

BOOK REVIEW

"FISHBONE IN THE THROAT"

WRITTEN IN STONE. By Sanford Levinson. Durham: Duke University Press, 1998

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In front of the state capitol in Austin, Texas, is a monument commemorating the Confederate dead.¹ On a pedestal stand four statues of fighting men representing the branches of the Confederate armed forces, and looming up from their midst is a larger than life-size figure of Jefferson Davis, the Confederate President. The pedestal names all the Confederate states and every battle fought during the Civil War. Written in stone on the front of the monument is its official message:

**DIED
FOR STATE RIGHTS
GUARANTEED UNDER THE CONSTITUTION.
THE PEOPLE OF THE SOUTH, ANIMATED BY THE SPIRIT
OF 1776, TO PRESERVE THEIR RIGHTS, WITHDREW FROM
THE FEDERAL COMPACT IN 1861. THE NORTH RESORTED
TO COERCION. THE SOUTH, AGAINST OVERWHELMING
NUMBERS AND RESOURCES, FOUGHT
UNTIL EXHAUSTED.²**

Lower down on the pedestal the message is punctuated by a comparison of the number of men enlisted in the two armies (Confederate: 800,000; Federal: 2,859,132), and the number lost in the carnage (Confederate: 437,800; Federal: 485,216).³ The monument was erected at the beginning of this century by surviving Confederate soldiers and their sympathizers, who by then had sufficiently recovered from the war to afford to commemorate it. It was enthusiastically dedicated in 1903 by a former Texas governor, who had been an aide to Davis, and the current governor, both of

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¹ See SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 54 (1998) (containing a photograph of the *Memorial to the Confederate Dead*, Austin, Texas).

² *Id.* at 57 (containing photograph of written inscription found on the *Memorial to the Confederate Dead*).

³ *Id.*

whom championed Davis, the Confederacy, and its cause.⁴

Understandably, Sanford Levinson, born and brought up in North Carolina, and now a professor at the University of Texas at Austin specializing in constitutional law, is troubled — and fascinated — by the monument. His book, an extended essay, composed in large part of previously published writings, is a meandering, personal, wonderfully nuanced mediation, peppered with numerous examples and asides, of what troubles him about Confederate monuments and the proper responses to them.

These musings center around a broader complex of questions concerning what society memorializes and how its monuments should be dealt with when society changes and the monuments fall into disfavor. These questions include: What should be honored? How are national or civil values expressed and inculcated? Are there limits as to how those with political power can use the public space to convey their desired message? What changes in the use of public space are appropriate to reflect new groups and values? Does society have an obligation to maintain its monuments as expressions of its past? And, most important of all, how are the clashes between old monuments and new values to be addressed in the contest for sacred public spaces, as exemplified by what flags are to fly, what statues are to stand, whose birth is to be celebrated by a public holiday, and who should be honored by a street's name or pictured on a postage stamp?

This last question is the central issue of the book. "Fishbone in the throat," the book's would-be title, is a phrase drawn from Robert Lowell's poem, *For the Union Dead*, about a monument to a white commander of a black regiment in Boston Common. It captures exactly what Levinson wants to address. As a constitutional law professor, he is interested in whether the United States Constitution can provide a legal basis for answering the question: Does the Constitution limit governmental authorities in stating certain views? As a result, the heart of his discussion is whether either the First Amendment's Establishment Clause, which prohibits the government from establishing religion, and interpreted as preventing it from furthering heirological views, or the Fourteenth Amendment, enacted after the Civil War to insure due process and equal protection of all citizens, and used to overcome the legacy of state imposed racial impediments, limits national or state governments in their power to express certain views. Specifically, does the law

⁴ *Id.* at 55.

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⁵ *Id.* at 87.

⁶ *Id.* at 90.

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The First Amendment discussion focuses on the supposed requirement of government neutrality on matters, like religion, that concern how one should live one's life. Recognizing that government speech is an element in forming the normative civil religion that is critical to any social order, Levinson maintains that non-neutral speech through governmentally endorsed monuments cannot be precluded.

It simply cannot plausibly be argued that a conscientious constitutional interpreter, whether judge or legislator, must rigorously deny the state the right to speak unneutrally insofar as it selects out some small fraction of humanity as heroes whose lives (and life choices) should be emulated by us today. Public monuments that designate communal heroes or sacred communal events throughout time have been ways by which regimes of all stripes take on a material form and attempt to manufacture a popular consciousness conducive to their survival.⁵

As a practical matter, then, a legal attack on memorials to the Confederate dead or the flying of the Confederate battle flag over state capitols must surely rest on something other than the purported duty of the state to maintain neutrality on basic political issues (other than the virtue of robust debate itself).⁶

Seemingly more promising is the Fourteenth Amendment's proscription against the legacy of racism. Levinson's discussion here focuses on a 1990 case in which the NAACP challenged the right of Alabama to fly the Confederate flag over its capitol.⁷ In *NAACP v. Hunt*, the force of the claim that flying the flag was unconstitutional comes from the fact that the flag was raised on April 25, 1963, the day Robert F. Kennedy came to Montgomery to confront Governor George Wallace over his declared intent to block black students from entering the University of Alabama. The argument that flying the Confederate battle flag was unconstitutional is that it symbolized a system of racial oppression, in effect memorializing and glorifying slavery, or whatever the equivalent of that would now be in our society, and, in the absence of a First Amendment purpose, does not serve a legitimate government function and is barred by the Fourteenth Amendment.⁸ The court in *Hunt* disagreed, and found that, while it was unfortunate that Alabama

⁵ *Id.* at 87.

⁶ *Id.* at 90.

⁷ See *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

⁸ LEVINSON, *supra* note 1, at 90-94. This argument and the apparent inspiration for

used state property in a manner that offended a large portion of its population, it "is a political matter which is not within our province to decide."⁹

Levinson concurs. While he agrees that in George Wallace's case the intent and purpose was inextricably linked with the legacy of racial subordination, that interpretation is not the only one possible *after* the flag was raised, and that flying the Confederate flag can also serve historical and cultural purposes unrelated to honoring slavery. Thus he is inclined to agree with the *Hunt* court, and also thinks that courts should be judicious in using their limited powers to advance social and cultural agendas, especially where such action can provoke a damaging backlash.

Not everything that is arguably unconstitutional should be enjoined by the judiciary. Judicial caution is especially merited when the challenged practices have become sedimented in historical memory and are simply accepted as status quo. . . .

Courts, like all political institutions, have invariably limited resources, and it is foolish for the courts to pick fights that they almost certainly cannot win, unless the very highest issues of political morality are being raised.¹⁰

Levinson's concern about taking legal action against Confederate monuments is even more pronounced than is his concern for the Confederate flag. Monuments to the Civil War dead, like the one in Austin, are understandable as attempts to memorialize state service by Civil War veterans, which, especially now, have little likelihood of being seen to vindicate slavery. They served a needed human purpose when erected, and now can be considered the sediment of the past, and, at least legally, should remain.

And so we arrive at the conclusion of Levinson's reflections. What is to be done is what political decency — not law — requires. A number of possibilities are proposed for the Austin monument: 1) do nothing; 2) erect a sign by the monument disclaiming that it voices an official position, or stating that the monument does not represent the government's view, or, more forcefully, that the inscribed message is immoral because it supported slavery, or, more neutrally, now has only historical significance; 3) erect adjoining corrective monuments with a pro-Union message or one commemorating black soldiers who fought for the Confederacy or otherwise

this entire discussion comes from James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 505 YALE L.J. 101 (1991).

⁹ *Hunt*, 891 F.2d at 1566, quoted in LEVINSON, *supra* note 1 at 92.

¹⁰ LEVINSON, *supra* note 1, at 105.

voice a pro-African American to a museum or otherwise on governmental ground; 5) simply destroy the monument.¹¹

If forced to choose between options, Levinson would opt for a set of monuments that honor the African American experience, a choice most difficult to support. He concedes that the choice to erect other monuments is more complex, and he concedes that the only realistic prospect for the legitimate resolution of this dilemma is to concede it is like endorsing a "central dilemma" of his book. Levinson concludes by saying that the central question is not whether to remove the monument and not be forgiving or to

I believe that we should not remove the monument when we support special interests. . . . when we support special interests, we have been describing, is especially of its future generation. . . . [O]ur history [of racial slurs] will not even if it would be viewed as a landmark. . . . Martin Luther King, Jr. . . . innocent in any such history. . . . necessary permanence. . . . cessfully socialized to view the monument as waving in ever-changing

As interesting and enlightening as it is, it is not clear that they give us a solution. . . . it does not provide a solution to the problem, and political decency requires us to hold the status quo, then we must wait after us further the community. . . . differ as to what that is. . . . ers, would like to say more. . . . should be no monuments. . . . grounds this on the fact that they were soldiers."¹³ But is this all

¹¹ *Id.* at 114-29.

¹² *Id.* at 139.

¹³ *Id.* at 123.

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voice a pro-African American message; 4) remove the monument to a museum or otherwise neutralize its association with sacred governmental ground; 5) sandblast the message off the pedestal; 6) destroy the monument.¹¹

If forced to choose between these possibilities, Levinson would opt for a set of monuments commemorating different aspects of the African American experience. He thinks destruction is the option most difficult to support. The other options, including his choice to erect other monuments with alternative messages, are all more complex, and he concludes that the first option, doing nothing, is the only realistic one. With regard to his own choice, respect for the legitimacy of multiple perspectives, Levinson concedes it is like endorsing relativism, which he thinks is the "central dilemma" of his book. The book concludes with a "coda," noting that the central question is whether to side with intransigence and not be forgiving or to be more tolerant.

I believe that we should have the grace to admit that our hope, when we support specific state speech in the circumstances I have been describing, is that the consciousness of the polity, especially of its future generations will be regulated in the proper direction. . . . [O]ur hope [is] that certain critical speech [e.g. racial slurs] will not even occur to citizens of the future because it would be viewed as a blasphemy visited upon a civic icon [e.g., Martin Luther King, Jr.]. It should be clear that there is nothing innocent in any such hopes, that what is written in stone has no necessary permanence unless successor generations can be successfully socialized to view granite as less evanescent than a flag waving in ever-changing winds.¹²

As interesting and enjoyable as Levinson's peregrinations are, it is not clear that they go anywhere. If, as he concludes, the law does not provide a solution to what monuments should stand or fall, and political decency can realistically only be expected to uphold the status quo, then all we can do is hope that we and those after us further the common weal and are tolerant of those who differ as to what that is. And yet, Levinson, and surely most readers, would like to say more. Levinson does say that he thinks there should be no monuments commemorating the Nazi SS, and grounds this on the fact that they were not "ordinary citizen-soldiers."¹³ But is this all that can be said? Are we limited in public

¹¹ *Id.* at 114-29.

¹² *Id.* at 139.

¹³ *Id.* at 123.

displays in democratic societies to whatever are the prevailing values, both at the time a monument is erected and later when it is called into question?

The issue Levinson addresses in the context of Confederate monuments — what should we do now about existing monuments with which we disagree? — surely dates back almost to the origin of monuments. For most of the past, it was summarily answered by new rulers destroying or usurping for their purposes the monuments that came before them. Now, at least in democratic societies, and where anger and disdain for the past does not lead to violent destruction, the issue has become one of practical importance.

The earliest and still the best systematic attempt to understand the underlying issues is Alois Riegl's *The Modern Cult of Monuments: Its Character and Its Origins*, written in 1903.¹⁴ Riegl, an Austrian art historian concerned with conservation, deciphered competing values affecting monuments, including: 1) their original intentional or deliberate commemorative value (the purpose the monument was intended to serve at the time of its creation); 2) historic value (what the monument unintentionally tells us generally about the period when it was erected and the influences and effects on it over time); 3) artistic value (its current aesthetic interest); 4) present day value (the monument's current use or function, as, for example, an ancient Greek temple now used as a church); and 5) age value (its importance solely as a survivor from the past where its outmoded appearance and other signs of the passage of time are its most significant aspects).

Most discussions of monuments (and public art generally) involve conflicts over aesthetic values, disagreements between those who love and abhor the work on visual grounds, and, to a lesser extent, conflicts over intentional, commemorative value, differences over the ideas or values thought to be represented by the work in question. Thus most of the vast literature on public art involves disagreement over placement of an aesthetically or ideologically offending work in the public domain.¹⁵ The issue Levin-

¹⁴ 25 OPPOSITIONS 21-51 (1982) (Karl W. Foster et al. trans.) translated from GESAMMELTE AUFSÄTZE, 144-93 (Dr. Brenno Filser Verlag, 1928) (originally published as *Der moderne Denkmal Kultus: Sein Wesen und Seine Entstehung* (W. Braumiller, 1903)).

¹⁵ See, e.g., JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989) (discussing the legal and aesthetic issues involved in preserving landmarks); see also *CRITICAL ISSUES IN PUBLIC ART* (Harriet F. Senie & Sally Webster eds., 1992) (discussing ideological issues involving public art, including the *Vietnam Memorial*, Richard Serra's *Tilted Arc*, the *Monument to Joe Louis* in Detroit, and other examples discussed by Levinson).

son raises may best be in the monument's commemorative value of that monument intended to commemorate those values, and also the monument.

Levinson's discussion of whether a more theoretical stance, at the heart of what a monument commemorating is permitted to stand or go away today. Using Riegl's categories of historic value, cause of historic value, a plaque should not be on a site for its historic value. Levinson argues that slavery in any way now represented by Confederate monuments liberate commemorative monuments (and for that matter, are likely also seen as representing advancing current ones).

That is, current battles over monuments most always reduce to preserving our past. For this to be true, the issue, historic monuments' values change — especially over time. Consequently, Levinson's approach to the monument itself is not a unanimous negative response to present day monuments. This is a theoretical approach that is not a pretation. This key point is that a monument's importance is not an interpretation: it never changes its intent once time has passed. The Confederacy, have since their intended commemorative purpose, the battle over the heart. Monuments should be preserved with differences.

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son raises may best be interpreted as continuing approbation for a monument's commemorative value — or, better, the current “use” value of that monument to further the values it was originally intended to commemorate, versus conflicts or disagreements with those values, and also the unintended historic value of the monument.

Levinson's discussion touches on this. The question is whether a more theoretical focus is useful. I think it is. For instance, at the heart of what troubles Levinson is whether a monument commemorating those who upheld slavery should be permitted to stand or go unremarked from the perspective of today. Using Riegl's categories the answers are: it should stand because of historic value, and, if remarked on, any “corrective” plaque should not be on the monument itself, which would affect its historic value. Levinson's real concern is: is commemorating slavery in any way now right. And I think the answer is that most Confederate monuments are no longer seen as expressing the deliberate commemorative value they had when erected and essentially only have historic significance (for most they are not “living” monuments), and for those to whom they continue to speak, they are likely also seen as recognizing past values, not inculcating or advancing current ones.

That is, current battles over already existing monuments almost always reduce to present day conflicts over how we are to view our past. For this to be, as it should, a recurrent, ever present issue, historic monuments should remain to be reinterrupted as times change — especially if their historic import is alive to some. Consequently, Levinson's conclusion, that nothing should be done to the monument itself and that we should seek to have a more unanimous negative response to the evils of slavery by erecting present day monuments inculcating those values, affects the more theoretical approach that the past be preserved for present reinterpretation. This key point can be more emphatically made. A monument's importance reflects its present meaning and interpretation: it never simply speaks its original commemorative intent once time has passed. Whether monuments, like those to the Confederacy, have some resonance for those sympathetic to their intended commemorative goal or only serve a historic purpose, the battle over them is for the present public's mind and heart. Monuments should not be scapegoats for political differences.

In the end Levinson's thoughtful meanderings are probably all that can be done to view Confederate monuments in their

"proper" light. More generally, the self-conscious evaluation of the state's symbols commemorating the past and inculcating values in the present — and hopefully for the future — is likely all that one can do. As Levinson says, nothing is really "written in stone." Teaching, writing, and otherwise influencing others about what we hope will make our society better is probably as much as can be done to assuage what troubles us.

IS ORIGINALITY A "QUESTION OF FACT?": T

What is original? The concept is central to everyday life, but it becomes a central issue in the context of copyright litigation. In copyright cases, plaintiffs' works are not original and thus cannot possibly be protected. It is an unhelpful strategy because "[a]ny attempt to define a limited scope of protection based on the amount of how much labor went into the work is to move on to the issue of infringement. We must first determine if the work is original, and therefore, capable of being protected by the variety of works covered by the Copyright Act of 1976. The Copyright Act of 1976 covers a wide range of rightable works.³

Even before a court can determine if a work is original, it must address the issue of whether the work is a "question of fact." In some cases, the issue is dispositive on this issue. Yet, the issue is often one with consequences. It depends on the facts and will be decided by a judge. The issue is often one of fact and whether a judge can determine the issue.

This Note advocates a more objective approach to an inherently subjective issue. This approach would ensure that the issue is decided on the facts and not on the judge's subjective view.

¹ See, e.g., *CMM Cable Repres. v. Am. Cable Ent. Ass'n*, 1504 (1st Cir. 1996); *Durham Indus. Corp. v. Borland Int'l, Inc.*, 777 F.2d 1420 (1st Cir. 1985).

² William Patry, *Copyright in the 21st Century*, 77 *Copyright Law Symposium* 1 (1999).

³ See 17 U.S.C. §§ 102(a), 103 (1)-(8) (listing categories of works of authorship covered by copyright).

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings;
(8) architectural works.

Section 103 adds two more categories of works: (9) compilations and (10) derivative works. See *infra* notes 36 and 62 and accompanying text.