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# Governments “Erasing History” and the Importance of Free Speech

NOAH C. CHAUVIN\*

*Nationwide protests against police brutality and structural racism have led to a renewed push for governments to take down or alter Confederate monuments and symbols. Advocates for these changes argue that they will make our public spaces more just and welcoming to all people. Not everyone agrees. Some defenders of the monuments and symbols accuse pro-removal protestors and the governments who acquiesce to their demands as conspiring to “erase history.” In this essay, I argue that those who oppose removing the monuments should come away from the controversy with an appreciation for the importance of free speech. On the other hand, supporters of removal should come away from the controversy with an appreciation for the importance of free speech.*

|      |   |    |
|------|---|----|
| I.   | INTRODUCTION.....                       | 1  |
| II.  | THE GOVERNMENT AS ARBITER OF TRUTH..... | 5  |
|      | A. GOVERNMENT AS SPEAKER.....           | 5  |
|      | B. GOVERNMENT AS ENFORCER.....          | 9  |
| III. | CONCLUSION.....                         | 15 |

## I. INTRODUCTION

In June of 2020, Virginia Governor Ralph Northam announced that the Commonwealth of Virginia would take down a massive statue honoring Confederate General Robert E. Lee that currently sits on state-owned land in Richmond.<sup>1</sup> Supporters of Northam’s decision praised it as “a step in the right direction” that was “long overdue.”<sup>2</sup> Critics decried the decision as erasing

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\* J.D., William & Mary Law School, 2019; B.A., SUNY Geneseo, 2016. This paper benefitted from early conversations with Matt Strauser and from careful editing by the members of the *Northern Illinois University Law Review*. All errors—and all views—are strictly my own.

1. Bill Chappell, *Massive Robert E. Lee Statue in Richmond, Va., Will Be Removed*, NAT’L PUBLIC RADIO (June 4, 2020, 11:27 AM), <https://www.npr.org/2020/06/04/869519175/massive-robert-e-lee-statue-in-richmond-va-will-be-removed> [<https://perma.cc/QAM4-L37M>].

2. Press Release, Virginia Legislative Black Caucus, *The Virginia Legislative Black Caucus Statement on the Removal of the Robert E. Lee Statue* (June 3, 2020), <https://www.vablackcaucus.com/news/c/0/i/46863762/vlbc-statement-removal-robert-e-lee-statue> [<https://perma.cc/H3U5-PNYX>].

history.<sup>3</sup> One Virginia politician went so far as to accuse Northam of “erasing the history of the white people.”<sup>4</sup> Opponents of removal quickly filed two lawsuits seeking to prevent the government from taking the statue down.<sup>5</sup> In one suit, an heir of two of the people who deeded control of the statue to the state alleges that by taking down the statue, the government is failing to “faithfully guard it and affectionately protect it,” as required by the terms of the original deed.<sup>6</sup> In the second suit, six nearby landowners argue that removing the statue will reduce their property values.<sup>7</sup>

Northam’s announcement came as the country was embroiled in nationwide protests decrying institutional racism and police brutality against black people.<sup>8</sup> While many protestors were peaceful and law-abiding, some protests descended into rioting and looting.<sup>9</sup> Increasingly, statues depicting historic figures became targets for petty vandalism or outright destruction.<sup>10</sup> While many of the targeted statues featured Confederate figures, this was not universally the case: vandals toppled statues of George Washington and Ulysses S. Grant, and statues of Thomas Jefferson, Theodore Roosevelt, and Woodrow Wilson were targeted by protestors.<sup>11</sup> President Donald Trump issued an executive order re-emphasizing current federal law protecting certain monuments.<sup>12</sup>

3. Sarah Rankin, *Judge Issues Order Halting Lee Statue Removal for 10 Days*, ASSOCIATED PRESS (June 8, 2020), <https://apnews.com/article/62da15fd455f6cd840eed707dcb32a46> [<https://perma.cc/PHW4-SUEL>].

4. See Chappell, *supra* note 1. Criticisms of this nature are common when governments decide to take down Confederate monuments, though they do not typically take on such a starkly racial tone. See, e.g., *Hayes v. City of Memphis*, No. W2014–01962–COA–R3–CV, 2015 WL 5000729 (Tenn. Ct. App. May 12, 2015).

5. Justin Mattingly, *Two Lawsuits Challenge Lee Statue’s Removal; Northam Says ‘Divisive’ Monument ‘Needs to Come Down’*, RICHMOND TIMES-DISPATCH (June 9, 2020), [https://www.richmond.com/news/virginia/watch-now-two-lawsuits-challenge-lee-statues-removal-northam-says-divisive-monument-needs-to-come/article\\_ab073021-aea5-55f0-96e4-c8ccc47cd361.html](https://www.richmond.com/news/virginia/watch-now-two-lawsuits-challenge-lee-statues-removal-northam-says-divisive-monument-needs-to-come/article_ab073021-aea5-55f0-96e4-c8ccc47cd361.html) [<https://perma.cc/AZ6N-WWXA>].

6. *Id.*

7. *Id.* This suit was initially filed in federal court, but the plaintiffs voluntarily dismissed that suit and re-filed in state court. Sarah Rankin, *Plaintiffs Drop 1 Lawsuit, File Another Over Lee Statue*, ASSOCIATED PRESS (June 17, 2020), <https://apnews.com/3f528b62849b075c2292dbf38a1b167c> [<https://perma.cc/X6AL-8BUT>].

8. See Chappell, *supra* note 1.

9. Anthony L. Fisher, *Destruction Swings at the System, but the Punch Lands on Peaceful Protests*, BUS. INSIDER (June 14, 2020, 9:37 AM), <https://www.businessinsider.com/george-floyd-peaceful-protests-looting-riots-destruction-righteous-cause-2020-6> [<https://perma.cc/SDR7-TKAS>].

10. See Stephen L. Carter, *How to Decide Which Statues to Pull Down*, BLOOMBERG (June 22, 2020, 1:00 PM), <https://www.bloomberg.com/opinion/articles/2020-06-22/how-to-decide-which-statues-to-pull-down> [<https://perma.cc/CD7H-8JYY>].

11. See *id.*

12. Exec. Order No. 13933, 85 Fed. Reg. 40,081 (July 2, 2020).

It is not just monuments that have come under fire or that have been taken down. Advocates have called for changing other public symbols that honor the Confederacy, such as military bases named after Confederate figures.<sup>13</sup> The Mississippi legislature voted to alter the state flag, which had included the Confederate battle flag as one of its elements.<sup>14</sup> The Marine Corps banned public displays of the Confederate flag on any of its installations.<sup>15</sup> Just like the decisions to take down Confederate monuments, these efforts have also been criticized. For instance, Senator Josh Hawley has claimed that the push to rename Army bases named after Confederate figures is part of a "Left-Wing Assault on History" that "will keep marching through all our cultural institutions until every American whom the woke crowd deems unjust is cancelled."<sup>16</sup> Proponents of the changes—both proposed and enacted—argue that they will make our institutions more just and inclusive.<sup>17</sup>

To make my own biases clear, I support efforts to remove Confederate monuments and symbols from public property; I do not believe that doing so erases history.<sup>18</sup> Public art that seeks to hold individuals, cultures, and nations accountable for atrocities such as the Holocaust or the September 11th attacks, does not feature benevolent-looking statues of Adolf Hitler and Osama

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13. John Ismay, *The Army Was Open to Replacing Confederate Base Names. Then Trump Said No.*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/magazine/army-confederate-base-names.html> [https://perma.cc/NXE4-CHCP].

14. Keisha Rowe & Lici Beveridge, *Mississippi's State Flag Controversy Over the Confederate Emblem: What You Should Know*, CLARION LEDGER (June 24, 2020, 9:18 AM), <https://www.clarionledger.com/story/news/2020/06/24/mississippi-state-flag-confederate-flag-ms-controversy/3243712001/> [https://perma.cc/67Q9-GPZU]; Emily Wagster Pettus, *Mississippi Takes Step Toward Dropping Rebel Image from Flag*, ASSOCIATED PRESS (June 27, 2020), <https://apnews.com/fdb1408a077b4988a71be339e4c94c2e> [https://perma.cc/BB3A-Z3DH].

15. Diana Stancy Correll, *Marine Corps Bars Public Display of Confederate Flag on Installations*, MARINE CORPS TIMES (June 6, 2020), <https://www.marinecorpstimes.com/news/your-marine-corps/2020/06/06/marine-corps-bars-public-display-of-confederate-flag-on-installations/> [https://perma.cc/Z2CN-BJF2]. Private organizations, such as NASCAR, are also banning Confederate symbols from their facilities and events. *NASCAR Statement on Confederate Flag*, NASCAR (June 10, 2020), <https://www.nascar.com/news-media/2020/06/10/nascar-statement-on-confederate-flag/> [https://perma.cc/SDN7-64ZX].

16. Press Release, Josh Hawley, Sen. Hawley Introduces NDAA Amendment to Resist Left-Wing Assault on History (June 24, 2020), <https://www.hawley.senate.gov/sen-hawley-introduces-ndaa-amendment-resist-left-wing-assault-history> [https://perma.cc/HHM9-BV3S].

17. See, e.g., Rowe & Beveridge, *supra* note 14.

18. I find attorney Beth Jacob compelling on this point. See Beth D. Jacob, *Confederate Monuments That Remain*, 44 HUM. RTS. 9, 10 (2020).

bin Laden. Instead, it rightly puts its focus where it belongs: on commemorating the victims.<sup>19</sup> When governments choose to take down monuments, they do not erase history, they simply change which aspects of it they choose to celebrate. However, while I believe that it is acceptable and desirable for governments to take down Confederate monuments and symbols, I do not condone the actions of private citizens who have defaced or torn down statues. I agree with commentators such as Professor Stephen Carter, who has argued that the decision about whether to take down monuments “should rest on . . . proper democratic debate.”<sup>20</sup> Moreover, I disagree with efforts to take down monuments to figures such as George Washington or Thomas Jefferson, who—though rightly condemned for holding slaves—are still towering figures whose positive contributions to United States history are worthy of celebration.<sup>21</sup>

However, this is not an essay about which monuments and symbols should be taken down. Rather, it is about claims that governments that do take them down are “erasing history” and what those claims—and the monuments themselves—can teach us about the importance of freedom of speech.<sup>22</sup> I believe that the controversy over these symbols teaches important lessons—to all concerned—about skepticism of government power and the importance of free speech. The first lesson is that those in power at any given time should be careful about how they employ government speech. The majority can (with few exceptions) make the government say what it wants, but this power should be used humbly and with the recognition that the current majority—whatever it may be—will not hold power forever. The second lesson is that we should be deeply skeptical of government power to punish

19. See, e.g., *Memorial to the Murdered Jews of Europe*, BERLIN.DE, <https://www.berlin.de/en/attractions-and-sights/3560249-3104052-memorial-to-the-murdered-jews-of-europe.en.html> [<https://perma.cc/8YDP-8T7A>]; *The Memorial*, 9/11 MEMORIAL & MUSEUM, <https://www.911memorial.org/visit/memorial> [<https://perma.cc/7NF6-U PPC>].

20. Carter, *supra* note 10; see also Nathan T. Carrington & Logan Strother, *Abstract Appeals to Free Speech Won't Solve the Debate Surrounding Confederate Monuments—It's a Political Question*, LSE US CENTRE (June 15, 2020), <https://blogs.lse.ac.uk/usappblog/2020/06/15/abstract-appeals-to-free-speech-wont-solve-the-debate-surrounding-confederate-monuments-its-a-political-question/> [<https://perma.cc/HQ9Y-9AHR>] (“Ultimately, the question of whether to remove or keep Confederate icons in our public spaces comes down to politics.”). The notion that *private* institutions should hold a community vote before deciding whether to take down a statue, though, is risible. See David Marcus, *Let the City Vote on Teddy Roosevelt*, N.Y. POST (June 25, 2020, 8:27 PM), <https://nypost.com/2020/06/25/let-the-city-vote-on-teddy-roosevelt/> [<https://perma.cc/58B8-XHQQ>].

21. I am persuaded by Professor Carter’s method of evaluating historical figures: “[W]hat we should ask is whether the views of the person to whom objection is now being raised were above or below the median position held by people of the era.” Carter, *supra* note 10.

22. Because “monuments and symbols” is a bit clunky, I occasionally refer to them simply as “monuments.”

citizens for their speech. Social and political norms shift over time, and with these shifts come changes in what speech is considered acceptable. Moreover, it is often speech itself that effectuates these shifts. For these reasons, we should be uncomfortable when the government claims the power to censor or punish private speech, even when it is speech that we find abhorrent.

## II. THE GOVERNMENT AS ARBITER OF TRUTH

The current controversy over whether to remove Confederate monuments and symbols from public spaces centers around a dispute over whether removal erases our history or simply alters which aspects of it we choose to celebrate. In many ways, it is a dispute over how the government defines our true history. Governments can act as arbiters of truth in two ways. The first is when they themselves speak; in a functioning democracy we would expect that when the government speaks, it gives its best understanding of what is true. The second is when the government punishes citizens for the things that they say. The current dispute over Confederate monuments and symbols highlights the dangers of governments as speakers, and of governments policing private speakers.

### A. GOVERNMENT AS SPEAKER

When we think about the relationship between governments and free speech, it is most often in the context of governments punishing citizens for the things they say.<sup>23</sup> But in fact, governments have their own free speech rights.<sup>24</sup> The so-called government speech doctrine means that while “[t]he Free Speech Clause restricts government regulation of private speech[,] it does not regulate government speech.”<sup>25</sup> With few exceptions, then, the government is entitled to say whatever it likes.<sup>26</sup> As a practical matter, this means that in a democratic society such as ours, government speech will typically reflect the will and views of the majority.

This is an expansive power. Under it, the Supreme Court has upheld regulations preventing doctors receiving federal funding for family planning projects from counseling their patients about abortion as a method of family planning (reasoning that the government was entitled to condition the manner

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23. See, e.g., Noah C. Chauvin, *The Need to Increase Free Speech Protections for Student Affairs Professionals*, 32 REGENT U. L. REV. 229, 232 (2020).

24. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

25. *Id.* The Free Speech Clause provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

26. The Establishment Clause prevents the government from, for example, endorsing a particular religious viewpoint. See Noah C. Chauvin, *Unifying Establishment Clause Purpose, Standing, and Standards*, 50 U. MEM. L. REV. 319, 349–50 (2019); see also Paul Horwitz, *A Close Reading of Barnette*, in *Honor of Vincent Blasi*, 13 FLA. INT’L U. L. REV. 689, 712–13 (2019).

in which the funds were used),<sup>27</sup> approved a \$1-per-head fee on cattle sales to support generic beef advertising (reasoning that the government had enough control over the ad campaigns that they qualified as government speech),<sup>28</sup> and allowed public employees to be fired for things they say in the course of performing their official duties (reasoning that they are speaking for the government when they speak in their official capacity).<sup>29</sup> All of these cases reflect the Supreme Court's judgment that the government has a nearly unfettered right to say whatever it likes.

The government speech doctrine is not limited to allowing the government to craft whatever message it wishes; it also lets the government "regulate its own speech however it wishes."<sup>30</sup> Under current Supreme Court case law, this includes speech by private individuals that need the "blessing" of the government before they can speak.<sup>31</sup> On this basis, the Court allowed the city of Pleasant Grove, Utah, to refuse to place a privately funded Ten Commandments monument in a public park,<sup>32</sup> and the state of Texas to refuse to sanction a license plate design that included the Confederate battle flag.<sup>33</sup> Thus, the government speech doctrine serves as both a shield that protects the government from free speech claims about the things it says, and as a sword the government can wield against private speech that requires some government involvement.

There has been a recent push from some left-leaning legal scholars to rein in the government's speech power.<sup>34</sup> These scholars argue that in addition to the Establishment Clause, other provisions of the Constitution such as the Equal Protection Clause, the Due Process Clause, or even the Free Speech

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27. See *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991), *abrogated on other grounds* by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

28. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–61 (2005).

29. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

30. First Amendment—Freedom of Speech—Government Speech—*Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 129 HARV. L. REV. 221, 221 (2015).

31. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 232 (2015) (Alito, J., dissenting) ("There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009) ("Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park."). In contrast, mere government involvement in some speech, such as through registering a trademark, does not convert it to government speech. See *Matal v. Tam*, 137 S. Ct. 1744, 1759–60 (2017).

32. *Summum*, 555 U.S. at 473.

33. *Tex. Div.*, 576 U.S. at 210–212 (majority opinion).

34. See Horwitz, *supra* note 26, at 713 & nn.123, 126; see also Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2138–39 (2018).

Clause itself should pose meaningful limits on government speech.<sup>35</sup> For the time being, however, this push is entirely academic; governments retain the power to say almost whatever they want to.<sup>36</sup> Any takeaway from the current controversies over governments taking down monuments and symbols is therefore necessarily policy-oriented, rather than legal. The policy takeaway for both sides, I think, should be that the government's speech power should be used humbly.

While governments should use their speech rights humbly, I do not argue that they should not use them at all, or that there are certain types of statements that governments should not have the power to make.<sup>37</sup> One of the great benefits of living in a democracy is the power, when you are in the majority, to make the government say what you want it to say. We should not avoid exercising this power merely because the things we want the government to say might be controversial. (One can imagine the consternation if Republicans were told they should not use the power of government to oppose abortion, or Democrats were told they could not use the power of government to support a woman's right to get one.) But at least when it comes to whom we memorialize with public art and symbols, we should be humble in how we use the government's speech power, and unafraid to critically re-evaluate past uses of it.

Those who oppose changing or removing Confederate symbols should recognize that while they do not view the monuments as a problem, others do. To many, the monuments send the message "that those who fought to preserve slavery should be honored, and those whose ancestors were slaves are less respected or even inferior to other Americans."<sup>38</sup> The monuments have so frustrated some people that, unwilling or unable to effect change through ordinary political channels, they have resorted to vandalizing the monuments or knocking them down.<sup>39</sup> (Notably, many governments have not just passively let the monuments stand, but have passed statutes removing them from local control, in many cases drastically raising the necessary threshold needed to remove the monuments through the democratic process.<sup>40</sup>)

Those who support leaving Confederate monuments and symbols in place see things differently. Perhaps they see portraits of Confederate gener-

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35. See Lakier, *supra* note 34, at 2138–39; Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 194–96 (2012); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 650 (2013).

36. See Horwitz, *supra* note 26, at 713 (referring to efforts to rein in government speech as a "proposed doctrinal turn" (emphasis added)).

37. Other than the constraints imposed by the Establishment Clause.

38. Jacob, *supra* note 18, at 9.

39. See Carter, *supra* note 10.

40. See Jacob, *supra* note 18, at 10.

als inside courthouses, or statues of Confederate figures outside of government buildings as something other than symbols of white supremacy originally installed to intimidate black people.<sup>41</sup> Perhaps they see them that way and do not care.<sup>42</sup> That is their right. But they cannot in good faith deny the pain and rage that many Americans say they feel when they see these symbols. And they must acknowledge that if government speech that they support can make others feel this way, then there is good reason to believe that government speech they do not support could, in turn, cause them pain and enrage them. Indeed, the decision by some governments to take down Confederate monuments, which opponents see as “erasing history,” is an example of precisely this kind of government speech. Thus, monument supporters should come away from the present controversy with the understanding that the government speech power—at least when it comes to erecting monuments—is best used sparingly.

Those who want Confederate monuments and symbols taken down are probably easier to convince that the government’s speech power should be used humbly. After all, they are explicitly advocating for the monuments to be taken down because they view them as symbols of public-sanctioned white supremacy.<sup>43</sup> They therefore acknowledge the power government speech has and the negative consequences it can have on people. The danger this group poses from a government speech perspective is that they may focus only on the issues caused by *this message* and will not generalize the lessons that the monuments teach about government speech generally. As attorney Beth Jacob has described, many Confederate monuments were put up in the Jim Crow era as signs “of resistance to emancipation and civil rights;” likewise, many public schools were renamed after Confederate figures in the wake of the Supreme Court’s decision in *Brown v. Board of Education*.<sup>44</sup> Those who support taking down the monuments should remember the ways in which government speech can be used to target and intimidate those in the minority, and as a result come away with a renewed commitment to humbly using the government’s speech power when they control it.

With respect to the current controversy, both those who oppose taking down Confederate monuments and those who support doing so should come away with a heightened appreciation for the importance of humbly using the government’s speech power. Opponents should recognize that the monuments and other forms of government speech presently at issue have evoked a vehement reaction because many people see them as a government endorse-

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41. *See id.* at 9.

42. *See* Chappell, *supra* note 1 (describing how a Virginia politician complained that taking down a statue of Robert E. Lee was an erasure of white history).

43. *See* Jacob, *supra* note 18, at 10.

44. *Id.*

ment of white supremacy. Supporters should recognize that just as the monuments are painful to them, so certain government speech acts they support may be painful to others.

#### B. GOVERNMENT AS ENFORCER

With few exceptions, the First Amendment—which provides that “Congress shall make no law . . . abridging the freedom of speech”<sup>45</sup>—prohibits the government from censoring citizen speech or punishing people for the things that they say.<sup>46</sup> Initially, the Amendment applied only to actions by the federal government (“Congress shall make no law . . .”<sup>47</sup>), but it was incorporated against state and local governments by virtue of the Fourteenth Amendment, and has applied to them for almost one hundred years.<sup>48</sup> In (very) broad terms, the First Amendment’s Free Speech Clause prohibits the government from regulating speech based on its content.<sup>49</sup> Professor Laura Weinrib put it best when she said that “the Constitution rarely permits government officials to prevent individuals from speaking or to penalize them for expressing their views.”<sup>50</sup>

People of virtually all political ideologies have advocated for suppressing the speech of those they disagree with, though at the moment, many of the most high-profile calls for government to suppress citizens’ speech come from the political left.<sup>51</sup> Much has been written about whether conservative speech is truly under threat, particularly on college and university campuses, but increasingly also on social media platforms such as Twitter.<sup>52</sup> (I myself

45. U.S. CONST. amend. I.

46. See Matthew Strauser & Noah C. Chauvin, *Student-Athlete Employee Speech*, 20 VA. SPORTS & ENT. L.J. (forthcoming 2020) (manuscript at 7–10) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3542468](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542468)).

47. U.S. CONST. amend. I (emphasis added).

48. See *Gitlow v. New York*, 268 U.S. 652, 666 (1952). Many states also afford speech protections to their citizens through their state constitutions; these protections can be even stronger than those guaranteed by the First Amendment. Strauser & Chauvin, *supra* note 46 (manuscript at 6 n.29).

49. See Strauser & Chauvin, *supra* note 46 (manuscript at 10–11).

50. Laura Weinrib, *Rethinking the Myth of the Modern First Amendment*, in *THE FREE SPEECH CENTURY* 48, 49–50 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

51. See NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* 15–19 (2018); Chauvin, *supra* note 23, at 235–37; Noah C. Chauvin, *Policing the Heckler’s Veto: Toward a Heightened Duty of Speech Protection on College Campuses*, 52 CREIGHTON L. REV. 29, 30–33, 42–43, 63–64 (2018).

52. See, e.g., Kate Conger & Davey Alba, *Twitter Comes Under Attack From Trump’s Supporters*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/technology/trump-twitter.html> [<https://perma.cc/62XD-6ES2>] (conservatives believe Twitter is threatening their speech); Shikha Dalmia, *The Growing Right-Wing Threat to Campus Free Speech*, REASON (Sept. 19, 2019, 10:35 AM), <https://reason.com/2019/09/19/the-growing-right-wing-threat-to-campus-free-speech/> [<https://perma.cc/L67L-XTQY>] (conservatives are

have spilled some ink discussing this issue.<sup>53</sup>) The point, though, is that many conservatives *see* themselves and their speech as under threat by left-leaning institutions that censor any viewpoints that do not comport with the liberal orthodoxy.

It is easy to see, then, why a person who believes that governments should not take down or change Confederate monuments or symbols would view efforts by those same governments to censor or punish private citizens for their speech with extreme skepticism. After all, if you believe that governments are “marching through all our cultural institutions until every American whom the woke crowd deems unjust is cancelled”<sup>54</sup> or are bowing to “[a]narchists and left-wing extremists” that seek “to impose [their] ideology on Americans through violence and mob intimidation,”<sup>55</sup> then you probably have little difficulty recognizing the dangers of government speech control. A person who believes these things will be distrustful of government efforts to control private speech out of a sense that, in our current cultural and political moment, it is that person’s speech that is threatened by the government.<sup>56</sup>

Free speech attorney Greg Lukianoff has described freedom of speech as the “Eternally Radical Idea.”<sup>57</sup> Freedom of speech is eternally radical, Lukianoff says, because a person’s right to speak her mind and challenge prevailing orthodoxies, no matter how controversial her opinions—what Justice Oliver Wendell Holmes referred to as “freedom for the thought that we hate”<sup>58</sup>—is so rare in human history.<sup>59</sup> Under this framing, freedom of speech is of greatest value to people who hold minority views; the majority does not

the threat to campus speech); William Davies, *The Free Speech Panic: How the Right Concocted a Crisis*, GUARDIAN (July 26, 2018, 1:00 PM), <https://www.theguardian.com/news/2018/jul/26/the-free-speech-panic-censorship-how-the-right-concocted-a-crisis> [<https://perma.cc/NM8C-VXBJ>] (conservative speech not under threat); Conor Friedersdorf, *Evidence That Conservative Students Really Do Self-Censor*, ATLANTIC (Feb. 16, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/evidence-conservative-students-really-do-self-censor/606559/> [<https://perma.cc/6UEQ-ZUVC>] (conservative student speech under threat); cf. Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 984–86 (2019) (courts can, and largely have, applied the First Amendment in a non-partisan, apolitical manner).

53. See Chauvin, *supra* note 23, at 235–37.

54. See Press Release, Josh Hawley, *supra* note 16.

55. See Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence, 85 Fed. Reg. 40081 (June 26, 2020).

56. See Lynn Stanton, *Consumer Protection News: Justice Department, Hawley Propose Changes to CDA Section 230*, WOLTERS KLUWER ANTITRUST L. DAILY (June 18, 2020), 2020 WL 3285736; see also Goldberg, *supra* note 52, at 970–72 (describing efforts by progressive scholars to reframe freedom of speech in a way that “affirmatively advanc[es] political and social justice aims”).

57. Greg Lukianoff, *What is the Eternally Radical Idea?*, FIRE (Apr. 9, 2020), <https://www.thefire.org/what-is-the-eternally-radical-idea/> [<https://perma.cc/K6W8-GCUE>].

58. *United States v. Schwimmer*, 279 U.S. 644, 655 (1919) (opinion of Holmes, J.).

59. Lukianoff, *supra* note 57.

need free speech protection because it holds the power in a democracy. Currently, a majority of Americans support “removing . . . Confederate statues from public places.”<sup>60</sup> Those that wish to keep Confederate monuments up, then, should come away from the current controversy with a heightened appreciation for the importance of free speech because, at the moment, theirs is “the thought that we hate.”<sup>61</sup>

Those supportive of taking down or changing Confederate monuments and symbols may be slightly more difficult to convince. For one thing, as Professor Erica Goldberg has discussed, many on the left “[see] free speech as a pretext for upholding racist values.”<sup>62</sup> Relatedly, there has been a concerted effort by some left-leaning scholars to reframe the way our free speech right is understood; these scholars wish for the right to be tempered by considerations of equality.<sup>63</sup> Moreover, as discussed above, a majority of the country currently supports removing the monuments, and supporting free speech becomes less of an imperative when you are in the majority.<sup>64</sup> These factors, alone or in concert, may contribute to those who want governments to take down Confederate monuments coming away from the present controversy without a renewed appreciation for the importance of free speech.

This would be a mistake. To begin with, the monuments themselves—and the Confederate battle flag, and military bases named after Confederate figures—are speech. As attorney Matt Strauser has described, attempts to remove the monuments are an explicit acknowledgement that “speech itself, unconnected to anything else, is something powerful that is worth fighting over.”<sup>65</sup> Of course, that in itself is not necessarily a defense of free speech. Acknowledgements that speech is powerful are often one of the predicates to censoring it. For instance, Professor Lisa Feldman Barrett has argued that certain kinds of speech are so powerful that they should be considered vio-

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60. Press Release, Quinnipiac University, 68% Say Discrimination Against Black Americans a “Serious Problem,” Quinnipiac University National Poll Finds; Slight Majority Support Removing Confederate Statues (June 17, 2020) [https://poll.qu.edu/images/polling/us/us06172020\\_unob16.pdf](https://poll.qu.edu/images/polling/us/us06172020_unob16.pdf) [<https://perma.cc/3W2K-8HYS>].

61. *Schwimmer*, 279 U.S. at 655.

62. Goldberg, *supra* note 52, at 972.

63. Not all on the political left support this project. Professor Carter and Dean Erwin Chemerinsky, for instance, are both left of center, but this has not prevented them from mounting a full-throated defense of free speech. *See, e.g.*, Stephen L. Carter, *We Can Fight for Racial Justice While Tolerating Dissent*, BLOOMBERG (June 11, 2020, 12:00 PM), <https://www.bloomberg.com/opinion/articles/2020-06-11/george-floyd-protesters-can-fight-racism-while-tolerating-dissent> [<https://perma.cc/Y82Y-2ZXX>]; Erwin Chemerinsky, *The Challenge of Free Speech on Campus*, 61 *How. L.J.* 585, 594–99 (2018).

64. *See supra* notes 57–61 and accompanying text.

65. Text Message from Matt Strauser to Noah Chauvin (June 29, 2020, 5:25 PM) (on file with the author).

lence, because they can lead to chronic stress, which can do serious physiological damage.<sup>66</sup> Acknowledgement of how powerful speech is, then, can serve as an argument in favor of restricting it. Under this view, the government should protect us from speech that can do us harm.<sup>67</sup>

It is important to remember, though, that those who seek to suppress speech always claim (and often have) pure motives. The McCarthy era was defined by communist witch hunts because “those with power to control the words and fates of others saw the threat [of communism] as real and deadly, always on the verge of rearing its destructive head.”<sup>68</sup> Similarly, those that seek to restrict hurtful or hateful speech today often do so based on the “laudable instincts” to make our public spaces “inclusive for all,” particularly “those who have been traditionally under-represented” in those spaces.<sup>69</sup> One can certainly quibble—as I have<sup>70</sup>—with whether each of these groups has accurately evaluated the threat posed by the speech they wish to see restricted. The point, though, is not whether those who wish to restrict speech are right about the dangers they believe speech poses. Rather, it is that in their belief that they are right, they will take whatever steps they deem necessary to suppress speech they believe is harmful.<sup>71</sup>

Additionally, it is worth noting that governments have long claimed that they are promoting safety and equality by suppressing speech. For instance, when Irving Feiner gave a speech on a street corner in Syracuse, New York, urging black Americans to fight for civil rights, he was arrested and convicted for inciting a breach of the peace.<sup>72</sup> Feiner was not encouraging his audience to break the law, however. He was arrested because of the hostile reaction the audience had to his speech; they did not like what he was saying, so they started “pushing, shoving, and milling around.”<sup>73</sup> The Supreme Court upheld Feiner’s conviction, reasoning that the police appropriately reacted to the public safety “crisis” caused by the crowd’s negative reaction to his speech.<sup>74</sup> Under current Supreme Court case law, Feiner’s conviction would almost

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66. Lisa Feldman Barrett, *When is Speech Violence?*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html> [<https://perma.cc/T5LT-Z4SJ>]. *But see, e.g.*, GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND* 94–97 (2018).

67. I agree with Lukianoff and Haidt that this is a critically flawed way of thinking about speech. *See* LUKIANOFF & HAIDT, *supra* note 66, at 22–24, 40–46.

68. Carter, *supra* note 63.

69. Chemerinsky, *supra* note 63, at 588–89.

70. *See* Chauvin, *supra* note 23, at 239; Chauvin, *supra* note 51, at 63–65.

71. *See* Carter, *supra* note 63; Chauvin, *supra* note 51, at 30–33; Chemerinsky, *supra* note 63, at 596–97. This point is also illustrated by the fact that in June of 2020, many Confederate monuments were knocked down by groups of private citizens, not by governments. *See* Carter, *supra* note 10.

72. *Feiner v. New York*, 340 U.S. 315, 317–18 (1951).

73. *Id.* at 317.

74. *Id.* at 319–21.

certainly not stand.<sup>75</sup> However, it is part of a long tradition of similar behavior by governments seeking to promote safety by limiting speech that ought to leave liberals wary of government censorship.

As mentioned above, many left-leaning legal scholars have called for a reframing of free speech rights that prioritizes safety and equality.<sup>76</sup> For instance, Professor Catherine Fisk has argued that a progressive vision of the First Amendment should include greater speech protections for labor protests while retaining restrictions on anti-union speech by employers.<sup>77</sup> Similarly, Professor Genevieve Lakier has written that the First Amendment ought to more frequently be interpreted to promote substantive equality rather than formal equality (equality of outcomes rather than equality of access).<sup>78</sup> Professor Goldberg has observed that scholars who hold these and similar beliefs “offer views about free speech that echo the older legal realist critiques of the 1990s.”<sup>79</sup> Government efforts to regulate speech to ensure safety and equality from that same time period should demonstrate why free speech is so important.

In the late 1980s and early 1990s, hundreds of colleges and universities across the country—some of them responding to horribly racist incidents on their campuses—instituted hate speech codes.<sup>80</sup> The codes were intended to target “purely hateful slurs,” but were quickly applied to “people who were expressing opinions that others objected to.”<sup>81</sup> Because the codes were overbroad, every one of them to be challenged in court as violating the First Amendment was struck down.<sup>82</sup> Not only were the codes overbroad, but they also were “used to punish the speech of minorities and others who were not the intended targets” of the codes.<sup>83</sup> Nor are these problems limited to campus

75. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992); *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969); Chauvin, *supra* note 51, at 44 (“[O]ver time, the Supreme Court’s jurisprudence in this area has increasingly trended towards familiar territory: even in the face of widespread discomfort, disgust, and outrage at a speaker’s message, the government has a duty to protect citizens’ free speech rights.”).

76. See *supra* notes 62–63 and accompanying text. Some have gone further and argued for progressives to recognize that First Amendment freedom of speech cannot serve progressive ends, and thus should be abandoned or at least deprioritized. See, e.g., Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2095, 2112–15 (2018); Louis Michael Weidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2249 (2018).

77. See Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2062–64 (2018).

78. Lakier, *supra* note 34, at 2154–56.

79. Goldberg, *supra* note 52, at 981.

80. See Chemerinsky, *supra* note 63, at 590.

81. *Id.* at 592.

82. *Id.* at 590. This includes a somewhat baffling case in which Stanford University—a private institution—was found to have violated First Amendment standards by implementing a speech code. See Chauvin, *supra* note 23, at 248–51.

83. *Id.* at 597.

speech codes. In her book on hate speech, Professor Nadine Strossen discusses how speech restrictions were used to undermine the Civil Rights movement in the United States, and how hate speech laws abroad are often used to target the very groups they were meant to protect.<sup>84</sup> Indeed, Black Lives Matter protestors in Richmond have repeatedly been moved away from the Lee statue for violating regulations that were enacted to prevent white supremacists from gathering there.<sup>85</sup>

It may well be that governments today would not use heightened censorship powers to target the speech of minorities or of those on the left.<sup>86</sup> Anecdotal evidence suggests that currently, both liberal and conservative dissenters are targeted for censorship; it appears to be their status *as dissenters*, and not as a part of another group, that marks them for this treatment.<sup>87</sup> Regardless of whether governments would abuse the power to censor liberal speech today, those that support taking down Confederate monuments and symbols should still be suspicious of governments having the power to do so. Time and again, governments have proved themselves incapable of wielding this kind of power responsibly.<sup>88</sup> This should make those who want the monuments to come down naturally suspicious of government power to decide who gets to speak, and on what topics, on the basis of subjective principles of safety and equality. This group should also question whether it trusts governments which so recently protected what it views as symbols of white supremacy to fairly or justly censor speech.<sup>89</sup>

Thus, both sides in the current dispute over whether to keep up Confederate monuments should come away with a renewed appreciation of the dangers of government interference with private speech. Those who wish to keep the monuments up should recognize that freedom of speech is important because at least some of their views are no longer shared by a majority of Americans, or by many in government. Those who wish for the monuments to come down should recognize that freedom of speech is important because speech is powerful and because efforts to suppress it—even efforts designed to promote safety and equality—have often ended up suppressing the speech of minorities and others whose speech the government disagreed with.

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84. STROSSEN, *supra* note 51, at 41–42, 86–88.

85. Graham Moomaw, *Post-Unite the Right Rules for Richmond's Lee Statue Now Enforced Against Black Lives Matter Events*, VA. MERCURY (June 30, 2020), <https://www.virginiamercury.com/2020/06/30/post-charlottesville-protest-rules-for-richmonds-lee-statue-now-enforced-against-black-lives-matter-events/> [https://perma.cc/L97L-2T2Q].

86. *But see id.*

87. *See* STROSSEN, *supra* note 51, at 27–29; Goldberg, *supra* note 52, at 981–82.

88. *See supra* notes 72–75, 80–84 and accompanying text.

89. Jacob, *supra* note 18, at 10.

### III. CONCLUSION

When one's political tribe is "winning," it is easy to imagine that it will always be so. It is easy to imagine that the wisdom of your views is finally changing hearts and minds, that the other side will be vanquished. This is a mistake. The Lee statue loomed over Monument Avenue in Richmond for 130 years.<sup>90</sup> As recently as April of 2020, it was easy to believe that it would stand for 130 more. Those who support *and* oppose Virginia's decision to remove the statue—along with those who support and oppose changes to any Confederate monuments and symbols—would do well to remember Justice Holmes's admonition that "time has upset many fighting faiths."<sup>91</sup> Bearing this in mind, they should humbly use the government's speech power when they control it, and they should always be skeptical when governments attempt to bring their awesome power to bear against private speech.

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90. See Rankin, *supra* note 3.

91. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).