

## CONFEDERATE MEMORY AND MONUMENTS: OF JUDICIAL OPINIONS, STATUTES AND BUILDINGS

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*[I]t is well that we keep in mind the fact that not all of American history is recorded. In some ways we are fortunate that it isn't, for if it were, we might become so chagrined by the discrepancies which exist between our democratic ideals and our social reality that we would soon lose heart. Perhaps this is why we possess two basic versions of American history: one which is written and as neatly stylized as ancient myth, and the other unwritten and as chaotic and full of contradictions, changes of pace and surprises as life itself. Perhaps this is to overstate a bit, but there is no denying the fact that Americans can be notoriously selective in the exercise of historical memory.*

—Ralph Ellison, Brown University, 1979<sup>2</sup>

In his 1979 address at Brown University, “Going to the Territory,” Ralph Ellison spoke about Americans’ memory of the Civil War, the era of Reconstruction afterwards and then those dark days of the Jim Crow era. In the aftermath of the war, Americans generally had reconciled, in part through a selective memory. As Ellison said, “Having won its victory, the North could be selective in its memory, as well as in its priorities, while leaving it to the South to struggle with the national problems which developed following the end of Reconstruction. And even the South became selective in its memory of the incidents that led to its rebellion and defeat.”<sup>3</sup> The victors, the North, left the field, leaving the South and African Americans to deal with the aftermath.

The usual memory of the Civil War in Ellison’s youth was that it was the result of a bumbling generation, where abolitionists and proslavery forces brought the rest of the sober and rational Americans to war. Afterwards, corrupt and incompetent Yankees and freed men made a mockery of the rule of law. Then, white Southerners “redeemed” themselves and re-established the rule of law. That vision, promulgated in history textbooks and in popular novels, correlated with a national policy of returning power to Southerners. One might look, for example, to Thomas Dixon’s

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novels *The Leopard's Spots* and *The Clansman* (which was later the basis for D.W. Griffith's movie *Birth of A Nation*) for a sense of the dominant interpretation of the war and reconstruction. Dixon's work has important analogs in the academic liter-

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ature as well, such as William Archibald Dunning's *Reconstruction, Political and Economic, 1865-1877* and Ulrich Bonnell Phillips' *American Negro Slavery*, on plantation slavery. This method of interpretation continued through Avery O. Craven's *The Coming of Civil War*—evidence that although a historical school may be thoroughly rejected, it con-

tinues on in books, which have the power to live (and even remain in print) well beyond the time they have otherwise been rejected.

Work of this character continued to appear past the Second World War. Perhaps the best-known of these works is E. Merton Coulter's *The South During Reconstruction* (1947) and later his *Confederate States of America* (1952). *The South During Reconstruction* appeared from the prestigious Louisiana State University Press.<sup>4</sup> By the time the book came out, there had already been decades of historical scholarship that pointed out the unfair—indeed, inaccurate—nature of such histories. W.E.B. DuBois's *Black Reconstruction in America 1860-1880*, published in 1935, for instance, provided an important catalog of the biased depictions of Reconstruction. In fact, pieces of this nature continue to appear today, though not from respectable scholarly sources.<sup>5</sup>

Thus, there was a process of selective memory, which historians have thoroughly documented in recent years.<sup>6</sup> The centrality of slavery as a cause of the Civil War was written out of the collective memory of the war.<sup>7</sup> The process by which that happened is significant—and important. It happened through a concerted effort to first forget the causes of the war, then to focus on the war as an effort to protect the homeland. We could talk about this, then, as a process of selective forgetting and selective remembering—or selective forgetting and then the recreation of memory. This selective process remade our nation's understanding of history and how that history relates to the present. For, if the common memory of the war is that it was about slavery, the actions of those who fought against the Union seem immoral. However, if we view the war as a struggle over political self-determination, about home rule, and about honorable people fighting for their homeland—then we have a much different sense of the war. That historical memory can then shape how we think about the efforts to repair our country after the war. If the war was about ending slavery and racial equality, then perhaps we think the Thirteenth Amendment should be construed broadly.<sup>8</sup> And perhaps we will think the Fourteenth Amendment ought to be construed broadly to give Congress power to prevent

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further intrusions by states on the rights of their citizens.

In a field like law, which draws so much upon cultural values, it is no surprise that judges—like historians, novelists, and filmmakers—reflected an incorrect view of history and built upon it. This occurred in the Slaughterhouse cases, when the court rewrote the Fourteenth Amendment from one of protection of social rights to protection of economic rights. This also occurred in *Cruikshank*, when the Supreme Court limited the power of Congress to protect civil rights. For *Cruikshank* held that Congress had no power to make violations of civil rights a federal crime.<sup>9</sup> For nearly a century afterwards, the federal government had only limited power to protect civil rights. Precedent being what it is, *Cruikshank* reflected the Supreme Court's endorsement of a narrowly limited Reconstruction. But it was not just a reflection of the Supreme Court's values. It also created limitations on federal power.

The Supreme Court's famous 1896 decision in *Plessy v. Ferguson* is another excellent illustration of the ways that the Supreme Court drew upon common tropes in writing about race and equality. Justice Brown drew upon the then-dominant ideas about the social need for the separation of the races to justify a Louisiana statute that demanded separation of the races on railroad cars:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the thirteenth amendment is strenuously relied upon by the plaintiff in error in this connection.<sup>10</sup>

In concluding the opinion, Justice Brown observed that equality should come from feelings of mutual affection between the races, which would emerge from a process of gradual accommodation in which black people would (as Booker T. Washington said in 1895 in his Atlanta exposition speech)<sup>11</sup> show themselves worthy, rather than from demanding equal rights:

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. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it

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must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals....Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.<sup>12</sup>

Justice John Marshall Harlan "saw through" this, to the truth, to paraphrase Ralph Ellison in *Invisible Man*. Justice Harlan phrased it starkly:

I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.<sup>13</sup>

Justice Harlan drew upon the case *Strader v. West Virginia*, decided before the Supreme Court and the country more generally abandoned the optimistic idea of equality borne of the Civil War and Reconstruction. *Strader* held that African Americans could not be excluded from a jury pool based solely on the consideration of race. Harlan, thus, had an expansive interpretation of the Thirteenth Amendment. He thought it "does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country." And the Thirteenth Amendment, in conjunction with the Fourteenth Amendment, "if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship."<sup>14</sup> Harlan, writing about the Reconstruction Amendments concluded:

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal

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discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race.” It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race, however well qualified in other respects to discharge the duties of jurymen, was repugnant to the fourteenth amendment.<sup>15</sup>

Pamela Brandwein discusses these issues in her important book, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*.<sup>16</sup> I have spent this space highlighting some of the ways in which judges’ understanding of history and society correlated with their judicial decisions. Such correlations are to be expected, of course, given the close connections between legal thought and social thought. Indeed, one of the primary subjects of study by legal historians is the way that legal thought relates to larger cultural values.<sup>17</sup> That is not to say that if judges had a different conception of history they would have decided those cases differently. The factors that cause a judge to decide a case one way or the other are exceedingly complex. Those conceptions—memories—of history, however, correlate with judges’ decisions. In trying to understand the process of historical reconciliation, it is important to focus on how we speak about our past.

A different conception of the past may not necessarily lead to different actions. But if our conception of the past is one that forgets about past suffering or forgets past injustice or forgets past efforts to maintain that injustice, we are less likely to support action aimed at reconciliation or recovery in the future. The understanding of the past relates to how we perceive the present and how we behave moving forward.

In the process of remaking the collective memory of the Civil War, there was much change and it came rapidly. As Ellison said in his speech, “Going to the Territory”:

Within thirteen years, Afro-Americans were swept from slavery to a brief period of freedom, to a condition of second-class citizenship. And from a condition of faint hope, through a period of euphoric optimism, to a condition of despair. The familiar world of slavery was gone, but now they faced a world of ambiguity in which their access to even the most fundamental of life’s necessities was regulated strictly on the basis of race and color.<sup>18</sup>

And yet, despite those changes, there was optimism that the world might be ordered differently. Ellison spoke in “Going to the Territory”—as he had in his novel *Invisible Man*—about the differences between truth and memory. There were “truths”—that African Americans were equal as human beings to whites—and then there were “facts”—that African Americans were put into a position of subordination. In *Invisible Man*, we learn that Tod Clifton, who met his death by “resisting reality in the form of a .38 caliber revolver in the hands of the arresting officer,”

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meant little to the police officer who shot him. Tod was there for the amusement of white people and when he tried to act outside of “history” or to deny his place—when he acted outside of the expected modes of action—he was killed.<sup>19</sup> So while we might think that history is neutral, that it records “the patterns of men’s lives,” and that “all things of importance are recorded,” the reality is quite different. “[F]or actually it is only the known, the seen, the heard, and only those events that the recorder regards as important that are put down, those lies his keepers keep their power by.”<sup>20</sup> For Clifton, the police officer was judge, witness and historian. To provide an alternative explanation, there was only the Invisible Man. So he was left wondering, as happened so often in events involving race in American history, “Where were the historians today? And how would they put it down?”<sup>21</sup>

Ellison knew the importance of understanding history. He had seen the two versions of history growing up. He had witnessed, for instance, the aftermath of the Tulsa riot of 1921—in which there were notoriously different versions of history in the black and white communities.<sup>22</sup> He was so moved by the devastation of the Tulsa riot that he named the Invisible Man’s home community Greenwood, after the black section of Tulsa destroyed during the riot.

Ellison, then, sought to understand the power of history and to overcome it. In his mind, it could be overcome through a quest for a return to the values of American democracy, as suggested in the Declaration of Independence and the Constitution. We, as Americans, honor those values, even if we do not always practice them. Ellison saw, as had his childhood hero Roscoe Dunjee, editor of the *Oklahoma City Black Dispatch*, the virtues of appeals to the Constitution’s idea of equality. While some in the black community (including the young Ellison) ridiculed Dunjee’s appeals, he later came to realize the importance that law might hold. Within Ellison’s lifetime, our country moved from a world of extraordinary violence like the East Saint Louis race riot of 1917, the Elaine Arkansas riot of 1919 and the Tulsa riot of 1921, to *Brown v. Board of Education*—which itself was based on a more realistic understanding of our nation’s commitment to equality—to the Civil Rights movement of the 1960s. A liberation of extraordinary proportions occurred in a brief period of time. Such signs of change are enough to cause even the most pessimistic to take on a glow of exuberance. Stanford University Law Professor Lawrence Friedman’s synthetic work *American Law in the Twentieth Century* represents the optimism one is led to feel for our country’s possibilities.<sup>23</sup> Those changes were possible because of changes in our collective understanding of our country’s promises in the Constitution and of our changing conception of ourselves, borne of increased participation of blacks in the political and economic life of our

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country, as well as the systematic campaign to point out the ways in which our country had failed to live up to the idea of equality.

As the process of changing conceptions of history unfolds, there is the possibility of further reconciliation—or at least increased opportunity for those left behind.

Yet, this process of reconciliation has a long way to go. There is yet a chasm between black and white income in the United States. According to the most recent census data, the poverty rate for black children is approximately three times that of the poverty rate for white children.<sup>24</sup> One does need to attribute all of that to the legacy of slavery and Jim Crow to believe that there are still issues of historical injustice that ought to be addressed.<sup>25</sup> And so I would like to turn to the issue of what a process of further historical reconciliation might look like.

Here there is precedent at many different levels. In the Supreme Court, such a process would include a concerted effort to record an accurate history. It would involve going back and reviewing the assumptions of past decisions and how those assumptions related to judicial decisions, like *Plessy v. Ferguson*. This is important because opinions are themselves monuments. The Supreme Court remarked a few years before the Civil War, in *Ableman v. Booth*, about the ways in which precedents are a form of monument: “[T]he sphere of action appropriate to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye.”<sup>26</sup> That sense that judicial opinions might serve as monuments suggests how important they might be to guide us. They are attempts to categorize and memorialize our values, and they are remarkably good at those tasks.

Perhaps a task of historical reconciliation in the Supreme Court would also involve the rethinking of precedent based on inaccurate histories. Remaking of precedent is extraordinarily difficult, because so many rights and expectations have grown up around those precedents. It is appropriate to reconsider what those precedents might be. In the political process, it is a process of acknowledgment of past misdeeds, and then something that would help repair the damage of those past misdeeds.

Much of the process of reconciliation of historical memory must occur at the local level. There is a need for scholarship that addresses the issues of the way that we have misremembered or forgotten our history. Historians have in recent years done important work on this score, but much remains to be done.<sup>27</sup> Moreover, we need those insights that are largely confined to the scholarly monograph to work their way down to high school textbooks, which I suspect is the place where most people formulate their understandings of history.<sup>28</sup> Given how long a tail the

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lessons of those high school textbooks have, we must realize this is a long, long process. Scholars have an important role to play here. Although Congressman John Conyers, Jr.'s (D-MI) bill to study the effects of slavery in the United States has yet to get even a hearing in Congress, scholars could be conducting this study on their own.<sup>29</sup>

Local communities can conduct these kinds of studies on their own as well.

Prompted by a Chicago City Ordinance that requires businesses contracting with the city to disclose their connections to slavery, JP Morgan Chase and Wachovia have both investigated their histories and apologized for their connections to slavery. The California Insurance Commission has a database of records of policies written by insurance companies on the lives of slaves.

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The database provides important and sobering information on the institution of slavery and the role of insurance companies in the institution.

It may, however, be that universities are the places where these issues of history and memory will receive their fullest exploration in the near future. At Brown, Yale, and the Universities of Alabama, North Carolina, and Virginia, there have already been significant efforts to learn about the connections of universities to the institution of slavery. And there is no shortage of other institutions where there should be further exploration: Transylvania University, the colleges of Randolph Macon and William and Mary, and the Universities of Georgia, Mississippi, North Alabama, South Carolina all spring to mind.

At my own University of Alabama, the process of recording an accurate history is exceedingly complex. The University of Alabama has deep connections to slavery—and to anti-slavery as well. One of the University's first acts after it was founded in the 1820s was to purchase a slave, Ben, to help in clearing the campus. Slaves were owned by the University throughout the period when that was legal. The president of the University recorded in his diary how one slave was beaten in the presence of the faculty, and when he was "not sufficiently humbled," the president beat him again, severely. But one of the first trustees, James Birney, was an important abolitionist. He ran for president on the Liberty Party ticket in 1844, after his anti-slavery views caused him to leave the South. At least one of the other early faculty members, Henry Tutwiler, was a collaborator with Birney in the anti-slavery cause. But by the late antebellum period, faculty at the University were important pro-slavery advocates.

The process of remembering the war and the era of slavery continued on the campus. In the early twentieth century the United Daughters of the Confederacy (UDC) placed monuments around campus to the alumni who fought for the Confederacy, including a granite monument in the center of campus, and a stained glass window in the library. In the late 19th and early 20th centuries, the universi-

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ty named buildings after its antebellum faculty who had been pro-slavery advocates or slaveholders, including Nott Hall, named for Josiah Nott, whose name had been on what became the University of Alabama Medical School. Nott was famous for his 1854 book, *Types of Mankind or Ethnological Research*, which advanced a theory of the separate origins of the races.

And then there is Barnard Hall, which is named for Frederick A.P. Barnard. In the 1840s and early 1850s, Barnard was a professor at the University of Alabama. After the Civil War, he became president of Columbia University and the prestigious women's school, Barnard College, which is named after him. While in Alabama, however, Barnard owned several human beings, including several young women. In 2004, as part of a process of rebalancing the memory of the era of slavery on the campus, the University of Alabama faculty senate issued an apology for the faculty's role in slavery before the Civil War and the University erected a monument to the slaves buried in the campus cemetery. It also pledged to preserve Foster Auditorium, where Governor Wallace made his stand in the school house door and to add an administrator in charge of "community relations."<sup>30</sup>

So across the country, it becomes a question: What should be done about schools' and cities' histories? Throughout the country, there are buildings named after people whose value systems were dramatically different from our own. There is Calhoun College at Yale, named after John C. Calhoun, one of the leading pro-slavery politicians. There is Ruffin Hall on the University of North Carolina campus, named in part for the important Chief Justice of the North Carolina Supreme Court, whose 1829 decision in *State v. Mann* became a focus of abolitionists' attacks on pro-slavery law. In Memphis there is a park named after Nathan Bedford Forrest, founding member of the Ku Klux Klan. In Liverpool, there is talk of renaming streets named after merchants in the slave trade, including Penny Lane! (Though cooler heads have prevailed given the cultural importance of Penny Lane.) And in Birmingham, Alabama, there is a park named for Henry Caldwell, one of the founders of the city of Birmingham and also a former Confederate officer and slave-owner.

There are several key questions:

- How much does removing a name benefit those who would wish to forget the past?
- How much does retaining a name honor those whose values and contributions, on balance, are no longer worthy of honor?
- How much do we want to retain names because of the importance of tradition or because of their subsequent importance (like Penny Lane), independent of the other messages they send?

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- How much is retention of names required by contracts or other legal commitments?

The placement of a statue had significance to the people who placed it there. When the United Daughters of the Confederacy placed statues in town squares throughout the South in the early twentieth century, those were important acts of public honoring. Those acts had the support of many, though by no means all, citizens. They “set in stone” one version of history and gave preference to one group.<sup>31</sup> But that is often the way that vested rights work: We do not go back and ask in a

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later era whether the property was acquired rightfully. Talk of the removal of names or monuments, thus, runs up against a question of principles: Must we accept the distribution of wealth (in this case intellectual wealth) that the past has bequeathed to us? Moreover, once a group has enough power that it is able to have the name removed, it may no longer need the gesture. The moving of a statue commemorating Confederate veterans from a town square or the renaming of a park may be an indication that our society has changed so much that we no longer even need to mark those changes.

On the Vanderbilt University campus, there is “Confederate Memorial Hall.” When Vanderbilt tried to remove the name “Confederate” in 2002, the UDC sued to prevent the change. And therein lies a story that touches on each of the questions noted above. It also touches on one other theme in this paper: the role of judges’ opinions as intellectual monuments. Vanderbilt Chancellor Gordon Gee began efforts to change the name when he arrived at the University in the summer of 2002. People on campus had been talking about renaming the building for some years. Some thought it was appropriate; unsurprisingly, others did not.

The UDC based its claim on \$50,000 it contributed towards the cost of the building in the 1930s on the campus of Peabody College. The complex history of the contract is worth examination in its own right, but for our purposes we can say that Peabody College built the dormitory, named it “Confederate Memorial Hall” and housed Peabody College students nominated by the UDC free of charge. In 1979 Peabody was acquired by Vanderbilt. As part of the acquisition agreement, Vanderbilt agreed to accept all liabilities of Peabody. While retaining the name after 1979, Vanderbilt no longer accepted any new nominations from the UDC to house young women rent-free in Confederate Memorial Hall.

The first judge to hear the case, Chancellor Irvin H. Kilcrease, 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.”<sup>32</sup> The UDC appealed.

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In a somewhat strange opinion, which among other things read a contract into the parties' course of dealings that may not actually have existed, Judge William C. Koch of the Tennessee Court of Appeals found for the UDC. Among other things, Judge Koch overturned Chancellor Kilcrease's interpretation of the contract as creating a charitable trust, which is subject to *cy pres* or other equitable modification, into a straight-out gift, which was not subject to such equitable modifications. In essence, the court of appeals interpreted the UDC's gift in a way that limited Vanderbilt's ability to alter the conditions of the gift.<sup>33</sup>

What is perhaps even more interesting for our purpose, however, is Judge William B. Cain's concurrence. For those of us interested in judges' thinking, the concurrence sheds light on the thoughts of Judge Cain. It consists in large part of a quotation from the memoirs of Union General Joshua Lawrence Chamberlain. Chamberlain is an important figure; he fought and was wounded at Gettysburg and he accepted the surrender at Appomattox.

At the time of the fiftieth anniversary of Gettysburg, as folks North and South were struggling with the memory of the war and with reunion, he published his memoirs of the battle. Judge Cain quotes extensively from Chamberlain's text, which honored the soldiers of both 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 Mahone's 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

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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 graven of all. For here is what remains of Kershaw's Division, which left 40 percent of its men at Antietam, and at Gettysburg with Barksdale's and Semme's 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, Kershaw's Division 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 manhood's honor....

Ah, is this Pickett's Division?—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!<sup>34</sup>

Chamberlain's thoughts appear again, nearly one hundred years later, in a judicial opinion. They are a reminder of how North and South reconciled after the war and the meaning of the monuments to the Confederacy to many. As Cain's 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.<sup>35</sup>

Thus, the concurrence attempts to provide a judicial reconciliation—to present a particular version of history as judicially recognized.

In part, reconciliation comes from each side understanding and respecting the other. We must, of course, ask the question: Can there be two competing histories? How can we have a history that says slavery was beneficial to the slaves, that they were treated well and were happy, alongside one that understands the brutality that ran through the institution from capture in Africa, through middle passage, to laboring under the sweltering sun on an isolated plantation in the deep South? One could

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of course argue that, on balance, there are benefits to descendants of the enslaved people. But those narratives are far apart. And the narratives about the cause of the war are even farther apart. There are several values that we must consider:

- Forgetting past injustices is important for the powerful;
- So is honoring those of the past;
- So is getting along in the present.

We are burdened too much with memories, as David Blight reminded us recently.<sup>36</sup> We need historians to keep us honest, of course, but we also need to focus on the future. For, as Ellison says, our task is for the future to overcome the past. This is a complex process of reconciliation, of remembering and honoring those who sacrificed in the past so that we may have a better life. 

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## NOTES

<sup>1</sup> I would like to thank my editor, Dedi Felman, for her assistance with this, as with so much of my other work.

<sup>2</sup> Ralph Ellison, "Going to the Territory," in *Collected Essays of Ralph Ellison* ed. John F. Callahan (New York: Modern Library, 1995): 591, 594.

<sup>3</sup> *Ibid.*, 595.

<sup>4</sup> Just four years after Coulter's *South During Reconstruction* (Baton Rouge: Louisiana State University Press, 1947) appeared, LSU Press published C. Vann Woodward, *Origins of the New South* (Baton Rouge: Louisiana State University Press, 1951). That is further evidence, as if it were needed, of how we Americans remake ourselves, sometimes very quickly.

<sup>5</sup> See, e.g., James Ronald Kennedy and Walter Donald Kennedy, *The South Was Right* (Gretna, LA: Pelican Publishing Company, 1994); Walter Donald Kennedy, *Myths of American Slavery* (Gretna, LA: Pelican Publishing Company, 2003). For an exploration of this literature, see William L. Ramsey and Sean M. Quinlan, "Southern Slavery As It Wasn't: Coming to Grips with Neo-Confederate Historical Misinformation," *Oklahoma City University Law Review*, 30 (2005): 209.

<sup>6</sup> See David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, MA: Belknap Press of Harvard University Press, 2001).

<sup>7</sup> See, e.g., Charles Dew, *Apostles of Disunion: Southern Secession Commissioners and the Causes of the Civil War* (Charlottesville: University of Virginia Press, 2001).

<sup>8</sup> It was not, however. As Justice Brown explained in *Plessy v. Ferguson* and in the Civil Rights Cases, 109 U.S. 3, it was said that the act of a mere individual—the owner of an inn, a public conveyance or place of amusement—refusing accommodations to colored people cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery question into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business." 163 U.S. 537, 542-543 (1896).

<sup>9</sup> *U.S. v. Cruickshank*, 92 U.S. 542 (1875).

<sup>10</sup> 163 U.S. 537, 543 (1896).

<sup>11</sup> Washington warned against agitation like Plessy's and emphasized work rather than the assertion of legal rights: "The wisest among my race understand that the agitation of questions of social equality is the extremist folly, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing. No race that has anything to

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contribute to the markets of the world is long in any degree ostracized. It is important and right that all privileges of the law be ours, but it is vastly more important that we be prepared for the exercise of these privileges. The opportunity to earn a dollar in a factory just now is worth infinitely more than the opportunity to spend a dollar in an opera-house.”

<sup>12</sup> 163 U.S. 537, 551-52.

<sup>13</sup> 163 U.S. 537, 554-55.

<sup>14</sup> *Ibid.*, 555.

<sup>15</sup> *Ibid.*, 555-56 quoting *Strauder v. West Virginia*, 100 U.S. 303, 306, 307 (1881).

<sup>16</sup> Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham and London: Duke University Press, 1999).

<sup>17</sup> See, e.g., G. Edward White, *The Marshall Court and Cultural Change, 1815-35* (New York: MacMillan, 1988); Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Thought, 1790-1960* (University of Chicago Press, 1998); William W. Fisher III, “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History,” *Stanford Law Review* 49 (1997): 1065.

<sup>18</sup> Ellison, “Going to the Territory,” 600.

<sup>19</sup> Ralph Ellison, *Invisible Man* (New York: Random, House, 1952), 457-58.

<sup>20</sup> *Ibid.*, 439.

<sup>21</sup> *Ibid.*

<sup>22</sup> Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Race Riot of 1921, Race, Reparations, and Reconciliation* (New York: Oxford University Press, 2002).

<sup>23</sup> Lawrence M. Friedman, *American Law in the 20th Century* (New Haven, CT: Yale University Press, 2002).

<sup>24</sup> U.S. Census Bureau, “Income, Poverty and Health Insurance Coverage in the United States: 2005,” 54-55, <http://www.census.gov/prod/2006pubs/p60-231.pdf>.

<sup>25</sup> One may reasonably accept as plausible the thesis that “the well-meant culture of the welfare state has been a significant contributor to the disadvantages that beset many black Americans today.” Calvin Massey, “Some Thoughts on the Law and Politics of Reparations for Slavery,” *B.C. Third World Law Journal* 157 (2004): 164 [citing John H. McWhorter, *Losing the Race: Self-Sabotage in Black America* (New York: HarperCollins, 2000)]. As Professor Massey states: “In 1995 the median income of black two-parent families was 88 percent that of white two-parent families, but the median income of all black families was only 61 percent of all white families...The disparity is attributable to the low income of many black single mothers...McWhorter also notes that a majority of blacks (56 percent) live in the South, a region notorious for wages lower than the rest of the country, and that the rate of increase in median pay was faster among blacks than whites in the 1990s...In mid-twentieth century America more than two-thirds of all black children were born into a two-parent family; by the end of the century more than two-thirds of all black children were born into a single mother family, a statistic leading one pair of researchers to conclude that this family structure is what divides poor blacks from middle-class or well-to-do blacks.”

<sup>26</sup> *Ableman v. Booth*, 62 U.S. 506, 516 (1859).

<sup>27</sup> See, e.g., Blight, 2001; David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York: Oxford University Press, 2006); James Oliver Horton and Lois E. Horton, eds., *Slavery and Public History: The Tough Stuff of American Memory* (New York: New Press, 2006); W. Fitzhugh Brundage, *Where These Memories Grow: History, Memory, and Regional Identity in the American South* (Chapel Hill: University of North Carolina Press, 2000).

<sup>28</sup> See generally Joseph Moreau, *Schoolbook Nation: Conflicts over American History Textbooks from the Civil War to the Present* (Ann Arbor, MI: University of Michigan, 2003).

<sup>29</sup> H.R. 40, “Commission to Study Reparation Proposals for Africa Americans Act,” 103rd Congress, 2nd Session, 1993.

<sup>30</sup> See Carter Davis, “Race and Reparations,” *Tuscaloosa City Magazine*, 24 April 2004.

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<sup>31</sup> Contentions over memorials frequently appear before courts. See, *State ex rel. Singelmann v. Morrison*, 57 So.2d 238 (La. Ct. App. 1952), upholding statue on public property to a saint who lived in New Orleans. Moreover, once dedicated to a city, a monument is under the city's care and subject to its control. See *City of Abbeville v. South Carolina Insurance Reserve Fund*, 448 S.E.2d 579 (S.C. Ct. App. 1994), finding that a monument dedicated by the United Daughters of the Confederacy in 1906 and located in the city's public square is "property in the care" of the city for purposes of insurance policy and thus excluded from coverage. In one early case, however, where the Texas legislature had (at least temporarily) set aside a room in the state capitol as a museum for the UDC, they were able to enjoin a state official from interfering with relics they stored in the room. See *Conley v. Texas Div. of United Daughters of the Confederacy*, 164 S.W. 24 (Tex. Ct. Civ. App. 1913).

<sup>32</sup> *Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, No. 02-3095-1 (Ch. Ct. Tenn., 20 Jud. Dist. Sept. 29, 2003): 12-13.

<sup>33</sup> *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, 174 S.W.3d 98 (Tenn. Ct. App. 2005).

<sup>34</sup> 174 S.W.3d.

<sup>35</sup> *Ibid.*

<sup>36</sup> David Blight, "If You Don't Tell It Like It Was, It Can Never Be as It Ought to Be," in *Slavery and Public History*, ed. James Oliver Horton and Lois E. Horton (New York: New Press, 2006).