

Coercive Ideology

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Tyler R. Clemons, *Coercive Ideology*, 83 Md. L. Rev. ()

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COERCIVE IDEOLOGY

TYLER ROSE CLEMONS*

Current equal protection jurisprudence does not permit challenges to discriminatory government expression, no matter how blatant or extreme. This doctrine, which I label the discriminatory treatment requirement, is a manifestation of anticlassification, the prevailing equal protection framework since the mid-1970s. According to anticlassification, only suspect government classifications implicate the Equal Protection Clause. In this Article, I contend that discriminatory government expression violates the Clause because it contributes integrally to racial subordination. Through a process I call coercive ideology, discriminatory government expression serves as a veiled threat that manipulates individuals into performing public compliance with the dominant ideology. Like the script of a stage play, the aggregate of individual decisions to comply with its instructions translates the dominant ideology into a social reality. Coercive ideology reveals how both Lost Cause Confederate monuments and Jim Crow segregation signage contributed to racial subordination as discriminatory government expression in the New South. Because anticlassification fails to account both for the subordinating effects of discriminatory government expression and for the expressive effects of government classification, coercive ideology ultimately raises doubts about its continuing validity as the dominant approach to equal protection jurisprudence.

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INTRODUCTION

Suppose that Mississippi changed its state motto to “White people are better than Black people.”¹ Suppose further that the state posted this statement wherever its motto is typically displayed: in government offices and courtrooms, on state-issued documents such as driver licenses, and on large roadside signs marking its borders. Finally, assume that Mississippi

1. This hypothetical is adapted from Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 651–61 (2013) (evaluating the constitutionality of a hypothetical congressional resolution declaring “America is a white nation”).

Mississippi adopted its actual motto, *Virtue et armis* (“By valor and arms”), on February 7, 1894—the same day it adopted a state flag that included the Confederate battle flag. *Mississippi State Emblems & Symbols*, OFFICIAL WEBSITE OF MISS., <https://www.ms.gov/mississippi-state-emblems-symbols> [<https://perma.cc/VAD6-G3TF>] (last visited Apr. 14, 2024). It takes no great leap of logic to infer that the “arms” the legislature had in mind were those of the Confederate States of America, which fought to preserve the enslavement of Black Southerners. *See infra* Part III.A.2.

takes no other action to implement the position declared in the new motto—that is, that the state does not change its formal treatment of Black people vis-à-vis white people. Would the state’s motto violate the Equal Protection Clause?² Who would have standing to challenge it?

The answer to the first question is probably “no,” while the answer to the second is “nobody.” Under current equal protection jurisprudence, “the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging.”³ In other words, so long as Mississippi does not *treat* Black people differently than non-Black people, it can *express* whatever it wants about them. Because a motto is quintessentially expressive,⁴ a court would almost certainly hold that the Equal Protection Clause gives it no power to prevent Mississippi from declaring that white people are better than Black⁵ people in its state motto. Thus, seventy years after *Brown v. Board of Education*,⁶ a former Jim Crow state could constitutionally require Black people to carry official documents containing an explicit declaration of white supremacy on their persons.

If this hypothetical seems alarmist or far-fetched, consider that essentially the same scenario has occurred within the past decade with precisely this outcome. In 2016, Carlos Moore, a Black lawyer and longtime Mississippian, sued to challenge the inclusion of the Confederate battle flag within the state’s official flag.⁷ The federal courts hearing Moore’s case acknowledged the strong link between the flag and white supremacy—a link Mississippi’s leaders intentionally invoked when they incorporated the battle flag into the state’s flag in 1894.⁸ But since every Mississippian lived under the same flag, Moore could not demonstrate that the flag treated him differently based on his race.⁹ Applying the rule that the Equal Protection

2. U.S. CONST. amend. XIV, § 1.

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

4. *See Motto*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/motto> [<https://perma.cc/9XNF-XEMS>].

5. I capitalize the *B* in *Black* because Black Americans “constitute a specific cultural group and, as such, require denotation as a proper noun” in a way that white Americans do not. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988); *see also* Mike Laws, *Why We Capitalize ‘Black’ (and not ‘white’)*, COLUM. JOURNALISM REV. (June 16, 2020), <https://www.cjr.org/analysis/capital-b-black-styleguide.php>.

6. 347 U.S. 483 (1954).

7. Complaint at 2, *Moore v. Bryant*, 205 F. Supp. 3d 834 (S.D. Miss. 2016) (No. 3:16-cv-151).

8. *See Moore v. Bryant*, 205 F. Supp. 3d 834, 838–45 (S.D. Miss. 2016), *aff’d*, 853 F.3d 245 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017).

9. *Id.* at 853.

Clause requires only equal treatment, not equal expression, the federal courts dismissed Moore's case.¹⁰

This result seems wrong—emotionally, logically, and constitutionally. But it follows directly from the Supreme Court's prevailing anticlassification approach to the Equal Protection Clause, according to which the core equal protection injury is the indignity of being treated as a function of one's race rather than as an individual. Discriminatory government expression cannot inflict such an injury because it does not classify individuals based on race.¹¹ Thus, addressing discriminatory government expression requires a different understanding of what the Equal Protection Clause actually means.

For decades, the antisubordination tradition of equal protection scholarship has developed that alternative understanding. The antisubordination tradition views subordination, not classification, as the core injury against which the Equal Protection Clause protects. While antisubordinationists acknowledge that classification has historically been used to accomplish subordination, they deny both that classification is inherently subordinating and that classification is necessary to achieve subordination. But because antisubordination developed in response to anticlassification's handling of affirmative action programs and government actions with racially disparate impacts, antisubordination scholars have largely ignored discriminatory government expression.

10. *Id.* at 858. Lest one mistakenly assume that *Moore's* outcome was anomalous due to the notoriously conservative makeup of the Fifth Circuit, the notoriously liberal Ninth Circuit applied the same principle (albeit under different circumstances) in 2003. See *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003) (“[A] plaintiff, to challenge [a racial] classification, must establish standing through showing a particularized denial of equal treatment.”). Moreover, the panel that decided *Moore* included two of the Fifth Circuit's more liberal members, Judge James Graves, Jr., and Judge Stephen Higginson, both Obama appointees. Judge Higginson wrote the opinion. *Moore*, 853 F.3d at 247.

11. Because this Article focuses on racial subordination, I use “race” throughout it as a shorthand for the entire group of suspect classifications that trigger increased equal protection scrutiny. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (sex); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (national origin); *SmithKline Beecham Corp. v. Abbot Lab's*, 740 F.3d 471, 484 (9th Cir. 2014) (sexual orientation); cf. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608–09 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (holding that discrimination based on transgender status is sex discrimination for equal protection analysis); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–42 (2020) (holding that discrimination based on transgender status and sexual orientation is sex discrimination prohibited by Title VII). I do not intend this shorthand to imply that the Equal Protection Clause should be limited to race and not extend to these or other classifications that serve or have served as bases of systemic societal subordination. Cf. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (suggesting that groups that have been “subjected to discrimination . . . exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and . . . area minority or politically powerless” should receive suspect status); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 778–88 (2014) (discussing classifications the Court has denied suspect status).

Rather, most existing scholarship approaches the problem of discriminatory government expression from the standpoint of expressive theory, which contends that government conduct must express “equal concern and respect” for all citizens.¹² While discriminatory government expression violates this requirement by definition, expressive theorists have not demonstrated how this violation inflicts the individual classification injury required by anticlassification. In other words, expressive theorists have failed to show why the harms of discriminatory government expression are among those against which the Equal Protection Clause should protect. In short, antisubordinationists have contested the dominant anticlassificationist interpretation of the Clause but have not articulated the subordinating harms of discriminatory government expression. At the same time, expressive theorists have articulated the harms of discriminatory government expression in ways that fall outside the dominant anticlassificationist interpretation of the Clause but have not contested that interpretation.

This Article extends the antisubordination tradition to discriminatory government expression by explaining how it contributes to subordination via a new paradigm of power: *coercive ideology*. Coercive ideology occurs when dominant groups coerce individuals into performing social roles consistent with the dominant ideology, thereby translating the dominant ideology into a social reality. Discriminatory government expression furthers coercive ideology by reminding individuals both of their prescribed roles and of the dominant group’s power to punish failures to perform those roles. Thus, discriminatory government expressions serve as veiled threats. The threat ensures that everyone performs their assigned roles, while the veil facilitates the falsehood that the dominant ideology—rather than naked coercion—is driving the show.

Part I begins with doctrine. It articulates the discriminatory treatment requirement, the rule that the Equal Protection Clause prohibits only discriminatory government treatment, not discriminatory government expression. It describes the requirement’s origins, function, and application and situates the requirement within anticlassification. It then shows how expressive theorists’ failure to grapple with the discriminatory treatment requirement’s anticlassification roots undermines their critiques before turning to antisubordination as a more fruitful starting point for such a critique.

Part II turns to theory, introducing coercive ideology. It explores how subordination functions as manipulation at the level of individual decision-making and illustrates the discursive power of coerced individual decisions

12. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520 (2000) (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977)).

to perform compliance with the dominant ideology. It then explains the role of discriminatory government expression as veiled threats.

Part III concludes with history. It applies coercive ideology to the New South, the racialized caste system that controlled life in the American South from the 1890s to the 1960s. It describes the systematic violence of lynching with which white Southerners enforced the ideology of white supremacy known as the “Lost Cause.” It then explores how two features of the New South functioned as discriminatory government expression, emphasizing the subordinating purpose of Lost Cause Confederate monuments and the expressive purpose of Jim Crow segregation.

Ultimately, coercive ideology demonstrates that both Jim Crow segregation—the quintessential form of discriminatory government treatment—and Lost Cause monuments—the quintessential form of discriminatory government expression—contributed to subordination in the New South in large part *because* they were expressive. As such, there is no principled reason to treat discriminatory government treatment differently than discriminatory government expression under the Equal Protection Clause.

I. THE DISCRIMINATORY TREATMENT REQUIREMENT

As the law currently stands, government expression—no matter how discriminatory it may be—cannot be challenged under the Equal Protection Clause unless it is accompanied by some form of discriminatory government treatment. I label this doctrine *the discriminatory treatment requirement*. Though the requirement crystallized in *Allen v. Wright*¹³ in 1984, its roots lie in an earlier line of cases in which the Supreme Court developed the view that the Equal Protection Clause solely prohibits intentional racial classification of individuals. This interpretation, commonly called anticlassification, mandates the discriminatory treatment requirement because discriminatory government expression involves no individual classification. As anticlassification has solidified as the prevailing interpretation of the Clause, *Allen*’s discriminatory treatment requirement has barred equal protection challenges to even blatantly discriminatory government expression.

One strand of legal scholarship, expressive theory, directly challenges the discriminatory treatment requirement by positing that the Equal Protection Clause requires the government to express “equal concern and respect” for its citizens.¹⁴ But expressive theorists have not persuasively situated such a duty within the prevailing anticlassification interpretation of

13. 468 U.S. 737.

14. See Anderson & Pildes, *supra* note 12, at 1520.

the Clause. Another strand of legal scholarship, commonly called antisubordination, directly challenges anticlassification by positing that subordination rather than classification is the core injury against which the Equal Protection Clause protects. But antisubordinationists have not persuasively demonstrated how discriminatory government expression contributes to subordination. Thus, the discriminatory treatment requirement, the poisonous fruit of anticlassification's tree, remains alive.

A. *The Fruits and Roots of Allen v. Wright*

1. *Allen v. Wright*

The discriminatory treatment requirement developed in the context not of something the government did or even something the government failed to do, but something it failed to do adequately. In 1971, the Internal Revenue Service ("IRS") published a revenue ruling denying tax-exempt charitable status to private schools with racially discriminatory admissions policies.¹⁵ Five years later, parents of Black schoolchildren in seven states sued the IRS for failing to enforce this prohibition sufficiently.¹⁶ The parents alleged that the IRS continued to grant tax-exempt status to some schools with *de facto* or *de jure* racially discriminatory admissions policies in violation of its own ruling.¹⁷ Because these grants effectively constituted government support for racially segregated education, the parents claimed they violated the Equal Protection Clause.¹⁸

The Supreme Court disagreed. The Court first attempted to identify the harm caused to the parents and their children by the government support of segregated education caused by the IRS's underenforcement.¹⁹ None of the parents alleged that their children had been denied admission to a racially discriminatory private school or even that they wanted to send their children to such a school.²⁰ The Court thus concluded that the harm must be characterized in one of two ways. First, the underenforcement might express

15. Rev. Rul. 71-447, 1971-2 C.B. 230; *Allen v. Wright*, 468 U.S. 737, 740 & n.1 (1984), *abrogated in part on other grounds by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

The Supreme Court upheld the IRS's policy of denying tax-exempt status to such institutions, commonly referred to as "segregation academies" or "white flight schools," one year earlier in *Bob Jones University v. United States*, 461 U.S. 574, 604-05 (1983). On segregation academies generally, see KRISTEN GREEN, SOMETHING MUST BE DONE ABOUT PRINCE EDWARD COUNTY 96-97 (2015).

16. *Allen*, 468 U.S. at 744.

17. *Id.*

18. *Id.* at 745.

19. *Id.*

20. *Id.* at 746.

a discriminatory message toward all Black Americans by supporting educational institutions that exclude them.²¹ Alternatively, it might diminish the opportunity of Black children to receive a racially integrated education.²²

Only the first characterization is relevant here.²³ The Court conceded that “[t]here can be no doubt that this sort of noneconomic [stigmatic] injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.”²⁴ But in the next sentence, the Court rejected that “most serious” consequence as insufficient on its own: “Our cases make clear, however, that such injury accords a basis for standing only to ‘those persons who are *personally denied equal treatment*’ by the challenged discriminatory conduct.”²⁵ This principle permitted the Court to bypass consideration of whether the IRS’s unintentional underenforcement actually expressed a discriminatory message.²⁶ Rather, the Court held that the parents’ failure to demonstrate discriminatory treatment was fatal to their equal protection challenge regardless of any message expressed by the underenforcement.²⁷

The Court framed its holding in standing terms,²⁸ characterizing the injury caused by discriminatory government expression alone as not “judicially cognizable” under the Equal Protection Clause.²⁹ As Andrew Hessick has noted, the cognizability requirement of standing doctrine is distinct from its injury-in-fact requirement.³⁰ While the injury-in-fact requirement evaluates whether plaintiffs have suffered a “factual injury,” the cognizability requirement determines whether that injury implicates a legally protected right.³¹ The cognizability requirement thus calls for an

21. *Id.* at 754.

22. *Id.* at 756.

23. As for the second, the Court held that while the diminished opportunity to receive a racially integrated education is a judicially cognizable injury, the link between that injury and the IRS’s underenforcement was too tenuous to support standing. *Id.* at 756–59.

24. *Id.* at 755.

25. *Id.* (emphasis added) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)).

26. Indeed, in a footnote the Court stated that it “assume[d], without deciding, that the challenged Government tax exemptions are the equivalent of Government discrimination.” *Id.* at 754 n.20.

27. *Id.* at 755–56.

28. Under the now-familiar constitutional standing doctrine, plaintiffs must allege that the challenged action or policy has injured them in a way that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 149 (2010)).

29. *Allen*, 468 U.S. at 754.

30. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 307–08 (2008).

31. *Id.* Each of the three equal protection standing cases *Allen* cited to support the discriminatory treatment requirement—*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–67 (1972);

interpretation of the substantive meaning of the right in question.³² This distinction explains how the *Allen* Court could both acknowledge the seriousness of the harm caused by discriminatory government expression and deem that harm insufficient to grant standing on its own.³³ Though discussing standing doctrine, the Court was making a substantive determination about the meaning of the Equal Protection Clause—about whom and against what the Clause protects.³⁴

Compare *Washington v. Davis*,³⁵ in which the Court declared that government action must be motivated by a racially discriminatory purpose to violate the Equal Protection Clause.³⁶ This “intent requirement” is widely acknowledged as a substantive limitation on the scope of the Clause.³⁷ But the *Davis* Court could theoretically have achieved functionally the same result by tweaking *Allen*’s language of cognizability and stating, for example: “Our cases make clear, however, that a racially disparate impact accords a basis for standing only when the action that caused it is motivated by a racially discriminatory purpose.”³⁸ The legal jargon of *Allen* and *Davis* may

O’Shea v. Littleton, 414 U.S. 488, 499–500 (1974); and *Rizzo v. Goode*, 423 U.S. 362, 371–72 (1976)—involved injury-in-fact issues, not cognizability issues. In other words, the equal protection claims in *Moose Lodge*, *O’Shea*, and *Rizzo* failed in relevant part because the plaintiffs had not personally suffered the identified injury, not because the injuries themselves did not implicate the Equal Protection Clause. Eliding this distinction permitted *Allen* to avoid acknowledging, as the Court had in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974), that the Court had no compunction about placing the alleged constitutional injury—discriminatory government expression—beyond judicial reach. See *infra* Part I.A.2.

32. See Hessick, *supra* note 30, at 306–07.

33. See *Allen*, 468 U.S. at 755.

34. Hessick discusses *Lewis v. Casey*, 518 U.S. 343 (1996), as another example of the cognizability requirement functioning this way. In *Lewis*, the Court denied standing to incarcerated people challenging their lack of access to a law library because the injury was not judicially cognizable. *Id.* at 356–57. “The Court explained that the Constitution does not provide a right to a law library but provides only the narrower right of access to the courts.” Hessick, *supra* note 30, at 307.

35. 426 U.S. 229 (1976).

36. *Id.* at 239.

37. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) (describing *Davis* as imposing a “requirement[] . . . that a plaintiff seeking to make out an equal protection violation on the basis of racial discrimination must show purpose.”); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 494–95 (2003) (“[T]he issue was whether courts would sustain equal protection challenges to facially neutral state action that was not intended to be discriminatory but had discriminatory effects. *Washington v. Davis* answered no to that question.”).

38. Compare *Allen*, 468 U.S. at 755 (“There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.” (internal citation and quotation marks omitted)), with *Davis*, 426 U.S. at 242 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the

be different, but their effects are similar. Just as *Davis* imposed an intent requirement on equal protection claims, *Allen* imposed a discriminatory treatment requirement.

Couching the discriminatory treatment requirement in the language of standing allowed the *Allen* Court to avoid engaging with the substance of the Equal Protection Clause, as *Davis* did.³⁹ Instead, the Court warned that recognizing challenges to discriminatory government expression without discriminatory government treatment would throw open the floodgates of litigation so that a “[B]lack person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine.”⁴⁰ But the Court had multiple means of preventing such an outcome short of imposing the discriminatory treatment requirement. The Court could have held (or assumed without holding) that discriminatory government expression violates the Equal Protection Clause but that such messaging was not fairly traceable to the IRS’s underenforcement.⁴¹ Or the Court could have reached the merits, holding that any discrimination expressed by the IRS’s underenforcement was *de minimis* or nonexistent.

Instead, the Court imposed the sweeping rule that discriminatory government expression, no matter how severe, is *never* sufficient by itself to violate the Equal Protection Clause. As with most sweeping rules, the magnitude of *Allen*’s consequences would only become apparent with the passing of time.

2. *Allen*’s Fruits

In the forty years since *Allen*, the substantive effects of the discriminatory treatment requirement have become clearer as lower courts have used it to dismiss equal protection challenges to government expression much more blatantly discriminatory than whatever was expressed by the IRS’s underenforcement of its prohibition of tax-exempt status to racially discriminatory private schools. Recall that in *Moore v. Bryant*, the Fifth Circuit affirmed the district court’s application of the discriminatory treatment requirement to dismiss Carlos Moore’s equal protection challenge to the inclusion of the Confederate battle flag in Mississippi’s state flag.⁴² Moore argued *inter alia* that because purely expressive violations of the

rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.” (internal citation omitted).

39. See *Davis*, 426 U.S. at 239 (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”).

40. *Allen*, 468 U.S. at 756.

41. The Court did precisely this with its second characterization of the parents’ injury. See *supra* note 24 and accompanying text.

42. *Moore v. Bryant*, 853 F.3d 245, 253 (5th Cir. 2017).

Establishment Clause are sufficient to confer standing, purely expressive violations of the Equal Protection Clause should be treated the same way.⁴³ As the clearest statement of the substantive function of the discriminatory treatment requirement, the Fifth Circuit's response is worth quoting at length:

[S]tanding often turns on the nature and source of the claim asserted. The reason that Equal Protection and Establishment Clause cases call for different injury-in-fact analyses is that *the injuries protected against under the Clauses are different*. The Establishment Clause prohibits the Government from endorsing a religion, and thus directly regulates Government speech if that speech endorses religion. . . . The same is not true under the Equal Protection Clause: *the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging*.⁴⁴

While the Fifth Circuit may deserve credit for intellectual honesty, the implications of its words are stunning. In the absence of some action that can be characterized as “differential treatment,” no government expression, no matter how discriminatory or denigrating, can ever violate the Equal Protection Clause.⁴⁵ The Fifth Circuit did not address Moore's interpretation of the Confederate battle flag as a blatant symbol of white supremacy, nor district court Judge Carlos Reeves's extensive factual findings to that effect,⁴⁶ because the meaning of the flag was irrelevant. The Equal Protection Clause simply does not prohibit discriminatory government expression, even when it is blatant and deliberate. Perhaps sensing the magnitude of this principle, the *Moore* court rushed to reassure readers that “in cases where the Government engages in discriminatory speech, that speech likely will be coupled with discriminatory treatment.”⁴⁷

That assurance rang hollow less than a month later, when the Fifth Circuit doubled down on the discriminatory treatment requirement. In *Barber*

43. *Id.* at 250.

44. *Id.* (emphasis added) (internal quotation marks and citations omitted).

45. This characterization of *Allen* is consistent with those of other circuits. *See id.* at 249 (collecting cases from other circuits).

46. *See Moore v. Bryant*, 205 F. Supp. 3d 834, 838–45 (S.D. Miss. 2016), *aff'd*, 853 F.3d 245 (5th Cir. 2017).

47. *Moore*, 853 F.3d at 251.

In 2021, after well more than a century, Mississippi finally removed the Confederate battle flag from its state flag in response to public outcry over the murder of George Floyd, a Black man, by a white police officer. Veronica Stracqualursi, *Mississippi Ratifies and Raises Its New State Flag over the State Capitol for the First Time*, CNN (Jan. 13, 2021, 9:00 AM), <https://www.cnn.com/2021/01/12/politics/mississippi-new-state-flag-flown/index.html> [https://perma.cc/7AQP-CRRW].

v. Bryant,⁴⁸ a group of LGBTQ Mississippians challenged HB 1523,⁴⁹ which granted special protections to individuals with anti-LGBTQ beliefs,⁵⁰ and which Mississippi enacted as a response to the Supreme Court’s legalization of same-gender marriage in *Obergefell v. Hodges*.⁵¹ Once again, Judge Carlos Reeves wrote an opinion clearly linking HB 1523 to anti-LGBTQ bias.⁵² Once again, the Fifth Circuit ruled that the expression of a “clear message of disapproval” of LGBTQ people, without more, was not enough to render the law unconstitutional under the Equal Protection Clause.⁵³

The Fifth Circuit’s assurance rings even more hollow today, as prominent politicians wage a war on “wokeness” focusing especially on censoring the insights of Critical Race Theory and rolling back the rights of LGBTQ people.⁵⁴ In July 2023, Florida promulgated new education standards that require teachers to instruct students on the “personal benefit” that Black Americans received from chattel slavery.⁵⁵ Between 2021 and 2022, state and local governments adopted 241 measures intended to ban the teaching of “critical race theory,” including any reference to concepts such as systemic racism or white privilege.⁵⁶ Florida’s “Don’t Say Gay” law similarly prohibits instruction about sexual orientation and gender identity in the state’s elementary and high schools, which has resulted in at least one teacher being investigated for inappropriate conduct for showing a Disney

48. 193 F. Supp. 3d 677 (S.D. Miss. 2016), *rev’d*, 860 F.3d 345 (5th Cir. 2017).

49. *Id.* at 693. “LGBTQ” refers to the community of lesbian, gay, bisexual, transgender, and other queer people. I use this acronym interchangeably with the umbrella term “queer.”

50. *Id.* Specifically, HB 1523 forbids Mississippi’s state and local governments from “discriminating” against individuals based on three “sincerely held religious beliefs or moral convictions”: (a) that “Marriage is or should be recognized as the union of one man and one woman; (b) that “Sexual relations are properly reserved to such a marriage; and” (c) that “Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.” *Id.* at 693–94.

51. 576 U.S. 644 (2015).

52. *Barber*, 193 F. Supp. 3d at 691–95.

53. *Barber v. Bryant*, 860 F.3d 345, 357 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 652 (2018).

54. *See, e.g.*, Jonathan Weisman, *Are G.O.P. Voters Tiring of the War on ‘Wokeness’?*, N.Y. TIMES (Aug. 7, 2023), <https://www.nytimes.com/2023/08/06/us/politics/woke-republicans-poll.html> [<https://perma.cc/HMC6-WSSL>].

55. Andrew Atterbury, *New Florida Teaching Standards Say African Americans Received Some ‘Personal Benefit’ from Slavery*, POLITICO (July 20, 2023, 2:53 PM), <https://www.politico.com/news/2023/07/20/florida-black-history-teaching-standards-00107067> [<https://perma.cc/BE8T-268B>].

56. *See* TAIFHA ALEXANDER ET AL., TRACKING THE ATTACK ON CRITICAL RACE THEORY 10–11, 17 tbl.3 (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [<https://perma.cc/8TNZ-4DJ7>]. The scare quotes and lowercase letters indicate that the concepts commonly labeled “critical race theory” by the politicians behind these measures have little to do with Critical Race Theory, “an interdisciplinary practice and approach to understanding the foundations and maintenance of race and racial subordination in the legal system throughout history.” *Id.* at 4.

movie with an openly gay character.⁵⁷ Oklahoma's governor issued an executive order dubbed the "Women's Bill of Rights," legally defining "female" and "male" to correspond with sex assigned at birth in an intentional swipe at transgender people.⁵⁸ Arkansas's governor issued an executive order banning the use of "Latinx," a gender inclusive term to describe Hispanic Americans, in state documents.⁵⁹

Similar incidents are proliferating so quickly that they defy easy cataloguing in a law review article. Though they differ in form, the core of each incident is an intentionally, blatantly discriminatory government expression against a group which the Equal Protection Clause has been held to protect. Yet because none of these expressions accompany a readily identifiable form of discriminatory government treatment, individuals within those groups cannot invoke the Clause to defend themselves. The discriminatory treatment requirement silences the Equal Protection Clause, even in the face of such vitriol.

3. Classification, Always and Only

While the fruits of *Allen v. Wright*⁶⁰ are apparent and unambiguous, exposing its roots requires some excavation. *Allen*'s discriminatory treatment requirement is a manifestation of the Supreme Court's prevailing understanding of Equal Protection Clause that been dominant since the mid-1970s. Commonly called anticlassification, this approach is exclusively concerned with the distinctions—classifications—that the government draws between people.⁶¹ Because limited resources preclude individualized

57. Isabel Rosales & Jaide Garcia, *Florida School System Has Closed Investigation into Teacher Who Showed Disney Movie with Gay Character*, CNN (May 23, 2023, 10:16 PM), <https://www.cnn.com/2023/05/23/us/florida-teacher-lgbtq-disney-movie-investigation/index.html> [https://perma.cc/65UD-N93Z]. The incident makes clear that the only sexual orientations and gender identities about which instruction is prohibited are non-heterosexual, non-cisgender ones.

58. Sean Murphy, *Transgender Rights Targeted in Executive Order Signed by Oklahoma Governor*, AP NEWS (Aug. 1, 2023, 5:34 PM), <https://apnews.com/article/transgender-rights-oklahoma-governor-67dc0c4a9d769066ccb1b9835c71449f> [https://perma.cc/5QPL-R2G6].

59. Ayana Archie, *Arkansas Gov. Sarah Huckabee Sanders is Banning 'Latinx' from State Documents*, NPR (Jan. 13, 2023, 2:09 AM), <https://www.npr.org/2023/01/13/1148966968/sarah-huckabee-sanders-arkansas-latinx> [https://perma.cc/2BH9-YCFJ].

60. 468 U.S. 737 (1984).

61. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Antidiscrimination or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003). Owen Fiss first described anticlassification, which he called "antidiscrimination," in articulating an alternative in 1976. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976). Fiss used "discriminate" in its classical sense—that is, as a way of distinguishing between individuals or groups—rather than the pejorative sense the word has since acquired. See *id.* at 117 n.14.

Fiss himself traced the anticlassification approach to a "now classic" 1942 *California Law Review* article by Joseph Tussman and Jacobus tenBroek, in which they called it the "reasonable

treatment in most situations, the government must often group individuals together based on certain characteristics—that is, it must classify them.⁶²

Anticlassification therefore views an equal protection challenge as a question of difference: based on the purpose of the challenged law, similarly situated people should be treated similarly.⁶³ According to anticlassification, the purpose of the Equal Protection Clause is to protect individuals from arbitrary or irrelevant governmental classifications.⁶⁴ Anticlassification defines the equal protection injury as the harm to individual dignity that occurs when the government treats a person as a function of an irrelevant classification rather than as an individual.⁶⁵ Though its proponents sometimes acknowledge that arbitrary classification may lead to other injuries such as group subordination or societal divisions,⁶⁶ anticlassification views this harm

classification” principle. *Id.* at 110 n.2 (citing Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949)).

62. Tussman & tenBroek, *supra* note 61, at 343–44; Fiss, *supra* note 61, at 108–09.

63. Catharine A. MacKinnon, *MacKinnon, J., Concurring in the Judgment, in WHAT BROWN v. BOARD OF EDUCATION SHOULD HAVE SAID* 143, 151–52 (2001); Tussman & tenBroek, *supra* note 61, at 345–46; Fiss, *supra* note 61, at 108–09; *see also* MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 109 (1990) (noting that anticlassification “presumes that the status quo is natural and good, except where it has mistakenly treated people who are really the same as though they were different”). For the embodiment of this principle in case law, *see, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (noting without elaboration that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”).

64. Fiss described anticlassification as fundamentally concerned with “means-end rationality.” Fiss, *supra* note 61, at 111.

65. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2170 (2023); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”); *Gutter v. Bollinger*, 539 U.S. 306, 337 (2003); *id.* At 353–54 (Thomas, J., concurring in part and dissenting in part); *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)); *id.* at 276–77 (O’Connor, J., concurring); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (“Striking individual jurors on the assumption that they hold particular views simply because of their gender is practically a brand upon them, affixed by the law, an assertion of their inferiority.” (internal quotation marks omitted)); *see also* Fiss, *supra* note 61, at 127 (noting that anticlassification “yields a highly individualized conception of rights”); Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 207 n.23 (2010). Christopher Bracey calls this individualist conception of dignity “first-order personal dignity,” which he contrasts with “second-order communal” dignity that is also relevant (but often ignored) in equal protection challenges. *See* Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 697–702 (2005).

66. *See Parents Involved*, 551 U.S. at 797 (“Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”).

to individual dignity as the core injury against which the Equal Protection Clause protects, the injury from which all others flow.⁶⁷

To protect against this injury, anticlassification requires that all governmental classifications be at least rationally related to a legitimate government purpose.⁶⁸ But anticlassification analysis singles out certain classifications—e.g., race, gender, and national origin—as particularly “suspect” because governments have historically given them undue weight.⁶⁹ The increased risk that the government may use suspect classifications in an arbitrary manner requires that any such use be justified by a showing that it is warranted and necessary, a process called “heightened scrutiny.”⁷⁰

Though it has been largely ascendant since the mid-1970s,⁷¹ anticlassification’s hold on the Roberts Court is stronger than ever before.⁷² It is difficult to formulate a clearer statement of anticlassification than Chief Justice John Roberts’s quip in 2007 that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁷³

67. See *Grutter*, 539 U.S. at 326 (quoting *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995)); *id.* at 353 (Thomas, J., concurring in part and dissenting in part) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”); *Croson*, 488 U.S. at 493 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

68. See, e.g., *Cleburne*, 476 U.S. at 440.

69. See, e.g., *SFFA*, 143 S. Ct. at 2169–70; *United States v. Virginia*, 518 U.S. 515, 531–34, 550 (1996) (discussing history of gender discrimination in the U.S. and striking down exclusion of women from military school based on “generalizations about ‘the way women are’”); *Croson*, 488 U.S. at 493–94; *Bakke*, 438 U.S. at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. This perception of racial and ethnic distinctions is rooted in our Nation’s constitutional and demographic history.”); see also *supra* note 11 (discussing suspect classifications).

70. See *SFFA*, 143 S. Ct. at 2162; *Bakke*, 438 U.S. at 299 (“When [government actions] touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”).

71. See Norton, *supra* note 65, at 210–15 (tracing anticlassification’s ascendance from *Washington v. Davis* in 1976 to *Ricci v. DeStefano* in 2009).

72. See generally Khiara M. Bridges, *Foreword: Race and the Roberts Court*, 136 HARV. L. REV. 23 (2022). Three of the four newest Justices on the Court—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—joined the Chief Justice’s starkly anticlassificationist majority opinion in *Students for Fair Admissions*, 143 S. Ct. at 2153, in June 2023. Both Justice Gorsuch’s and Justice Kavanaugh’s separate concurrences in *SFFA* espouse anticlassificationist positions. See *id.* at 2209 (Gorsuch, J., concurring) (applying anticlassification to Title VI of the Civil Rights Act of 1964); *id.* at 2225 (Kavanaugh, J., concurring) (“[T]he Court’s opinion today is consistent with and follows from the Court’s equal protection precedent . . .”).

73. *Parents Involved*, 551 U.S. at 748. The quip exploits the definitional ambiguity of the word “discriminate,” see *supra* note 61, to suggest that racial *subordination* may be remedied by ending racial *classification*. Regardless, even anticlassification’s early proponents understood that the Equal Protection Clause cannot be reduced to such a tautology. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976); see also Bridges, *supra*

Anticlassification entails two distinct but related corollaries, which I label *always* and *only*.⁷⁴ The first is that classification *always* inflicts an equal protection injury, while the second is that *only* classification does so. The *always* corollary is often called “formal equality” or “colorblind constitutionalism.”⁷⁵ According to the *always* corollary, all acts of classification are harmful regardless of the race of the classified individual or

note 72, at 158; Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 967–68 (2010); cf. HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY 88 (2d ed. 1991) (1964) (“At the nodal points of the universe of public discourse, self-validating, analytical propositions appear which function like magic-ritual formulas . . . Such nouns as ‘freedom,’ ‘equality,’ ‘democracy,’ and ‘peace’ imply, analytically, a specific set of attributes that occur invariably when the noun is spoken or written.”).

74. The internal logic of anticlassification requires both these corollaries—that is, anticlassification collapses if either is discarded. The *always* corollary could be removed by permitting racial classifications designed to benefit certain groups—for example, by acknowledging that remedying historical and societal discrimination is a “compelling government interest” that satisfies strict scrutiny. Lawyers both on and off the Court have pushed this doctrinal shift for decades. See, e.g., *Bakke*, 438 U.S. at 362 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part); *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting); *SFFA*, 143 S. Ct. 2141, 2173 (2023) (characterizing the dissenting opinions as “permit[ting] state actors to remedy the effects of societal discrimination through explicitly race-based measures”). But see *id.* at 2249 (Sotomayor, J., dissenting) (calling this characterization a “straw man”). But once historical subordination is recognized as sufficiently compelling to justify the classification injury, why should nonclassification government conduct that contributes to subordination lay beyond the reach of the Clause? Cf. *supra* note 31 (describing the discriminatory treatment requirement as placing nonclassification conduct beyond the reach of the Equal Protection Clause).

Removing the *only* corollary would entail acknowledging other forms of injury—for example, expressive injuries. The result might be something like a “Don’t Say Race” law for the government. Cf. *supra* note 57 (discussing Florida’s Don’t Say Gay law). Confederate monuments might be banned, but so would official celebrations of Black History Month. As with the *always* corollary, however, the reasons for doing so sound in antisubordination. Indeed, as I argue in the next section, attempting to dislodge the discriminatory treatment requirement within the anticlassification framework has proved fruitless. If subordination provides the grounds for recognizing such injuries, it must also inform the remedy. This requires consideration of the overwhelming unidirectionality of racial subordination throughout American history—which of course destroys colorblindness. See Fiss, *supra* note 61, at 161 (noting the inherent asymmetry of antisubordination).

In short, anticlassification is like a Jenga tower: Pulling on one block brings down the whole tenuously constructed tower. Or from the other side: Antisubordination is like a cow. Once it gets its nose in the barn door, keeping the rest of it out becomes quite the challenge. Regardless—to invoke yet another simile—shoehorning antisubordination into the anticlassification framework puts the cart before the horse. See *id.* at 135 (describing attempts to justify affirmative action under anticlassification as “devoid of any theoretical foundations . . . As an intellectual feat this may be possible, but not within the confines of the anti[classification] principle”).

75. See, e.g., *SFFA*, 143 S. Ct. at 2164; *id.* at 2176–208 (Thomas, J., concurring) (offering “an originalist defense of the colorblind Constitution”); Fiss, *supra* note 61, at 119 n.17, 120; CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 33 (1987).

the government's motive.⁷⁶ Indeed, “[d]istinctions between citizens solely because of [suspect classifications] are *by their very nature* odious to a free people.”⁷⁷ Because of its focus on the injury to individual dignity, anticlassification explicitly denies the relevance of historical patterns of subordination to the equal protection analysis,⁷⁸ as well as judges' ability to distinguish a benevolent or benign classification from an invidious one.⁷⁹ Due to the nature of the equal protection disputes decided by the Supreme Court in recent decades, the *always* corollary has received the lion's share of criticism—both within the Court⁸⁰ and outside it.⁸¹

While the *only* corollary has received considerably less attention, it is no less embedded in anticlassification. According to the *only* corollary, intentional classification is the only government conduct that implicates the Equal Protection Clause.⁸² The intent requirement imposed by *Washington v. Davis*,⁸³ is one manifestation of the *only* corollary. But before *Davis*, there was *Palmer v. Thompson*.⁸⁴ In *Palmer*, the Supreme Court held that Jackson, Mississippi did not violate the Equal Protection Clause by closing its public pools to avoid racially integrating them.⁸⁵ The plaintiffs, Black Jacksonians,

76. *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 222 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989); *see also SFFA*, 143 S. Ct. at 2162 (identifying only two interests the Supreme Court has deemed sufficiently compelling to justify the use of race-based classifications). Bridges, *supra* note 72, at 158–59, describes the increasing tendency of the Roberts Court to interpret the Equal Protection Clause as “proscrib[ing] race consciousness as a general matter” in government decision making. *Cf.* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 296, 296 n.379 (1991) (describing the early tension between a “processual” interpretation of equal protection focused on purging impermissible considerations from government decision-making and an “impact” interpretation focused on harmful results).

77. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (emphasis added) (internal quotation marks omitted) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

78. *Adarand*, 515 U.S. at 223–24, labelled this proposition “consistency.” *Cf. SFFA*, 143 S. Ct. at 2173 (“[The dissenters] would instead uphold respondents’ admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. . . . [T]his Court has long rejected their core thesis.”).

79. *Adarand*, 515 U.S. at 223–24, labelled this proposition “skepticism.” *See also Croson*, 488 U.S. at 493–94; *SFFA*, 143 S. Ct. at 2161–62.

80. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”); *Adarand*, 515 U.S. at 245 (Stevens, J., dissenting) (accusing the majority of “disregard[ing] the difference between a ‘No Trespassing’ sign and a welcome mat”).

81. *See infra* notes 141–42 and accompanying text.

82. *See Fiss, supra* note 61, at 136–41 (discussing nonclassification government conduct that contributes to racial subordination).

83. 426 U.S. 229 (1976).

84. 403 U.S. 217 (1971).

85. *Id.* at 227.

presented substantial evidence that the closure was motivated by anti-Black racism.⁸⁶ The Court dismissed such evidence as beside the point. *Even if* the pools' closure was motivated by racism, "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."⁸⁷

On its way to this holding, the *Palmer* Court noted a crucial caveat: Jackson was neither operating segregated public pools nor denying Black citizens access to pools the city was otherwise operating.⁸⁸ In either case, the Court strongly implied, the outcome would have been different.⁸⁹ In other words, if the city had engaged in discriminatory treatment based on racial classifications, it would have violated the Equal Protection Clause. But because there was no classification involved in Jackson's blanket pool closures, there was no equal protection violation. This is the discriminatory treatment requirement in so many words—thirteen years before *Allen v. Wright*.⁹⁰

Washington v. Davis merely completed the circle *Palmer* began.⁹¹ After *Palmer*, lower federal courts began dutifully emphasizing disparate racial effects in finding equal protection violations.⁹² The *Davis* Court went out of its way to curtail this practice.⁹³ Five years after declaring discriminatory intent essentially irrelevant to the equal protection analysis in *Palmer*,⁹⁴ the

86. Justice White surveyed this evidence in his dissent. *See id.* at 246–54 (White, J., dissenting). Jackson reluctantly integrated its other public recreational facilities—including parks, the auditorium, the golf course, and the zoo—following a desegregation order from the Fifth Circuit in 1963. *See id.* at 220 n.5 (majority opinion); *id.* at 249 (White, J., dissenting) (citing *Clark v. Thompson*, 313 F.3d 637 (5th Cir. 1963)). Officials treated the city's pools differently due to their racist belief that sharing water with Black people was dirty and unhygienic. *See* HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 26–28 (2021). Jackson finally opened integrated public schools in 1975. Randall Kennedy, *Reconsidering Palmer v. Thompson*, 2018 SUP. CT. REV. 179, 210.

87. *Palmer*, 403 U.S. at 224; *see also* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 31 n.164 (2016).

88. *Palmer*, 403 U.S. at 220.

89. *See id.* (first citing *Watson v. City of Memphis*, 373 U.S. 526 (1963); and then citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

90. 468 U.S. 737 (1984).

91. *Washington v. Davis*, 426 U.S. 229 (1976).

92. *See* Klarman, *supra* note 76, at 297, 297 n.385; Eyer, *supra* note 87, at 48–50.

93. *See Davis*, 426 U.S. at 238–39, 238 nn.8–10. Though the complaint in *Davis* included an equal protection claim, the cert petition raised only Title VII issues. The Court decided the constitutional issue based on a procedural rule allowing it to "notice a plain error not presented." *Id.*; *see also* Eyer, *supra* note 87, at 51–52. Unwilling to overturn its decision five years earlier in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court left disparate impact liability under Title VII intact. *See Davis*, 426 U.S. at 249–52 (applying *Griggs*'s disparate impact standard); *see also* Kennedy, *supra* note 86, 209 n.120. *But see* Bridges, *supra* note 72, 154–58 (discussing likelihood that Roberts Court will invalidate statutory disparate impact liability).

94. *See* 403 U.S. at 224.

Court *required* discriminatory intent for equal protection violations in *Davis*.⁹⁵ The Court itself struggled with the apparent contradiction,⁹⁶ and later commentators have described *Palmer* and *Davis* as “embarrassingly difficult to reconcile.”⁹⁷ But the two are perfectly consistent if “discriminatory intent” means not *racist intent* but rather *intent to classify* based on race.⁹⁸ *Davis* confirmed that the lack of racial classification in Jackson’s pool closures determined *Palmer*’s outcome.⁹⁹ In other words—and this is the nub—*Davis* clarified that Jackson’s anti-Black racism, translated into law as blanket pool closures, did not violate the Equal Protection Clause because it did not treat citizens differently based on race.¹⁰⁰

Later cases substantiate *Davis* as requiring *intent to classify*.¹⁰¹ In 1985’s *Hunter v. Underwood*,¹⁰² for example, the Court struck down a provision of the Alabama Constitution of 1901 that disenfranchised individuals convicted of “crimes involving moral turpitude.”¹⁰³ Though the provision was facially neutral, officials had deployed it overwhelmingly to disenfranchise Black Alabamians.¹⁰⁴ Crucially, the historical record contained evidence that the

95. 426 U.S. at 239–40.

96. *See id.* at 242–43 (discussing *Palmer* as containing “some indications to the contrary” of the discriminatory intent requirement).

97. Klarman, *supra* note 76, at 297 n.386; *see also* Kennedy, *supra* note 86, at 209–10.

98. *See supra* note 61 (discussing definitional ambiguity of discrimination).

99. *See Davis*, 426 U.S. at 243 (distinguishing *Palmer* on the grounds that “[Jackson] was not overtly or covertly operating segregated pools and was *extending identical treatment* to both whites and Negroes” (emphasis added)). Klarman, *supra* note 76, at 297 n.386, describes *Davis* as “distinguishing *Palmer* on the unilluminating grounds that it involved different facts.” Fair enough, but those different facts betray the Court’s definition of *discrimination* as *classification*, even if the Court itself did not say as much.

Katie Eyer has excavated the progressive roots of the intent requirement as explaining the hesitance of the Court’s conservatives to adopt it and the failure of the Court’s liberals to resist it. *See Eyer, supra* note 87, at 53–54, 54 n.309. One plausible reading of *Palmer* and *Davis* is as a sleight of hand by which the more conservative Justices cabined the intent requirement through subtle redefinition into a doctrine that would ultimately limit rather than expand substantive equality.

100. Klarman, *supra* note 76, at 296, describes *Palmer* as “[t]he first case requiring the Court to choose between the processual [roughly, anticlassification] and impact [roughly, antisubordination] understandings of equal protection.” Fiss, *supra* note 61, at 139–41, understood *Palmer* this way even before *Davis* clarified it.

101. More specifically, later cases apply the gloss on *Davis*’s discriminatory intent requirement provided one year later by *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Arlington Heights* neither altered nor clarified the definition of “discriminatory intent” as “intent to classify.” *See id.* at 264–65.

102. 471 U.S. 222 (1985).

103. *Id.* at 231–32.

104. *Id.* at 227. Within two years of its adoption, the provision had disenfranchised roughly ten times the number of Black Alabamians as white Alabamians. By the 1980s, Black voters in some counties were nearly twice as likely as white voters to be disenfranchised under the provision for nonprison offenses. *Id.* (citing *Underwood v. Hunter*, 730 F.2d 614, 620 (11th Cir. 1984)).

provision was originally adopted to target Black voters.¹⁰⁵ Thus, Alabama both intended to and did enact the provision to treat Black voters differently from white voters. “[W]here both impermissible racial motivation and racially discriminatory impact are demonstrated,” the Court held, the Equal Protection Clause is violated.¹⁰⁶ *Hunter* and a handful of similar cases illuminate the narrow path between the Scylla of *Palmer* and the Charybdis of *Davis*: Even in challenges to facially neutral laws, the Court’s objective is to ascertain an intent to treat people differently based on race.¹⁰⁷

Palmer and *Davis* crystalized the *only* corollary: The government violates the Equal Protection Clause only when it *both* intends to treat people differently based on racial classifications *and* actually does so. Thus, *Allen v. Wright*’s statement that “only . . . those persons who are personally denied equal treatment” suffer an equal protection injury¹⁰⁸ was simply a restatement of what *Palmer* and *Davis* had already made clear. Consider once again the case of Carlos Moore, the Black lawyer who challenged the inclusion of the Confederate battle flag in the Mississippi state flag.¹⁰⁹ Mississippi did not assign a race to Moore or consider his perceived or self-identified race in any decisions about him as an individual.¹¹⁰ Indeed, Mississippi could not have considered Moore in adopting the Confederate battle flag into its state flag at all, since it did so in 1894, well before Moore was born.¹¹¹ The relentless logic of anticlassification’s *only* corollary, manifesting as the discriminatory treatment requirement, dictated the dismissal of Moore’s equal protection challenge: No classification, no injury.

105. *Id.* at 229–32 (“[I]t is beyond peradventure that [discrimination against Black voters] was a ‘but-for’ motivation of [the provision].”).

106. *Id.*

107. In *Keyes v. School District No. 1*, 413 U.S. 189, 198, 201–02 (1973), for example, the Court required public districts in Denver, Colorado, which were *de facto* racially segregated but had never been formally so, to show that a neighboring school district’s “policy of deliberate racial segregation” was sufficiently isolated. And in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 232–34 (1964), the Court refused to allow a Virginia county to close its public schools to avoid integrating them. In *Palmer*, 403 U.S. at 221–23, Justice Black distinguished *Griffin*—which he also wrote—because Prince Edward County had set up “a thinly disguised ‘private’ school system actually planned and carried out by the State and the county to maintain segregated education with public funds.” See also Brest, *supra* note 73, at 13–14 (discussing invalidity of racially motivated but facially neutral laws under anticlassification). But see Kennedy, *supra* note 86, at 207–08 (labelling Black’s description of *Griffin* in *Palmer* an “obfuscation”).

108. 468 U.S. 737, 755 (1984) (internal quotation omitted).

109. *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017).

110. See *Moore v. Bryant*, 205 F. Supp. 3d 834, 853 (S.D. Miss. 2016), *aff’d*, 853 F.3d 245 (5th Cir. 2017).

111. *Id.* at 838–45; see text accompanying *supra* note 7.

B. Challenging the Discriminatory Treatment Requirement

I am far from the first legal scholar to be troubled by the implications of discriminatory government expression, particularly in the form of state-sponsored Confederate iconography. The most comprehensive attempts to deal with the issue belong to, or can at least be fairly characterized as belonging to, *expressive theory*. Expressive theory posits that discriminatory government expression should be subject to constitutional scrutiny either because it violates a deontological duty owed by the government to its citizens or because it causes harm in the forms of personal offense and social stigma. Most expressive theorists have not engaged with *Allen* at all,¹¹² and the few who have done so have treated it purely as a standing decision without acknowledging its substantive implications.¹¹³ By failing to grapple with *Allen*'s discriminatory treatment requirement as an anticlassificationist limitation on the substance of the Equal Protection Clause, expressive theorists also fail to show why the Clause should protect against the harms they identify. Only a challenge to anticlassification itself can unseat the discriminatory treatment requirement and bring the harms of discriminatory government expression within the ambit of the Clause.¹¹⁴

1. Expressive Theory

Elizabeth Anderson and Richard Pildes define an “expressive theory” as one that evaluates behavior, including speech and conduct, by the attitudes it expresses “toward various substantive values.”¹¹⁵ In the legal context, the

112. See, e.g., Helen Norton, *The Equal Protection Implications of the Government's Hateful Speech*, 54 WM. & MARY L. REV. 159 (2012) (discussing the equal protection implications of hateful government speech without citing *Allen*).

113. See, e.g., Tebbe, *supra* note 1, at 661–62 n.56 (“*Allen v. Wright* could raise a relevant concern, even though standing is not my focus, if it was understood to say that expressive harm alone raises no constitutional problem on the merits. However, that decision is probably better read to address standing alone.”); Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 431–33, 458–62 (2007) (discussing *Allen* as standing decision and theorizing ways stigmatic harm should satisfy injury-in-fact requirement).

114. Per the government speech doctrine, the First Amendment's Speech Clause does not restrict government expression. See *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009)). The doctrine is based in part on the necessity for a wide range of government expression to perform public business and enact the popular will. See *id.* at 207–08. I agree with this rationale and with the government speech doctrine generally, but I obviously contend that the Equal Protection Clause (and the Establishment Clause, as I will argue in a future article) restrict government expression that contributes to racial (and religious) subordination. See *infra* Part II.

115. Anderson & Pildes, *supra* note 12, at 1504; see also Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 58 (2021) (“[E]xpressivist theories of morality and law understand the goodness or badness of all acts, including communicative acts, by the attitude expressed by the act or by the social meaning that attaches to the act. *Expressive wrongs* occur when a government act, symbolic or otherwise, communicates a constitutionally inappropriate meaning.”).

behavior under scrutiny is that of the government.¹¹⁶ The substantive values that determine the appropriate attitudes to be expressed by government behavior derive at least in part from the Constitution.¹¹⁷ As a rule, expressive theorists who address discriminatory government expression agree that one of the substantive values that the government's behavior must express is "equal concern and respect" for everyone.¹¹⁸ Because discriminatory government expression by definition expresses that some group of citizens is worthy of less concern and respect than others, expressive theorists view discriminatory government expression as wrong.¹¹⁹

116. Anderson & Pildes, *supra* note 12, at 1520.

117. Schragger, *supra* note 115, at 58.

118. See, e.g., Anderson & Pildes, *supra* note 12, at 1520; Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 8 (2000).

Expressive theorists often judge an expression by its "social meaning," which loosely refers to the meaning attributed to the expression by society regardless of the speaker's intent. See, e.g., Anderson & Pildes, *supra* note 12, at 1513; Hellman, *supra* note 118, at 23. Richard Ekins has critiqued the concept of social meaning, contending in part that a speaker's intent to insult is required to render a statement or action insulting. Richard Ekins, *Equal Protection and Social Meaning*, 57 AM. J. JURIS. 21, 27, 35 (2012). ("Acts do not express contempt; rather, agents express contempt (or admiration or fealty) by way of some act.").

A full treatment of this debate is beyond the scope of this Article, because the discriminatory treatment requirement applies even to government expression with a message that is explicitly, intentionally discriminatory. See *supra* Section I.A.2. That said, I agree with Ekins that "expression" requires intent to express. Thus, the government must intend to express a discriminatory message for its conduct to violate the Equal Protection Clause as *discriminatory government expression*. This requirement makes sense both theoretically and practically. From a theory standpoint, dominant-group intent is required for a discriminatory government message to function as a veiled threat within the framework of coercive ideology I articulate in Part II, *infra*. Pragmatically, requiring government intent to express a discriminatory message prevents equal protection challenges to every government action for which some unintentional discriminatory expression might be concocted. Notably, this requirement would foreclose the plaintiffs' claims in *Allen v. Wright*, 468 U.S. 737 (1984), because the IRS presumably did not intend to express a discriminatory message through the underenforcement of its own policy. See *supra* notes 15–21 and accompanying text.

Finally, I wish to emphasize that requiring an intent to express a discriminatory message for equal protection challenges to discriminatory government expression is distinct from the "intent to classify" requirement imposed upon equal protection challenges more broadly. See *Washington v. Davis*, 426 U.S. 229, 239 (1976); *supra* notes 90–98 and accompanying text. Unintentionally discriminatory messages, like actions that unintentionally create racially disparate impacts, may be challenged under different strands of antidisubordination theory. See *infra* Section I.B.2; see also Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (developing a critique of the intent requirement based on the stigma created by government actions with a racially disparate impact). Moreover, perpetuating or failing to correct a discriminatory expression that was originally unintentional may evince intent to express a discriminatory message, just as ignoring or failing to remedy an unintentional racially disparate impact may evince intent to discriminate. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979).

119. See L. Darnell Weedon, *A Growing Consensus: State Sponsorship of Confederate Symbols Is an Injury-in-Fact as a Result of Dylann Roof's Killing Blacks in Church at a Bible Study*, 32 BYU J. PUB. L. 113, 132 (2017) (applying this line of reasoning to inclusion of Confederate battle flag in Mississippi flag).

Expressive theorists have developed various taxonomies of the injuries caused by discriminatory government expression, but it is easiest to group them into deontological harms and consequentialist harms.¹²⁰ Deontological harm occurs automatically when the government breaches its duty to treat all people with “equal concern and respect.”¹²¹ This claim is unobjectionable nearly to the point of being axiomatic. Few would argue that it is moral for the government to disregard or disrespect people by expressing that one person or group of people is inherently worthier or more important than another. But the text of the Fourteenth Amendment guarantees “the equal protection of the laws,”¹²² not “equal concern and respect.” An understanding of the Clause rooted in anticlassification clearly has no space for the duty of “equal concern and respect” articulated by expressive theorists.¹²³ Indeed, the essence of the discriminatory treatment requirement articulated by *Allen v. Wright* and its progeny is that the Equal Protection Clause imposes no such duty.¹²⁴ Because expressive theorists do not provide any reasons *why* the Clause imposes such a duty, their deontological argument fails to engage persuasively with the discriminatory treatment requirement.

In contrast to deontology, consequentialism focuses on the consequences of discriminatory government expression.¹²⁵ Expressive theorists have identified two consequentialist harms of discriminatory

120. This categorization roughly follows that proposed by Richard Schragger, who calls deontological harms “expressive harms” and consequentialist harms “expressions that harm.” See Schragger, *supra* note 115, at 53. There is some overlap since consequentialist harms can be said to flow from the violation of the deontological duty while avoiding such harms may partially justify the existence of the duty.

121. See *supra* note 118 and accompanying text; Hellman, *supra* note 118, at 13 (“[T]he government may not express, in words or deeds, that it values some of us more than others.”). Ronald Dworkin coined the phrase “equal concern and respect” in his 1977 book *Taking Rights Seriously*:

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with *equal concern and respect*. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s.

DWORKIN, *supra* note 12, at 272–73 (emphasis added).

Dworkin later clarified that the phrase means that “[f]rom the standpoint of politics, the interests of the members of the community matter, and matter equally.” Ronald Dworkin, *Comment on Narveson: In Defense of Equality*, 1 SOC. PHIL. & POL’Y 24, 24, 31–32 (1983).

122. U.S. Const. amend. XIV, § 1.

123. See *supra* Section I.A.3.

124. See *supra* Sections I.A.1–I.A.2.

125. Schragger, *supra* note 115, at 53.

government expression: (1) personal offense and (2) social stigma.¹²⁶ But anticlassification also explicitly precludes such harms from counting as equal protection injuries.¹²⁷ Michael Dorf calls this preclusion “the sticks and stones baseline of constitutional law” in reference to the playground chant, “Sticks and stones may break my bones but words will never hurt me.”¹²⁸ The term captures the fact that the American legal tradition does not treat psychological injuries as serious.¹²⁹ Federal courts have frequently characterized such injuries as “mere offense” and downplayed them in various legal contexts,¹³⁰ regardless of sincerity or severity.¹³¹ This is true even when the psychological distress is severe enough to cause physical manifestations, such as heart arrhythmia, excessive sweating, and high blood

126. *See id.* at 53–57.

127. *See supra* Section I.A.1 (discussing *Allen v. Wright*, 468 U.S. 737 (1984)); Schragger, *supra* note 115, at 53–57 (collecting cases trivializing “mere offense”).

128. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1277, 1284–86 (2011).

129. *Id.* In no way do I intend to trivialize the serious injuries, psychological and otherwise, that result from discriminatory government expression.

130. *See, e.g., Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring) (“[T]his Court has already rejected the notion that offense alone qualifies as a ‘concrete and particularized’ injury sufficient to confer standing.”); *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (noting that “[o]ffense . . . does not equate to coercion” sufficient for Establishment Clause injury); *United States v. Castleman*, 572 U.S. 157, 167 (2014) (stating that “mere offensive touching” is insufficient to constitute “violent force” in domestic violence statute); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (stating that “mere offensive utterances” are insufficient to constitute sexual harassment in violation of Title VII); *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 485–86 (1982) (“The psychological consequences presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”); *Klen v. City of Loveland*, 661 F.3d 498, 510 n.5 (10th Cir. 2011) (“Mere offense, even if objectively justified, cannot be a sufficient basis for establishing fighting words.”); *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) (“[M]ere offense is not a justification for the suppression of speech.”).

131. *See Whitmore v. Arkansas*, 495 U.S. 149, 166 (1990) (“However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this.” (quoting *Gusman v. Marrero*, 180 U.S. 81, 87 (1901))); *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (“The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”).

pressure.¹³² Scholars have been similarly dismissive.¹³³ Indeed, even when the Supreme Court has taken psychological injuries seriously, it has relegated them to one negative consequence of otherwise illegal action.¹³⁴ Such “exceptions” prove the rule.

Expressive theory’s struggles illustrate the futility of attempting to dislodge the discriminatory treatment requirement within the confines of anticlassification analysis. No description of the injuries caused by discriminatory government expression, no matter how sympathetic or compelling, will convince federal courts to rectify them unless they are the kinds of injuries against which the Equal Protection Clause protects.¹³⁵ Reaching discriminatory government expression requires reevaluation of the “gravamen of an equal protection claim”¹³⁶—that is, the meaning and reach of the Clause itself.

2. Antisubordination

Throughout anticlassification’s inception and ascendancy, some jurists and scholars have propounded an alternative framework for understanding and applying the Equal Protection Clause: antisubordination.¹³⁷

132. See *Moore v. Bryant*, 205 F. Supp. 3d 834, 854 (S.D. Miss. 2016) (“Moore’s arguments are phrased as constitutional claims, yet his allegations of physical injuries suggest that he is making an emotional distress tort claim. To succeed in constitutional litigation, however, Moore needs to identify that part of the Constitution which guarantees a legal right to be free from anxiety at State displays of historical racism. There is none. We are again back at a stigmatic injury untethered to a legal right, and that—even a stigmatic injury causing physical ailments—is not sufficient for standing.”), *aff’d* 853 F.3d 245 (5th Cir. 2017).

133. See, e.g., Joseph C. Davis & Nicholas R. Reaves, *Fruit of the Poisonous Lemon Tree: How the Supreme Court Created Offended-Observer Standing, and Why It’s Time for it to Go*, 96 NOTRE DAME L. REV. REFLECTION 25, 28 (2020); John R. Suermann, *Regulating Standing: Defending the Constitution, Separation of Powers, and Religious Symbols from Offended Observers*, 17 HOLY CROSS J.L. & PUB. POL’Y 178, 188–92 (2013); David Harvey, *It’s Time to Make Non-Economic or Citizen Standing Take a Seat in Religious Display Cases*, 40 DUQ. L. REV. 313, 366–67 (2002); William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 353 (1991).

134. *Allen v. Wright* is the quintessential example of this: “There can be no doubt that this sort of noneconomic injury [the stigmatizing injury often caused by discriminatory government expression] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to ‘those persons who are personally denied equal treatment by the challenged discriminatory conduct.’” 468 U.S. 737, 755 (1984) (emphasis added) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)).

135. See *Moore*, 205 F. Supp. 3d at 854 (“To succeed in constitutional litigation, however, Moore needs to identify that part of the Constitution which guarantees a legal right to be free from anxiety at State displays of historical racism. There is none.”).

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

137. See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1063–64 & n.16 (2011). Fiss is widely credited with first articulating antisubordination, which he called “the group-disadvantaging principle.” Fiss, *supra*

Antisubordination proceeds from a historical consciousness that groups of people have been and continue to be subordinated based on certain characteristics; that this subordination has been and still is reflected in and perpetuated by social systems and institutions, including legal systems and institutions; and that this subordination continues to have profound consequences for the life outcomes of subordinated group members.¹³⁸ Antisubordinationists view this subordination as the opposite of equality and the ultimate injury against which the Equal Protection Clause protects.¹³⁹ Antisubordination therefore evaluates the constitutionality of government behavior under the Clause based on whether it contributes to or ameliorates subordination.¹⁴⁰

Antisubordinationists acknowledge that classification has frequently been a powerful tool to accomplish subordination,¹⁴¹ but they deny that classification is harmful per se. Indeed, antisubordinationists charge that, by vilifying classification regardless of its impact on the distribution of power,

note 61, at 147; see Balkin & Siegel, *supra* note 61, at 9. Ruth Colker coined the term “antisubordination” a decade later. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 n.12 (1986). Antisubordination has also been called antisubjugation, equal citizenship, anticaste, and substantive equality. Barnes & Chemerinsky, *supra* note 73, at 1064; Balkin & Siegel, *supra* note 61, at 9. MINOW, *supra* note 63, at 110–14, articulated a similar approach called the “social-relations approach.”

138. See, e.g., Colker, *supra* note 137, at 1008–09 nn.15–16.

139. See MACKINNON, *supra* note 75, at 40 (“[A]n equality question is a question of the distribution of power.”); Fiss, *supra* note 61, at 157.

140. MACKINNON, *supra* note 75, at 43 (“Once no amount of differences justifies treating women as subhuman, eliminating that is what equality law is for.”); cf. MARCUSE, *supra* note 73, at xlii–xliii (noting that critical theory proceeds from two value judgments: that “human life is worth living” and that “specific possibilities exist for the amelioration of human life and specific ways and means of realizing these possibilities”).

While a full treatment of the subordination inquiry is beyond the scope of this Article, I note that the impact of challenged government conduct on subordination is a factual question to be determined based on the totality of the circumstances. Ultimately, the Equal Protection Clause grants all individuals, regardless of race, the right to be free from racial subordination. But the vastly disparate legal treatment of racial groups throughout America’s history—and the persistent regime of racialized inequality it created—must inform any good-faith subordination inquiry. Antisubordination does not require denial or deprecation of the psychological and material injuries suffered by white Americans in the service of remedial measures any more than deciding that childless taxpayers should be made to give up some discretionary income to support local schools. It requires merely that those injuries be considered in proper perspective beside the accumulated consequences of four centuries of racial domination. Cf. Bridges, *supra* note 72, at 133–67 (discussing the Roberts Court’s increasing solicitation for the injuries of white plaintiffs challenging remedial measures); Crenshaw, *supra* note 5, at 1376–77; Tah-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [https://perma.cc/2X5T-WR8D].

141. See MACKINNON, *supra* note 75, at 40; see also *id.* at 37 (“I will also concede that there are many differences between women and men. I mean, can you imagine elevating one half of the population and denigrating the other half and producing a population in which everyone is the same?”); MINOW, *supra* note 63, at 111 (“[T]he statement of difference distributes power.”).

anticlassificationists have confused the end and the means of equal protection jurisprudence. In other words, by focusing myopically on the injury created by government classification itself, anticlassificationists erase or ignore the differences in material circumstances and life outcomes which those classifications were developed and employed to justify.¹⁴² This inversion has led the anticlassificationists on the Supreme Court to apply the Equal Protection Clause in ways that preserve rather than disrupt existing hierarchies.¹⁴³ Antisubordination first developed in opposition to this inversion and its incongruous results.¹⁴⁴

As equal protection jurisprudence has developed in increasingly anticlassificationist directions, scholars have articulated arguments for antisubordination's superiority based on several distinct modes of constitutional interpretation. From an originalist perspective, some have argued that antisubordination comports better than anticlassification with the original meaning of the Equal Protection Clause and the intentions of its Framers.¹⁴⁵ Others have argued that antisubordination better explains the reasoning and results in *Brown v. Board of Education*¹⁴⁶ and the other cases that dismantled Jim Crow segregation¹⁴⁷ than anticlassification does.¹⁴⁸ Some of the most compelling arguments for antisubordination have come from policy arguments made by those frustrated with anticlassification's inability or unwillingness to rectify the vast disparities that continue to permeate virtually every aspect of American society.¹⁴⁹

142. Barbara and Karen Fields call this the "race-racism evasion." KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE* 99–103 (2012) ("[R]acism, unlike race, is not a fiction, an illusion, a superstition, or a hoax. It is a crime against humanity."); see also MACKINNON, *supra* note 75, at 8, 36–37.

143. See, e.g., Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 17–18 (2015); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142, 1146 (1997); MACKINNON, *supra* note 75, at 42 ("[I]n the view that equates differentiation with discrimination, changing an unequal status quo is discrimination, but allowing it to exist is not.")

144. See Balkin & Siegel, *supra* note 61, at 14.

145. See Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 29–48 (2020); Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 3 CHI.-KENT L. REV. 1019, 1037–41 (2014); Barnes & Chemerinsky, *supra* note 137, at 1066–76.

146. 347 U.S. 483 (1954).

147. See *infra* Section III.B.2.

148. See, e.g., Colker, *supra* note 137, at 1022–23. But see Balkin & Siegel, *supra* note 61, at 11 (arguing that *Brown* and related cases contained language and reasoning reflecting both antisubordination and antidifferentiation).

149. See, e.g., Siegel, *supra* note 143, at 1147 ("Today, no less than in the past, the nation gives reasons for sanctioning practices that perpetuate the race and gender stratification of American society."); Colker, *supra* note 137, at 1004; see also ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 29–30 (1994)

Antisubordination responds to anticlassification's *always* corollary¹⁵⁰ with an insistence that context—especially historical context—matters.¹⁵¹ More specifically, antisubordinationists emphasize the unidirectional nature of subordination, which inherently sorts individuals into dominant and subordinate groups.¹⁵² White Americans have subordinated Black Americans and other non-white Americans because of their race, not vice versa;¹⁵³ men have subordinated women¹⁵⁴ because of their gender, not vice versa.¹⁵⁵ In doing so, to be sure, the dominant group has classified both itself and the subordinated group.¹⁵⁶ But the mere fact that a tool has been used for invidious purposes does not render the tool itself invidious. To believe otherwise is not merely to “disregard the difference between a ‘No Trespassing’ sign and a welcome mat;”¹⁵⁷ it is to equate the use of a blade to perform life-saving surgery and the use of a blade to commit murder.

Antisubordination's response to the *only* corollary has focused overwhelmingly on *Washington v. Davis*'s intent requirement and its preclusion of disparate impact liability.¹⁵⁸ But antisubordination scholars have thus far paid little attention to the discriminatory treatment requirement.¹⁵⁹ Situating discriminatory government expression within an antisubordination approach to the Equal Protection Clause requires understanding expression's role in subordination itself.

II. COERCIVE IDEOLOGY

Discriminatory government expression plays a fundamental role in subordination. Existing legal scholarship on discriminatory government

(advocating an “abolitionist” interpretation of the Equal Protection Clause that emphasizes the word *protection* as much as the word *equal*).

150. See *supra* notes 73–77 and accompanying text (describing *always* corollary).

151. See Crenshaw, *supra* note 5, at 1369–81 (discussing importance of race consciousness); Colker, *supra* note 137, at 1011–12. Fiss, *supra* note 61, at 161, called this the “asymmetry” of equal protection.

152. MACKINNON, *supra* note 75, at 148–51 (“[I]t is group dominance in the historical space that is the enemy of equality.”).

153. Crenshaw, *supra* note 5, at 1370–72.

154. Including transgender women, non-binary femme people, and people assigned female at birth.

155. MACKINNON, *supra* note 75, at 40–42.

156. *Id.*; Crenshaw, *supra* note 5, at 1370 (“Racism serves a consensus-building hegemonic role by designating Black people as separate, visible ‘others’ to be contrasted in every way with all other social groups.”).

157. *Adarand Constrs. v. Peña*, 515 U.S. 200, 244 (1995) (Stevens, J., dissenting).

158. See, e.g., Siegel, *supra* note 143, at 1131–35 (discussing the intent requirement as “status-enforcing”); Lawrence, *supra* note 118, at 319 n.3 (collecting early sources). On the intent requirement, see *supra* notes 94–105 and accompanying text.

159. *But see* Fiss, *supra* note 61, at 136–41, 157–59 (discussing facts of *Palmer v. Thompson* as example of subordinating government conduct without classification).

expression has focused largely on its psychological effects. Though these consequences are legitimate and may reinforce subordination, they are largely secondary to its actual process.¹⁶⁰ Exposing the centrality of discriminatory government expression to subordination requires a more precise understanding of the way subordination functions as manipulation at the level of individual decision-making. This Part articulates that more precise understanding, which I label *coercive ideology*.

Coercive ideology occurs when dominant groups coerce individuals into performing social roles consistent with the dominant ideology, thereby translating the dominant ideology into a social reality. Discriminatory government expression furthers coercive ideology by reminding individuals both of their prescribed roles and of the dominant group's power to punish failures to perform. Dominant groups deploy discriminatory government expression as a veiled threat to coerce compliance while maintaining the façade of consent. Even if no one actually believes the dominant ideology, most act as if they do. The result is a panorama of daily life that conforms with the dominant ideology—in other words, subordination.

A. Gramsci's Hegemony

Human societies tend to be structured as systems of group-based social hierarchies.¹⁶¹ A group-based social hierarchy is one in which a person's access to power and resources is to some extent dependent on their membership in a socially-defined group—such as race, gender, or religion—instead of their individual characteristics, such as talent and motivation.¹⁶² In a group-based social hierarchy, a dominant group is one whose members systematically enjoy a disproportionate share of power and resources at the expense of members of subordinated groups by virtue of their membership in the dominant group.¹⁶³

160. See *supra* notes 129–134 and accompanying text.

161. JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 31–32 (1999). Developed by psychologists Jim Sidanius and Felicia Pratto, Social Dominance Theory (“SDT”) is a framework for identifying and understanding these systems of group-based hierarchies, including how they form and persist. *Id.* at 39. Despite its influence on other academic disciplines, SDT has made few inroads into legal scholarship. David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033, 1040–41 n.24 (2019). Indeed, I have located only one other article that mentions SDT in the context of equal protection jurisprudence. See Hutchinson, *supra* note 143, at 41–42 (marshaling SDT as one part of a sweeping critique of anticlassification).

162. SIDANIUS & PRATTO, *supra* note 161, at 32.

163. *Id.* In practice, individuals belong to multiple intersecting social groups, and the relevance of each group membership varies across circumstances. While dominance is thus highly context-dependent, “in given contexts we can make judgments concerning who has power over whom.” TIM CRESSWELL, IN PLACE/OUT OF PLACE: GEOGRAPHY, IDEOLOGY, AND TRANSGRESSION 115

Despite their universality as generalized phenomena, particular instances of group-based social hierarchies do not arise naturally.¹⁶⁴ In other words, while humans in all societies may possess an inherent instinct to distribute power and resources unequally based on group membership, the specific criteria for group membership selected by the humans in each society are neither inherent nor natural.¹⁶⁵ Because group-based hierarchies do not arise naturally, they must be created, imposed, and maintained, a process called *subordination*.¹⁶⁶ The most obvious means available to dominant groups—from playground bullies to slave masters—to achieve subordination is violent force.¹⁶⁷ Violence is a notoriously inefficient means to achieve subordination, however, because “[t]here is never ultimately enough force to go around, particularly since submission is hardly ever an end in itself.”¹⁶⁸ But if this is so, why are group-based hierarchies so ubiquitous and enduring? If violent force alone is insufficient to deprive humans of their freedom, why do people remain everywhere in chains?¹⁶⁹

This question troubled Italian political dissident Antonio Gramsci in the 1920s and 1930s. As he served his prison sentence for opposing Benito Mussolini’s fascist regime, Gramsci struggled to understand why the working classes of Western European nations and the United States failed to rise up

(1996). In other words, whether a group is socially dominant or subordinated is a factual question that depends on the totality of the circumstances.

The word “systematic” indicates that it is a group’s position within society, rather than isolated individual or community dynamics, that is relevant for determinations of dominant or subordinated status.

164. See THOMAS PIKETTY, *CAPITAL AND IDEOLOGY* 7–8 (Arthur Goldhammer trans., 2020) (2019) (“Inequality is neither economic nor technological; it is ideological and political [I]nequality varies widely in time and space, in structure as well as magnitude.”). This is captured by Sidanius and Pratto’s emphasis on “arbitrary-set” systems, in which groups are defined based on “any . . . socially relevant group distinction the human imagination is capable of constructing.” SIDANIUS & PRATTO, *supra* note 161, at 33. While age-based (i.e., adults dominant over children) and gender-based (i.e., men dominant over women) hierarchies appear to be universal in human societies, arbitrary-set hierarchies seem to arise only in non-subsistence societies—that is, societies with some measure of economic surplus. *Id.* at 35–36.

165. See, e.g., JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 94–112 (1995); MINOW, *supra* note 63, at 111–12. Searle posits that status functions arise via the assignment of power and value to an arbitrary characteristic by collective intentionality.

166. See STEVEN LUKES, *POWER: A RADICAL VIEW* 163 (3d ed. 2021). This process is also commonly called *domination* or *oppression*. Though I use *subordination* in keeping with the bulk of the legal literature, I intend the terms to be read synonymously.

167. See MARY R. JACKMAN, *THE VELVET GLOVE: PATERNALISM AND CONFLICT IN GENDER, CLASS, AND RACE RELATIONS* 59 (1994).

168. FIELDS & FIELDS, *supra* note 142, at 138; see also JACKMAN, *supra* note 167, at 59, 63.

169. This is of course a shameless paraphrase of JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Peter Eckler trans., 1893) (1762).

in a Bolshevik-style revolution to depose their bourgeois overlords.¹⁷⁰ Gramsci's answer was to expand the toolbox of subordination to include *ideology* as well as violent force.¹⁷¹ Gramsci postulated that dominant groups need not actually employ violence to dominate subordinated group members to the extent that subordinated group members consent to the control of the dominant group. Dominant groups secure that consent by controlling the moral, economic, spiritual, intellectual, political, and "common sense" beliefs of society to legitimate their right to rule—in Gramsci's terms, to establish *hegemony*.¹⁷² The dominant group imposes moral beliefs via its control of the criminal law, mass media, and family structures; economic beliefs via the civil legal system and financial institutions; spiritual beliefs via religious institutions; intellectual beliefs via schools; and political beliefs via political parties and nonprofit organizations.¹⁷³ Through these institutions, the ideology of the dominant group becomes the "common sense" of a society.¹⁷⁴ When subordinated group members accede to this common sense, it becomes a *false consciousness* that induces them to consent to and participate in their own domination.¹⁷⁵ Hegemony thus serves two mutually reinforcing goals of the dominant group: first, to preserve resources, and second, to mask subordination behind the fiction of consent.

The "recovery" of Gramsci's concept of hegemony in the early 1980s¹⁷⁶ coincided with the development of antisubordination theory¹⁷⁷ and the broader Critical Legal Studies movement.¹⁷⁸ Prominent scholars used hegemony to critique existing conceptions of law and power.¹⁷⁹ But in part because of the controversy surrounding false consciousness¹⁸⁰ and in part

170. Quintin Hoare & Geoffrey Nowell Smith, *Introduction to SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI*, at lxxxix–xcvi (Quintin Hoare & Geoffrey Nowell Smith trans., 1971 ed.).

171. JOSEPH V. FEMIA, *GRAMSCI'S POLITICAL THOUGHT: HEGEMONY, CONSCIOUSNESS, AND THE REVOLUTIONARY PROCESS* 24 (1981).

172. *Id.* at 24–25.

173. The extent to which the state formally controls these institutions differs by institution and by society. Gramsci attributed much of the strength of bourgeois hegemony in the West to the organizations of such institutions largely outside the state in a sphere he called "civil society." *See id.* at 26–29.

174. *See* Gramsci, *Critical Notes on an Attempt at Popular Sociology*, in *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI*, *supra* note 170, at 419, 423–25.

175. FEMIA, *supra* note 171, at 43 (quoting Gramsci, *Some Preliminary Points of Reference*, in *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI*, *supra* note 170, at 323, 326–27).

176. *See* ROBERT BOCOCK, *HEGEMONY* 21 (1986).

177. *See supra* Section I.B.2.

178. *See* Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L.R. 515, 515, 532–33.

179. *See id.* at 515, 515 n.2 (collecting sources); *see also* Crenshaw, *supra* note 5, at 1350–52.

180. *See infra* notes 252–254 and accompanying text.

because of tensions inherent in the critical movement itself, hegemony soon fell out of favor in legal academia.¹⁸¹ Contemporary legal scholarship typically eschews the idea of an overarching cultural hegemony in favor of multiple legal hegemonies—that is, areas of law that exert hegemonic influence over specific fields of human relations.¹⁸²

Nevertheless, my project to elucidate discriminatory government expression's role in subordination begins with Gramsci's insight that ideology functions together with coercion to facilitate domination, but it departs from traditional interpretations that treat coercion and ideology as largely independent mechanisms of control.¹⁸³ Understanding the interpenetration of coercion and ideology begins with understanding how subordination functions at the level of individual choice.

B. Domination as Manipulation

In his 1978 essay *The Power of the Powerless*, Czechoslovak dissident Václav Havel tells of a Soviet greengrocer who displays a sign proclaiming “Workers of the world, unite!” in his shop window.¹⁸⁴ The customer of a store displaying such a sign today in Cleveland, Ohio, would justifiably read it as an indication of the owner's bold Marxist political views.¹⁸⁵ Yet Havel expresses skepticism of the Soviet greengrocer's sincerity.¹⁸⁶ In Havel's view, the greengrocer's display is not a courageous proclamation of proletarian sympathies but rather a self-interested performance of conformity with the dominant Soviet ideology:

Obviously the greengrocer is indifferent to the semantic content of the slogan on exhibit; he does not put the slogan in his window from any personal desire to acquaint the public with the ideal it expresses. This, of course, does not mean that his action has no motive or significance at all, or that the slogan communicates

181. See Litowitz, *supra* note 178, at 536–39.

182. *Id.*

183. Kimberlé Crenshaw criticized this strict separation of coercion and ideology more than thirty years ago, noting its inconsistency with Gramsci's own articulation of hegemony. See Crenshaw, *supra* note 5, at 1359–60 & nn.106–108. Crenshaw posited that the coercion of a subordinated, nonconsenting group of “others” facilitated the ideological consensus of other groups within a society. *Id.* at 1360. While othering is an important component of subordination, Crenshaw's critique did not discuss the discursive power of the coerced performance of consent by subordinated group members. See *infra* Section II.C.2.

184. VÁCLAV HAVEL, *THE POWER OF THE POWERLESS* (Paul Wilson trans., 1978), reprinted in 32 E. EUR. POLITICS & SOC'YS & CULTURES 353, 359 (2018).

185. A full treatment of Soviet Marxist ideology is beyond the scope of this article. For a summary account, see SHEILA FITZPATRICK, *EVERYDAY STALINISM: ORDINARY LIFE IN EXTRAORDINARY TIMES: SOVIET RUSSIA IN THE 1930S*, at 15–24 (1999). For a fuller critique, see HERBERT MARCUSE, *SOVIET MARXISM: A CRITICAL ANALYSIS* (1958).

186. HAVEL, *supra* note 184, at 359.

nothing to anyone. The slogan is really a *sign*, and as such it contains a subliminal but very definite message. Verbally, it might be expressed this way: “I, the greengrocer XY, live here and I know what I must do. I behave in the manner expected of me. I can be depended upon and am beyond reproach. I am obedient and therefore I have the right to be left in peace.” This message, of course, has an addressee: it is directed above, to the greengrocer’s superior, and at the same time it is a shield that protects the greengrocer from potential informers. The slogan’s real meaning, therefore, is rooted firmly in the greengrocer’s existence. It reflects his vital interests.¹⁸⁷

Later in the essay, Havel illustrates the greengrocer’s “vital interests” by pondering what would happen to him if he failed to display the sign.¹⁸⁸ Soviet authorities would take the greengrocer’s shop from him and transfer him to a lower-paying job in a warehouse.¹⁸⁹ Those around him would persecute him.¹⁹⁰ The taint of the greengrocer’s disobedience would radiate outward from him to affect those closest to him, limiting the professional and leisure opportunities of his loved ones.¹⁹¹

1. *The Illusion of Choice*

American readers easily detect subordination in the greengrocer parable. At the most basic level, power is exercised any time one entity causes another to behave in a manner the other would not otherwise.¹⁹² One may exercise power by violently seizing physical control of another to make them perform the desired action against their will, such as in cases of assault, rape, and murder.¹⁹³ But that is obviously not the form of subordination at work in the greengrocer parable: No Soviet bureaucrat entered the greengrocer’s shop, grabbed him by the arms, and used his body to place the sign in the window. The greengrocer is instead presented with a choice: display the sign *or else*. The form of subordination present in the greengrocer parable is therefore *manipulation* rather than direct force.¹⁹⁴ That is, the dominant group—Soviet

187. *Id.*

188. *Id.* at 367.

189. *Id.*

190. *Id.* at 367–68.

191. *Id.*

192. See LUKES, *supra* note 166, at 21 (quoting Robert A. Dahl, *The Concept of Power*, 2 BEHAVIORAL SCI. 201, 202–03 (1957)). Power is an “essentially contested” concept, meaning that “reasonable people, who disagree morally and politically, may agree about the facts but disagree about where power lies.” *Id.* at 68. This definition is sufficiently basic to capture near-universal agreement. See *id.*

193. See *id.* at 26–27.

194. See *id.* at 26–27, 41.

authorities—have manipulated circumstances to induce the greengrocer to *choose* to display the sign.

Recall that direct force is inefficient,¹⁹⁵ that it inherently provokes resistance,¹⁹⁶ and that it often damages or even destroys its target.¹⁹⁷ For these reasons, manipulation via threat of negative consequences is a far more common form of subordination than the exertion of direct physical control over individuals or their property. When someone says that a person was “forced” to do something in common parlance, the speaker generally means that the person was given the choice to do it *or else* face some negative consequence—legally speaking, that the person did so “under duress.”¹⁹⁸ Even if the “or else” includes violence or death, and even if the choice seems patently obvious to the average observer, the person retains the choice of whether to comply.¹⁹⁹

Understanding how individuals make choices elucidates how dominant groups manipulate those choices. According to *expected utility theory*, individuals make choices by weighing the likelihood that each alternative will produce a desirable outcome.²⁰⁰ Imagine for example that I want to take a walk outside on an afternoon with a slight chance of rain and must decide

195. See *supra* notes 168–174 and accompanying text.

196. See JACKMAN, *supra* note 167, at 62.

197. FIELDS & FIELDS, *supra* note 142, at 155–56.

198. See *Duress*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *duress* as “a threat of harm made to compel a person to do something against his or her will or judgment”).

199. Havel calls this choice “the power of the powerless.” HAVEL, *supra* note 184, at 352; see also IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 2 (1998) (“All of which is to say that [American chattel] slavery, though imposed and maintained by violence, was a negotiated relationship. To be sure, the struggle between master and slave never proceeded on the basis of equality and was always informed by the master’s near monopoly of force Although the playing field was never level, the master-slave relationship was nevertheless subject to continual negotiation For while slaveowners held most of the good cards in this meanest of all contests, slaves held cards of their own. And even when their cards were reduced to near worthlessness, slaves still held that last card, which, as their owners well understood, they might play at any time.”).

200. See, e.g., LARA BUCHAK, RISK AND RATIONALITY 1 (2013). Importantly for my purposes, a desirable outcome includes the avoidance of an *undesirable* outcome.

Expected utility theory is a form of *rational choice theory*, which posits that humans are rational actors who make choices according to their own self-defined self-interest. See, e.g., Amy Allen, *Rationalizing Oppression*, 1 J. POWER 51, 52 (2008). A handful of scholars have applied rational choice theory to explain the nature and persistence of oppression. See *id.*; Joseph Heath, *Ideology, Irrationality and Collectively Self-Defeating Behavior*, 7 CONSTELLATIONS 363, 366 (2000); Ann E. Cudd, *How to Explain Oppression: Criteria of Adequacy for Normative Explanatory Theories*, 35 PHIL. SOC. SCI. 20, 45–47 (2005); ANN E. CUDD, ANALYZING OPPRESSION 37 (2006). To the extent that these scholars address ideology at all, they treat ideology as false consciousness, which they either take seriously, see CUDD, *infra*, at 170–73, or dismiss. See Heath, *supra*, at 370–71. I argue in Section II.C, *infra*, that ideology plays an important role in subordination regardless of the existence or prevalence of false consciousness.

whether to carry an umbrella.²⁰¹ If I choose to carry my umbrella and it does not rain, I have wasted energy by suffering an unnecessary encumbrance. If I choose to avoid the encumbrance of carrying my umbrella and it does rain, however, I may return to my apartment soaked to the bone. The primary variables influencing my decision are my subjective evaluation of the (un)desirability of each outcome—i.e., how cumbersome I find my umbrella versus how much I hate getting wet—as well as my tolerance for risk.²⁰² Accordingly, an external party may influence my choice by manipulating those variables—e.g., by offering me a smaller and lighter (but still effective) umbrella or by reassuring me that the chance of rain is within my tolerance for risk.

Viewing the greengrocer's compliance through the lens of expected utility theory highlights how Soviet authorities manipulated his decision: They dramatically increased the desirability of compliance for the greengrocer by virtually guaranteeing that noncompliance would cause ongoing upheaval in his life.²⁰³ By no means does the greengrocer's "choice" to comply erase the coercion behind his decision, nor does it somehow make him morally responsible for his own subordination.²⁰⁴ Indeed, the point is that this type of manipulation *is* coercion—that it is part and parcel of subordination.

201. This hypothetical is adapted from BUCHAK, *supra* note 200, at 1.

202. *Id.* Expected utility theorists differ over whether an individual's subjective preferences can differ from an external, objective "utility." See *id.* at 17–18. While a thorough treatment of this debate is beyond the scope of this Article, I refer to utility in a *formalist* sense (that is, that "utility" is nothing more than a representation of subjective preferences) and a *constructivist* sense (that is, that an individual's preferences are the sole determinant of utility for that individual).

203. See HAVEL, *supra* note 184, at 367–68.

204. Barbara Falk calls Havel's emphasis on individual resistance to domination regardless of the consequences "responsibilityism." Barbara J. Falk, *The Power of the Powerless and Václav Havel's "Responsibilityism,"* 32 E. EUR. POL. & SOC'YS & CULTURES 328, 328–29 (2018). In the same volume, David Ost criticizes Havel's responsibilityism in *The Power of the Powerless* as both "morally wrong in that it blames the most vulnerable" and "politically false [in that] state socialism did not collapse because regular people stopped conforming to rituals, but when movements organized by activists became strong enough to win over and transform wary conformists." David Ost, *The Sham, and the Damage, of "Living in Truth,"* 32 E. EUR. POL. & SOC'YS & CULTURES 301, 302 (2018); see also LUKES, *supra* note 166, at 173 (agreeing with Ost's critiques).

Both of Ost's critiques target Havel's normative prescription for responding to subordination, and I agree with him to that extent. I use the greengrocer parable purely as a compelling illustration of ideology's function within domination. Normatively, I believe that subordination is morally wrong; I also assign exclusive moral responsibility for subordination to those who practice and benefit from it. Any reading of this Article or interpretation of coercive ideology that departs from these normative positions is in bad faith.

Indeed, the very purpose of coercive ideology is to unmask the subordination operating within ostensibly "free" choices to comply with the dominant ideology. Politically, I hope that better understanding the ways subordination works as manipulation will enable individuals to make more informed choices about compliance and will better equip activists to dismantle systems of subordination, including through the law.

2. *The Ubiquity of Coercion*

Due to the power inherent in the position of dominant groups,²⁰⁵ the negative consequences at their disposal are legion. English scholars have often equated *dominio*, the Italian word Gramsci used for the first component of hegemony,²⁰⁶ with violence or force.²⁰⁷ Obviously, dominant groups have widely used and threatened violence as a means of control throughout history.²⁰⁸ It is equally obvious, however, that violence is far from the only harm with which a dominant group may threaten an individual contemplating noncompliance. *Dominio* thus encompasses the full panoply of negative consequences used by the dominant group to manipulate individual decisions toward compliance—coercion writ large.²⁰⁹

This does not mean that dominant groups possess some omniscient centralized intelligence that calculates the precise consequences necessary to sway each individual decision, nor do they employ an army of goons sufficient to threaten every individual personally each time someone must decide whether to comply. Rather, dominant groups manipulate circumstances to make the potential consequences for noncompliance *ubiquitous* enough that almost everyone knows what will happen to them if they fail to comply and *severe* enough that almost no one would dare to do so.²¹⁰ In other words, they create a “cultural common sense” about what happens to people who cross the dominant group’s will. The result of this weaponization of suffering is, in Michel Foucault’s words, “a perpetual victory that avoids any physical confrontation and which is always decided in advance.”²¹¹

a. *Severity*

The most severe consequences a dominant group can impose for noncompliance obviously involve violence. Some individuals in every society will find compliance intolerably undesirable, no matter how severe

205. See *supra* note 160 and accompanying text.

206. FEMIA, *supra* note 171, at 24.

207. See, e.g., Crenshaw, *supra* note 5, at 1351 (“physical coercion”); Litowitz, *supra* note 178, at 518 (“physical force”); see also JACKMAN, *supra* note 167, at 59 (discussing “ideology” as juxtaposed with “force”); SIDANIUS & PRATTO, *supra* note 161, at 103 (“There are two primary means by which dominant groups maintain their hegemonic position over subordinate groups: the threat or actual exercise of naked force, and control over ideology and the contents of “legitimate” social discourse.”).

208. See, e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 57 (Alan Sheridan tran., Vintage Books 1995) (1975).

209. See FEMIA, *supra* note 171, at 24 (translating *dominio* as *coercion*).

210. See JACKMAN, *supra* note 167, at 61–63.

211. FOUCAULT, *supra* note 208, at 203.

and certain the threatened punishment.²¹² A dominant group's authority ultimately derives from its ability to suppress such serious threats to its rule by resorting to naked violence—what Havel calls “the low foundations of power.”²¹³ Havel's greengrocer no doubt knew that if he persisted in resisting the Soviet regime, he would be thrown in the gulag and eventually executed. Knowledge of the final sanctions for noncompliance—injury, imprisonment, death—haunts the collective subconscious and steers the masses away from even the smallest first step down the path of resistance.²¹⁴ Whether staged as public spectacle or hushed up in menacing silence, retributive acts of state violence serve the same function: to instill terror in the masses sufficient to deter further acts of noncompliance.²¹⁵

The consequences necessary to coerce compliance in most individuals fall far short of such violence, however. The fate of Havel's hypothetically rebellious greengrocer illustrates some of these potential consequences. For refusing to display the prescribed sign, the greengrocer does not face the firing squad and is not consigned to a gulag cell.²¹⁶ Yet he hardly escapes unscathed—he loses his job, takes a pay cut, and suffers social persecution and exclusion.²¹⁷ What is more, his insubordination triggers these negative sanctions not only for himself but also for his spouse, children, parents, and closest friends.²¹⁸ In short, the greengrocer knows that Soviet authorities can punish him without striking a blow or firing a bullet. Opprobrium, ostracism,

212. One such individual was John Lewis, a Black man who was beaten by white men outside his home in South Carolina in June 1871 for exercising his right to vote. KIDADA E. WILLIAMS, *I SAW DEATH COMING: A HISTORY OF TERROR AND SURVIVAL IN THE WAR AGAINST RECONSTRUCTION* 106 (2023). Telling his story before the congressional committee investigating white violence against Black Southerners, Lewis vowed to committee members that he would vote again. *Id.* at 205–06. Foreshadowing the courageous defiance of the U.S. senator who would share his name more than a century later, see Katherine Q. Seelye, *John Lewis, Towering Figure of Civil Rights Era, Dies at 80*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/john-lewis-dead.html>, Lewis told the committee, “I will vote just as did at first They will whip me for it anyhow . . . but I will vote again.” WILLIAMS, *supra*, at 205–206.

For examples of such courage under the Soviet regime, see 2 ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO, 1918–1956: AN EXPERIMENT IN LITERARY INVESTIGATION* 641–42 (Thomas P. Whitney tran., 1974) (1973).

213. HAVEL, *supra* note 184, at 359.

214. See JACKMAN, *supra* note 167, at 61–62.

215. See *id.*; see also FOUCAULT, *supra* note 208, at 57–58 (“In the ceremonies of the public execution, the main character was the people, whose real and immediate presence was required for the performance The aim was to make an example, not only by making people aware that the slightest offense was likely to be punished, but by arousing feelings of terror by the spectacle of power letting its anger fall upon the guilty person”).

216. See HAVEL, *supra* note 184, at 367.

217. *Id.*; see also SOLZHENITSYN, *supra* note 212, at 633 & n.1 (listing additional “intermediate threats” Soviet authorities could impose on transgressors); FITZPATRICK, *supra* note 185, at 118 (same).

218. HAVEL, *supra* note 184, at 363, 367.

hardship, and discrimination suffice to make noncompliance prohibitively undesirable.

Indeed, though the gulag has become the leading symbol of Stalinist oppression,²¹⁹ Soviet authorities deployed such “lesser” consequences far more frequently and with brutal effectiveness. While Alexander Solzhenitsyn spoke for the millions who suffered within the gulag,²²⁰ Havel’s allegorical greengrocer represents the hundreds of millions who suffered outside it.²²¹ As one example, consider the case of Tanja, a Croatian journalist who wrote an article criticizing the nationalization of pinball machines in the early 1980s.²²² Recounting Tanja’s story years later, her friend and fellow journalist Slavenka Drakulić translated the transgression of such an ostensibly innocuous act:

Read through ideological glasses, [Tanja’s] article was clearly political. In fact, her political mistakes were severe. . . . Her article, naïve as it seems today, speaking ‘only’ about pinball machines, revealed the functioning and hypocrisy of the communist state. She mocked it, and she had to be punished for that.²²³

The government’s response was neither swift nor severe—because neither speed nor severity were necessary. After a week of “consultations” with communist party officials, Tanja’s editors published a brief “explanation” admitting that “publishing the article represent[ed] a serious editorial mistake.”²²⁴ Read through the same ideological glasses that exposed the political content of Tanja’s article, the explanation served as a signal to

219. See GOLFO ALEXOPOULOS, *ILLNESS AND INHUMANITY IN STALIN’S GULAG* 2–5 (2017) (noting that the term *gulag* “has become synonymous with the Soviet forced labor camp system” and that it was “an expression of the Soviet order itself”).

220. See 1 SOLZHENITSYN, *supra* note 212, at v (dedicating *The Gulag Archipelago* “to all those who did not live to tell it”).

221. Approximately 18 million people passed through the gulag system throughout its history, of whom at least 1.6 million died. ALEXOPOULOS, *supra* note 219, at 15–16 (estimating that “no fewer than one-third of all individuals who passed through [the gulag] died as a result of their detention”). By comparison, more than 200 million people lived in the Soviet Union in 1956. See Michael K. Roof & Frederick A. Leedy, *Population Redistribution in the Soviet Union, 1939–1956*, 49 GEOGRAPHICAL REV. 209, 212 tbl.1 (1959); see also STEVEN ROSEFELDE, *RED HOLOCAUST* 21–22 tbl.2.1 (2009) (providing statistics for various forms of deaths attributable to the Soviet Union under Joseph Stalin); FITZPATRICK, *supra* note 185, at 137 (“We do not know how many lives were scarred by social stigmatization [in the Soviet Union] in the 1920s and 1930s, but the numbers must have been great.”).

222. See SLAVENKA DRAKULIĆ, *HOW WE SURVIVED COMMUNISM AND EVEN LAUGHED* 1–10 (1991).

223. *Id.* at 3–4.

224. In a striking echo of Havel, see *supra* note 187 and accompanying text, Drakulić notes that regardless of the explanation’s text, “this was the message they [the editors] were trying to convey: ‘We, the editorial board, admit our mistake in not having had such complete control of our newspaper that, unfortunately, the unwanted ideas appeared. We will make sure it doesn’t happen again.’” DRAKULIĆ, *supra* note 222, at 4–5.

everyone around her that she was politically contaminated. From that moment on, Tanja was “put ‘on ice’—ignored, invisible, nonexistent, a non-journalist, a non-person.”²²⁵ Her editors continued to pay her salary but refused to publish anything she wrote. Her colleagues stopped speaking to her.²²⁶ Finally, after months of isolation, she sealed all the doors and windows in her apartment and opened the valve on her gas stove. The friends who found her body noticed that she had done the dishes. She was thirty-six years old.²²⁷

“The earth beneath her was crumbling,” Drakulić writes of her friend.²²⁸ But the use of the passive voice obscures the fact that Soviet authorities deliberately dug the earth out from under Tanja’s feet because she failed to toe the party line. Arranging for Tanja to be frozen out by her colleagues served the same purpose as sending her to the gulag would have done: To make further noncompliance prohibitively undesirable both for Tanja and for everyone around her. That further force proved unnecessary does not render the initial intervention any less coercive. Soviet authorities did not need to execute Tanja. All they had to do was make her life unlivable.²²⁹

b. Ubiquity

The threat of punishment for noncompliance hangs above the heads of members of subordinated groups like a Damoclean sword. Solzhenitsyn described the “constant fear” that lashed Soviet citizens into obedience:

Just as there is no minute when people are not dying or being born, so there was no minute when people were not being arrested . . . [A]ny adult inhabitant of this country, from a collective farmer up to a member of the Politburo, always knew that it would take only one careless word or gesture and he would fly off irrevocably into the abyss Peace of mind is something our citizens have never known.²³⁰

One means by which dominant groups make consequences ubiquitous is to require individuals to police others’ noncompliance. Many of the consequences the greengrocer will face if he refuses to display the sign are

225. *Id.* at 5.

226. *Id.*

227. *Id.* at 1.

228. *Id.* at 6.

229. Drakulić acknowledges that Tanja had a tumultuous romantic relationship with a man who had unexpectedly died around the time her controversial article was published. *See id.* at 2. It is impossible to know whether the freeze-out would have driven Tanja to suicide in the absence of her lover’s death—but it is also irrelevant. Tanja was a real person, and real people make decisions within complicated webs of life circumstances. Soviet authorities pulled on Tanja’s web with the intention of manipulating her into compliance with their ideology. That is coercion.

230. SOLZHENITSYN, *supra* note 212, at 633–34.

imposed not by Soviet authorities but by relatively “private” individuals: his friends, family members, and coworkers.²³¹ According to Havel, these people punish the greengrocer not from “any authentic inner conviction” that he should have displayed the sign.²³² Rather, they do so for fear of being suspected and subjected to punishment themselves,²³³ because “the least dangerous form of existence [is] constant betrayal.”²³⁴ Indeed, the fear of visible noncompliance can be so strong that a noncomplier’s associates may be shunned even if they also punish the noncomplier. Thus, Havel tells us, the children of the noncompliant greengrocer will struggle to get into college due solely to the sin of their father.²³⁵

By imposing collective responsibility for noncompliance, dominant groups deputize every member of society to enforce its will. The result is a field of constant visibility that extends to all but the most private spaces,²³⁶ a field in which every individual constantly screens every action of every other individual for compliance.²³⁷ So long as the panorama of compliance remains undisturbed, this screening occurs largely in the background, such that most people hardly notice discrete acts of compliance.²³⁸ But individuals are instantly and acutely aware of aberrations within the panorama and will quickly move to protect themselves either by distancing themselves from the noncompliance, reporting to dominant authorities, or punishing the noncomplier themselves.²³⁹ Thus, in Tanja’s case, a single, subtle signal from

231. HAVEL, *supra* note 184, at 367.

232. *Id.*

233. *Id.*; SOLZHENITSYN, *supra* note 212, at 637–42.

234. SOLZHENITSYN, *supra* note 212, at 637.

235. HAVEL, *supra* note 184, at 367; *see also* FITZPATRICK, *supra* note 185, at 137 (“[W]hole families were affected by the stigmatization of one member . . .”). Solzhenitsyn recounts an incident in which an eight-year-old boy escaped as he was taken to a Moscow train station to be exiled with his mother and siblings. But when he returned home, the neighbors and even his parents’ friends refused to let him so much as spend the night with them. Left with no other option, the boy walked to an orphanage and turned himself in. SOLZHENITSYN, *supra* note 212, at 638–39. On Soviet surveillance and treatment of children as political threats, *see* FITZPATRICK, *supra* note 185, at 171–72.

236. *See* JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* 136–82 (1990) (emphasizing appropriately the importance of these private spaces both to individual health and political resistance); *cf.* Julie E Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1906 (2013) (arguing that one reason privacy is essential is that it provides space for self-determination away from the public gaze).

237. SOLZHENITSYN, *supra* note 212, at 636–37. Solzhenitsyn informally estimated that at least twenty percent of urban Soviet citizens had received an offer from the authorities to spy or report on their friends, colleagues, and family members, “[s]o that in every group of people, in every office, in every apartment, either there would be an informer or else the people there would be afraid there was.” *Id.* at 636; *see also* FITZPATRICK, *supra* note 185, at 135–36 (describing denunciation as “a common hazard in the lives of people with bad social origins” in the Soviet Union).

238. HAVEL, *supra* note 184, at 367.

239. *Id.* at 367–68; SOLZHENITSYN, *supra* note 212, at 635 (“This universal mistrust had the effect of deepening the mass-grave pit of slavery. The moment someone began to speak up frankly,

Soviet authorities that she had stepped out of line proved sufficient for her colleagues to shun her totally.²⁴⁰

Operating within this field of constant visibility causes most individuals to police themselves for compliance most of the time.²⁴¹ Michel Foucault famously wrote that the major effect of the Panopticon, the prison designed by Jeremy Bentham so that a centralized guard could always observe any prisoner, was “to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.”²⁴² This state is such that “[h]e who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.”²⁴³ Crucially, the Panopticon need not be operated by a prison guard; because constant visibility is the essential mechanism of control, anyone with the power of sight will suffice.²⁴⁴

The “panopticon of daily life” provides the dominant group with tremendous benefits. It facilitates a level of compliance that the dominant group would struggle to achieve through direct force.²⁴⁵ Further, deputizing nondominant individuals substantially reduces the resources the dominant group itself must expend to monitor for and punish noncompliance. Doing so also bolsters the fiction that dominant group rule arises spontaneously and naturally rather than through the dominant group’s manipulation and coercion. The dominant group can therefore reserve its resources for the comparatively rare instances in which threats alone prove insufficient to compel compliance—instances that will in turn deter further noncompliance.

C. *Living Within the Lie*

Subordination-as-manipulation creates a gap into which dominant groups insert ideology, the second component of Gramsci’s hegemony.²⁴⁶

everyone stepped back and shunned him: ‘A provocation!’ And therefore anyone who burst out with a sincere protest was predestined to loneliness and alienation.”).

As anyone who has worn obviously gender-nonconforming clothing in public knows well, the loss of public anonymity and resulting hypervisibility itself carries a powerful deterrent effect. Cf. CLAUDIA RANKINE, *CITIZEN: AN AMERICAN LYRIC* 49 (2014).

240. See *supra* notes 222–229 and accompanying text.

241. Cf. FITZPATRICK, *supra* note 185, at 166 (“People knew they could get arrested for expressing ‘anti-Soviet’ opinions; thus they tended either to refrain from doing so or to express such opinions outside the range of state surveillance (as they hoped).”).

242. FOUCAULT, *supra* note 208, at 201.

243. *Id.* at 202–03.

244. *Id.* at 202.

245. See *supra* notes 168–174 and accompanying text.

246. See FEMIA, *supra* note 171, at 24.

The dominant ideology justifies dominant group rule and assigns roles to individuals based on group membership. The illusion of choice permits the dominant group to claim, however implausibly, that widespread compliance with its ideology is proof of the ideology's veracity rather than the result of its own coercive manipulation. The point of this ideological camouflage is not necessarily to convince anyone, subordinated or otherwise, that subordination is not occurring. The point is rather to make the dominant ideology a social reality via countless individual acts of compliance, what Havel calls "liv[ing] within the lie."²⁴⁷ That lie is made no less real by the fact that the acts creating it are performances driven by fear rather than manifestations of sincere belief.²⁴⁸

1. *The Mask of Ideology*

In Gramsci's classic formulation, a dominant group propagates a set of self-serving beliefs about reality—an ideology—via its institutions.²⁴⁹ Over time, individuals internalize these beliefs until they become the "common sense" of a society.²⁵⁰ These internalized beliefs, commonly called *false consciousness*, lead subordinated individuals to consent to dominant group rule against their own interests.²⁵¹

Gramsci's false consciousness model of ideology sparked a century of heated debate. From an empirical standpoint, some scholars have found that members of subordinated groups rarely internalize dominant ideology to the

247. HAVEL, *supra* note 184, at 361.

248. *See id.* ("Individuals need not believe all these mystifications, but they must behave as though they did, or they must at least tolerate them in silence, or get along well with those who work with them. For this reason, however, they must live within a lie. They need not accept the lie. It is enough for them to have accepted their life with it and in it.")

249. FEMIA, *supra* note 171, at 24. Gramsci's Italian is *direzione intellettuale e morale*, literally "intellectual and moral leadership." *Id.*

250. *See, e.g.,* Litowitz, *supra* note 178, at 525–29. I am of course reducing to a few sentences concepts to which others have devoted entire articles and even books. Litowitz, for example, describes three functions of the dominant ideology as universalization, naturalization, and rationalization. *Id.* at 525. Ideology universalizes the dominant group's special interests, equating them with the common interests of society as a whole. *Id.* Ideology naturalizes dominant group rule by making it seem natural and inevitable. *Id.* at 526. Finally, ideology rationalizes dominant group rule by making it seem reasonable and right. *Id.*; *see also* FEMIA, *supra* note 171, at 24 ("Hegemony is attained through the myriad ways in which the institutions of civil society operate to shape, directly or indirectly, the cognitive and affective structures whereby men perceive and evaluate problematic social reality.")

251. *See, e.g.,* SCOTT, *supra* note 236, at 71–72; LUKES, *supra* note 166, at 149–51; Litowitz, *supra* note 178, at 523 (quoting Gramsci, *The Intellectuals*, in *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI*, *supra* note 170, at 5, 12). Scott articulates two versions of false consciousness: the "thick version," under which subordinated individuals believe their subordination is reasonable and right, and the "thin theory," under which subordinated individuals believe their subordination is "natural and inevitable." SCOTT, *supra* note 236, at 72. I discuss Scott's argument further in Section II.C.2, *infra*.

point of subjective belief.²⁵² From a moral standpoint, others have argued that false consciousness is both patronizing—in that it presumes to know the “real” interests of subordinated group members better than they themselves²⁵³—and unfair in that it erases persistent but often subtle acts of resistance against dominant group rule.²⁵⁴ I need not settle the debate over false consciousness in this Article. Rather, I claim that acts of compliance with dominant ideology contribute to domination *regardless of the subjective belief of the actors*.

Dominant groups care little whether individuals subjectively believe the dominant ideology so long as they *perform* belief—that is, so long as both their actions and words conform to the dominant ideology.²⁵⁵ Attribution itself thus becomes the subject of coercion. In other words, to avoid negative consequences, it is not sufficient merely to comply with the dominant group’s will; one must also cite the dominant ideology as the reason for one’s compliance. At the very least, dominant groups punish open disagreement with the dominant ideology, including suggestions that such punishments are unjust. To expand upon Havel’s greengrocer parable, the greengrocer knows better than to display a sign nakedly declaring “I am afraid and therefore unquestioningly obedient.”²⁵⁶ Ironically, Soviet authorities would likely perceive such a sign as an act of noncompliance because it would reveal their coercive manipulation too starkly. As such, the greengrocer would be punished for displaying such a sign just as for refusing to display any sign at all.

Indeed, dominant groups sometimes compel performative belief with falsehoods that *everyone knows to be false* to demonstrate the extent of their power. For example, James Scott writes that the pastoralist Tutsi of Rwanda,

252. NICHOLAS ABERCROMBIE, STEPHEN HILL & BRYAN S. TURNER, *THE DOMINANT IDEOLOGY* THESIS 157 (1980).

253. LUKES, *supra* note 166, at 154 (quoting Colin Hay, *Divided by a Common Language: Political Theory and the Concept of Power*, 17 POL. 45, 47–48 (1997)). *But see* Steven Lukes, *In Defense of “False Consciousness,”* 2011 U. CHI. LEGAL F. 19, 24 (2011).

254. *See* SCOTT, *supra* note 236, at 81–82.

255. Dominant groups obviously cannot coerce ideological justifications from individuals who refuse to comply in the first place. *See supra* notes 208–212 and accompanying text.

256. Havel also explores the function of ideology as increasing the desirability of compliance by offering moral cover to the individual forced to comply. For example, what if instead of a sign proclaiming, “Workers of the world, unite!” Soviet authorities ordered the greengrocer to display a sign declaring “I am afraid and therefore unquestioningly obedient”? After all, such a slogan more accurately captures the greengrocer’s real motivation. Yet Havel tells us that the greengrocer would be considerably less likely to display such a sign, because doing so would embarrass him. The actual sign’s ideological message sidesteps this scruple by camouflaging its true function—that of a signal of obedience—as an expression of orthodoxy. In Havel’s words, it “helps the greengrocer to conceal from himself the low foundations of his obedience, at the same time concealing the low foundations of power. It hides them behind the facade of something high. And that something is ideology.” HAVEL, *supra* note 184, at 359.

who dominated the agriculturalist Hutu, pretended that the Tutsi subsisted entirely on blood and milk from their herds and never ate solid food.²⁵⁷ Scott rightly scoffs at the notion that the Hutu actually believed this falsehood, but he admits that “it is significant that, at that time, the Hutu would not have ventured a public declaration of Tutsi meat-eating, and the public transcript could proceed as if the Tutsi lived by fluids alone.”²⁵⁸ That fact is indeed significant, because it is the entire point. The Tutsi’s goal was not to convince the gullible Hutu to believe something false but to compel the Hutu to act as if they believed something that everyone knew to be impossible.

2. *The Power of Performance*

Rather than patronizing subordinated individuals or blaming them for their own subordination, coercive ideology respects the discursive power of their choices while acknowledging that the extreme manipulation of those “choices” is in itself subordination. In *Domination and the Arts of Resistance*, James Scott recounts an Ethiopian proverb: “When the great lord passes the wise peasant bows deeply and silently farts.”²⁵⁹ Scott uses the proverb to critique scholars for focusing on the bow—the visible acts of ostensible compliance that build what he calls “the public transcript”²⁶⁰—and ignoring the fart, the hidden acts of resistance that build a “hidden transcript” that belies the existence of false consciousness and ultimately undermines dominant group rule.²⁶¹

Scott advances one of the most compelling cases against the false consciousness model of ideology, and his book draws appropriate and necessary attention to the more subtle ways that members of subordinated groups resist domination individually and collectively.²⁶² Ironically (and presumably unintentionally), however, his critique fails to appreciate fully the power of subordinated individuals. While Scott is certainly correct that the fart matters, the bow *also* matters.

Compare the wise peasant’s choice to bow to the greengrocer’s choice to display the required sign. It is upon such seemingly trivial choices that Havel hinges the entire apparatus of Soviet control.²⁶³ For it is not merely the greengrocer who makes such a choice. So too does the woman who visits his

257. SCOTT, *supra* note 236, at 50–51.

258. *Id.* at 51.

259. *Id.* at v.

260. *Id.* at 2 n.1.

261. *Id.* at 4–5.

262. *See id.* at 136–82 (Ch. 6, “Voices under Domination: The Arts of Political Disguise”).

263. HAVEL, *supra* note 184, at 361. For a masterful treatment of the ways that ordinary people in the Soviet Union navigated such choices, see ORLANDO FIGES, *THE WHISPERERS: PRIVATE LIFE IN STALIN’S RUSSIA* (2007).

shop over lunch and has hung the same sign in her office.²⁶⁴ And so too do countless other individuals who operate within the Soviet system. Every choice to display the sign may be coerced—that is, every choice may stem from fear of negative consequences rather than sincere belief. Indeed, every individual who displays the sign may secretly harbor radical capitalist sympathies; some of them may even participate in hidden resistance activities. But those beliefs and activities are by definition silent, secret, hidden. To all but their closest confidants, the wise peasant, the greengrocer, and the office worker *perform* compliance with the dominant ideology. In the words of Solzhenitsyn, “The permanent lie becomes the only safe form of existence.”²⁶⁵

These countless individual choices to align one’s outward behavior with the dominant ideology aggregate into what Scott calls the “public transcript”²⁶⁶ and Havel calls “the panorama of everyday life.”²⁶⁷ In this manner, Havel says, relatively powerless individuals translate the abstract principles of dominant ideology into concrete social reality.²⁶⁸ Whether individuals subjectively believe these principles is irrelevant; all that matters is that they act as if they do.²⁶⁹ This is what Havel calls “living within a lie.”²⁷⁰ By doing so, “individuals confirm the system, fulfill the system, make the system, *are* the system.”²⁷¹

This is coercive ideology: Dominant groups use coercion to create panoramas of daily life that conform with dominant ideology. These panoramas—these public transcripts—are subordination, because outward compliance is all the dominant group really wants.²⁷² In this way, dominant groups function like the director of a play in which every member of society

264. HAVEL, *supra* note 284, at 365.

265. SOLZHENITSYN, *supra* note 212, at 646.

266. SCOTT, *supra* note 236, at 2 & n.1.

267. HAVEL, *supra* note 184, at 364.

268. *Id.* at 362–63. In fairness to Scott, he does not discard the public transcript as completely useless to achieving and maintaining domination. *See* SCOTT, *supra* note 236, at 45–69 (Ch. 3, “The Public Transcript as Respectable Performance”). Scott attributes four possible functions to the public transcript: affirmation, concealment, euphemization and stigmatization, and ostensible unanimity. *Id.* at 45. Some of these overlap considerably with the functions of coercive ideology I describe in the next subsection. In keeping with his broader argument against false consciousness, however, Scott focuses on the public transcript as generally ineffective in convincing subordinated individuals of the rightness of the dominant ideology. *See id.* at 68.

269. HAVEL, *supra* note 184, at 361.

270. *Id.* at 371.

271. *Id.* at 361.

272. Scott concedes that coerced compliance creates a “*dramatization* of power relations” that is “behaviorally, nearly indistinguishable from behavior that arises from willing consent.” SCOTT, *supra* note 218, at 66–67.

is both an actor and an audience member. Dominant ideology is the script.²⁷³ The director's goal is to produce a simulacrum of reality based on the script by getting the actors to play their parts, not to convince either the actors or the audience that the show is "real." The fact that all but the most gullible know that a play is make-believe does not deprive the performance of its power. If one's only takeaway from a performance of August Wilson's *Fences*²⁷⁴ is that the show "isn't real," one has entirely missed the point.²⁷⁵

D. Marking Public Space

Coercive ideology illustrates how discriminatory government expression is one of the dominant group's most powerful tools to achieve subordination. Discriminatory government expression mark public space with the dominant ideology. These marks remind individuals both of the requirement to perform their prescribed roles and of the dominant group's power to punish failures to perform. Thus, individual instances of discriminatory government expression serve as sinister set pieces within the play of coercive ideology. Though they blend seamlessly into the background of the stage of everyday life, their presence ensures everyone follows the script set by the dominant group.

1. Public Space as Script

Geographers study spaces as texts that are composed and interpreted like any other: "Places, as well as the landscapes that allow us to grasp them, are thoroughly narrative constructs. They would not exist *as places* were it not for the stories told about and through them . . . Places without stories are unthinkable."²⁷⁶ Fittingly, the stories humans tell about and through the

273. See FIELDS & FIELDS, *supra* note 142, at 134 ("Ideology is best understood as the descriptive vocabulary of day-to-day existence through which people make rough sense of the social reality that they live and create from day to day. It is the language of consciousness that suits the particular way in which people deal with their fellows. It is the interpretation in thought of the social relations through which they constantly create and recreate their collective being, in all the varied forms their collective beings may assume: family, clan, tribe, nation, class, party, business enterprise, church, army, club, and so on."). The Fields sisters make a similar point using the metaphor of terrain: "Human beings live in human societies by negotiating a certain social terrain, whose map they keep alive in their minds by the collective, ritual repetition of the activities they must carry out in order to negotiate the terrain. If the terrain changes, so must their activities, and therefore so must the map . . . Exercising rule means being able to shape the terrain." *Id.* at 139–40.

274. See generally AUGUST WILSON, *FENCES: A PLAY* (1986).

275. See FIELDS & FIELDS, *supra* note 142, at 134 ("[I]deologies are not delusions but real, as real as the social relations for which they stand.").

276. PATRICIA L. PRICE, *DRY PLACE: LANDSCAPES OF BELONGING AND EXCLUSION*, at xxi (2004); see also Richard H. Schein, *The Place of Landscape*, 87 ANNALS ASS'N AM. GEOGRAPHERS 660, 662–63 (1997) (describing landscape as "discourse materialized" and noting that it "at once captures the intent and ideology of the discourse as a whole and is a constitutive part of its ongoing

places we share—that is, about and through public spaces—reflect collective identity and communal values. In other words, humans use public spaces to make important claims about belonging: who “we” are, what “we” believe, and how “we” relate to one another.²⁷⁷

Marking public spaces with symbols and monuments is among the chief means by which humans inscribe them with meaning.²⁷⁸ Indeed, the expressive purpose of public monuments is a cornerstone of the Supreme Court’s emerging government speech doctrine²⁷⁹:

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power A monument, by definition, is a structure that is

development and reinforcement”); *see also* Richard H. Schein, *A Methodological Framework for Interpreting Ordinary Landscapes: Lexington, Kentucky’s Courthouse Square*, 99 GEOGRAPHICAL REV. 377, 383, 396 (2009) [hereinafter Schein, *Methodological Framework*].

Many of the insights I discuss in this chapter are central to *cultural landscape theory*, a methodology of geography that studies the “tangible, visible, impress of human activity on the surface of the earth.” Richard H. Schein, *Cultural Landscapes*, in RESEARCH METHODS IN GEOGRAPHY: A CRITICAL INTRODUCTION 222 (Basil Gomez & John Paul Jones III eds., 2010). Though cultural landscape theory studies private as well as public landscapes, I use the term “public space” synonymously with “landscape” and “place” both because my focus here is on public, collective spaces and because *public space* is already used in many branches of American jurisprudence.

277. Richard H. Schein, *Belonging Through Land/Scap*e, 41 ENV’T & PLANNING 811, 812–13 (2009); Daniel Trudeau, *Politics of Belonging in the Construction of Landscapes: Place-Making, Boundary-Drawing and Exclusion*, 13 CULTURAL GEOGRAPHIES 421, 435 (2006) (“Landscapes thus are constructed to appear a certain way, and in turn normalize those particular relations, value, aesthetics and ways of seeing the world that orthodoxy represents. Landscapes are visual representations of what belongs. In other words, landscapes codify membership to a polity and its territory.”).

278. *See* KIRK SAVAGE, STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND MONUMENT IN NINETEENTH CENTURY AMERICA 4 (1997); Nuala Johnson, *Cast in Stone: Monuments, Geography, and Nationalism*, 13 ENV’T & PLANNING D: SOC’Y & SPACE 51, 62–63 (1995); *see also* Schein, *Methodological Framework*, *supra* note 276, at 391–92 (using monuments as key data points in interpreting narrative of courthouse square).

Though I focus here on monuments to align with my focus on New South Confederate monuments below, *see infra* Section III.B.1, these precepts also apply to other markings of public space, such as street names, *see, e.g.*, Maoz Azaryahu, *German Reunification and the Politics of Street Names: The Case of East Berlin*, 16 POL. GEOGRAPHY 479, 479–80 (1997), and the designation of significant historical sites, *see, e.g.*, Richard R. Flores, *Memory-Place, Meaning, and the Alamo*, 10 AM. LITERARY HIST. 428, 429 (1998).

Finally, place also expresses ideology more subliminally than through symbols and monuments. *See* DAVID SIBLEY, GEOGRAPHIES OF EXCLUSION: SOCIETY AND DIFFERENCE IN THE WEST, at ix (1995). In Chapter 6 of *In Place/Out of Place*, Tim Cresswell describes the various ways that place can be ideologically productive. CRESSWELL, *supra* note 163, 149–62. Cresswell’s discussion of “Place and Practice,” *id.* at 155–58, and “Place as Natural,” *id.* at 158–61, are particularly resonant with the theory of coercive ideology.

279. The government speech doctrine holds that “[w]hen government speaks, it is not barred by the Free Speech Clause [of the First Amendment] from determining the content of what it says.” *Walker v. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”²⁸⁰

In modern democracies, “we the people” ostensibly control public space through elected representatives.²⁸¹ The assumption that democratic governments speak on behalf of the political community rather than kings or emperors strengthens the association between public space and collective identity.²⁸²

2. *Scripting Public Space*

Thus far, no society has ever enjoyed a single, universally shared vision of its collective identity. By expressing one vision at the expense of all others, marking public space imposes collective identity as much as reflects it.²⁸³ The power to mark public space is thus the power to define the boundaries of belonging within a society—to define one’s own group as superior, one’s parochial interests as universal, and one’s chosen values as right.²⁸⁴ It is the power “to speak for the people [and to] etch the people’s voice in stone.”²⁸⁵ For dominant groups, it is the power to write the script for the play of subordination.

Marking space also allows dominant groups to disseminate veiled threats throughout the public sphere. Recall that to manipulate individual decisions effectively, the threat of negative consequences must be ubiquitous.²⁸⁶ Each marker inscribed with the dominant ideology also carries an implicit threat: The group with the power to mark public space can also turn that power upon those who violate its will.

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

281. ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 106–115 (1989), includes “effective participation,” which he defines as requiring that that “citizens . . . have an adequate . . . and an equal opportunity for expressing their preferences as to the final outcome,” as one of the five defining characteristics of democracy.”

282. *See Summum*, 555 U.S. at 472 (“Public parks are often closely identified in the public mind with the government unit that owns the land. City parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world.”); *Walker*, 576 U.S. at 207 (“[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”).

283. *See SAVAGE*, *supra* note 278, at 4; Schein, *supra* note 277, at 662–63.

284. *Cf. Litowitz*, *supra* note 168, at 525 (discussing “universalization” of the dominant group’s interests as one of the primary functions of hegemony); CRESSWELL, *supra* note 163, at 158 (discussing the use of place to “naturalize” artificial power arrangements).

285. SAVAGE, *supra* note 278, at 7–8.

286. *See supra* Section II.B.2.b.

Unsurprisingly, therefore, the power to mark public space is hotly contested.²⁸⁷ For example, Europeans and their descendants have fought each other for the right to mark public space with their preferred religious iconography for half a millennium.²⁸⁸ During the first two centuries of this conflict, it commonly included horrific violence that sometimes erupted into full-scale international war.²⁸⁹ Historian Benjamin Kaplan has described “the age of religious wars” as a period of relatively stable coexistence punctuated by bloody popular rampages against religious enemies.²⁹⁰ Kaplan identifies public displays of religion as particularly potent flashpoints for religious violence because of the claims they made about collective identity:

[W]hen a religious group enacted its beliefs in a public space, it was claiming possession not just of that space but of the entire community, appropriating the authority to speak and act for everyone, and making those of other faiths accomplices in rituals they rejected or even abhorred.²⁹¹

287. See SAVAGE, *supra* note 278, at 4.

288. Similarly, destruction and reclamation of tsarist public imagery became a fundamental feature of the Leninist revolution in Russia. See ORLANDO FIGES & B. I. KOLONITSKII, *INTERPRETING THE RUSSIAN REVOLUTION: THE LANGUAGE AND SYMBOLS OF 1917*, at 48–57 (1999) (“[T]he destruction of the symbols of the old regime was, at least for the revolutionaries, the destruction of the old regime itself.”).

289. See BENJAMIN K. KAPLAN, *DIVIDED BY FAITH: RELIGIOUS CONFLICT AND THE PRACTICE OF TOLERATION IN EARLY MODERN EUROPE 1–4* (2007) (discussing the St. Bartholomew’s Day massacres of 1572 as an introduction to the “age of religious wars”).

In a future article, I plan to discuss this history in the context of the Establishment Clause and to apply coercive ideology to explain the role of religious government expression in religious subordination.

290. *Id.* at 11, 98. Kaplan refers to this stable coexistence, periods in which “conflict was being successfully contained and physical violence avoided,” as *toleration* and notes that “the religious riots and massacres of early modern Europe cannot simply be blamed on an intolerant culture. Popular religious violence was not ‘natural’ to early modern society. It usually required a specific trigger as well as ideological fuel to set it off. That meant it was neither inevitable nor universal.”

291. *Id.* at 97. Two caveats bear noting. First, Kaplan’s flashpoints are public rituals—funerals, processions, and holidays—rather than public monuments. (Public monuments did not become a prominent means of marking public space until the nineteenth century. See Johnson, *supra* note 278, at 51.) These rituals naturally involved crowds, which Kaplan suggests may have increased participants’ propensity for violence. KAPLAN, *supra* note 289, at 96–97. While crowds are not inherent components of public monuments (though they do become focal points of community life and commonly serve as meeting places, see SAVAGE, *supra* note 278, at 7), they claim public space for a specific vision of collective identity in the same way. See *supra* notes 280–282 and accompanying text.

Second, Kaplan attributes part of the power of public rituals to the early modern belief in communalism, the idea that the entire community was spiritually responsible for the actions of each its members. See KAPLAN, *supra* note 289, at 97; on communalism generally, see *id.* at 54–55. While communalism has yielded to individualism as the organizing principle of modern Western societies, see *id.* at 239–40, the democratic belief that governments speak on behalf of the people imbues public space with similar power to define collective identity. See *supra* notes 255–258 and accompanying text; see also SAVAGE, *supra* note 278, at 7–8 (discussing public monuments as “speak[ing] for the people”).

The violence that erupted over control of the religious marking of public space contrasts sharply with the comparative toleration of dissenters who were willing to practice their faith privately. In the 1600s, for example, the Reformed (Calvinist) Church was the official church of the Dutch Republic; practice of any other faith within its borders was explicitly forbidden.²⁹² “Religious dissenters, however, enjoyed a de facto tolerance that made Dutch society religiously the most diverse and pluralistic in seventeenth-century Europe.”²⁹³ The primary mechanism of this tolerance was the *schuilkerken*, or clandestine church, a private space where non-Calvinists worshipped “in secret.”²⁹⁴ The scare quotes indicate that this secrecy was at best a collective fiction: *Schuilkerken* were large and numerous, employed a permanent clergy, and held regular services attended by noticeable crowds of worshippers.²⁹⁵ Unsurprisingly, therefore, Calvinist neighbors, strangers, and even magistrates often knew of their location and activities.²⁹⁶

If the privacy of the *schuilkerken* was “a widely acknowledged fiction, and an increasingly thin one at that,” why were breaches of that fiction still being harshly punished as late as the 1780s?²⁹⁷ The answer is coercive ideology. Dutch officials did not care what religious dissenters actually believed or even practiced so long as their beliefs and practices did not disrupt the public appearance of the superiority of the Reformed Church.²⁹⁸ Control over public space permitted Calvinists to write a script of public life in which Calvinism reigned supreme; so long as dissenters said their lines and played their parts in public, they were left in relative private peace.

The example of the *schuilkerken* captures the fact that marking public space is about status. Ubiquitous public Calvinist iconography served as a

292. KAPLAN, *supra* note 289, at 174.

293. *Id.*

294. *Id.*

295. *Id.* at 174–75, 179–80.

296. *Id.* at 174, 182. Similar clandestine churches existed elsewhere in Europe at the time, though with varying levels of toleration by neighbors and officials. *Id.* at 176.

297. *Id.* at 180–81, 197 (“Grand or humble, what all *schuilkerken* had in common was invisibility: they could not be identified as churches from any public thoroughfare. Their outsidings lacked all the symbolic markers of a church: crosses, bells, icons, tower, splendor . . . *Schuilkerken*, though, not only lacked public presence as churches, they literally hid behind the façade of a different sort of structure. They did the same legally as well, appearing in deeds and mortgages as houses or barns or warehouses, and remaining the property of a private individual, usually an eminent member of the congregation. The congregation did not exist as a legal entity, nor did the larger ecclesiastic organization to which it belonged. Its physical disguise, though, not its legal one, was the most essential mark of a *schuilkerk* and the key to its functional success. It avoided causing ‘offense’ or ‘scandal’ by not signaling its presence through visual and auditory symbols. Dutch authorities who informally authorized *schuilkerken* always insisted on such self-effacement.”).

298. *Id.* at 183 (“Keeping dissent out of sight, stripped of any symbolic presence, preserved the monopoly of the Reformed Church over public religious life. It thus maintained a semblance, or fiction, of religious unity.”).

declaration both that Calvinists should enjoy higher status in Dutch society and an indication that they in fact did, because they possessed sufficient power to mark public space with their preferred faith. Such iconography implicitly threatened dissenters to keep their mouths shut, since the Reformed Church's power to mark public space could be marshalled against them. But the threat was masked behind the ideological content of the iconography, allowing dissenters' silence to be referenced as support for the supposed religious unity of Dutch society. This is coercive ideology enacted through the marking of public space. Marking public space as Calvinist did not force everyone to become a Calvinist; it simply forced everyone to follow the Calvinist script.

III. THE NEW SOUTH

Few dominant groups in history have deployed coercive ideology as effectively as white Southerners in the construction of the "New South," the white supremacist caste system that defined life in the American South from the 1880s until the 1960s.²⁹⁹ This Part begins by articulating the particular coercive and ideological means by which white Southerners reimposed white supremacy after the Civil War and Reconstruction. White Southerners coerced compliance with white supremacy via brutal, semi-official lynchings that could be inflicted for even the slightest violations of the racist ideology.³⁰⁰ That ideology was rooted in the myth of the "Lost Cause Confederacy," which cast Black Southerners as vicious betrayers responsible for the destruction of the "Old South," a pastoral era of racial harmony and widespread happiness.³⁰¹

This Part then demonstrates how white Southern governments disseminated and reinforced this ideology through two forms of discriminatory expression: Lost Cause Confederate monuments and the physical signage of Jim Crow segregation. Coercive ideology clarifies the essential role that Lost Cause Confederate monuments played in the racist subordination of the New South—a role that Black Southerners understood

299. Henry W. Grady popularized the term "the New South" in an editorial published in the *Atlanta Daily Herald* on March 14, 1874. Darren Germ, *Henry W. Grady*, NEW GA. ENCYC. (Jan. 20, 2004), <https://www.georgiaencyclopedia.org/articles/arts-culture/henry-w-grady-1850-1889/> [<https://perma.cc/N34K-UWBK>]. Grady, who became a well-known spokesperson for the New South, described it primarily in terms of upgrading the agrarian, slavery-dependent economy of the Antebellum South with modern industry. *Id.* But white supremacy was always an important part of New South dogma, and Grady himself was an ardent white supremacist. GRACE ELIZABETH HALE, *MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940*, at 46 (1998); *see also id.* at 202 (describing lynching as "central to the New South").

300. *See infra* text accompanying notes 321–340.

301. *See infra* text accompanying notes 341–364.

and resisted.³⁰² At the same time, coercive ideology exposes the expressive function of Jim Crow segregation—a function that white Southerners understood and exploited.³⁰³ Both monuments and signs marked public space with ubiquitous reminders of the requirement to perform white supremacy and of the severe consequences for failing to do so. As Southerners responded to these veiled threats with public compliance, they created a panorama of daily life in which white supremacy, undergirded by Lost Cause mythology, supplied the predominant organizing principle of everyday life in the South.

A. *The South Rises Again*

The landscape of the American South of 1870 was ironically alien to white Southerners. Within the span of a decade, the rigid social order of the antebellum period was upended by the Civil War and Reconstruction. Many of the mansions that loomed over the landscape lay abandoned or in ruins.³⁰⁴ Most alarmingly, Black Southerners, securely trapped by chattel slavery at the bottom of the social hierarchy for centuries, were gaining economic and political power that equaled—and in some cases surpassed—their white neighbors.³⁰⁵

Indeed, despite hardships and continuing white opposition, Black Southerners made unprecedented social, economic, and particularly political progress during Reconstruction.³⁰⁶ The degree of terror that these gains

302. See *infra* text accompanying notes 374–393.

303. See *infra* text accompanying notes 396–418.

304. See JAMES M. MCPHERSON, *ORDEAL BY FIRE: CIVIL WAR AND RECONSTRUCTION* 476 (1982) (“The South was not only invaded and conquered, it was utterly destroyed. By 1865 the Union forces had . . . destroyed two-thirds of the assessed value of Southern wealth, two-fifths of the South’s livestock, and one-quarter of her white men between the ages of twenty and forty. More than half the farm machinery was ruined, and the damages to railroads and industries was incalculable . . . Southern wealth decreased by 60 percent. . .”).

305. See ROGER L. RANSOM & RICHARD SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* 40–55 (2001). Ransom and Sutch acknowledge the economic devastation of the Civil War but note that accounts are often exaggerated because historians mistakenly equate plantation owners’ losses with those of the entire Southern economy:

[T]he outlawing of slavery did not destroy the “capital” embodied in the black population. The apparent disappearance of nearly one-half of the southern capital stock represented, not a loss to the South, but a transfer of the ownership of “capitalized labor” from the slaveholders to the ex-slaves themselves. As free agents, the former slaves “owned” themselves and the right to profit from their own labor as they saw fit. Apparently, it is because so much of southern history has been written from the perspective of the slaveowner that this transfer of ownership has been incorrectly viewed as a loss to the southern economy. Former slaveowners’ laments about their financial losses cannot be generalized and used as evidence of the destructive impact of the Civil War.

Id. at 52.

306. See WILLIAMS, *supra* note 212, at 34–35, 204; C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW: A BRIEF ACCOUNT OF SEGREGATION* 26 (1955); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION: 1863-1877*, at 372 (1988). See

evoked in white Southerners is difficult to overstate.³⁰⁷ The first attempts at reasserting white control, the notorious Black Codes,³⁰⁸ were stymied by Black resistance³⁰⁹ and federal intervention³¹⁰ and later explicitly superseded by the Fourteenth Amendment.³¹¹ During the period that followed, white and Black Southerners frequently intermixed as relations between them fluctuated both temporally and geographically.³¹²

After the federal government abandoned the South in 1877, white Southern elites violently retook control of state governments in the period known as “Redemption.”³¹³ The otherwise diverse group of Redeemers shared a commitment to subordinate Black Southerners and undo the work of Reconstruction.³¹⁴ Learning from the mistakes of the Black Codes, the Redeemers began not by attacking the burgeoning power of Black Southerners directly but by imposing voting restrictions, repealing public benefits, and increasing taxes that disproportionately affected them.³¹⁵

generally PHILIP DRAY, *CAPITOL MEN: THE EPIC STORY OF RECONSTRUCTION THROUGH THE LIVES OF THE FIRST BLACK CONGRESSMEN* (2008).

307. *See, e.g.*, WOODWARD, *supra* note 306, at 23. That terror led to white violence that the nominal federal military presence in the South struggled to contain; the Ku Klux Klan was most active in the South between 1868 and 1871. *See* HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 10, 15 (1988). On white violence toward Black Southerners during Reconstruction generally, *see id.*, at 5–29; WILLIAMS, *supra* note 212; EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 12–15, 18–21 (2017).

308. WILLIAMS, *supra* note 212, at 13–15. The Black Codes were a series of facially discriminatory laws designed to limit the freedom of newly emancipated Black Southerners “by imposing restrictions on their employment, property ownership, independence, family rights, and movement.” *Id.* Mississippi and South Carolina adopted the first Black Codes in 1865; other formerly Confederate states soon followed suit. *Id.*; EQUAL JUST. INITIATIVE, *supra* note 307, at 23 & n.95.

309. *See* EQUAL JUST. INITIATIVE, *supra* note 307, at 9 (describing attempt by Black New Orleanians to convene a state constitutional convention to repeal Louisiana’s Black Codes in 1866); Herbert Shapiro, *Afro-American Responses to Race Violence During Reconstruction*, 36 *SCI. & SOC’Y* 158, 163–64 (1972) (“In the first year of Reconstruction blacks assembled in South Carolina, Alabama and Georgia to urge repeal of the black codes.”).

310. *See* FONER, *supra* note 306, at 208–09 (noting that federal military governors sometimes blocked some or all Black Code restrictions in their respective states).

311. *See id.* at 244.

312. *See* WOODWARD, *supra* note 306, at 33–44 (describing the period between roughly 1870 and 1900 as one “of experiment, testing, and uncertainty [in race relations]—quite different from the time of repression and rigid uniformity that was to come toward the end of the century”).

313. WILLIAMS, *supra* note 212, at 227–31; FONER, *supra* note 306, at 587; FIELDS & FIELDS, *supra* note 142, at 149 (emphasizing the deployment of white supremacy by white Southern elites to disenfranchise their poorer white neighbors and noting that “the question was not white supremacy but ‘which whites should be supreme’” (quoting C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913: A HISTORY OF THE SOUTH* 328 (1951))).

314. FONER, *supra* note 306, at 587–88.

315. *Id.* at 598; *see also* WOODWARD, *supra* note 306, at 31, 34 (“More than a decade was to pass after Redemption before the first Jim Crow law was to appear on the law books of a Southern [S]tate.”). Throughout the period known as Redemption, Black Southerners continued to assert

Between 1880 and 1900, Southern governments used facially race-neutral means to systematically suppress Black votes³¹⁶ and trap Black families in the emerging system of sharecropping.³¹⁷

Unfortunately for the Redeemers, the “damage” of Reconstruction could not be completely undone. More than a decade of interracial sex outside the constraints of chattel slavery increased the ratio of racially ambiguous Southerners.³¹⁸ Further complicating matters, some Black Southerners continued to prosper economically despite economic, social, and political discrimination.³¹⁹ Miscegenation and Black wealth frustrated attempts to divide Southern society cleanly into privileged white and subordinated Black. Thus, to restore what they believed to be the proper order, white Southerners turned to violence. In the “war on freedom” that followed, white Southerners strove to achieve through other means what the Confederacy had failed to achieve: the total resubjugation of their Black neighbors.³²⁰

themselves in ways that would have been unthinkable under chattel slavery. FONER, *supra* note 306, at 592–93, 595–96; WOODWARD, *supra* note 306, at 33–44.

316. See EZRA KLEIN, WHY WE’RE POLARIZED 24–25 (2020) (noting that Black voter registration in the Deep South ranged eighty-five to ninety-four percent in 1868 but had plummeted to five percent by 1944 (citing ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA’S DEEP SOUTH, 1944–1972, at 38 (2015))); WOODWARD, *supra* note 306, at 83–85 (noting that the number in the South of Black voters in Louisiana declined from 130,334 in 1896 to 1,342 in 1904; “[b]etween the two dates the literacy, property, and poll-tax qualifications were adopted”).

317. Though not as oppressive as chattel slavery, the system of sharecropping that replaced it once again trapped Black families into laboring on farms owned by white Southerners. See FONER, *supra* note 276, 405–09; see also *id.* at 595–96 (quoting a New York business journal as reporting in 1877 that “[t]his year . . . labor is under control for the first season since the war”); WILLIAMS, *supra* note 212, at xiii. For a detailed account of the economic roots and pitfalls of sharecropping (or more accurately “debt peonage”), see RANSOM & SUTCH, *supra* note 305, at 149–170.

318. The 1850 Census recorded that 11.2% of Black Americans were “recognizably of mixed ancestry”; by 1910, that number had jumped to 20.9%. Patricia Morton, *From Invisible Man to “New People”: The Recent Discovery of American Mulattoes*, 46 PHYLON 106, 116 (1985). This increase in racial ambiguity fueled white paranoia about “invisible blackness” and spurred the creation of Jim Crow. JOEL WILLIAMSON, A RAGE FOR ORDER: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 247–48; HALE, *supra* note 299, at 128–30.

319. See WILLIAMS, *supra* note 212, at 34–35, 204 (noting many examples “of the wealth African Americans accumulated once emancipation gave them more control over their lives, and of how well many did charting their families’ course”); RANSOM & SUTCH, *supra* note 305, at 2–7 (estimating that the material income of newly emancipated Black Southerners rose by twenty-nine percent after the Civil War).

320. WILLIAMS, *supra* note 212, at xvii, 41, 233 (describing the campaign of white violence that overthrew Black Reconstruction as “the pursuit of the Confederate cause by other means”).

1. *The Reign of Terror*

In 1935, white anthropologist John Dollard visited the Mississippi Delta from Yale University.³²¹ One day, a group of three white men drove Dollard to inspect the cabins of some Black sharecroppers in the area. When a resident of the first cabin reluctantly responded to the white driver's instructions to "come here," the driver laughed and joked, "Come on, we're not going to hang you." This interaction repeated itself at each cabin that Dollard and the white men visited. Dollard later commented that "the Negroes are very polite around here." Another laugh accompanied the driver's perfunctory response: "They have to be."³²²

Navigating the complicated racial caste rules of the New South was no laughing matter for Black Southerners, for whom the barest hint of noncompliance risked brutal violence at the hands of white lynch mobs.³²³ Alleged sexual advances toward white women, often but not always including rape, served as the one of the most common pretexts for lynching Black men.³²⁴ Some victims were accused of other crimes, including arson,

321. This anecdote is recounted in JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 359–60 (1957). I first encountered it in ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 157–58 (2020).

322. DOLLARD, *supra* note 321, at 359–60.

From this point forward in this subsection, I depart from my practice of illustrating my points with stories and anecdotes to avoid perpetuating *trauma porn*, the graphic depiction of Black people's pain to educate, persuade, or entertain non-Black people. See Brittany Johnson, *What Trauma Porn Is, and Why It Hurts Black People*, MIGHTY (Oct. 12, 2020), <https://themighty.com/topic/mental-health/trauma-porn/> [https://perma.cc/6C9B-6PMF]. The specific accounts of horrific acts of violence and brutality against Black people documented by historians and activists for more than a century, beginning with Ida B. Wells's *Southern Horrors: Lynch Law in All Its Phases* in 1892, obviate the need to recount those stories here. See generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 274–75 (2016); EQUAL JUST. INITIATIVE, *supra* note 307; SHAPIRO, *supra* note 307, at 30–63, 93–118; ARTHUR F. RAPER, *THE TRAGEDY OF LYNCHING* (1933); ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 37–39, 60–62 (2010); SHERRILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* (2007).

323. See DOLLARD, *supra* note 321, at 253, 339–40; cf. FIELDS & FIELDS, *supra* note 142, at 35 ("Rules designed to promote feelings of inferiority and superiority travel in tandem with expectations of deference and with rituals that simultaneously create and express the requisite feelings. In the South just after the Civil War (and, depending on the place, for many years thereafter), a Black person was required to step off the sidewalk when a white person approached and, if male, to uncover his head. Obedience usually concealed the intrinsic violence of the rule and kept Black people visibly in their place.").

324. See EQUAL JUST. INITIATIVE, *supra* note 307, at 29–30 ("Nearly 25 percent of the lynchings of African Americans in the South were based on sexual assault . . . Whites' fears of interracial sex extended to any action by a Black man that could be interpreted as seeking or desiring contact with a white woman."); SHAPIRO, *supra* note 307, at 32 (eight of forty-nine Black men lynched in 1907 were accused of rape or attempted rape); RAPER, *supra* note 322, at 4 (eight of nineteen Black men lynching in 1930 were accused of "crimes involving women"); KENDI, *supra* note 322, at 275. The most well-known lynching, that of fourteen-year-old Emmett Till, involved his alleged sexual

robbery, and ill-defined “vagrancy.”³²⁵ But white lynch mobs were not so scrupulous as to require criminal allegations, no matter how flimsy, against their victims. Even the smallest perceived failures to perform deference to white Southerners, including “speaking disrespectfully, refusing to step off the sidewalk, using profane language, using an improper title for a white person, suing a white man, arguing with a white man, bumping into a white woman, [or] insulting a white person,” could justify the violent death of the Black perpetrator.³²⁶ Black Southerners could even be lynched for infractions committed by *other* Black Southerners, particularly when the mob could not get its hands on its preferred victim.³²⁷ And in the rare instances when no specific protocol violation could be charged, the mob could always accuse its victim of the universal crime of being “uppity.”³²⁸

Recall that for a means of coercion to be effective, it must be both severe and ubiquitous.³²⁹ The human mind strains to imagine a consequence more severe than a New South lynching. Indeed, death was often the least horrific of the torments inflicted by the lynch mob. Mobs frequently tortured their victims, including by beating them, gouging out their eyes, amputating their limbs or sexual organs, roasting them over a fire, inflicting multiple deliberately non-lethal gunshot wounds, or dragging them along the ground behind a horse or vehicle.³³⁰ Sometimes even the victim’s death was insufficient to satiate the mob’s sadism, as bodies were desecrated, displayed, or dismembered and distributed to the participants as souvenirs.³³¹ In the most extreme cases, the sparks of an individual lynching ignited a conflagration that could consume an entire Black community in brutal violence and destruction.³³²

Severe as they were, lynchings were a common occurrence in the New South. “If it is necessary, every Negro in the state will be lynched,” future-

assault of a white woman in Money, Mississippi, in 1955. *See generally* TIMOTHY B. TYSON, *THE BLOOD OF EMMETT TILL* 1–6 (2017). The white woman, Carolyn Bryant, has since admitted that she lied under oath about Till’s conduct toward her. *Id.*

325. EQUAL JUST. INITIATIVE, *supra* note 307, at 29.

326. *Id.* at 31; WILLIAMS, *supra* note 212, at 61 (noting the spread of mob violence from punishment for alleged crimes to retaliation for “quotidian disputes”).

327. EQUAL JUST. INITIATIVE, *supra* note 307, at 29.

328. *See* DOLLARD, *supra* note 321, at 340; WILKERSON, *supra* note 321, at 39 (noting that some Black Southerners were lynched for “trying to act like a white person” (quoting RAPER, *supra* note 322, at 36)).

329. *See supra* Section II.B.2.

330. *E.g.*, SHAPIRO, *supra* note 307, at 31; EQUAL JUST. INITIATIVE, *supra* note 307, at 33, 35; WILKERSON, *supra* note 321, at 60–62; TYSON, *supra* note 324, at 203–07; RAPER, *supra* note 322, at 1–2.

331. SHAPIRO, *supra* note 307, at 31.

332. EQUAL JUST. INITIATIVE, *supra* note 307, at 38.

Mississippi Governor James K. Vardaman declared in 1903.³³³ The Equal Justice Initiative has documented 4,084 racial terror lynchings in twelve Southern states between 1877 and 1950.³³⁴ Historian Herbert Shapiro estimates that the majority of the New South's Black population had either personally witnessed a lynching or knew someone who had done so.³³⁵ "Every Negro in the South knows that he is under a kind of sentence of death," John Dollard wrote upon returning from Mississippi. "[H]e does not know when his turn will come, it may never come, but it may also be at any time."³³⁶

Indeed, because lynching participants almost always acted with impunity and often even semi-officially,³³⁷ mobs often turned lynchings into public spectacles attended by many thousands of Southerners.³³⁸ Newspapers across the United States reported on such "lynch carnivals" with macabre fervor, further contributing to the ubiquity of the threat.³³⁹ White Southerners

333. WILKERSON, *supra* note 321, at 39.

334. EQUAL JUST. INITIATIVE, *supra* note 307, at 4, 40 tbl.1. The twelve states are Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *Id.* at 3. Lynchings and other violence against Black Americans occurred outside the South during the same period, but in no other place did lynching reach the level of a systematic method of coercion. *See id.* at 27–29.

335. SHAPIRO, *supra* note 307, at 32; *see also* IFILL, *supra* note 322, at xiv–xv ("In effect, Black Americans share a kind of communal memory of lynching that is not bound by region or time.").

While lynchings have received the most attention from both contemporaries and historians, Margaret Burnham has recently highlighted the "mundane, largely hidden violence that, while it lay at a different point on the spectrum, was equally essential to Jim Crow." MARGARET A. BURNHAM, *BY HANDS NOW KNOWN: JIM CROW'S LEGAL EXECUTIONERS*, at xiv (2022). Burnham notes that such acts of "quotidian violence . . . shaped routine experiences like grocery shopping and tied the nation's legal institutions to its racial culture." *Id.* at xii. Together with Melissa Nobles, Burnham has begun collecting evidence of such incidents in the CRRJ Burnham-Nobles Digital Archive, <https://crjarchive.org/>. *Id.* at xv. While the work to recover and document these events is somewhat preliminary, it supports the ubiquity of violence and the threat of violence as a means of enforcing white supremacy as the dominant ideology of the New South.

336. DOLLARD, *supra* note 321, at 359. One Black Mississippian noted that mob violence was so ubiquitous that white children as young as eight years old used the threat of it to manipulate Black adults. WILLIAMS, *supra* note 212, at 57.

337. *See* RAPER, *supra* note 322, at 2 ("Of the tens of thousands of lynchers and onlookers, the latter not guiltless, only forty-nine were indicted and only four have been sentenced."); IFILL, *supra* note 322, at 8–9 ("What in the early 1900s was often referred to in the local press as 'lynch law' was often regarded by whites as just that—a form of law that had as much legitimacy as the formal, codified laws of the state's justice system."); TYSON, *supra* note 324, at 178–80 ("All of the [Emmett Till] jurors Whitaker interviewed agreed that the sole reason they had voted 'not guilty' was because a Black boy had insulted a white woman, and therefore her kinsmen could not be blamed for killing him."). For "semi-officially," *see generally* IFILL, *supra* note 322; WILLIAMS, *supra* note 212, at 54–55.

338. HALE, *supra* note 299, at 201–08; EQUAL JUST. INITIATIVE, *supra* note 307, at 33–35, 38; WILKERSON, *supra* note 321, at 39 (describing the lynching of Jesse Washington in May 1916 before a crowd of 15,000 people in Waco, Texas).

339. *See* HALE, *supra* note 299, at 203, 205–06.

used the publicity to bolster their developing ideology of white supremacy, a narrative that justified and even necessitated horrific violence against Black Southerners. Any Southerners who openly disagreed with that narrative faced the threat of lynching themselves.³⁴⁰

2. *Finding the Lost Cause*

White Southerners cloaked the naked brutality of the New South in an ideology born from their need to deflect responsibility for the devastation of the Civil War. Modern commentators often use the term *white supremacy* to invoke its converse, non-white inferiority. But as the South limped through the decades following the war, the public image of Southern whiteness desperately needed rehabilitation.³⁴¹ After all, white Southerners had started a war of rebellion to preserve their right to enslave their Black neighbors—a war that white Southerners lost after four years of slaughter and destruction primarily concentrated within the South itself.³⁴² Surrounded by painful evidence of the catastrophic consequences of white supremacy, white Southerners could have abandoned racism once and for all.³⁴³ Instead, they invented a mythology of biblical proportions that recast Southern whiteness as noble victim instead of vicious perpetrator.

As the setting for their mythology, New South leaders conjured the “Old South,” an Arthurian Eden of moonlight and magnolias, from the slave society that dominated the region before the Civil War.³⁴⁴ In the funhouse mirror of the Old South, the brutal system of chattel slavery provided the ideal conditions for relationships between white and Black Southerners.³⁴⁵ White plantation owners—who routinely tortured, raped, and sold Black enslaved people for pleasure and profit³⁴⁶—transformed into paragons of

340. See *id.* at 202 (noting that Black anti-lynching activists were often the target of lynchings themselves); WILLIAMS, *supra* note 212, at 59 (noting that white Southerners who opposed violence against their Black neighbors could be targeted as well).

341. See Alan T. Nolan, *The Anatomy of the Myth*, in *THE MYTH OF THE LOST CAUSE AND THE CIVIL WAR* 11, 13 (Gary W. Gallagher & Alan T. Nolan eds., 2000) (quoting an influential Confederate veteran as stating, “[i]f we cannot justify the South in the act of Secession, we will go down in History solely as a brave, impulsive but rash people who attempted in an illegal manner to overthrow the Union of our Country”); WOODWARD, *supra* note 316, at 118.

342. Nolan, *supra* note 341, at 29–30.

343. Lest history erase their heroic efforts, I note that some Southerners—both white and Black—proposed doing exactly that. See, e.g., HALE, *supra* note 299, at 44–51 (discussing the anti-racist work of George Washington Cable).

344. *Id.* at 24; WOODWARD, *supra* note 316, at 154–55 (“One of the most significant inventions of the New South was the Old South.”).

345. See SAVAGE, *supra* note 278, at 157–59; Nolan, *supra* note 341, at 13 (quoting a New South historian who described chattel slavery as “one of the mildest and most beneficent systems of servitude in the world”); HALE, *supra* note 299, at 51–53.

346. As with lynching, historians have extensively documented the horrors of American chattel slavery. See generally BERLIN, *supra* note 199 (describing American chattel slavery in detail);

patriarchal virtue who cared for and “civilized” Black people at their own considerable expense.³⁴⁷ Black enslaved people—who resisted enslavement through means up to and including violence³⁴⁸—became happy servants who were loyal to white plantation owners even above their own family members.³⁴⁹ The dynamic of beneficent white master and “happy darky” manifested in many forms: Black mammy and white child, white master and Black playmates, white cavalier and Black body servant.³⁵⁰ In short, the Old South was a place in which everyone had a place and everyone liked their place.

If the Old South was Eden, the Yankee was its serpent.³⁵¹ According to the new mythology, Northerners manufactured a dispute over slavery to mask their cultural and economic envy of Old South society.³⁵² Yankee abolitionists slithered into the South, seducing naïve Black Southerners with propaganda about the supposed evils of slavery and poisoning the region’s otherwise unmarred racial harmony.³⁵³ That poison spread until, with the election of the openly hostile Abraham Lincoln to the presidency in 1860, the South was forced to secede preemptively to protect its way of life, as was its constitutional right.³⁵⁴ When the vile Yankees refused to let them go

EQUAL JUST. INITIATIVE, *SLAVERY IN AMERICA: THE MONTGOMERY SLAVE TRADE 15–21* (2018); ANTHONY GENE CAREY, *SOLD DOWN THE RIVER: SLAVERY IN THE LOWER CHATTAHOOCHEE VALLEY OF ALABAMA AND GEORGIA 111–13* (2011).

Kidada Williams has proposed replacing the romanticized term “plantation” with the more accurate term “labor camp” or “forced labor camp.” WILLIAMS, *supra* note 212, at 1. I retain the use of “plantation” here because I am describing the mythology that romanticized it.

347. See HALE, *supra* note 299, at 62–64; Nolan, *supra* note 341, at 26–27; Peter S. Carmichael, *New South Visionaries: Virginia’s Last Generation of Slaveholders, the Gospel of Progress, and the Lost Cause*, in *THE MYTH OF THE LOST CAUSE AND THE CIVIL WAR*, *supra* note 341, at 111; GAINES M. FOSTER, *GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH, 1865-1913*, at 120 (1987). The image of plantation master as beneficent patriarch had roots in antebellum notions about collective order. See BERLIN, *supra* note 199, at 3–4.

348. See BERLIN, *supra* note 199, at 2–3; Nolan, *supra* note 341, at 21–22; see also HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS 374* (1943) (conducting detailed study of historical evidence of violent resistance to chattel slavery and concluding that “[t]he evidence . . . points to the conclusion that discontent and rebelliousness were not only exceedingly common, but, indeed, characteristic of American Negro slaves”).

349. See SAVAGE, *supra* note 278, at 157–159; Nolan, *supra* note 341, at 16; HALE, *supra* note 299, at 59–60.

350. SAVAGE, *supra* note 278, at 157.

351. See *Genesis 3* (describing the temptation and fall of Adam and Eve).

352. Nolan, *supra* note 341, at 15–16.

353. *Id.*

354. See *id.* at 26–27 (“There had been a distinctive and superior Southern culture, benign and effective in its race relations. That culture was led by wise and superior men who seceded because they sought freedom from an oppressive Northern culture . . .”); FOSTER, *supra* note 347, at 118–19.

peacefully, valiant Southerners had no choice but to fight.³⁵⁵ In the war that followed, both white Southern leaders and average Confederate infantrymen demonstrated valor that proved their exemplary moral character.³⁵⁶ Nevertheless, the South lost the war.

The defense of the Old South became the “Lost Cause” of the Confederacy.³⁵⁷ New South mythology attributed the Confederate loss to two principal factors. The first was the overwhelming superiority of the North’s manpower and resources.³⁵⁸ The second was a betrayal that became as tragic and consequential in the Southern imagination as Eve’s offering the forbidden fruit to Adam.³⁵⁹ For rather than assist their white benefactors in the defense of their idyllic homeland, newly freed Black Southerners joined with the Yankee invaders to destroy the Old South.³⁶⁰

Black betrayal of white Southerners became complete during “the hell that is called Reconstruction.”³⁶¹ Far from showing gratitude for the grace of their former masters and benefactors, Black Southerners conspired with Yankee “carpetbaggers” to seize political power and economic resources that rightfully belonged to white Southerners.³⁶² Within New South mythology, the reign of free “darkies”—not the waging and loss of a reckless war by white Southerners—was to blame for the violent turmoil and poverty of Reconstruction.³⁶³ The hysterical fear that beastlike Black men would rape virtuous white women was a tangible manifestation of the belief that Black Southerners had raped the Old South.³⁶⁴

As an ideology, Lost Cause mythology served several important purposes for white Southerners beyond absolving them for the horrors of slavery and the Civil War. By emphasizing the total destruction of the Old South way of life, it cleared the way for the industrialization of the South’s

355. Nolan, *supra* note 341, at 15–16.

356. See FOSTER, *supra* note 347, at 120–22; Carmichael, *supra* note 347, at 111; Nolan, *supra* note 341, at 24–26; SAVAGE, *supra* note 278, at 150, 166.

357. On the origin of the term “Lost Cause,” see Nolan, *supra* note 341, at 13.

358. See FOSTER, *supra* note 347, at 116, 119; Nolan, *supra* note 341, at 22.

359. See *Genesis* 3:6 (King James) (“And when the woman saw that the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise, she took of the fruit thereof, and did eat, and gave also unto her husband with her; and he did eat.”).

360. Nolan, *supra* note 341, at 21–22 (“One of the biggest problems facing Federal logisticians was how to handle the slaves fleeing in wholesale numbers to the Federal lines as those lines advanced southward . . . Further contradiction of the myth appears in the numerous accounts by Federal soldiers of assistance rendered to them by slaves in the field. And Benjamin Quarles, Dudley Cornish, and others have reminded us that approximately 180,000 African Americans, mostly former slaves, were enlisted in the armies of the United States . . .”).

361. The phrase was coined by U.B. Phillips in 1928. HALE, *supra* note 299, at 77.

362. See *id.* at 75–77.

363. *Id.* at 76 (“Reconstruction as the world turned upside down in the aftermath of total war and defeat became instead a flattened time of black over white.”).

364. See *id.* at 79.

agrarian economy.³⁶⁵ By deflecting blame for the war onto Black Southerners, it facilitated reconciliation of North and South against a common racial enemy.³⁶⁶ Most importantly, by blaming Black Southerners for both the Confederate defeat and the hell of Reconstruction, it relieved white Southerners of any moral obligation toward the Black neighbors they had formerly enslaved.³⁶⁷ Indeed, it provided a moral justification for the white subordination of and violence toward Black Southerners.³⁶⁸

Lost Cause mythology became the script by which white Southerners shaped the New South.³⁶⁹ And with the threat of lynching constantly hanging over them, most Southerners—both white and Black—dutifully performed their assigned roles. As in Solzhenitsyn and Havel’s Soviet Union, “the permanent lie [became] the only safe form of existence.”³⁷⁰ Like Havel’s greengrocer,³⁷¹ it did not matter whether they did so because they subjectively believed the mythology or because they were terrified of lynch mobs. Each choice to comply publicly with the ideology of white supremacy contributed to a society in which white supremacy was a tangible reality.³⁷² Between the end of Reconstruction in 1877 and John Dollard’s visit in 1935, white Mississippians had successfully recast their Black neighbors from upwardly mobile fellow citizens to sharecroppers who cringed in politeness to the white “visitors” who randomly ransacked their homes.³⁷³ Only when a wry white Southerner pulled back the curtain could Dollard see the lynch mob waiting in the wings.

B. White Space

White Southern governments scrawled the script of white supremacy on every inch of the New South. They did so in two primary ways: by erecting monuments to Lost Cause ideology and by posting “Whites Only” signs in

365. See, e.g., *id.* at 53; WOODWARD, *supra* note 306, at 118–19.

366. HALE, *supra* note 299, at 75–76.

367. *Id.* at 79 (“In these extremely popular portrayals of Reconstruction [*Birth of a Nation* and *The Clansman*], both the white South and the white North have slipped free from any last traces of moral obligation to the ex-slaves. The fall from plantation grace, the loss of racial ease that make segregation the only possible future, have been African Americans’ fault all along. Beastlike blacks have destroyed the Old South’s racial paradise and the North’s idealistic if misguided attempt to lift up an ‘inferior race.’”); see also WILLIAMS, *supra* note 212, at xx, 209–210, 213.

368. HALE, *supra* note 299, at 79 (quoting Thomas Dixon, the author of *The Clansman*, describing the mythology as “the best apology for lynching”); WILLIAMS, *supra* note 212, at 220 (“Any violence white men used along the way, Lost Cause inventors and enthusiasts insisted, was a legitimate response to Black people’s lechery, incompetence, and criminality.”).

369. HALE, *supra* note 299, at 43–44.

370. SOLZHENITSYN, *supra* note 212, at 646.

371. See *supra* notes 181–188 and accompanying text.

372. See *supra* Section II.C.

373. See *supra* text accompanying notes 318–319.

virtually every public space. Both Lost Cause Confederate monuments and Jim Crow segregation signs served as forms of discriminatory government expression. As veiled threats against failing to perform white supremacy, both contributed fundamentally to subordination in the New South.

1. Southern White Folks on Top

Toward the end of May 1890, more than 100,000 people gathered in Richmond, Virginia.³⁷⁴ The occasion was the dedication of a statue whose subject had recently recaptured the Southern imagination: Confederate General Robert E. Lee.³⁷⁵ The attendees, almost exclusively white,³⁷⁶ listened as the dedication address extolled the virtues of Lee as “a perfect union of Christian virtues and old Roman manhood.”³⁷⁷ To underscore the celebratory mood of the unveiling, the organizers preceded it with a parade, a band concert, cannon and musket fire, and a sham battle.³⁷⁸ An elderly Black man, clearly understanding the implications of the event, exclaimed upon seeing the parade and the Confederate battle flags, “[t]he Southern white folks is on top—the Southern white folks is on top!”³⁷⁹

The Richmond dedication sparked an explosion of copycat ceremonies across the New South. In the twelve years between 1900 and 1912, Southerners erected more monuments to the Confederacy than in the first three decades following the end of the Civil War.³⁸⁰ In the years immediately after the war, a period C. Vann Woodward deemed the “Great Recantation,” many Southerners strove to distance themselves from chattel slavery and the Confederacy that ignominiously lost its fight to preserve it.³⁸¹ Southerners erected monuments during the Great Recantation, but their purpose was to commemorate fallen soldiers and otherwise memorialize the human toll of a

374. SAVAGE, *supra* note 278, at 156–57; Carmichael, *supra* note 347, at 111.

375. SAVAGE, *supra* note 278, at 156–57. After standing in the heart of Richmond for more than 130 years, the Lee statue was removed on September 8, 2021, in response to demands by anti-racist activists following the police murder of George Floyd. Whitney Evans & David Streever, *Virginia’s Massive Robert E. Lee Statue Has Been Removed*, NPR (Sept. 8, 2021, 9:17 AM), <https://www.npr.org/2021/09/08/1035004639/virginia-ready-to-remove-massive-robert-e-lee-statue-following-a-year-of-lawsuit> [<https://perma.cc/QCQ8-KHUW>].

376. Richmond’s Black population almost universally shunned the dedication of the Lee statue. SAVAGE, *supra* note 278, at 151.

377. FOSTER, *supra* note 347, at 101.

378. *Id.* at 100–01; Carmichael, *supra* note 347, at 111.

379. SAVAGE, *supra* note 278, at 151.

380. FOSTER, *supra* note 347, at 273. The total number of monuments erected between 1865 and 1899 was 194; the total between 1900 and 1912 was 306.

381. See WOODWARD, *supra* note 306, at 117–18 (quoting a Southern newspaper as writing in 1880 that “[t]he ‘bonny blue flag’ [the Confederate battle flag] is the symbol of nothing to the present generation of Southern men” (alterations omitted)).

war that remains the bloodiest in American history.³⁸² More than ninety percent of the Confederate monuments erected before 1885 were either placed in a cemetery or incorporated some funereal aspect in their designs.³⁸³ The memorial movement had largely run its course within twenty years of the war's end.³⁸⁴

Domination, not commemoration, was the subject matter of Lost Cause Confederate monuments. Beginning with the statue of Lee in Richmond, Southerners saturated Confederate statues and their dedication ceremonies with the symbolism of Lost Cause mythology. Monuments to Confederate leaders such as Lee, Stonewall Jackson, and Jefferson Davis celebrated them as exemplars of the virtues of the Old South plantation owner,³⁸⁵ what Kirk Savage has called their “canonical whiteness.”³⁸⁶ But increasingly, Southerners eschewed the elitism implied by statues of Southern aristocrats in favor of monuments to the “common soldier.”³⁸⁷ Statues of standardized Confederate soldiers—invariably and deliberately white—made canonical whiteness the universal property of white Southerners.³⁸⁸

Lost Cause monuments differed from their earlier commemorative counterparts in placement as well as subject matter. Far from being relegated to the cities of the dead, Lost Cause monuments were erected among the living on large streets or town squares.³⁸⁹ The site of Lee's statue in Richmond, once a remote and barren corner of the distant suburbs, became the beginning of “Monument Avenue” and the center of the city's public life.³⁹⁰

Lost Cause monuments expressed a clear message: that Southern white folks were on top—and conversely that Southern Black folks were on the bottom. And like the Black man at the Richmond dedication of the Lee statue, Black Southerners received that message clearly. Karen Fields recounts the response of her grandmother to the erection of a statue of slavery apologist

382. See FOSTER, *supra* note 347, at 37.

383. *Id.* at 40. One influential memorial association explicitly indicated that such memorials should not be “triumphal . . . Placed in the City of the Dead, and near the entrance, the sight of it cannot fail to call back the memory of the sad history which it commemorates.” *Id.* at 41. Seventy percent of the Confederate monuments erected between 1865 and 1885 were placed in cemeteries. *Id.* at 40.

384. *Id.* at 40.

385. See *id.* at 120–22; Nolan, *supra* note 341, at 18–19; Carmichael, *supra* note 347, at 111.

386. SAVAGE, *supra* note 278, at 132.

387. *Id.*; see FOSTER, *supra* note 347, at 122; Nolan, *supra* note 341, at 17–18.

388. See FOSTER, *supra* note 347, at 122 (quoting a Southerner in 1892 as stating that “[t]he purest spirit, the deepest love, the greatest hero, the noblest manhood, was in the infantry private of the South”); SAVAGE, *supra* note 278, at 19, 184–86.

389. See FOSTER, *supra* note 347, at 129.

390. SAVAGE, *supra* note 278, at 148.

John C. Calhoun in Marion Square in downtown Charleston, South Carolina, in 1887:

We [the Black population of Charleston] hated all that Calhoun stood for. Our white city fathers wanted to keep what he stood for alive [T]hey put up a life-size figure of John C. Calhoun preaching and stood it up on the Citadel Green, where it look at you like another person in the park. Blacks took that statue personally. As you passed by, here was Calhoun looking you in the face and telling you, “N—, you may not be a slave, but I am back to see you stay in your place.”³⁹¹

Gram Fields’s account suggests two additional insights. First, Southern governments deliberately erected Lost Cause monuments in locales essential to public life so that Black Southerners could not conduct their business without encountering the monuments’ racist message. Every time Black Southerners visited the town square—the center of American public life³⁹²—they were confronted by a looming reminder of their subordinated status within New South society.³⁹³ Second, the message expressed by Lost Cause monuments included white Southerners’ readiness to enforce the racial order. In other words, Lost Cause monuments implicitly but deliberately referenced the semi-official punishment of lynching with which every Black Southerner was terrifyingly familiar.³⁹⁴

Thus, whether they depicted wealthy leaders or common soldiers, the eyes of Lost Cause monuments were a vital part of the panopticon of daily life in the New South.³⁹⁵ They served as ornate stand-ins for the violent

391. FIELDS & FIELDS, *supra* note 142, at 182. Indeed, vandalism of the Calhoun statue by Black Charlestonians eventually forced its replacement in 1896 by a version on a pedestal. *See id.*; Angela Brown, *Looking Back at Controversial History of Calhoun Monument*, ABC NEWS (June 23, 2020), <https://abcnews4.com/news/local/looking-back-at-controversial-history-of-calhoun-monument> [https://perma.cc/7RHD-CAN9]. Like the Lee monument in Richmond, *see supra* note 305, the Calhoun monument was removed in June 2020 following antiracist protests over the police murder of George Floyd. *See* Stephen Hobbs et al., *John C. Calhoun Statue Taken Down From Its Perch Above Charleston’s Marion Square*, POST & COURIER (June 23, 2020), https://www.postandcourier.com/news/john-c-calhoun-statue-taken-down-from-its-perch-above-charlestons-marion-square/article_7c428b5c-b58a-11ea-8fcc-6b5a374635da.html [https://perma.cc/5APH-QEB3].

392. *See* Schein, *Methodological Framework*, *supra* note 276, at 390 (“The seemingly innumerable functions and activities housed or hosted in the Courthouse Square remind us of the long historical association in the United States between free-market capitalism and democratic individualism; the square represents the commingling of civil and economic and political society in the daily lives of Lexingtonians of all classes and colors. We can read the square for its meaning as unwitting autobiography, reflecting our social and cultural predilections and everyday activities. The square was central to people’s lives.”).

393. *See id.* at 392 (“Lost Cause statuary facilitated through the landscape a dominant-class cultural-political vision of what Lexington-indeed, the South-ought to be.”).

394. *See supra* Section III.A.1.

395. *See supra* notes 237–242 and accompanying text.

enforcers of the racial order, be they police officers, lynch mobs, or lone vigilantes. That step of removal permitted white Southerners to threaten their Black neighbors while maintaining the fiction—no matter how transparent—of benign gentility. Lost Cause monuments ensured that while Black Southerners could always choose to violate the racial order, they could never forget the consequences for doing so.

2. *Deadly Signs and Separations*

On June 5, 1934, as Adolf Hitler moved to consolidate his power over Germany, a group of leading Nazi jurists met to discuss how best to translate the party's fanatical antisemitism into law.³⁹⁶ The first item on their agenda was a thorough consideration of “the preeminent example of a ‘race state’”: The United States of America.³⁹⁷ Though the Nazis discussed various aspects of American race law, Jim Crow segregation featured prominently in their debates.³⁹⁸ The Nazis were primarily interested in segregation's use as a tool to “educate and enlighten” Americans about the tenets of white supremacy.³⁹⁹ One of the most fervently racist attendees, Karl Klee, a criminal court judge and law professor at the University of Berlin, argued strenuously for the German importation of some form of American segregation.⁴⁰⁰ Comparing segregation to the Nazi boycotts of Jewish stores in 1933 and 1934, Klee identified Jim Crow as a form of “consciousness raising” that constantly alerted white Southerners of the need to protect white superiority from pollution by Black inferiority.⁴⁰¹

Two decades later, Flannery O'Connor captured Jim Crow's “consciousness raising” effects in literary form. In the short story “The Artificial N—,” a poor white man and his grandson take a train to the city from their home in a rural Georgia county.⁴⁰² The boy, dressed in his only,

396. JAMES Q. WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 94 (2017). The seventeen men present at the meeting constituted the Nazi Commission on Criminal Law Reform. *Id.* Hitler would seize total control of Germany, including the armed forces, in August 1934, less than a month after this meeting. See RICHARD J. EVANS, *THE THIRD REICH IN POWER* 42–43 (2005). On antisemitism as a core component of Nazi ideology, see RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 38, 153 (2003).

397. WHITMAN, *supra* note 396, at 111, 113 (“The bottom line is this: when the leading Nazi jurists assembled in early June 1934 to debate how to institutionalize racism in the new Third Reich, they began by asking how the Americans did it.”).

398. *Id.* at 84–86, 112.

399. *Id.* at 104.

400. *Id.* at 103–04.

401. *Id.* The Nazis ultimately rejected Jim Crow-style segregation, in part because the relative wealth and influence of Jewish Germans would dilute segregation's intended message of inferiority. See *id.* at 98–99.

402. Flannery O'Connor, *The Artificial N—*, in *A GOOD MAN IS HARD TO FIND AND OTHER STORIES* 103 (1955). As a white author, I choose to abbreviate the epithet.

ill-fitting suit, soon becomes enthralled by another passenger, a heavy-set “coffee-colored man” in a “light suit and a yellow satin tie with a ruby pin on it,” carrying a “black walking stick” and wearing a “sapphire ring,” who passes the boy and his grandfather on his way down the aisle to another train car.⁴⁰³ The grandfather quickly corrects the boy’s mistake: When the boy calls the other passenger a “man,” his grandfather informs him curtly, “That was a n—.”⁴⁰⁴ Tellingly, the boy directs the shame of his misidentification of the wealthy Black man into a “fierce raw fresh hate” of the man himself and of Black people more generally.⁴⁰⁵

Later in the dining car, where the boy and his grandfather cannot even afford to buy a meal, the boy observes the Black man and his companions separated from the rest of the car by a yellow curtain. “They rope them off,” his grandfather tells him.⁴⁰⁶ By physically separating the Black passengers, the yellow curtain signals their inferiority to the white passengers—including the boy and his grandfather. Though it does nothing to fill his empty stomach, the boy revels in his feelings of superiority over the object of his admiration-turned-ire. He has learned his first lesson in the Jim Crow code.⁴⁰⁷

Like the Nazis, white Southern leaders understood the expressive power of Jim Crow and deployed it to establish white supremacy. By the publication of O’Connor’s short story in 1955, the mandatory physical separation of white from Black Southerners popularly known as Jim Crow segregation marked every facet of life in the New South.⁴⁰⁸ Southerners’ lives were legally segregated literally from the cradle to the grave.⁴⁰⁹ Beyond the well-known examples of schools, water fountains, and train cars, Southern legislatures seemed to compete with one another to invent increasingly meticulous regulations to reinforce the distinction between their white and Black citizens.⁴¹⁰ In South Carolina, Black and white textile workers were

403. *Id.* at 109–10.

404. *Id.* at 110.

405. *Id.* at 111.

406. *Id.* at 112.

407. See HALE, *supra* note 299, at 130–31.

408. *Id.* at 124–25. On the origin of the term “Jim Crow,” see WILKERSON, *supra* note 322, at 40–41.

409. Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1019–27 (2005) (describing totality of Southern segregation). For “literally,” see *id.* at 1019–20, n.221–22 (Mississippi and South Carolina required Black babies to be born in a separate hospital from white babies; North Carolina required Black bodies to be buried in separate cemeteries from white ones.).

410. *Id.* at 1027 (“Such laws seem almost comical, as though state legislatures constantly searched to find something new to segregate. . . . These ‘whimsies,’ codified by law, reminded blacks over and over again that in the American South, and much of the North, they could never expect equal treatment, even in houses of worship.” (quoting William H. Hastie, *Toward an Equalitarian Legal Order, 1930-1950*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 20 (1973))).

forbidden from working in the same room, from using the same entrances or exits at the same time; from going up or down the same staircase or looking out the same window at the same time; and from using the same restrooms or water buckets.⁴¹¹ Birmingham, Alabama, outlawed interracial games of checkers, while Calhoun City, Mississippi, segregated the parking spaces on its town square.⁴¹²

Even more than Lost Cause monuments—which proliferated during the exact same period—yellow curtains, “whites only” placards, and other Jim Crow markers constantly intruded into Southerners’ lives.⁴¹³ And as the Nazis had recognized, that was precisely their purpose.⁴¹⁴ The sheer ubiquity and inconvenience of Jim Crow restrictions deliberately interrupted Southerners’ automatic functioning, reminding them of the relentless requirement to perform white supremacy. Far from concealing the vexatious concept of race or avoiding racial conflict, segregation was designed to make racial subordination a conspicuous part of daily life.⁴¹⁵ Jim Crow turned the lives of Southerners, both white and Black, into a complex and often ridiculous dance designed to reproduce white supremacy at every step.⁴¹⁶ “Ours is a world of inexorable divisions,” a white Southern pastor lamented in 1909. “Segregation has made of our eating and drinking, our buying and selling, our labor and housing, our rents, our railroads, our recreations, a problem of race as well as of maintenance.”⁴¹⁷

Even more than Lost Cause monuments, the “deadly signs and separations” of Jim Crow carried the threat of violent retribution for those who refused to follow the script of white supremacy.⁴¹⁸ Whereas the threat of

411. *Id.* at 1025 (quoting PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR 414 (1951)).

412. WILKERSON, *supra* note 322, at 45.

413. *See* WOODWARD, *supra* note 306, at 34 (noting that Jim Crow developed from roughly 1890 to 1900); WILKERSON, *supra* note 322, at 41 (noting that Georgia was the first state to mandate segregated railroad cars in 1891; by 1905 every Southern state did so); *supra* notes 374–379 and accompanying text (describing the dedication of the Lost Cause statue of Robert E. Lee in 1890).

414. *See supra* text accompanying notes 396–401–398.

415. *See* HALE, *supra* note 299, at 131.

416. *See* FIELDS & FIELDS, *supra* note 142, at 86–88 (noting that Jim Crow “loom[ed] up suddenly, like death, in the midst of everyday activities, with unexpected features revealing themselves in different guises from moment to moment”).

417. HALE, *supra* note 299, at 121 (alterations omitted) (quoting EDGAR GARDNER MURPHY, THE BASIS OF ASCENDANCY 122, 138 (1909)).

418. *See supra* Section III.A.1. The phrase “deadly signs and separations” is a paraphrase by HALE, *supra* note 274, at 129–30, of KATHARINE DU PRE LUMPKIN, THE MAKING OF A SOUTHERNER 215 (1947) (“Never had I seen so plainly as on this day how deadly serious the white South was in its signs and separations, or understood in clearer focus its single-mindedness of aim.”).

Lost Cause monuments was veiled by appeals to “heritage not hate,”⁴¹⁹ Jim Crow’s threat was veiled beneath a veneer of “separate but equal.” White Southerners never meant the veneer to convince anyone that things actually were equal under segregation; indeed, that would defeat Jim Crow’s entire purpose. Rather, the point was to create a façade just thick enough to provide plausible deniability for those who had no real desire to see past it. That included the Justices of the Supreme Court, who deemed it a “fallacy” to attribute a message of subordination to segregation in *Plessy v. Ferguson* in 1896.⁴²⁰ That message was obvious to at least one member of the Court, Justice Harlan, who accused the Court of ignoring what “[e]very one knows” in his famous dissent.⁴²¹ But the “separate but equal” veil had done its job. The Court upheld segregation as constitutional, clearing the way for its proliferation in the New South.⁴²²

Fifty years later, the Court was finally prepared to tear down the veil and acknowledge Jim Crow’s message of subordination.⁴²³ *Brown v. Board* cited psychological harm to Black schoolchildren for its determination that “[s]eparate educational facilities are inherently unequal.”⁴²⁴ The Court attributed this harm not to the act of segregation itself but rather to the “interpret[ation]” of segregation “as denoting the inferiority of the negro group.”⁴²⁵ In other words, Jim Crow’s expressive content was central to *Brown*’s holding that it violated the Equal Protection Clause.⁴²⁶

Brown was right that segregation’s message of subordination psychologically harmed Black children, but that harm was not its primary

419. See, e.g., Ta-Nehisi Coates, *Heritage Not Hate*, ATLANTIC (Apr. 28, 2009), <https://www.theatlantic.com/entertainment/archive/2009/04/heritage-not-hate/16754/> [<https://perma.cc/ZF35-VJ36>].

420. 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

421. *Id.* at 557 (Harlan, J., dissenting) (“Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.”).

422. *Id.* at 551–52 (majority opinion).

423. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

424. *Id.* at 495.

425. *Id.* at 494.

426. This interpretation of *Brown* is nearly as old as the decision itself, stretching back at least to Charles Black Jr.’s classic defense of the decision in the *Yale Law Journal* in 1960. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426–28 (1960); see also Dorf, *supra* note 128, at 1273 (calling Black’s article “the most persuasive and obvious account of *Brown*’s correctness”).

purpose.⁴²⁷ Jim Crow's expressive function was not incidental; it was integral to segregation's contribution to subordination in the New South. Just as they did with Lost Cause monuments, white Southern governments saturated the landscape with Jim Crow segregation signs to remind Southerners of the constant need to perform white supremacy and the consequences of failing to do so. As a form of discriminatory government expression, Jim Crow signs facilitated the translation of the ideology of white supremacy into a social reality.

Unfortunately, *Brown's* lack of clarity about the centrality of subordination created space for later Justices to claim that the equal protection violation defined by *Brown* was racial classification—that is, the specific form of subordination deployed by Jim Crow—rather than subordination itself.⁴²⁸ By the time the Court was forced to choose explicitly between classification and subordination in *Palmer v. Thompson*,⁴²⁹ it had endured two decades of exhausting struggle over integration⁴³⁰ and was composed of Justices with markedly different political persuasions and priorities than the Justices who decided *Brown*.⁴³¹ Whatever its faults,⁴³² *Brown* exhibited a willingness to credit Black Southerners' lived experiences of Jim Crow as not only valid but constitutionally significant.⁴³³ From *Palmer* onward, as the Court moved steadily toward an anticlassification interpretation of the Equal Protection Clause, it became increasingly

427. See *supra* notes 126–131 and accompanying text.

428. See *supra* note 148.

429. 403 U.S. 217 (1971); see also *supra* note 100.

430. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 389–408 (2004) (describing “massive” Southern resistance to *Brown*, including the resurgence of the Ku Klux Klan).

431. President Richard Nixon appointed Chief Justice Warren Burger, the Chief Justice of the *Palmer* Court, in large part because of Burger's open criticism of Chief Justice Earl Warren, the Chief Justice of the *Brown* Court. See Lucius J. Barker, *Black Americans and the Burger Court: Implications for the Political System*, 1973 WASH. U. L.Q. 747, 747–48. Although Nixon's two subsequent appointees, Lewis Powell and William Rehnquist, joined the Court the year after *Palmer*, both were political conservatives who would join the majority in *Washington v. Davis*, 426 U.S. 229, in 1976. Prior to his nomination, Powell authored a memo outlining a plan for transforming American institutions, including the judiciary, so that they would be more sympathetic to conservative business interests. See JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 89–94, 103 (2016). While clerking for Justice Robert Jackson during the term that the Court decided *Brown*, William Rehnquist, who would go on to be Chief Justice in his own right, wrote Jackson a memo in which Rehnquist contended that *Plessy v. Ferguson*, 163 U.S. 537 (1896), “was right and should be affirmed.” Reva Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 121–22 (2023).

432. See Finkelman, *supra* note 409, at 974 (noting that “many scholars and civil rights activists regard the decision [*Brown*] as a failure”).

433. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (describing psychological effects of segregation on Black schoolchildren).

unwilling to acknowledge the ever-evolving manifestations of white supremacy and their impacts upon the lives of Black Americans.⁴³⁴

Instead of accepting *Brown*'s invitation to eradicate the use of the law as a tool of racial subordination, later Justices have—like the majority in *Plessy*—covered their eyes to hide the social reality of racism.⁴³⁵ Willful blindness leads to doctrinal distortions. *Plessy*'s “separate but equal” was one such distortion; the discriminatory treatment requirement is another. Just as one refused to see how segregation subordinated Black Southerners, the other refuses to see how discriminatory government expression contributes to subordination regardless of whether it is accompanied by discriminatory government treatment. As with “separate but equal,” modern distortions will persist until a majority of Justices are willing to remove their self-imposed blindfolds.⁴³⁶

CONCLUSION: ANTICLASSIFICATION'S ABSURD RESULTS

The Equal Protection Clause was born from and forged in Black Americans' struggle against white supremacy. The major project of the Clause's framers during the First Reconstruction was to dismantle the system of racialized chattel slavery of the Antebellum South;⁴³⁷ the major project of the Supreme Court's expansion of the Clause during the Second Reconstruction⁴³⁸ was to dismantle the racialized caste system of the New South.⁴³⁹ The Clause's reduction to a tool overwhelmingly used by white Americans to strike down measures designed to benefit Black Americans is one of the greatest travesties of American constitutional law in a history chocked full of them.

While “the equal protection of the laws” is a notoriously ambiguous phrase,⁴⁴⁰ the anticlassification approach has defined Jim Crow segregation

434. See Siegel, *supra* note 143, at 1123–46 (describing the ways that status-enforcing regulations evolve in response to resistance).

435. See *supra* text accompanying notes 420–422.

436. See *supra* notes 71–73 and accompanying text.

437. See FONER, *supra* note 306, at 256–57; Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & C.R. L. REV. 389, 409 (2004).

438. Historian C. Vann Woodward is credited with labeling the mid-twentieth century movement to dismantle the New South, including a “succession of dramatic decisions” from the Supreme Court of the United States, as a “New Reconstruction.” See WOODWARD, *supra* note 306, at 9–11; Kevin K. Gaines, *The End of the Second Reconstruction*, 1 MOD. AM. HIST. 113, 114–15 (2018). Today the period is commonly called the “Second Reconstruction.” *Id.*

439. See, e.g., Finkelman, *supra* note 409, at 973–74 (discussing the historical importance of *Brown v. Board*).

440. See FONER, *supra* note 306, at 257–58; WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 60–67 (1988); Barnes et al., *supra* note 73, at 967–68; Brest, *supra* note 73, at 5; Fiss, *supra* note 61, at 108, 173 (“[T]he text [of the Equal Protection Clause] clothes the court with the authority to give specific meaning to the

as the quintessential equal protection violation for forty years.⁴⁴¹ This has led to the conclusion that the Equal Protection Clause *always* and *only* prohibits discriminatory government treatment based on race.⁴⁴² Within statutory interpretation, the canon against absurd results provides that if a certain interpretation of statutory text creates an absurd result, the interpretation must be wrong.⁴⁴³ Coercive ideology exposes the absurd results of anticlassification. Because anticlassification recognizes Lost Cause monuments as expressive but not subordinating, it ignores a vital tool whereby white Southerners achieved subordination in the New South. Because anticlassification recognizes Jim Crow segregation as subordinating but not expressive, it misses one of the primary means by which segregation contributed to subordination. In actuality, both Lost Cause monuments and Jim Crow segregation contributed to subordination in large part *because* they were expressive. Anticlassification's distinction between differential governmental treatment and discriminatory government expression is incoherent.

Coercive ideology provides a fruitful starting point for further research within the field of law and beyond. Most fundamentally, however, coercive ideology suggests the untenability of anticlassification as the prevailing approach to equal protection jurisprudence. At a minimum, coercive ideology indicates that discriminatory government expression should be unconstitutional—that is, that the Equal Protection Clause should prevent dominant groups from marking public, government-owned space with their own ideology. It is time to stop living within the lie that the Equal Protection Clause is powerless to protect the powerless.

ideal of equality The ethical issue is whether the position of perpetual subordination is going to be brought to an end for our disadvantaged groups, and if so, at what speed and at what cost.”).

441. Indeed, it sometimes seems as though the battle over the Equal Protection Clause has become more about interpreting *Brown v. Board* than interpreting the Clause itself. See, e.g., *SFFA*, 143 S. Ct. 2141, 2159–61 (2023); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (plurality opinion); see also Balkin & Siegel, *supra* note 61, at 11–12.

442. See *Parents Involved*, 551 U.S. at 747–48; *supra* Section I.A.3.

443. See generally Veronica Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994).