

THE LAW AND MORALITY OF BUILDING RENAMING

ALFRED L. BROPHY*

Abstract

This essay responds to Thomas Russell's research on William Simkins and the dormitory named after him at the University of Texas—Austin campus. It places Simkins into the context of early twentieth-century thought and action in the Southwest and highlights some of the reasons why the University of Texas renamed Simkins Hall. It surveys the law related to monument removal (of which building renaming is a part) and identifies a set of factors one might consider when there is a request for renaming. Those factors look to the circumstances in which the naming first took place (such as what was known and who participated in the naming) and the current meaning as well. The essay concludes with a caution that renaming can lead to the forgetting of historical context and an observation that memory is more important than renaming.

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* Reef C. Ivey II Professor of Law, University of North Carolina—Chapel Hill. Contact the author at abrophy@email.unc.edu or 919.962.4128. I would like to thank Tom Russell for bringing the story of William Simkins to light and Mary Sarah Bilder, Mark E. Brandon, William S. Brewbaker, Carol N. Brown, Daniel M. Filler, Ariela Gross, Daniel W. Hamilton, Terry Meyers, and Lindsey Moorhead for comments and assistance.

This past summer, Simkins Hall on the University of Texas's campus was renamed.¹ In 1954, when the name William Simkins was suggested for the dormitory, the University of Texas faculty seem to only have known that Simkins was a popular law school professor from 1899 to 1928.² Apparently, they did not know that Simkins participated in the Ku Klux Klan's violence during Reconstruction or that he promoted the Klan in the early twentieth century. Few, if any, knew about this until Thomas Russell's research on Simkins was published on the internet in April 2010.³ The controversy that arose when Russell suggested that the building should be renamed gives us an opportunity to consider when building renaming is appropriate and how we can try to balance the competing considerations of preservation of tradition, knowledge of the past, and avoiding honoring deeds we do not think honorable.

I. WILLIAM SIMKINS AND HIS ERA

Racial violence was tragically common in the Southwest in the years from 1915 to 1930, which witnessed the terrors of riots, "Negro drives," lynchings, and segregation in housing, schools, streetcars, and public accommodations.⁴ The Klan grew so powerful in neighboring Oklahoma in the early 1920s, for instance, that the Governor declared martial law and instituted military tribunals to wrest control from them.⁵

1. See *University of Texas at Austin President Will Propose Removal of Simkins Name from Residence Hall*, THE U. OF TEX. AT AUSTIN (July 9, 2010), http://www.utexas.edu/news/2010/07/09/simkins_residence_hall/.

2. *Id.*; Leslie Harris, *Life Among the Ruins*, 52 S. TEX. L. REV. 73 (2010).

3. Russell's paper, which is a form of "applied legal history," recovered the context of Simkins and the University of Texas before and after *Brown v. Board of Education*, and thus speaks to both historians and those of us interested in contemporary law. See Thomas D. Russell, "Keep Negroes Out of Most Classes Where There Are a Large Number of Girls": The Unseen Power of the Ku Klux Klan and Standardized Testing at the University of Texas, 1899–1999, 52 S. TEX. L. REV. 1 (2010); *Former Professor Urges UT to Rename Simkins Hall*, DAILY TEXAN (May 9, 2010), <http://www.dailytexanonline.com/content/horns-horns-down-3>.

4. See generally CHARLES C. ALEXANDER, THE KU KLUX KLAN IN THE SOUTHWEST 20–22, 33 (Okla. Paperbacks ed., Univ. of Okla. Press 1995) (1965); KENNETH T. JACKSON, THE KU KLUX KLAN IN THE CITY, 1915–1930, at 66–80 (Elephant Paperback 1992) (1967) (discussing the Klan in Dallas); ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 8–9 (2002) (discussing the violence of lynchings, "Negro drives," and riots that swept neighboring Oklahoma at this time).

5. Quincy Roland Lehr, *Terror, Reform, and Repression: Oklahoma Politics in the Early 1920s*, at 178–79 (2006) (unpublished Ph.D. dissertation, Columbia University) (on file with author); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, 18–19 (2004).

Simkins was part of the movement that began around 1915 to restart the Klan.⁶ It came to life again in part because D.W. Griffith made Thomas Dixon's 1905 novel about the Klan during Reconstruction, *The Clansman*, into the movie *The Birth of a Nation*.⁷ Dixon celebrated the first Klan's role in reclaiming the South from the Yankees and "Negroes" who had taken over the Southern legislatures and courts in the wake of the Civil War.⁸ The introduction to Dixon's novel captured the book's central theme; that is, the Klan's role in the preservation of white southern society:

In the darkest hour of the life of the South, when her wounded people lay helpless amid rags and ashes under the beak and talon of the Vulture, suddenly from the mists of the mountains appeared a white cloud the size of a man's hand. It grew until its mantle of mystery enfolded the stricken earth and sky. An "Invisible Empire" had risen from the field of Death and challenged the Visible to mortal combat.⁹

The novel was filled with demeaning depictions of African Americans. For instance, Dixon said of an African American judge in South Carolina:

This man was but yesterday a slave, his father a medicine-man in an African jungle who decided the guilt or innocence of the accused by the test of administering poison. If the poison killed the man, he was guilty; if he survived, he was innocent. For four thousand years his land had stood a solid bulwark of unbroken barbarism. Out of its darkness he had been thrust upon the seat of judgment of the laws of the proudest and highest type of man evolved in time. It seemed a hideous dream.¹⁰

Simkins echoed Thomas Dixon's idea that African Americans needed to be kept in place. In fact, his address in the university's alumni magazine, which Russell has rediscovered, reads like a *Cliff's Notes* version of Dixon's novel.¹¹ The version of history that celebrates the Klan for its supposed role in protecting the South from Yankees and "negroes" continues to reappear on occasion even today.¹² In fact, several comments on stories about Simkins Hall drew on that theme.¹³

6. *Horns Up: Former Professor Urges UT to Rename Simkins Hall*, DAILY TEXAN (May 9, 2010), <http://www.dailytexanonline.com/content/horns-horns-down-3>.

7. THE BIRTH OF A NATION (Epoch Film Co. 1915).

8. See, e.g., THOMAS DIXON, JR., THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN 269–73 (1905) (depicting corrupt "Negroes" and "scalawags" in the South Carolina legislature).

9. *Id.* at ii.

10. *Id.* at 273.

11. See Russell, *supra* note 3, at 3–4.

12. See, e.g., typical white person, Comment to Ralph K.M. Haurwitz, *Half-Century Later, UT to Reconsider Naming of Dorm for Klansman*, STATESMAN.COM (May 20, 2010, 7:46 AM), <http://www.statesman.com/news/local/half-century-later-ut-to-reconsider-naming-of-698255.html>

We are rightfully critical of a *law* professor who celebrated the Klan's violence and who spoke in favor of the Klan, especially one whose advocacy of violence went beyond many of his contemporaries. Yet, Simkins was not the only academic who policed the Jim Crow segregation of the early twentieth century. The powerful and well-educated taught ideas that fit with, and indeed contributed to, segregation. An early and important member of the University of Oklahoma's faculty, Edwin C. DeBarr, was a Klansman.¹⁴ Although the University of Oklahoma chastised him in the 1920s for participating in the Klan, it nevertheless named the chemistry building for him.¹⁵ In 1988, the university renamed the building;¹⁶ however, one of the streets near campus still bears his name.¹⁷

The popularity of racial ideas over these years is apparent in many places in American culture, even in F. Scott Fitzgerald's 1927 novel *The Great Gatsby*. Daisy's husband, Tom Buchanan, refers to a book he is

?plckOnPage=2&plckItemsPerPage=25&plckSort=TimeStampDescending#pluck_comments_list
GLENN FELDMAN, POLITICS, SOCIETY, AND THE KLAN IN ALABAMA, 1915–1949, at 5–7 (1999).

13. See, e.g., typical white person, Comment to *Half-Century Later*, *supra* note 12 (May 20, 2010, 7:46 AM),

<http://www.statesman.com/news/local/half-century-later-ut-to-reconsider-naming-of-698255.html>
?plckOnPage=2&plckItemsPerPage=25&plckSort=TimeStampDescending#pluck_comments_list.

The real story is in the cause for the formation of the KKK in the first place. To imagine that it was formed simply because there was some "hatred" toward black people is to imagine the history of the Civil War should [sic] be told by Dora the Explorer or Shreck [sic]. Things happen for a reason. Take the time and do the research. Reconstruction in the South is a subject seldom covered in today's world of education, particularly in the North. The spirit of reconstruction is alive and well in the Congress of this country and in the hearts of many people from the North. The excesses of the KKK are well documented, there are excesses of others who are not so . . . easy to find, but they were there and at the time the KKK was all that stood between the re-constructionist [sic] carpet baggers and the citizens of the South. The federal government provided no protections at all, either physically or under the law. And Sherman and all of his troop were war criminals!

Id.; stinc, Comment to *Half-Century Later*, *supra* note 12 (May 20, 2010, 10:09 AM), <http://www.statesman.com/news/local/half-century-later-ut-to-reconsider-naming-of-698255.html>

?plckOnPage=2&plckItemsPerPage=25&plckSort=TimeStampDescending#pluck_comments_list.

And someday, many years from now, someone may note that Nelson Mandella [sic] was a terrorist whose bombings killed innocent South Afrikan [sic] whites. And I bet the argument will be that it was OK because apartheid was so bad . . . Same argument could be made for reconstruction. But I bet the dorm name changes and none of the Mandella namesakes [sic] do.

Id. (ellipsis in original).

14. See ALEXANDER, *supra* note 4, at 133–34.

15. *Id.*

16. Elizabeth Titus, *UT Weighs Change for Dorm Named for KKK Leader*, THE TEX. TRIB. (July 15, 2010), <http://www.texastribune.org/texas-education/university-of-texas-system/ut-weighs-change-for-dorm-named-for-klk-leader/>.

17. Kaci Applegate, *Controversial Street Name Still Present on Campus Corner*, THE OKLA. DAILY (June 19, 2007), http://hub.ou.edu/articles/article.php?article_id=1064826974.

reading, “‘The Rise of the Colored Empires’ by this man Goddard”¹⁸ Fitzgerald based that scene on Lothrop Stoddard’s 1920 book, *The Rising Tide of Color Against White World-Supremacy*.¹⁹ Perhaps the error in the author’s name was designed to show the lack of serious attention Buchanan paid to the book, to give the reader the sense that Buchanan was, like so many people in the 1920s, thoughtlessly accepting the popular theories of the day.

The Klan meant many things to different people—from its self-appointed policing of the morals of white women, to the enforcement of prohibition and other perceived offenses, even charitable work.²⁰ While two distinguished economists are now hazarding questions about the extent of terror that the Klan actually provoked, the weight of historical evidence maintains that their violence was extraordinary.²¹

Many who would never dream of joining the Klan expressed support for the separation of the races. In the academy, some wrote that slavery was not so bad, that during Reconstruction corrupt Yankees and free blacks stole from the helpless South. They wrote of Reconstruction as the “tragic era” and called the end of Reconstruction the era of “redemption,” as in the

18. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 13 (Collier Books 1986) (1925).

19. LATHROP STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY* (Charles Scribner’s Sons 1920); LAURA HENSLEY, *HISTORY IN LITERATURE: THE STORY BEHIND F. SCOTT FITZGERALD’S THE GREAT GATSBY* 32 (2008). Two years later Stoddard published *The Revolt Against Civilization: The Menace of the Under Man*. LATHROP STODDARD, *THE REVOLT AGAINST CIVILIZATION: THE MENACE OF THE UNDER MAN* (1922).

20. FELDMAN, *supra* note 12, at 4–7 (observing that the Klan was many things all at once).

21. See Roland G. Fryer, Jr. & Steven D. Levitt, *Hatred and Profits: Getting Under the Hood of the Ku Klux Klan*, *National Bureau of Economic Research Working Paper 13417* (Sept. 2007), available at <http://www.nber.org/papers/w13417>.

Fryer and Levitt maintain that “[r]ather than a terrorist organization, the 1920s Klan is best described as a social organization built through a wildly successful pyramid scheme fueled by an army of highly-incentivized sales agents selling hatred, religious intolerance, and fraternity in a time and place where there was tremendous demand.” *Id.* at Abstract. They go on to say that “the Klan’s true genius lay in its uncanny ability to raise revenue.” *Id.* at 3.

To make that convincing, we need to measure the terror more effectively than looking at lynchings and the emigration of African Americans and foreign-born people from counties with Klan members, which are Fryer’s and Levitt’s primary measures. See *id.* That is, lynchings and out migration by themselves are not good measures of the Klan’s effect.

To illustrate some of the problems with this, take Oklahoma in the 1920s. There were a lot of beatings and mutilations; many people were run out of their homes (popularly known as “negro drives”). See Brophy, *supra* note 5, at 29. The military tribunals set up under martial law collected hundreds of pages of testimony about the Klan’s violence. *Id.* at 19. Of course, such claims served some of the Governor’s political purposes as well. See *id.* at 29–31. The most obvious effect of the Klan may be found at the local level, below the places that Fryer and Levitt looked, and perhaps also in states other than Pennsylvania, Colorado, and Indiana, where they focused their attention.

period when Southerners took back control from the North.²² The desire for reconciliation between North and South bent how people thought about our nation's history in the years leading up to the Civil War. For instance, even moderate Yale University history professor Allen Johnson wrote about the constitutionality of the Fugitive Slave Act of 1850 in the *Yale Law Journal* in 1921.²³ Johnson sought to revive the case of the supporters of the Act (belated, obviously) from the anti-slavery criticism that the Act was unconstitutional.²⁴ Johnson's exercise was part of an attempt to get past the controversies surrounding the Civil War.²⁵

That is something of Simkins' context in the larger academic world. But Simkins was an outlier at the University of Texas as well. Simkins,

22. Newspaperman Claude Bowers wrote of *The Tragic Era: The Revolution after Lincoln*. CLAUDE BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN*, at vi (Houghton Mifflin Co. 1929). W.E.B. DuBois summarized the scholarship on Reconstruction in his book *Black Reconstruction*. See generally W.E.B. DUBOIS, *BLACK RECONSTRUCTION* 711 (S.A. Russel Co. 1935).

Ralph Ellison wrote several times about the remaking of history in the wake of the Civil War, which was the central theme of his lecture at Brown, "Going to the Territory." See Ralph Ellison, *Going to the Territory*, in *THE COLLECTED ESSAYS OF RALPH ELLISON* 591, 594 (1996). It appeared again in his posthumously published novel, now known as *Three Days Before the Shooting . . .*:

Soon after putting down their guns, they started fighting with words and blaming all that happened on those who they'd now made outcast and homeless. They made what they call their white man's burden their Balaam's ass but wouldn't listen to what he was telling them.

RALPH ELLISON, *THREE DAYS BEFORE THE SHOOTING . . .* 814 (John F. Callahan & Adam Bradley eds., 2010). In another vignette in *Three Days Before the Shooting . . .* the jazz-musician-turned-preacher Hickman recalled hearing how his college-educated grandfather had taken a role as an actor in *Birth of a Nation* as a slave. *Id.* at 715–16. Perhaps the role was not so much acting as the grandfather had wished.

The ways that Americans rewrote the meaning of the Civil War and blamed the war and the problems of life in post-War America on the formerly enslaved people set in motion much of Ellison's work on the meaning of race, on how life was not as it seemed, and in particular, on the distinction between life as it was and life as "the law" said it ought to be. That was part of what led to the observation in *Three Days Before the Shooting . . .* that "[w]e have our history just as you have yours, but unfortunately both are against you." *Id.* at 723.

23. See generally Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 *YALE L.J.* 161 (1921).

24. *Id.*

25. *Id.* at 161. ("Patient investigation North and South is taking the place of heated denunciation and defense . . . yet some unfortunate errors persist even in the writings of candid historians."); see also Alfred L. Brophy, *The Civil War's Echo in the Yale Law Journal* (unpublished paper) (on file with author). Running on at least distantly parallel tracks to that scholarship was another strain that portrayed slavery as not all bad. Yale University history professor U.B. Phillips's important and highly regarded book, *American Negro Slavery*, depicted slavery as relatively benign. U.B. PHILLIPS, *AMERICAN NEGRO SLAVERY* (Appleton-Century-Crofts, Inc. ed., La. State Univ. Press 1969) (1966). For example, his chapter on plantation management focused on advice planters gave on how to treat workers, and rarely discusses the beating of slaves. See *id.* at 261–90; see also *id.* at 291–92 (depicting the "plantation type" of enslaved people, who were, among other things, superstitious, lazy, and accepted subordination).

thus, was a part of an era where many people believed in segregation and participated in violence, which we need to understand and remember. It is easy to forget how closely we are connected in time to people who defended illegal violence from their positions of influence at our nation's great universities. However, Simkins went beyond the typical views of his era; he was, to use a phrase popular these days, outside the mainstream.

And by the early 1950s, when the naming took place, Simkins' views were far outside the mainstream of those on campus. We can turn to the *Texas Law Review*, which began publication in 1922,²⁶ for evidence of the life of the mind in Austin. In that review are the vibrant writings of people who sought to remake legal thought, such as Herman Oliphant's legal realist work, published shortly after Simkins' death.²⁷ In 1965, about a decade after the dormitory was named for Simkins, Charles L. Black advocated civil disobedience in the pages of the *Texas Law Review*.²⁸ By the early 1950s, the ideas held by William Simkins were not those of most others—or perhaps of any others—at his former institution. And by 1954, when Simkins Hall was named after him,²⁹ (and the nearby park was named after his brother, a former member of the university's board of regents³⁰) his contributions to the Klan seem to have been forgotten. There was, so far as the record discloses, no effort to honor Simkins for his connections to the Klan.³¹ Recent evidence shows that, had Dean W. Page Keeton—who prepared the report requesting the naming—known about Simkins' record, he would not have recommended Simkins as the dormitory's namesake.³²

This was how things stood until April 2010, when Thomas Russell's article on Simkins was posted on the Internet. This event set off soul-searching at the University of Texas, throughout the state of Texas, and indeed, throughout the United States.³³

26. TEX. L. REV., available at <http://www.texasrev.com/about>.

27. See Herman Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 127 (1932).

28. See Charles L. Black, Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEX. L. REV. 492, 492 (1965).

29. *Regents Approve New Name for University Residence Hall and Park*, THE U. OF TEX. AT AUSTIN (July 15, 2010), http://www.utexas.edu/news/2010/07/15/creekside_residence_hall/.

30. *Id.*

31. Haurwitz, *Half-Century Later*, *supra* note 12.

32. Russell, *supra* note 3, at 34 (discussing W. Page Keeton's petition regarding naming of building); Haurwitz, *Half-Century Later*, *supra* note 12 (“Carole Keeton Strayhorn, a former . . . Austin mayor, said her late father could not have known about Simkins' Klan connection. ‘My dad was a staunch, staunch advocate for civil rights. He would never have condoned anything that gave any credibility to anything having to do with the KKK. He'd be leading the charge today to change the name.’”).

33. See, e.g., Ralph K.M. Haurwitz, *Questions Linger Regarding Confederate Statues at UT: Panel to Consider ‘Imagery’ but Focus on Dorm Named for Klan Member*, AUSTIN AMERICAN STATESMAN (May 27, 2010); Ibram Rogers, *KKK Leader's Name Erased, but What*

II. THE LAW OF BUILDING RENAMING

Monument law—who has the right to place, repair, and remove monuments—combines constitutional and property law.³⁴ The constitutional law of monuments deals with the free speech rights of private individuals, organizations, and governmental entities to speak on public land and the obverse.³⁵ Additionally, monument law includes a limitation from the Establishment Clause, which restricts religious speech on public property. Property law, which appears less frequently in disputes over monuments, is usually invoked only when property has been dedicated to use for memorial purposes.

A large number of monuments are on private land, and the owners of the land, therefore, retain broad authority over the placement or removal of monuments. Sometimes private organizations may have internal disputes about the monuments, which appear in court. In the late nineteenth century, for instance, members of the Florida Confederate Memorial Association

About UT's Confederate Statues, DIVERSE BLOG (July 22, 2010), <http://diverseeducation.com/blogpost/283/>; Thomas Russell, *Strip the Klansman's Name from Simkins Hall*, THE HORN (May 10, 2010), http://www.readthehorn.com/the_horn/campus/788/op_ed_strip_the_klansman_s_name_from_simkins_hall; Meena Hartenstein, *University of Texas Poised to Re-title Dormitory Named for KKK Leader*, N.Y. DAILY NEWS (June 9, 2010), http://www.nydailynews.com/news/national/2010/06/09/2010-06-09_university_of_texas_may_re_dub_dormitory_named_for_kkk_leader.html#ixzz0vqcM2Jyr.

34. See Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 926–27 (2007); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 607–10 (2008); Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1326, 1348 (2004).

Sometimes we may think of judicial opinions as monuments, which put into print a particular interpretation of our history. Some opinions articulate particular visions of politics and history. A Kentucky opinion from 1913 told, in detail, of the sufferings of Confederate soldiers during the “war between the states” as a way of justifying a statute that provided funding for them, against a challenge that it was a special law. *Bosworth v. Harp*, 157 S.W. 1084, 1088 (Ky. Ct. App. 1913) (upholding a statute that provided for care of Confederate veterans against a challenge that it was a prohibited “special law” because the veterans rendered “public service”). *Bosworth* presented an image of the motives for the Confederacy that fit it within the American tradition of freedom. Yet, here I am concerned not with judicial opinions as monument but instead how the law deals with physical monuments and the names attached to them. See also Alfred L. Brophy, *Considering Reparations for Dred Scott*, in *THE DRED SCOTT CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW 177–90* (David Thomas Konig et al. eds. 2010) (asking what might be done about a judicial monument to the era of slavery).

35. In the 1990s, monument law's free-speech issues included the right of a charitable organization to have its name and symbol on a license plate and of a municipality to display a Confederate flag on its property. *Sons of Confederate Veterans v. Faulkner*, 509 S.E.2d 207, 209 (N.C. Ct. App. 1998) (holding that the state must issue Sons of Confederate Veterans license plate); *Daniels v. Harrison Cnty. Bd. of Supervisors*, 722 So.2d 136, 138–39 (Miss. 1998) (holding that the County Board of Supervisors may fly the Confederate flag).

could not decide where to place a monument they had purchased, so they turned to court to settle the dispute.³⁶ The monument eventually made its way to the Walton County Courthouse.³⁷

Disputes are more likely to arise when a monument is placed on public property than private. An organization representing Pennsylvania veterans, for instance, challenged the location of a monument at Gettysburg, though the organization did not object to the monument in general.³⁸ The Supreme Court of Pennsylvania concluded that the Gettysburg Battlefield Memorial Association only needed to take advice from the veterans; it was not compelled to accept their recommendations.³⁹ Other disputes along these lines occur when a private group seeks to place a monument or urges their particular interpretation of a monument at a public park.⁴⁰

Sometimes a governmental body, a company, or a charitable organization dedicates land for a public monument and restricts the removal of the monument or the use of land for other purposes.⁴¹ Once the land is dedicated, the owner of the land has to follow the rules established at the time of dedication.⁴² The Jefferson Davis Memorial Park in Abbeville, Georgia was established in 1898, and Abbeville dedicated the property to use as a park at that point.⁴³ Fifty years later, it was enjoined from selling the park for commercial uses.⁴⁴ Similarly, a housing developer dedicated land for a memorial park in Florence, Alabama, in the late nineteenth century and was prohibited from using the land for other, non-park purposes several decades later.⁴⁵ In yet another similar circumstance,

36. *McCullom v. Morrison*, 14 Fla. 414, 416–17 (Fla. 1874).

37. *Id.* at 417 (enjoining removal of monument); *see also* WALTON COUNTY COURTHOUSE, <http://www.jud10.org/Courthouses/Walton/walton.htm> (last updated Oct. 17, 2003).

38. *Reed v. Gettysburgh [sic] Battlefield Mem'l Ass'n*, 24 A. 597, 597 (Pa. 1891).

39. *Id.* at 598.

40. *See, e.g.*, J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENVTL. L.J. 203, 240 (2009) (discussing the condemnation of property for Gettysburg and shifting state, then federal, authority over the battlefield); Dwight T. Pitcaithley, "A Cosmic Threat": *The National Park Service Addresses the Causes of the American Civil War*, in *SLAVERY AND PUBLIC HISTORY: THE TOUGH STUFF OF AMERICAN MEMORY* 171–72 (James Oliver Horton & Louise Horton eds., 2006) (discussing the National Park Service's process for deciding on interpretations it presents).

41. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 475–76 (1981).

42. *City of Abbeville v. Jay ex rel. Syms*, 55 S.E.2d 129, 132 (Ga. 1949).

43. *Id.* at 131.

44. *Id.* at 134.

45. *See* *City of Florence v. Florence Land & Lumber Co.*, 85 So. 516, 517 (Ala. 1920) (mentioning the dedication of a monumental park in late nineteenth century enforced decades later). In the absence of such dedication, the rights of a city to move or develop around a monument are broad. *Id.* In *Antonakas v. Anderson Chamber of Commerce*, South Carolina refused to issue an injunction against building on a lot that was once a public square. 126 S.E. 35,

Senator Augustus O. Bacon's heirs were able to reclaim land in early 1972 that had been given for a segregated public park by Bacon in the early 1910s.⁴⁶ The public park could not be operated on a segregated basis—obviously—and so the property reverted to Bacon's heirs.⁴⁷

A. *A Gift with a Restriction: Vanderbilt's Confederate Memorial Hall*

Although building renamings are fraught with more moral than legal questions, gifts are often conditioned on the naming of a building. Thus, the terms of gifts govern the circumstances upon which the name may be changed. In those instances, as in the dedication of real property for a park or monument, there is a legally enforceable right to a building's name. The issue of interpretation of a building-name gift recently arose in *United Daughters of the Confederacy v. Vanderbilt*, which was decided in 2005 by the Tennessee Court of Appeals.⁴⁸

The lawsuit over Vanderbilt's attempt to rename "Confederate Memorial Hall" to "Memorial Hall" lies at the center of several points of contention, such as how we remember the South's role in the Civil War: Should we remember the war as a fight by noble people, defending their homeland, or as a war to maintain slavery? But the legal issue was framed on somewhat different grounds: How much discretion do we give schools to rename buildings given by donors decades ago? That question turns on how we classify property rights created long ago.

The road to the Tennessee Court of Appeals was a long one. It began in the 1910s, when the United Daughters of the Confederacy (UDC) talked with Peabody College about funding a dormitory.⁴⁹ Contracts were drafted in 1913 and 1927, which together called for the UDC to provide \$50,000 towards the cost of construction of a dormitory.⁵⁰ In return, Peabody would call the building "Confederate Memorial Hall" and allow the UDC to nominate young women who descended from Confederate veterans to live rent-free in the building.⁵¹

Meanwhile, the UDC had trouble raising money. Then in 1933 there was a new contract drafted (which ratified the previous two), calling for

39 (S.C. 1924). The proposed building would block the view of a Confederate monument, but there was no right to see the monument.

46. See *Evans v. Abney*, 396 U.S. 435 (1970).

47. *Id.*; *Evans v. Newton*, 382 U.S. 296, 298 (1966); see also *Ink v. City of Canton*, 212 N.E.2d 574, 575 (Ohio 1965).

48. *United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 102 (Tenn. Ct. App. 2005).

49. *Id.* at 103–04.

50. *Id.* at 104.

51. *Id.*

\$50,000 from the UDC and conditioned on the rest of the money coming from the National Recovery Administration, a New Deal Agency. The contract provided that the agreement was void if the NRA did not provide funding. That contract was never signed that we can tell and Peabody ended up getting the remaining funding from a bond they floated when the NRA refused to provide money to a private school. Peabody went ahead and built the dormitory, named it “Confederate Memorial Hall” and housed young women nominated by the UDC free of charge. Then, in 1979 Peabody College, skirting the rim of bankruptcy, was acquired by Vanderbilt. As part of the acquisition agreement, Vanderbilt agreed to accept all liabilities of Peabody. But after 1979, they no longer accepted any new nominations from the UDC to house young women rent-free in Confederate Memorial Hall.

From 1979 to 2002, there had been periodic discussions about changing the name of Confederate Memorial Hall. In 1987 and 1988, discussion arose about the building’s name when Vanderbilt spent \$2.5 million remodeling Confederate Memorial Hall.⁵² The Vanderbilt Student Government Association passed a resolution recommending installation of a plaque that would put “Confederate” into context.⁵³ The plaque, which was installed on the front of the building, reads:

Confederate Memorial Hall

Constructed in 1935 by George Peabody College for Teachers, in part, with funds raised at personal sacrifice during the Great Depression, by Tennessee women of the United Daughters of the Confederacy, in memory of their fathers and brothers who fought in the War between North and South, 1861–65. Dedicated to the education of teachers for a region sorely in need of them. Renovated by Vanderbilt University in 1988, for continued service to all its students.

1989⁵⁴

Vanderbilt’s chancellor, Joe B. Wyatt, declined to recommend a name change in part because of “the absence of any indication that the naming of Confederate Memorial Hall by George Peabody College for Teachers was in any sense intended to support either slavery or any other form of prejudice towards Blacks.”⁵⁵

After becoming chancellor of Vanderbilt in 2000, Gordon Gee announced plans in 2002 to change the name of “Confederate Memorial

52. *United Daughters of the Confederacy*, 174 S.W.3d at 106.

53. *Id.* at 107.

54. *Id.* at 107 n.11.

55. *Id.* at 107.

Hall” on campus maps and on the front of the building to “Memorial Hall.”⁵⁶ The United Daughters of the Confederacy sued to prevent the change.⁵⁷ The Tennessee Chancellor who first heard the UDC’s plea for an injunction found that it was “impracticable and unduly burdensome for Vanderbilt to continue to perform that part of the contract pertaining to the maintenance of the name ‘Confederate’ on the building and at the same time pursue its academic purpose of obtaining a racially diverse faculty and student body.”⁵⁸ The UDC appealed.⁵⁹

Judge (now Justice) William C. Koch reversed the chancellor.⁶⁰ He made several interesting moves in his opinion. First, Judge Koch (following the chancellor) read a contract into the parties’ course of dealings. That is, even though the 1933 contract was never signed (and even if it had been, the NRA never provided funding), the court found that there was a contract through Peabody’s acceptance of the \$50,000, through the naming of “Confederate Memorial Hall,” and through their acceptance of women to live in the hall.⁶¹

Second, Judge Koch found that the contract was divisible between the UDC’s right to nominate women to live rent-free, and the name of the Hall.⁶² If those rights were not divisible, then the statute of limitations would have run on the UDC’s right to enforce the contract in the early 1980s. There is nothing surprising here, but that leads to a strange result: Judge Koch awarded damages on the entire \$50,000.⁶³ That is, while the contract was divisible for purposes of the applicable statute of limitations, it was not divisible for purposes of damages.⁶⁴

There is a lot more that one might say about the majority opinion. For example, the majority opinion converted the chancellor’s interpretation of the contract as having created a charitable trust—a trust subject to *cy près* or other equitable modification—into a straight-out gift, not subject to such equitable modification.⁶⁵ This was a subtle slight-of-hand, which may in some way usurp the role of the chancellor. Though, since this was done on summary judgment, without taking any testimony, the appellate court was in as good a position as the chancellor to make the factual determination.

56. *Id.*

57. *Id.* at 102.

58. *Id.* at 111.

59. *Id.* at 102.

60. *Id.* at 102, 120.

61. *See id.* at 115–16, 120.

62. *Id.* at 109 n.13.

63. *Id.* at 104–05, 119–20.

64. *See id.* at 104–05, 109 n.13, 119–20.

65. *Id.* at 113–14, 120.

Perhaps even more interesting is Judge William B. Cain's concurrence, which consists in large part of a quotation from the memoirs of Union General Joshua Lawrence Chamberlain.⁶⁶ Chamberlain is an important figure; he fought and was wounded at Gettysburg and accepted the surrender at Appomattox.⁶⁷ About the time of the fiftieth anniversary of Gettysburg, as people—North and South—were struggling with the memory of war and subsequent reunion, Chamberlain published his memoirs.⁶⁸ Judge Cain quotes Chamberlain's text, which honored the soldiers of both the North and South:

Before us in proud humiliation stood the embodiment of manhood: men whom neither toils and sufferings, nor the fact of death, nor disaster, nor hopelessness could bend from their resolve; standing before us now, thin, worn, and famished, but erect, and with eyes looking level into ours, waking memories that bound us together as no other bond;—was not such manhood to be welcomed back into a Union so tested and assured?

Instructions had been given; and when the head of each division column comes opposite our group, our bugle sounds the signal and instantly our whole line from right to left, regiment by regiment in succession, gives the soldier's salutation, from the "order arms" to the old "carry"—the marching salute. Gordon at the head of the column, riding with heavy spirit and downcast face, catches the sound of shifting arms, looks up, and, taking the meaning, wheels superbly, making with himself and his horse one uplifted figure, with profound salutation as he drops the point of his sword to the boot toe; then facing to his own command, gives word for his successive brigades to pass us with the same position of the manual,—honor answering honor. On our part not a sound of trumpet more, nor roll of drum; not a cheer, nor word nor whisper of vain-glorying, nor motion of man standing again at the order, but an awed stillness rather, and breath-holding, as if it were the passing of the dead!

....

What is this but the remnant of Mahones Division, last seen by us at the North Anna? its thinned ranks of worn, bright-eyed men recalling scenes of costly valor and ever-remembered history.

Now the sad great pageant—Longstreet and his men! What shall we give them for greeting that has not already been spoken in volleys of thunder and written in lines of fire on all the riverbanks of Virginia? Shall we go back to Gaines Mill and Malvern Hill? Or to the Antietam of Maryland, or Gettysburg of Pennsylvania?—deepest

66. *Id.* at 122–24 (Cain, J., concurring).

67. *Id.* at 122

68. *Id.* at 122–24.

graven of all. For here is what remains of Kershaws Division, which left 40 per cent. of its men at Antietam, and at Gettysburg with Barksdales and Semmes Brigades tore through the Peach Orchard, rolling up the right of our gallant Third Corps, sweeping over the proud batteries of Massachusetts—Bigelow and Philips,—where under the smoke we saw the earth brown and blue with prostrate bodies of horses and men, and the tongues of overturned cannon and caissons pointing grim and stark in the air.

Then in the Wilderness, at Spottsylvania and thereafter, Kershaws Divison again, in deeds of awful glory, held their name and fame, until fate met them at Sailors Creek, where Kershaw himself, and Ewell, and so many more, gave up their arms and hopes,—all, indeed, but manhoods honor

. . . .

Ah, is this Picketts Divison?—this little group left of those who on the lurid last day of Gettysburg breasted level cross-fire and thunderbolts of storm, to be strewn back drifting wrecks, where after that awful, futile, pitiful charge we buried them in graves a furlong wide, with names unknown!

Met again in the terrible cyclone-sweep over the breast-works at Five Forks; met now, so thin, so pale, purged of the mortal,—as if knowing pain or joy no more. How could we help falling on our knees, all of us together, and praying God to pity and forgive us all!⁶⁹

Chamberlain provided a touching memoir. Not for nothing was there a movement in the hearts and minds of Americans to forget the origin of the war in slavery and move forward, unburdened by a sense of the injustices wrought in the past. There was a need for the South to bury the past so that it might reintegrate with the United States; the North had economic and social interests in reunification as well. In that process of reconciliation, African Americans were left with little protection, as the meaning of the anti-slavery struggle and the war was forgotten.⁷⁰

The way that Chamberlain's thoughts appear again, nearly one hundred years later in a judicial opinion, is significant. His thoughts serve as a reminder of how the North and South reconciled after the war, and a

69. *Id.* (quoting JOSHUA LAWRENCE CHAMBERLAIN, *THE PASSING OF THE ARMIES* 260–62 (Stan Clark Military Books 1994) (1915)).

70. David Blight details the rewriting of the war's origins in the late nineteenth century. *See* DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001). The story of how those narratives worked their way into legal thought is only now being told. *See, e.g.,* PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999); Glory McLaughlin, *A "Mixture of Race and Reform": The Memory of the Civil War in the Alabama Legal Mind*, 56 ALA. L. REV. 285 (2004); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

reminder of what the monuments to the Confederacy mean to many. As the concurrence later observed,

It is to the memory of these men that Confederate Memorial Hall was built and, to that end and at great personal sacrifice in the midst of the Great Depression, that the United Daughters of the Confederacy raised and contributed to Peabody College more than one-third of the total cost of the construction of the dormitory.⁷¹

Judge Cain tried to judicially settle something that did not admit of judicial settlement. He obviously believed, honestly and in good faith, in the positive association of the Confederacy. And he also believed that the memorial called up those positive associations. The concurrence propagated the belief that monuments to the Confederacy had no relationship to slavery or to the era of Jim Crow segregation that followed.⁷² The Tennessee laws of contract and property now require that Vanderbilt continue to call “Confederate Memorial Hall” by that name as long as the building stands.⁷³

B. When the Law Does Not Apply

Quite frequently, however, monuments are placed on land without reservation, or a building is named without a contract with its donor. In those instances, the group that placed the monument and other interested parties have limited rights. For instance, in 1891 the Ladies Memorial Association of Greenville County, South Carolina, received permission to erect a monument “to the Confederate dead of Greenville county” at the center of Main Street.⁷⁴ Thirty years later, Main Street was crowded and the city decided—over strong but not unanimous protests from veterans—to relocate the monument to the county courthouse grounds.⁷⁵ The Supreme Court of South Carolina rejected a series of arguments against the monument’s removal.⁷⁶ The court did not think that the property was solely dedicated to the monument and did not think the city was estopped from moving the monument.⁷⁷

71. *United Daughters of the Confederacy*, 174 S.W.3d at 124 (Cain, J., concurring).

72. *Id.* at 121–22.

73. *Id.* at 120 (majority opinion). For further discussion of the case, see Alfred L. Brophy *et al.*, *Integrating Spaces: Property Law and Race* 193–200 (2011).

74. *Grady v. City of Greenville*, 123 S.E. 494, 495 (S.C. 1924).

75. *Id.*

76. *See id.* at 496–500.

77. *See id.* at 497–99. Jack Chin and Randy Wagner point out that during the era of Jim Crow, African Americans formed a majority in some Southern states, just not a majority of voters. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 81 (2008). Chin and Wagner focus on the deprivation of voting rights. *See id.* at 80–83. That further questions the legitimacy of naming

For many university buildings, then, the law is not so rigid. Often buildings are named in honor of someone, rather than as part of a naming contract. And so the issues involve morality more so than what the law prohibits or permits. Indeed, the renaming of Simkins Hall does not pose any of the legal issues as raised in response to the attempted renaming of Confederate Memorial Hall.⁷⁸ It was a naming decision undertaken by the university,⁷⁹ and they may undo it whenever they like. In this instance, the questions are of morality and expediency rather than law.

III. THE MORALITY OF RENAMING

There is a natural sentiment and prepossession in favor of age, of ancestors, of barbarous and aboriginal usages, which is a homage to the element of necessity and divinity which is in them. The respect for the old names of places, of mountains and streams, is universal. The Indian and barbarous name can never be supplanted without loss. The ancients tell us that the gods loved the Ethiopians for their stable customs; and the Egyptians and Chaldeans, whose origin could not be explored, passed among the junior tribes of Greece and Italy for sacred nations.

—Ralph Waldo Emerson, *The Conservative*.⁸⁰

My first experience with the renaming of a building came when I was a second-year law student. One afternoon, I heard a racket outside the library, and I looked out to see a couple of men using a jackhammer to remove a concrete block from above the entrance to (what I knew as) “Johnson Hall.” Shortly thereafter, a new block appeared with a new name: “Wien Hall.” I complained to a classmate about this, and he casually said something along the lines of, “All the money from the original donor’s probably gone and they won’t get any more from that family, so we sold the

decisions made when a segment of the population, sometimes a substantial segment, was unable to participate in the political process that led to the placement of the monument at issue.

78. Similarly, the state has the authority to reword a plaque at the Texas State Capitol Building to downplay the importance of the building as a memorial to Confederate soldiers. *See Strybos v. Perry*, No. 03-07-00073-CV, 2010 Tex. App. LEXIS 2200 (Tex. App.—Austin Mar. 26, 2010, no pet.) (mem.op.) (refusing mandamus to prohibit the rewording). However, Texas Government Code sections 2166.501 and 2166.5011 protect a monument once it has been placed by the Texas Historical Commission from removal without the Commission’s permission. *See Sweeney v. Jefferson*, 212 S.W.3d 556, 563–65 (Tex. App.—Austin July 28, 2006, no pet.) (reversing dismissal of Confederate veterans’ organization’s complaint). The Austin Capitol has been the subject of lawsuits in the Supreme Court of Texas over Confederate monuments for nearly a century. *See, e.g., Conley v. United Daughters of the Confederacy*, 164 S.W. 24 (Tex. 1913) (enjoining the removal of Confederate objects from museum room in the state capitol building).

79. *See Haurwitz, Half-Century Later, supra* note 12.

80. 1 RALPH WALDO EMERSON, *The Conservative*, in NATURE, ADDRESSES, AND LECTURES 293, 304 (1903).

name to someone else.” That horrified my sense of propriety, tradition, and perhaps even justice.⁸¹ I guess it reflects my change in attitude over time that, while I still find such renaming disquieting, I no longer feel the same sense of moral outrage as I had in my early twenty-something student days. I suppose my classmate’s explanation accurately reflects the calculations made by many university administrators. When there is new money or talent to be cultivated, we gravitate to it. Sadly, in some ways, the world we inhabit loves “the new.” And perhaps that is why there is such reverence for what has survived over time; for there must be something noble in a person, or a building, or a tree, or anything else that has lived for a long time.

Despite our reverence for the old, questions of renaming historical buildings arise now and then, though there are a host of arguments against it. Prime among those arguments is that a building’s name is part of a tradition; the name exists because of the contributions made by person to the institution; we should not rewrite history; and renaming is a meaningless, “feel-good” action.

A. *Framing Issues for the Morality of Renaming*

Let me try to borrow a legal framework for thinking about renaming. Renaming involves different considerations from an initial naming. For though there is no actual vested property right, expectations have grown around a name and any such move invites, at the very least, confusion and lost goodwill. Perhaps it is wise to recall here Oliver Wendell Holmes’s observation about the nature of possession and one’s instinct to retain possession:

It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again. Philosophy may find a hundred reasons to justify the instinct, but it would be totally immaterial if it should condemn it and bid us surrender without a murmur.⁸²

Holmes suggests that there should be a very good reason to change a name or deprive another of a right they have come to expect, whether doing so is legally cognizable or not.⁸³

81. Though I now learn—if the Columbia University “wiki-page” is to be believed—that Johnson Hall was named after an eighteenth-century president of Columbia and, thus, there was no donor whose money had been expended. This was a more straight-forward case of selling the name of the building. *Wien Hall*, WIKICU, http://www.wikicu.com/Wien_Hall (last modified July 19, 2010).

82. OLIVER WENDELL HOLMES, *Possession*, in *THE COMMON LAW* 206, 213 (1881).

83. *See id.*

Perhaps we could analogize this to Federal Rule of Civil Procedure 60(b), which identifies the grounds for relief from a judgment.⁸⁴ It provides for relief when there is substantial information that was not known at the time of the judgment and could not have been developed, or there are other circumstances warranting reopening the case.⁸⁵

In looking to see if there are other extraordinary circumstances, we should look to whether evidence was unknown or overlooked at the time, who participated in the initial naming, and the procedure used to decide on a name. We should look to an honoree's history, who made the naming decision, the process for selecting the name, what the chosen name means now, and what message removing (or keeping) the name sends. If these factors, together, point strongly in favor of renaming, and if the moral sense of the community is strongly in favor of renaming, then the presumption against renaming can be overcome.

1. *Who Named It and What Did the Name Mean?*

We should start with some sense of how the building was named. In deciding on the removal of something, there are some questions that may be useful to consider, including: Who had a say in the naming? What was the purpose of the naming? What did they know? Answers to these questions generate some sense for the appropriateness of a name originally and the message that was being sent with the naming. We may feel different about renaming depending on who participated in the naming and the spirit in which the naming took place.

In some cases, evidence of who participated in decisions to erect Confederate monuments may appear in litigation. For instance, *Van Hook v. McNeil Monument Co.* dealt with a dispute between a Confederate memorial group and a county judge who agreed to contribute to the erection of a memorial fountain on the grounds of the Union County Courthouse in Arkansas.⁸⁶ But in many other cases, monuments may have been paid for

84. FED. R. CIV. P. 60(b).

85. FED. R. CIV. P. 60(b)(2), (6). The analogy is not exactly apt, of course, because this information might have been developed at the time if there had been someone there with some interest in developing it. What I am looking for is some reasonably close analogy that has the authority of law, to help guide through the labyrinth of what to do next.

86. 155 S.W. 110, 111 (Ark. 1913); *see also* Ward v. McMath, 241 S.W. 3, 4 (Ark. 1922) (rewriting a deed to reflect that a park was purchased jointly by the Confederate veterans' association and the county). For instance, the Jefferson Davis memorial in Pembroke Kentucky was paid for largely by the United Daughters of the Confederacy, although the state of Kentucky contributed some money for the completion of the 351' monument in the 1920s. *See History of Jefferson Davis State Historic Site*, KY. ST. PARKS, <http://parks.ky.gov/findparks/histparks/jd/history/> (last visited Sept. 2, 2010).

entirely by private memorial organizations like the United Daughters of the Confederacy.⁸⁷

Litigation over the moving of a Confederate monument in Greenville, South Carolina may similarly be used as evidence for the purpose of determining the monument's meaning. In 1924, a South Carolina Supreme Court justice summarized the positive imagery that a Confederate memorial called to mind:

The obvious and avowed object of its erection . . . was, not only to serve as a record of the tender reverence in which the memory of the gallant dead was held by the builders, but to recall to the children and kinsmen of these men, who glorified a fallen cause by the simple manhood of their lives, and by the heroism of death, how worthily they lived, and how nobly they died; to remind the stranger in future times that these were men "whom power could not corrupt, whom death could not terrify, and whom defeat could not dishonor;" and to enlighten the understanding, correct the temper, purify the heart, and elevate the affections of the South Carolinian of another generation by inculcating the generous and noble sentiment that the example of these men lives on to teach "all who may claim the same birthright that truth, courage, and patriotism endures forever."⁸⁸

In the case of Simkins Hall, the people who were involved in the naming seem to have known very little, if anything, about Simkins' advocacy on behalf of the Klan.⁸⁹ This points in two different directions. On one hand, that the name was not an implicit endorsement of the Klan mitigates the degree to which the building sent a pro-Klan or pro-segregation message at the time. On the other hand, it illustrates that the record was incomplete, so there was some relevant history that was not known.

2. *What Does the Name Mean Now?*

Once there is some baseline sense of what the naming meant, we can then move to a question closer to our time period: What does the name mean now? To what extent does the "Simkins Hall" name reflect a current statement by the University of Texas, as opposed to some statement made decades ago when the naming decision was made? Is the name more about some tradition, in which the name is now separate from the honoree's

87. See, e.g., *City of Abbeville v. S.C. Ins. Reserve Fund*, 448 S.E.2d 579 (S.C. Ct. App. 1994) (noting that a Confederate monument was supplied by a memorial association, not the city); *Grady v. City of Greenville*, 123 S.E. 494 (S.C. 1924) (noting that the city of Greenville gave permission for the placement of a monument).

88. *Grady*, 123 S.E. at 501.

89. See Russell, *supra* note 3, at 28–30.

actions? Then again, maybe we are now in a new place because we have been reminded of the person's actions. We likely think differently about the Simkins Hall name now than we did at the beginning of the year.

These issues—that is, who participated in a monument's establishment, and what message is now sent—appear in a series of cases involving the display of the Ten Commandments, which swept through federal courts in the last decade. The United States Supreme Court, and lower courts too, were similarly asked to determine the meaning of such displays today.⁹⁰ These cases raise several issues.

First, what is the message that overtly religious displays send to the average viewer?⁹¹ Does a person who walks past the Austin State Capitol building and sees a block of granite engraved with the Ten Commandments assume that the government is endorsing religion?⁹² Chief Justice Rehnquist's majority opinion in *Van Orden* focused on the "nature of the monument and . . . our Nation's history."⁹³ His opinion acknowledged that the United States' government recognizes religion in many ways,⁹⁴ that the Ten Commandments appear in many government buildings including the courtroom of the United States Supreme Court,⁹⁵ and that judicial opinions recognize the role the Ten Commandments play "in America's heritage."⁹⁶

90. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 681–82, 692 (2005) (concluding that a Ten Commandments monument erected in the 1960s on the Texas State Capitol grounds was not an unconstitutional endorsement of religion); *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 851, 881 (2005) (concluding a Ten Commandments display erected in 1999 violated the Establishment Clause); *Buono v. Salazar*, No. 08-472, slip op. at 3, 4 (U.S. Apr. 28, 2010); *Freethought Soc'y of Greater Phila. v. Chester Cnty.*, 334 F.3d 247, 249, 270 (3d Cir. 2003) (concluding that a Ten Commandments plaque on the courthouse, dedicated in the 1920s, was not an endorsement of religion). The framework within which such cases are decided involves freedom of religion; such cases all relate to the extent to which monuments on government property may be considered "government speech."

Decades ago, the Louisiana Supreme Court faced a similar question about whether a statue of a religious figure was an improper government endorsement of religion. It surveyed the many monuments on public property in New Orleans and concluded that the statue was consistent with other statues in New Orleans and around the country. It found that the statue was erected to honor Saint Frances Xavier Cabrini's service, not her religious contributions. See *State ex rel. Singelmann v. Morrison*, 57 So.2d 238, 247 (La. Ct. App. 1952).

91. See *Van Orden*, 545 U.S. at 690.

92. *Id.* at 682 (asking whether "this passive monument conveyed the message that the State was seeking to endorse religion"); see also *id.* at 701 (Breyer, J., concurring) (noting that the Ten Commandments convey multiple meanings). Justice Stevens's dissent focused more attention on the original religious meaning of the monument when it (and many others like it) was donated in 1961, whereas Chief Justice Rehnquist's majority focused its attention on the monument's current meaning. See *id.* at 712–13 (Stevens, J., dissenting).

93. *Id.* at 686.

94. *Id.*

95. *Id.* at 688.

96. *Id.* at 689.

Applying a similar analysis to building names tends to minimize the significance of the name. It suggests, perhaps correctly, that the typical viewer may not see the building's name as a current endorsement of the building's namesake. Moreover, the analysis suggests that we should recognize a building's name to be a part of the historical period when the building was named.

Still, there may be those who believe that a building's name is not just a passive expression of history—it is also an honor. Even as Chief Justice Rehnquist emphasized that the Ten Commandments are part of “our American heritage,”⁹⁷ some may question the extent to which a building name reflects our unified heritage, as opposed to a fragment of our heritage. We may ask, to what extent should Confederate history be read as *American history*?⁹⁸

The freedom of religion cases are not an exact analogy to the Simkins Hall issue because they deal with whether monuments *must* be removed—not whether they *ought* to be removed.⁹⁹ There may be some instances—perhaps many instances—where monuments ought to be removed, even though the law does not require their removal. So, we must ask two related questions: (1) What does the continuation of a name say about us today? (2) What would the removal of a name say about us today?

It is difficult to answer these two questions; in some ways the questions are circular. Depending on whom one asks, the changing of a building's name will mean different things. The public debate over Simkins Hall demonstrated this. For some (though perhaps only a few) the removal of Simkins' name represented yet another surrender to political correctness.¹⁰⁰ For others, it signaled the casting-out of bad blood.¹⁰¹

3. *Does the Building Name Speak Now?*

Having a building named for one is an honor of sorts. Of sorts. Before Tom Russell's paper appeared, few people knew who William Simkins was. Would it be far off to guess that there were no residents of the dormitory who knew Simkins' history with the Klan? I was reminded of

97. *Id.* at 688.

98. *See* *Freethought Soc'y of Greater Phila. v. Chester Cnty.*, 334 F.3d 247, 270 (3d Cir. 2003) (Bright, J., concurring) (pointing out that the Ten Commandments are grounded in Judeo-Christian tradition). *Van Orden* is balanced by *McCreary's* finding that a display of the Ten Commandments, first put up in 1999 and challenged almost immediately thereafter, was a violation of the Establishment Clause because the display did not include any secular content. *See* *McCreary Cnty. v. ACLU*, 545 U.S. 844, 851–52, 854 (2005).

99. *See* *McCreary*, 545 U.S. at 854, 860.

100. *See* Destinee Hodge, *Simkins Forum Gets Public Input*, DAILY TEXAN (June 23, 2010), <http://www.dailytexanonline.com/content/simkins-forum-gets-public-input>.

101. *Id.*

just how much the campus architecture blends into the background when I was making arrangements to meet a long-time Chapel Hill resident at the University of North Carolina's campus recently. I said, "Let's meet at the Confederate soldier monument." Her response was, after a moment of silence, "Where's that?" She has probably walked by the statue, "Silent Sam," a few times a week, maybe more, for years.

Still, a building's name is not just a part of our history, which we ought to acknowledge. I want to acknowledge that history and pay due respect to those who came before us; to those who made contributions to the institution that we have inherited; and to also remember who those people were, what they struggled with, and what legacy they left us—for good and for ill. However, a building name is not just a piece of history, like an ancient speech that reveals the mind of its author.¹⁰² A name is a valuable commodity; the prices paid for stadium names are enormous. Similarly, charitable trusts are frequently named after donors. Settlers of charitable trusts establish them to promote causes they believe in, obviously. Settlers also often purchase good will in the form of a trust in their name.¹⁰³ While a name on a building on a university campus is worth only a fraction of a name on a stadium or charitable trust, it is not valueless.¹⁰⁴ A building's name continues to speak to us today. We should consider a building's name as a reference to a past person who should be honored by our remembering her in a world where memories are so often short.

What, then, is the meaning of a name today? It is defined by what we know of an individual and what we think of him, taking measure of his entire life and legacy. We should struggle to see the good as well as the bad, to make sure that we are taking the full measure of a life. But the measures by which we judge someone's life change over time. Emerson's *Lecture on*

102. See, e.g., Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 89 N.C. L. REV. (forthcoming 2011) (manuscript at 17–18), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644996.

103. RAY D. MADOFF, IMMORALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 87, 96–97 (2010); William A. Drennan, *Surnamed Charitable Trusts: Immortality at Taxpayer Expense*, 61 ALA. L. REV. 225, 239, 252 (2010).

104. See *Stadium Naming Rights*, ESPN SPORTS BUS., (Sept. 29, 2010, 7:43 AM), <http://espn.go.com/sportsbusiness/s/stadiumnames.html>; Stan Diel, *Auburn University Considers Slashing Price of Naming Rights for Campus Buildings*, AL.COM (Feb. 5, 2010, 9:20 PM), http://blog.al.com/spotnews/2010/02/auburn_university_slashes_pric.html; Andrea Moss, *San Marcos: CSUSM Quietly Marketing Naming Opportunities for New Building: Options Range from \$2,500 to Millions of Dollars*, N. COUNTY TIMES (Mar. 17, 2010, 7:35 PM), http://www.nctimes.com/news/local/san-marcos/article_d19cd755-d36a-5658-8d1e-8ef1d842c7b3.html.

the Times—given in the 1840s, another era that, like our own, was suspicious of the past—noted the almost inevitable decline in reputations:

As the solar system moves forward in the heavens, certain stars open before us, and certain stars close up behind us; so is man's life. The reputations that were great and inaccessible change and tarnish The change and decline of old reputations are the gracious marks of our own growth. Slowly, like light of morning, it steals on us, the new fact, that we, who were pupils or aspirants, are now society: do compose a portion of that head and heart we are wont to think worthy of all reverence and heed. We are the representatives of religion and intellect, and stand in the light of Ideas, whose rays stream through us to those younger and more in the dark.¹⁰⁵

To return to Judge Cain's concurrence in *United Daughters of the Confederacy v. Vanderbilt*, many people see the Confederacy in a different light than they did in 1915, or even 1960.¹⁰⁶

Associations with the Confederacy are, to say the least, fragmented, though we are far from the world Robert Penn Warren described in 1961 in *The Legacy of the Civil War* when he wrote, "We have not yet created a union which is, in the deepest sense, a community."¹⁰⁷ If we have not quite created a union that is a community, it is not because we are still fighting the Civil War, as we were when Warren wrote *The Legacy of the Civil War* fifty years ago. Yet, perhaps one way we continue to hear distant echoes of the Civil War is in our clash over what Warren termed "idealism" and "legalism"—the idea of a morally pure campus against vested rights of decisions once set in stone¹⁰⁸—or in the case of Simkins, cast in bronze. We have not yet settled the issues of how our country views its history with the Civil War.

I suspect that few—very few—people, when they are being honest rather than provocative, think the Klan conjures up any kind of positive imagery. Still, some of the comments to stories about Simkins Hall point out the strong feelings against its renaming.¹⁰⁹ Some people thought it particularly unfair to rename Simkins Hall while adding names of people they did not like to other structures. One person wrote:

Cesar Chavez was a member of the Communist Party, which sought to undermine and destroy the entire United States of America and all its citizens, regardless of race. Yet the city can't name things fast

105. RALPH WALDO EMERSON, *Lecture on the Times*, in SELECT WRITINGS OF RALPH WALDO EMERSON 245, 248–49 (Percival Chubb ed., 1888).

106. See *United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 121–22 (Tenn. Ct. App. 2005) (Cain, J., concurring).

107. ROBERT PENN WARREN, *THE LEGACY OF THE CIVIL WAR* 107 (1961).

108. See *id.* at 40–41.

109. See comments to *Half-Century Later*, *supra* note 12.

enough for him. But a peep from the [*Austin American*] *Statesman* about that? Nahhhh.¹¹⁰

Another person wrote, “MLK wasn’t a saint either, but we name every thing we can after that womanizer and dooper.”¹¹¹ It is likely that this commentator does not seriously believe there is an equivalency between Martin Luther King and a Klansman; however, such comments illustrate the anger that can be called up by public honors to some individuals.

Adding monuments to the landscape, so that there are multiple images, as has been done in many places, is one common way of addressing such fragmented views. Several of my favorite examples come from southern state capitol grounds. In Nashville, the Tennessee State Capitol has a monument to the victims of the Trans-Atlantic Slave Trade only a few feet away from a monument to the Confederacy.¹¹² In Columbia, the South Carolina Statehouse has an African American monument that emphasizes the eras of slavery and Jim Crow, to go along with the Confederate monument.¹¹³ Maybe the best example of this integration of monuments is at the South Carolina monument to Strom Thurmond, where the name of his African American daughter, Essie Mae, was recently added to his granite monument.¹¹⁴

The expression of conflicting ideas contributes to discussion; it can actually be part of a very positive debate on campus. During the tough years of the mid-1960s, the *Mississippi Law Journal* published a symposium on Leon Friedman’s 1965 volume, *Southern Justice*.¹¹⁵ It was a most extraordinary symposium, which collected widely varying reactions from people as different as Mississippi Supreme Court Justice W.N. Ethridge, Mississippi Attorney General Joe N. Patterson, and Yale Law Professor

110. TexHorn96, Comment to *Half-Century Later*, *supra* note 12 (May 20, 2010, 1:26 AM).

111. Baseyag, Comment to *Half-Century Later*, *supra* note 12 (May 20, 2010, 6:46 AM).

112. See Alfred Brophy, *Monument Law: Tennessee Statehouse Version*, THE FACULTY LOUNGE (June 15, 2009, 9:19 PM), <http://www.thefacultylounge.org/2009/06/monument-law-tennessee-statehouse-version.html> (showing pictures of the Tennessee Capitol monuments).

113. Alfred Brophy, *South Carolina Statehouse: African American Monument*, THE FACULTY LOUNGE (Jan. 18, 2010, 7:29 AM), <http://www.thefacultylounge.org/2010/01/south-carolina-statehouse-african-american-monument.html> (showing a picture of the South Carolina statehouse African American monument). See Alfred Brophy, *South Carolina Statehouse Monuments: The Confederate Soldier*, THE FACULTY LOUNGE (Dec. 14, 2009, 11:49 AM), <http://www.thefacultylounge.org/2009/12/south-carolina-statehouse-monuments-the-confederate-soldier.html> (showing pictures of the South Carolina Statehouse Confederate Monument).

114. See Alfred Brophy, *Monument Law: South Carolina Statehouse Version*, THE FACULTY LOUNGE (Nov. 9, 2009, 7:04 AM), <http://www.thefacultylounge.org/2009/11/monument-law-south-carolina-statehouse-version.html> (showing pictures of the South Carolina Statehouse Strom Thurmond Monument).

115. See Foreword, *Symposium: Southern Justice*, 37 MISS. L.J. 396, 396 (1966).

Alexander Bickel.¹¹⁶ Shortly afterwards, Walter Dellinger, then a young professor at Ole Miss, defended *Brown v. Board of Education* in the pages of the *Mississippi Law Journal*.¹¹⁷ That spectrum of opinions itself is the hallmark of a vibrant intellectual life.

4. *What Does Removal of a Name Say About Us?*

The flip side of the question, “What does keeping the name say about us?” is “What does removal of a name say about us?” A common charge is that removal of a name is an attempt to rewrite history.¹¹⁸ That charge suggests that we may be dishonest in renaming. Rewriting history has connotations of attempting to make history we do not like disappear. I am quite worried about removal of names for precisely this issue because it can cause us to forget that a person who celebrated extra-legal violence, like William Simkins, ever worked at the University of Texas. Moreover, whenever we talk about one person, we risk losing an overall balance in the understanding of an institution’s contribution. We do not want to allow talk of one person to distract from the enormous contribution of an institution to its students, its state, and our nation.

But I think that the opposition is based partly on the idea that removal of a name means dishonoring someone. It is not that renaming makes us

116. *See id.* at 396–450.

117. Walter E. Dellinger, III, *School Segregation and Professor Avins History: A Defense of Brown v. Board of Education*, 38 *MISS. L.J.* 248, 249–53 (1967).

118. *See, e.g.*, jeffersonian1, Comment to *Half-Century Later, supra* note 12 (May 20, 2010, 12:28 AM) (“I find it ironic that the NAACP was advocating today for a change to the Texas textbooks because they felt they did not give an accurate picture of slavery and did not show the good, bad and the ugly aspects of American history. This building’s name sure shows us the ugly. Should we change history to accommodate any ethnic group?”); deptofcommonsense, Comment to *UT to Mull Taking Klansman off Dorm*, *CHRON.COM* (July 14, 2010, 4:43 PM), <http://www.chron.com/disp/story.mpl/metropolitan/7108046.html> (“Our founding fathers established the United States on the backs of immigrants, slaves and outright rebellion and war. Does that mean we should change the name of our country too? LEARN from history . . . don’t re-write or erase it.”); Terryanne, Comment to *Break with the Past: Changing a Dorm Name Marks a Good Step Towards Healing UT’s Troubled Racial History*, *CHRON.COM* (July 14, 2010, 9:55 PM), <http://www.chron.com/disp/discuss.mpl/editorial/7108789.html?p=1> (“I wish the PC carpetbaggers would stay out of Texas. Erasing all records of our history does nothing to change it. Until every road and building named after Robert Byrd is changed it should not even be under consideration to rename this dorm room. Simkins was a man of his time, living under what he considered foreign occupation. Maybe it should be required that students learn about the war crimes committed against Southerners, both black and white, during reconstruction General Grant owned slaves till after the war, should we take him off the fifty dollar bill? This hypocrisy is absurd and one more of the never ending attacks on the history of the South. Furthermore I wish these tellers of fairy tales would stop sullyng the name of my Great-gr-gr grandfather Sam Houston by painting him as some Yankee sympathizer. He was no fan of the despotic Lincoln but instead, being an experienced and great General[,] he knew we could not win.”).

forget history; it is that renaming dishonors and, perhaps, removes those names from their historical context, which makes us lose sight of the good they did. The charge that we are rewriting history is another form of the argument that we are redistributing the honors given to historical figures. I am not sure that renaming is rewriting history so much as redistributing the wealth in the form of honors. And as we all know, any effort at redistribution of wealth meets stiff opposition.

It may be dangerous to begin the process of revisiting, for there are so many things that might be revisited. Renaming has a tendency to destabilize, to be sure. It hints at the perception of injustice that lies behind someone's wealth. Even as staunch a supporter of vested rights as Sir William Blackstone warned about the dangers of investigating the origin of wealth.¹¹⁹ And in fact, in history, reformers often have little respect for tradition. If they respected tradition, they probably would not advocate change.

Yet, famous instances of monument removal do exist, particularly in times of regime change. The question of removing a building's name is different from some of the most famous monument removal cases. When "New Yorkers" tore down the statue of George III on July 9, 1776, they did so as part of a live revolution; that act had immediate political implications as they struggled to create a new nation.¹²⁰ (They melted down some of the lead statue and used it to make bullets, which was a tangible remaking of the meaning of the monument!)¹²¹ To take a more recent example, the dismantling of Saddam Hussein's statue in Baghdad in April 2003 was part of live political conflict.¹²² The removal of those monuments had immediate political implications. They invite Sanford Levinson's question: How do "those with power . . . organize public space to convey . . . desired political lessons?"¹²³ The toppling of the monuments in New York during the American Revolution and in Baghdad following the removal of Saddam Hussein from power were both parts of reform movements, of wresting the scepter from unjust powers. Though as I am reading the page proofs of this essay, events in Bahrain point again to the important place that monuments

119. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF THE RIGHTS OF THINGS 2 (Oxford, Clarendon Press 1766). I am indebted to John C.P. Goldberg for reminding me of this point.

120. See *Favorite v. Miller*, 407 A.2d 974, 975–76 (Conn. 1978) (awarding fragments of the statue found on private property in a Connecticut swamp in 1972 to the owner of the swamp because the finder was a trespasser).

121. *Id.* at 976.

122. *Saddam Statue Toppled in Central Baghdad*, CNN.COM (Apr. 9, 2003, 12:45 PM), <http://www.cnn.com/2003/WORLD/meast/04/09/sprj.irq.statue/>.

123. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 10 (1998).

have in contemporary movements, and the ways that sometimes monument removal is the act of a powerful state trying to exercise control over protesters. On March 18, 2011, authorities tore down the monument at the heart of Pearl Square in Manama, which was the center of protests in that country. Bahrain's foreign minister said it was torn down "to remove a bad memory."¹²⁴ While it remains to be seen what will happen, the removal of the monument was not just about the removal of memory, it was also removing a symbol for future organizing.

To continue the analogy to regime changes and monuments that attempt to establish a controversial interpretation of history, one might think of Confederate monuments. When they were placed in the late nineteenth and early twentieth century, one purpose—in addition to honoring family members—may have been to establish a pro-Confederate history.¹²⁵ They put that version of history in conspicuous places. But I wonder if politics—150 years after the Civil War began—has so changed that the monuments are not so much about organizing political space. Maybe the monuments have themselves become a testimony to history and part of the historical landscape rather than a positive effort to remake how we think about history. That is, maybe there was a time when the controversy was more alive than it is today, when the monuments were active participants in politics. Perhaps the case for removing them was stronger when the political controversy was more alive than it is now.

B. *The Voice of Constituents in Renaming*

Once there is some sense of the initial meaning of a name versus its meaning today, and once we have weighed the messages that would be sent by keeping a name versus removing it, we can turn to other issues like the moral sense of the community. Then, we can look for an orderly procedure to decide what to do next. The renaming of Simkins Hall sprang from humble people—the constituents, rather than the administration.¹²⁶ Tom Russell took the lead with his scholarship, and other people on the campus and in the city joined the movement—well ahead of the administration, which seemed, at the distance I observed, to be at best passive, perhaps

124. Ethan Bronner, *Bahrain Tears Down Monument as Protesters Seethe*, N.Y. TIMES (Mar. 18, 2011), available at <http://www.nytimes.com/2011/03/19/world/middleeast/19bahrain.html>.

125. See generally KIRK SAVAGE, *STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND MONUMENT IN NINETEENTH-CENTURY AMERICA* (1999).

126. Gregory J. Vincent, *University of Texas at Austin Continues its Progress on Diversity*, DIVERSEEDUCATION.COM (June 30, 2010), <http://diverseeducation.com/article/13993/>.

even hostile to the movement.¹²⁷ This is, I think, as it ought to be. Commemorations should spring from the minds and hearts of constituents. If they do not want a name, the name should not be imposed on them. However, neither should a name be taken away from a people who want it.

Once the story began to gather steam, as editorials and individuals supported the building's renaming, the administration established a process to decide what to do. The University of Texas's administration composed a committee of about twenty people (whose names I could not find), held two public meetings to take testimony from interested witnesses, invited written comment, and prepared a recommendation to the university's president, who recommended to the board of trustees that the name be changed.¹²⁸ The renaming of Simkins Hall, thus, served the interests of the community; members of the community decided that they wanted a new name. There were dissenting voices of course, but overall, the opinion ran strongly in favor of renaming.¹²⁹ We often take comfort in the judgments of morality of the many—so when newspapers and individuals begin to call for a renaming, perhaps we should listen.¹³⁰

127. *UT Reconsiders Dorm Name Linked to KKK Member*, MYFOXAUSTIN.COM (May 20, 2010, 10:07 PM), <http://www.myfoxaustin.com/dpp/news/UT-Reconsiders-Dorm-Name-Linked-to-KKK-Member-052010-ktktb>. Perhaps I misjudged this, which is entirely possible because I was watching from afar. But the initial reaction of Dr. Gregory Vincent, the school's Vice President of Diversity and Community Engagement, and first administrative official to speak on this, was that Simkins' history had already been acknowledged. On May 20, 2010, Vincent was quoted by Fox News as saying that the university has acknowledged Simkins' past with the KKK in dorm histories online and at the school. "The KKK was about exclusion, violence[;] and that's not to be celebrated." Vincent said. "It's not a celebration of that[,] but the contributions he made to the law school." *Id.*; see also Vincent, *supra* note 126. In an opinion piece published after the renaming of Simkins Hall, Vincent opposed a request that the university address the statues of Confederate heroes and the Confederate Memorial Fountain elsewhere on campus, most of which were dedicated in April 1933. See Vincent, *supra* note 126.

128. Meena Hartenstein, *University of Texas Poised to Re-title Dormitory Named for KKK Leader*, NYDAILYNEWS.COM (June 9, 2010, 3:23 PM), http://www.nydailynews.com/news/national/2010/06/09/2010-06-09_university_of_texas_may_redub_dormitory_named_for_kkk_leader.html; see also Vincent, *supra* note 126.

129. Vincent, *supra* note 126.

130. See *Horns Up*, *supra* note 6; Austin Am. Statesmen Editorial Bd., *A Stain that Must be Scrubbed from Campus*, AUSTIN-AMERICAN STATESMAN (May 21, 2010, 8:24 PM), <http://www.statesman.com/opinion/a-stain-that-must-be-scrubbed-from-campus-702183.html>; *Break with the Past: Changing a Dorm Name Marks a Good Step Toward Healing UT's Troubled Racial History*, CHRON.COM (July 14, 2010, 7:39 PM), <http://www.chron.com/disp/story.mpl/editorial/7108789.html>. Among the newspapers calling for renaming of Simkins Hall were the *Daily Texan*, the *Austin-American Statesman*, and the *Houston Chronicle*. See *Horns Up*, *supra* note 6.

C. *Limiting Renaming*

The federal courthouse in Birmingham, Alabama is named after Hugo Black, beloved by many for his leadership on the Supreme Court on civil liberties.¹³¹ Some may recall that Black was, at an early stage in his career, also a member of the Klan.¹³² Yet few, if any, would seek to have that building's name changed. Perhaps the different intuitions about the Hugo Black Courthouse and the Simkins Dormitory may flush out some of the assumptions regarding building naming and renaming. Black's career as a pillar of racial justice in a difficult setting made him a hero,¹³³ obviously. When we view his career in its full context, we understand the reasons why we remember him fondly.

Perhaps that is the key to Simkins Hall. While we can recognize that Simkins was a respected law professor, looking at him in the full light, we see it as inappropriate to have a building honoring him at a university that is the pride of our nation. Taken in full light, which we had never seen before Tom Russell, many people thought it time for a change.

IV. NAME CHANGES AND THE PROCESS OF FORGETTING?

We live in an age that investigates our nation's past. In the twenty-first century, Brown University, Emory University, the University of Maryland, the University of North Carolina, and William and Mary have all undertaken investigations of their connections to slavery.¹³⁴ Faculty at the University of Alabama, and the administration at the University of Virginia,

131. *Hugo L. Black Federal Courthouse*, EMPORIS, <http://www.emporis.com/application/?nav=building&lng=3&id=201216> (last visited Sept. 28, 2010); *see also Hugo L. Black*, ENCYCLOPEDIA OF ALA., <http://encyclopediaofalabama.org/face/Article.jsp?id=h-1848> (last updated Aug. 2, 2010). I am indebted to Mark E. Brandon for this point.

132. ENCYCLOPEDIA OF ALA., *supra* note 131.

133. ENCYCLOPEDIA OF ALA., *supra* note 131.

134. *See* Brown Univ. Steering Comm. on Slavery and Justice, *Slavery and Justice*, BROWN UNIV., 3, (2006) http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf; Leslie M. Harris, *(Re)Writing the History of Race at Emory*, ACADEME ONLINE (July–Aug. 2006), <http://www.aaup.org/AAUP/pubsres/academe/2006/JA/feat/Harr.htm>; Univ. of Md. students of HIST429; *Knowing Our History: African American Slavery and the University of Maryland*, U. of Md., 12–13 (May 2009), <http://www.history.umd.edu/slavery/KOHFullTextnoendnotes.pdf>; Susan Ballinger, Bari Helms & Janis Holder, *Slavery and the Making of the University*, UNC U. LIBR., <http://www.lib.unc.edu/mss/exhibits/slavery/> (last visited Sept. 28, 2010); Brian Whiston, *The Lemon Project: A Journey of Reconciliation*, WM. & MARY (May 30, 2010), <http://www.wm.edu/sites/lemonproject/index.php>.

have apologized for their institutions' connection to slavery.¹³⁵ The project of recovering history is afoot in many places.

Yet, no sooner do we remember history—or learn about it for the first time—than some of us try to forget. As of August 1, 2010, the University of Texas has already removed the name “Simkins Hall” from its website and has replaced it with “Creekside.”¹³⁶ It has nothing on the history of the building's name nor of the movement to rename it.¹³⁷ One looking on the university's website for information about Simkins will find nothing. We have gone from not knowing who William Simkins was to having erased him entirely. That absence calls into question the promise made in the *Wall Street Journal* that the debate about Simkins would be part of an educational process:

Whatever the decision on Simkins Residence Hall, Dr. Vincent said that the university would use the controversy to educate the campus about UT's history. “No matter what happens,” he said, “I do believe that we are going to use this as an educational opportunity of where UT is and where it was as a university.”¹³⁸

That particular exercise in forgetting points out the reason why I have come full circle, back to my youthful opposition to renaming. As I see the calculus now, removal of a name threatens our memory of the past. It is not that I have any particular interest in honoring someone like Thomas Ruffin, who served as a justice on the North Carolina Supreme Court and wrote an opinion that released a man from criminal liability for abusing a slave in his custody.¹³⁹ One might argue—with some reasonable likelihood of arguing persuasively—that Ruffin's opinion in *State v. Mann*, which became a

135. Max Clarke & Gary Alan Fine, “A” for Apology: Slavery and the Discourse of Remonstrance in Two American Universities, 22 HIST. & MEMORY 81, 102 (2010); University of Virginia's Board of Visitors Passes Resolution Expressing Regret for Use of Slaves, UVA TODAY (April 24, 2007), <http://www.virginia.edu/uvatoday/newsRelease.php?id=1933>.

136. Description of Creekside (CRH)—Men's Residence Hall, THE U. OF TEX., <http://www.utexas.edu/student/housing/index.php?site=1&scode=4&id=146> (last visited Sept. 28, 2010).

137. See *id.* The removal of Simkins' name from campus allows us to forget, if we want to, that he ever existed. We have seen the rewriting of corporations' histories. “Uncle Ben's Rice,” for instance, was rebranded as “Uncle Ben.” As part of Uncle Ben's renaming, the company recast Uncle Ben as the chairman of its board of directors. The company's image makeover sends many positive messages, though it also makes history look different from what it was. See *Ben's Office*, UNCLE BEN'S RICE, <http://www.unclebens.com/?showoffice=true> (last visited Sept. 28, 2010).

138. Perry Stein & Ann Zimmerman, *Dorm That Honors Klansman Sparks Debate*, WSJ.COM (June 28, 2010), http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704846004575333002403489686.html.

139. Alfred L. Brophy, *Thomas Ruffin: Of Monuments and Moral Philosophy*, 87 N.C. L. REV. 799, 801 (2009). I have similarly suggested that perhaps we need a statue to Bull Connor for everything he did to hasten the Civil Rights movement. See Alfred L. Brophy, *Overcoming at the University of Alabama*, 1 ALA. C.R. & C.L. L. REV. 13, 25 (2011).

rallying point for abolitionists,¹⁴⁰ actually helped hasten the Civil War and thus the end of slavery. And from that point of view, Ruffin deserves a statue for what he did to end slavery. However, that consequence was at most inadvertent. Ruffin was a pillar of the slave system. Yet, I think we should keep his name on the dormitory on the University of North Carolina campus because it is part of our history *and* because we should remember that there was a time when his ideas were triumphant.¹⁴¹

I hope that future calls for building renaming will follow some of the principles that were present in the University of Texas renaming: investigating the circumstances of the naming, what was known, what was forgotten, and who participated; considering the value of continuing the name and the interests served by removal; and getting substantial input from the school's stakeholders and the community. Moreover, I hope that those who ask for changes will also investigate whether the cause of promotion of knowledge of our past is best accomplished by removal of a name or whether removal facilitates, instead, the process of forgetting.

Much more important than renaming is remembering. That our nation's great universities once supported people like William Simkins is significant. As we rush to reform, we should not lose sight of our history. Nor should we overlook this very American story of how an institution has transformed itself over the century since Simkins' arrival. The institution that Simkins supported is completely different from what it is today. The mere fact that it would consider removing a name is evidence of how far we have all come.

We owe Tom Russell a debt for having taught us about another episode in our nation's march towards justice. May we be fortunate enough to have other scholars with his talents and his dedication to teach us about the past.

140. Brophy, *Thomas Ruffin*, *supra* note 139, at 807–08.

141. *See id.* at 847–54 (discussing calculations around Ruffin Hall).