DEATH AND DIXIE:
HOW THE COURTHOUSE CONFEDERATE FLAG INFLUENCES
CAPITAL CASES IN LOUISIANA

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I. INTRODUCTION

Recent Supreme Court jurisprudence opines that the official discrimination is of a bygone era, and that the original concerns animating the post-Civil War amendments have faded along with the last vestiges of African American oppression.1 This history is alive and well in Caddo Parish, Louisiana, the site of the last capital of the Confederacy and widespread and brutal hate crimes during the turn of the century. The bygone era of slavery and the Confederacy continues to influence the administration of justice in Louisiana: the Confederate flag flies over the parish courthouse at which lynching occurred and death sentences are meted out along racial lines.

Concurring in McDonald v. City of Chicago, Justice Thomas referred back to the Colfax Massacre—in which at least 150 newly-freed blacks were slaughtered by whites—to suggest that the racial attitudes of that era poisoned our Fourteenth Amendment jurisprudence.2 Justice Thomas was

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1 See McDonald v. City of Chicago, 130 S.Ct. 3020 (2010) (relying on United States v. Cruikshank, 92 U.S. 542 (1875) (reversing convictions of some of the perpetrators of the Colfax Massacre) to reject a Privileges or Immunities challenge to the Chicago handgun ban); cf. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) (holding that public school districts’ attempts to correct de facto segregation were unconstitutional).

2 McDonald, 130 S.Ct. at 3060 (Thomas, J., concurring).
right to lament the artificial circumscription of the rights of national citizenship under Privileges or Immunities, but his opinion stops short of acknowledging a second wrong: fragmentation in the interpretation of related clauses in the Fourteenth Amendment. The courthouse Confederate flag underscores the relationship between the clauses. Because of its history, social cognitive meaning, and influence, the flag robs Louisiana citizens of privileges “which owe their existence to the Federal government” and due process of law.

Shreveport was the Confederacy’s last stand. Caddo Parish, which encompasses Shreveport and the surrounding smaller towns and rural areas, stretches from the Louisiana-Arkansas border, down the Louisiana-Texas border and across two bayous in the south, and is bounded on the east by the Red River. Caddo includes both the rural areas of North Louisiana notorious for the Ku Klux Klan’s omnipresence which continues to this day, and Shreveport, a majority-black city that is the third-largest in the state. Caddo’s population is roughly half-black, half-white; its parish council likewise has six black members and six white members. The biracial composition of the Caddo Commission is deceptive. The prospect of risking position or livelihood by taking a stand that offends white interests remains paralyzing.

Citizens must pass under the Confederate flag in order to enter the

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6 Black politicians in Caddo Parish have faced violent backlash from the Ku Klux Klan even in these modern times. In 1990, a black politician dared to run for mayor of Shreveport. He was pummeled with death threats and vandalism by the Klan. Years before, when he had was active in the civil rights movement, his house was bombed. Michelle McCalope, *Black Dentist Vows to Run for Mayor of Shreveport Despite Death Threats by KKK*, JET Magazine, Nov. 5, 1990, at 5-7. In 2004, the city of Greenwood elected its first black mayor. Soon after his election, however, a “For Sale” sign was placed in his front yard. Later, his house was riddled with buckshot in a drive-by shooting. Dan Berry, *Yes, the Ill Will Can Be Subtle. Then, One Day, It Isn’t*, N.Y. Times, Jan. 21, 2007, at 116.
Caddo Parish Courthouse in downtown Shreveport. Every defendant, attorney, court employee, journalist, judge, and citizen sees this flag first before entering the halls of justice. The message is clear: the justice administered in Caddo Courthouse is not the justice of the United States Constitution and its post-war amendments which implemented the concept of equality under the law. The justice in Caddo Parish is that of the Confederate States of America, which valued the rights of the slave-owners above those of the slaves. Translated into the political narrative in the twenty-first century, it means that the white agenda is paramount, and attempts to disrupt the status quo may be met with violent hostility.

This article explores the constitutional problems associated with flying the Confederate flag at a death penalty trial in the South. Specifically, the Confederate flag at Caddo Courthouse plays a toxic role in the administration of the death penalty in Shreveport. Post-*Furman*, Caddo Parish juries have voted to impose the death penalty on sixteen men and one woman: all but four have been black, and the combination of black-defendant and white victim exponentially increases the likelihood of aggressive prosecution. And while the flying of the Confederate flag at a state capitol, or the design of a state flag to include the Confederate flag, is problematic, the flag’s presence at this courthouse raises unique dangers. Beyond the equal protection issues generated by the mere government display of the flag on state property, the flag’s presence at a courthouse implicates the accused’s right to due process, and both the defendants’ and the prospective jurors’ rights to all of the privileges or immunities attendant to being a citizen of a state in the Union.

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7 The Confederate flag was raised at the South Carolina state capitol in 1962 and still remains on capitol grounds. See David Firestone, *46,000 March on South Carolina Capitol to Bring Down Confederate Flag*, N.Y. TIMES, Jan. 18, 2000, at A14. In Alabama, the Confederate flag flew at the top of the capitol dome from 1956 until 1993, at which point it was moved across the street. *Stars and Bars Gone from Alabama Capitol*, CHICAGO TRIBUNE, April 30, 1993, at 8.

8 The Confederate battle flag makes up about two-thirds of the Mississippi state flag. In a 2001 vote, three quarters of the state’s white voters opted to keep the Confederate emblem in the state flag. See David Firestone, *Mississippi Votes by Wide Margin to Keep State Flag That Includes Confederate Emblem*, N.Y. TIMES, April 18, 2001, at A14. The Georgia state flag was changed to contain the Confederate battle flag in 1956. In 2003, it was changed again to replicate the first flag of the Confederacy (the “stars and bars”). See Associated Press, *Georgia Governor Wants Vote on Flag With Confederate Emblem*, N.Y. TIMES, Feb. 13, 2003, at A27 (quoting NAACP leader, “‘If it were up to the majority of people in the state of Georgia, slavery would still be legal and lynching would still be the law of the land’”).
Part II of this article recounts the history of the Confederacy and its aftermath in Caddo Parish, leading up to the death sentence of the latest capital defendant, Felton Dorsey. Part III discusses previous attempts to challenge the Confederate Flag using the Equal Protection Clause. This Part highlights obstacles that can be anticipated with an equal protection challenge. Part IV addresses two new arguments particular to the courthouse scenario. The first analysis considers the social psychological implications of the flag and concludes that these pose an unacceptable risk or prejudice to the accused in his trial. The second analysis advances the argument that a state government flying the Confederate violates the Privileges or Immunities Clause of the Fourteenth Amendment and the Eighth Amendment’s prohibition of cruel and unusual punishment. Finally, Part V addresses the flag’s bearing on equal protection challenges to system wide discrimination.

II. CADDO PARISH: A CASE STUDY

The current racial climate in Caddo Parish may be explained in part by what transpired in Louisiana during the Civil War, or, as the Confederates have deemed it, the War Between the States. Shreveport was never touched by Union forces, and as a result its white residents held a unique resentment to the changes brought by the end of the war. This resentment grew to bloodshed at the turn of the century, but as the violence faded, the Confederate flag remains a symbol of intimidation.

A. The Last Bastion of the Confederacy

The Confederate cause placed white interests above the human rights of black slaves. The South was yoked to slavery; its white-owned cotton empire could not continue to pull in huge profits without forced labor. Southern leaders developed the theory of “states’ rights” as a matter of self-preservation.9 If the North was allowed to take control of the federal government, the South feared, prohibitively high tariffs and the abolition of slavery would soon follow. Secession was viewed as the only way to preserve the Southern way of life, a fundamental aspect of which was slavery.

Slavery poisoned the whole situation. It was the issue that could not be compromised, the issue that made men so angry that they did not want to compromise. It put an edge on all arguments. It was not the

only cause of the Civil War, but it was unquestionably the one cause without which the war had not taken place.\textsuperscript{10}

Among plantation owners and public figures in Louisiana, fear ran high in late 1860 and early 1861.\textsuperscript{11} Fear of the abolition of slavery, and the economic ruin and loss of political clout that would necessarily follow. Fear of the election of a “Black Republican president.”\textsuperscript{12} Fear of the end of the very existence of the slaveholding states. Governor Thomas Overton Moore, elected in 1860, warned that the institution of slavery, which the slave-owning states “regard[ed] as a great social and political blessing,” was being threatened by Northern hostility.\textsuperscript{13} Slavery was deemed a “just cause” for war. On January 26, 1861, Louisiana seceded from the Union.\textsuperscript{14} But it was only three months later that Union Admiral Glasgow Farragut mowed his ships up the Mississippi and captured New Orleans.\textsuperscript{15}

When Governor Moore heard that New Orleans had surrendered, he ordered an evacuation of southeast Louisiana and the destruction of all cotton and liquor.\textsuperscript{16} Slaves soaked bundles of cotton in whisky and lit them on fire before floating the flaming bales down the Mississippi river.\textsuperscript{17} The wealthy plantation-owners promptly evacuated, many sending their slaves east to dig a canal to divert the river to protect Vicksburg.\textsuperscript{18} Skirting federal forces, the state government moved first to Opelousas, then to Alexandria, and finally settled in Shreveport in May of 1863.\textsuperscript{19} The Louisiana Statehouse stood at the same site as does the Caddo Courthouse today.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{10} Id.
\item \textsuperscript{11} JOHN DAVID WINTERS, THE CIVIL WAR IN LOUISIANA 3 (1991).
\item \textsuperscript{12} In Governor Moore’s address to the extraordinary session in December 1861, he stated that “I do not think it comports with the honor and self respect of Louisiana, as a slaveholding state to live under the government of a Black Republican President.” Id. at 8.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. at 3
\item \textsuperscript{15} Catton, supra note 9, at 77.
\item \textsuperscript{16} Winters, supra note 11, at 103.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Winters, supra note 11, at 107.
\item \textsuperscript{19} WRITERS’ PROGRAM OF THE WORK PROGRESS ADMINISTRATION, LOUISIANA: A GUIDE TO THE STATE 254 (1941).
\item \textsuperscript{20} NEIL JOHNSON, SHREVEPORT AND BOSSIER CITY 48 (1995).
\end{itemize}
Thousands of white confederate refugees poured into Shreveport as federal troops inched closer to the Red River. Vicksburg and Port Hudson, the last Confederate bastions on the Mississippi river, fell to federal forces in July of 1863. The Union not only held all of Louisiana east of the Mississippi, but also the Louisiana coast as far west as Berwick Bay, and all of Arkansas beyond the southwest corner. Shreveport became the hub of a substantial commerce network between the last outposts of the Confederacy and Mexico. During the Union’s campaign to Alexandria, the Confederates successfully defended Alexandria and the surrounding area from capture, and saved all of their vital installations in Shreveport.

The Confederate cause was struggling elsewhere, however. On April 9, 1865, General Robert E. Lee surrendered to Ulysses S. Grant at Appomattox in what is widely considered to be the end of the war, with the Confederates as losers. In Shreveport, however, the confederacy was still going strong. The Confederate capital was briefly relocated from Danville, Virginia, to Shreveport. Jefferson Davis attempted to flee from Virginia to Shreveport, in hopes that the unconquered areas of northern Louisiana, Arkansas, and Texas would continue to fight in the face of Union victory. He was captured en route and taken prisoner. But Louisiana Confederate leaders still stood ground and urged Shreveport citizens to “fight the tyrant as long as possible.”

Shreveport was the last point in the Confederacy to surrender. Federal troops never actually entered the area. It finally lowered the last Confederate flag, at the now-Caddo Courthouse, nearly two months after Lee’s surrender at Appomattox.

21 Waldo W. Moore, The Defense of Shreveport--The Confederacy’s Last Redoubt, MILITARY AFFAIRS Vol. 17, No. 2 (Summer, 1953), at 74.
22 Id. at 73.
23 Id. at 74.
24 Id. at 79.
25 See Mona Strange, Last Units of Confederate Army Were Disbanded Here, SHREVEPORT TIMES, Oct. 14, 1951.
26 ERIC BROCK, SHREVEPORT 44 (2001).
B. Mob Murder in Post-Bellum Caddo

The end of the Civil War marked the beginning of mass violence in Caddo Parish. Shreveport emerged from the war undamaged and largely unoccupied. In 1865, the Freedmen’s Bureau came to Caddo to assist the former slaves secure fair-paying jobs, medical care, and education. The Bureau established elementary schools for black children and negotiated labor contracts with former slaveowners. In 1867, the Bureau registered black voters for an upcoming constitutional referendum, drawing a violent reaction. Armed bands of angry whites began patrolling sections of Caddo Parish, kidnapping free blacks and forcing them to go back to work for their former masters. The Bureau chief wrote to Washington that “the mere presence of the schools and the enfranchisement of blacks elicited a strong white backlash in the Shreveport area. . . so bitter is the feeling of whites against blacks that many of the latter are afraid to go anywhere without being armed, and many employers have forbidden their laborers from attending any political meetings without threat of being fired.”

Nevertheless, the Caddo Parish region voted to select two black men and a Republican white Yankee to go to the state constitutional convention in the fall of 1867. In early 1868, there was a referendum and a general election. In Caddo Parish, 1,121 of 1,730 blacks voted for ratification, while 1,025 out of 1,050 whites voted against it.

The Republican triumph gave impetus to a movement by former Confederates and other conservatives to insure a Democratic victory in the November presidential election by any means. 1868 became an especially bloody year in a bloody decade for Caddo Parish, with at least 154 blacks killed by almost all white perpetrators. In September of 1868, white

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29 *Id.* at 445-46.

30 *Id.* at 439.

31 *Id.* at 450.

32 *Id.* at 452.

33 *Id.* at 455.

34 *Id.* at 458.

vigilantes hunted down, tortured, and killed nearly 100 freedmen in the Caddo-Bossier area, with at least fifty more unreported. During the presidential election, armed bands of white men reportedly surrounded polling places to control balloting. The only Republican vote in Caddo Parish was cast by James Watson, a black parish constable who was murdered in a nearby grocery store a half-hour after leaving the polls.

After the 1868 election, the number of black voters statewide fell from 130,344 to 5,320, with an all-time low in 1940 of 886. General lawlessness abounded in Caddo in the decade that followed. A Caddo Parish judge testified before a congressional committee in 1875 that “it was not an uncommon thing for a colored man to be found dead.” Indeed, the killing of a black by a white was not considered murder by whites in Caddo and no local grand jury would indict a white for such a murder. Between 1865 and 1876, at least 416 blacks were killed in Caddo Parish. About forty percent of white men in Caddo between the ages of eighteen and forty-five were involved in these homicides. Mob violence erupted in the Caledonia settlement, about twenty five miles south of Shreveport, in 1878. The riot began with seventy-five blacks and about twenty whites, but as only a few blacks were armed, they were rapidly driven to the swamps and other hiding places. Then a “negro hunt” began as white reinforcements arrived from elsewhere. At least twenty blacks were tortured and murdered that night. Soon after, the “Black Exodus,” or “Kansas Fever,” originated in Caddo Parish as African Americans left the Northwest Louisiana area in droves.

36 Smith, supra note 28, at 458.
37 Id. at 463.
40 Id.
41 Vandal, supra note 35, at 164.
42 Id. at 167.
43 Vandal, supra note 35, at 179.
44 Id.
45 Id. at 180.
46 See generally, Morgan D. Peoples, “Kansas Fever” in North Louisiana, LOUISIANA
The culture of lynching steadied as Shreveport grew in the 1890s and early 1900s. Lynch mobs murdered at least twenty-one blacks in Caddo Parish from 1900 to 1923, at least four in the city of Shreveport.\(^\text{47}\) Congressional commissions deemed the parish “Bloody Caddo”;\(^\text{48}\) those who took part in the violent intimidation of blacks and republicans, the “Caddo Parish Bulldozers.”\(^\text{49}\) After five blacks were lynched in rural Caddo in December of 1914,\(^\text{50}\) the Louisiana Prison Reform Association called the lynchings a “regression into the dark ages.” Nevertheless, the Caddo Sheriff’s Office was firmly aligned with the white planters and against the “elites” who opposed the institution of lynching.\(^\text{51}\) Caddo claimed the sinister distinction of being the lynching capital of the state from 1910 until 1929.\(^\text{52}\) Together, Caddo and Bossier Parishes had the most lynchings in the entire South for many decades at the end of the nineteenth century and the beginning of the twentieth.\(^\text{53}\)

Historians have attempted to explain why Caddo Parish had such a massive amount of violence directed against blacks during the time following the Civil War. There was a sizeable black community in Caddo—over 70% of the population—and so whites toiled to maintain their social control. Whites in Caddo refused to accept the end of slavery and the beginning of black suffrage and citizenship. “[V]iolence in Caddo has to be understood in a racist and white supremacy perspective, as a reactionary


\(^{49}\) The Caddo Parish Bull-Dozers, N.Y. TIMES, Jan. 11, 1879.

\(^{50}\) See, e.g., Louisiana Negro Lynched, N.Y. TIMES, May 13, 1914:

For three hours a mob of 1,000 men and boys stood in the rain outside the jail, hammering away with a heavy railroad iron at the steel doors. Steel saws finally were used, and an entrance was gained by the mob. . . . A rope was placed about his neck and he was dragged half a block to a telephone pole opposite the [Caddo] parish court house and strung up. A knife was left sticking in the body.

\(^{51}\) Pfeifer, supra note 47, at 46.


\(^{53}\) Pfeifer, supra note 47, at 39-40.
fear of a large segment of the white population, as a desperate attempt to regain the rights they had once enjoyed over the lands and the black population.\textsuperscript{54} Caddo whites were determined to maintain their parish as “white country” regardless of the fact that whites were a minority. Caddo had evaded federal forces in the Civil War and its white citizens felt that the political and social changes wrought by the end of the war were invalid as applied to them.\textsuperscript{55}

\textbf{C. Lest We Forget}

Intimidation of Caddo Parish blacks was attempted in non-violent ways as well. On June 18, 1903, the Police Jury of Caddo Parish unanimously voted to “reserve” the front plot of the courthouse square for a Confederate Monument.\textsuperscript{56} The Caddo Parish budget of 1903 included $1,000 donated to the Daughters of the Confederacy\textsuperscript{57} for the commission and construction of this monument.\textsuperscript{58} Six months later, a mob of 1,200 hung three black men from the same tree in Shreveport.\textsuperscript{59}

Pursuant to these official actions, a towering monument was built on the courthouse lawn. At the front, Clio, the muse of history, points to a giant

\textsuperscript{54} Vandal, \textit{supra} note 48, at 376-77.

\textsuperscript{55} “[T]he situation in Caddo was particularly difficult as the parish came out of the war undamaged, without suffering any devastation. As a result, whites there did not feel vanquished and resented more strongly the changes brought by the war.” \textit{Id.} at 381.


\textsuperscript{57} The Daughters of the Confederacy (“U.D.C”) is an all-female Neo-Confederate group with close ties to the Ku Klux Klan. Karen L. Cox, \textit{Dixie’s Daughters: The United Daughters of the Confederacy and the Preservation of Confederate Culture} 171 n. 19 (2003). The U.D.C. uses indoctrination of white Southern youth to “instill into the descendants of the people of the South a proper respect for the... ‘True History’ of the Confederacy.” \textit{Id.} at 20; \textit{see also} United Daughters of the Confederacy Homepage, available at http://www.hqudc.org (stating that one of the organization’s primary objectives is “to assist descendants of worthy Confederates in securing a proper education”). The group has written and endorsed countless propaganda textbooks and periodicals glorifying the Klan and revising civil war history. \textit{See, e.g.}, S.E.F. Rose, \textit{The Ku Klux Klan and the Birth of a Nation}, \textit{Confederate Veteran} (April 1916) (“The Ku-Klux Klan was organized to... resist lawlessness, to defend justice, to preserve the integrity of the white race, and to enforce civil and racial law. No braver men were ever banded together, no grander brotherhood ever existed, than the original Ku-Klux Klan.”).

\textsuperscript{58} Budget for 1903, Caddo Parish Police Jury (on file at the Louisiana State University-Shreveport Library).

\textsuperscript{59} Three Negroes Lynched, \textit{N.Y. Times}, Dec. 1, 1903.
book beneath the words “LEST WE FORGET.” At each corner of the monument is a bust of a Confederate leader. Stonewall Jackson stares to the north. P.G.T. Beauregard looks east. Henry Watkins Allen stands guard to the west. And Robert E. Lee watches south. The rear is inscribed with a dedication “To The Just Cause, 1861-1865.” A confederate soldier stands alone with his rifle at the top of the monument.

At the time the Confederate monument was dedicated in 1906, no flag flew from its steps. Nor was there a flag when the new courthouse was constructed and unveiled to much fanfare in 1928. It was not until October 17, 1951, however that the parish government decided to erect a flagpole and fly the Confederate flag at Caddo Courthouse.

It is clear why the flag was raised in 1951, rather than in 1906. In 1906, the most useful intimidation tool for the Caddo Parish white supremacist was lynching and other violence. The Confederate flag, at that point, stood for nostalgia and heartbreak for the lost cause. “By the 1920s or ‘30s, Confederate symbols had been pretty much drained of their ideological content.” But then came the Civil Rights movement, when the Ku Klux Klan and other white supremacist groups made the flag part of their arsenal of symbols. “In the ’50s, the Confederate flag ceased to be benign; we lost it to the segregationist movement.” The flag “came to mean defiance of the national will and Southern white insistence upon political, economic, and social domination over the Negro.” Moving into the 1950s, when the Southern white man stood ground against the “assaults of the judicial,

60 In 1936, a new element was added to the monument: a plaque commemorating the reunion of the Confederate Veterans held that year in Shreveport. This new component came at the heels of a substantial population boom in Shreveport. Between 1920 and 1930, Shreveport’s population grew by 74%, moving 60 places up on the list of the nation’s biggest cities. *Ford’s City Jumps into 10,000 Class*, N.Y. TIMES, May 19, 1930. In 1930, oil was discovered in nearby Rodessa, and Shreveport quickly became an oil boom town that rivaled Dallas. *WPA Writer’s Program, supra* note 19, at 672. As the population mushroomed, new blacks flowed in—between 1930 and 1940, the black population in Caddo went from 57,041 to 68,793. *U.S. CENSUS BUREAU, 1940 CENSUS, available at http://www.census.gov/prod/www/abs/decennial/1940.html* (last visited 1/3/11).

61 *Minutes*, Caddo Parish Police Jury, October 17, 1951 (on file at the Louisiana State University-Shreveport Library).


63 *Id.*

legislative, and executive branches of the Federal Government,” the flag was “debased by many into a harsh summons to racial hate.”

Following a decision holding segregation of interstate railway cars unconstitutional, the Congress of Racial Equality (CORE) began its freedom rides into the South in April of 1947. The original plan, publicized in the Louisiana Weekly, called for a racially-mixed group to ride together from Washington, D.C., to New Orleans. A month earlier, a federal jury in Shreveport acquitted five white men from civil rights charges stemming from a fatal beating of two black men abducted from a jailhouse.

The year 1948 brought President Truman’s order establishing racial integration of the armed forces. That year, the NAACP’s Shreveport chapter boasted over fourteen hundred members. Headed by A.P. Tureaud, the Louisiana NAACP fought to force equality in public teacher pay, educational opportunities, and access to government and public programs and facilities. Then, in a series of lawsuits culminating in Brown v. Board of Education, the organization succeeded in forcing nationwide integration. Tureaud successfully argued a case to equalize salaries in the Orleans Parish school district in 1941; in 1947, a federal judge ruled that the Iberville Parish school district salaries were discriminatory. The Fifth Circuit in Hall v. Nagel opened up the decisions of the voting registrar

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Id.


Id. at 35. After several members warned of “wholesale slaughter” if the freedom riders entered the Deep South, the plan was changed to restrict the ride to the “Upper South.” Id.

Freed in Flogging Case, N.Y. TIMES, March 2, 1947. “Lewd photos of white women” were allegedly found on the victim’s body. Negro in Louisiana is Beaten to Death, N.Y. TIMES, August 16, 1946.


Fairclough, supra note 38, at 218.


Fairclough, supra note 38, at 108.
denying black applicants to judicial review in 1946. In 1950, a federal court in New Orleans held that Louisiana State University Law School must admit African Americans. Two days before the flag was raised, a federal judge ordered integration of the LSU nursing school. The structure of white supremacy, set in place by the violence of the years following the Civil War, was crumbling.

By 1951, lynching was down; the white leaguers and citizens’ councils could no longer kill blacks so liberally as society matured. The Confederate flag became the new symbol in Caddo Parish. Shreveport became the “most oppressive city in the South.”

D. The Blood-Stained Banner

Since Furman v. Georgia, Caddo Parish has sentenced thirteen black men to death under the Confederate flag, all but four for killing a white victim. Felton Dejuan Dorsey was the latest citizen of Caddo Parish to be sentenced to death. He is black, and was convicted by a jury of eleven whites and one black of killing a white firefighter in Greenwood, a white suburb of Shreveport. During jury selection, a prospective juror spoke out against holding criminal trials at a courthouse that flies the Confederate flag. He was promptly removed for this reason by the prosecution; white

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74 Hall v. Nagel, 154 F.2d 931 (5th Cir. 1946); see also Mitchell v. Wright, 154 F.2d 924 (5th Cir. 1946).


76 Negro Files Suit for LSU Admittance, SHreveport Times, Oct. 9, 1951, at 13; Court Rules Negro Nurse May Enter LSU, SHreveport Times, Oct. 16, 1951.

77 “Shreveport furnished some of the most determined defenders of white supremacy. In the 1920s it was the Klan’s most fertile recruiting ground; during the 1950s and 1960s it became the bastion of the segregationist Citizens’ Council movement.” Fairclough, supra note 38, at 8.

78 Fairclough, supra note 38, at 285.

“Shreveport is hermetically sealed,” stated attorney John R. Martzell. “No ideas get in or out.” Whites in Shreveport found it difficult to identify with the rest of Louisiana; they considered themselves as part of “Ark-La-Tex” rather than the Pelican State. Residents were far more likely to visit Dallas than New Orleans, . . . But unlike Dallas, another city dominated by oil money, Shreveport had Old South roots that reinforced its attachment to white supremacy.

Id, at 286.
defense counsel had no objection.

Now, one hundred and forty five years after the flag was lowered after the war, seventy years after the mass murder of black citizens, fifty years after the violent resistance to integration, the Confederate flag in its "blood-stained" glory flies over capital trials in Caddo Parish. If the flag was the new lynching in 1951, the administration of the death penalty under the flag is the new lynching today.

III. THE CONFEDERATE FLAG AND THE CONSTITUTION

The flag’s impact on the justice system is as invisible as it is invidious. Indeed, the “impact” requirement of the Supreme Court’s Equal Protection jurisprudence has been the Achilles’ heel of constitutional challenges to state displays of the Confederate flag. But the threat of constitutional harm in a criminal case—and a fortiori in a capital case—is far more tangible than that posed by, for example, a flag at the state legislature. While the legislature may have a pro-Confederate agenda, it is or should be the people’s right to remove offending legislators. In the judicial system, where there are numerous parties involved, it is not so simple. The judicial system as a whole must satisfy not only justice, but also the appearance of justice.

A. Overview of Prior Legal Challenges

The flying of the Confederate flag at the trial of a black defendant would seem to be the antithesis to the constitutional principles of equal protection. There are enormous barriers in place, however, for a litigant to establish a constitutional violation caused by the Confederate flag, and still more barriers for capital defendants to prove racially discriminatory application of the death penalty. The unfortunate fact is that courts have turned a blind eye to racism where it is not overt and explicit.

79 The flag that flies at Caddo Courthouse is an incarnation of the Third National Flag of the Confederacy—the “blood-stained banner.” This flag was developed during the last throes of the Confederacy as a way to incorporate the battle flag with a red stripe running down the edge to symbolize the Confederates’ willingness to die for their cause.

After Alabama Governor George Wallace promised to physically block black students from entering the University of Alabama, Robert F. Kennedy travelled to Montgomery to warn him that federal troops would enforce integration. That morning, the Confederate battle flag was raised above the state capitol dome, as an “act of defiance” against the federal government’s attempts to integrate the public schools of Alabama. Weeks later, Governor Wallace made good on his promise and stood in the doorway of the University of Alabama in a feeble attempt to maintain segregation. Although the schools have integrated, the flag flew from that date in 1963 until 1993, when the governor ordered it removed and relocated across the street. A towering Confederate monument inscribed with a tribute to “the knightliest of the knightly race” still remains on the Alabama state capitol grounds.

In 1988, the NAACP filed suit for a declaratory judgment that the flying of the flag atop the Alabama capitol dome violated the First, Thirteenth, and Fourteenth Amendments. The Eleventh Circuit held that the suit was barred by res judicata stemming out of a similar 1975 challenge; but the court nevertheless proceeded to “lay to rest” the merits as well. In a terse opinion, the court held that “it is not certain that the flag was hoisted for racially discriminatory reasons. The only problem with the flag, the court opined, was the plaintiff’s “own emotions.”

Seven years later, the Eleventh Circuit was called upon to decide the issue again. The challenged Confederate flag in Coleman v. Miller was

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81 See NAACP v. Hunt, 891 F.2d 1555, 1558 (11th Cir. 1990).
82 Claude Sitton, Robert Kennedy Unable to Budge Alabama Governor on Race Issue, N.Y. TIMES, April 26, 1963.
84 DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 180 (2008).
85 NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990).
86 Id. at 1561-62.
87 Id. at 1565
88 117 F.3d 527 (11th Cir. 1997). The Georgia flag had been redesigned in 1956 to include the Confederate battle flag during a period of racial hostility and violent opposition
the Georgia state flag, which at the time of the lawsuit consisted of two-thirds Confederate battle flag, one-third Georgia state seal. James Coleman, an African American, brought suit to remove the flag, alleging that it violated his rights to equal protection and free expression. He testified in the district court that the “Confederate symbol, which is often used by and associated with hate groups such as the Ku Klux Klan, inspires in him fear of violence, causes him to devalue himself as a person, and sends an exclusionary message to Georgia’s African-American citizens.”

The Eleventh Circuit, quoting its own decision in Hunt, held that the district court had properly granted summary judgment in favor of the state. It concluded that Mr. Coleman’s evidence of personal harm caused by the flag was insufficient to prove disproportionate impact on members of his race as a whole. The Mississippi state flag also contains the Confederate battle flag, and has also been the subject of unsuccessful litigation in which the court gave short shrift to the claims of equal protection violations.

The Eleventh Circuit’s appraisal of contemporary race relations in the south has been widely-assailed as a regression to the discriminatory
to the federal desegregation rulings.

89 Id. at 528.
90 Id. at 530.
91 Id. at 531.
92 In Daniels v. Harrison County Board of Supervisors, the plaintiffs challenged the county’s decision to fly the Confederate battle flag at a public beach. The Mississippi Supreme Court relied on Hunt and Coleman in holding that there was no evidence that any constitutionally protected rights had been violated. 722 So.2d 136, 138 (Miss. 1998). Similarly, in Mississippi Division of the Sons of Confederate Veterans v. Mississippi Conference of the NAACP, the court summarily held that “[n]either the flying of the State Flag, nor the flag itself, causes any constitutionally recognizable injury.” 774 So. 2d 388, 390 (Miss. 2000).
93 See James Forman, Jr., Note, Driving Dixie Down: Removing the Confederate flag from Southern State Capitols, 101 YALE L.J. 505, 515 (1991) (“[I]n light of the historic message the Confederate flag conveys, its current use as a symbol of white supremacy by racial hate groups, and its elevation above the capitol buildings in opposition to demands for black equality, constitutes government endorsement of discrimination by private parties. The Supreme Court has rejected such government approval of private discrimination”); L. Darnell Weeden, How to Establish Flying the Confederate flag with the State as Sponsor Violates the Equal Protection Clause, 34 AKRON L. REV. 521, 551 (“Because of its appeal to a prurient interest in race relations, the Confederate flag is the most inflammatory symbol that the South has”); I. Bennett Capers, Flags, 48 HOW. L. J. 121, 140-41 (2004) (“The Eleventh Circuit offered no empirical support for this
legacy of Plessy v. Ferguson,94 United States v. Cruikshank,95 and Pace v. Alabama.96 Although the reasoning in these cases has been undermined,97 it is worth considering a different way to frame challenges to state displays of the Confederate flag. While the courthouse flag, like other displays of the Confederate flag, threatens basic African-American equality before the law, it also raises distinct concerns that are specific to the courthouse scenario. It affects the rights of the accused as he stands trial and those whose presence may be compelled for jury service. As an alternative to equal protection challenges to the flag, the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment may be called into action.

B. The Accused’s Right to Due Process

As the Court stated most recently in Caperton v. AT Massey Coal Co., Inc., “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”98 The Due Process Clause prohibits a state practice wherever “a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.”99 There is no single test for determining whether a practice is

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94 163 U.S. 537 (1896) (upholding racially segregated railroad cars).
95 92 U.S. 542 (1875) (reversing convictions of the perpetrators of the Colfax Massacre).
96 106 U.S. 583 (1883) (affirming Alabama’s anti-miscegenation statute).
97 See Adarand Constrs., Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all allegations of group-based racial discrimination “should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”) (emphasis in original); Mack v. ST Mobile Aerospace Engineering, Inc., 195 Fed. Appx. 829, 837-38 (11th Cir. 2006) (in employment discrimination case, holding that the display of Confederate flags created a hostile work environment for African-American employee).
99 Estes v. Texas, 381 U.S. 532, 542-43 (1965); see also Holbrook, 475 U.S. at 572 (“All a federal court may do in such a situation is look at the scene presented to juror and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant’s right to a fair trial.”).
inherently prejudicial. Rather, when making an inherent prejudice determination, “[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.” In light of the flag’s demonstrated effects on the subconscious mind and human behavior, reason and principle dictate that it should be removed prior to the trial of an African American as an inherently prejudicial symbol.

The Confederate flag impermissibly primes the expression of negative views towards African-Americans. A recent study found that exposure to the Confederate flag increased the expression of negative attitudes toward African Americans among whites. Specifically, the study found white participants exposed to the Confederate flag to be more prone to negatively evaluating a hypothetical African-American male. After receiving either control or the Confederate flag priming stimulus, participants were asked read a story about a hypothetical black male engaged in ambiguously negative and aggressive behavior. Participants then evaluated his behavior by indicating their agreement to several positive and negative trait attributions. White participants primed with the Confederate flag agreed more strongly with negative characterizations of the hypothetical subject than those in the control group. The study’s authors concluded that “prominent displays of the Confederate flag” may activate greater negativity toward blacks amongst those exposed to them.

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100 See United States v. Wood, 299 U.S. 123, 145-46 (1936) (“Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”).


103 Id. at 10.

104 Id.

105 Id.

106 Id. The Confederate flag was able to evoke these biases in study participants, regardless of the subjective meaning they gave to the flag. Id.

107 Id. Some may be tempted to question the external validity of this kind of study. After all, in the experiment, subjects are exposed to the Confederate flag for a period of milliseconds. Inferences regarding the effect of seeing the flag on a flagpole may thus
The negative views measured in the study are damning in their own right; no influence that causes trial participants to view the accused or his witnesses as aggressive or selfish should be allowed near the court room. However, the impact of the Confederate flag is not limited to making the accused appear more aggressive or selfish. Racial priming functions by increasing the accessibility of culturally associated biases to the subconscious mind. Once the racial category is implicated, the prime makes the full complement of associated biases more accessible to the mind. For African Americans, implicitly associated traits extend well beyond aggression and selfishness. Race is implicitly associated with a person’s guilt, criminality, and dangerousness.

Moreover, implicit racial bias has both cognitive components, like stereotypes, and affective components. The cognitive components once activated affect how people remember and process information. The affective components can do this as well, but they also affect basic

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108 Ehrlinger, et al., supra note 102, at 10.
112 Id.
115 See, e.g., Weslie G. Moons & Diane M. Mackey, Thinking Straight While Seeing
nonverbal human behavior. These nonverbal behaviors, expressed during interpersonal interactions, can reduce the quality of interaction and render more negative each party’s appraisal of the interaction.\textsuperscript{116}

Psychological research demonstrates that the flag creates an unacceptable risk that implicit racial bias will impact the jury and defense counsel to the detriment of the accused. The flag should be removed as inherently prejudicial in light of its official character, the prolonged nature of its exposure to those involved with a trial, and the practical difficulty of detecting and spelling out its prejudicial effects. Finally, the special due process significance of race argues strongly in favor of removing the flag.

1. The Flag’s Impact on the Jury

The accused’s right to a fair trial protects him from the bias and interests of judges,\textsuperscript{117} juries,\textsuperscript{118} and any other relevant decision-maker\textsuperscript{119} in his cause. While the Due Process Clause requires impartiality of each member of the tribunal before they hear a case, it also contemplates the special sensitivity of the jury to sources of bias existing and emerging during the trial itself.\textsuperscript{120} As Justice Thurgood Marshall wrote: “Our faith in the adversary system and in jurors’ capacity to adhere to the trial judge’s instructions has never been absolute . . . .”\textsuperscript{121} For this reason, the Supreme Court has held that the due process prohibits practices that undermine the jurors’ ability to adhere to its


\textsuperscript{117} See \textit{Caperton}, 129 S. Ct. at 2260-62 (summarizing cases).


\textsuperscript{120} Cf. \textit{Holbrook v. Flynn}, 575 U.S. 560, 568 (1986) (“Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.”)

\textsuperscript{121} \textit{Id.}; see also, e.g., \textit{Illinois v. Allen}, 397 U.S. 337, 344 (1970) (noting “the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant”); \textit{Estes v. Texas}, 381 U.S. 532, 545 (1965) (“The potential impact of television on the jurors is perhaps of the greatest significance.”).
Constitutional imperatives after the trial has begun. These imperatives include impartiality, the presumption of innocence, and reliable sentencing, all of which are threatened by the Confederate flag’s presence.

a. Impartiality

Early cases addressing sources of prejudice on the jury focused primarily on the jury’s duty under due process to be impartial. The Court has long recognized the due process significance of this concept. Even as early as *Irvin v. Dowd*, the Court recognized that “the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”

The due process requirement of impartiality applies to the juror’s assessment of guilt or innocence, as well as their assessment of the probative value of evidence. It further applies to capital sentence determinations. As the Supreme Court stated, impartiality entails the principle that “a verdict must be based upon evidence developed at the trial.”

Partiality is not necessarily fatal to a proceeding where a juror can lay aside his outside impressions on relevant issues.

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123 See *Estes v. Texas*, 381 US 532, 535 (1965) (“it is not only possible but highly probable that it will have a direct bearing on [the juror’s] vote as to guilt or innocence.”).

124 In *Turner v. Louisiana*, the Court found the practice of placing jurors in the protective custody of deputies who were also state witnesses impaired the ability of jurors to impartially evaluate testimony. 379 U.S. 466, 474 (1965). As the justices observed, the fate of the accused “depended upon how much confidence the jury placed in these two witnesses.”


126 *Irvin*, 366 U.S. at 722 (citing Thompson v. City of Louisville, 362 U.S. 199 (1960)).


128 See *Irvin*, 366 U.S. at 723 (“It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.”). Though *Irvin* was addressing the juror’s impartiality “as they stood unsworne,” *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), applied a similar understanding to potential prejudice arising during the trial itself. See *Donnelly*, 416 U.S. at 644 (finding no due process violation where “the trial court took special pains to correct any impression that the jury could consider the prosecutor’s statements as evidence.”).
The increased activation of implicit bias caused by the Confederate flag predisposes the juror to subconscious belief in the guilt and aggression of the accused and the probative value of evidence against him. Justin Levinson and his colleagues have conducted a series of studies on implicit bias and juror decision-making. These studies find a significant implicit association between African-Americans and guilt. Ehrlinger’s study, addressed supra, demonstrates the increased attribution of aggressive character traits to African-Americans following exposure to the flag. Finally, Levinson, collecting other empirical research, has also argued that ambiguous racial priming leads to the perceptions of aggression in African-American behavior and, more importantly, that people so affected by the prime attribute this aggression to dispositional factors, like violent personality. Increased activation of these kinds of implicit bias make the accused seem not only more guilty but also more deserving of the death penalty.

Moreover, these subconscious preconceptions about guilt and aggression cannot be consciously set aside. This is true especially because these initial trait attributions and predispositions influence subsequent recall and processing of case relevant information. It is not merely that perpetrator skin tone predicts tendency to associate African Americans with factual guilt; perpetrator skin-tone predicts juror tendency to interpret ambiguous evidence as indicative of guilt. Levinson and colleagues have also found that, independent of the race of the accused, the implicit association between African-Americans and guilt predicts juror tendency to evaluate evidence to the detriment of the accused. Another study revealed significant implicit racial bias in juror recall of case relevant facts. This study demonstrated stereotype-consistent failures to recall mitigating

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129 Levinson, supra note 114, at 207.
130 See supra notes 120-128 and accompanying text.
131 Levinson, supra note 114.
132 As the Court observed in Deck v. Missouri, danger to the community is often a statutory and nearly always a relevant consideration of the capital jury. 544 U.S. 622, 633 (2005).
134 Levinson, supra note 114, at 207.
135 Levinson, supra note 111.
information and falsely remembered aggravating facts. Because the Confederate flag is able to increase the activation of the aforementioned cognitive processes, it seriously impairs the jurors’ ability to hear a case impartially.

b. The Presumption of Innocence

The presumption of innocence is another constitutionally mandated component of the right to a fair trial. In the words of Chief Justice Burger, “[t]he presumption of innocence, although not articulated in the Constitution, is a component of a basic fair trial under our system of criminal justice.” The difference between the Sixth Amendment’s impartiality requirement and the presumption of innocence is subtle but important. While the latter entails the former’s emphasis on decisions based in trial evidence, it also requires jurors to be mindful of the prosecutions burden to establish guilt beyond a reasonable doubt. As Levinson has argued, the subconscious bias in processing and memory described in his previous cases lead to a presumption of guilt for African-Americans that resists conscious correction. By priming these thoughts, the flag creates a great risk subconscious appeal to this presumption in the case of an African American.

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136 Id. at 399-402.
137 Estelle, 425 U.S. at 503. In Holbrook v. Flynn, the Court further expanded on the constitutional imprimatur of the presumption of innocence:

To guarantee a defendant’s due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client’s interests and the trial judge assiduously works to impress jurors with the need to presume the defendant’s innocence, we have trusted that a fair result can be obtained.

Holbrook, 475 U.S. at 567-68. See also Deck v. Missouri, 544 U.S. 622 (2005), addressing whether the practice of shackling violates due process despite the absence of a presumption of innocence.

138 “To implement the presumption, courts must be alert to factors that may undermine the fairness of the factfinding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” Estelle, 425 U.S. at 503.

139 Levinson, supra note 114, at 207.
c. Reliability

Finally, just as the Due Process Clause imposes restrictions on the way that the jury determines guilt and innocence, it incorporates the Eighth Amendment’s restrictions on the way that the capital jury determines sentence. These restrictions address “the ‘acute need’ for reliable decisionmaking when the death penalty is at issue.” The Court has held that this acute need constitutes a concern “similarly weighty” to the presumption of innocence. The “need for reliability in the determination that death is the appropriate punishment in a specific case” encompasses the requirement of “consideration of the character and record of the individual offender and the circumstances of the particular offense.” Thus, under

140 See Deck v. Missouri, 544 U.S. 622. In Deck v. Missouri, the Court considered whether the practice of shackling a defendant without justification offends due process in the penalty phase of a capital trial, where the presumption of innocence does not apply. The Court held that three factors justified extending due process protection against the practice of shackling to the penalty phase of a capital trial. Id. at 632-33. One such factor was “the ‘acute need’ for reliable decisionmaking when the death penalty is at issue.” Id. The other two factors, impact on the right to counsel and impact on court decorum and integrity, id. at 633, are addressed infra.

141 Id.

142 Id. The Supreme Court has repeatedly held that capital sentencing is a unique process that creates the unique need for additional procedural safeguards for the rights of defendants. The Court has recognized that the death penalty is “unique in its severity and irrevocability.” Gregg v. Georgia, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Owing to this unique quality alone, the Court has been willing to extend additional protection to defendants facing capital sentence. For instance, the death penalty has occasioned the most “extensive application” of the Eighth Amendment’s narrow proportionality principle by the Supreme Court. Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (opinion of Kennedy, J.). However, the death penalty is not merely unique in its severity and irrevocability; rather, the Court has repeatedly recognized that the death penalty is unique in the process by which it is often imposed – the capital jury. Even in concluding that unlimited sentencing discretion did not violate the Due Process Clause, the Court recognized “the truly awesome responsibility of decreeing death for a fellow human.” McGautha v. California, 402 U.S. 183 (1971). The Eighth Amendment proscribes the “unacceptable risk that ‘the death penalty [is] meted out arbitrarily or capriciously,’ or through ‘whim . . . or mistake,’” . . .” Caldwell v. Mississippi, 472 U.S. 320, 343 (1985). For this reason, the Court has, under the Eighth Amendment, shielded juries from sources of bias that “minimize the jury’s sense of responsibility for determining the appropriateness of death.” Id. at 341.

143 Woodson v. North Carolina, 428 U.S. 280 (1976). The link between reliability and individualized determinations can be confusing, as the two virtues seem to conflict. However, reliability in the Eighth Amendment sense refers to procedural fairness and gives the Court license to impose greater uniformity in the procedures used to determine death sentences than it has in other contexts. See California v. Ramos, 463 U. S. 992, 998-999
due process, the Court has proscribed practices that impair the jurors’ ability to “weigh accurately all relevant considerations -- considerations that are often unquantifiable and elusive -- when it determines whether a defendant deserves death.”

The Confederate flag runs afoul of the acute need for reliable decision-making in capital sentencing. As a majority of justices recognized in *Turner v. Murray*, the “risk of racial prejudice infecting a capital sentencing proceeding” violates the requirement. Implicit racial bias necessarily inhibits the jurors’ ability to perceive the defendant as an individual. The Confederate flag, in triggering that bias, encourages the jury to see the defendant in group terms and to attribute to him characteristics associated with the group. This cognitive process alone denies the defendant the opportunity for meaningful individual consideration to which he is entitled under the Eighth Amendment. However, as the justices in *Turner v. Murray* recognized, the problem is not just that racial bias deindividualizes the defendant; a constitutional issue also arises because the racial associations the juror is likely to make are uniformly negative and argue in favor of death.

[A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.

The need for reliable decision-making also requires that the basis for death sentence be relevant and accurate. The Confederate flag violates

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144 *Deck*, 544 U.S. at 633.
146 *Id.*
this command in two senses. To be certain, racial prejudice injects an arbitrary and irrelevant basis for the imposition of capital sentence—the defendant’s race. Further, as cognitive science demonstrated, reliance on racial schema renders the recall and interpretation of relevant bases for capital sentence less accurate. Because exposure to the flag increases subconscious appeals to these schemas, it creates an unreasonable risk of unreliable, arbitrary sentence.

2. The Right to Counsel

The Court has given added scrutiny to sources of prejudice that impair the accused’s other fundamental trial rights. Among those fundamental rights the court has sought to shield from collateral harm is the right to counsel. This factor weighed prominently in the Court’s finding that the presentation of the accused in shackles violates his Due Process rights in Deck v. Missouri. The Court observed shackling of the accused diminishes his right to counsel because it interferes with his “‘ability to communicate’” with counsel.148

Psychological experiments establish that racial priming can lead to nonverbal behaviors, which, in turn, cause persistent breakdowns in interracial communications and relationships. Numerous studies have probed how implicit bias, once activated, can “influence the quality of [human] social interactions.”149 One study demonstrated that racial priming leads to increased hostility between pairs engaged in collaborative activity.150 Another study found high levels of implicit bias among Whites to be connected with unfriendly nonverbal behavior toward African Americans.151 The unfriendly nonverbal behaviors associated with increased activation of implicit bias include blinking, lack of eye-contact/averted gaze, speech hesitations and errors, less frequent smiling, and more physical distance.152 These nonverbal cues are not trivial. In

148 Deck, 544 U.S. at 631.
149 Kang, supra note 113, at 1524. For an overview of these studies, see id. at 1523-26.
150 Mark Chen & John A. Bargh, Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 554-55 (1997); see also Kang, supra note 113, at 1524 (interpreting Chen and Bargh’s study).
151 Dovidio, Kawakami, & Gaertner, supra note 116, at 68. In these studies, both the African American participants and White observers tended to rate the behavior of White participants toward the African-American participants as unfriendly. Id. at 71.
152 Amodio & Devine, supra note 109, at 654; Dana R. Carney & Greg Willard, Racial
addition to unfriendliness, they lead to perceptions of conscious racism, deceit, and manipulation among African-American conversation partners. The resulting unfriendly or even hostile behavior creates a “positive feedback loop,” which leads to even greater communication failures.

The likelihood that increased activation of these non-verbal behaviors, such as can be expected with the Confederate flag, will impoverish interracial attorney-client relationships is unacceptably high. Contrary to the greatest aspirations of the Gideon Court, capital defense attorneys have been shown to possess significant implicit own race preferences that increase the leaking unfriendly and hostile behavior when primed. These concerns are especially urgent in Caddo parish, where interracial attorney-client relationships are the rule for an accused African-American, as opposed to the exception. This research demonstrates that the risk of substantial deprivation of the right to counsel posed by the flag exceeds that which is acceptable under the Due Process Clause. The flag should therefore be removed as inherently prejudicial.

3. Practical Considerations

The flag’s impact on the jury and the accused’s right to counsel both provide a basis for its removal under settled due process principles. However, in addition to the fundamental rights threatened, the Court has taken several practical considerations into account when deciding whether a practice is inherently prejudicial. These considerations include authority imbued in the source of prejudice, the nature of the trial participant’s exposure to the source of prejudice, and the feasibility of detecting and


154 Kang, supra note 113, at 1524.

155 Eisenberg and Johnson’s study of capital defense attorneys revealed that this occupational group displays implicit biases consistent with those of the general population. Theodore Eisenberg & Sheri Lynn Johnson, Implicit Racial Attitudes of Death Penalty Lawyers, 53 DEPAUL L. REV. 1539, 1551-52 (2004). That is, capital trial attorneys more easily associated their own race with good, but White attorneys’ implicit own-race preference was stronger than that of African-American attorneys. Id. This study measured implicit bias a response latency test, which is most highly correlated with leaked hostility and unfriendliness. Dovidio, Kawakami, & Gaertner, supra note 116, at 66.
remedying the impact of the source of prejudice. Each of these factors weighs in favor of finding the flag inherently prejudicial.

a. Hidden Nature of Actual Prejudice

The Due Process Clause prohibits sources of prejudice especially where their impact is difficult to detect and understand and is therefore difficult to address after the fact. In Deck v. Missouri, the Supreme Court recognized that the finding of inherent prejudice is “rooted in [the Court’s] belief that the practice will often have negative effects, but–like ‘the consequences of compelling a defendant to wear prison clothing’ or of forcing him to stand trial while medicated–those effects ‘cannot be shown from a trial transcript.’”156 Older due process prejudice cases reflect a similar sensibility. In Estes v. Texas, the Court proscribed videotaping of trial proceedings in light of the fact that the practice “might cause actual unfairness – some so subtle as to defy detection by the accused or control by the judge.”157

Implicit racial bias presents this kind of situation. On the one hand, some kind of impact is not only possible but highly probable; on the other, the bias is impossible to detect or control once it occurs. The Court emphasized that the videotaping, even the announcement that videotaping would occur, would have both “conscious and unconscious effect” on the juror’s judgment, both of which could not be evaluated.158 Implicit racial bias, like videotaping, operates at a subconscious level. A majority of the Court has already acknowledged this in Turner v. Murray.159 The impact of implicit racial bias, though well understood scientifically, is impossible to detect in non-experimental settings. It impacts the way the jurors perceive, interpret, and recall stimuli they receive throughout the trial.160 The

156 Deck, 544 U.S. at 635 (quoting Riggins v. Nevada); see also Peters v. Kiff, 407 U.S. 493, 504 (1972) (plurality of justices requiring no showing of harm where African Americans were systematically excluded from the jury because harm is virtually impossible to adudge where an entire perspective has been eliminated from the jury).

157 Estes, 381 U.S. at 544-45.

158 Id. at 545.

159 See Turner, 476 U.S. at 35 (“More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case.”); id. at 42 (Brennan, J., concurring in part, dissenting in part) (“it is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised.”)

160 See infra section III.B.1. on the flag’s impact on implicit bias in the jury.
subconscious level at which implicit racial bias operates and the fact that it cannot be detected forecloses conventional remedy associated with prejudice. This fact strengthens the argument that the flag should be removed.\footnote{See Donnelly, 416 U.S. at 644 (finding no due process violation where “the trial court took special pains to correct any impression that the jury could consider the prosecutor’s statements as evidence.”)} By contrast, the ease of the proposed remedy of removing the flag cannot be ignored in interpreting whether the flag presents an unacceptable risk of a biased and arbitrary outcome.\footnote{See Turner v. Murray, 476 U.S. 28 (1986) (plurality opinion) (“the risk that racial prejudice may have infected petitioner’s capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.”) (emphasis added)).}

b. Official Nature of the Display

Biasing influences imbued with official authority increase the risk of prejudice sufficiently to be considered inherently prejudicial. In \textit{Turner v. Louisiana}, the Court found that placing a sequestered jury in the care of sheriff’s deputies who testified for the state violated due process.\footnote{379 U.S. 466 (1965).} The Court noted that this practice would have “undermined the basic guarantees of a trial by jury” even if the state witnesses had not been deputies.\footnote{\textit{Id.} at 474.} However, the practice was particularly offensive in light of the deputies’ position as the jury’s “official guardians.”\footnote{\textit{Id.}} The Court made a similar observation in \textit{Parker v. Gladden}.

There, the Court ordered a new trial where the bailiff escorting the sequestered jury told one juror that he thought the accused was guilty and told another juror that the Supreme Court would correct any error in the trial.\footnote{\textit{Id.} at 363-64.} Relevant to this ruling was the fact that “the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury which he had been shepherding for eight days and nights.”\footnote{\textit{Id.} at 365.}

The Court in \textit{Turner v. Louisiana} and \textit{Parker v. Gladden} addressed the impact of perceived authority on the conscious decision-making processes
of the jury. The court officers in both cases had been cloaked in the official authority of the court, thereby raising an inference of prejudice from their conduct. Displays that impact decision-making through subconscious channels should likewise be treated as inherently prejudicial where their effect is heightened by perception of authoritative status.

The flag’s physical location and orientation give it an “official character” in the subconscious mind of observers that heighten its impact on decision-making. Robert Shanafelt has argued that evolved social intelligence makes human beings sensitive to “topographic features of flag displays that signal subordination and dominance.”169 Shanafelt found that, unlike other displays of the flag, the raised flag is a display of dominance that naturally implies authority.170 He further argued that the raised flag prompts the in-group to submit to the power structure represented by the flag and to subordinate those who the flag does not represent.171 Moreover, others have found that physical proximity implies relatedness and task relevance to the subconscious mind.172

Our evolved cognitive process interprets the flag as an assertion of Confederate dominance, which in turn divides the community along racial lines. This increases the accessibility of racial schema, increasing the potency of the prime. The suggestion is that both are equally relevant to the activities occurring in the area – both supply tone and moral content to the judicial activity. In this way, the flag makes the activities in the courthouse more race salient, thereby increasing activation of implicit bias and its behavioral consequences.

c. Nature of Exposure

The Supreme Court has taken special steps to protect against sources of


170 Id. at 16.

171 Id.

172 See Christopher D. Wickens & C. Melody Carswell, The Proximity Compatibility Principle: Its Psychological Foundation and Relevance to Display Design, HUM. FACTORS, Vol. 37 (1995) (“Perceptual proximity (display proximity) defines how close together two display channels conveying task-related information lie in the user's multidimensional perceptual space (i.e., how similar they are).”).
prejudice where they are continually or frequently exposed to the jury.\textsuperscript{173} The presence of the Confederate flag is a regular and frequent visual stimulus for the jurors. Members of the jury must pass the flag in order to enter the First Judicial District courthouse. Thus, during trial, the jurors of necessity encounter the flag at least once every day. The jurors likely also encounter the flag as they leave the courthouse and each time they go to eat lunch. The capital trial of Felton Dorsey lasted for ten days. His jurors also attended jury selection over the course of a weeklong period. By the time they voted on sentence, each juror had seen the memorial at least a dozen times and likely two or three dozen. This aspect of the jury’s exposure to the flag argues further in favor of its removal under due process principles.

4. The Due Process Significance of Race Bias

The foregoing analysis has considered whether the psychological impact of the flag creates an unacceptable risk of prejudice to the accused in a criminal trial. To this point, the analysis has treated the due process issue presented by the Confederate flag like any other source of potential prejudice. However, the Supreme Court has treated sources of racial that arise during the trial with heightened vigilance under its due process precedents. Due process cases concerning voir dire on racial bias provide evidence of this particular concern. \textit{Turner v. Murray}, discussed \textit{supra}, obviously supports the significance of race bias in the capital sentencing context. In \textit{Ham v. South Carolina}\textsuperscript{174} and \textit{Ristiano v. Ross},\textsuperscript{175} the Court grappled with whether the Due Process Clause entitles an African-American defendant to voir dire on the prospective jurors’ racial biases prior to their determination of guilt. Though, under these precedents, the issue of whether a case merits race bias voir dire is subject to case-by-case determination,\textsuperscript{176} the Court has found the accused entitled to voir dire on

\textsuperscript{173} In \textit{Turner v. Louisiana}, one of the more troublesome aspects of the jurors contact with the deputies was its “continuous” nature. Turner, 379 U.S. at 468, 473. Similarly, in \textit{Donnelly v. DeCristoforo}, the Court made much of the fleeting nature of the prosecutor’s illicit comments about the trial strategy of the accused. For instance, the Court observed that “the prosecutor’s remark here, admittedly an ambiguous one, was but \textit{one moment in an extended trial . . .}” Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Finally, in determining that forcing the accused to appear in prison garb violates due process, the Court observed that “[t]he defendant's clothing is so likely to be a \textit{continuing} influence throughout the trial . . .” \cite{Estelle v. Williams}, 525 U.S. 501 (1976).

\textsuperscript{174} 409 U.S. 522 (1973).

\textsuperscript{175} 424 U.S. 589 (1976).

\textsuperscript{176} In each case, the court must determine “whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about
racial prejudice where aspects of the trial rendered race “inextricably bound up with the conduct of the trial” and were “likely to intensify any prejudice that individual members of the jury might harbor.” These cases, thus establish a general principle that the accused is entitled to additional due process protection where the issue of race is injected into his proceeding.

This additional protection is justified by the Court’s inattention to race bias in the interpretation of other clauses. In denying Warren McCleskey’s Eighth Amendment claim, the Court stated “[b]ecause of the risk that the factor of race may enter the criminal justice process, we have engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.” The Court thus shifted the burden of preventing racial prejudice in death cases from the prohibition on cruel and unusual punishment to other provisions of the Constitution such as the Due Process Clause.

Moreover, additional vigilance against racial bias advances not only actual justice, but the appearance of it as well. The appearance of justice is a necessary component of the decorum and integrity of the courtroom that the Court has sought to preserve in its due process jurisprudence.

racial prejudice, the jurors would not be as ‘indifferent as [they stand] unsworne.’ Id. at 596 (citations omitted).

177 Id. (emphasis added). In Ham, the accused himself put race directly at issue. Therefore, eliminating the thing that injected race into the proceedings was not an option. In Caddo, however, eliminating the source of racial prejudice is a viable option.


179 This reasoning is most prominent in the realm of jury selection. See, e.g., Lockhart v. McCree, 476 U.S. 162, 175-76 (1986) (noting that systematic exclusion of Blacks and Mexican-Americans creates the appearance of unfairness); Batson v. Kentucky, 476 U.S. 79, 87 (1986) (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).

180 Decorum, dignity, and integrity are paramount due process concerns. The Court included this factor in Deck v. Missouri among its reasons for extending due process prohibition to shackling during the penalty phase of trial. Deck, 544 U.S. at 631; see also Illinois v. Allen, 397 U.S. at (“the use of [shackling] is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.”); Estes, 381 U.S. at 574 (“The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization.”). As the Court stated in Estes v. Texas,

[T]he courtroom in Anglo-American jurisprudence is more than a location with
presence of racial bias mars the integrity of proceedings.\textsuperscript{181} Thus, a court has ample reason to see that a prejudicial symbol like the flag is removed and to mobilize due process to do it. The psychological impact of the flag must lead to the conclusion that it is inherently prejudicial to the accused where the accused is African American. Ehrliger’s study has demonstrated that the flag creates an unacceptable risk that implicit racial bias will impact the jury and defense counsel to the detriment of the accused. An array of other experimentation has shown us what the consequences of this heightened implicit bias are. These behavioral consequences severely undermine the integrity of adjudication and continue a legacy of African American oppression through the criminal justice system.

C. A New Assessment under the Privileges or Immunities Clause

Justice Thomas, in his concurring opinion in \textit{McDonald v. City of Chicago}, advocated for a fundamental reorganizing of the Court’s Fourteenth Amendment jurisprudence. \textit{The Slaughter-House Cases}, Justice Thomas opined, “left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship.”\textsuperscript{182} Post-\textit{Slaughter-House} decisions that narrowly construed its holding were based on shaky—and racially prejudiced—ground. Citing \textsc{L. Keith, The Colfax Massacre} (2008), Justice Thomas implies that a case in which the Court reversed the convictions of “members of a white militia who had brutally murdered as seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.

\textit{Id.} at 562.

The Court has repeatedly recognized that these notions of dignity and integrity hinge in part upon the appearance of fairness. \textit{See, e.g.}, \textit{Caperton v. A.T. Massey Coal Co.}, 129 S. Ct. 2252 (2009) (noting the connection between the integrity of the judiciary and public confidence in fairness and integrity).

\textsuperscript{181} \textit{Edmondson v. Leesville Concrete Co.}, 500 U.S. 614 (1991) (“Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality.”); Sawyer v. Smith, 497 U.S. 227, 248 (1990) (Marshall, J., dissenting) (observing that the Batson rule has a fundamental impact on the integrity of the criminal process, as opposed to its accuracy); Peters, 407 U.S. at 502 (“Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.”).

\textsuperscript{182} \textit{McDonald}, 130 S.Ct. at 3060.
many as 165 black Louisianians” should not be followed—at least because of its “circular reasoning.”¹⁸³

1. General Principles

The key to a challenge under the Privileges or Immunities Clause lies in the designation of a “privilege or immunity” as one that is conferred by virtue of federal citizenship to the Union.¹⁸⁴ The Slaughter-House Cases,¹⁸⁵ decided five years after the ratification of the Fourteenth Amendment, held that the Privileges or Immunities clause protects only rights of United States citizenship and not those of state citizenship. Before coming to its conclusion, however, the Court undertook a detailed examination of the purpose and meaning of the Reconstruction Amendments. The “one pervading purpose” that lay “at the root” of the Privileges or Immunities Clause, was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”¹⁸⁶

The Court indicated that the most important right of federal citizenship is freedom from racial oppression, as made possible by the Union’s victory in the Civil War:

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing

¹⁸³ Id.
¹⁸⁵ 83 U.S. 36 (1873).
¹⁸⁶ Id. at 71 (emphasis added).
and efficient cause was African slavery.\textsuperscript{187}

A citizen of the southern portion of the United States must therefore owe his privilege of living in a nation governed by the principles of the victors of the Civil War to the federal government, and not to the individual state in which he lives. Quite literally, a state’s action in flying the Confederate flag over its halls of justice “abridge[s] the privileges”\textsuperscript{188} vested in its citizens by virtue of the federal government. Caddo Parish citizens have just as much of a right to national citizenship as citizens of northern states, or places actually conquered by Union troops. The Confederate flag, as a symbol of a set of values that are altogether inconsistent with the purpose of the Privileges or Immunities clause as laid out in \textit{The Slaughter-House Cases}, infringes upon the privileges of being a citizen of the United States.

A challenge under the Privileges or Immunities Clause would therefore be a viable option in the civil context. In the criminal context, and even more fundamentally where the death penalty is involved, a challenge to the flag under this framework presents a stronger case. The interest at stake is exponentially higher, as is the appearance of “oppressions of those who had formerly exercised unlimited dominion”—formerly slave owner, now judge and prosecutor. A Louisiana capital defendant has the privilege not to be tried under the flag of the illegal Confederate States of America and immunity against the influence of race in his capital sentencing proceeding. To try a black citizen of the United States under the Confederate flag is patently inconsistent with the Privileges or Immunities Clause.

2. Jurors’ Rights

A criminal defendant in Louisiana who is accused of a felony has a right to a jury trial; this right stems not from his citizenship in the state of Louisiana, but from his federal citizenship. Indeed, under the civil law of pre-purchase Louisiana, juries were not a part of the criminal justice system.\textsuperscript{189} As a condition of the Louisiana Purchase, President Jefferson required the new state of Louisiana to apply the United States Constitution,

\textsuperscript{187} \textit{Id.} at 68.

\textsuperscript{188} \textsc{U.S. Const. Amend. XIV.}

in particular the writ of habeas corpus and the right to a jury trial. The Louisiana Cession Act specifically provided that

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyments of all the rights, advantages and immunities of citizens of the United States...

Nevertheless, Louisiana was loath to embrace the right to a jury trial until it was compelled to do so in Duncan v. Louisiana. And as demonstrated by cases such as Campbell v. Louisiana, Snyder v. Louisiana, Alexander v. Louisiana, Eubanks v. Louisiana, and Pierre v. Louisiana, Louisiana has also resisted both the defendant’s right to a jury selected pursuant to nondiscriminatory criteria and the juror’s right not to be struck on the basis of race. Given this history, these rights may be fairly considered—in Louisiana at least—“rights of United States citizens

192 391 U.S. 145 (1968) (holding that the Sixth Amendment right to a jury trial is applicable to the states).
193 523 U.S. 392 (1998) (remanding where, for the prior 16 1/2 years, no black person had served as grand jury foreperson even though more than 20 percent of the registered voters were black).
194 552 U.S. 472 (2008) (holding that the prosecution’s use of peremptory challenges was racially discriminatory).
195 405 U.S. 625 (1971) (holding that two jury culling-out procedures which resulted in a venire containing only one African American in a parish that was 21% black were unconstitutional).
196 356 U.S. 584 (1958) (holding that, where African Americans made up a third of the population, only one was chosen to serve on a jury in eighteen years, the defendant was entitled to relief under the equal protection clause).
197 306 U.S. 354 (1939) (holding that evidence “that from 1896 to 1936 no negro had served on the Grand or Petit Juries in the Parish; that a venire of three hundred in December, 1936, contained the names of three negroes, one of whom was then dead, one of whom (D. N. Dinbaut) was listed on the venire as F. N. Dinfant; the third—called for Petit Jury service in January, 1937—was the only negro who had ever been called for jury service” established an equal protection violation).
against states.”

It is well-established that race-based exclusion from jury service violates the prospective juror’s right to participate in civic life. Under Batson and its progeny, a prospective juror’s right to equal protection is violated when he is peremptorily struck on account of his race. At the same time, the state violates the juror’s right “to participate in the administration of the law, as juror[]. [It] is practically a brand upon [him], affixed by the law, an assertion of . . . inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”

A Louisiana citizen called for jury service must be entitled to the privilege of serving on a jury without being removed on the basis of race, and the immunity from being compelled to serve under the Confederate flag and its attendant values and associations. An African-American prospective juror has the right, under the Privileges or Immunities Clause, not to be forced to choose between serving under the flag of those who would reduce his ancestors to chattel slavery and giving up the opportunity to participate in the jury system. This right is violated every day in Caddo Parish. In the recent Caddo Parish case of State v. Felton Dorsey, it was violated on the record.

On May 14, 2009, Carl Staples was summoned for jury duty after thirty years of living as a registered voter in Caddo Parish. Knowing that the courthouse flies a Confederate flag, he called the clerk’s office to state his objection to serving under the flag. The clerk told him that if he did not show up for jury duty, a warrant would be put out for his arrest. So he swallowed his pride and walked beneath the Confederate flag and past the hulking monument to the confederacy into Caddo Parish court, where a jury was being chosen for the capital trial of Felton Dejuan Dorsey.

When called for individual examination, Staples made his position known:

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198 McDonald, 130 S.Ct. at 3073 (Thomas, J., concurring).
201 Strauder v. West Virginia, 100 U.S. 303, 308 (1879).
“[the flag] is a symbol of one of the most . . . heinous crimes ever committed to another member of the human race, and I just don’t see how you could say that. I mean, you’re here for justice, and then again you overlook this great injustice by continuing to fly this flag which . . . put[s] salt in the wounds of . . . people of color. I don’t buy it.”

The State promptly removed him for cause, and then proceeded to strike five out of the remaining seven qualified black prospective jurors. The trial judge found no prima facie case of discrimination when defense counsel raised a *Batson* challenge. Dorsey, a black man accused of killing a white victim, was convicted and sentenced to death by a jury of eleven whites and one black juror. While the noose that for years adorned the halls of the Caddo Courthouse has been removed, the climate of lynching is alive and well in Caddo Parish and the courthouse Confederate flag preserves that climate.

Carl Staples’ courageous stand against the flag was an aberration in the Caddo Parish jury system. It is not an everyday occurrence that a prospective juror who is offended by the courthouse flag shows up for service, and then moreover speaks out against the flag on record. It is much more likely that those black jurors who find the flag offensive and demeaning simply avoid jury service. This is oppression. And while not everyone who finds the flag offensive is black, the fact that blacks are offended by a flag that celebrates the regime of black slavery is no coincidence. Nor is the fact that “bloody” Caddo Parish, which once boasted the highest lynching rate in the South, has become one of the most death-penalty prone parishes in Louisiana—at least when the defendant is black. It is time for the flag to come down in Caddo Parish.

IV. THE CONFEDERATE FLAG, *MCCLESKEY*, AND SYSTEM-WIDE RACIAL BIAS

This Article has thus far sought to demonstrate why the existence of a Confederate Flag at a courthouse violates well-established principles of due process and privileges or immunities. It now turns to examine the implications of the flag for how courts evaluate evidence systemic racial bias in sentencing. The starting and ending points for this question is

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McCleskey v. Kemp.\textsuperscript{203}

The Supreme Court’s Equal Protection jurisprudence in the context of the criminal justice system has fixated on the intent prong of the analysis. Almost never do we see a criminal law containing an explicit race classification.\textsuperscript{204} The burden is thus heavy on criminal defendants to prove both discriminatory intent and impact. Although certain cases seemingly leave the door open for equal protection claims made solely upon the impact prong, in criminal cases the Court has virtually closed that door.

When Warren McCleskey attempted to make a claim of race discrimination in his case based on clear statistical evidence of discriminatory impact—but no evidence of discriminatory intent—the Court held that he failed to carry his burden.\textsuperscript{205} McCleskey had presented evidence that a defendant in Georgia accused of killing a white victim was eleven times more likely to be sentenced to death than if he had been accused of killing a black victim. Further, a black defendant convicted of killing a white victim was twenty-two times more likely to be sentenced to death than if the victim had been black. Clearly there was a “dual system” at work in the Georgia capital sentencing scheme: one for those accused of killing white victims and one for those accused of killing black victims.\textsuperscript{206} The Supreme Court was not satisfied with Warren McCleskey’s claim. The Court held that while “stark” discriminatory impact may obviate the need to prove discriminatory intent,\textsuperscript{207} McCleskey needed far more powerful proof.\textsuperscript{208} Because each capital jury is “unique in its composition” and


\textsuperscript{204}But see, Miller-El v. Cockrell, 537 U.S. 322, 334-35 (2003) (“A manual entitled ‘Jury Selection in a Criminal Case’ was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney’s Office, outlining the reasoning for excluding minorities from jury service.”).

\textsuperscript{205}McCleskey was a young black man convicted of killing a white police officer in the course of a robbery of a furniture store in Fulton County, Georgia. His jury, eleven whites and one black juror, returned a death sentence.


\textsuperscript{207}McCleskey, at 294 n. 12.

\textsuperscript{208}In a memorandum to Justice Powell, however, Justice Scalia wrote:

I plan to join Lewis [Powell]’s opinion in this case, with two reservations. I disagree with the argument that the inferences that can be
called upon to consider “innumerable factors,” a capital defendant must be armed with evidence of racial animus at work in his case.

Since *McCleskey v. Kemp* was decided in 1987, many courts have rendered decisions denying claims of race discrimination in capital cases. Commentators and jurists have condemned the *McCleskey* standard as impossible for a criminal defendant to meet. It is highly unlikely that in a given case there will be actual evidence of racially discriminatory intent on the part of the state.

Enter the Confederate flag. In a case where the state tries a black defendant capitally for the murder of a white victim under the shadow of the Confederate flag, the inference of discriminatory intent is both plainly

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210 *Id.* at 292-93.

211 See, e.g., Andrews v. Shulsen, 802 F.2d 1256, 1267 n. 10 (10th Cir. 1990) (“[W]e believe that the standard adopted by the majority in *McCleskey* is too stringent. While intent is difficult enough to prove, intent that permeates an entire sentencing system is practically beyond proof.”); Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Sentencing and Racially Neutral Standards*, 2 Tex. Wesleyan L. Rev. 45, 84 n. 236 (“The Court imposed an impossible task on *McCleskey* in setting forth his burden of proving discriminatory intent on the part of the actors in his case. This would involve proving that jury members were prejudiced and that they discriminated against him. The Court, however, claimed the jury could not be called to testify as to their motives.”).
Caddo is its own case-study in the discriminatory application of the death penalty. Even despite the presence of the Confederate flag and the historical context surrounding its placement at the courthouse, capital defendants in Caddo may find themselves, like Warren McCleskey, unable to adduce sufficient evidence of discriminatory purpose under existing case law. While the flag may not satisfy the McCleskey standard, it provides a better context for understanding system-wide race disparities in sentencing. This context argues in favor of reconsidering McCleskey’s onerous intent requirements.

First, the flag’s demonstrated impact on the subconscious mind render more credible the claim that “discrimination extends to every actor in [a given] capital sentencing process.” Cognitive psychology has shown that there is common ground in the way that people think and process information. The flag makes race a bigger factor in all of these processes. Therefore, the Court’s assumption that, for instance, the uniqueness of each jury forecloses a finding that race impacted the outcome of sentencing is unwarranted. Admittedly though, the flag does not present evidence of a decision-maker’s conscious discriminatory purpose, as McCleskey requires. The real question is: where we can point to a specific factor that has been demonstrated to increase race-based decision-making, why should lack of a specific discriminatory purpose be a barrier to judicial scrutiny and appropriate relief?

More importantly, the flag and the history it represents undermine the central theme in McCleskey’s equal protection analysis—that the procedures in place for trying cases and challenging discrimination in those cases are sufficient to allow courts to ignore discriminatory patterns in sentencing. Carl Staples’ statements totally refute the Court’s assumptions about individual sentences handed down by “properly constituted” juries. Any system of jury selection which engenders conscientious objectors like Carl Staples cannot be said to be functioning properly. Moreover, there are

212 See Minutes, Shreveport Biracial Commission, Nov. 28, 1988 (“[One member of the audience said] Shreveport is a racist city. You must face that fact. [He] recommends the Commission remove the profane rebel flag from the Courthouse. . . . Mrs. Kohlbacher (from the audience) said she thought that the southern community had respect for the rebel flag because it embodied the spirit of states [sic] rights. The flag has always stood for spirit. She said she will fight to the death for a person’s freedoms.”) (emphasis added) (on file at Louisiana State University-Shreveport).

213 McCleskey, 481 U.S. at 292.

214 Id.
no procedures currently in place to catch subconscious acts of racial discrimination. Even where someone has consciously discriminated, however, the existing corrective procedures are insufficient because they rely on the oversight of actors influenced by subconscious stereotyping. How can a judge engaged in subconscious stereotyping be expected to effectively scrutinize a pretextual peremptory strike justification that is also based on the same stereotype? Both of these factors suggest that the current way of looking at racial patterns under *McCleskey* is incorrect and likely to perpetuate massive injustice.

V. Conclusion

The Confederate flag has important implications for how we think about race disparities in the criminal justice system. The flag exposes just how unfounded many of *McCleskey v. Kemp*’s central premises can be in a given situation. While the Caddo flag is in a sense exceptional, it nevertheless has nationwide implications. What is captured by the Confederate flag in front of the courthouse in Shreveport operates elsewhere under the cloak of official race neutrality. This analysis of the flag will hopefully inform future discussions and jurisprudence on manifest racial disparities and injustice. However, the main goal of this article has been to educate about the depths of injustice reflected in the courthouse flag itself.

The flag harms the criminal defendant’s rights, as well as those of jurors and prospective jurors, and serves as a symbol of the ongoing oppression of African American citizens. A system of justice that guarantees equal protection cannot operate fairly under a symbol of government favoritism of one race over another. The risk of race influencing any aspect of a capital case—the charging decision, whether the death penalty is sought, which jurors are chosen, which arguments are made, what language is used—is too great, and too elusive, for the Confederate flag to be allowed to remain at the steps of a courthouse where capital cases are tried.

A system of justice that allows race to play a role cannot satisfy the basic requirements of the Constitution. What is the Confederate flag, then,

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215 Equally disconcerting are the common sense and demeanor based judgments that judges are expected to bring to rulings on challenges for cause. *See* Uttecht v. Brown, 551 U.S. 1, 7 (2007).

if not a reference to race? 217 It is a “shortcut from mind to mind” 218 that celebrates the regime of black slavery. Further, with its inscription “LEST WE FORGET,” the monument at Caddo Courthouse instills in black criminal defendants the message that “we” — the white political and economic power in Caddo — were the slave masters. “We” were the soldiers that fought and died for the right of plantation owners to enslave black people. “We” were the democrats of the late nineteenth and early twentieth century that passed the Jim Crow laws and constitutional amendments. Then, “we” were the segregationists of the civil rights era. It is impossible to extinguish race from the message of the courthouse Confederate flag. To say that there is no chance that the flag “might cause prejudice” would be to view the flag in a vacuum and overlook the past 150 years of U.S. history. And, as the monument commands, we must not forget.

217 See Ehringer, supra note 102, at 13 (“We argue that the cultural associations between the Confederate flag and racial bias led to greater negativity toward Blacks after exposure to this meaningful symbol.”).