defeat, not victory. The monument's dedication ceremony even featured a speech that framed the end of slavery as a positive thing that could inspire future progressive victories in the United States, something that would be hard to imagine occurring at a more standard Confederate memorial site from the period. With these disparate motivations in mind, it would be tough to argue that the monument went up "because of, rather than in spite of" an intent to discriminate as required by Supreme Court precedent.

B. The Courthouse Monument

Even as Reuben Everett dealt with controversies surrounding the Unity Monument's design and dedication, some of the same parties were involved in constructing another, more typical Confederate monument

²²³ See *infra* Section B.

²²⁴ *Gen. Carr Approves Celebration Plans*, NEWS & OBSERVER (Raleigh, NC), Sept. 15, 1923 at 7.

²²⁵ *To Preserve House Where Gen. Johnson Surrendered*, *supra* note 121.

in Durham—what this Article will refer to as “the courthouse monument.” There had already been a Confederate monument of sorts in Durham until at least 1922, but in a somewhat surprising place: Durham’s black hospital. Washington Duke was a supporter of Confederate monuments generally,²²⁶ and had originally planned on funding the construction of a monument to “loyal slaves” on Trinity College’s campus.²²⁷ Before doing so, however, Duke was convinced by members of Durham’s black elite to instead support the descendants of the slaves he wanted to honor by helping to build Lincoln Hospital.²²⁸ Duke was able to get his paternalistic monument at least partially realized in the form of a large plaque placed on the hospital’s wall.²²⁹ The plaque’s inscription read:

With grateful appreciation and loving remembrance of the fidelity and faithfulness of the Negro slaves to the Mothers and Daughters of the Confederacy during the Civil War, this institution was founded by one of the Fathers and Sons: BN Duke, JB Duke, W. Duke. Not one act of disloyalty was recorded against them.²³⁰

The building where the hospital was housed was damaged by a fire in 1922 and was ultimately destroyed by another fire in 1968.²³¹ The fate of the plaque is not clear.

Julian Carr was one of the most active supporters of Confederate monument building in North Carolina, so he likely felt embarrassed that his own city waited so long to construct anything besides a small plaque

²²⁶ See Washington Duke, Ledger, May 7, 1895 (listing a \$2,000 donation for a Confederate monument).

²²⁷ See LESLIE BROWN, UPBUILDING BLACK DURHAM: GENDER, CLASS, AND BLACK COMMUNITY DEVELOPMENT IN THE JIM CROW SOUTH, 157 (2009).

²²⁸ *Id.* at 157–58.

²²⁹ While some sources describe the inscription as having been placed on the hospital’s “cornerstone,” a photograph shows that it was a relatively standard looking memorial plaque placed against a brick wall. The original Lincoln Hospital building in 1908 appears to have had wood siding based on surviving photographs; it was damaged by a fire in 1922. The second hospital, erected in 1925, had brick walls, so the brick background of the plaque in the photograph may indicate that the plaque survived the 1922 fire and was placed on the second hospital (also funded in part by the Duke family). See Email from Andre Vann, Archives Coordinator, N.C. Cent. Univ., to Aaron D. Sanders, J.D. candidate, Duke University School of Law (Apr. 9, 2020, 1:59 PM) (on file with author); P. PRESTON REYNOLDS, DURHAM’S LINCOLN HOSPITAL, 18 (2001) (describing the 1922 hospital).

²³⁰ See *Lincoln Hospital (1901–1924)*, OPEN DURHAM, <https://www.opendurham.org/buildings/lincoln-hospital-1901-1924/> (last visited Jan. 15, 2020).

²³¹ *Id.*; see also REYNOLDS, *supra* note 229 (noting that the brick hospital, another possible location of the plaque, was demolished in 1983).

on Lincoln Hospital.²³² Carr had wanted a Durham monument since at least 1912; in that year he and the UDC raised \$5,000 for the construction of a Confederate monument (their goal was a \$10,000 monument), but this effort must have fizzled out.²³³ In 1923, Durham's UCV chapter, led by W.T. Redmond, decided to petition the state legislature for funds to build a monument, an initiative supported by the UDC.²³⁴ Carr was appointed as the leader of a county committee to assist in this endeavor.²³⁵ The process was as contentious as the Unity Monument debacle, but this time Carr initiated the controversy rather than the UDC. The commission planned to ask the legislature for \$5,000.²³⁶ But Carr wanted "\$15,000 or nothing," and thought anything less was an embarrassment to a city of Durham's size and wealth.²³⁷ In a public meeting held on the subject, a teary-eyed Carr begged the commission to request more money.²³⁸ But Durham's county commissioners refused to change their minds; they "saw danger" in asking for more than \$5,000 and decided "half a loaf is better than no loaf at all."²³⁹ Carr resigned from the commission in a "flat-footed" huff.²⁴⁰ The commission did get the bill sought; the bill allowed Durham to "apply one-half of one percent of the county's taxes for the purchase and erection of a monument."²⁴¹ The UDC initially agreed with Carr that the project required more money and tried to raise the funds

²³² Carr was involved in numerous other monument dedications in North Carolina. He led "an even thousand" of Durham's veterans to the dedication ceremony of Raleigh's Confederate monument in 1895 and donated a significant number of supplies for the ceremony. Butler, *supra* note 75, at 53. He was guest of honor at Tarboro's dedication. Butler, *supra* note 75, at 82. He tried and failed to raise money for a Raleigh monument to Confederate women in 1911. Butler, *supra* note 75, at 166. He spoke at the dedication of Nash County's Confederate monument in 1917. BROWN, *supra* note 1, at 87. And, as previously discussed, he delivered a now infamous speech at the dedication of Chapel Hill's Silent Sam. BROWN, *supra* note 1, at 125.

²³³ See *Monument to the Confederacy: Lee-Jackson Chapter, Daughters of the Confederacy Have \$4,000 of the \$10,000 Needed*, FARMER & MECHANIC (Raleigh), Feb. 27, 1912, at 5.

²³⁴ See MINUTES OF THE TWENTY-SEVENTH ANNUAL CONVENTION OF THE UNITED DAUGHTERS OF THE CONFEDERACY, HELD AT GREENSBORO, NORTH CAROLINA, OCTOBER 4-6, 1923, 143 (1924) ("Aided Confederate veterans to get a bill through the Legislature for a Durham County Monument."); *Unveiling Ceremonies were Attended by Many Veterans*, DURHAM MORNING HERALD, May 11, 1924, at 3 [hereinafter *Unveiling Ceremonies*].

²³⁵ *Carr Demands Better Shaft*, CHARLOTTE OBSERVER, Apr. 4, 1923, at 15.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ See MINUTES OF THE TWENTY-SEVENTH ANNUAL CONVENTION, *supra* note 234, *Unveiling Ceremonies*, *supra* note 234, at 3 (emphasis added).

themselves.²⁴² The UDC was unsuccessful; according to city records, the monument's final cost was \$5,000.²⁴³ Carr never had to witness the disgracefully cheap monument as he died a month before the monument's dedication ceremony in 1924.²⁴⁴

Unlike the unique design of Bennett Place, Durham's Confederate monument is a soldier statue—one of the most ubiquitous types of Civil War monuments in both the North and South.²⁴⁵ Durham's monument was erected during this style of memorial's twilight period; by 1924, monument companies had stopped advertising soldier statues nationally due to lack of demand.²⁴⁶ The Durham courthouse monument was purchased from one of the most prolific monument manufacturers: McNeel Marble Company of Marietta, Georgia.²⁴⁷ The fact that Durham's statue is nearly identical to another McNeel-manufactured Confederate monument erected on the same day in Lenoir County highlights the mass-produced nature of the monument.²⁴⁸ While the most expensive monuments were made of marble or cast bronze, Durham's (and Lenoir's) was from the budget line—comprised of sheets of metal soldered together to look like bronze.²⁴⁹ This inferior construction method was likely why the monument was so badly damaged when toppled.²⁵⁰ Even the monument's plinth inscription to "The Boys Who Wore the Gray" was rather bland—the phrase was commonly used to refer to Confederate soldiers during Memorial Day festivities across North Carolina.²⁵¹

The Durham monument's dedication took place on May 10, 1924, as part of Durham's other Confederate Memorial Day celebrations.²⁵²

²⁴² See *General Carr May Win Out in Monument Plan*, CHARLOTTE OBSERVER, Apr. 12, 1923, at 24.

²⁴³ See CITY-COUNTY REPORT, *supra* note 82 at 19.

²⁴⁴ See MENA WEBB, *JULE CARR: GENERAL WITHOUT AN ARMY* 258 (1987).

²⁴⁵ See *generally* BROWN, *supra* note 1, at 64–127.

²⁴⁶ See Butler, *supra* note 75, at 151 (noting also "the popularity of the parade-rest soldier was rapidly waning").

²⁴⁷ See Butler, *supra* note 75, at 151–52.

²⁴⁸ See Butler, *supra* note 75, at 150.

²⁴⁹ See Butler, *supra* note 75, at 137, 151–52.

²⁵⁰ See David A. Graham, *How the Activists Who Tore Down Durham's Confederate Monument Got Away With It*, ATLANTIC, (Feb. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/02/durham-confederate-monument-charges-dismissed/553808/>, ("Carr's concern with cost-cutting was validated in August 2017, when the statue—cheap sheet metal covered in bronze—crumpled.").

²⁵¹ See, e.g., *Memorial Day Exercises*, TAR HEEL (Chapel Hill, NC), June 6, 1903, at 5 (using the phrase).

²⁵² See *Large Throng Expected to Attend Ceremonies of Unveiling Exercises Today*, DURHAM MORNING HERALD, May 23, 1924, at 5 [hereinafter *Large Throng*].

Confederate Memorial Day was a major event in early twentieth-century North Carolina (at least among the state's white population). Banks and stores were closed, and white Durhamites participated in a variety of activities to honor living and dead Confederate veterans including parades, speeches, and the decoration of Confederate cemeteries.²⁵³ The city's veterans were generally fêted with dinners and, on one occasion, taken on a "site-seeing tour" to nearby Raleigh.²⁵⁴ As Mrs. Erwin stated it the year after the courthouse monument's dedication: "[Memorial Day] belongs to the Confederate soldier, and was designed for his peculiar glory."²⁵⁵

The dedication ceremony was part of this wider veteran-honoring context as veterans were to be "the center of activities"²⁵⁶ meant to "impress upon the soldiers the fact that they were appreciated."²⁵⁷ Around sixty veterans came to the 1924 ceremony, despite bad weather.²⁵⁸ Some traveled from as far away as Virginia.²⁵⁹ The ceremony began inside the courthouse, which was decorated with red and white flowers to represent the Confederate flag. Veterans were escorted to their "place of honor" by young women also in red and white.²⁶⁰

The formal dedication ceremony was lengthy, featuring speeches, a UDC ritual, and the songs "Dixie" and "America the Beautiful."²⁶¹ The first speech was a eulogy for Carr, which was followed by remarks from General Albert Cox. Cox was a North Carolinian who had led soldiers during the First World War, and whose father was a planter and Confederate general.²⁶² His speech focused on the "fast thinning line of grey":

When we see these veterans and pass the monuments erected to them let us pause and reflect anew what they have done for us and make their last days pleasant so that when they pass

²⁵³ See *Confederate Dead Honored in State: Memorial Day Was Observed Throughout the Entire State Yesterday*, DURHAM MORNING HERALD, May 11, 1924, at 1.

²⁵⁴ See *id.*; *Confederate Memorial Day Observed Yesterday by Durham Veterans: Flags Placed on Graves of Durham Heroes*, DURHAM SUN, May 10, 1925, at 9.

²⁵⁵ See *Julian S. Carr Chapter Plans Rites Saturday*, DURHAM SUN, May 6, 1925, at 7.

²⁵⁶ See *Large Throng*, *supra* note 252.

²⁵⁷ See *Unveiling Ceremonies*, *supra* note 234.

²⁵⁸ See Butler, *supra* note 75, at 197; *Unveiling Ceremonies*, *supra* note 234, at 3 (noting that Mayor Manning made jokes about the rainy weather).

²⁵⁹ See *Unveiling Ceremonies*, *supra* note 234, at 1; *Durham Honors Heroic Dead*, NEWS-RECORD (Marshall, N.C.), May 23, 1924 at 3.

²⁶⁰ See *Unveiling Ceremonies*, *supra* note 234.

²⁶¹ See *Unveiling Ceremonies*, *supra* note 234; *Large Throng*, *supra* note 252.

²⁶² See *Albert Cox*, NCPEDIA, <https://www.ncpedia.org/biography/cox-albert-lyman> (last accessed Jan. 15, 2020).

across the river that we cannot feel that the homage due them was not paid when they were here.²⁶³

The next two speeches took place outside, in front of the monument, which was covered by a cloth.²⁶⁴ Judge R.H. Sykes presented the monument to the city, using the opportunity to chastise North Carolina for not doing enough for its “private soldiers” and urging that they be given bigger pensions in order to “make their declining years as comfortable and happy as is possible”²⁶⁵ His speech was followed by that of the mayor of Durham, J.M. Manning, who accepted the monument “as a slight token, though somewhat delayed, of the admiration, love[,] and respect which our people hold for the Confederate soldier.”²⁶⁶ The newspaper described the “tears of happiness and pride” that the veterans shed while watching the monument’s dedication.²⁶⁷ After the ceremony’s conclusion, the veterans were treated to a dinner at the YMCA; the *Herald* reported that the “old soldiers have not forgotten how to eat.”²⁶⁸

The courthouse statue, if it were still standing, would be a much more likely target of litigation than Bennett Place. It was controversial enough to be toppled, after all. And some scholars have argued that placing monuments in front of Southern courthouses was a conscious decision to signal white supremacy.²⁶⁹ But while on one level any commemoration of Confederate soldiers might be considered part of the Lost Cause, the dedication of the courthouse monument lacked the intense states’ rights rhetoric that marked the one at Bennett Place. This is probably in part because, while the Unity Monument was a nationally focused monument that lent itself to broader themes, the courthouse monument was local, so its speakers focused on parochial concerns. The most specifically Lost Cause element of the ceremony came, not surprisingly, from the UDC. The *Herald* refers to a UDC “ritual” performed at the start of the dedication.²⁷⁰ This was likely the standardized liturgy that UDC chapters often read at Confederate memorial ceremonies.²⁷¹ The ritual included a prayer that stated: “We

²⁶³ *Unveiling Ceremonies, supra* note 234.

²⁶⁴ *Unveiling Ceremonies, supra* note 234.

²⁶⁵ *Unveiling Ceremonies, supra* note 234.

²⁶⁶ *Unveiling Ceremonies, supra* note 234.

²⁶⁷ *Unveiling Ceremonies, supra* note 234.

²⁶⁸ *See Large Throng, supra* note 252.

²⁶⁹ *See BROWN, supra* note 1, at 108.

²⁷⁰ *See Large Throng, supra* note 252.

²⁷¹ *See* MINUTES OF THE TWENTY-FOURTH ANNUAL CONVENTION, UNITED DAUGHTERS OF THE CONFEDERACY HELD IN CHATTANOOGA, TENN., NOV. 14-17, 1917 461-63 (1918) (publishing the “Program for Memorial Days of Observance.”).

thank [God] for [the Confederacy's] pure record of virtue, valor, and sacrifice . . . [and that we have] nothing to regret in our defense of the rights and the honor of the Southland."²⁷² Additionally, the *Herald* made reference to wreaths being placed on the monument by "representatives from the different *white* schools of the city."²⁷³ The celebrations were clearly meant for white Durhamites alone. But besides these elements, nothing in the reporting of the time seems to indicate that anything as damning as Carr's Silent Sam speech, or even his Lost Cause-focused Bennett Place speech occurred at the dedication. It is, of course, fascinating to speculate about what Carr might have said had he lived to give a speech at the dedication (assuming he would have deigned to speak before such an inexpensive monument).

Scott Holmes' intuition that an examination of the courthouse monument specifically would show speakers explicitly "celebrating new Jim Crow laws and white supremacy" does not seem to have been correct.²⁷⁴ Such a motivation could very well have been part of the ceremony's subtext, especially insofar as the UDC was involved. As the newspaper's mention of white schools implies, this was a monument for Durham's white inhabitants. But if a judge were to apply the sort of analysis used in *American Legion* to interpret the Bladensburg Cross, it might not be enough to classify the monument as racist government speech, since it is not clear that this was the primary intent behind its construction.²⁷⁵ Most of the rhetoric surrounding the monument was focused on honoring the veterans who were the focal point of the day's festivities. Just as the Bladensburg Cross (itself erected just a little over a year after the Durham courthouse monument) was upheld despite some evidence of its wider anti-Semitic historical context,²⁷⁶ the courthouse monument could have been defended on the grounds that the people talking about the monument at the time it was erected saw it primarily as a way to honor the sacrifice of their local veterans. While condemnation of the cause these veterans sacrificed for is justified, it is not clear that this would be enough to require the monument's removal under the Fourteenth Amendment.

II. CONCLUSION

It should go without saying that this Article does not in any way endorse Confederate monuments. As offensive symbols to people of

²⁷² *Id.*

²⁷³ See *Unveiling Ceremonies*, *supra* 234 (emphasis added).

²⁷⁴ *CityofDurhamNC*, *supra* note 61.

²⁷⁵ See Schragger, *supra* note 55, at 56.

²⁷⁶ See *supra* notes 42-54 and accompanying text.

color, they *should*, in most cases, be moved from places of prominence in the modern urban landscape.²⁷⁷ The legal question of whether they *must* be removed, however, is a bit trickier. The use of history for instrumental purposes, especially legal ones, can be risky.²⁷⁸ It is easy to allow one's policy goals—especially as worthy a goal as removing Confederate monuments—to subtly influence the resulting historical narrative.²⁷⁹ As our cities and states continue to assess the history of Confederate monuments, many would no doubt prefer to categorize them as one terrible whole, marble and iron detritus left over from decades of white supremacy. The idea that Confederate monuments might have been meant, even in part, to honor local veterans or national reconciliation rather than as pure symbols of white supremacy is disturbing, especially insofar as it seems like a concession to Confederate apologists.²⁸⁰ But the history of Durham's two major Confederate monuments reveals somewhat multi-faceted motivations. Unity Place was constructed to be a tourist attraction, a commemoration of the end of a terrible war, and a monument to the Lost Cause. The courthouse monument was both meant to honor Durham's dwindling number of Civil War veterans and to support the UDC's historical revisionism. This means that in a legal context, meeting the “because of, not in spite of” standard of an Equal Protection case might be rather difficult.²⁸¹ There is little evidence that Durham chose to erect either monument only, or even primarily, to celebrate white supremacy.

²⁷⁷ For a moving personal account of how black Southerners interact with Confederate monuments, see Matthew Teutsch, *Guest Post: “This South Has No Real Place for Me”*, INTERMINABLE RAMBLING (May 25, 2017), <https://interminablerambling.com/2017/05/25/5174/>. And this need not be only a black or progressive view; mid-century Southern author Walker Percy was somewhat sympathetic to the Confederacy but recognized that regardless of whether Confederate symbols had any normative value originally, they had taken on obvious racist connotations. Cf. WALKER PERCY, SIGNPOSTS IN A STRANGE LAND 79-80 (Patrick Samway ed. 1993) (discussing the Confederate flag and phrases like “states’ rights” specifically); see also LESLIE MARSH, WALKER PERCY PHILOSOPHER 3 (2018) (discussing how as an expert witness Percy testified against the Confederate flag in a federal court case).

²⁷⁸ See generally Helen Irving, *Outsourcing the Law: History and Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 960–62 (discussing problems with the instrumental use of history).

²⁷⁹ See *id.*; see also ANTONIN SCALIA, A MATTER OF INTERPRETATION 36 (1997) (describing how lawyers are sometimes guilty of looking “over the heads of the crowd to pick out [their] friends” when using legislative history).

²⁸⁰ See Holmes, *supra* note 68, at 43 (“The focus of Confederate Memorials as mere war memorials, like any other war, echoes the ‘Lost Cause’ mythology.”); see also CityofDurhamNC, *supra* note 61 (Holmes angrily rebuking a committee member sympathetic to the monument).

²⁸¹ See Schragger, *supra* note 55, at 56.

In some sense, however, recognizing the various motivations behind those who put up Confederate monuments could strengthen the arguments of those who seek to take them down. Writing about a similar issue, what to do with the scholarship of historians now associated with the Lost Cause movement, Civil War historian Gary Gallagher wrote:

Although the temptation [to reflexively dismiss all Lost Cause scholarship] might be strong . . . a willingness to point out instances in which [Lost Cause writers] advanced arguments well supported by evidence will lend greater power to critiques of Lost Cause interpretations based on blatant twisting of the historical record.²⁸²

Similarly, if we recognize that there were at least some legally unproblematic reasons that municipalities erected Confederate monuments, monuments more directly linked to white supremacy—like monuments to Confederate leaders or those erected to explicitly challenge the Civil Rights movement—become all the more striking in contrast. Litigants challenging monuments with “good facts” (an unfortunate phrase in this context) could strengthen their arguments for discriminatory intent through comparison with less provocative monuments.²⁸³

In the aftermath of George Floyd’s murder, the pace of Confederate monument removal has increased dramatically, and it may very well be that soon few will remain to be challenged using a Fourteenth Amendment lawsuit, particularly if more state governments choose to—like Virginia—repeal their Heritage Protection Acts.²⁸⁴ But the conclusions of this Article do not apply to Confederate monuments alone. The same Equal Protection Clause argument that has been directed so far only at Confederate statues could conceivably be made against other monuments recently targeted by protestors, such as those honoring Christopher Columbus, George Washington, and Abraham Lincoln.²⁸⁵ The main lesson learned from analyzing Durham’s

²⁸² Gary Gallagher, *Shaping Public Memory of the Civil War: Robert E. Lee, Jubal A. Early, and Douglass Southall Freeman*, in *THE MEMORY OF THE CIVIL WAR IN AMERICAN CULTURE* 58 (Alice Fahs & Joan Waugh, eds. 2004).

²⁸³ Compare Levin, *supra* note 33 (discussing a particularly egregious monument), with Oney, *supra* note 79 (discussing a more ambiguous Confederate statue).

²⁸⁴ See Governor Northam Signs Landmark Legislation on Historic Justice, Equity, VA GOV. RALPH S. NORTHAM (Apr. 11, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856052-en.html#>.

²⁸⁵ See, e.g., DeNeen L. Brown, *Frederick Douglass Delivered a Lincoln Reality Check at Emancipation Memorial*, WASH. POST BLOG (Jun. 27, 2020, 11:31 AM), <https://www.washingtonpost.com/history/2020/06/27/emancipation-monument->

Confederate monuments—that historical motivations for statue-construction were often multi-faceted—would likely apply to such efforts as well.²⁸⁶

Confederate monuments must be studied as individual historical moments and as parts of a wider national monument-building movement. While often mass-produced commodities, they were also intimately connected to the individual people who chose to erect them, people who spoke with a range of voices. Sometimes these voices could be quite contradictory, as in the case of Bennett Place. Acknowledging the various meanings of Confederate monuments, but nevertheless deciding that they no longer have a place in the modern municipal landscape is a more defensible position. The Confederate monuments should be moved, but if history is to have any part in this process, that history should be suitably nuanced.

in-washington-dc-targeted-by-protests/ (discussing the historical context of Washington D.C.'s "Freedman's Monument").

²⁸⁶ Cf. Holland Cotter, *We Don't Have to Like Them. We Just Need to Understand Them*, N.Y. TIMES (June 24, 2020) (discussing the complicated background of some monuments under assault by protestors, including a Lincoln statue erected by freedmen); Christina Caron, *Why Some Italian-Americans Still Fiercely Defend Columbus Day*, N.Y. TIMES (Oct. 5, 2018) (discussing some of the original motivations for Columbus veneration in the United States).