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## What Is a Confederate Monument?: An Examination of Confederate Monuments in the Context of the Compelled Speech and Government Speech Doctrines

Ellen Hunt†

“I think it wiser, moreover, not to keep open the sores of war but to follow the examples of those nations who endeavored to obliterate the marks of civil strife, to commit to oblivion the feelings engendered.” – Robert E. Lee (declining an invitation to commemorate the Battle of Gettysburg)<sup>1</sup>

### Introduction

Monuments are statues, plaques, street names, and buildings. Monuments serve to memorialize historic events and commemorate historic figures. Some monuments become more than just a memorial, transforming into the symbol of a town and its people. The Statue of Liberty, for example, is inextricably linked with New York City. The Arch in Saint Louis, Missouri, makes the city’s skyline unmistakable and iconic.

Some monuments, though, have troubled pasts, like Stone Mountain in Georgia, which depicts three Confederate generals.<sup>2</sup> It is built on the land of a Ku Klux Klan member and funded by the United Daughters of the Confederacy,<sup>3</sup> an organization formed to promote and honor Confederate veterans.<sup>4</sup> Over time, people may become indifferent to these contentious monuments. However,

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†. J.D. Candidate 2019, University of Minnesota Law School. The author would like to thank the friends and family who have supported her through this journey, Professor Carol Chomsky for her advice and guidance, and the journal staffers and editors for their invaluable feedback. Finally, she thanks her partner, Patrick Gallagher, for his unending encouragement and love throughout this process and always.

1. Robert E. Lee, *Column 01*, REPUBLICAN VINDICATOR, Sept. 03, 1869, at 1.

2. *See generally* SOUTHERN POVERTY LAW CENTER, WHOSE HERITAGE?: PUBLIC SYMBOLS OF THE CONFEDERACY (2016) [hereinafter WHOSE HERITAGE?].

3. *Id.*

4. *Id.*

certain events like the Unite the Right Rally in 2017 in Charlottesville, Virginia bring them to the fore of our collective consciousness. The coverage of the white nationalist torchlight parade and then the murder of a counter-protestor sparked national outrage.<sup>5</sup> These and other recent events have served to reignite the debate around Confederate monuments and their proper place in the country. The resulting push to remove these monuments requires us to examine whether they are somehow distinct from other monuments, which are typically considered government speech and free from First Amendment challenges.<sup>6</sup> If Confederate monuments were classified instead as compelled speech, they could be challenged in court.

This Note seeks to examine where Confederate monuments fit within First Amendment jurisprudence by examining the doctrines of government speech and compelled speech. Specifically, this Note will look at how the perception of Confederate monuments could change their categorization. Part I of this Note will discuss the historical and present-day contexts of Confederate monuments. Part II will discuss the government speech and compelled speech doctrines. Part III will discuss why Confederate monuments would fit in each category. Finally, this Note will conclude with the potential issues of challenging the categorization of Confederate monuments.

### Part I. The Context of Confederate Monuments

Confederate monuments have a long and contested history in the United States.<sup>7</sup> There is disagreement about what they mean

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5. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?noredirect=on&utm\\_term=.e382bb4c6403](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?noredirect=on&utm_term=.e382bb4c6403). See also Matt Stevens, *How the Media Captured Charlottesville and Its Aftermath*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/business/media/charlottesville-media-trump.html> (describing media coverage of the event). At the 2018 anniversary rally, counter-protestors exponentially outnumbered White nationalists, signaling distaste for the events of the previous year on one side and a reluctance to be publicly linked to the cause on the other. German Lopez, *Unite the Right 2018 Was a Pathetic Failure*, VOX (Aug. 12, 2018), <https://www.vox.com/identities/2018/8/12/17681444/unite-the-right-rally-dc-charlottesville-failure> (reporting that several of the attendees in 2017 had been “doxed” as white nationalists and subsequently publicly shamed and even fired from their jobs).

6. Government Speech Doctrine, LEGAL INFO. INST. CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-1/the-government-speech-doctrine> (last visited Mar. 16, 2019).

7. See *id.* (This Note will use the term ‘monument’ as defined by the Southern Poverty Law Center, which includes statues, public buildings, and landmarks

and what they meant; however, there is a growing number of people who believe that Confederate monuments promote racism and white supremacy.<sup>8</sup> This section will examine the monuments themselves: what they are, where they came from, and what they mean.

#### A. *What Are Confederate Monuments?*

Confederate monuments are dedicated to the soldiers and supporters of the Confederate States of America during the American Civil War. The Confederacy, created to protect the legacy of slavery in the United States, was “founded upon . . . the greatest truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition.”<sup>9</sup>

In 2016, the Southern Poverty Law Center launched a project to document Confederate monuments in the United States.<sup>10</sup> The project tracked both the location and type of monument and found that most monuments were in states that were a part of the Confederacy.<sup>11</sup> However, there are monuments in states that aligned with the union during the Civil War, including Massachusetts, California, and Iowa.<sup>12</sup>

These monuments are more than statues. They include the naming of courthouses, public schools, and streets.<sup>13</sup> Some of them are even maintained by the federal government.<sup>14</sup> The United

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dedicated to persons who fought for the Confederate States of America).

8. See Jack Holmes, *Read New Orleans Mayor Mitch Landrieu's Remarkable Speech About Removing Confederate Monuments*, ESQUIRE (May 23, 2017), <http://www.esquire.com/news-politics/a55218/new-orleans-mayor-speech-Confederate-monuments/> (quoting Mitch Landrieu, Mayor of New Orleans: “Another friend asked me to consider these four monuments from the perspective of an African American mother or father trying to explain to their fifth grade daughter who Robert E. Lee is and why he stands atop of our beautiful city. Can you do it? Can you look into that young girl’s eyes and convince her that Robert E. Lee is there to encourage her? Do you think she will feel inspired and hopeful by that story? Do these monuments help her see a future with limitless potential? Have you ever thought that if her potential is limited, yours and mine are too? We all know the answer to these very simple questions.”).

9. WHOSE HERITAGE?, *supra* note 2, at 8 (quoting Confederate Vice President Alexander Stephens’s inaugural address).

10. WHOSE HERITAGE?, *supra* note 2, at 4.

11. WHOSE HERITAGE?, *supra* note 2, at 12.

12. WHOSE HERITAGE?, *supra* note 2, at 17–35.

13. WHOSE HERITAGE?, *supra* note 2, at 17–35.

14. LAURA B. COMAY, ET AL., CONFEDERATE SYMBOLS: RELATION TO FEDERAL LANDS AND PROGRAMS (Cong. Research Serv., R44959, Version 4, 2017).

States Congressional Research Service reported on the scope of and issues posed by Confederate monuments maintained by the Federal Government.<sup>15</sup> The report concluded that “Congress faces multiple questions and proposals concerning Confederate symbols on federal lands and in federally funded programs . . . questions could arise about how the proposals would be implemented from a logistical and financial standpoint, and how they would interact with existing authorities.”<sup>16</sup>

*B. Where Did Confederate Monuments Come From?*

The Southern Poverty Law Center and the United States Congressional Research Service agree that most Confederate monuments were erected decades after the end of the American Civil War in three waves. After the Civil War, there was little fanfare about Confederate heroes, and monument-building was minimal. Between the start of the Civil War in 1861 and the Supreme Court’s decision in *Plessy v. Ferguson* in 1896,<sup>17</sup> only 101 Confederate monuments were erected.<sup>18</sup> After *Plessy*, which marked the beginning of the Jim Crow era,<sup>19</sup> however, hundreds of Confederate monuments were erected.<sup>20</sup> This Confederate monument boom did not subside until the start of the 1920s.<sup>21</sup> Confederate monuments surged again in the 1950s and 1960s, and more than 45 monuments were dedicated or rededicated between the Supreme Court’s decision in *Brown v. Board of Education* and Dr. Martin Luther King Jr.’s assassination, a span of only fourteen years.<sup>22</sup> This is a similar rate to the period after the American Civil War, but is odd considering this Confederate monument boom was ninety years later. Dozens of Confederate monuments have been erected within the last fifteen years,<sup>23</sup> perhaps signaling a fourth wave.

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15. *Id.*

16. WHOSE HERITAGE?, *supra* note 2, at 19.

17. *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* was a landmark civil rights case signaling a new era of civil rights and also created a strong backlash).

18. WHOSE HERITAGE?, *supra* note 2, at 12.

19. *Jim Crow and Plessy v. Ferguson*, PBS, <http://www.pbs.org/tpt/slavery-by-another-name/themes/jim-crow/> (last visited Mar. 18, 2019) (explaining how the Jim Crow era began).

20. WHOSE HERITAGE?, *supra* note 2, at 12.

21. WHOSE HERITAGE?, *supra* note 2, at 12.

22. WHOSE HERITAGE?, *supra* note 2, at 8 (spanning the years 1954 to 1968).

23. WHOSE HERITAGE?, *supra* note 2, at 17–35.

C. *How Do People Feel About Confederate Monuments?*

Many have called for the removal of Confederate monuments because of the growing acknowledgement of their racist and oppressive legacy. Indeed, there has been a recent increase in removal of Confederate monuments.<sup>24</sup> This has in turn led to an entrenchment by supporters of the monuments. More than thirty-two Confederate monuments and symbols have been dedicated or rededicated since 2000.<sup>25</sup> Some argue the monuments were erected as a backlash against civil rights victories for Black persons, and as an assertion of White supremacy.<sup>26</sup> The Confederate monument booms mirror the surges in prominence of the Ku Klux Klan.<sup>27</sup> These booms also follow civil rights victories for Black persons.<sup>28</sup> Monument-building appears to parallel times when White supremacists attempt to reassert their power.<sup>29</sup> This coincidence may show the interrelatedness of White supremacy and Confederate monuments.

Proponents of removal argue that Confederate monuments promote White supremacy. Some see monuments like the Nathaniel Bedford Forrest Monument in a Memphis city park as a shadow of oppression.<sup>30</sup> Forrest was a slave trader and the first Grand Wizard of the Ku Klux Klan.<sup>31</sup> Several prominent political figures have echoed this sentiment and argue that the monuments should be taken down to signify that society no longer supports their legacy. Then House Minority Leader, Nancy Pelosi stated, “[t]he Confederate statues in the halls of Congress have always been reprehensible.”<sup>32</sup> Senators Barbara Lee and Cory Booker introduced

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24. WHOSE HERITAGE?, *supra* note 2, at 17–35.

25. WHOSE HERITAGE?, *supra* note 2, at 17–35.

26. WHOSE HERITAGE?, *supra* note 2, at 12.

27. WHOSE HERITAGE?, *supra* note 2, at 9.

28. See WHOSE HERITAGE?, *supra* note 2, at 9.

29. See 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>; Karen L. Cox, *The Whole Point of Confederate Monuments Is to Celebrate White Supremacy*, WASH. POST (Aug. 16, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-Confederate-monuments-is-to-celebrate-white-supremacy/?utm\\_term=.6734aa608bc7](https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-Confederate-monuments-is-to-celebrate-white-supremacy/?utm_term=.6734aa608bc7) (showing the connection between White supremacy and Confederate monuments).

30. Tyler Whetstone & Ryan Poe, *Historical Commission Denies Removal of Memphis’ Forrest Statue*, COMMERCIAL APPEAL (Oct. 13, 2017), <http://www.commercialappeal.com/story/news/government/city/2017/10/13/live-coverage-historical-commission-hears-arguments-removal-memphis-Confederate-monument/758712001/>.

31. *Id.*

32. Thomas Kaplan, *Call to Remove Confederate Statues from Capitol Divides Democrats*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/us/poli>

legislation to remove monuments of persons “who voluntarily served the Confederate States of America from the National Statuary Hall Collection . . .”<sup>33</sup> According to Senator Lee, “Confederate statues and monuments pay tribute to white supremacy and slavery in public spaces. These hateful symbols should have no place in our society and they certainly should not be enshrined in the U.S. Capitol.”<sup>34</sup> And for Senator Booker, Confederate monuments “are, unequivocally, not only statues of treasonous Americans, but [also] . . . advance hate and division.”<sup>35</sup> These monuments serve as a powder keg, igniting arguments, violence, and death, and have spurred on the debate of whether the Confederate monuments should continue to stand.<sup>36</sup>

Others argue that Confederate monuments should be honored, or at least respected, as articles of history. They believe that because these monuments are long-standing they should remain in place.<sup>37</sup> Monument defenders do not believe the monuments promote White supremacy;<sup>38</sup> instead, they argue that the monuments serve as historically appropriate memorials erected by survivors.<sup>39</sup> They further argue the monuments honor soldiers who “were willing to sacrifice and die to defend their values,” which they believe is a noble cause regardless of what those values were.<sup>40</sup>

Monument defenders argue those soldiers “truly believed freedom and democracy were at stake, and they truly believed they had chosen the right side.”<sup>41</sup> For people whose ancestors fought for the Confederacy, the attack against the monuments feels personal. For example, Bradley Dixon of North Carolina believes his

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tics/pelosi-Confederate-statues-capitol.html.

33. Eugene Scott, *Democrats Offer a Bill to Remove Confederate Statues from the Capitol*, WASH. POST (Sept. 7, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/democrats-are-offering-a-bill-to-remove-Confederate-statues-from-the-capitol/?utm\\_term=.1f6b1c41d156](https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/democrats-are-offering-a-bill-to-remove-Confederate-statues-from-the-capitol/?utm_term=.1f6b1c41d156).

34. *Id.*

35. Kaplan, *supra* note 32.

36. *See, e.g.*, Heim, *supra* note 5 (describing the violence around the 2017 Unite the Right Rally).

37. *See* Kevin Thornton, *The Confederate Flag and the Meaning of Southern History*, 2 Southern Cultures, no. 2, Winter 2008 at 233 (describing a Confederate monument in Mississippi that compares the Confederacy to the Spartans at Thermopylae).

38. *Id.* at 242 (quoting John Shelton Reed, who stated that flying the Confederate flag, for many Southerners, has nothing to do with Black people).

39. *Id.* at 233 (“[T]he Yazoo City monument proclaims that the men and women of the Confederacy fought for nothing less than the principle of liberty.”).

40. *Id.* at 241.

41. *Id.*

ancestors did not fight to protect slavery.<sup>42</sup> The attacks on monuments that honor families like his are “a direct blow” to their “blood.”<sup>43</sup> Still others, like Jacob Harris, see the battle as one of relativism, stating, “I don’t see why they [Black persons] can memorialize theirs if we can’t memorialize ours.”<sup>44</sup> Some of these arguments are based on false premises and are easier to dismantle. But all are based on personal beliefs about the value of history and what is worth remembering.

Emotional attachments make these beliefs particularly difficult to confront and change. The argument might be summarized as follows: at the time of the Civil War, Confederate soldiers thought they were on the right side of history. Modern-day hindsight should not undermine the value and importance of their beliefs. These arguments are so prevalent that even Donald Trump has railed against the idea of removing the monuments, claiming it will remove the history and beauty from communities.<sup>45</sup> Opponents of removal, echoing the President, argue that the monuments preserve history.<sup>46</sup>

Although Confederate monuments may symbolize history, to persons of color they also serve as an ongoing endorsement of slavery. Monuments serve as a reminder of who has the economic and social power to create and maintain them.

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42. Colleen Jenkins, *In North Carolina County, Strong Support for Confederate Statue*, REUTERS (Sept. 1, 2017), <https://www.reuters.com/article/us-usa-protests-statues/in-north-carolina-county-strong-support-for-Confederate-statue-idUSKCN1B C4FP>.

43. *Id.*

44. *Id.*

45. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 6:07AM), <https://twitter.com/realDonaldTrump/status/898169407213645824>; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 6:15AM), <https://twitter.com/realDonaldTrump/status/89817154423668736>; Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 6:21AM), <https://twitter.com/realDonaldTrump/status/898172999945392131>. [hereinafter Donald Trump Tweets]. Collectively the tweets read: “Sad to see the history and culture of our great country being ripped apart with the removal of our beautiful statues and monuments. You can’t change history, but you can learn from it. Robert E Lee, Stonewall Jackson - who’s next, Washington, Jefferson? So foolish! Also the beauty that is being taken out of our cities, towns and parks will be greatly missed and never able to be comparably replaced!” (ellipses omitted).

46. Christopher Carbone, *Confederate Monuments: This 124-year-old Women’s Group Is Fighting to Keep Them Around*, FOX NEWS (Aug. 12, 2017), <https://www.foxnews.com/us/confederate-monuments-this-124-year-old-womens-group-is-fighting-to-keep-them-around>.



## Part II. The First Amendment Doctrines of Government Speech and Compelled Speech

Confederate monuments are again at the fore of the national consciousness because of the surge of racist pro-Confederacy organizations like the groups that put on the “Unite the Right” rally and its anniversary rally. Many people have leaped into action to oppose these groups and called for the removal of Confederate monuments. Since then, the pro-Confederacy groups remain strong, few monuments have been removed, and limited progress has been made.<sup>47</sup> This debate brings the meaning and purpose of First Amendment protections squarely into focus.

The First Amendment is not only the first in the Bill of Rights, but it is also one of the broadest constitutional rights. It protects “freedom of speech” by citizens, including symbolic speech.<sup>48</sup> Protesters often cite it as an absolute right to express contrary views.<sup>49</sup> It is an overstatement that the First Amendment protects all speech from all interference. But, the government is nonetheless constrained in its ability to limit speech. Typically, the government may only place content-neutral, “time, place, and manner” restrictions on speech.<sup>50</sup>

Two doctrines within First Amendment jurisprudence—government speech and compelled speech—provide a framework for understanding how to confront the place of Confederate monuments in a contemporary context. Government speech, when the government speaks for itself,<sup>51</sup> is immune from First Amendment challenges.<sup>52</sup> Compelled speech is an exception to government speech’s immunity.<sup>53</sup> The government cannot force others to speak

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47. See *infra* Part I.

48. U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

49. See Katie J.M. Baker, *An Idiot’s Guide to Free Speech*, JEZEBEL (Feb. 20, 2013) <https://jezebel.com/5985635/an-idiots-guide-to-free-speech>; XKCD, “Free Speech,” <https://xkcd.com/1357/> (last visited Jan. 23, 2018) (portraying how some protesters cite the first amendment even when it has no application, such as suppression of speech by nongovernmental actors).

50. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

51. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARVARD L. REV. 2411 at 2411, 2412 (2004) [hereinafter “Curious Relationship”].

52. *Id.* at 2411.

53. *Id.* at 2418–22 (describing the historical jurisprudence of compelled speech).

for it.<sup>54</sup> The compelled speech doctrine provides some protection for those citizens compelled to speak.<sup>55</sup> If Confederate monuments are government speech, they are afforded greater protections than other types of speech. If, on the other hand, Confederate monuments are compelled speech, their continued maintenance could be a violation of the First Amendment.

#### A. *The Government Speech Doctrine*

When the government speaks for itself, it is government speech.<sup>56</sup> The questions then become, when is the government speaking for itself? What can it say? The government speech doctrine is a newer and still evolving constitutional doctrine.<sup>57</sup> The essence of the doctrine is that the government is not required to maintain neutrality. It may make decisions, promulgate ideas, and speak about issues and topics related to its programs and goals.<sup>58</sup> When the government speaks, it does not have the protections of the First Amendment, and the content of the speech is only limited by the procedural requirements of the government speech doctrine.<sup>59</sup> Government speech does not impede on the rights of citizens to speak or prevent citizens from opposing or demanding the government speech change.<sup>60</sup>

Scholars have identified a four-factor test for determining whether speech falls into this category: “the government’s expressive purpose, editorial control, role as literal speaker, and ultimate responsibility.”<sup>61</sup> The Supreme Court has not explicitly adopted this test, but its analysis of government speech tracks this formulation. Courts have said that government speech cannot be challenged under the First Amendment.<sup>62</sup> Many recent cases have dealt with determining when the government is speaking and what it can say.

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54. *Id.* at 2422.

55. *Id.*

56. *See* Curious Relationship, *supra* note 51, at 2411 n.3.

57. *Id.* Some scholars argue that the government speech doctrine first appeared in *Rust v. Sullivan*, 500 U.S. 173, 177–78, (1991), while others argue that *Rust* was a precursor to the doctrine.

58. Curious Relationship, *supra* note 51, at 2411 n.3.

59. Curious Relationship, *supra* note 51, at 2411 n.3.

60. Curious Relationship, *supra* note 51, at 2411 n.3.

61. Mary J. Dolan, *Why Monuments Are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 11 (2008).

62. Curious Relationship, *supra* note 51, at n.3.

In *Johanns v. Livestock Marketing Ass'n*,<sup>63</sup> the Supreme Court held that a compelled tax on cattle producers to fund a generic beef advertising campaign was government speech, which could not be challenged under the First Amendment.<sup>64</sup> In *Johanns*, several cattle producers challenged the constitutionality of the Beef Order, which excised a \$1-per-head tax on all cattle, collected by the Beef Board.<sup>65</sup> The Beef Board used the funds to create marketing campaigns including “Beef. It’s What’s for Dinner.”<sup>66</sup> The petitioners argued that the subsidy and resulting advertisement were compelled speech (*see infra* Part III.b) and thus impermissible.<sup>67</sup> The Court found that “compelled funding of government speech does not alone raise First Amendment concerns” because the government has the power to tax, and to use those taxes to fund government programming.<sup>68</sup> If the government “effectively controlled” the message then it was still government speech even if written by a third party. It was “not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources . . . .”<sup>69</sup> The Court found that since it was clear the government was speaking and promoting its own message, the petitioners could not challenge the speech under the First Amendment.<sup>70</sup>

As seen in *Johanns*, the government is immune from First Amendment challenges when it speaks through spoken or written messages. It also is immune when the speech is symbolic. In *Pleasant Grove City v. Summum*,<sup>71</sup> the Summum Church requested the city of Pleasant Grove erect a stone monument to the Seven Aphorisms, the seven principles of creation in their religion.<sup>72</sup> Pleasant Grove city park already housed eleven monuments including one of the Ten Commandments.<sup>73</sup> Pleasant Grove rejected the monument and Summum sued. Summum argued that Pleasant Grove violated their First Amendment right to free speech.<sup>74</sup> The

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63. 544 U.S. 550 (2005).

64. *Id.* at 564–65.

65. *Id.* at 553–54.

66. *Id.* at 554.

67. *Id.* at 564.

68. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005).

69. *Id.* at 560, 562.

70. *Id.* at 565–67.

71. 555 U.S. 460 (2009).

72. *Id.* at 465–66.

73. *Id.* at 464–65.

74. *Id.* at 466.

Supreme Court found that “[p]ermanent monuments displayed on public property typically represent government speech.”<sup>75</sup> In this case, the Court again found the four-factor test met because “[g]overnments have long used monuments to speak to the public.”<sup>76</sup> The Court stated, “there is little chance that observers will fail to appreciate the identity of the speaker,”<sup>77</sup> and the government is selective in choosing what monuments to accept and display.<sup>78</sup> The Court relied on the public accountability of the government and the ultimate responsibility “to the electorate and the political process.”<sup>79</sup>

These cases show that the government speech doctrine establishes procedural requirements that do not limit content beyond the fact that it must be related to a relevant government program or interest. While this gives wide latitude to what the government can say, this power is not boundless.

### *B. The Compelled Speech Doctrine*

Government speech may seem impervious to challenges, but there are still some avenues left open. One such path is compelled speech. Compelled speech violates the First Amendment because the government requires a citizen to promote the government’s message.<sup>80</sup> Even if a court finds that Confederate monuments would ordinarily be government speech, a petitioner may still argue they are being compelled to bear the speech. This would make the monuments unconstitutional compelled speech. The compelled speech doctrine attacks the third prong of the government speech doctrine: the government as literal speaker.<sup>81</sup> A compelled speech claim arises when the government compels citizens to promulgate its message, or when it is unclear that the government itself is speaking.<sup>82</sup> These cases do not rely on the citizen’s First Amendment right to free speech, but rather its inverse, the right to say nothing.

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75. *Id.* at 470.

76. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

77. *Id.* at 471.

78. *Id.*

79. *Id.* at 468 (quoting *Board of Regents Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 235 (2000)).

80. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

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

82. *Barnette*, 319 U.S. 624 (1943).

*West Virginia State Board of Education v. Barnette*<sup>83</sup> is the earliest compelled speech case.<sup>84</sup> There, petitioners challenged the rule that students had to salute the flag during the pledge of allegiance or face suspension.<sup>85</sup> The Court found the rule violated the First Amendment because it “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”<sup>86</sup> The Court emphasized that:

[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech . . . may not be submitted to vote; they depend on the outcome of no elections.<sup>87</sup>

This is a markedly different approach than that of government speech. Once the court deems something compelled speech, it cannot be government speech because the third and fourth prongs of the test are not met: the government is not the literal speaker or bearer of ultimate responsibility. Instead, citizens are compelled to bear the repercussions of the speech. No government interest can overrule these rights. *Barnette* exemplifies this because the Court found that a compelling governmental interest like national unity could be encouraged but not compelled.<sup>88</sup>

Later in *Wooley v. Maynard*,<sup>89</sup> the petitioner successfully challenged the propriety of a government license plate. In *Wooley*, the petitioners argued that displaying New Hampshire’s state motto “Live Free or Die” on license plates was compelled speech because the government required the display.<sup>90</sup> The Court found the New Hampshire statute that required an unobscured license plate “requires that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message—or suffer a penalty . . . .”<sup>91</sup> In finding the statute unconstitutional, the Court held “[t]he First Amendment protects the right of individuals to

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83. *Id.*

84. *Id.* at 642 (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)). Because *Barnette* overruled *Gobitis* it is the first compelled speech case.

85. *Barnette*, 319 U.S. at 627–29.

86. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

87. *Id.* at 638.

88. *Id.* at 631 n.12.

89. 430 U.S. 705 (1977).

90. *Id.* at 713.

91. *Id.* at 715.

hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”<sup>92</sup>

These compelled speech cases show that once a petitioner has proven they are compelled to speak in a way they disagree with, the government has violated their First Amendment rights. It is a strong defense against government speech. Courts recognize that compelled speech is an exception to government speech. This leaves open the possibility that typical government speech vessels, such as monuments, may violate compelled speech protections when the government shifts the burden to its citizens.

### *C. Overlap Between Government Speech and Compelled Speech*

Although the Court has stated that government speech and compelled speech do not coexist,<sup>93</sup> case law draws a finer distinction. In the wake of *Wooley*, the Tenth Circuit took on another license plate case. In *Cressman v. Thompson*,<sup>94</sup> the petitioner argued the Oklahoma license plate promoted pantheism, a view the petitioner disagreed with. The plate depicts a Native American shooting an arrow into the sky, which an Oklahoma artist modeled from a famous sculpture.<sup>95</sup> Like in *Wooley*, the petitioner argued that the requirement he display an unobscured license plate was compelled speech.<sup>96</sup> The Tenth Circuit found that the license plate was government speech, and that labeling speech as such did not eliminate private-speech concerns.<sup>97</sup> The court held that government speech could still be impermissible compelled speech.<sup>98</sup> Even though license plates were typically government speech, it was problematic that the petitioner had to bear the speech. Ultimately, the court rejected the claim because there were too many possible interpretations of the license plate design, and the pantheism interpretation was not the most reasonable one.<sup>99</sup> A petitioner may not prevail if the message found objectionable was

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92. *Id.*

93. *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 559 (2005).

94. 798 F.3d 938 (10th Cir. 2015).

95. *Id.* at 944–45.

96. *Id.* at 944.

97. *Id.* at 948.

98. *Id.* at 961.

99. *Cressman v. Thompson*, 798 F.3d 938, 950–51 (10th Cir. 2015).

not the most reasonable interpretation of the license plate by third parties.<sup>100</sup>

### Part III. Where Do Confederate Monuments Fit?

While it may seem obvious to some that Confederate monuments are government speech in that they more closely resemble a statue of the Ten Commandments than a license plate, there is room for argument. In *Summum*, the Supreme Court stated that monuments “typically represent government speech,”<sup>101</sup> making it possible that a specific monument—or class of monuments—may not meet all the requirements. This section analyzes the arguments for whether Confederate monuments meet the requirements of government speech or compelled speech.

#### A. Confederate Monuments as Government Speech

##### i. Expressive Purpose

The expressive purpose prong requires the government to advance a legitimate government interest.<sup>102</sup> The government satisfies this prong if it promotes industries it subsidizes, like in *Johanns*, or where it has chosen to promote a permissible message through art and sculpture in a public space, like in *Summum*. Confederate monuments may promote a legitimate government interest such as informing the public about an important historical event (e.g. the Civil War). But, as discussed above, some see Confederate monuments as memorials to White supremacy.

This argument is stronger when the monuments have a racist legacy. One such monument—Stone Mountain—is inextricably linked with racism. Stone Mountain in Stone Mountain, Georgia, is the largest high relief carving in the world.<sup>103</sup> It depicts three Confederate generals: Robert E. Lee, Jefferson Davis, and Stonewall Jackson.<sup>104</sup> The United Daughters of the Confederacy provided the original funding for the monument.<sup>105</sup> When funding

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100. *Id.* at 963–64.

101. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

102. *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2844, 2251 (2015).

103. Stone Mountain Park, *Confederate Memorial Carving*, <https://www.stonemountainpark.com/Activities/History-Nature/Confederate-Memorial-Carving> (last visited Jan. 20, 2018) [hereinafter *Confederate Memorial Carving*].

104. *Id.*

105. *Id.*

ran out, the state of Georgia purchased it.<sup>106</sup> Georgia's governor, Marvin Griffin, a staunch segregationist, was instrumental in the sale<sup>107</sup> after having campaigned on the promise to never integrate Georgia schools.<sup>108</sup> After its dedication, Stone Mountain was home to more racist events, including the revival of the Ku Klux Klan and a simulated plantation exhibit in the 1950s that involved Black actors serving as "hands."<sup>109</sup> A monument like Stone Mountain may have a legitimate government purpose, but to the extent that this message is overshadowed by others, it may be difficult to meet this prong. Nevertheless, most monuments, including Confederate monuments, will meet the expressive purpose prong.

ii. Editorial Control

The government satisfies the editorial control prong when it retains the ability to choose what to say and when to say it.<sup>110</sup> As long as the government can "change its mind" about the speech, either by editing or removing the speech, this prong is satisfied.<sup>111</sup>

When discussing editorial control, the Supreme Court has emphasized the public's ability to hold officials accountable.<sup>112</sup> This includes electing new officials or protesting. In some states, legislation limits the ability to change or remove monuments.<sup>113</sup> These laws remove the government's control over the message it is promoting. Arguably, in these states, the government has lost its editorial control. In this sense, editorial control is closely related to the ultimate responsibility prong. If no one is responsible for the

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106. *Id.*

107. Steve Hendrix, *Stone Mountain: The Ugly Past — And Fraught Future — Of the Biggest Confederate Monument*, WASH. POST (Sept. 19, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/09/19/stone-mountain-the-ugly-past-and-fraught-future-of-the-biggest-confederate-monument/?noredirect=on&utm\\_term=.a3eabd0bbb61](https://www.washingtonpost.com/news/retropolis/wp/2017/09/19/stone-mountain-the-ugly-past-and-fraught-future-of-the-biggest-confederate-monument/?noredirect=on&utm_term=.a3eabd0bbb61); Scott E. Buchanan, *Marvin Griffin (1907-1982)*, NEW GEORGIA ENCYCLOPEDIA (Mar. 10, 2003), <http://www.georgiaencyclopedia.org/articles/government-politics/marvin-griffin-1907-1982>.

108. Buchanan, *supra* note 107.

109. Lorraine Boissoneault, *What Will Happen to Stone Mountain, America's Largest Confederate Memorial?*, SMITHSONIAN.COM (Aug. 22, 2017), <https://www.smithsonianmag.com/history/what-will-happen-stone-mountain-americas-largest-Confederate-memorial-180964588/>.

110. Dolan, *supra* note 61.

111. Dolan, *supra* note 61.

112. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (quoting *Board of Regents Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 235 (2000)).

113. See Anil Kovvali, *Confederate Statute Removal*, 70 STAN. L. REV. ONLINE 82, 82–83 (2018) (citing North Carolina, Alabama, and South Carolina as states that have memorial protection statutes).



speech, then neither prong is met. In these states, people cannot easily hold the government accountable for the monuments. Monuments without restrictions can be removed by executive order or decrees. Monuments with these restrictions require new legislation or referenda to remove. Either process is significantly more restrictive than what the Supreme Court has found to meet the prong.

The editorial control prong is easily met in states without restrictions on monument removal. In states with these restrictions, the outcome is less clear.

### iii. Literal Speaker

As the Supreme Court stated in *Summum*, monuments are typically government speech.<sup>114</sup> This likely stems from the perception that the government speaks through the monument. Counterarguments to this are presented below in Part III.b.iii.

### iv. Ultimate Responsibility

The final prong looks at who bears the ultimate responsibility for the speech, and is what the Supreme Court has consistently emphasized as perhaps the most important prong.<sup>115</sup> This prong requires that the government be responsible for any backlash. If the government burdens someone else with the speech, that speech cannot be considered government speech.<sup>116</sup> Essentially, the government satisfies the prong if citizens can vote out the people they hold responsible.

The Supreme Court, arguably, puts too much weight on this prong. Issues of government speech, even egregious speech, distort the incentives of voters. Candidates run on a variety of separate issues, and the Supreme Court's reasoning incentivizes single-issue voting. It puts the onus on the electorate to change their representatives when they disagree with speech. Citizens should be free to vote for a candidate that will best represent their values on all issues, not just single issues.

Further, in states with limited ability to remove monuments, the government is not ultimately responsible. In these states, local governments cannot remove monuments in their city limits, even if

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114. *Summum*, 555 U.S. at 470.

115. *Id.* at 468 (quoting Board of Regents Univ. of Wisconsin System, 529 U.S. at 235).

116. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 636 (1943).

there is a strong political will to do so.<sup>117</sup> Cities or local governments need to convince state legislators to remove or change the monuments, a seemingly improbable feat. In states that have made removal impossible, there is no ultimate responsibility.

### B. Confederate Monuments as Compelled Speech

In *Cressman*, the Tenth Circuit affirmed that government speech may still be compelled speech in certain cases.<sup>118</sup> It is possible that even if monuments are typically government speech, certain ones may qualify as impermissible compelled speech if the prongs are met. Based on *Cressman*, speech is compelled when it has a clearly understood meaning, the speaker objects to that meaning, and third parties would interpret the individual as endorsing the speech.<sup>119</sup>

#### i. Clearly Understood Meaning

The first prong, “meaning understood by others” is generally simple, but can be complicated when many parties assert different meanings to a monument. As discussed in Section II above, some interpret Confederate monuments as symbols of history and heritage and others as symbols of oppression and segregation. However, there is a growing acknowledgment that at least some Confederate monuments promote White supremacy.<sup>120</sup>

Courts use an educated person standard when determining the meaning of a particular monument.<sup>121</sup> Based on this standard, it is possible that some monuments have a meaning that promotes White Supremacy. Stone Mountain (addressed above in Section III.a.), for example, may meet this meaning requirement. Its long and racist legacy makes it more likely an average, educated person,

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117. *See generally*, Kaeli Subberwal, *Several States Have Erected Laws to Protect Confederate Monuments*, HUFFINGTON POST (Aug. 17, 2017), [https://www.huffingtonpost.com/entry/states-Confederate-statue-laws\\_us\\_5996312be4b0e8cc855cb2ab](https://www.huffingtonpost.com/entry/states-Confederate-statue-laws_us_5996312be4b0e8cc855cb2ab) (discussing how Alabama, Mississippi, Georgia, Virginia, and North Carolina have limited their own ability to remove Confederate monuments).

118. *Cressman v. Thompson*, 798 F.3d 938, 948 (10th Cir. 2015).

119. *Id.* at 950–51, 963–64.

120. *See generally*, WHOSE HERITAGE?, *supra* note 2 (describing the racist history of the Confederate States of America and the racist undertones in Confederate monument-building).

121. *See Cressman*, 798 F.3d at 948 (assuming that an ordinary person would know the historical and artistic works that inspired the depictions on the license plate).

would understand Stone Mountain to be promoting racism and White supremacy.

ii. Speaker's Subjective Objection

The second prong, “meaning which the speaker objects to,” is likely the easiest prong to meet. People across the country have protested the monuments, some even taking it upon themselves to remove the monuments. While courts only require subjective objection to the speech, not societal condemnation,<sup>122</sup> the growing cry against the monuments can only bolster this prong.

iii. Viewed as Speaker by Observers

The third prong, plaintiffs as “literal speaker,”<sup>123</sup> is likely the most difficult prong to meet. This relates to the third prong of the government speech doctrine, the government as the literal speaker. It is possible for the speech to be both spoken by the government and individuals.<sup>124</sup> This is often true in cases like *Wooley* and *Cressman*. In those cases, the license plates were government speech that nonetheless was compelled speech of the individuals who were compelled to use the plates.<sup>125</sup> The Supreme Court has suggested that monuments typically are government speech. But, as seen in *Cressman*, this is not definitive and some monuments are so integrated into a town that they come to represent its inhabitants.

In states that have limited the ability to remove Confederate monuments, a city is compelled to speak through its monuments even if it or its residents disagree with the message. In these instances, the city is perceived as the literal speaker because of the monument's location,<sup>126</sup> and the city has no way to stop displaying

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122. *Id.* at 944–45.

123. Dolan, *supra* note 61, at 11.

124. *Cressman v. Thompson*, 798 F.3d 938, 948 (10th Cir. 2015).

125. *Wooley*, 430 U.S. at 715.

126. While this may be beyond the limits of the doctrine, cities and their citizens are often defined by various aspects of their towns, including their monuments. When these citizens say their home cities while traveling, others will make the connection to these aspects. These include New York City with the Statue of Liberty or San Francisco with the Golden Gate Bridge. Both monuments have come to symbolize the city. Confederate monuments have similar effects. These include Stone Mountain near Atlanta, Georgia or Monuments Avenue in Richmond, Virginia. Monument Row is a street filled almost exclusively with Confederate monuments. It is impractical to say that those who object to the monuments should move to disaffiliate themselves from them. Such decisions require financial resources and may be prohibitive in other ways. Citizens should not be forced to be associated with

the monuments and in essence “stop speaking.” Effectively the cities are billboards for the state’s agenda. A challenge like this is limited by the rights of local government to act independently of the state.

Ultimately, the issue of citizen as the literal speaker behind monuments can be difficult, but not impossible, to solve. Monuments can come to symbolize towns and their people. It is difficult to distinguish a person from where they are from. Often when people describe their homes, they use monuments and landmarks. The monument defines the city and its people, and perhaps becomes a town’s “personal billboard.” An individual could then challenge these monuments as impermissible compelled speech. This is also important in states with laws limiting Confederate monument removal. Those laws may mean Confederate monuments are not government speech because of the lack of editorial control and ultimate responsibility. If so, they are not entitled to the same deference as monuments without removal restrictions.

### Conclusion

The passion and furor around Confederate monuments seem to ebb and swell with current events. But the latest surge sparked by the violence in Charlottesville has maintained some vitality. The opinions surrounding Confederate monuments may not change their categorization. Nevertheless, in states like North Carolina, Georgia, and Tennessee, where laws prohibit the removal of Confederate monuments,<sup>127</sup> the laws may amount to compelled speech. These laws may also mean the monuments are not government speech.

If a city or individual were to bring suit, judicial action may prove effective but may also prove over-inclusive. If the challenged monuments are impermissible, perhaps all offensive monuments are impermissible. This is slippery slope, “where does it end?” rhetoric,<sup>128</sup> which is not without merit. If one person can object to a

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Confederate monuments because others have the resources to leave.

127. Jim Galloway, *The Georgia Law that Protects Stone Mountain, Other Confederate Monuments*, POLITICAL INSIDER BLOG (Aug. 17, 2017), <http://politics.myajc.com/blog/politics/the-georgia-law-that-protects-stone-mountain-other-confederate-monuments/IlyMj6919d5JFo40QMS4RJJ/>; David A. Graham, *Local Officials Want to Remove Confederate Monuments—But States Won’t Let Them*, ATLANTIC (Aug. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351/>.

128. Donald Trump Tweets, *supra* note 45.

monument because of their understanding of it, then what would prevent successful legal challenges against the Martin Luther King Jr. monument in Washington D.C., or Mount Rushmore? The answer is that the compelled speech doctrine requires that a reasonable person would ascribe a similar meaning to such monument. It is unlikely that a court would find the subjective objection to the monument to be the understood meaning behind most monuments, so such challenges would be unsuccessful.

Even so, a court would need to balance the potential to open all monuments to challenge and the importance of protecting individuals from being represented by monuments over which they have no control and are powerless to remove. However, if these challenges were successful, it may indicate that society no longer finds monuments to other historical figures acceptable either. One such example may be Christopher Columbus, who was, besides an early explorer of North America, an imperialist and cruel to Native Americans.<sup>129</sup> Finding other monuments beyond those depicting the Confederacy problematic or deserving removal does not invalidate the point. Further, many activists have called, not for the obliteration of the monuments, but for moving and contextualizing them.<sup>130</sup> Potential remedies include moving portable structures into museums and adding context through signs explaining the problematic nature of immovable monuments such as Stone Mountain.<sup>131</sup>

Generally, suppression of speech of any kind raises concerns. But in the case of monuments and the laws which protect them, the speech of the government appears to trump the voice of its citizens. In this case, typical suppression concerns are minimal because the remedy is to allow more ideas from citizens and to limit the influence of the government.

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129. *Columbus Controversy*, HISTORY, <https://www.history.com/topics/exploration/columbus-controversy> (last visited Apr. 11, 2018).

130. See ACLU, *The Truth About the Confederacy in the United States*, YOUTUBE (Aug. 24, 2017), <https://youtu.be/QOPGpE-sXh0>.

131. These remedies are a form of injunctive equitable relief. For a discussion of injunctive relief, see BOUVIER LAW DICTIONARY, Injunctive Relief.