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Symbolism and the Thirteenth Amendment: The Injury of Exposure to Governmentally Endorsed Symbols of Racial Superiority

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SYMBOLISM AND THE THIRTEENTH AMENDMENT:
THE INJURY OF EXPOSURE TO GOVERNMENTALLY
ENDORSED SYMBOLS OF RACIAL SUPERIORITY

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TABLE OF CONTENTS

Table of Authorities.....	78
I. Introduction: The Case of <i>Moore v. Bryant</i>	81
II. Article III Standing and the Badges of Slavery.....	85
A. <i>The Elements of Standing</i>	85
B. <i>Courts have the Power to Determine for Themselves What the Badges of Slavery Are</i>	86
C. <i>Defining the Badges of Slavery</i>	88
D. <i>Racial Supremacy v. Racial Discrimination</i>	92
E. <i>The Message of Racial Supremacy Was Always Considered a Badge of Slavery</i>	94
III. A Message May be Unconstitutional.....	98
IV. Symbology and Article III Standing.....	100
A. <i>Mere Exposure to a Constitutionally Barred Symbol is a Recognized Injury in Fact</i>	100
B. <i>Test for Whether Exposure to a Particular Symbol of Racial Superiority is Sufficient to Provide Article III Standing</i>	102
V. Conclusion.....	106

Table of Authorities

CASES

<i>Allen v. Wright</i> , 468 U.S. 737, 104 S. Ct. 3315 (1984).....	83, 93, 102
<i>Am. Jewish Cong. v. City of Beverly Hills</i> , 90 F.3d 379 (9th Cir. 1996).....	105
<i>American Jewish Congress v. Chicago</i> , 827 F.2d 120 (7th Cir. 1987).....	104, 105
<i>Baker v. Carr</i> , 369 U.S. 186, 686 (1962).....	88, 89, 110
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483, 74 S. Ct. 686 (1954).....	97
<i>Carey v. Phipps</i> , 435 U.S. 247, 266, 98 S. Ct. 1042 (1978).....	85
<i>Church of Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520, 113 S. Ct. 2217 (1993).....	100
<i>Clyatt v. United States</i> , 197 U.S. 207, 216 (1905).....	86, 93
<i>Cty. of Allegheny v. ACLU</i> , 492 U.S. 573, 593, 109 S. Ct. 3086 (1989).....	98, 99, 100, 101
<i>Dennis v. U.S.</i> , 341 U.S. 494 (1951).....	88
<i>DOC v. New York</i> , 139 S. Ct. 2551, 2565 (2019).....	108
<i>Doe v. Cong. of the United States</i> , 2018 U.S. App. LEXIS 14083 (6th Cir. 2018).....	98
<i>Engel v. Vitale</i> , 370 U.S. 421, 82 S. Ct. 1261 (1962).....	98
<i>Flast v. Cohen</i> , 392 U.S. 83, 101 (1968).....	101
<i>Foremaster v. City of St. George</i> , 882 F.2d 1485 (10th Cir. 1989).....	104
<i>Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.</i> , 832 F.3d 469, 478 (3d Cir. 2016).....	103, 104
<i>Freedom from Religion Found., Inc. v. Lew</i> , 773 F.3d 815, 819-20 (7th Cir. 2014).....	101
<i>Hodges v. United States</i> , 203 U.S. 1, 16 (1906).....	passim
<i>Int'l Refugee Assistance Project v. Trump</i> , 883 F.3d 233, 258-59 (4th Cir. 2018).....	98, 103
<i>Jesner v. Arab Bank, PLC</i> , 138 S. Ct. 1386, n.1 (2018).....	90
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409, 88 S. Ct. 2186 (1968).....	86, 89, 91, 95
<i>Larson v. Valente</i> , 456 U.S. 228, 245, 102 S. Ct. 1673 (1982).....	101, 103
<i>Lemon v. Kurtzman</i> , 403 U.S. 602, 612, 91 S. Ct. 2105, 2110 (1971).....	99, 104
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136-37 (1992).....	85, 103
<i>Lynch v. Donnelly</i> , 465 U.S. 668, 104 S. Ct. 1355 (1984).....	99, 101, 105
<i>Matal v. Tam</i> , 137 S. Ct. 1744, 1757-58 (2017).....	98
<i>Memphis v. Greene</i> , 451 U.S. 100, 125 (U.S. 1981).....	86, 87, 96
<i>Moore v. Bryant</i> , 138 S. Ct. 468 (2017).....	84

Moore v. Bryant, 205 F. Supp. 3d 834, 838-49 (S.D. Miss. 2016).....	83, 87
Moore v. Bryant, 853 F.3d 245 (5th Cir. 2017).....	82, 84, 93
Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991).....	104
Obergefell v. Hodges, 135 S. Ct. 2584 (2015).....	88
Oregon v. Mitchell, 400 U.S. 112, 91 S. Ct. 260 (1970).....	87
Palmer v. Thompson, 403 U.S. 217, 91 S. Ct. 1940 (1971).....	87
Patterson v. McLean Credit Union, 491 U.S. 164 (1989).....	96
Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995).....	104
Salazar v. Buono, 559 U.S. 700, 130 S. Ct. 1803 (2010).....	104
Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222, 83 S. Ct. 1560 (1963).....	99, 100, 101
Scott v. Sandford, 60 U.S. 393, 404-5 (1857).....	88, 95
Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).....	85
Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192 (1980).....	106
Trump v. Hawaii, No. 17-965, 2018 U.S. LEXIS 4026 (2018).....	99
United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973).....	87
United States v. Cannon, 750 F.3d 492, 501 (5th Cir. 2014).....	92
United States v. Cruikshank, 25 F. Cas. 707, 711 (Cir. Ct. D. LA, 1874).....	93, 94
United States v. Hatch, 722 F.3d 1193, 1198-9 (10th Cir. 2013).....	92
United States v. Metcalf, No. 15-CR-1032-LRR, 2016 U.S. Dist. LEXIS 25950 (N.D. Iowa Mar. 2, 2016).....	92
United States v. Rhodes, 27 F. Cas. 785 (Cir. Ct. D. Ken. 1866).....	89
United States v. Stanley, 109 U.S. 3, 21, 3 S. Ct. 18, 28 (1883).....	passim
United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973).....	85
Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 102 S. Ct. 752 (1982).....	102, 103, 106, 109
Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479 (1985).....	98, 100
Walz v. Tax Com. of N.Y., 397 U.S. 664, 668, 90 S. Ct. 1409 (1970).....	99
Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679 (6th Cir. 1994).....	100, 104
Wong v. Stripling, 881 F.2d 200 (5th Cir. 1989).....	87

STATUTES

2001 Miss. ALS 301, 2001 Miss. Laws 301, 2001 Miss. H.B. 524, 2001 Miss. ALS 301, 2001 Miss. Laws 301, 2001 Miss. H.B. 524.....	85
Miss. Code Ann. § 3-3-15.....	85
Miss. Code Ann. § 3-3-16.....	85

CONSTITUTIONAL PROVISIONS

U.S. Const. amend I.....	99
U.S. Const. amend. XIV, § 1	93
U.S. Const. Art. III, § 2.....	85
U.S. Const., amend, XIII, § 1.....	89

SCHOLARSHIP

<i>Defining the Badges and Incidents of Slavery</i> , 14 U. Pa. J. Const. L. 561	90
From Status To Agency: Abolishing The "Very Spirit Of Slavery", 7 Colum. J. Race & L. 245	91
<i>Originalism: The Lesser Evil</i> , 57 U. Cin. L. Rev. 849.....	88
Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery, 65 UCLA L. Rev. 426.....	91

OTHER AUTHORITIES

<i>13th Amendment</i> , The History Channel	88
<i>Badge</i>	93, 94
Constitutional Rights Foundation, <i>A Brief History of Jim Crow</i>	97
David Lohr, Debate Over Confederate Emblem In Mississippi Flag Heats Up In Charlottesville's Wake	106
Jacey Fortin, The Statue at the Center of Charlottesville's Storm.....	107
Jessica Taylor, The Complicated Political History Of The Confederate Flag	106
John Mark N. Reynolds, Historical Parochialism: American Slavery is Not Ancient Slavery	95
Josh Sanburn, <i>Why Mississippi is Unlikely to Redesign Its State Flag</i>	82
Logan Strother, Spencer Piston, and Thomas Ogorzalek, Are Confederate Monuments Our Heritage or Symbols of Hate?.....	106
Michael Minkoff, American Slavery and Racism.....	95
Supremacy.....	93
Supreme Court Website	84
Thomas G. Clemens, <i>Confederate Battle Flag</i> , Encyclopedia Virginia (July 7, 2018 10:30 AM), https://www.encyclopediavirginia.org/ Confederate_Battle_Flag	82
8 CONG. GLOBE, 38TH CONG., 1ST SESS. 1465 (1864)	89
S. EXEC. DOC. NO. 2, 39TH CONG., 1ST SESS. AT 46 (1865).	96
The American Civil Rights Union, <i>The Truth About Jim Crow</i>	97
Trey Parker, Chef Goes Nanners, South Park (Comedy Central) (2000).....	81

ABSTRACT

One of the debates often encountered by native southerners centers around our historical symbols. There are heated opinions on both sides of the issue as to what these symbols mean and whether they should be allowed to be displayed. The latter question has begun making its way into the courts, with many southern symbols and memorials being accused of promoting the philosophy of racial supremacy. Despite the growing public concern, modern courts refuse to rule on the question. They claim they are forestalled by Article III's standing requirement that plaintiffs must have suffered a concrete injury in fact. They state that merely asserting offense at a message does not meet this requirement, even if the message is offered by the Government. In this article, I show that holding to be incorrect.

The Constitution provides certain absolute rights that the government may not infringe upon. One of those rights is the right to be free from slavery, which the courts have expanded to include all of its badges and incidents. Though courts have gone back and forth on what constitutes a badge of slavery, a historical look at the Thirteenth Amendment shows that amongst the things the drafters intended the definition to include was the philosophical message of racial supremacy if it is communicated by the government. In my article, I demonstrate that the scope of the Thirteenth Amendment includes a ban on the governmental endorsement of racial supremacy, including endorsements made in the form of symbols. I show that mere exposure to such a message is the unique form of injury that a violation of that right creates and, as such, is a concrete harm on which Article III standing can be based. Finally, I provide a workable test for determining whether a particular exposure to a symbol of racial superiority possesses all the elements necessary to constitute an injury in fact for the purposes of standing.

I. INTRODUCTION: THE CASE OF *Moore v. Bryant*

Close to the time of its founding, the fictitious town of South Park, Colorado voted on the new town's flag.¹ The locals decided on a design featuring a dark yellow field with four cheering White human figures gathered around a gallows on which a Black figure was hanging by his neck.² Later generations would call for its change, stating that such a symbol sends a strikingly clear message to the viewer: the town government favors racial supremacy.³ It condones the right of the White race to

1. Trey Parker, *South Park: Chef Goes Nanners* (Comedy Central television broadcast July 5, 2000).

2. *Id.*

3. *Id.*

treat the Black race any way it sees fit and communicates that the city government still harbors and endorses at least one of the elements that led to and maintained the institution of American slavery.⁴ Many people would like to believe this is a simple work of fiction; nothing more than a satirization of the debate between heritage and hate that could never actually happen in the United States of America. Unfortunately, these people may be wrong.

In 2001, voters in the State of Mississippi were presented with the question of what the visual composition of their State flag would be.⁵ They decided to maintain the 1894 design, which featured three horizontal bars of blue, white, and red, as well as a depiction of the Battle Flag of the Army of Northern Virginia (commonly referred to as the “Confederate Battle Flag” or the “Confederate Flag”)⁶ prominently placed in the upper left corner.⁷ To many voters, the design represented the history of their State and a pride in their Southern culture and way of life.⁸ However, for others it was a reference to a dark period in American history when the Government not only tolerated but also actively endorsed the institutions of white supremacy and human slavery.⁹ Carlos Moore was of the latter opinion.

Mr. Moore was an African American citizen of Mississippi who claimed his family line traced back to slaves of the American south.¹⁰ Since Mississippi State law called for the display of the State flag in front of all public buildings,¹¹ Moore was consistently exposed to it and its perceived message – both as a private citizen and due to his employment as an attorney, as a local professional.¹² He found it difficult to conduct his professional and personal life and began suffering increased anxiety due to the constant reminder that his State favored a social construct in which he was considered, at best, a second-class citizen.¹³ More concerning for him was the flag’s effect on his daughter, a school-aged child who would be taught to honor and compelled to pledge allegiance to a perceived

4. *Id.*

5. 2001 Miss. ALS 301, 2001 Miss. Laws 301, 2001 Miss. H.B. 524.

6. Thomas G. Clemens, *Confederate Battle Flag*, ENCYCLOPEDIA VIRGINIA (Sept. 7, 2016), https://www.encyclopediavirginia.org/Confederate_Battle_Flag.

7. Miss. Code Ann. § 3-3-16.

8. Josh Sanburn, *Why Mississippi is Unlikely to Redesign Its State Flag*, TIME (July 7, 2018), <http://time.com/3932807/mississippi-state-flag/>.

9. *Id.*

10. Petition for Writ of Certiorari at 11, *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017) *cert. denied*, 2017 U.S. Lexis 7027 (No. 17-23), 2017 U.S. S. Ct. Briefs LEXIS 2319.

11. Miss. Code Ann. § 3-3-15.

12. Petition for Writ of Certiorari at 11, *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017) *cert. denied*, 2017 U.S. Lexis 7027 (No. 17-23), 2017 U.S. S. Ct. Briefs LEXIS 2319.

13. *Id.* at 11-12.

symbol of her subjugation.¹⁴ Since the flag was the result of a public vote, there was no aid for him in the halls of his State legislature or executive offices, so he went to the courts for relief from the message. Unfortunately, no comfort was to be found there either.

Judge Reeves of the United States District Court for the Northern Division of the Southern District of Mississippi gave an impassioned response to Moore's position.¹⁵ In an eleven-page analysis, Judge Reeves tracked the use of the Confederate Battle Flag from its origins in the Confederacy through its usurpation by modern hate groups.¹⁶ In his written opinion, he emphasized that the purpose of the symbol as adopted by Mississippi was to tell the rest of the Union that Mississippi continued to believe that the Black race was not equal to the White race, and that the State refused to acknowledge otherwise.¹⁷ In essence, he concluded, it was the same type of sentiment that had contributed in part to the institution of slavery, the War for Southern Independence, and the civil unrest that followed.¹⁸ Despite his apparent agreement with Moore's position, Judge Reeves then slammed closed the doors of the courthouse.

While Judge Reeves felt that Moore's argument was factually correct, Moore had failed in one key legal aspect: he had not shown himself to have standing to bring his case.¹⁹ Judge Reeves held that the injury Moore complained of, a physical ailment due to the stigmatic unequal treatment of his race in violation of the Fourteenth Amendment, was not sufficient to establish standing (in other words Moore's right to be heard in court).²⁰ The Supreme Court decided in *Allen v. Wright* that mere discrimination was not a sufficient injury under the Fourteenth Amendment.²¹ The discrimination must be accompanied by a particularized, tangible injury to the individual resulting from the challenged action.²² Since Moore could only point to generalized injuries, none of which constituted an act of discrimination against him or demonstrated some form of unequal treatment, he had no personal grounds on which to challenge the flag. Though Moore also complained of a violation of his Thirteenth Amendment right, Reeves dismissed this argument in a footnote, stating that Congress had not passed any statute or resolution addressing or de-

14. *Id.* at 12.

15. *Moore v. Bryant*, 205 F. Supp. 3d 834, 838-49 (S.D. Miss. 2016).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 856.

20. *Id.*

21. 468 U.S. 737, 755 (1984); *Moore v. Bryant*, 205 F. Supp. 3d 834, 852-53 (S.D. Miss. 2016).

22. *Moore*, 205 F. Supp. 3d at 852-53.

fining the Confederate Battle Flag as a badge of slavery and therefore, it was not a violation.²³

On appeal, the Fifth Circuit affirmed Judge Reeves's conclusion regarding standing.²⁴ Writing for a unanimous three-judge panel, Judge Higginson emphasized that mere exposure to an offensive message, even one spoken by the government, is not a sufficient injury to grant standing under the Equal Protection Clause of the Fourteenth Amendment.²⁵ Simply stated, since Moore could not demonstrate some personalized, concrete injury resulting from an act of discrimination conducted in response to the flag, the federal courts had no grounds to hear his case. In his appeal, Moore dropped the Thirteenth Amendment complaint and the Fifth Circuit did not refer to it.²⁶

Later that year, Moore filed an appeal to the U.S. Supreme Court.²⁷ At first, it appeared the Court intended to hear the case, which would have served as an opinion of first impression on the question of standing with regard to racial symbols. The Court ordered extended time for the submission of briefs and requested a brief from the State of Mississippi, which had previously waived its right to provide one.²⁸ Then, without providing explanation, the Court denied the petition.²⁹ Just like that, the issue was closed.

Regrettably, the courts and Moore's legal team failed to see the true nature of the case and what injury the flag may have been producing. Neither party properly applied the Thirteenth Amendment to a situation it was designed to address. Specifically, if the Confederate Battle Flag was indeed offered as a symbol of the State's endorsement of the philosophy of racial superiority as it existed under the institution of U.S. slavery, then the flag was conveying a message that the United States Constitution specifically forbade the government from expressing. The injury was the exposure to that message. The proper course of action should have been an examination of that symbol in court.

In this article, I will start by examining the Thirteenth Amendment and demonstrate that part of its intended purpose was to forbid the governmental endorsement of racial supremacy. I will then show how expo-

23. *Id.* at 858 n.118.

24. *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017).

25. *Id.*

26. *Id.*

27. Petition for Writ of Certiorari, *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017) *cert. denied*, 2017 U.S. Lexis 7027 (No. 17-23), 2017 U.S. S. Ct. Briefs LEXIS 2319.

28. U.S. Supreme Court Docket Files, *Moore v. Bryant*, No. 17-23, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-23.html>.

29. *Moore v. Bryant*, 138 S. Ct. 468 (2017).

sure to such a message alone is a sufficient injury to establish standing under Article III of the U.S. Constitution.

II. ARTICLE III STANDING AND THE BADGES OF SLAVERY

A. *The Elements of Standing*

Under Article III of the United States Constitution, for a party to bring an action in federal court, they must have a personal case or controversy.³⁰ This has been interpreted as meaning that a party must (1) have suffered an “injury in fact” (2) that is “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” (3) which is traceable to the challenged actions of the defendant, and (4) which is likely to be redressed by a favorable decision.³¹ The injury in fact must be particularized, meaning that a plaintiff must show that they personally have a legally protected interest that was violated by the actions of the defendant.³² The injury must be concrete, meaning that it may not be a mere “psychological consequence presumably produced by observation of conduct with which one disagrees.”³³ However, this does not mean that the term is limited to tangible injuries only.³⁴

When faced with an intangible injury, the courts may determine that standing exists if history and the judgment of Congress point to the intangible harm as being one that traditionally provided standing under U.S. or English law, such as the violation of an absolute and protected right.³⁵ If the Constitution creates an absolute right and if a person is deprived of that right, then an injury has occurred regardless of whether there is any other effect.³⁶ One such right, as will be shown below, is the

30. U.S. CONST. art. III, § 2, cl. 1.

31. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

32. *Id.* See also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982).

33. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 485 (1982).

34. *Spokeo, Inc.* 136 S. Ct. at 1549 (“Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.”); *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973); see *Baker v. Carr*, 369 U.S. 186, 686 (1962) (Stewart, J., dissenting) (“In interpreting ‘injury in fact’ we made it clear that standing was not confined to those who could show ‘economic harm’”). . . .)

35. *Spokeo, Inc.*, 136 S. Ct. at 1549.

36. See *Spokeo, Inc.*, 136 S. Ct. at 1552 (2016) (Thomas, J., concurring) (“Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the ‘injury-in-fact’ requirement.”); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (unanimously holding that the deprivation of an abso-

right to be free of the badge of slavery that results from the government's endorsement of the message of racial supremacy.³⁷ A plaintiff need not meet the elements of standing with definitive proof in order to be heard in court; they need only be able to make "general factual allegations of injury."³⁸ Naturally, there will always exist the requirement that the allegations are true and provable at trial.³⁹

B. *Courts Have the Power to Determine for Themselves What the Badges of Slavery Are*

An area of contention in Thirteenth Amendment jurisprudence is whether the courts have the power to determine, without an act of Congress, whether a specific indicator constitutes a badge of slavery. Nearly every decision the Supreme Court has made regarding the Thirteenth Amendment refers to Congress' power to create laws under the Amendment.⁴⁰ This, however, does not mean that the courts have found such power to belong purely to the legislative branch.

Justice Brewer stated that "[t]his amendment denounces a status or condition, irrespective of the manner or authority by which it is created."⁴¹ Though the Court has never explicitly declared something to be a badge of slavery, it has indicated that the courts possess such an ability. The Thirteenth Amendment has been held as self-executing, which means it does not require an act of Congress to be implemented.⁴² Though Congress has broad power under the second clause of the Amendment, that power is meant only to facilitate enforcement.⁴³ The

lute constitutional right, such as due process, is an injury for the purposes of standing even if no other cognizable injury exists. "Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process.").

37. See *infra* II.B.

38. *Lujan*, 504 U.S. at 561.

39. *Baker*, 369 U.S. at 688–89.

40. *Or. v. Mitchell*, 400 U.S. 112, 126 (1970); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery. . ."); *Hodges v. U.S.*, 203 U.S. 1, 16 (1906); *U.S. v. Stanley*, 109 U.S. 3, 20 (1883).

41. *Clyatt v. U.S.*, 197 U.S. 207, 216 (1905).

42. *Memphis v. Greene*, 451 U.S. 100, 125 (1981); *Stanley*, 109 U.S. at 20 ("This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.").

43. *Mitchell*, 400 U.S. at 128–29 ("[C]ongress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, or to undermine those protections of the Bill

amendment *itself* was meant to provide rights that Congress does not have any power to limit by refusing to legislate them into being. Simply stated, just because Congress has not declared something to be a badge of slavery does not mean that it isn't or that the Courts are forestalled from making such a determination.

Still, this is not without some contention. In *Palmer v. Thompson*, the Supreme Court held that a municipality's decision to close public swimming pools rather than integrate them was not a violation of the Thirteenth or Fourteenth Amendment because the statute was neutral on its face and in its effect.⁴⁴ When discussing the Thirteenth Amendment, Justice Black, who a year earlier in *Oregon v. Mitchell* seemed to agree with the Court's power to determine the badges,⁴⁵ held that the refusal to allow Blacks and Whites to swim in the same public pool was not a badge of slavery because Congress had not passed a law regulating pools.⁴⁶ He stated: "[e]stablishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a lawmaking power far beyond the imagination of the amendment's authors."⁴⁷ While this position has never been directly overturned, neither the Supreme Court nor any other federal court has cited *Palmer* in support of it. Further, the Court indicated in later opinions that the courts retained the power to define a badge of slavery.⁴⁸ Even the example case of *Moore* does not point to *Palmer* or any Supreme Court case asserting that the courts may not determine what is a badge of slavery.⁴⁹ There, Judge Reeves cited two Fifth Circuit cases that held that Congress has the power to define the badges, but neither case directly stated the power was Congress' alone.⁵⁰

From the holdings of the Court, it is clear that while Congress has the power to define the badges of slavery, it is not a power granted to them alone. The Court need not refrain from hearing a case purely because the harm is rooted in a symbol not addressed by Congress.⁵¹ In fact,

of Rights which we have held the Fourteenth Amendment made applicable to the States.") (citation omitted).

44. *Palmer v. Thompson*, 403 U.S. 217, 224–26 (1971).

45. *See Or. v. Mitchell*, 400 U.S. 112, 128–29 (1970).

46. *See Palmer*, 403 U.S. at 226–27.

47. *Id.*

48. *See Memphis v. Greene*, 451 U.S. 100 (1981).

49. *See Moore v. Bryant*, 205 F. Supp. 3d 834 (S.D. Miss. 2016).

50. *See id.*; *see also Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989); *see also U.S. v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973).

51. *See Memphis*, 451 U.S. 100 (holding that the closing of a road leading from a black neighborhood into a white one was not a badge of slavery without stating a requirement that Congress have previously legislated it as such); *see also id.* at 153 (Marshall, J., dissent-

if the threat to the rights protected is truly one of great social concern, it may be argued that the courts not only have the power, but also the duty to make such a determination.⁵²

C. Defining the Badges of Slavery

Before it can be established that freedom from governmental endorsement of racial supremacy is a right under the Thirteenth Amendment, how the Amendment has been interpreted and what it was meant to encompass must be examined. When interpreting any Constitutional provision, especially one that is a direct result of significant historical events, it is important to consider what the provision meant to the country at the time it was written.⁵³

Following the War for Southern Independence, the nation was faced with the question of how to prevent the evils it perceived as causing the conflict. Most pressing was the issue of the freed slaves in the South, and what their status would be moving forward. Despite the fact that they had been liberated through war and proclamation,⁵⁴ the Constitution itself did not recognize them as citizens or assign them a right to be free.⁵⁵ To remedy this, in 1865 the States ratified the Thirteenth Amendment to the Constitution.⁵⁶ Its wording was plain “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States,

ing) (“[I]t defies the lessons of history and law to assert that if the harm is only symbolic, then the federal courts cannot recognize it).

52. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (finding that the question of gay marriage, though on its face a political question, was a proper one for the courts to answer due to the immediate and large damage being inflicted on citizen’s rights while waiting for the legislature to act).

53. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (arguing that the proper interpretation of the Constitution and its Amendments requires a study of the wording of the text and the “immersing [of] oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day” adulterated with the stare decisis of the provision); see also *Dennis v. U.S.*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring) (“The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illuminated by the presuppositions of those who employed them. . . . As in the case of every other provision of the Constitution that is not crystalized by the nature of its technical concepts.”)

54. Abraham Lincoln, A Proclamation (Jan. 1, 1863), reprinted in 12 Stat. App. 1268.

55. *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

56. *13th Amendment*, THE HISTORY CHANNEL, <https://www.history.com/topics/black-history/thirteenth-amendment>.

or any place subject to their jurisdiction.”⁵⁷ Yet, seemingly before the ink of the words was dry, their exact meaning became nothing short of a complicated debate.

On its surface, the meaning of the amendment seems straightforward. The literal action of enslaving another person is forbidden.⁵⁸ However, early in the amendment’s history the Court read more into those words than plain liberty.⁵⁹ Justice Bradley famously wrote that the Amendment did not just bar the actual act of slavery, but also all of its “badges and incidents.”⁶⁰ He held that the Thirteenth Amendment was not merely aimed at laws allowing slavery or even just at the actual act of enslavement, it also had a “reflexive character . . . establishing and decreeing universal civil and political freedom throughout the United States.”⁶¹ This reflective character empowered the Amendment to not just ban slavery itself, but also all of its elements and indicators.⁶²

The question remained of how exactly to define these badges and incidents. The Congressional debates around the ratification offered no clarification. Many Congressmen of the time argued that their intention in proposing and voting on the Amendment was simply to free the black man, nothing more.⁶³ Others argued that nothing short of true racial equality was the mission of the Amendment.⁶⁴ Senator Harlan, for example, argued that the removal of slavery also meant the removal of all of its incidents, meaning there should be no right provided to a citizen essential for the condition of freedom that was denied because of a person’s race.⁶⁵ The only point of agreement was that the state of forced servitude was to be banned.

The most telltale evidence of the interpreted meaning of the Amendment is the concept of a “badge” of slavery.⁶⁶ The Oxford dictionary defines “badge” as “a feature or sign which reveals a particular

57. U.S. CONST., amend, XIII, § 1.

58. *Hodges v. U.S.*, 203 U.S. 1, 16 (1906) (Brewer, J.), *overruled in part by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), (“The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another.”).

59. *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

60. *Id.*

61. *Id.*

62. *Id.*

63. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1465 (1864) (Sen. Henderson argued that the effect of the proposed amendment was to free the black slaves, not to make them equal to white men).

64. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1438-40 (1864).

65. *Id.*

66. *See* *United States v. Rhodes*, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (Swayne, J.) (equating the badges of slavery with the incidents of slavery).

quality.”⁶⁷ At its core, therefore, prohibiting the badges of slavery includes the barring of any feature or sign that would reveal the status of slavery in a person. The nature of these features or signs of slavery went through a transition during the period of ratification of the Thirteenth Amendment.⁶⁸ Prior to its passing, many considered a “badge of slavery” to be the color of a man’s skin or some other physical indication that, in the eyes of society and the law, he was inferior.⁶⁹ Since the passage of the Thirteenth Amendment removed the color of a man’s skin as an indicator, many began to see the term as referring to legal restrictions placed on the civil rights of a citizen due to his race.⁷⁰ Looking at both meaning and history, it becomes clear that the focus of the Amendment, at a minimum, was to remove not only slavery itself but also any indicator – physical or civic – that the person was considered a slave. Since the Thirteenth Amendment is applicable against all actors, state and private, this bar on the indicators of slavery applies equally to all level of government.⁷¹

When the Supreme Court heard *The Civil Rights Cases*, it seemed ready to venture into this quagmire of a definition. Instead of elaborating on the term, however, Justice Bradley unsuccessfully sought to confine it. While declaring that the Thirteenth Amendment bans more than the act of enslavement, he also carefully explained that the goal of the Thirteenth Amendment was not to create equal citizenry.⁷² He wrote that the purpose was only to emancipate the former slaves to the same extent as the Black men of the Northern States.⁷³ Justice Bradley discussed how the envisioned Amendment was intended to make Blacks of the south the same as their northern brethren.⁷⁴ At the time, Black citizens of the north were free but did not enjoy all of the rights of the White men.⁷⁵ Since a person in such a state of second-class citizenship⁷⁶ was considered a

67. *Badge*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/badge> (last visited July 10, 2018).

68. See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 581 (2012).

69. *Id.*

70. *Id.*

71. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, n.1 (2018) (Sotomayor, J., dissenting).

72. See *U.S. v. Stanley*, 109 U.S. 3, 25 (1883).

73. *Id.* at 24 (“It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make.”).

74. See *id.* at 25.

75. *Id.* at 25.

76. The Oxford Dictionary defines second-class citizen as, “[a] person belonging to a social or political group whose rights and opportunities are inferior to those of the domi-

freedman that must have been what was intended by the Thirteenth Amendment.⁷⁷

After *The Civil Rights Cases*, the Supreme Court has never offered a clear definition or test for the term. At times the Supreme Court has endorsed a narrow meaning, confining the term to the literal, physical bondages of slavery, while at other times it seemed to be holding the door wide open for a broad interpretation.⁷⁸

The modern precedent for the definition of “badges of slavery” comes from *Jones v. Alfred H. Mayer Company*, in which the Court held that the Civil Rights Act of 1968 barred racial discrimination in the selling of private as well as public property.⁷⁹ Though Justice Stewart never directly defined the term, he strongly indicated that it meant more than mere physical freedom.⁸⁰ He held that it at least meant that all races had the freedom to enjoy the same civil rights, in that case specifically the right to purchase property.⁸¹ Though vague, his holding implies that the Court considers section one of the Thirteenth Amendment to go beyond physical liberty. At the same time, the Court directly overruled *Hodges v. United States*, which had called for a narrow definition of the term.⁸²

Modern legal scholars continue to debate what the badges are and specifically how to identify them.⁸³ The test that is gaining the strongest footing in modern courts seems to be the one proposed by Associate Professor McAward of the University of Notre Dame Law School. After a

nant group in society.” OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/second-class_citizen (last accessed July 9, 2018).

77. See *Stanley*, 109 U.S. at 25.

78. Compare *Hodges v. U.S.*, 203 U.S. 1, 16 (1906) (“The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another.”), with *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 411 (1968) (“For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its burdens and disabilities—included restraints upon those fundamental rights which are the essence of civil freedom.”) (quotation removed).

79. See *Jones*, 392 U.S. at 413.

80. *Id.* at 440–43.

81. *Id.*

82. *Id.* at 441 n.78.

83. See James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 468 (2018) (arguing that the proper test was one that looked to whether the group targeted was of African American descent and asked whether there was some connection between the injury and “law, practice, or experience” of slavery); see also Herman N. Johnson Jr., *From Status to Agency: Abolishing the “Very Spirit of Slavery”*, 7 COLUM. J. RACE & L. 245, 256 (2017) (claiming that “the Thirteenth Amendment provides a constitutional foundation for laws that combat implicit bias and hidden discrimination because it serves to transform persons from a status of bondage to the relative freedom of individual agency”).

lengthy exploration of the history of the term, she stated that, “[i]n its most general sense, the term ‘badge of slavery’ therefore refers to indicators, physical or otherwise, of African Americans’ slave or subordinate status.”⁸⁴ Accordingly, the proper test looks to whether the challenged indicator is one that was traditionally associated with a slave or subordinate status and whether its allowance has significant potential to lead to the de facto re-enslavement or legal subjugation of the targeted group.⁸⁵ Due to this test reflecting the base line concerns of the drafters of the Thirteenth Amendment, the federal courts are embracing it more and more.⁸⁶

The central theme that can be taken from all of these definitions and tests is that, if nothing else, the Thirteenth Amendment was intended not just to ban the physical act of slavery. Its purpose was to also ban all of slavery’s individual elements that would have the effect of indicating that the targeted person is of a subjugated race and whose allowance could lead to the de facto subjugation of that race.

D. Racial Supremacy v. Racial Discrimination

It is important to note here that what is being discussed is the message of racial supremacy, not racial discrimination. While this may seem like splitting a fine hair, it is an important distinction for the purposes of Thirteenth Amendment analysis. Webster’s Dictionary defines “supremacy” as “the quality or state of having more power, authority, or status than anyone else.”⁸⁷ It defines “discrimination” as “the practice of unfairly treating a person or group of people differently from other people or groups of people.”⁸⁸ Racial supremacy has to do with an actual state of existence, specifically that one’s state is superior to another’s because of race. Discrimination deals not with a state of existence, but rather with a method of treatment. Looking at the content and effect of the Thirteenth and Fourteenth Amendment, this distinction appears to have been in the

84. McAward, *supra* note 68, at 575.

85. *Id.*

86. See *United States v. Cannon*, 750 F.3d 492, 501 (5th Cir. 2014) (applying the McAward test directly); *United States v. Hatch*, 722 F.3d 1193, 1198-99 (10th Cir. 2013) (citing McAward repeatedly); *United States v. Metcalf*, No. 15-CR-1032-LRR, 2016 U.S. Dist. LEXIS 25950, at *8 (N.D. Iowa Mar. 2, 2016) (quoting McAward).

87. *Supremacy (English Language Learners Definition)*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/supremacy>.

88. *Discrimination (English Language Learners Definition)*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/discrimination>.

minds of the drafters.⁸⁹ The Thirteenth Amendment deals specifically with a state of existence—that of freeman versus slave—while the Fourteenth aims specifically at methods of treatment under the law.⁹⁰

The Court has spoken very clearly about standing under the Fourteenth Amendment.⁹¹ It has held that for a person to have standing the claimed injury must not be merely stigmatic; there must be an accompanying tangible unequal treatment.⁹² This approach is not being challenged here and makes logical sense, considering the subject matter of the Amendment. Naturally, an Amendment meant to forestall unequal treatment may not be violated unless someone has suffered an injury resulting from unequal treatment.⁹³ This must logically differ, however, from an Amendment meant to prevent a state of existence. What the Thirteenth Amendment aims at is the institution of slavery as a whole, including the elements necessary for its existence.⁹⁴ The concern is not the harm of being unequally treated, but the promotion of the existence of the institution.

When deciding which amendment to apply to a particular case, this distinction is remarkably important, and it reflects the mistake made by

89. See *Civil Rights Cases*, 109 U.S. 3, 25 (1883) (“Mere discriminations on account of race or color were not regarded as badges of slavery.”).

90. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

91. See *Allen v. Wright*, 468 U.S. 737, 755 (1984); see also *Moore v. Bryant*, 853 F.3d 245, 249 (5th Cir. 2017).

92. *Allen*, 468 U.S. at 755; *Moore*, 853 F.3d at 249.

93. The mere fact that a person is being mistreated should not be enough because there is almost no logical way to draft a statute that doesn’t treat somebody differently from society as a whole, making a harm necessary.

94. See *Civil Rights Cases*, 109 U.S. at 24 (“The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery.”); *Clyatt v. United States*, 197 U.S. 207, 216 (1905) (“This amendment denounces a status or condition, irrespective of the manner or authority by which it is created.”); *Hodges v. United States*, 203 U.S. 1, 33 (1906) (Harlan, J., dissenting) (“Congress had power, under the Thirteenth Amendment, not only to forbid the existence of peonage, but to make it an offense against the United States for any person to hold, arrest, return or cause to be held, arrested or returned, or who in any manner aided in the arrest or return of another person, to a condition of peonage.”); *United States v. Cruikshank*, 25 F. Cas. 707, 711 (C.C.D. La. 1874) (No. 14, 1897), *aff’d*, 92 U.S. 542 (1876) (“This is not merely a prohibition against the passage or enforcement of any law inflicting or establishing slavery or involuntary servitude, but it is a positive declaration that slavery shall not exist. It prohibits the thing.”); see also *Pope*, *supra* note 84, at 440 (“‘Slavery’ often signified the system of slavery, conceived as an interlocking set of components, raising the possibility that the eradication of slavery would entail eliminating not only chattelism and physically or legally coerced labor, but also other important components of the system.”).

the parties and courts in *Moore*. If what is being questioned is the treatment of the individual under the law, then the Fourteenth Amendment is proper. However, if, as in *Moore*, what is being challenged is whether an action changes the status of a person to, or endorses a person as, a second-class citizen in the eyes of the government, then the Thirteenth Amendment and its rulings must be applied.

E. *The Message of Racial Supremacy Was Always Considered a
Badge of Slavery*

In 1874, less than a decade after the ratification of the Thirteenth Amendment and nine years before he would write the majority opinion for *The Civil Rights Cases*, Justice Bradley, then a circuit judge for the District of Louisiana, heard a case regarding criminal charges against a group of White men who intimidated and falsely held a group of Black men in order to prevent them from voting. Regarding the scope of the Thirteenth Amendment, he wrote:

It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and, therefore, that congress had the power, under the amendment, to declare and effectuate these objects. The form of doing this, by extending the right of citizenship and equality before the law to persons of every race and color . . . was necessary for the purpose of settling a point which had been raised by eminent authority, that none but the white race were entitled to the rights of citizenship in this country. As disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that congress had the power, under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race.⁹⁵

Bradley's writing reflects almost word for word the charge of the Civil Rights Act of 1866—which declared all people born in the United States to be equal citizens and prescribed penalties for their subjugation.⁹⁶ The Civil Rights Act of 1866 is unique in that it was written by a majority of the Congressmen who had drafted the Thirteenth Amendment, and it

95. Cruikshank, 25 F. Cas. at 711.

96. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1986 (1991)).

was passed prior to the passage and ratification of the Fourteenth Amendment.⁹⁷ It demonstrates the intentions of the drafters of the Thirteenth Amendment clearly, because it was in no way influenced by the parallel charges of the Fourteenth.⁹⁸ What is clear from the Amendment itself as well as the writing of the courts at the time is that the intention of the Thirteenth Amendment was not merely the ending of literal slavery, but also an ending to those elements that allowed the institution of slavery to exist. Right away, the philosophy of racial supremacy was identified as one such element.⁹⁹

Racial supremacy and American slavery went hand in hand almost from the beginning, though there is debate on which came first.¹⁰⁰ The foundation of the moral acceptance of American slavery was the belief that the enslaved race was so inferior to the enslaving race that its subjugation was not only morally correct, it was a natural state that benefited the enslaved.¹⁰¹ This sentiment was even upheld by the Supreme Court itself where, in perhaps the Court's most infamous decision, Chief Justice Taney wrote:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.¹⁰²

Further proof of this mentality can be found in a report from General Carl Schurz to the President of the United States from the time between

97. See Civil Rights Cases, 109 U.S. 3, 22 (1883).

98. *Id.*; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-40 (1968).

99. See Civil Rights Act of 1855, 14 Stat. 27.

100. Compare Michael Minkoff, Jr., *American Slavery and Racism*, LAST RESISTANCE (May 29, 2018 12:42 pm), <https://lastresistance.com/american-slavery-and-racism/> with John Mark N. Reynolds, *Historical Parochialism: American Slavery Is Not Ancient Slavery*, PATHEOS (Dec. 5, 2013), <http://www.patheos.com/blogs/philosophicalfragments/2013/12/05/historical-parochialism-american-slavery-is-not-ancient-slavery>.

101. Minkoff, *supra* note 100; Reynolds, *supra* note 100.

102. Scott v. Sandford, 60 U.S. 393, 407 (1857).

the end of the War for Southern Independence and the passing of the Civil Rights Act. General Schurz was tasked by President Johnson to travel the former Confederacy and ascertain, inter alia, the condition of the freed blacks. Schurz found that their condition was one in need of dire attention.¹⁰³ He reported that the Southerners had not abandoned their supremacy views and were working to return the freed slaves to a state of subjugation.¹⁰⁴ The report ended with the warning, “[a]s to the future peace and harmony of the Union, it is of the highest importance that the people lately in rebellion be not permitted to build up another ‘peculiar institution’ whose spirit is in conflict with the fundamental principles of our political system”¹⁰⁵ This sentiment would later be echoed on the Senate floor in support of the Civil Rights Act of 1866.¹⁰⁶

Since Justice Taney’s sentiments and General Schurz report reflect the prevalent beliefs of the time, they surely were in the minds of the drafters of the Thirteenth Amendment. In attempting to eliminate slavery, the drafters were looking not just to forced servitude itself, but also to the philosophies that had enabled its past and future existence. This included the belief on the part of the governing body that the White race was superior and therefore justified in subjugating Black people. Justice Bradley would later reflect this in *The Civil Rights Cases* where he wrote:

Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its *substance and visible form*; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom . . . as is enjoyed by white citizens.”¹⁰⁷

This core belief is emulated in modern rulings as well. In *Jones v. Alfred H. Mayer Company*, Justice Douglas writing in concurrence observed, “The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced

103. S. EXEC. DOC. NO. 39-2, at 20 (1st Sess. 1865); see also *City of Memphis v. Greene*, 451 U.S. 100, 131 n.4 (1981) (White, J., concurring); *Adamson v. California*, 332 U.S. 46, 109 n.3 (1947) (Black, J., dissenting).

104. S. EXEC. DOC. NO. 39-2, at 17.

105. *Id.* at 46.

106. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1865); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 194-96 (1989) (Brennan, J., concurring in part and dissenting in part); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 462 n.28 (1968) (Harlan, J., dissenting).

107. *Civil Rights Cases*, 109 U.S. 3, 22 (1883) (emphasis added).

the notion that the white man was of superior character, intelligence, and morality. . . . While the institution has been outlawed, it has remained in the minds and hearts of many white men.”¹⁰⁸ Ultimately, the goal of Congress in creating the Thirteenth Amendment was not mere freedom, but the establishment of the Black race as equal citizens in status to the White.¹⁰⁹ Any indication that the government considers the Black man to have a different status of citizenship from the White would be a continuance of a substance of slavery, which is banned by the Constitution.

Finally, when the McAward test is applied¹¹⁰, it shows that racial supremacy ought to be considered a badge of slavery. It has already been demonstrated that history considers racial supremacy to be an element of the American slave system. But could its allowance lead to the de facto re-subjugation of a race? Again, history shows that the allowance of government endorsed racial superiority will indeed have such an effect. We need look no farther than the Jim Crow era to find such evidence.

Under Jim Crow, the Southern States sought to reestablish a system by which Blacks would occupy a lower level of society and politics than Whites did.¹¹¹ They enacted laws aimed at perpetuating the segregation of the races under the reasoning that allowing an inferior race to intermingle with a superior one would have dire results.¹¹² Just as General Schurz had warned, allowing the State governments to operate under the philosophy of racial superiority was leading to the subjugation of the freed Black man.¹¹³ Under these new laws, Blacks were banned from exercising basic rights, such as voting, serving on juries, traveling with Whites, showing public affection, or even just lighting the cigarette of a White woman.¹¹⁴ While these laws were eventually struck down under the Fourteenth Amendment, it is clear that the base philosophical element that allowed the *de facto* return to second class citizenship was the belief that the government was justified in viewing the Black man as an inferior race.¹¹⁵

108. 392 U.S. at 445 (Douglas, J., concurring).

109. *Hodges v. United States*, 203 U.S. 1, 29 (1906) (Harlan, J., dissenting) (“It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen . . .”).

110. The elements of which are whether what is being challenged is historically linked to the institution of slavery and whether its allowance would lead to a de facto subjugation of a race. McAward, *supra* note 68.

111. See *A Brief History of Jim Crow*, CONSTITUTIONAL RIGHTS FOUND (July 18, 2018 12:34 pm), <http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow>.

112. *Id.*

113. See THE AM. CIVIL RIGHTS UNION, THE TRUTH ABOUT JIM CROW 3 (2014), <https://www.theacru.org/wp-content/uploads/The-Truth-About-Jim-Crow.pdf>.

114. *Id.* at 10-11.

115. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Racial superiority was an element of the institution of American slavery. The drafters who sought to end this institution knew and acknowledged the subjugating effect of allowing the government to endorse the message of racial superiority. History shows that the allowance of such an endorsement can, and at points has, led to the re-establishment of Blacks as second-class citizens.¹¹⁶ Thus, the governmental endorsement of racial superiority constitutes a badge of slavery and is therefore unconstitutional under the Thirteenth Amendment.

III. A MESSAGE MAY BE UNCONSTITUTIONAL

Once freedom from a governmentally endorsed message of racial superiority is established as a right, the next step is to establish the form of injury its infringement would take. When it comes to an injury caused by exposure to that particular message, there is no applicable case law or statute. Fortunately, there is a parallel history under the First Amendment's Establishment Clause and its constitutional ban of governmental endorsement of any specific religion. In this jurisprudence, the courts have held that mere exposure to a symbol of religious preference that carries government endorsement is itself an injury on which standing can be based.¹¹⁷ As with racial supremacy, it is the message itself that is being barred, not the effect of the message on the treatment of the people, and the injury it produces may be based on this distinction.¹¹⁸

The First Amendment promises the freedom of expression of all parties, including the government when it speaks for itself.¹¹⁹ Yet, immediately preceding those words of freedom was written a limitation: "Congress shall make no law respecting an establishment of reli-

116. See *supra* Part II.D.

117. See, e.g., *Doe v. Cong. of the U.S.*, 891 F.3d 578, 585-86 (6th Cir. 2018) (finding standing to challenge the phrase "In God We Trust" on U.S. currency); see also, e.g. *Vasquez v. L.A. Cty.*, 487 F.3d 1246 (9th Cir. 2007) (finding standing to challenge use of a cross in a city seal); see also, e.g. *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (finding standing to challenge the public display of a nativity scene); see also, e.g. *Stone v. Graham*, 449 U.S. 39 (1980) (finding standing to challenge display of Ten Commandments on public school grounds).

118. See *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 258-59 (4th Cir. 2018), *vacated on different grounds*, 2018 U.S. LEXIS 4049; *Cty. of Allegheny v. ACLU*, 492 U.S. at 595; see also *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.").

119. See *Matal v. Tam*, 137 S. Ct. 1744, 1757-58 (2017).

gion”¹²⁰ As with the Thirteenth Amendment, the charge of the clause of the First Amendment seems clear on its face: the U.S. shall not establish a national religion. But, it too has since been read to have a much wider scope.¹²¹ The Supreme Court has held that the Amendment bars the government not only from creating a national religion, but also from endorsing the idea that any one religion is superior to another.¹²²

The Founders feared a national church because of the long history between the government of England and the Church of England, as well as the effect that state sponsored churches were already having on the early colonists.¹²³ At the same time, they feared the message that any group of people were outsiders due to their religious affiliation and thus not equal citizens.¹²⁴ In response to this fear, the Founders sought to ensure that the government would be barred from communicating such a message,¹²⁵ either through legislation or a showing of endorsement.¹²⁶

In other words, the First Amendment bars not only the actual establishment of a national religion, but also the message that any religion is

120. U.S. CONST. amend I.

121. *See* *Trump v. Hawaii*, 138 S. Ct. 2393, 2417 (2018) (“Our cases recognize that the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”) (internal quotation marks omitted); *Cty. of Allegheny v. ACLU*, 492 U.S. at 592-93 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (“It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”) (O’Connor, J. concurring); *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.”) (internal quotation marks omitted).

122. *Id.*

123. *See* John P. Kaminski, *Religion and the Founding Fathers*, ANNOTATION, (Nat’l Historical Publ’ns and Records Comm’n, D.C.), Mar. 2002, at 1.

124. *E.g.* *Trump v. Hawaii*, 138 S. Ct. 2392, 2434 (2018) (Sotomayor, J., dissenting) (“Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion ‘inevitabl[y]’ foster ‘the hatred, disrespect and even contempt of those who [hold] contrary beliefs.’”) (alteration in original) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 612-13.

125. *See* *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (“As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof.”) (emphasis added).

126. *See* *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 668 (1970) (“The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute.”); *Doe v. Cong. of the U.S.*, 891 F.3d 578 (6th Cir. 2018).

endorsed by the government. This was done because it was feared that the allowance of such an expression would hinder the constitutional right of a citizen to be free of the government's establishment of a religion.¹²⁷ In the same light, when the Thirteenth Amendment barred the badges of slavery, it barred anything that would lead to the hindrance of the constitutional right to be free of all elements of slavery based on a person's race.¹²⁸ This includes the government endorsement of racial superiority. As under the Establishment Clause, it is the message itself that is barred.

The bar on endorsement has not been limited to direct statements or actions.¹²⁹ When the government has endorsed religion through symbolism, such as allowing prayer in school,¹³⁰ the displaying of paintings of Jesus,¹³¹ and the offering of religious symbols such as crosses and the Ten Commandments,¹³² the courts have repeatedly found the endorsement to be in violation of the Constitution.¹³³ Since the message itself is barred, any method by which the government may be interpreted as promoting that message is likewise unconstitutional.

IV. SYMBOLOGY AND ARTICLE III STANDING

A. *Mere Exposure to a Constitutionally Barred Symbol is a Recognized Injury in Fact*

In order to determine if a right has been invaded to the extent necessary to qualify as an injury for the purpose of Article III standing, standards can be set reflecting the particular kind of injury that such an inva-

127. See *Cty. of Allegheny*, 492 U.S. at 590-94; see also *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. at 221.

128. See *Or. v. Mitchell*, 400 U.S. 112, 128-29 (1970); see also *Hodges v. U.S.*, 203 U.S. 1, 26-27 (Harlan, J., dissenting).

129. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.' Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.") (citations omitted).

130. See *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 232; see also *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

131. See *Washegesic v. Bloomington Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994).

132. See *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (displaying of the Ten Commandments in a school); see also *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 573-74 (1989) (displaying a nativity scene on government property).

133. See *Washegesic*, 33 F.3d at 684; *Wallace*, 472 U.S. at 38; *Schempp*, 374 U.S. at 232; *Engel*, 370 U.S. at 424.

sion would create.¹³⁴ While there has been no direct holding on the standards for exposure to a symbol of racial supremacy, analogous conclusions from the Establishment Clause can be drawn.

An invasion of the Establishment Clause requires only an exposure to the message, nothing more.¹³⁵ It is not required that the people hearing the endorsement be compelled or coerced or show any other effect; it is enough that they were exposed to a message that the government was not allowed to convey.¹³⁶ The exposure creates the harm by fostering “the hatred, disrespect and even contempt of those who held contrary beliefs.”¹³⁷ Since the interest protected under the Establishment Clause is of a spiritual, rather than economic or physical in nature, then an injury to the spirit beyond mere offense may be deemed a concrete injury for the purposes of standing.¹³⁸ Though mere exposure is not commonly considered a tangible harm, ultimately, it is the right to be free of the message and its possible effect on one’s spirit that is protected. Exposure is the unique harm the violation of that right creates. Since this harm is of such a similar nature to the harm of a government-endorsed message of racial superiority, it is logical to apply the same standard to both.¹³⁹

One of the original intentions of the Thirteenth Amendment was to ban the badges of slavery, including the government endorsement of the message of racial superiority.¹⁴⁰ This is an absolute right created by the

134. See generally *Flast v. Cohen*, 392 U.S. 83, 101-02 (1968) (“However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. For example, standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause.”); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) (“While the plaintiffs are not exempt from the basic constitutional requirement that they be injured and thus have a concrete stake in the dispute, we have nonetheless recognized that standing principles must be tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer.”); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (“Nonetheless the standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer. . . . rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable.”).

135. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963).

136. See *Sch. Dist. of Abington Twp.*, 374 U.S. at 221.

137. *Engel v. Vitale*, 370 U.S. 421, 431; see also *Cty. of Allegheny*, 492 U.S. at 595.

138. See *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 819-20 (7th Cir. 2014).

139. See *Larson v. Valente*, 456 U.S. 228, 245 (1982) (Bradley, J.) (“Security for civil rights must be the same as that for religious rights.”).

140. See *supra*. Part II.E.

Constitution, thus its abridgment alone is enough to constitute an injury.¹⁴¹ Since the injury prevented spiritual in nature, exposure may be considered the unique harm that results from the abridgement. In the end, it is the message that people are protected against, not its effect on them. Mere exposure to such a message constitutes a concrete harm to the absolute right to be free of that message and therefore, meets the standing requirements of Article III.

B. *Test for Whether Exposure to a Particular Symbol of Racial Superiority Is Sufficient to Provide Article III Standing*

Of course, it is not correct to say that exposure alone, viewed in a vacuum, is *always* an injury in fact. Such a broad allowance for standing has been widely denounced by the courts.¹⁴² In *Allen*, Justice O'Connor voiced a concern that granting standing for such a broad style of injury would allow almost anyone in the country to challenge almost anything anywhere, something that was never intended by the Constitution.¹⁴³ Fortunately, though the recognition of the injury of exposure to a symbol of racial superiority would be new, there is precedent to be found in Establishment Clause cases that would limit its allowance and create a workable test. While the Supreme Court has not provided a test or series of requirements regarding standing specifically for religious symbol exposure, the lower courts have created a workable model that can easily be applied to symbols of racial supremacy.¹⁴⁴ Specifically, it can be shown that a plaintiff has standing to bring an action into federal court if they can show that they are a member of a community whose government has offered a symbol of racial supremacy meant to communicate that in the eyes of the government, the plaintiff is a second class citizen due to their race.

The first element, and most limiting, is that the party bringing the action must belong to the governmental community that is offering the message. In *Valley Forge Christian College v. Americans United for Separation of Church & State*, the Court held that the parties did not have standing to challenge the transfer of property from the government to a church related college because the plaintiffs did not belong to the affected community; they were merely aware of the action.¹⁴⁵ A party cannot bring a gen-

141. *Id.*

142. *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

143. *Id.* at 755-56.

144. *See infra* Part IV.B.

145. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & St.*, 454 U.S. 464, 485-86 (1982).

eral grievance simply because they see that the government is not following the Constitution.¹⁴⁶ In dealing with religious symbols, the lower courts strongly integrated the *Valley Forge* holding by requiring that the parties be from the community offering the symbol.¹⁴⁷ In the same way, it would not be enough for a plaintiff to merely have been exposed to a symbol of racial superiority; they must be a member of the community whose government endorsed such a message in order for them to have standing to challenge it.

Secondly, for an injury to provide Article III standing, it is also required that the plaintiff show they are amongst the people who have been injured.¹⁴⁸ It is not enough to be a caring citizen or to be personally offended at the actions of one's own community; the accused action must directly injure the plaintiff.¹⁴⁹ This requirement may be more difficult to satisfy when challenging a symbol under the Thirteenth Amendment as opposed to the First. Since the Establishment Clause provides a general right to all citizens, it is hard to imagine a plaintiff from the offering community who cannot claim they were amongst the injured parties. If the government endorses Catholicism, the right of Catholics to be free from religious endorsement is as infringed as a Jewish citizen's would be.

For the Thirteenth Amendment to apply, it would require a showing that the person was of the race being targeted as inferior. For example, a White citizen of a community offering a symbol of white supremacy would not have been personally injured, despite being a member of the offering community, because his personal status is not affected. His right to not be viewed as a second-class citizen by his government has not been infringed. It is necessary for a plaintiff to show that they are of the group whom the message is targeting as inferior for them to claim that they have been personally injured by the particular endorsement.

146. *Id.*

147. See *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 261 (4th Cir. 2018) (“[M]ere awareness of religious animus, without more, is insufficient.”); *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 478 (3d Cir. 2016) (“A passerby who is not a member of the community, and who faces no risk of future contact, may not have an injury in fact sufficient to confer standing. This is because standing requires that the plaintiff has a concrete grievance that is particularized to him and that the plaintiff is not one simply expressing generalized disagreement with activities in a place in which he has no connection.”).

148. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

149. *Id.*, see *Larson v. Valente*, 456 U.S. 228, 238–39 (1982); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“The essence of the standing inquiry is whether the parties seeking to invoke the court’s jurisdiction have ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’”).

While some courts have held that there must be some effect from the exposure (generally that the plaintiff have changed some of their activities in response¹⁵⁰), a majority of courts have held that the exposure is the harm and nothing further is required to establish standing.¹⁵¹ In addition, the number of exposures or possible exposures is inconsequential; it is enough that an exposure occurred.¹⁵² The size of the population ultimately harmed and whether the symbol was seen by a large number of people is unimportant.¹⁵³

Finally, it must be shown that the message is in fact government speech promoting racial superiority. While the Courts have not been entirely clear on the relationship between the First Amendment, Thirteenth Amendment, and private actions, there has never been a question about their relationship to the government.¹⁵⁴ Since what is barred is endorsement by the government, the plaintiff must show that what they are challenging is in fact an endorsement of racial superiority by the government. This is not as easy of a question as it sounds on the surface.

In the very split decision of *Lemon v. Kurtzman*, the majority, the concurrence, and the dissent agreed that the purpose of a religious symbol must be analyzed not just by its facial meaning, but also by its historical and physical context to determine whether it was a message of endorsement.¹⁵⁵ While the issue there was whether subsidizing teachers at a

150. See, e.g., *Vasquez v. L.A. Cty.*, 487 F.3d 1246 (9th Cir. 2007); see also, e.g., *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); see also *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989).

151. See, e.g., *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476-9 (3d Cir. 2016) (Shwartz, J.) (“Nearly every court of appeals has held that standing in this context requires only direct and unwelcome personal contact with the alleged establishment of religion . . . While altering one’s behavior to avoid something may demonstrate that the thing avoided is unwelcome, altered conduct is not a prerequisite for obtaining standing in this context.”) (internal citations removed). See also *Salazar v. Buono*, 559 U.S. 700 (2010) (Noting that the lower courts had found standing despite there being no change in the activities of the plaintiff); *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), cert. denied, 517 U.S. 1201 (1996); see e.g. *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), rehearing denied, 1991 U.S. App. LEXIS 29558 (5th Cir.), cert. denied, 505 U.S. 1219 (1992); see e.g. *Am. Jewish Cong. v. Chicago*, 827 F.2d 120 (7th Cir. 1987).

152. *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d at 478 (“frequent contact with a display is not a requirement for standing . . .”).

153. See *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) (“Though the portrait, like school prayers and other sectarian religious rituals and symbols, may seem ‘de minimis’ to the great majority, particularly those raised in the Christian faith and those who do not care about religion, a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case.”).

154. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Harlan, J., dissenting).

155. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

religious school constituted endorsement, the same opinion has been applied to such seemingly obvious symbols as a cross,¹⁵⁶ a menorah,¹⁵⁷ and a nativity scene.¹⁵⁸ In all of these cases, the plaintiff was required to demonstrate that the symbol – taking into account not only its facial and subjective meaning but also its history and the method of its display – was offered by the government for the purpose of religious endorsement in order to gain standing to challenge it.¹⁵⁹

In the same vein, a plaintiff making a claim against a symbol under the Thirteenth Amendment must take into account meaning as well as historical and physical context to show that it is being offered by the government for the purpose of endorsing racial supremacy. This requirement functions as much as a safeguard as it does a gate. Staying with the example of *Moore*, if the courts had determined that the Confederate Battle Flag as offered within the Mississippi State flag communicated a message of racial supremacy, that would not mean that the State could not display the Confederate Battle Flag or the old State flag in places where historical context warrants it, such as a historical battlefield. In such a context, the symbol – though arguably a promotion of racial supremacy in nature – is not functioning as an advancement of the message but instead as a historical reference and would not be barred by the Thirteenth Amendment.

Using this long history of rulings as a guide, it is simple to determine whether a particular exposure to a symbol of racial superiority should be considered an injury for the purposes of standing. The plaintiff must be able to make some factual allegation that the challenged symbol is being offered by the government for the purpose of endorsing racial supremacy, and that that offering creates the concrete harm. The plaintiff must be a member of the community offering the symbol and must be of the race being promoted as inferior. While they must demonstrate exposure, they need not show that the exposure was frequent, that it altered their activities, or that it created any other effect or influence. So long as these elements are met, the plaintiff should not be refused his opportunity to be heard by the courts.

156. See *e.g.*, *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991).

157. See *e.g.*, *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 380 (9th Cir. 1996).

158. See *e.g.*, *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 122 (7th Cir. 1987).

159. See *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (holding that the relevant question was not whether the symbol offered was a religious one, but whether the symbol, analyzed in context, could be said to be functioning as an advancement of a particular religion); see also *Am. Jewish Cong. v. Chicago*, 827 F.2d at 131.

V. CONCLUSION

. . . [T]here is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels “standing”; this accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law. The serious by-product of that practice is that the Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses “standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.” The opinion of the Court is a stark example of this unfortunate trend of resolving cases at the “threshold” while obscuring the nature of the underlying rights and interests at stake.¹⁶⁰

Justice Brennan penned these scolding words in dissent to the denial of standing in *Valley Forge*.¹⁶¹ He criticized the actions of a Court that, by his accusation, was not afraid to invoke standing to dodge a ruling on the merits of the issue.¹⁶² While not every denial of standing is such, in the case of *Carlos Moore* it very much seems to be so. By refusing to hear his case, the Supreme Court has shut the door on a controversial issue that is growing in national importance.¹⁶³

More and more, symbols such as flags, statues, and memorials are being challenged for their perceived message of racial supremacy. Those challenges have grown to the point of violence in the streets, as was re-

160. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & St.*, 454 U.S. 464, 490-91 (1982) (Brennan, J., dissenting) (quoting *Barlow v. Collins*, 397 U.S. 159, 178 (1970)).

161. *Id.* at 490.

162. *Id.*

163. See Logan Strother, Spencer Piston & Thomas Ogorzalek, *Are Confederate Monuments Our Heritage or Symbols of Hate?*, NEWSWEEK (July 17, 2018, 3:51 PM), <https://www.newsweek.com/are-confederate-monuments-our-heritage-or-symbols-hate-633678>; see also David Lohr, *Debate Over Confederate Emblem In Mississippi Flag Heats Up In Charlottesville's Wake*, HUFFINGTON POST (July 17, 2018, 3:39 PM), https://www.huffingtonpost.com/entry/confederate-flag-mississippi-state-charlottesville_us_59930a84e4b08a247277809e; see also Jessica Taylor, *The Complicated Political History Of The Confederate Flag*, NPR (July 17, 2018, 3:48 PM), <https://www.npr.org/sections/itsallpolitics/2015/06/22/416548613/the-complicated-political-history-of-the-confederate-flag>.

cently seen at the 2017 Charlottesville protests.¹⁶⁴ At the center of this public debate is the question of whether such symbols should be allowed to exist at all, much less carry any form of governmental endorsement. Courts have understandably been reluctant to hold such a hot potato, using the excuse of standing to keep such questions outside the courthouse. Unfortunately, in doing so, they are ignoring a charge of the Constitution itself.

From its creation, the Thirteenth Amendment was meant to do more than simply free the then-existing slaves.¹⁶⁵ It was intended to eradicate the institution of slavery from the American landscape, and provide an equal citizenship status to all races.¹⁶⁶ This meant not only breaking the bonds of servitude, but also removing all elements that caused slavery or could enable its return.¹⁶⁷ To accomplish this, it is essential that the government not be able to convey the message that any race of citizen is inferior to another. The right to be free of such an attack is implicit in the freedom provided by the Amendment.¹⁶⁸

A U.S. citizen has a right to not be told by their government, at any level, that they are not deserving of the full rights of any other citizen.¹⁶⁹ Since this is an absolute right, any infringement results in an injury regardless of whether it is accompanied by a further action or not.¹⁷⁰ The message need not be a direct statement or statute, it is barred no matter what form it takes, even that of symbology.¹⁷¹ Since the harm can be connected to a government action – such as endorsement – and a court order will relieve the harm, it is proper that a remedy be sought through the courts.¹⁷²

This is not a novel or unique approach to such a problem. Just as under the Thirteenth Amendment, the First Amendment equally creates an absolute right to be free from a specific message: governmental endorsement of a particular religion.¹⁷³ There it has been accepted that a mere one time exposure to such a message, even in the form of a simple religious symbol, is enough to unjustly infringe a citizen's right, even

164. See Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (July 17, 2018, 4:00 PM), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>.

165. See *supra* Part II.C.

166. See *supra* Part II.E.

167. See *supra* Part II.C.

168. See *supra* Part III.

169. *Id.*

170. *Id.*

171. See *supra* Part IV.A.

172. See *Dep't Of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

173. See *supra* pp. 96-99.

though no economic or physical harm existed.¹⁷⁴ To ensure such protection, a formula was created to show standing and allow the wronged to have their day in court.¹⁷⁵

Such a standard is equally applicable to the harm of exposure to a message of racial supremacy. Though no physical or economic harm may be inflicted by such an expression, it still represents an injury to an absolute right and therefore, must be capable of being argued in court.¹⁷⁶ This is not a call for the floodgates to open. The plaintiff must still be able to show they were personally harmed by the message by offering a factual allegation that it is a message of racial superiority, that it carries government endorsement, that they are a member of the community offering the symbol, and that they are themselves a member of the race being promoted as inferior.¹⁷⁷

The need for standing in these types of cases goes beyond a mere desire to create a theoretical interpretation of a one-hundred and fifty-eight year-old amendment and its satellite issues. One need not stretch their minds to find the intrinsic harm in a city passing a resolution that the White race is supreme to all others or erecting a statute celebrating the teachings of William J. Simmons. Despite their personal agreement that such symbols should not be allowed, the courts will simply throw up their hands and say there is nothing they can do. Nothing can be done to remove such symbols unless the plaintiff can point to a specific, physical harm or mistreatment resulting from the symbol's existence. According to the courts, simply being told by your government that you are of an inferior race is not enough.¹⁷⁸ These courts have erred in their analysis.

While they are right in saying that the Fourteenth Amendment, which promises equal treatment, has not been violated, what they have failed at is recognizing the promise of equal citizenship required by the Thirteenth. The courts failed in seeing that the nation was driven into its bloodiest conflict due as much to an idea as an action. That the Constitution was amended to demand that the people have a method by which they may challenge and remove such a philosophy.

What is not being argued in this writing is that specific symbols of Southern heritage, including the Confederate Battle Flag, are absolutely a promotion of racial superiority and therefore should be taken down and banned. There is still a lot of muddy water to wade through in order to get to an ultimate decision: issues of historical context and the extent to which it can immunize a message; at what point private speech becomes

174. See *supra* note 171.

175. See *supra* Part IV.B.

176. See *supra* Part II.E.

177. See *supra* Part IV.B.

178. See *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017).

government speech; whether a vote can turn government speech into private speech; and, ultimately, what message is being conveyed must still be addressed. However, the fact that such heated and controversial issues lay ahead is no reason for the courts to refuse to enter the fray. In fact, as the debate gets more and more intense it has arguably become the duty of the court to give the parties on both sides the proper forum they deserve to be heard and to determine whether either side is losing their constitutional protection. Article III must not be invoked for the purpose of avoiding the difficult constitutional issues that are within that debate. For, as Brennan argued, “[t]o construe that Article to deny standing to the class for whose sake constitutional protection is given simply turns the Constitution on its head. Article III was designed to provide a hospitable forum in which persons enjoying rights under the Constitution could assert those rights.”¹⁷⁹ This includes the right to free expression, but it also includes the right to be free from all government-endorsed symbols of racial superiority.

179. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 493-94 (1982) (Brennan, J., dissenting).

