

# SILENCING THE PAST: PUBLIC MONUMENTS AND THE TUTELARY STATE\*

SANFORD LEVINSON\*\*

This essay is concerned with a kind of censorship that falls outside the usual understanding of that term. In particular, I will be asking if the state itself should ever be subject to censorship — i.e., prevented, perhaps even by the force of law, from articulating certain sentiments.

Typically, when one considers the subject of censorship, especially if one is a liberal, one almost reflexively calls up the basic drama of the state invoking its legal powers — and the threat of punishment underlying the law — to suppress, and thus to silence, a “private” party who wishes to express herself. If this is the paradigm case, then the literally almost paradigmatic response for most liberals is to express appropriate dismay about the threat posed by the state, and to adopt as a corrective a notion of the state as limited to presiding over — and seeking to safeguard — a “free marketplace of ideas.” What this means, especially for Americans imbued with the tradition of Holmes and Brandeis, is that the state simply sets neutral, procedural rules for an otherwise unfettered competition of ideas. In Owen Fiss’s canonical statement of this ideal, the state is required to act “as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard.”<sup>1</sup> It must refrain not only from “choosing among viewpoints,” but also from structuring the public debate “in such a way as to favor one viewpoint over another.”<sup>2</sup>

To be sure, neutral regulation may have consequences for particular speech. To deny a group the right to block traffic in order to mount a demonstration is to make it less likely that the group’s views will in fact be communicated to an audience, but, or so the

---

\* Adapted as an abridged version of a paper presented by Sanford Levinson at the December 1995 conference *Censorship and Silencing: Practices of Cultural Regulation*, sponsored by The Getty Research Institute for the History of Art and the Humanities, The American Academy of Arts and Sciences, and the University of California Humanities Research Institute. A full-length version was published in a book anthology entitled *CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION*, edited by Robert C. Post. Copyright 1998 by The Getty Research Institute for the History of Art and the Humanities, Los Angeles, CA. Reproduced by permission.

\*\* W. St. John Garwood & W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School.

<sup>1</sup> Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2100 (1991).

<sup>2</sup> *Id.*

standard doctrine has it, the basis of this regulation is "content neutral," targeted not at *what* is said but only at *how* it is said. The state would presumably act against the obstruction of traffic even were the demonstrators rallying in favor of the most popular of causes.

#### THE STATE AS PARTICIPANT

This view of the state as merely the benignly neutral traffic cop presiding over "robust" exchanges between and among private citizens is, I believe, quite naive, in part because it fails to notice the extent to which the state itself speaks. While such a view gives prominence to the state's role as a disinterested, somewhat distant, *regulator* of the intellectual and cultural marketplace, it pushes to the margins any recognition of the state as an active *participant* in that market. Yet state authorities — whether Presidents giving major policy addresses or teachers using state-mandated textbooks within the public school system — regularly articulate, on behalf of the state, highly contestable and completely unneutral views about important political and cultural matters.<sup>3</sup> The danger of silencing those who disagree with the state's views comes, most often, not from any plausible fear of classic censorship — that is, overt punishment for offering views repugnant to state authorities — but, rather, from being "drowned out" by the superior resources often available to the state.

The state may benefit from having more *economic* resources to devote to articulating its position than do its opponents. But one should be aware that not the least valuable of the resources available to the state is the ability to *legitimate* certain arguments merely by virtue of its being the state that is offering them. From this perspective, the main threat posed by the contemporary Western state is that it will become an overweening *tutor* of the public, and that others who wish to take on this role will be denied legitimacy. In any event, one might well fear a state that so dominates the marketplace that alternative conceptions of the public good will find themselves not so much silenced — at least in the specific sense of becoming legally unsayable — as marginalized.

Those fearful of a tutelary state may even suggest that state speech itself on occasion be subject to censorship, even if, from a traditional liberal perspective, it sounds willfully paradoxical to

---

<sup>3</sup> See Stephen H. Schiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); see also MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

speak of the state as the object of censorship rather than the agency that (usually illegitimately) censors others. It is possible, though, to read the United States Constitution as limiting the power of either the national or state government to profess certain views.<sup>4</sup> The easiest example would involve the First Amendment's ban on the "establishment" of religion. A majority of the current Supreme Court, led by Justice O'Connor, has interpreted this as, at the very least, prohibiting the "endorsement" by the state of explicitly religious points of view.<sup>5</sup> Thus, I think most (though in fact not all) constitutional scholars would agree that Congress could not constitutionally legislate the addition of "In Christ is our Redemption" to the flag or the coinage.

In other cases, the constitutional status of government speech is more controversial. What about adding "Devoted to White Supremacy" to the American or a state flag? This example is not as arbitrary or outlandish as it might sound; indeed, it is central to an example I consider later in this essay. There is a non-frivolous argument that an affirmation of white supremacy would violate the anti-subordination principle that many view as the core of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. To the extent that our government is indeed founded on a principle of "equal concern and respect" for all members of the polity, any such expression in the name of the state would be not only censurable, but, even more to the point, the proper object of judicially mandated (because constitutionally mandated) censorship.<sup>6</sup>

#### SACRED SPACE

I have suggested that the state acts in relation to the intellectual marketplace not only — indeed, increasingly rarely, at least in the United States — through the negative acts of overtly silencing by threat of punishment those with given views, but, perhaps more significantly, through the *affirmative* acts of speaking in behalf of the people, or community, in whose name it claims to rule. In the age of the activist state, governmental speech, even when lacking the formal status of law, is a pervasive method of cultural regulation. Two obvious examples are programs in civic education,

---

<sup>4</sup> See YUDOF, *supra* note 3.

<sup>5</sup> See *Allegheny County v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573 (1989); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring).

<sup>6</sup> See generally Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992).

where the metaphor of the state as tutor is most clearly instantiated, and the phenomena of public monuments, through which the state privileges certain understandings of the community by celebrating particular heroes or sacred events.

"Public," in this context, refers primarily to the placement and ideological function of such monuments. Quite often, of course, they will be funded by the taxpayers, and be "public" in that very fundamental sense as well. Yet is it not at all unusual for private individuals or groups to finance a monument while seeking, through its display in a particular setting, the state's special imprimatur for its message. From this perspective, the most "public" of all public monuments are those occupying what Chidester and Linenthal describe as a culture's "sacred space," such as Capitol grounds, official cemeteries, or important parks or streets.<sup>7</sup> They serve as the icons within the civic religion that, as Rousseau argued, helps to maintain any political order. But then, for just this reason, the placement of a statue or commemorative plaque in these public settings can be a source of intense controversy. I shall explore one example in some detail.

#### THE LIBERTY MONUMENT

In New Orleans, stands what for most persons is an obscure monument to an obscure incident. The Liberty Monument celebrates the 1874 Battle of Liberty Place, described by an admiring local historian as "The Overthrow of Carpet-Bag Rule in New Orleans — September 14, 1874."<sup>8</sup> Members of the appropriately named White League engaged in the violent overthrow of the existing Louisiana government, composed of an alliance of Republican whites and newly enfranchised African-Americans. Thirty-two lives were lost on both sides, with about three times that many persons injured. The ousted administration of Republican Governor Kellogg was in fact reinstated by force of federal arms, but it was only a matter of time until the Compromise of 1877 resulted in full-scale restoration of conservative white rule as sought by the White League, with attendant consequences for the future of African-Americans.

Immediately following the battle, with the partisans of the White League in apparent control of the state (of which New Orleans was then the capital), the *New Orleans Daily Picayune* saluted the

<sup>7</sup> David Chidester & Edward T. Linenthal, *Introduction to AMERICAN SACRED SPACE* (David Chidester & Edward T. Linenthal eds., 1995).

<sup>8</sup> JOE GRAY TAYLOR, *LOUISIANA RECONSTRUCTED 1863-1877* (1974).

downfall of the Kellogg regime (which, in the words of the editors, had "collapsed at one touch of honest indignation and gallant onslaught") and called for the erection of a memorial to the eleven whites who had died in behalf of the insurgency. The New Orleans City Council formally agreed in November 1882, when it passed an ordinance renaming the area of the battle as "Liberty Place" and authorizing the erection of a monument "in honor of those who fell in defense of liberty and home rule in that heroic struggle of the 14th of September, 1874." By 1891 these hopes were realized with the construction of an obelisk near the Mississippi River at the foot of Canal Street, a principal street in the city. (New Orleans had, seven years earlier, erected a giant monument to Robert E. Lee that continues to preside, entirely unobscurely, over Lee Circle.) The Liberty Monument included the names of those White Leaguers who gave their lives in attacking the hated mixed-race government, as well as the names of some of the League leaders. According to Judith Kelleher Schafer, a leading historian of the incident, the 1891 dedication of the monument initiated what became a yearly parade thereafter each September 14, with suitable wreath-laying ceremonies to honor the civic heroes.<sup>9</sup>

Lest anyone unaccountably fail to get the intended message, the city, using artisans supplied by the federally funded Works Progress Administration, added in 1934 two plaques setting out the official version of events. On one side of the base was chiseled, "United States troopers took over the state government and reinstated the usurpers but the national election in November 1876 recognized white supremacy and gave us our state." On the opposite side appeared, "McEnery and Penn, having been elected governor and lieutenant governor by the white people, were duly installed by the overthrow of the carpetbag government, ousting the usurpers Gov. Kellogg (white) and Lt. Gov. Antoine (colored)."

As one might well expect, the Liberty Monument has remained a source of controversy in New Orleans, especially as African-Americans have become a dominant political force in the city. In 1974, for example, Mayor Moon Landrieu agreed to the placement near the monument of a brass plaque describing the battle as an "insurrection" and noting that the controversial language carved on its base had not in fact been part of the original 1891 monument. Most important, no doubt, was the plaque's additional message that "the sentiments expressed are contrary to the philosophy and beliefs of present-day New Orleans," a statement itself rais-

---

<sup>9</sup> Judith Kelleher Schafer, *The Battle of Liberty Place*, 8 LA CULTURAL VISTAS 17 (1994).

ing delicious political and philosophical questions.<sup>10</sup> Is New Orleans an entity that can have a "philosophy and beliefs," and, if so, how precisely does one identify what they are, or who is authorized to speak performatively as to their content? One wonders also if it is possible that the statement, whatever its accuracy at the time of installation, was chiefly designed to *create* the consciousness that it purports to describe. In any event, there is no doubt that New Orleans adopted an overtly tutelary role in attempting to limit somewhat the pernicious consequences of the Liberty Monument, lest the citizens be tempted to treat the words chiseled upon it as an authoritative enunciation of the meaning of the event that was, after all, being commemorated.

When Ernest Morial became the first black mayor of the city in 1981, he attempted to remove the monument, but was stopped from doing so by the majority white City Council, which forbade the moving of any monuments without its consent.<sup>11</sup> (Does the Council therefore merit an award for fending off the forces of censorship?) The Council did, however, authorize the removal of any offensive wording on the monument (so maybe it doesn't deserve an award after all). Smooth granite slabs were then placed over the 1934 additions, presumably obviating the need for the plaque's renunciatory sentiments.<sup>12</sup>

During the late 1980s the administration of a second black mayor, Sidney Barthelemy, tried to remove the monument permanently from view during the course of general riverfront reconstruction, when it had been taken down from its Canal Street location. However, an interesting alliance of traditionalists, historical preservationists, and white supremacists successfully blocked the effort. Nevertheless, the monument was ultimately moved from its original spot to a decidedly more obscure setting about a block away, where it now languishes out of the sight of most of the tourists who crowd Canal Street and its fine shops, casinos, municipal aquarium, and vistas of the Mississippi.<sup>13</sup> It remains in the area at all only because of a consent agreement between the City and the State Historic Preservation Officer, based on federal historic preservation laws, that the monument remain in the general vicinity of the battle.

<sup>10</sup> See Royal Brightbill, *Reconstruction Era Battle Still Being Fought in New Orleans*, UNITED PRESS INT'L, Oct. 20, 1989.

<sup>11</sup> *Id.*

<sup>12</sup> See Christina Cheskalos, *Monument Debate Divides New Orleans*, ATLANTA CONSTITUTION, Dec. 15, 1992.

<sup>13</sup> *Id.*

there  
"In h  
died  
shou  
left w  
leavir  
wong  
coun  
meni  
the c  
of m

the  
its fi  
Win  
dire  
ness  
whc  
and  
the  
fere  
"ho  
is w  
the  
"Gr  
cor  
mc  
cle

mc  
wa  
set  
tic  
of  
m

Once again, though, the "official" story changed, for now there was yet another large plaque placed on the monument itself: "In honor of those Americans on both sides of the conflict who died in the Battle of Liberty Place. A conflict of the past that should teach us lessons for the future." What these lessons are is left wholly unarticulated. The voice of the tutor is quite muffled, leaving the monument to "speak for itself." We may reasonably wonder if this really represents progress over the 1974 point-and-counterpoint between the chiseled words on the base of the monument and the revisionist plaque, an exchange that at least educated the careful reader as to the ideological stakes behind the ascription of meaning to the Liberty Monument.

#### THE NATURE OF HISTORICAL MEMORY

During the height of the controversy in New Orleans, when the monument had been removed from its original site but when its fate had not yet been decided, the noted Yale historian Robin Winks attacked those who were calling for its destruction. He took direct issue with those who viewed the struggle over its appropriateness as a "clash between those who look to the future and those who hang on to the past, or even more sharply put, between racists and those who regard race as irrelevant."<sup>14</sup> Instead, he suggested, the struggle was really about the nature of historical memory. Different concepts of history were at war, Winks wrote. The first "holds that society should never forget any part of its past," that "it is wrong to purge the record of past events."<sup>15</sup> Winks characterized the contrasting view by evoking the classic negative example of the "Great Soviet Encyclopedia," which was continually revised in accordance with the desires of successive ruling elites. Not to put the monument back up, the historian declared, "would be an act of the clearest Stalinism, of intellectual vandalism."<sup>16</sup>

For Winks, however, the real issue was not whether to keep the monument standing but, rather, where to put it. He agreed that it was not appropriate to restore the monument to its Canal Street setting, where, despite the best arguments of the historic preservationists, it constituted "an insult to most of the present population of New Orleans."<sup>17</sup> Instead, Winks argued for placing the monument in a museum, presumably (since no one defends the Liberty

<sup>14</sup> Robin W. Winks, *A Place for Liberty Monument*, NEW ORLEANS TIMES PICAYUNE, Aug. 17, 1992, at B7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Monument as art) a history museum.<sup>18</sup> In support of this proposal, Winks offered the example of Zimbabwe, which, upon its creation as a successor-state to Rhodesia, was faced with the issue of what to do with the "great statues of Cecil Rhodes, Lord Salisbury and others who dreamt of empire." The new regime's solution was not to "deny the significance" of these figures "to the history of modern Zimbabwe." Instead, they moved the statues from the great public places of the capital and deposited them "on the grounds of the nation's new national archives and museum, a clear statement that the figures spoke to the past, not to the future."<sup>19</sup>

Even if Winks is right to say that complete destruction of these monuments is unwise (whether or not it is "Stalinist"), one might obviously wonder if the state should be content to count on their placement in a museum setting to convey the proper message. Suppose that the Zimbabwean example were followed by the new government of South Africa, with the result that Afrikaners could continue to see mighty monuments to their ancestors, though in museums rather than in great public squares. Suppose the new governments of Russia, Poland, and other countries formerly ruled by Communists were to place various statues of Lenin, Stalin, and others in the equivalent of Communist theme parks, where parents could bring their children and impart to them whatever lessons they wished. In these cases, would adoption of the Zimbabwean solution necessarily be beneficial in the struggle to extirpate racist or Communist sympathies? It takes little imagination to extend the comparison to Germany and Japan, following their defeats in World War II. Would one have been altogether comforted had the postwar regimes moved any public statuary of Hitler, Tojo, and their minions to the carefully tended grounds of a state museum where they would stand, without further adornment or explanation, for the presumed edification of onlookers?

#### SUBVERTING OFFICIAL STORIES

Perhaps one might want the statuary to be accompanied by various "educational" plaques and other materials that specify who is to be considered heroic and who is villainous. But, of course, anyone who has drunk from the postmodernist well (or, perhaps, anyone simply with common sense) knows how easily such official stories can be subverted by viewers. Unreconstructed Southerners (or Afrikaners, Communists, etc.) might well continue to treat

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



even statuary enclosed in a museum as iconic and to teach their children quite different lessons from those described by state authorities. Indeed, the tutelary inscriptions might be pointed out to the young as direct evidence of hegemonic oppression rather than offered as the right way to understand the monuments. "Political correctness," the desire for which is a part of all political regimes, including liberal ones, is all too easily subverted in all but the most totalitarian of settings.

So how should a contemporary non-racist respond to the Liberty Monument? My immediate answer is, "with caution." That is, I remain highly uncertain that there are any useful general norms that offer much help. I have little doubt that the removal of villains' statues from public space — or, for that matter, the cancellation of a traditional "official" parade or wreath-laying ceremony — is a form of regulation designed to inculcate in the citizenry a "correct" civic consciousness. I am less sure that this should be described as "silencing," since private individuals and organizations presumably remain free to organize marches and other ceremonies on their own, just as they can place monuments on private property. In any event, I cannot cogently offer general criticisms of states that engage in such regulation; for I cannot imagine a state that does not devote at least some of its energies to exactly that, even if it otherwise tolerates relatively unfettered private discourse. Moreover, I am happy with the state's playing a tutelary role, at least so long as I am happy, enough of the time, with the state's substantive decisions as to whom to honor (or dishonor).

But that, obviously, is the rub. Will our response to the expressive acts of the tutelary state simply depend on whose cultural symbols are being affirmed or supplanted? One would like to say no, especially if one is a liberal yearning for suitably neutral standards that enable us to transcend our own substantive politics when considering who is fit for public honor. But I don't know what those standards are. I find myself thinking of Justice Holmes's reminder that "general propositions do not decide concrete cases." What this means, among other things, is that there *are* times when the proper response to the sacred symbols of a prior political regime is to destroy them, that we certainly are *not* obligated to preserve them in places of honor or, perhaps, even in the disinfected space of a museum.<sup>20</sup>

---

<sup>20</sup> Many of these arguments are further elaborated in SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).