Brigham Young University Journal of Public Law

Volume 32 | Issue 1 Article 5

11-30-2017

A Growing Consensus: State Sponsorship of Confederate Symbols is an Injury-in-Fact as a Result of Dylann Roof's Killing Blacks in Church at a Bible Study

L. Darnell Weeden

A Growing Consensus: State Sponsorship of Confederate Symbols is an Injury-in-Fact as a Result of Dylann Roof's Killing Blacks in Church at a Bible Study

L. Darnell Weeden[*]

I. INTRODUCTION

"The current debates over Confederate symbols were ignited by Dylann Roof's murder of nine black churchgoers in Charleston, S.C. in 2015. The racially motivated killings produced new opposition to Confederate icons in public spaces."[1] As New Orleans officials eliminated the statue of Louisiana native son and Confederate General P.G.T. Beauregard on May 17, 2017, they provided an example of how to start the process of making right the national shame of honoring people who led the battle to protect Southern slavery.[2] "No matter how artfully apologists attempt to promote a romanticized Southern heritage, the Confederacy waged war on the United States primarily for the preservation of slavery."[3] Regarding the implication of Confederate symbols, such as the Confederate flag and monuments honoring Civil

Roberson King Professor, Thurgood Marshall School of Law, Texas Southern University; B.A., J.D., University of Mississippi. I give a particular expression of gratitude to my wife and children for their forbearance as I developed this article. The author would like to thank my colleague, Associate Professor Shaundra K. Lewis, for her valuable feedback, and Daniel Caldwell, Thurgood Marshall School of Law Class of 2019, for his assistance.

1. Logan Strother et al*, The Confederate Flag Largely Disappeared After the Civil War*, WASHINGTON POST, June 12, 2017, 2017 WLNR 18023240.

2. Yohuru Williams, *Confederate Symbols, Statues Whitewash Shameful History,* THE BULLETIN (Norwich, Conn.), May 31, 2017 at A7, 2017 WLNR 16865869.

3. *Id.*

War generals, the battle has gone on for decades.[4] However, the murder of black parishioners in June of 2015 at the Emanuel A.M.E. Church caused the issue to surge in the regular news media.[5] "The Confederate flag, monuments and memorials are not harmless remembrances of an honorable war, but of our deepest shame as a nation. They are symbols of hate, representative of an inglorious past built on the immoral underpinnings of racial slavery."[6]

Karl Oliver, a member of the Mississippi House of Representatives, is an unabashed, enthusiastic endorser of all Confederate symbols.[7] Oliver clearly disagrees with those who want confederate symbols to be removed from taxpayer sponsored parks and public spaces.[8] Unlike Oliver, some people would limit the display of Confederate symbols honoring the lost cause to private forums by private owners.[9] Representative Oliver, according to one commentator, "has managed to make himself a national embarrassment by calling for the lynching of elected officials in New Orleans for removing Confederate symbols — including a 20-foot tall statue of Civil War Gen. Robert E. Lee."[10] However, Oliver does not appear to be as dangerous as Roof, who wrapped himself in symbols of the Confederacy prior to executing nine African-American worshippers in church in South Carolina in 2015.[11] "Roof's murderous rampage started a renewed effort to get rid of Confederate symbols from public spaces. Hopefully Oliver's

4. *Id.*
5. *Id.*
6. *Id.*.
7. *See* Otis Sanford, Opinion, *Lynching Comment National Disgrace,* CLARION-LEDGER (Jackson, Miss.), May 28, 2017, at C4, 2017 WLNR 16534184 (Sanford holds the Hardin Chair of Excellence in Journalism and Strategic Media at the University of Memphis).
8. *See id.*
9. *See id.*
10. *Id.*
11. *Id.*

dangerous and asinine comments will help complete the push, once and for all."[12]

The process of removing four Confederate statutes in New Orleans, including one of General Robert E. Lee, began two years ago after the gunman, Roof, struggled to promote a do-it-yourself 'race war' by murdering nine individuals during a Bible study at a historic Charleston, S.C. church.[13] Many cities do not have the courage to follow the City of New Orleans's example regarding the proper treatment of the public display of Confederate symbols in a public forum by public officials.[14] A rational case for engaging in a public debate about whether the public display of southern Confederate symbols represents sound or poor public policy is both necessary and proper.[15] "And shame on us if it takes another atrocity for the discussion to start. Our past is meaningless if we don't use it to find a path to a better future."[16]

Biloxi, Mississippi is now directly involved in a current southern clash regarding Confederate symbols after its Republican Mayor, Andrew "FoFo" Gilich, mandated in April 2017 that the Mississippi State flag be removed from city buildings.[17] Mississippi is the last state flag in America to display the Confederate battle symbol.[18] The Mississippi flag became subject to passionate analysis after the self-proclaimed white supremacist Roof slew nine black participants at a Bible Study in a church in June of 2015.[19] It is now well known that Roof posed for pictures while embracing and possessing the

12. *Id.*

13. Editorial, *Don't Wait for Another Hate-Warped Gun Rampage to Force Action on Confederate Memorials,* DALLAS MORNING NEWS*,* May 25, 2017, 2017 WLNR 16249697.

14. *See id.*

15. *See id.*

16. *Id.*

17. *See* Emily Pettus, *'Fly The Flag'? Rift in Mississippi over Confederate Symbol,* ASSOCIATED PRESS, May 24, 2017, 2017 WLNR 16066908.

18. *Id.*

19. *Id.*

rebel Confederate flag.[20] "Instead of waiting for a top-down decision, many cities and counties and all eight public universities [in Mississippi] have acted on their own to remove the flag from display since 2015."[21] Biloxi Mayor Gilich had the Mississippi flag removed from city buildings during April of 2017 because he thinks the Confederate symbol causes people to sense that they are not welcome.[22] "Hospitality is important in Biloxi, a diverse city that is home to an Air Force base and has an economy heavily dependent on tourists who gamble in casinos and sunbathe on white-sand beaches,"[23] so a pragmatic Mayor Gilich's goal is to make sure that everybody feels welcome in Biloxi.[24]

Contrary to the modern trend in the courts,[25] any individual living in Mississippi has traditional standing under common law to challenge Mississippi's state flag on equal protection grounds as a public injury.[26] The state's display of the flag at state-sponsored activities and on state properties constitutes government hate speech endorsing racial prejudice since the Confederate flag, a racist Confederate symbol, represents slavery, racial animus, and inequality. Part II highlights the ongoing debate about how society should treat the problematic historic legacy of the Confederacy. Part II of this article emphasizes that denying state governments the ability to sponsor Confederate symbols is necessary. This denial is necessary since these symbols honor the supporters of slavery; Southern history shows a direct connection to the Confederacy and slavery. As a rule in the litigated cases generally, plaintiffs

20. *See id.*

21. *Id.*

22. *Id.*

23. *See* Pettus, *supra* note 17.

24. *See id.*

25. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169–70 (1992) (citing *Barlow v. Collins*, 397 U.S. 159 (1970)).

26. *See id.* at 167.

challenging state-sponsored use of Confederate symbols have not been successful because courts have misunderstood the nature of their public Article III injuries.[27] "There is no evidence of constitutional limits on the power to grant standing. In both England and America, actions by strangers, or by citizens in general, were fully permissible and indeed familiar. There is no basis for the view that . . . English and . . . American conception of adjudication forbade suits by . . . citizens."[28] Part III reveals the injury-in-fact was not a historical requirement to establish a violation of a private right: Since Article III standing may apply to either public or private injuries, a private injury-in-fact is unnecessary to guarantee the separation of powers under an Article III theory.[29] Part IV makes the claim that the Mississippi flag, with its incorporated Confederate symbol, violates the Constitution because the state's use of its flag allows a reasonable observer to believe the Mississippi flag represents government speech endorsing racial subordination in violation of the principle of equal protection. Mississippi's sponsorship of a Confederate symbol in its flag constitutes invidious government speech under the equal protection clause because racial history matters. Mississippi's long-standing, racially-tainted political process prohibits African Americans, a racial minority in the state, from using the normal political process as a tool to remove the Confederate flag symbol, a form of symbolic government speech, from the state's flag. Part V makes the case that Mississippi's public universities are plausible successful plaintiffs to challenge Mississippi's sponsorship of a Confederate symbol in its official flag under the controversial conventional standing rules. In conclusion, Part V maintains that the judges in the Confederate

27. *Id.* at 167.

28. *Id.* at 171.

29. Andrew Hessick, *Standing, Injury in Fact, and Private Rights,* 93 CORNELL L. REV. 275, 299 (2008) (citations omitted).

flag cases who have blindly followed the personal injury-in-fact requirement of standing have in fact denied deserving plaintiffs, who are descendants of slaves, relief from state sponsorship of odious discriminatory Confederate government speech, which sends a message of white supremacy.

II. AN ONGOING DEBATE ABOUT HOW SOCIETY SHOULD TREAT THE HISTORIC PROBLEMATIC LEGACY OF THE CONFEDERACY

A simple but profound question regarding the public display of Confederate symbols has challenged towns, counties, and states throughout the South over many years: "What place do symbols honoring a failed rebellion, one that fought for the right to subjugate people, have in a modern society?"[30] In May 2017, after another expanded Rebel flag fight in Henry County, Georgia, Jason Pye, a politically active libertarian who has a Rebel ancestor, has rather insightfully answered the Confederate symbols question by advising his southern friends and family to remember: "It's over. The South lost; let it go. . . . Until people accept that, people will continue to spend money to honor slavery."[31]

"Confederate symbols do not appeal directly to racial animus. Still, the politics of Confederate symbols have not changed completely: In surveys of whites, racial animus correlates strongly with support for Confederate symbols. Opponents of these symbols continue to make the connection to race."[32]

30. Bill Torpy, Opinion, *The Atlanta Journal-Constitution, Torpy at Large column,* ATLANTA J. CONST., May 30, 2017, 2017 WLNR 16699122.

31. *Id.* (quoting Jason Pye, a politically active libertarian).

32. Strother et al., *supra* note 1.

A. Confederate Flags and Monuments as Honoring Slavery

There is a Southern divide on the treatment of Confederate symbols. For example, Brandenburg, Kentucky, located about 40 miles southwest of Louisville, gladly accepted on Monday, May 29, 2017, Memorial Day, a monument honoring Confederate soldiers, after the University of Louisville removed the same monument as an unwanted symbol of slavery.[33] After protests and because of student and faculty disapproval, in April of 2016 the University of Louisville declared that it would remove the monument, which had been established in 1895.[34]

The debate regarding removing a Confederate statue from the property outside of the Hillsborough County Courthouse is unquestionably long overdue and should be quickly resolved in favor of removal because, "How can a government purporting to represent every citizen salute those who fought to deny equality to every citizen?"[35] It is a valid assertion to contend a person looking for justice in a courthouse should not be required implicitly to acknowledge a symbol of racial injustice.[36] Regardless of the historically sanitized discussion, "the Confederate Constitution clearly indicates that if the Confederacy had won, it would have continued slavery in the South and possibly extended it to new territories."[37]

Controversies regarding the removal of public Confederate monuments in New Orleans and Charlottesville, Virginia simply highlight an ongoing debate about how society

33. Bryan Woolston, *Kentucky Town Welcomes Confederate Monument,* SAN DIEGO UNION-TRIB., May 30, 2017, at 11, 2017 WLNR 16689406.

34. *Kentucky Town Rededicates Confederate Memorial Moved from Louisville,* WASH. POST (Wash., D.C.), May 30, 2017, at A02, 2017 WLNR 16684871.

35. Ernest Hooper, *Battle Goes Beyond Removing Confederate Symbols*, TAMPA BAY TIMES (FL), May 29, 2017, at 1, 2017 WLNR 16630992.

36. *Id.*

37. *Id.*

should treat the historic legacy of the Confederacy.[38] Ilya Somin agrees with conservative columnist Jeff Jacoby, libertarian Ronald Bailey, and others who believe that the government should remove Southern Confederate symbols when they are intended to honor the supporters of the legacy of slavery.[39] According to Somin, the Confederate symbols issue has evolved to this uncomplicated plan: "the government should not honor people whose principal claim to fame is that they fought a bloody war in defense of the evil institution of slavery."[40] Ultimately, Somin argues that both Confederate monuments and the Confederate flag should disappear from public spaces of honor because the main goal of the Confederates during the secession from the United States was to preserve the enslavement of African Americans.[41] Mississippi's official justification for its secession clearly indicated a very close link between secession and maintaining the institution of slavery.[42] Mississippi argued that because products produced by slave labor had "become necessities of the world, and a blow at slavery is a blow at commerce and civilization. That blow has been long aimed at the institution . . . and . . . reaching its consummation. There was no choice left us but submission to the mandates of abolition, or a dissolution of the Union."[43]

38. Ilya Somin, *The Case for Taking Down Confederate Monuments,* WASH. POST, May 17, 2017, 2017 WLNR 15340103.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (quoting Mississippi's official statement outlining its reason for secession).

B. Southern History Shows a Direct Connection to the Confederacy and Slavery

Supporters of the Confederate flag often attempt to deny that it represents their Southern heritage of slavery.[44] Reginald Hildebrand, a professor emeritus of history at the University of North Carolina, concedes it is conceivable the Civil War involved more than one issue, although "it would be hard to argue slavery was not the key issue."[45] On this issue, Confederate Vice President Alexander Stephens delivered the Cornerstone Speech in Savannah, Georgia, just prior to the Confederacy setting off shots at Ft. Sumter which started the Civil War.[46] "Our new government is founded upon exactly [this] idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race, is his natural and normal condition."[47] University of North Carolina Law Professor Al Brophy asserts that regardless of how one feels about Southern heritage, a "compelling" case exists for removing Confederate symbols from public settings.[48] The Confed-erate flag in 2017 represents a "symbol of white supremacy and that is the message it sends."[49]

The statue of Confederate General Robert E. Lee became the last of New Orleans's four confederate monuments removed from the public square.[50] The removal of Lee's statue marked the end of 130 years of publicly honoring a person who

44. Mark Schultz, *Chapel Hill Panel Debates Confederate Flag in Schools,* HERALD SUN (Durham NC), May 21, 2017, at 854, 2017 WLNR 15791043.

45. *Id.*

46. *Id.* (quoting Reginald Hildebrand).

47. *Id.*

48. *Id.*

49. *Id.* (quoting Al Brophy).

50. Janell Ross, *New Orleans Removes Confederacy Monuments,* WASH. POST, May 21, 2017, at A01, 2017 WLNR 15692612.

symbolized Southern pride and racial oppression.[51] Mayor Mitch Landrieu celebrated this historic occasion with an inspiring speech in a diplomatic attempt to end almost two years of intense discussion in New Orleans regarding the historical significance of the monuments.[52] "They are not just innocent remembrances of a benign history. These monuments celebrate a fictional sanitized Confederacy ignoring the death, ignoring the enslavement, ignoring the terror that it actually stood for."[53] Landrieu said that because Lee and the Confederate army fought against the United States, they were soldiers who were not patriots.[54]

C. Plaintiffs' Challenging State-Sponsored Use of Confederate Symbols as a General Rule Have Not Been Successful

Little legitimate precedent is available regarding state-supported utilization of Confederate symbolic speech, and the courts that have judged the issue have generally rejected the removal of Confederate flags by strictly construing the First, Thirteenth, and Fourteenth Amendments.[55] Plaintiffs have also been unsuccessful in having Confederate symbols removed from the public square because the courts have misunderstood the nature of their public Article III injury.[56] Cases that have analyzed state sponsorship of the Confederate issue outside of the context of school desegregation requirements have rejected removal of Confederate flags as mandated by the equal protection principle.[57] The Eleventh Circuit refused to order

51. *Id.*

52. *Id.*

53. *Id.* (quoting New Orleans Mayor Mitch Landrieu).

54. *Id.*

55. Kathleen Riley, *The Long Shadow of the Confederacy in America's Schools: State-Sponsored Use of Confederate Symbols in the Wake of* Brown v. Board, 10 WM. & MARY BILL OF RIGHTS J. 525, 532–534 (2002).

56. Sunstein, *supra* note 25, at 167.

57. *Id.*

the removal of the Confederate flag from atop the Alabama capitol building in *NAACP v. Hunt*.[58] In *Hunt*, the Eleventh Circuit rebuffed the NAACP's claim that a state-sponsored use of the Confederate flag violated the Constitution; the court decided that the NAACP plaintiffs were not sufficiently deprived of the constitutional right of equal protection to constitute a recognizable injury thereby.[59]

If the premise is true that a racially motivated statute may be unconstitutional even if it is facially neutral, then it is equally true that since Alabama flew the Confederate flag for racially discriminatory reasons, Alabama flying the flag violates the equal protection principle.[60] Although there was no state law mandating the flying of the Confederate flag, Alabama raised the flag in 1961 for purposes of honoring the 100th anniversary of a Civil War fought to support black enslavement.[61] "The flag was raised again on the morning of April 25, 1963, the day that United States Attorney General Robert F. Kennedy travelled to Montgomery to discuss with then-Governor George Wallace the governor's announced intention to block the admission of the first black students to the University of Alabama."[62] To reasonable observers considering the context in which Alabama raised its pro-segregation Confederate flag symbol, the state of Alabama obviously intended flying the flag atop the capitol dome to advance the message that it was playing its race card to appease white segregationist at the expense of the right of blacks to the equal protection of the law.[63] Moreover, there is an unequal

58. NAACP v. Hunt, 891 F.2d 1555, 1566 (11th Cir. 1990) (superseded by rule as stated in Stadium Book & Video, Inc. v. Miami-Dade Cty., 2006 WL 2374740 (S.D. Fla. 2006).

59. *Id.* at 1562.

60. *Contra* Hunter v. Underwood, 471 U.S. 222, 231–32 (1985) (declined to extend by Planned Parenthood of Kan. & Mid-Mo. v. Moser, 747 F.3d 814 (10th Cir. 2014)).

61. NAACP v. Hunt, 891 F.2d at 1558.

62. *Id.*

63. *See id.*

application of the state policy since it should now be common knowledge that even if all people of all races are exposed to the flag, black people, living in the state because of a history of slavery and Jim Crow, are disproportionally injured when Alabama flies that flag over its capitol.[64]

In *Mississippi Division of the United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches*, the NAACP unsuccessfully pursued declaratory relief and an injunction prohibiting any future purchases, displays, maintenance, or expenditures of public funds on the Mississippi Flag with its incorporated Confederate symbol.[65] The Mississippi Supreme Court rejected the NAACP's argument that the flying of the Mississippi state flag violates its members' constitutional rights to equal protection as guaranteed by the Mississippi Constitution because the NAACP failed to meet the threshold question of constitutional injury.[66] In *Daniels,*[67] the Mississippi Court decided that the flying of a Confederate battle flag by county officials did not violate constitutionally protected rights because there is no injury under the standing requirement.[68] In *Moore v. Bryant*, the plaintiff in a 2016 case unsuccessfully challenged the Mississippi state flag because the plaintiff failed to demonstrate an injury-in-fact.[69] After following a wrongheaded revisionist interpretation of an Article III personal-injury-in-fact standing requirement,[70] a federal district court held the plaintiff did not have standing to challenge the Mississippi flag as

64. *Id.* at 1562.

65. Miss. Div. of United Sons of Confederate Veterans v. Miss. State Conference of NAACP Branches, 774 So. 2d 388, 388–89 (Miss. 2000).

66. *Id.* at 390.

67. Daniels v. Harrison County Bd. of Supervisors, 722 So. 2d 136, 139 (Miss. 1998).

68. Miss. Div. of the United Sons of Confederate Veterans, 774 So. 2d at 390.

69. Moore v. Bryant, 205 F. Supp. 3d 834, 858 (S.D. Miss. 2016).

70. Sunstein, *supra* note 25 at 167.

unconstitutional because he did not in fact suffer a recognizable personal injury.[71]

According to Cass R. Sunstein, the "injury-in-fact" test represents a revisionist interpretation of Article III.[72] Since the injury-in-fact test is without an identifiable constitutional source, it appears that the Supreme Court just made up the "injury-in-fact" concept.[73] Sunstein contends that the Article III theory that "the plaintiff must suffer an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"[74] is not really mandated by the Constitution.[75]

While following the revisionist interpretation of Article III,[76] the Fifth Circuit affirmed the trial court's decision to deny standing to Moore.[77] Moore challenged the constitutionality of Mississippi flag by articulating an injury-in-fact theory made up by the Supreme Court.[78] This theory posits that "the requirement that a litigant have standing derives from Article III of the Constitution."[79]

Under this injury-in-fact theory, the Fifth Circuit declared that, at an irreducible constitutional minimum, standing required plaintiff Moore to have experienced an injury-in-fact which involves "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[80]

The constitutional challenge to the Mississippi flag in *Moore v. Bryant* should have caused the court to recognize that

71. Moore, 205 F. Supp. 3d at 834, 858.
72. Sunstein, *supra* note 25 at 185.
73. *Id.* at 168
74. Moore, 205 F. Supp. 3d at 850.
75. Sunstein, *supra* note 25, at 185.
76. *Id.* at 185–86.
77. Moore v. Bryant, 853 F.3d 245, 248 (5th Cir. 2017).
78. Sunstein, *supra* note 25, at 185.
79. Moore, 853 F.3d at 248.
80. *Id.*

society has developed new standards of civil rights regarding state-sponsored use of Confederate symbols,[81] and that, under the standing rules, the first element of standing is injury-in-fact. The federal appeals court disregarded Moore's claim that he suffered injury-in-fact because the Mississippi state flag stigmatized him.[82] The court rejected Moore's stigmatic injury argument because, according to the court's revisionist interpretation of Article III,[83] "stigmatic injury accords a basis for standing only to those persons who are personally denied equal treatment" by the challenged discriminatory conduct."[84]

It is now time for courts to accept the societal standard that state sponsorship of Confederate symbols is a violation of the principle of equal protection. It is relatively easy for a court to find that state sponsorship of a Confederate flag creates invidious racial discrimination where, by adopting "widely accepted academic critiques, the Court is flatly wrong to claim historical support for a constitutional requirement of standing, particularly for the requirement that private parties show some sort of individualized injury before they can proceed in federal court."[85] Unfortunately, courts have failed to recognize the harm produced by Mississippi's sponsorship of a Confederate symbol in its flag because, according to Cass Sunstein, the twentieth-century Supreme Court wrongly incorporated "a private-law model of standing" into the Constitution.[86]

81. *See* Moore v. Bryant, 205 F. Supp. 3d 834 (S.D. Miss. 2016); *See also* Kathleen Riley, *The Long Shadow of the Confederacy in America's Schools: State-Sponsored Use of Confederate Symbols in the Wake Of Brown v. Board, supra* note 55 at 531–32.

82. Moore, 853 F.3d at 249.

83. Sunstein, *supra* note 25 at 185 (internal quotations omitted).

84. Moore, 853 F.3d at 249 (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)).

85. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 690 (2004).

86. *Id.* at 691 (quoting Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988)).

III. PROOF OF THE PRIVATE INJURY-IN-FACT IS NOT A HISTORICAL REQUIREMENT UNDER ARTICLE III

This article supports the beliefs that the Constitution, under Article III, does not mandate, and history does not require, private injury-in-fact for a party to have standing. Contemporary standing law requires a private plaintiff suing in federal court to prove that she has endured "injury-in-fact," that the injury is legitimately linked to the conduct of the defendant, and that a favorable decision from the court can remedy the private injury.[87] F. Andrew Hessick insists that the private injury-in-fact require-ment is unnecessary because neither American nor English law practice originally required factual harm.[88] Historical practice does not support the argument that a private injury-in-fact is (or should be) mandated by Article III.[89]

A. Article III Standing Should Apply to Public Injuries or Private Injuries

From both a historical and contemporary perspective, the concept of standing may involve either "public rights" (injuries) or "private rights" (injuries).[90] Public rights are rights possessed by the community at large.[91] Public rights include the common benefit incurred by general compliance with controlling substantive law,[92] which may include the Equal Protection Clause of the Constitution.[93] The consequences for

87. Hessick, *supra* note 29, at 276.
88. *Id.* at 299.
89. *Id.* (citations omitted).
90. Woolhandler & Nelson, *supra* note 85, at 693 *et seq.*
91. *Id.*
92. *Id.*
93. *Id.*

violations of public consti-tutional rights “are not measured strictly by private loss[.]”[94] The proper role of standing is not solely to compensate individuals for their private losses but also to provide a forum for members of the community to vindicate claims that the law of the land was broken.[95] Private rights, however, are those possessed by a distinct person,[96] and “include an individual’s common law rights in property and bodily integrity, as well as in enforcing contracts.”[97] Nevertheless, “private rights may generally be distinguished by private law’s focus on individual compensation (or the avoidance of private loss by injunctive remedies).”[98] Steven Winter, supported by Professor Sunstein, has concluded that American courts initially allowed a private person “‘who had no personal interest or injury-in-fact’ to initiate and conduct mandamus actions on behalf of the public at large.”[99] In today’s America there should be very little doubt that allowing any Mississippian to challenge the state’s display of a Confederate symbol in its flag supports the greater community’s constitutional interest of eliminating state-sponsored endorsement of racial discrimination.

B. A Private Injury-in-Fact Requirement is Not Needed to Guarantee the Separation of Powers Under Article III

The failure to include a private injury-in-fact requirement for more than a hundred years following the Constitution’s ratification is very strong evidence that the personal injury-in-fact mandate is unnecessary to implement

94. Woolhandler & Nelson, *supra* note 85, at 693 *et seq.*
95. *See id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 708. *See supra* note 94 (quoting Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance,* 40 STAN. L. REV. 1371, 1377 (1988)).

federal judicial power.[100] If injury-in-fact were truly necessary to guarantee the separation of powers between the three branches of the federal government, the Court would have embraced the injury-in-fact mandate prior to 1970.[101] Similarly, if the injury-in-fact mandate were essential, the Court would have developed a dependable and uniform rationale for it.[102] The Court requirement of injury-in-fact should be rejected because, with a flag that conveys sympathy for the goals of white supremacy, "the function of courts is to provide relief to those who have suffered a legally cognizable injury."[103] This should also apply to harm from state-sponsored symbolic governmental speech. "So, why does current standing doctrine require injury-in-fact? The most likely reason is that it is firmly entrenched in the law."[104]

Cass R. Sunstein correctly explained that the "injury-in-fact" test is both relatively new and also represents a revisionist interpretation of Article III.[105] Although the injury-in-fact requirement does not have any textual or historical backing, the Court recognized injury-in-fact as a constitutional requirement.[106] Sunstein appropriately contends that the concept of "injury in fact is heavily dependent on an assessment of law instead of being a law-free inquiry into facts."[107] More fundamentally, a basic belief in an "injury-in-fact" theory is more than a misinterpretation of Article III, because it additionally represents a considerable conceptual error.[108] The judicial treatment of standing as a constitutional law issue is an extremely modern occurrence, since no court utilized the

100. Hessick, *supra* note 29, at 299.
101. *Id.*
102. *Id.*
103. *Id.* at 300.
104. *Id.*
105. Sunstein, *supra* note **Error! Bookmark not defined.**, at 167.
106. *Id.*
107. *Id.*
108. *Id.*

expression "injury-in-fact" prior to 1970.[109] There is simply no favorable evidence mandating an "injury-in-fact" other than the basic requirement that an identifiable legal theory grants a plaintiff a cause of action.[110] Since the personal injury-in-fact test lacks an identifiable constitutional source, it appears that the Supreme Court invented the 'injury-in-fact' concept.[111] The author, a native Mississippian, contends federal courts should not deny plaintiffs like Moore an opportunity to prove on the merits that Mississippi's flag violates the equal protection of the law concept under a made-up Article III personal injury-in-fact standing requirement.[112]

IV. THE CONFEDERATE FLAG WHEN INCORPORATED IN A STATE FLAG IS RACIALLY DISCRIMINATORY GOVERNMENT SPEECH PROHIBITED UNDER AN EQUAL PROTECTION ANALYSIS

Carlos Moore, an African-American attorney and a citizen of Mississippi, is the plaintiff in a lawsuit challenging Mississippi's display of its state flag.[113] Moore asserts that Mississippi's state flag, which incorporates the Confederate flag, is race-based, harmful government speech prohibited by the Equal Protection Clause of the Fourteenth Amendment.[114] Although the First Amendment does not prohibit the government from speaking,[115] the Equal Protection Clause prohibits the government from intentionally conveying a

109. *Id.* at 169 (citing Barlow v. Collins, 397 U.S. 159 (1970)).

110. *Id.* at 178.

111. *Id.* at 185.

112. U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

113. Moore v. Bryant, 205 F. Supp. 3d 834, 837 (S.D. Miss. 2016).

114. *Id.*

115. Mary-Rose Papandrea, *The Government Brand*, 110 NW. U.L. REV. 1195, 1198 (2016).

message that creates a strong inference of support for racial discrimination and subordination.[116] The state of Mississippi could easily function with a race-neutral state flag if denied the ability to promote a message of racial segregation in its flag. Because the Mississippi flag is a form of government speech that opposes racial equality, it injures the general public, and any Mississippian should be able to file a constitutional claim against the state. Professor Alexander Tsesis properly recognized the progressive position taken by Helen Norton that government speech promoting racial discriminatio n may violate Equal Protection principles.[117]

A. The Government Speech Doctrine Does Not Allow a State to Sponsor a Flag with a Governmental Message of White Supremacy

Even if the First Amendment does not restrain the government's expression, the equal protection prohibition on racially discriminatory purposes should apply to a state flag with a Confederate symbol that virtually says on its face that it is racially discriminatory.[118] It should not be controversial to prohibit the government from speaking in a manner that welcomes racial discrimination and racial intolerance. When a state government displays a flag that incorporates a Confederate symbol, it is engaging in prohibited government speech, because it is sending a message of support for racial discrimination that is inconsistent with the principle of equal protection. Because the Court has not clearly stated what speech represents government speech, the cases addressing the

116. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

117. Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement,* 97 MINN. L. REV. 1145, 1178 n.180 (2013) (citing Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 163 (2012)).

118. Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218 (1964).

government speech theory are often inconsistent.[119] Nevertheless, the Court implies that the government speech doctrine is associated with a situation where it is obvious the government is endorsing private speech.[120] One example of this can be seen when school officials place limits on expressive speech in public schools that members of the public might reasonably believe has the approval and support of the school.[121]

It is my position that, under an Equal Protection Clause analysis, the government speech doctrine requires the judiciary to find that the presence of a Confederate symbol in the Mississippi flag is unconstitutional. This is because a reasonable observer would likely view a state flag incorporating a Confederate symbol in the courtroom or public square as expressive speech supporting white supremacy with the approval and support of the state of Mississippi. Therefore, displaying the Mississippi state flag inherently violates the principle of equal protection. The Court categorized some controversies before it as involving government speech.[122] Under the government speech doctrine, "when the government speaks, individuals and groups cannot use the Free Speech Clause to challenge a government message that conflicts with private viewpoints."[123] In effect, the government speech doctrine allows the government to engage in its own speech to end any private speech that the government concludes is objectionable.[124]

The Court appropriately warned that the government speech doctrine is subject to constitutional constraints.[125] For

119. Papandrea, *supra* note 115, at 1199.

120. *Id.*

121. *Id.*

122. Nelda H. Cambron-McCabe, *When Government Speaks: An Examination of the Evolving Government Speech Doctrine,* 274 EDUC. L. REP. 753, 754 (Feb. 16, 2012).

123. *Id.*

124. *Id.*

125. *Id.* at 759.

example, the Court specifically identified the constraints of the Establishment Clause, while strongly suggesting laws and regulations that place restrictions on advocacy of public officials are outside the scope of the government speech doctrine.[126] In my view, a government entity engaging in government speech may be liable under the Equal Protection Clause for creating a state flag that incorporates a Confederate symbol representing a continued adherence to racial segregation. I believe a governmental entity should be held liable under the Equal Protection Clause for express advocacy of Confederate symbols that are closely linked to the support of intentional racial discrimination. If the Equal Protection Clause means anything it should prohibit Mississippi from promoting a flag that includes the Confederate battle emblem in the top left corner because such a flag is unacceptable government speech that endorses the unequal protection of the law.[127] One commentator correctly observed how "the Equal Protection Clause has become a primary tool wielded by litigants and jurists to reshape American society."[128] Now is an appropriate time for courts to reshape their thinking about how the Mississippi flag, which is tainted by an incorporated Confederate symbol of racial insubordination, clearly injures a plaintiff under the equal protection principle, and conclude that the government speech doctrine is not a bar.

Mississippi's use of a Confederate symbol in its state flag creates a situation that undermines the equal protection principle because the state flag is government speech that conflicts with the *Carolene* Court's expanding of effective political process expression for racial minorities.[129]

126. *Id.*

127. U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

128. Brian R. Markley, *Constitutional Provisions in Conflict: Article III Standing and Equal Protection After Shaw v. Reno,* 43 U. KAN. L. REV. 449, 449 (1995).

129. U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

The *Carolene* Court outlined its new vision of political process expression for racial minorities in extremely expansive terms.[130] The Court refused to constrain its future intervention to easy incidents where African Americans or another oppressed people were rejected at the polls and generally not allowed to effectively engage in the fundamental rights of political expression.[131] *Carolene* recommended a role for the judiciary that would remain robust even if every adult American had exercised his or her right to be involved in politics.

The *Carolene* footnote four rationale supports the argument that in a hypothetical world where African Americans voted at the same proportionality rates as whites, and where election districts accurately followed the Court's reapportionment decisions, African Americans would nonetheless hold, as a result of their discreteness and insularity, a disproportionately underrepresented amount of power in shaping legislative policy—an inequality great enough to justify a judicial decision that a nondiscriminatory democratic process would produce results analytically to advance the concerns of African Americans and other disliked minorities.[132]

The Mississippi flag, with its incorporated Confederate flag symbol, is unconstitutional government speech. In the real world because of their discreteness and insularity, racial minorities in Mississippi do not possess enough political power to successfully challenge Mississippi's endorsement of the Confederate flag without judicial intervention.[133] It is constitutionally correct to assert that the Mississippi flag with its incorporated Confederate symbol is government speech prohibited by the Equal Protection Clause of the Fourteenth Amendment.[134] However, this constitutionally correct

130. See *id.*
131. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985).
132. *Id.* at 715–16.
133. *Id.* at 716.
134. Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection,* 28 SETON

declaration that state sponsorship of a Confederate symbol, specifically the Confederate flag, violates the right to equal protection should not remain abstract academic theory.[135] Federal courts must now recognize that Mississippi's incorporation of a Confederate symbol in its state flag creates an unacceptable race-based government speech that is the proximate cause of a public injury-in-fact to racial minorities.

Although the government's racially discriminatory speech may be consistent with free speech values, this does not suggest that the message is tolerable, because the Equal Protection Clause serves separate goals.[136] The main objective of the Free Speech Clause is to promote democratic self-governance by accommodating a marketplace of both political and non-political ideas.[137] The state is most likely to sponsor racially discriminatory symbolic speech when the expression of approval for Confederate symbols and racial segregation is politically popular with majority of its constituency.[138] Thus, "hateful government expression often targets unpopular minorities in situations when ordinary political accountability measures would provide no meaningful remedy, thus increasing the importance of identifying some means of constitutional redress."[139] Unlike the Free Speech Clause, the primary goal of the Equal Protection Clause is to overcome barriers to full equality that are based on racial and other status.[140] "Hateful government speech that reinforces traditional patterns of hierarchy by communicating a message of exclusion or

HALL L. REV. 897, 900 (1998).

135. *Id.* at 901.

136. Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 169 (2012).

137. *Id.*

138. *Id.* at 170.

139. *Id.* (citing Jeffrey S. Helmreich, *Putting Down: Expressive Subordination and Equal Protection*, 59 UCLA L. REV. DISCOURSE 112, 115 (2012)).

140. *Id.* at 170–71.

inferiority based on class status thus offends an anti-subordination view of the Equal Protection Clause."[141]

Moore argues that the Confederate flag, as incorporated in the Mississippi flag, is an unconstitutional symbolic government speech supporting illegal race-based subordination, and can be reasonably understood to violate the Fourteen Amendment's anti-subordination equal protection rationale.[142] The federal district court denied Moore an opportunity to show that the Mississippi state flag, with an incorporated Confederate symbol, is unconstitutional when the court decided he lacked standing to oppose the flag because he did not suffer a personal injury-in-fact.[143] The conventional case or controversy mandate of Article III limits the judiciary to accepting only those cases that can be traditionally resolved by the judicial process.[144] A significant doctrine the Court has utilized to protect habitual restraint on the judicial process is standing.[145]

James Coleman sued to stop the flying of the Georgia state flag above Georgia's state operated workplaces.[146] Coleman, an African American, understood that such a display of the Georgia flag, which at the time included the Confederate battle flag symbol, was government speech that infringed upon his collective right to the equal protection of the law.[147] Because Southern history matters, the court in *Miller* had judicial notice that flying the Georgia flag with an incorporated Confederate symbol had disproportionate effects along racial lines; therefore, Coleman's equal protection claim should have been

141. *Id.* at 171.
142. Moore v. Bryant, 853 F.3d 245, 248 (5th Cir. 2017).
143. *Id.*
144. Hessick, *supra* note 29, at 276.
145. *Id.*
146. Coleman v. Miller, 117 F.3d 527, 527 (11th Cir. 1997).
147. *See id.*

accepted and not rejected.[148] An African American plaintiff should not be required to show obvious disproportionate impact by means of racial lines by producing specific factual evidence to demonstrate that a state flag that includes a Confederate symbol, in this case the Confederate flag, inflicts a considerable subordination burden upon African Americans as a group that is not experienced by whites. The disproportionate impact of racial subordination is a self-evident proposition because state sponsorship of the Confederate flag is plainly understood as government speech inviting and encouraging racial discrimination by whites.[149]

The Confederate battle flag symbolizes a governmental philosophy dedicated to preserving a divisive society where only whites were entitled to liberty and equality.[150] "The continued glorification of Confederate symbols in official venues around the country, and especially in the South, reflects an unwillingness to abide by the full scope of the Thirteenth Amendment, which bans all badges of servitude."[151] A current exhibition of the Confederate battle flag by a state government in a glorified place above state owned buildings and on official state logos is an ugly reminder that, while slavery is no longer legal in America, "some of its vestiges linger in American culture."[152] "Governmental incorporation of Confederate symbols . . . encourages the uninhibited expression of racism through unfair hiring practices and hate crimes."[153]

The Eleventh Circuit all but conceded that the Georgia State flag, which included the Confederate flag symbol, represented government speech with a racially discriminatory

148. *Contra id.* at 529–30.

149. *Contra id.* at 530.

150. Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 543 (2002).

151. *Id.* at 558–59.

152. *Id.* at 559.

153. *Id.* at 556.

purpose because the state flag was approved as part of Georgia's public leaders' crusade to reject the Supreme Court's school desegregation decisions.[154] In 1956, Georgia's Governor Marvin Griffin said, "there will be no mixing of the races in public schools, in college classrooms in Georgia as long as I am Governor."[155] Anti-desegregation public officials in Georgia raised and resurrected the Confederate battle flag as expressive governmental speech to demonstrate their disdain for even the thought of integrated public schools. Those who lost the Civil War and the battle to preserve a separate but unequal society based on race have used the Confederate flag as government speech symbolizing resistance to both racial integration and racial equality. It is reasonable to declare Southern resistance to racial integration, including celebrating Confederate war symbols, as government speech. The message: Blacks' fight for freedom and justice was a lost cause because the white South would rise again to overcome racial justice.

The Article III standing requirement allows a person the right to challenge a state's sponsorship of the Confederate flag as a racially biased symbol that causes constitutional injury to those who oppose race-based subordination.[156] Since the Confederate flag incorporated in Mississippi's flag endorses pervasive racial discrimination, the lower federal courts should appropriately abandon conventional standing principles to cure a state's equal protection violation.[157] When a state flag incorporates the Confederate flag into its official or de facto state flag, it endorses the discredited separate but equal

154. Coleman v. Miller, 117 F.3d at 528 n.3 ("In 1954, the Supreme Court declared racially segregated public schools unconstitutional, *see Brown v. Bd. of Educ.,* 347 U.S. 483 (1954) ('*Brown I*'), and, a year later, the Court ordered that the desegregation of public schools proceed 'with all deliberate speed.' *Brown v. Bd. of Educ.,* 349 U.S. 294, 299 (1955) ('*Brown II*')").

155. *Id.* at 528.

156. Markley, *supra* note 128, at 452.

157. *Id.*

principle.[158] "Racist symbols, placed conspicuously in public places, have the effect of bolstering persons resolved to act on racist ideology."[159] As a matter of fact specific "[h]ate groups that have incorporated the same Confederate symbols into logos, such as the KKK and Aryan Nation, are keenly aware that they are joined by some state governments in lauding the Confederate cause and its heroes."[160] In *Coleman v. Miller*, the court explicitly implemented the historical-ly wrongheaded personal injury-in-fact standing theory to justify its conclusion that a state's intentional racially discriminatory endorsement of the Confederate flag is not a violation of the equal protection principle.[161] Intentional discrimination against a racial group that cannot be corrected by the political process should be acknowledged as a public injury-in-fact under an anti-subordination political process rationale.[162]

A proper, historically correct understanding of the standing doctrine and the equal protection principle supports the conclusion that Mississippi is prohibited from endorsing the pre-Civil War concept of separate but equal established in *Roberts v. City of Boston*.[163] After the Civil War and the adoption of the Fourteenth Amendment's Equal Protection Clause, the Supreme Court of the United States nevertheless approved the separate but equal doctrine in *Plessy v. Ferguson*.[164] Any plausible reading of *Plessy* leads to the unavoidable conclusion that the Supreme Court gave its approval to state-sponsored racial discrimination against African Americans in spite of the language in the Equal

158. *See* Tsesis, *supra* note 150, at 558.

159. *Id.*

160. *Id.*

161. Coleman v. Miller, 912 F. Supp. 522 (N.D. Ga. 1996).

162. *Carolene Products Co.*, 304 U.S. at 152 n.4.

163. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850). *See also* Sunstein, *supra* note 25, at 167.

164. Plessy v. Ferguson, 163 U.S. 537 (1896).

Protection Clause, which clearly appears to prohibit racial discrimination against blacks and others who are not white.[165] The discredited separate but equal doctrine, when endorsed by the state sponsorship of a Confederate flag, may reasonably be viewed as a state granting the racially insensitive a license to engage in racial discrimination.

An objective observer could reasonably regard Mississippi's sponsorship of the Confederate flag as symbolic government speech perpetuating illegitimate sympathy for Jim Crow racial discrimination. Mississippi should not be permitted, by incorporating the Confederate flag into its state flag, to encourage the racial separation of people or to burden people with a race-based Confederate flag that symbolizes the perceived racial inferiority of African Americans.[166] Mississippi should not be allowed to engage in government speech that promotes a perception of racial inferiority for nonwhites.[167] Conversely, this perception of racial inferiority of nonwhites and its connection to Mississippi's government speech endorsing a race-based Confederate flag is very likely to perpetuate a feeling of racial superiority in the minds and hearts of unthinking whites in a manner unlikely to end anytime soon.[168] Unfortunately, *Moore v. Bryant* joins the courts that have not recognized that standing rules without the personal injury-in-fact requirement allow an equal protection objection to a state's endorsement of the Confederate flag.[169] A misapplication of the standing doctrine occurs when a court fails to recognize that the Confederate flag, when incorporated into the Mississippi flag, should be treated as a virtual Jim Crow racial classification.[170] Symbolic racial classifications supporting

165. *Id.* at 552 (Harlan, J., dissenting).
166. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
167. *Id.*
168. *See id.*
169. Moore v. Bryant, 205 F. Supp. 3d 834 (S.D. Miss. 2016).
170. *See* Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts's*

Jim Crow Confederate symbols, when endorsed by Mississippi, produce a concrete public injury.[171]

B. Mississippi's Flag Represents a Racially Tainted Political Process that Produces Racially Tainted Government Speech

Mississippi's sponsorship of the Confederate flag should also be treated as a tainted state political process issue inspired by Jim Crow policies that racial minorities have not been able to correct.[172] Mississippi's endorsement of the Confederate flag as its official flag is constitutionally suspect government speech because the state's white majority continues to burden its black minority with a racially insensitive Jim Crow flag.[173] Since African Americans are unable to use a tainted political process to remove the Confederate flag symbol as government speech, the political process rationale requires judicial intervention to prevent Mississippi from using its flag as a daily reminder of racial subordination.[174] In February 2001, the Mississippi legislature scheduled a special election for April 17, 2001, and voters decided to keep the current flag with its Confederate symbol and rejected a replacement design without the Confederate symbol.[175] "The special election results substantially favored the 1894 flag, with 65% voting to keep it and 35% favoring the alternate design. It once again was the State's official banner."[176]

The rationale of footnote four in *United States v. Carolene Products* applies to the Mississippi flag because the state display of the flag is not entitled to the presumption of

Reinterpretation of Brown, 69 OHIO ST. L.J. 791, 816 (2008).

171. *See id.*

172. *Id.*

173. *See id.*

174. *See id.*

175. Moore v. Bryant, 205 F. Supp. 3d 834, 846 (S.D. Miss. 2016).

176. *Id.*

constitutionality. The Mississippi flag, as symbolic government speech, virtually appears on its face to be within the specific prohibition of the Constitution's Equal Protection Clause.[177] The Equal Protection Clause prohibits the government from engaging in government speech that promotes a message of a superior race.[178] Courts must acknowledge that the white voting majority in Mississippi and blind loyalty to a false Southern heritage disable the political process. Mississippi's tainted political process cannot effect a repeal of the display of a racially subordinating Confederate government speech symbol in the state flag. Mississippi's incorporation of the Confederate flag symbol in its flag is so inherently suspect that the state should be subject to the strictest judicial scrutiny of the Fourteenth Amendment.[179]

A legitimate Southern heritage would not hide behind a Confederate flag government speech symbol representing a white supremacy state of mind. The real Southern heritage acknowledges its entire Southern people regardless of race. For example, the author is very happy to be black and a real Southerner. True Southerners know that all lives matter, and false Southerners are all too quick to forget all lives matter, including black lives. If it is true that in the South all lives matter equally, then a Confederate flag representing government speech promoting racial discrimination against people because the color of their skin represents an offense to true Southern fundamental fairness. Without fundamental fairness to everyone in the South, Southern hospitality is a mere myth.

The expressive governmental speech symbol of the Confederate flag inside the Mississippi flag intentionally directs its racial prejudice against discrete and insular racial

177. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

178. *See id.*

179. *See id.*

minorities.[180] The racial subordination represented by the Mississippi flag cannot be corrected by a tainted political process that abandons minorities rather than protecting them.[181] When a state's political process fails to protect racial minorities from a state flag representing racial discrimination, a more searching judicial inquiry, now known as strict scrutiny, is needed.[182] Strict scrutiny is needed because Mississippi's flag represents racially divisive governmental speech that violates equal protection. Mississippi could acknowledge an inclusive, truly race neutral Southern heritage in its flag with a race neutral magnolia, a Southern symbol. When a state engages in government speech by supporting the Confederate flag symbol, it communicates an illegitimate message that incites sympathy for racial inequality in violation of equal protection of the law. Regardless of the degree of psychological knowledge available when *Plessy v. Ferguson* was decided, courts now should recognize that a government speech message of racial inferiority conveyed about African Americans creates a public-place, psychological group injury to the members of the stigmatized group.[183] Any unreasonable reading of *Plessy v. Ferguson* supporting a finding of no concrete public harm under a false standing doctrine should be rejected.[184] Because the Confederate flag symbol as government speech is so closely connected to the doctrine of "separate but equal," it has no place in the Mississippi state flag.[185] If racially separate educational facilities are inherently unequal, then it stands to reason that a Confederate flag representing the government speech of white supremacy in Mississippi also inherently

180. *Id.*
181. *Id.*
182. *Id.*
183. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
184. *Id.* at 494–95.
185. *Id.* at 495.

deprives an African American plaintiff "the equal protection of the laws guaranteed by the Fourteenth Amendment."[186]

Government speech endorsing the Confederate flag plays the race card without any legitimate reason. If the constitutional theory of "equal protection of the laws" has any significance at all, it is clear that, even under its simplest application, it has to signify that a state-sponsored plan to send messages of racial subordination to "a politically unpopular group cannot constitute a legitimate governmental interest,"[187] even if the message is only expressed by government speech. In 1970, the adoption of the Confederate flag at Southside High School in Muncie, Indiana, was unsuccessfully challenged as a violation of the Equal Protection Clause.[188] The school's conduct could easily have been seen by a reasonable person as government speech by a school endorsing the lost cause of white supremacy. After Southside opened in 1962, the students were permitted under established school board policy to adopt the Confederate flag as the school flag and designate the school's athletic teams the Rebels.[189] In a 1968 report entitled "Student Friction and Racial Unrest at Southside High School, Muncie, Indiana" to the United States Commission on Civil Rights, the Indiana State Advisory Committee recommended that the school stop using the Confederate flag at Southside High School without delay because "it is [virtually] impossible for [African American] students to feel loyal to a school whose official symbols represent a system that enslaved their ancestors."[190]

The conclusion that the Southside High plaintiffs made no showing of racial or political discrimination should be

186. *Id.*
187. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
188. Banks v. Muncie Cmty. Sch., 433 F.2d 292, 297 (7th Cir. 1970).
189. *Id.*
190. *Id.*

rejected because of the school intentionally adopted a separate but equal Confederate flag symbol, which a reasonable observer is substantially certain to perceive as government speech endorsing racial discrimination and white supremacy.[191] A school board policy that approved the use of a Confederate flag, which constituted "measurable" racially subordinating government speech, at Southside High [was] racially neutral in name only.[192] Since the racially subordinating Confederate flag is substantially certain to be viewed as racially discriminatory government speech, a state-sponsored display of the flag should be considered an act of intentional racial discrimination.[193] An intentional school board policy that permits students to use a Confederate flag as a school symbol is government speech that should be treated the same as a policy that contains a racial classification on its face because of the flag's connection to slavery and subordination.[194] No inquiry into legislative policy is needed because the racially discriminatory nature of the Confederate flag, as government speech supporting subordination, is self-evident.[195]

V. MISSISSIPPI'S PUBLIC UNIVERSITIES ARE PLAUSIBLE SUCCESSFUL PLAINTIFFS TO CHALLENGE THE STATE'S SPONSORSHIP OF A CONFEDERATE SYMBOL IN ITS OFFICIAL FLAG

The Ninth Circuit's statement in *Washington v. Trump*[196] that Washington and Minnesota had standing to assert their own rights and rights of third parties may help to

191. *Contra id.*
192. Bein, *supra* note 134, at 917.
193. *Id.* at 917–18.
194. Shaw v. Reno, 509 U.S. 630, 642 (1993).
195. *Id.*
196. Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017).

identify potential successful plaintiffs to challenge Mississippi's sponsorship of a Confederate symbol. On January 27, 2017, President Trump issued Executive Order 13769 entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States."[197] After referring to the terrorist attacks of September 11, 2001, the Executive Order declared, "numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes."[198] The Executive Order proclaims "the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles."[199] The power of the Executive Order was instant and extensive.[200] "It was reported that thousands of visas were immediately canceled, hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travelers were detained."[201]

Washington alleged that the Executive Order, among other things, unconstitutionally damaged the State's economy and public universities in violation of the Fifth Amendment.[202] Particularly relevant for the purposes of my analysis, schools have been permitted to assert the rights of their students.[203] Since the interests of the States' universities are aligned with their students for purposes of conventional Article III standing,[204] Mississippi universities may be the plaintiffs' best-positioned to establish standing to challenge the Mississippi flag with its Confederate symbol. "The students' educational success is 'inextricably bound up' in the universities' capacity to

197. *Id.* at 1156 (citing 82 Fed. Reg. 8,977 (Feb. 1, 2017)).
198. *Id.*
199. *Id.*
200. *Id.* at 1157.
201. *Id.*
202. *Id.* at 1159–60.
203. *Id.* at 1160.
204. *Id.*

teach them . . . [a]nd the universities' reputations depend on the success of their professors' research."[205]

By analogy, a Mississippi university may assert not only its own rights (to the extent that the university is harmed by the Mississippi flag's incorporation of a Confederate symbol of racial subordination), but the state university may also assert the right of its students and faculty to a competitive educational experience. If the facts demonstrate that a disproportionate number of well-regarded professors refuse to come to a Mississippi university to teach or conduct research because of Mississippi's official flag, the university's students and faculty have suffered an injury-in-fact. Once a Mississippi university demonstrates its students have suffered an injury-in-fact because of the loss of an opportunity to recruit a competitive faculty, the third party standing rules allow the affected Mississippi university to sue the State of Mississippi on behalf of its students to remove the official flag of racial subordination.[206]

VI. CONCLUSION

Confederate symbols are currently impacting American and Southern life[207] although they essentially vanished into the wind once the Civil War ended.[208] White Southerners returned to Confederate symbols to demonstrate their resistance to the Civil Rights movement.[209] A longing to continue the practice of racial segregation and racial discrimination against African Americans in

the United States inspired the reappearance of Confederate sy

205. *Id.*
206. *Id.*
207. Strother et al., *supra* note 1.
208. *Id.*
209. *Id.*

m-bols.[210] In 1948, the Confederate flag developed into a powerful political symbol of white support for racial segregation during the Dixiecrat revolt after Strom Thurmond organized a demonstration by white Southerners at the Democratic National Convention to picket against President Harry S. Truman's endorsement of civil rights.[211] Many others followed the practice begun by the Dixiecrats of waving the Confederate flag to challenge any movement toward racial equality.[212] After the show the Dixiecrats put on at the Democratic convention in 1948, the Confederate flag represented white supremacy and a rejection of equal rights for African Americans because of their race.[213]

A real issue, not appropriately addressed in any of the opinions challenging the state sponsorship of a Confederate flag symbol in its official flag, implicates the correct description of the injury.[214] To understand the point, it may be necessary to remember the standing problem before the Court in *Regents of the University of California v. Bakke.*[215] Bakke could not demonstrate that but for the affirmative action plan he opposed, he would have been accepted into the medical school of the University of California at Davis.[216] A plausible argument was made that Bakke would not qualify for standing under the Article III requirement of injury-in-fact.[217]

According to Sunstein, the Court addressed the standing issue in *Bakke* in a manner that, in theory, has allowed it to find injury-in-fact without technically abandoning its conventional approach to standing.[218] "What happened here was that

210. *Id.*
211. *Id.*
212. Strother et al., *supra* note 1.
213. *Id.*
214. Sunstein, *supra* note 25, at 203.
215. *Id.* (citing Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).
216. *Id.*
217. *Id.*
218. *Id.*

the *Bakke* Court found injury, causation, and redressability by the simple doctrinal device of *recharacterizing the injury.*"[219] "In *Bakke,* the Court described the injury as involving not admission to medical school but the [lack of] opportunity to compete on equal terms."[220] Similarly, in *Allen v. Wright,*[221] the Court could "have recharacterized the injury as an opportunity not to have the desegregation process distorted by the incentives created through the grant of unlawful tax deductions to private schools."[222] The contextual racial subordination of minorities occurs when a state sponsors a Confederate symbol in its official flag. The courts should recharacterize the plaintiff injury challenging Mississippi's flag as an opportunity not to have the concept of the equal protection of the law distorted by the racially tainted government speech endorsing the discredited separate but equal doctrine.[223]

In sum, the contemporary standing law and personal injury-in-fact requirement represents a revisionist interpretation of Article III that is not actually mandated under Article III. I have taken the position that the judges in the Confederate flag cases, who have blindly followed the private injury-in-fact requirement of standing, have denied deserving plaintiffs who are descendants of slaves relief from state-sponsored speech in the form of Confederate symbols that send a message of white supremacy. Accordingly, federal courts should recognize that any individual living in Mississippi has a right to challenge Mississippi's usage of a state flag with a Confederate symbol, which violates the Equal Protection Clause.

219. Sunstein, *supra* note 25, at 203.
220. *Id.*
221. *Id.* at 204 (citing Allen v. Wright, 468 U.S. 737 (1984)).
222. *Id.*
223. *See id.*