March 24, 2020

TO: Colleagues and Friends

FROM: Genevieve Lakier

SUBJECT: Public Law & Legal Theory Workshop

The Public Law & Legal Theory Workshop will meet on Tuesday, March 31st, 2020 from 3:30 pm – 4:45 pm over Zoom. To join the meeting, go to the link below. Please make sure that your video is on and your audio is off. Helen Norton from the University of Colorado Law School will present the attached chapters from her new book, *The Government’s Speech and the Constitution*.

The workshop schedule, as well as electronic copies of the workshop papers, are available at:

[http://www.law.uchicago.edu/workshops/publiclawandlegaltheory](http://www.law.uchicago.edu/workshops/publiclawandlegaltheory)

Here is the Invite for the Zoom Meeting:

Law School Auditorium is inviting you to a scheduled Zoom meeting.

**Topic:** 3/31/20 - Public Law Workshop  
**Time:** Mar 31, 2020 03:30 PM Central Time (US and Canada)

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Governments must speak in order to govern, and so governments have been speaking for as long as there have been governments. The stone inscriptions on Nebuchadnezzar’s Ishtar Gate, for instance, include sixth-century B.C. boasts of the King’s reign and its many achievements. Governments still boast today, just as they also speak in many other ways. Consider a few examples:

The Surgeon General’s report documenting the dangers of tobacco. A town council’s prayers to open its meetings. The Johnson and Nixon Administrations’ lies about what the United States was doing, and why, in Vietnam. Exhortations from the Forest Service’s Smokey Bear that “only you can prevent wildfires.” The District of Columbia’s motto of protest, “End Taxation Without Representation,” displayed on its license plates. Apologies, decades after the fact, by Congress, the President, and the Solicitor General for the federal government’s World War II internment of Japanese-Americans. President Trump’s tweets attacking the press, the judiciary, and many other institutions and individuals. A school board’s resolution opposing school voucher legislation, posted on its website. A Senate Subcommittee report entitled “The Employment of Homosexuals and Other Sex Perverts in Government.”

The government’s expressive choices—and by this I mean the government’s choices about whether and when to speak, what to say, how to say it, and to whom—are neither inevitably good nor evil, but instead vary widely in their effects as well as their motives. The government’s expressive choices are at times heroic, at other times banal, and at still other times despicable. Through its speech, the government informs, challenges, teaches, and inspires. Through its speech, the government also threatens, deceives, distracts, and vilifies. Because the government’s speech has changed the world for better and for worse, it deserves our attention, at times our appreciation, and at times our concern.

The government’s speech can deliver great value. Through its expression, the government disseminates vital information to the public on a broad range of topics. Think again of the Surgeon General’s groundbreaking 1964 report on the dangers of cigarettes, a report that challenged the tobacco industry’s efforts to discount the mounting medical evidence linking its products to serious health conditions. The government’s speech also illuminates the workings of our democracy. Regardless of whether you love or hate the government’s views, its expression generates important conversations and helps inform the public’s political choices. The State of the Union address reveals the executive’s values and policy priorities to the American public, as does a President’s resort to the

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1 See Brian Fagan, A Little History of Archaeology 9-10 (2018).
bully pulpit to advocate for everything from environmental conservation to free enterprise, immigration reform to child nutrition. The government’s voice can assert moral and political leadership in ongoing battles for equality: consider President Lyndon Johnson’s nationally televised promise that "We Shall Overcome" in the midst of 1960s civil rights battles, and President George W. Bush’s repudiation of anti-Muslim bigotry in a speech at a mosque immediately after the 9/11 attacks.

But sometimes the government’s speech instead wreaks grave harm. This can be the case of its lies told to resist legal and political accountability for its misconduct or to enable the exercise of its powers to imprison or deploy lethal force. The government’s speech can silence dissent: think of the FBI’s efforts to muzzle antiwar protestors and other governmental critics during the 1950s and 1960s by spreading false information about them to their family, neighbors, and employers. The government’s speech can exclude and divide—and worse. In 1907, Mississippi Governor James Vardaman declared: “[I]f it is necessary every Negro in the state will be lynched; it will be done to maintain white supremacy.” As of 2018, Alabama and Texas required their public schools’ sex education curricula to include “[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public.”

Because the government’s speech holds the potential for great value as well as substantial harm, the constitutional rules that apply to it are important. When we discuss constitutional law, we usually focus on the constitutional rules that apply to what the government does. Far less clear are the constitutional rules that apply to what the government says. We need to empower our government to serve and protect us, even while we reasonably fear, and should take steps to protect ourselves from, its power to harm us. When does the speech of this unusually powerful speaker violate our constitutional rights and liberties? More specifically, when does the government’s speech facilitate the public’s democratic self-governance and contribute to the marketplace of ideas—and when does the government’s expression instead interfere with public discourse? Under what circumstances does the government’s speech threaten our liberty or our equality? And when, if ever, does the Constitution prohibit our government from lying to us? This book considers these questions, and more.

**The Constitutional Implications of the Government’s Speech**

When we see or hear the terms “government” and “speech” in close proximity, we often think of the constitutional issues triggered when the government regulates our expression. This book focuses instead on the constitutional issues sparked by the government’s own speech. When I refer to the government’s speech, I mean the collective speech of a governmental body like an agency or a legislature. I also mean the speech of an individual who speaks for such a body (like the Secretary of

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3 President Lyndon B. Johnson, Special Message to Congress (Mar. 15, 1965).
4 President George W. Bush, Remarks by the President at Islamic Center of Washington, D.C. (Sept. 17, 2001).
Health and Human Services, or a congressional committee chair), as well as an individual who speaks when backed by the government’s power (like a police officer interrogating a suspect). I put aside for now the speech of an individual government official or legislator when she expresses her own views in a personal, rather than in a governmental, capacity (although, as we’ll see, the line between the two is not always bright).

The Constitution itself at times expressly commands the federal government’s speech. Article I, for instance, requires Congress to speak in ways that make certain governmental actions transparent to the public. It directs that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,” and that “[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same” (today this journal is called the Congressional Record).

The Constitution sometimes requires the federal government to speak by consulting with other government actors. Article I charges a President who vetoes a bill to return it, along “with his Objections to that House in which it shall have originated.” Article II commands that the President “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.” (As we’ll see, Presidents remain free to choose when, where, and how to deliver their assessments of the State of the Union.) Article II also empowers, but does not compel, the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments upon any Subject relating to the Duties of their respective Offices.”

The Constitution also affirmatively protects government speech that takes the form of legislative debate, providing Senators and Representatives with immunity from criminal prosecution and civil liability for “any Speech or Debate in either House.” The Speech or Debate Clause thus prevents executive and judicial branch interference with the federal legislature’s independence. “For Congress to compete effectively with the other branches in the public sphere, it must be able to communicate with the public,” legal scholar Josh Chafetz observes. “This means that its members must be able to air their views publicly, without the threat of prosecution by the other branches.”

The Constitution also identifies, and sometimes requires, what some call “speech acts” or “performative utterances”—in other words, speech that, once uttered, accomplishes a change in legal status. Examples include Congress’s Article I power to declare war; this declaration means that the U.S. is now a belligerent. Article II requires that the President take an oath of office before undertaking service; once pronounced, this oath completes an individual’s transition from private

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8 U.S. CONST. art. I, § 9, cl. 7.
9 U.S. CONST. art. I, § 5, cl. 3.
10 U.S. CONST. art. I, § 7, cl. 2.
11 U.S. CONST. art. II, § 3.
13 U.S. CONST. art. I, § 6, cl. 1.
14 JOSH CHAFETZ, CONGRESS’S CONSTITUTION 231 (2017).
15 U.S. CONST. art. I, § 8, cl. 11.
citizen to President.\textsuperscript{16} And a written declaration of a President’s inability to discharge the duties of that office, as provided by the Twenty-Fifth Amendment, initiates the process through which a President may be replaced.\textsuperscript{17}

And the Supreme Court has occasionally interpreted the Constitution to compel the government’s speech to make specific constitutional protections meaningful. In the now-canonical \textit{Miranda v. Arizona}, the Court required law enforcement officials to disclose available constitutional protections (like the right to remain silent and the right to counsel) to those in their custody.\textsuperscript{18}

So the Constitution sometimes requires the government to speak. But for the most part, the government’s speech reflects its choice of whether, when, and how to deploy its expressive power. What are the constitutional rules that govern those choices?

I propose a framework for thinking about this question that requires us to wrestle with what I will call “first-stage” and “second-stage” government speech problems. First-stage problems force us to untangle competing governmental and private claims to the same speech: this is important because the constitutional rules that apply to the government when it speaks itself are very different from those that apply to the government when it regulates others’ speech. If we determine that the government itself is speaking (rather than regulating others’ speech), we then turn to second-stage problems: these consider whether and when the government’s speech infringes specific constitutional rights.\textsuperscript{19}

\textit{First-Stage Government Speech Problems: Determining Whether and When the Government is Speaking}

The First Amendment’s Free Speech Clause forbids the government from regulating nongovernmental parties’ speech based on viewpoint. But the government itself must speak if it is to govern. For this reason, the Supreme Court’s government speech doctrine (that is, its body of precedent considering these first-stage problems) shields the government’s own expression from Free Speech Clause challenge by those who object to the government’s views; the Court identifies political checks, rather than First Amendment litigation, as the appropriate recourse for those unhappy with their government’s expressive choices. Because the constitutional standards that apply to the government as a speaker differ so dramatically from those that apply to the government as a regulator of other parties’ speech, the first step in our constitutional analysis is figuring out whether the government itself is speaking.

How do we decide whether contested speech is the government’s or instead the speech of a nongovernmental party regulated by the government? As the key to solving first-stage government

\textsuperscript{16} U.S. CONST. art. II, § 1, cl. 7.
\textsuperscript{17} U.S. CONST. amend. XXV.
\textsuperscript{19} This book focuses on the constitutional rights provided by the Establishment, Equal Protection, Due Process, Free Speech, and Press Clauses. Other constitutional provisions may also constrain the government’s speech under certain circumstances, like the Take Care and Guarantee Clauses, but I set those possibilities aside for now.
speech problems, I propose what I’ll call the transparency principle. I focus on transparency because the government’s speech is more valuable and less dangerous to the public when its governmental source is apparent. In other words, the government’s expressive choices are valuable, and thus insulated from First Amendment scrutiny, because of what they offer the public: information that furthers democratic self-governance by enabling the public to identify and thus evaluate their government’s priorities and performance. Because the public can hold the government politically accountable for its expressive choices only when it actually understands the contested expression as the government’s, we should require the government’s transparency as a condition of claiming the government speech defense. And when the governmental source of a message is clear, we should understand the Constitution to permit the government to control the content of that message—but not to restrict public comments on that message based on their viewpoint. The transparency principle also applies to the government’s efforts to restrict the speech of its own workforce: in my view, we should understand the First Amendment to permit the government to control the speech of its employees as its own only when it has specifically commissioned or hired those employees to deliver a transparently governmental viewpoint.

Many courts and commentators think of the government speech doctrine as dealing only with these first-stage problems. But we still have work to do. Once we are convinced that the government itself is speaking, then the Free Speech Clause constraints on the government as a regulator—like those that forbid the government from regulating private parties based on their viewpoint—do not apply. But the second step in our constitutional analysis requires us to consider whether and when the government as a speaker runs afoul of specific constitutional protections. In other words, some constitutional limits still apply to the government as a speaker, even though they differ from those that apply to the government as a regulator.

Second-Stage Government Speech Problems
Determining When the Government’s Speech, By Itself, Violates the Constitution

Second-stage government speech problems focus on whether and when specific constitutional provisions (like the Establishment Clause, the Equal Protection Clause, the Due Process Clause, and more) restrain the government’s speech. Second-stage problems present challenging constitutional questions in part because the government’s speech involves an exercise of governmental power distinct from its lawmaking and other regulatory actions that regulate behavior through, for example, financial or criminal penalties; some describe this distinction as one between the government’s “soft” and “hard” powers. The Surgeon General’s report on the dangers of tobacco exemplifies the government’s speech, its soft power: the government informed but did not imprison, fine, or tax. Contrast, as an illustration of the government’s hard power, Congress’s later enactment of a law requiring tobacco manufacturers to publish the Surgeon General’s warning on their packages and advertisements, with the failure to comply punishable by a $10,000 fine. As another example, the original Pentagon Papers themselves—the series of reports commissioned by

Defense Secretary Robert McNamara to study the history of the United States’ involvement in Vietnam—represented the government’s own speech, entirely apart its lawmakership or other regulatory action. But the Nixon Administration later exercised its hard powers when it sought—and for a few days, federal courts acquiesced in granting—an injunction to stop the New York Times and other newspapers from publishing the Papers.22 New Hampshire’s choice of “Live Free or Die” as its motto represents the state’s expressive choice, its speech, as does a school board’s decision to start the day with the Pledge of Allegiance. But when the government compels private (that is, nongovernmental) parties on pain of punishment to display the state motto or repeat the Pledge, it exercises its traditional regulatory powers—and the Free Speech Clause rules that apply to the government as regulator, rather than speaker, apply.23

“Hard” and “soft” power are not legal terms of art, but instead metaphors that describe relative points on a continuum of government power. Even so, it’s not always so easy to separate the two. And some things share both qualities at the same time depending on where you look, like an energetic kitten with the fur of an ermine and the teeth of a shark. Stroke it when it’s at rest: it’s soft. Receive its fangs with your flesh: it’s hard (and sharp). The government’s speech similarly comes in a variety of textures, some more flinty than others.

To help us think about these second-stage government speech problems—that is, whether and when the government’s speech, by itself, violates our constitutional rights—I suggest that we ask and answer a series of questions about the consequences of, and the motivations underlying, the government’s speech. Some of these questions focus on the different types of harmful effects, or injuries, that the government’s speech may inflict upon its listeners. When we look at the effects of the government’s speech, we ask whether the targets of the government’s speech suffered harm, whether we should hold the government responsible for causing that harm, and whether a specific constitutional provision bars the government from inflicting that particular harm. And some of these questions focus instead on the various purposes underlying the government’s speech. When we look at the government’s motives for speaking, we ask why the government chose to speak in a certain way, and whether the constitutional provision at issue denies the government the power to speak for that reason. More specifically:

When does the government’s speech change its targets’ choices or opportunities to their disadvantage, and does the Constitution bar the government from causing those changes? Here we consider whether and when the government’s speech changes its listeners’ choices or opportunities in ways that would violate the a specific constitutional provision if the government accomplished those same changes through its lawmakership or other regulatory actions. Think, for example, of the government’s threats that silence dissenters as effectively as jailing them, the government’s lies that pressure its targets into relinquishing their constitutional rights as effectively as denying those rights outright, or the government’s religious speech that coerces listeners’ participation in prayer or other religious observance as effectively as fining or taxing those who fail to partake. This approach sometimes requires us to wrestle with difficult questions about the

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requisite causal connection between the government’s speech and harm to its targets’ choices and opportunities.

When does the government’s speech inflict expressive, or dignitary, harm upon its targets, and does the Constitution bar the government from causing those harms? Here we remain focused on the effects of the government’s speech but consider instead whether it inflicts expressive, or dignitary, harm upon its targets. Rather than asking whether the government’s speech has interfered with its targets’ choices and opportunities, we query whether the government’s speech has injured their dignity by treating them as outsiders to the political community, by failing to treat them with equal concern and respect because of who they are or what they believe. Think, for instance, of the government’s speech that communicates hostility to or disrespect for its targets based on their religion (or nonreligion), or their race, gender, or sexual orientation. Under this approach, we grapple with difficult questions about when the government’s speech delivers a message of denigration or disrespect, and whether the relevant constitutional provision protects us from those harms.

What are the purposes underlying the government's speech, and does the Constitution bar the government from seeking to accomplish those purposes? Here we turn from the possible harmful consequences of the government’s speech for its targets to consider instead the government’s reasons for speaking. Sometimes the government speaks to accomplish objectives that some, perhaps many, of us find morally wrongful or constitutionally illegitimate. This can be the case, for example, of the government’s speech intended to advance some religions at the expense of others, to harm members of unpopular groups, or to interfere with constitutionally protected rights. Under this approach, we must identify the government’s reasons for speaking and determine whether the constitutional provision at issue denies the government the power to speak for those reasons.\(^{24}\)

These questions reflect different approaches to the second-stage constitutional law problems triggered by the government’s speech. As we’ll see, our theory of a specific constitutional provision—in other words, our understanding of the values it protects—often drives our preferences among these approaches. And because different constitutional provisions often protect very different values, our preferences among the approaches may differ from provision to provision. By applying these approaches in different settings in the chapters that follow, I hope to illuminate their various strengths as well as their limitations in solving second-stage government speech problems. My point is not that any one of is necessarily better than another, nor to persuade you to answer these questions in any particular way; I hope instead to show that this series of questions gives us a helpful framework for thinking about these problems.

The difficulties of these questions counsel that we proceed with care. We may wonder whether efforts to constrain the government’s speech through constitutional litigation will deter

\(^{24}\) In this book, I’ll generally use the terms “intentions,” “purposes,” and “motivations” interchangeably. See Richard H. Fallon, Jr., Constitutionally Forbidden Legislative Intent, 130 HARV. L. REV. 523, 534-35 (2016) (observing that courts often use these terms synonymously). To be sure, we can, and in certain contexts should, recognize shades of distinction among these terms, but for now I put those subtleties aside.
government speakers from engaging in important expression. Indeed, a central thesis of this book is that the government’s speech often delivers great value: the more the government speaks, often the better for the public. We may worry that the government’s critics will exploit constitutional litigation to attack the government’s speech for partisan, rather than principled, reasons. We may fear that efforts to identify constitutional limits on the government’s speech will force courts to undertake difficult, even dangerous assessments of the political branches’ expressive choices. We may query whether claims that the government’s speech violates the Constitution are even justiciable—that is, whether the federal courts have the constitutional power to decide them. Difficult government speech problems force us to choose between holding our government constitutionally accountable for its destructive expressive choices and hamstringing the government’s communication in counterproductive ways. This is no easy choice.

That constitutional litigation is a limited and imperfect tool for curbing abuses of the government’s expressive powers, however, does not mean that it is without value. The ugliest of the government’s expressive choices are often those least susceptible to political redress, as the government sometimes speaks in hurtful ways precisely because those messages appeal to its preferred constituencies. This can be the case, for example, when the government targets vulnerable communities or unpopular dissenters. An independent judiciary offers a crucial check on the government’s politically successful choices that undermine key constitutional values.²⁵

As a constitutional scholar, teacher, and lawyer, I view these problems primarily through the lens of constitutional law. Even so, I acknowledge the great value offered by other disciplines in thinking about them. Philosophers and political scientists, for instance, can help us understand when the government’s speech is good (or not) as a matter of moral or democratic theory, and behavioral experts can help us understand how speech shapes its targets’ responses, for better and for worse. I hope that anyone interested in the uses and abuses of government power will engage these questions.

For these reasons, throughout this book I shine a spotlight on the many shapes and forms of the government’s expression to help us recognize its presence in, and assess its impact on, our daily lives. The more we notice the government’s speech, the more clearly we can think about its constitutional implications. So before we begin to grapple with the hard and important constitutional problems raised by the government’s speech, let’s start to attune our ear to the government’s voice—its timbre and pitch, its range and register.

THE ABUNDANCE AND DIVERSITY OF THE GOVERNMENT’S EXPRESSION

The government is unique among speakers because of its coercive power as sovereign, its considerable resources, its privileged access to key information, and its wide variety of speaking roles as policymaker, commander-in-chief, employer, educator, health care provider, property owner, and

²⁵ See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (explaining that the Constitution “protects the citizen against the State itself and all of its creatures. . . . [T]hese have, of course, important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”).
more. Attending to the government’s speech in its many manifestations helps us evaluate its potential for both value and harm. And once you start to listen for the government’s voice, you’ll hear it everywhere, sometimes in surprising places.

The Government’s Many and Varied Audiences and Speakers

This book focuses on the speech of American governments to American audiences, but the targets of the government’s speech also include our foreign allies, neutrals, and enemies. The government’s audiences include other governmental actors too, as federalism (the vertical division of power among the federal, state, and local governments) and separation of powers principles (the horizontal division of power among the legislative, executive, and judicial branches) force different government actors to talk with each other. Sometimes the government’s listeners are entirely internal, as can be the case when the government does not intend its speech to reach the public at large: recall the Defense Department’s original Pentagon Papers, a series of reports and studies commissioned by then-Secretary of Defense Robert McNamara to document the history of the United States’ involvement in Vietnam, or the government’s diplomatic cables revealed by WikiLeaks.

The government itself is composed of sundry speakers, as “the government” can refer to any of many public entities and officials within the United States. When we think about the government’s speech, we often focus on the President’s expression, as the President is among the most visible of governmental speakers. But legislative and judicial branch speakers—as well as speakers from all levels of federal, state, and local governments—also demand our notice.27

Agencies’ Speech

Federal, state, and local governmental agencies are now among the most prolific and significant of government speakers, bringing the government’s speech into our everyday lives. The power of agencies’ speech first became clear in the early twentieth century, when the federal Committee on Public Information (CPI) relied on expressive technologies then both old and new—posters, traveling exhibits, speeches, books, pamphlets, movies, and newsreels—to mobilize public support for the nation’s World War I efforts. Writing in the Great War’s immediate aftermath, reporter and political commentator Walter Lippmann portrayed the CPI as undertaking “the largest and most intensive effort to carry quickly a fairly uniform set of ideas to all the people of the

26 See JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 20 (1977) (“A Churchill is honored not only for his attempt to warn of things to come but for his capacity to make the country see itself as involved in a meaningful struggle, to lift its spirit in adversity, to sustain its awareness of its destined task. Apart from war, our great political heroes are often awokeners and summoners, creating the appropriate mood, expressing the necessary idea. And even routinely we expect government to direct attention to problems, to make us think about energy or pollution or population or crime. In various ways, legislators, executives, judges try to shape and reshape public awareness. Without claiming monopoly, government must, at least, enter the struggle for attention.”).

27 As noted earlier, when I refer to the government’s speech, I mean the collective speech of a governmental body like an agency or a legislature, or the speech of an individual empowered to speak for such a body—like a congressional committee chair, a police chief, or the Secretary of Health and Human Services. I do not include the speech of an individual government official or legislator when she speaks only for herself. To be sure, the line between the two is not always bright, as some of these examples show.
nation,” an effort that inspired some and alarmed others. More recently, historian Susan Brewer described the agency’s “inner struggle between educating and inflaming the public,” and how that struggle, in turn, led to damaging consequences: “The slogan, ‘100% American,’ meant to be inclusive, was turned into a weapon against Americans suspected of being traitors because of their ethnic heritage.”

The expansion of the modern administrative state fueled enormous growth in agencies’ expression. In the peace immediately following the Great War, for instance, agricultural extension agencies reached out to inform “farmers and farm women” about new farming practices through meetings and home visits, bulletins, exhibits, letters, and radio announcements; the agencies measured their success by “the extent to which improved practices have been adopted.” During the New Deal, federal agencies’ speech celebrated the work of the Civilian Conservation Corps, educated the public about the spread of sexually transmissible diseases, and explained the terms and benefits of the newly-enacted Social Security insurance program to its participants.

Agencies’ speech today is plentiful and pervasive. In “the country’s longest-running public service announcement,” the Forest Service’s Smokey Bear implores us to take action to prevent wildfires. Meanwhile the Department of State issues travel alerts, the Internal Revenue Service instructs us how to track the progress of our tax returns, the Federal Emergency Management Administration tells us how to prepare for natural disasters, and the Centers for Disease Control advise us about the latest flu season. On the state and local level, city police departments post crime statistics, state transportation departments offer traffic reports available by phone and online, and much more.

Legislatures’ Speech

Legislatures speak too. Through resolutions, for example, both chambers of Congress articulate their views on a dizzying array of topics both large and small, and state and local legislatures do the same. Virginia’s House of Burgesses, for instance, passed a resolution objecting to the Stamp Act, and then watched its expressive campaign spread across colonial legislatures. A few decades later, with the help of James Madison and Thomas Jefferson, the Virginia state legislature passed a resolution protesting the federal Alien and Sedition Acts as an affront to free speech rights. More recently, Vermont’s legislature resolved that the “State flavor shall be maple from the Vermont sugar

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28 WALTER LIPPMANN, PUBLIC OPINION 46–47 (1922).
31 See JAMES C. MCCAMY, GOVERNMENT PUBLICITY: ITS PRACTICE IN FEDERAL ADMINISTRATION 22-78 (1939).
32 See ERIC RUTKOW, AMERICAN CANOPY: TREES, FORESTS, AND THE MAKING OF A NATION 267 (2013) (Smokey “remains an integral part of forest fire prevention in America. Various estimates have suggested that the character’s impact in decreasing forest fires has saved the country tens of billions in forest damage.”).
maple tree," Missouri declared the fiddle as the state’s official musical instrument, and California’s legislature announced the saber-toothed cat as its official fossil. More seriously, local governments debate whether to issue proclamations honoring “Gun Violence Awareness Day” or instead “Firearms Awareness and Safety Day,” and in 2018 the Senate reaffirmed “that the press is not the enemy of the people,” notwithstanding President Trump’s assertions to the contrary.

Legislative committees speak through their reports. The many examples include the 1970s work by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (often known as the Church Committee, named after its chair, Senator Frank Church) that revealed the executive branch’s widespread domestic surveillance of Americans.

Legislatures’ speech—like that of other governmental speakers—often takes the form of one-way communications like resolutions and reports. But sometimes the government’s speech involves rebuttals, dialogue, conversations, and other forms of counterspeech. Consider the back-and-forth between President Andrew Jackson and the Congress. Jackson’s 1832 annual message on the state of the union (itself an example of government speech) included an attack on the Bank of the United States in which he disputed the Bank’s ability to keep the government’s deposits secure. The House of Representatives responded with governmental speech of its own: a resolution expressing the body’s confidence in the Bank. In yet another exercise of government expression, the Senate then voted to censure Jackson, expressing its disapproval of the President in what remains the only congressional censure of a President in American history. An angry Jackson retorted with still more speech through his “solemn Protest . . . to be placed on the files of the executive department and to be transmitted to the Senate.” Legislative oversight presents another example of government speech as a dialogue. As Josh Chafetz explains, “The aggressive questioning of an official, a nominee, or a private citizen, or the releasing of a critical (or supportive) report are mechanisms by which the congressional houses can make the public case for their own trustworthiness, and therefore for augmenting their own power.”

36 MO. ANN. STAT. § 10.080 (West 1987).
37 CAL. GOV’T CODE § 425.7 (West 2018).
38 Sam Lounsberry, Longmont Mayor Didn’t Read Gun Rights Decree to Maintain “Cohesiveness,” BOULDER DAILY CAMERA (Sept. 15, 2018, 04:55 PM) [https://perma.cc/P7Y3-YKGY].
42 For a detailed discussion of these events, see HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 99-105 (2015).
43 President Jackson’s Message of Protest to the Senate (April 15, 1834) (emphasis in original), in 3 A Compilation of the Messages and Papers of the Presidents 1288-1312 (James D. Richardson ed., 1897).
44 JOSH CHAFETZ, CONGRESS’S CONSTITUTION 197-98 (2017).
The Judiciary’s Speech

In an important sense, the judiciary is defined by judges’ speech. We often describe the judiciary’s powers in terms of its expression: the judiciary holds the power of the pen, rather than that of the sword or purse. This includes not only its power to issue judgments, orders, and binding precedent backed by the state’s coercive force, but also its softer power to write dicta, concurrences, and dissents. To illustrate, a federal appellate court recently added a footnote to one of its opinions to remonstrate a trial judge for sexist comments in the proceedings under review, comments that the appellate judges described as “demeaning, inappropriate, and beneath the dignity of a federal judge.”45

Early judicial speech included grand jury charges directed not only to litigants but also to the American public, where federal judges weighed in on a wide range of contemporary issues through the equivalent of “informal advisory opinions.”46 These expressive efforts quickly met with outcry and opposition, as Supreme Court Justice and partisan Federalist Samuel Chase faced (and survived) impeachment proceedings for his use of grand jury charges to attack the Republican Party and its policies.47 In the twentieth century, Chief Justice Charles Evan Hughes spoke for the Supreme Court with his letter to the Senate Judiciary Committee refuting President Roosevelt’s claims that the nine-Judge Court was struggling to handle its workload; many considered his letter to be key in cohering opposition to FDR’s Court-packing proposal.48 Today the Chief Justice and the Judicial Conference regularly speak for the federal judiciary to Congress and other audiences.49

The judiciary’s expressive norms often vary from those of other government speakers in its greater tendency toward formality and deliberation. Judges (and government lawyers) are also unlike other government speakers in that their speech is constrained by ethics codes that prohibit, among other things, their false speech50 and sometimes their campaign speech.51 Even so, judicial speakers increasingly join in a wide range of expressive efforts that include educating the public about the judicial branch and debating competing approaches to statutory and constitutional interpretation.

45 U.S. v. Swenson, 894 F.3d 677, 681 n.3 (5th Cir. 2018).
47 See Lynn H. Rambo, When Should the First Amendment Protect Judges From Their Unethical Speech?, 79 OHIO ST. L.J. 279, 285-86 (2018) (“Chase’s impeachment (and near conviction) seems to have persuaded the judiciary that its grand jury charges, and other judicial appearances, should no longer include overtly political speeches.”).
50 E.g., MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(11) (2007) (prohibiting judges and judicial candidates from “knowingly, or with reckless disregard for the truth, mak[ing] any false or misleading statement”); MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2014) (“In the course of representing a client a lawyer shall not knowingly[] make a false statement of material fact or law to a third person[,]”).
As Judge Nancy Gertner wrote, “[t]he issue is not whether judges should speak – we plainly have to – but when and more importantly how.”

**Presidents’ Speech**

Presidents, of course, also speak in many ways both mighty and slight. Examples include their speeches and proclamations in which they offer their views on a wide range of matters, as well as their signing or veto statements in which they assess the merits and deficiencies of legislation passed by Congress. President George W. Bush offers an illustration: his proclamations included his celebration of “National Character Counts Week,”53 while his signing statements included his view that the Detainee Treatment Act’s bar on “cruel, inhuman, and degrading treatment of detainees” did “not interfere with his commander-in-chief authority, implying that Congress cannot prevent the president from ordering subordinates to engage in such treatment during wartime.”54

Presidents have come to speak more boldly and directly over the years. Because the Framers so feared that charismatic speakers posed grave threats to a democratic state, they sought to limit those speakers’ power and influence through norms (that is, customs and traditions) of discourse as well as structural constraints like separation of powers and federalism principles.55 Starting with George Washington and continuing through most of the 19th century, presidents addressed policymakers and the public primarily through written communications that offered greater formality and opportunity for reflection. Thomas Jefferson started what would become a longstanding presidential tradition when he sent his assessment of the State of the Union to Congress in writing rather than through an oral address he felt more appropriate for a monarch.56 For similar reasons, as legal scholar Harold Bruff explains, Andrew Jackson “made his arguments to the people in the form of official statements such as his annual messages and the Nullification Proclamation, rather than by giving speeches. This formalized process allowed presidential positions on the Constitution to be fully vetted with advisors and crafted for widespread consumption.”57

An exemplar of thoughtful and restrained presidential rhetoric, Abraham Lincoln largely preferred to address the people through public letters published in the press without the intervention of journalists. Civil War historian Harold Holzer observes: “In an era in which presidential candidates did no public campaigning of their own – tradition forbade it, and the country was yet too vast and unconnected to permit it – the printed word became the chief weapon

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55 See James W. Ceaser, Demagoguery, Statesmanship, and Presidential Politics, in THE CONSTITUTIONAL PRESIDENCY 251 (Joseph M. Bessette & Jeffrey K. Tulis eds., 2009) (“The Federalist is filled with grave warnings against flattery and against the ‘artful misrepresentations of interested men’ who encourage the people to indulge ‘the tyranny of their own passions.’”); id. at 252 (explaining that the Framers sought to channel presidential communication “away from informal popular orations and towards more deliberative forms of rhetoric”).
in battles for the presidency.” Communications scholar Mary Stuckey further explains that, during the presidency’s early years, “[t]he president was above the public side of politics. For him to engage in public politics would have been equivalent to demagoguery; rabble-rousing was not among the virtues that the founders ascribed to a successful president.”

Lincoln’s successor, Andrew Johnson, provides the exception that demonstrates the pre-20th century rule, as Johnson routinely engaged in direct and informal appeals to the public that his contemporaries found inappropriate, even outrageous. Articles of impeachment passed by the House of Representatives signal how his speech offended prevailing norms of presidential discourse. Ultimately unsuccessful in the Senate, those articles included allegations that President Johnson had made:

> with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States . . . . Which said utterances, declarations, threats and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof, . . . Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens.

(Just over a century later, another President would face impeachment for misconduct that included his speech, as the House Judiciary Committee’s charges included allegations that Nixon had made “false or misleading public statements for the purpose of deceiving the people of the United States.” Nixon would resign before the full House could vote on the Committee’s recommendation.)

Presidents’ expressive choices changed significantly in the 20th century, beginning with Teddy Roosevelt’s strategic decision to advocate for his policies directly to the people. Bruff describes Roosevelt’s “[u]nprecedented bombardment of Congress with messages calling for legislation on this and funding of that . . . . Eventually he learned to work his way indirectly, urging his views on the people until they were ready to pressure their legislators.” Woodrow Wilson built on this move, offering important policy statements directly to the citizenry through public speeches with visionary tones. In his Fourteen Points speech, for example, he identified the objectives to be achieved by the Great War, and thus his aspirations for the terms of treaty negotiations. He also reclaimed a dramatic stage for presidential speech by delivering his assessment of the State of the Union to Congress in person, resuscitating the tradition dormant since Jefferson’s time (and leaving the Senate “in a frenzy of puzzlement and excitement about the propriety of a presidential visit to their domain”).

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59 Mary E. Stuckey, *The President as Interpreter-In-Chief* 17 (1991).
63 Carol Gelderman, *All the President’s Words: The Bully Pulpit and the Creation of the Virtual Presidency* 5 (1997).
Newer communicative technologies further enabled and emboldened this turn in the norms of presidential discourse. Franklin D. Roosevelt “became the first master of the electronic media” with fireside chats broadcast directly to the public, and “Kennedy began the practice of live televised press conferences [because he] wanted to control the news.”⁶⁴ As political scientist Jeffrey Tulis summarizes this revolution:

The rhetorical presidency and the understanding of American politics that it signifies are twentieth-century inventions and discoveries. Our pre-twentieth-century polity proscribed the rhetorical presidency as ardently as we prescribe it. . . . Today it is taken for granted that presidents have a duty constantly to defend themselves publicly, to promote policy initiatives nationwide, and to inspirit the population. And for many, this presidential “function” is not one duty among many, but rather the heart of the presidency – its essential task.⁶⁵

The Government’s Many and Varied Choices About What to Say and How to Say It

As we’ve seen, governmental speakers’ choices about what to say and how to say it have varied dramatically over time, reflecting shifts in technology as well as politics. The earliest governments chiseled their speech onto stone tablets. And governments today still rely on visual displays like monuments, artwork, and architecture to express themselves. A government’s display of statues honoring Confederate veterans in its parks or on its streets reflects the government’s expressive choice, as does its decision to fly the Confederate flag above its capitol and courthouses. Just as expressive is a government’s decision to take them down.

Newer technologies now empower government, along with the rest of us, to speak through social media platforms, webcasts, blogs, and more. During the Obama Administration, for example, the White House’s Office of Digital Services increasingly chose to break presidential news directly to the public through Obama’s social media accounts rather than wait for traditional print media to do so. That office also relied on data analytics to “track what United States senators and the people who worked for them, and influenced them, were seeing online—and make sure that no potential negative comment passed without a tweet.”⁶⁶

Governmental speakers of all types and at all levels have seized these opportunities (so enthusiastically, in fact, that the Obama Administration eventually undertook an effort called TooManyWebsites.Gov, charged with eliminating unnecessary federal websites⁶⁷). The federal Government Accountability Office now tweets a fact a day from its reports (its first fact: “Over 65% of households in the U.S. relied solely or mostly on wireless phones to make and receive phone calls as of 2016.”).⁶⁸ State and local governments use blogs and social media accounts to communicate

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⁶⁶ David Samuels, The Storyteller and the President, N.Y. TIMES MAG., May 8, 2016, at MM44.
⁶⁸ Eric Yoder, Every Day, GAO to tweet just a fact, ma’am, WASH. POST, (Aug. 13, 2018), [https://perma.cc/E8J5-GAJG].
with their citizens. Even as you read this, technological developments create new opportunities for the government’s speech.

Changes in the means of delivering the government’s speech can also lead to changes in the substance and tone of its expression. As Mary Stuckey observed more than a quarter-century ago, “Television does not simply mean that presidents talk more. It also means that they talk differently.”69 Today, Twitter requires brevity and rewards outrageousness—and President Trump often excels at both. Trump himself has celebrated his departures from traditional norms of presidential discourse, innovations that some find resonant and others repellent: “Trump argued over the weekend that his outsized Twitter presence was part of a calculated redefinition of the presidency: ‘My use of social media is not Presidential—it’s MODERN DAY PRESIDENTIAL’.”70 As just one of many examples, Trump is unusually combative and eager to engage conflict, rather than defuse it, with his speech—a choice that some attribute to his background in entertainment, media, and reality TV where the norms of discourse are very different from those of traditional politics—and especially effective in attracting public attention.71

The full range of the government’s expressive choices includes not only its affirmative speech but also its secrets and its silences. Governmental secrets generally involve the government’s decision not to disclose certain facts. Governmental silences, in contrast, reflect the government’s decision not to express its views on a contested public policy issue or crisis.

Often these silences signal a failure of governmental nerve and at times its moral abdication. Think, for instance, of the congressional battle from 1835 to 1844 over efforts to enact, and later repeal, a series of parliamentary "gag rules" in which the House forbade its members to discuss—even for a moment—citizen petitions asking Congress to consider abolishing slavery in the District of Columbia. Although Congress assuredly had the constitutional power to consider the matter—even if it lacked the political will to do so—for years overwhelming majorities in Congress deemed the matter literally unspeakable on the House floor. To this end, they enacted rules that "No [such] petition shall be received by this House or entertained in any way whatever," which ensured that any such petition would be automatically laid on the table, without reading, debate, referral, or any of the legislative processes generally applied to citizen petitions. As historian William Lee Miller recounts in his wonderful book on this episode, the story includes the congressional effort to censure former President and then-Congressman John Quincy Adams for his persistence in fighting the gag rule, along with threats to prosecute and even assassinate Adams when he went so far as to present a petition on the floor of Congress signed by enslaved African-Americans.72

Additional examples of the government’s silences abound. During World War II, as Susan Brewer reminds us, “Bowing to the presence of anti-Semitic prejudice in American society, federal

government officials did not want to reinforce Nazi allegations that the Allies fought on behalf of the Jews. When [they] did refer to German atrocities, [they] frequently avoided naming the victims as Jews."73 Related silences include President Eisenhower’s unwillingness to endorse the Supreme Court’s decision and reasoning in Brown v. Board of Education.74 And the years-long failure of many city and state health departments, as well as the federal government, to speak about AIDS and its threats to public health.75 And President Trump’s reluctance to condemn white supremacists in the aftermath of violence in Charlottesville, Virginia.76

Sometimes the government chooses to speak while saying as little as possible: the Federal Reserve Board scrubs its statements to remove any signal of its plans that might trigger market reactions. And consider the following illustration of a governmental speaker’s strategic silence for partisan advantage: Thomas Dewey, FDR’s opponent during the 1944 presidential campaign, “bought time immediately after one of Roosevelt’s radio talks in order to capitalize on Roosevelt’s audience. Roosevelt finished his speech five minutes early, leaving dead time between his talk and Dewey’s scheduled appearance. The audience turned en masse to other stations.”77 At times the government’s expressive forbearance signals self-restraint or discretion. Think here of the Supreme Court Justices’ decision not to issue any concurring opinions in Brown to bolster the strength and legitimacy of the Court’s decision when announced through a single unanimous voice.78

As this sketch makes clear, the government’s expressive choices—and again, by this I mean the government’s choices about whether and when to speak, what to say, how to say it, and to whom—are abundant and diverse. Recognizing their nuances and complexities can help us understand why they deserve our attention and often our concern, as well as what’s hard and important about the constitutional questions that they sometimes trigger.

THE PLAN FOR THIS BOOK

This book’s structure tracks the possible constitutional sources of constraint on the government’s speech. To this end, Chapter 1 details the development of the Supreme Court’s government speech doctrine in which the Court has considered Free Speech Clause challenges by private parties who seek to silence or alter what the government claims as its own speech. Because the Free Speech Clause protects private parties’ speech from the government’s interference while

74 See Numan V. Bartley, The Rise of Massive Resistance 63 (1969) ("Eisenhower was later to state in his memoirs that the Supreme Court’s judgment in the desegregation cases was unquestionably correct. During his years in office, however, the President failed to express publically his approval either of the principle enunciated in the Brown decision or of the ruling itself. Since the racial question was the dominant domestic issue of the period, he made many comments on the subject. Yet not once did he endorse the desegregation decision or offer support to those struggling to implement its provisions. ‘I do not believe,’ the President reiterated, ‘it is the function or indeed it is desirable for a President to express his approval or disapproval of any Supreme Court decision.’").
77 Mary E. Stuckey, The President as Interpreter-In-Chief 33 (1991).
insulating the government’s own speech from private parties’ interference, these cases require the Court to determine when the government is speaking itself and when it instead regulates the speech of others (what I call first-stage government speech problems).

After looking back at this series of decisions, Chapter 1 then considers some challenging first-stage problems to come. We can’t anticipate all the changes ahead, but we can develop a framework for thinking about them. As noted earlier, I urge what I call the transparency principle—that is, an insistence that the governmental source of a message be transparent to the public—as key to solving these first-stage government speech problems. Because the public can hold the government politically accountable for its expressive choices only when it actually understands the contested expression as the government’s, we should require the government’s transparency as a condition of claiming the government speech defense. After showing how the government can, as a practical matter, ensure this transparency, the chapter then revisits the Supreme Court’s government speech canon—the series of cases described above that required the Court to consider first-stage government speech problems—to check their consistency with the transparency principle. Finally, it applies the transparency principle to emerging first-stage government speech problems that require courts to untangle competing expressive claims by private and governmental speakers using newer communications technologies; to determine when an individual government official speaks as the government or instead as a private citizen; and to ascertain whether an individual public employee’s speech is the actually the government’s to control.

We then turn to second-stage problems that wrestle with whether and when the government’s speech itself infringes specific constitutional rights. As explained earlier, I suggest a structure for thinking through these issues that involves a series of questions about the consequences of, and the motivations underlying, the government’s expression. Chapter 2 embarks on these inquiries, starting with the Establishment Clause problems sometimes triggered by the government’s religious speech. We begin here because courts and commentators to date have most often considered second-stage government speech problems in the Establishment Clause setting. Some find that the government’s religious speech inflicts harmful, and constitutionally forbidden, consequences only when it coerces onlookers’ participation in prayer or other religious practice. Some assert that the Establishment Clause prohibits the government from inflicting expressive as well as coercive harms, contending that the government’s religious speech violates the Constitution when it sends a message that excludes its listeners based on their religion or nonreligion. Finally, some focus on the objectives underlying the government’s speech instead of (or in addition to) its consequences, concluding that the Establishment Clause forbids the government’s speech that abandons religious neutrality and seeks to advance religion (or nonreligion). As we’ll see, our reactions to these various approaches turn largely on our preferences among the many values thought to underlie the Establishment Clause. We’ll also see that these approaches illustrate available tools for thinking about whether and when the government’s speech threatens equal protection, due process, free speech, and other constitutional protections. Chapter 2 also briefly considers whether and when constitutional challenges to the government’s speech are justiciable—that is, whether the federal courts have the constitutional power to decide them. Later chapters will return to these questions.
Focusing on the Equal Protection Clause, Chapter 3 starts by surveying how the government’s speech sometimes advances equality, and sometimes undercuts it. It then asks a series of familiar questions about the consequences of, as well as the motivations underlying, the government’s speech. First, it explores how the government’s speech can change its listeners’ choices or opportunities in discriminatory ways—as can be the case, for example, when the government’s expression commands, enables, or encourages discrimination by private parties; or when its speech deters its targets from exercising constitutional rights or pursuing important life opportunities. It then investigates whether we can understand the Equal Protection Clause to restrain the government’s speech that inflicts expressive harm by disparaging its targets based on their race, gender, sexual orientation, or other class status. Moving from the effects of the government’s speech to its purposes, this chapter then considers whether the government’s speech offends the Equal Protection Clause when motivated by the government’s discriminatory intent, including but not limited to its animus—that is, the government’s bare desire to harm certain individuals or groups. These possibilities require that we ponder a number of tough questions, like the requisite causal connection between the government’s speech and discriminatory consequences, and the dangers of deterring the government’s laudable efforts to engage important conversations about discrimination and equality.

Chapter 4 interrogates whether and when the Due Process Clause restrains the government’s speech, like its lies and other falsehoods, its disclosures of private information, and its humiliating or cruel expressive choices. It starts by looking at the effects of the government’s speech, more specifically by studying the government’s speech that interferes with its listeners’ choices or opportunities in ways that would violate the Due Process Clause if the government accomplished those same changes through its lawmaking or other regulatory action. Think, for example, of law enforcement officers’ lies that coerce their targets’ waiver of constitutional liberties, or the government’s lies that deny their targets the ability to exercise reproductive or voting rights. Next, it turns to the expressive, or dignitary, harms sometimes inflicted by the government’s speech, investigating whether the government’s speech that shames or humiliates its targets offends due process protections. Finally, it moves from the effects of the government’s speech to its purposes, considering whether the Due Process Clause limits the government’s speech motivated by its intent to interfere with protected liberties or to inflict cruelty. Judicial precedents here are rarer, but law enforcement officers crossed the line, according to one federal court, when they falsely claimed that they had a warrant to extract drugs involuntarily from a suspect’s vagina such that she then extracted them herself.

Chapter 5 turns to the government’s speech about others’ speech, probing when, if ever, the government’s expressive choices violate the First Amendment’s Free Speech or Free Press Clauses. It starts by considering the harmful consequences of the government’s speech, more specifically how the government’s speech can change, deter, or punish its targets’ speech. This can be the case, for instance, of the government’s threats, disclosures, and designations that silence its targets’ speech, and its expressive attacks that incite or encourage third parties to punish its targets for their speech. It then considers the expressive, or dignitary, harms inflicted by the government’s disparaging speech that targets disfavored speakers, and whether that speech infringes Free Speech or Free Press Clause protections apart from any effect on its targets’ choices and opportunities. Finally, turning from the
consequences of the government’s speech about speech to its purposes, it considers whether the Free Speech and Press Clauses prohibit the government’s expressive choices motivated by its intent to silence or punish speech to which it objects. Once again, these problems require us to wrestle with difficult questions of causation, intent, and unintended consequences.

Chapter 6 explores longstanding controversies over the government’s speech to influence the public’s views about ballot initiatives, referenda, and certain other political contests subject to vote by the people themselves or by their elected representatives. Those challenging the government’s expressive efforts in these settings emphasize either or both of two sets of arguments. Invoking concerns about the consequences of the government’s speech, one argument posits that the government’s voice—with its advantages of resources and power—inevitably distorts public discourse and plays favorites in ways fundamentally unfair to those with other views. The other argument, steeped in concerns about the government’s purposes for speaking, maintains that the government’s role as sovereign requires it to refrain from taking sides in these contests. The chapter explains these arguments as applied to the government’s persuasive speech in candidate campaigns, and then considers whether those objections still hold when applied to the government’s persuasive speech in ballot and legislative campaigns. It closes by identifying certain conditions that exacerbate or diminish the constitutional dangers posed by that speech.

Finally, Chapter 7 identifies available responses to the government’s speech that endangers constitutional values. It starts by outlining possibilities for, and barriers to, constitutional remedies that include injunctive relief, declaratory relief, and damages. It then turns to a range of legislative, structural, and political possibilities for constructively influencing the government’s expressive choices apart from constitutional litigation.

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The chapters that follow consider not only how courts, policymakers, and commentators to date have approached the constitutional questions sparked by the government’s speech, but also how we might answer them going forward. By identifying and exploring relevant pockets of theory and doctrine that help us think about these questions—and noting their difficulties, gaps, and ambiguities—this book seeks to stitch together a coherent framework for understanding the relationship between the government’s speech and our constitutional rights.

Because the constitutional standards that apply to the government as a speaker differ so dramatically from those that apply to the government as a regulator of other parties’ speech, the first step in our constitutional analysis is figuring out whether the government itself is speaking or instead regulating. The next chapter embarks on that inquiry.

... [skips to chapter 3]
Imagine that you’re a ninth-grader sitting in class at your public school. This week, your teacher is lecturing on the school’s required sex education component, and starts today’s discussion by announcing: “Our state’s legislature wants you to know that homosexuality is not a lifestyle acceptable to the general public, and that homosexual conduct is a criminal offense under the laws of our state.”

Maybe you wonder if you’re gay. Maybe you’ve never thought much about it. Maybe you and your family believe, as your church teaches, that homosexuality defies the will of God. Maybe your friends use slurs to describe folks they suspect of being gay. Maybe your parents are gay. Does the government’s speech change how you, or your classmates, act? How you feel? Does the government’s speech violate the Constitution?

The last chapter explored whether and how the government’s speech “establishes” religion in violation of the Establishment Clause. This chapter considers whether and how the government’s speech violates the Equal Protection Clause, which forbids the government from “deny[ing] any person within its jurisdiction the equal protection of the laws.”

The Diversity and Complexity of The Government’s Speech About Equality

This chapter starts with a brief but illustrative sketch of the government’s wide-ranging speech about equality. We’ll see heroes, villains, and, as is so often the case with humans and with governments, some that are hard to characterize. These stories show that some of the challenges that confront us today are far from new, even if they sometimes feel different in degree and occasionally in kind. The more we attend to the government’s speech, the better (one hopes) our thinking about it: recognizing the diverse array of the government’s speech about equality helps illuminate the importance and difficulty of the second-stage government speech problems sometimes generated by that speech.

The Good (if Sometimes Complicated)

Through its speech, the government can assert moral and political leadership in the nation’s ongoing struggles against bigotry and hatred. Consider President Lyndon B. Johnson’s nationally televised exhortation that "We Shall Overcome" in response to the violent attacks on those marching for African-Americans’ voting rights in Selma, Alabama. Think too of President Barack Obama’s...
appeals for justice and grace when eulogizing the African-Americans murdered by a white supremacist they had welcomed into their South Carolina church.82

The government’s choices about who and what to honor in our public places can also communicate its views about equality and inclusiveness. As one of many examples, think of the boulevards and schools named after civil rights icon Martin Luther King Jr. Among the most expressive of the government’s choices is its decision to fly the Confederate flag above or adjacent to its capitol, or to feature Confederate monuments in its public spaces—and the government’s choice to take them down is equally expressive. As New Orleans Mayor Mitch Landrieu explained his city’s decision first to erect, and much later to remove, its statues honoring Confederate leaders:

The historic record is clear: the [] statues were not erected just to honor these men, but as part of the movement which became known as The Cult of the Lost Cause. This “cult” had one goal – through monuments and through other means – to rewrite history to hide the truth, which is that the Confederacy was on the wrong side of humanity. . . . These statues are not just stone and metal. They are not just innocent remembrances of a benign history. These monuments purposefully celebrate a fictional, sanitized Confederacy; ignoring the death, ignoring the enslavement, and the terror that it actually stood for. After the Civil War, these statues were a part of that terrorism as much as a burning cross on someone’s lawn; they were erected purposefully to send a strong message to all who walked in their shadows about who was still in charge in this city. . . . Surely we are far enough removed from this dark time to acknowledge that the cause of the Confederacy was wrong. And in the second decade of the 21st century, asking African Americans—or anyone else—to drive by property that they own; occupied by reverential statues of men who fought to destroy the country and deny that person’s humanity seems perverse and absurd. . . . Here is the essential truth: we are better together than we are apart.83

Through its apologies the government can unite and heal. Congress offered an official apology for the government’s World War II internment of 120,000 Japanese-Americans: “For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.”84 Later still, the Solicitor


84 See DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 169 (2016) (“In 1988, Congress passed and Reagan signed the Civil Liberties Act, which provided $20,000 for each interned Japanese American, and contained an extraordinary official apology.”).
General’s office, the office that represents the federal government in the Supreme Court, apologized for its falsehoods when defending the internment from constitutional challenge.\(^{85}\)

Even better when the government, through its speech, rejects appeals to division and hatred in the midst of crisis (rather apologizing long afterwards). President George W. Bush repudiated anti-Muslim bigotry in a speech at a mosque immediately after the 9/11 attacks, in which he emphasized Islam as a religion of peace and highlighted the “incredibly valuable contribution[s]” Muslim Americans make to the United States as “doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads.” He underscored that Americans’ failure to treat their fellow citizens with respect “represent[s] the worst of humankind,” asserting that “[t]hose who feel like they can intimidate our fellow citizens . . . should be ashamed of that kind of behavior.”\(^{86}\) In a similar vein, in 2010 New York Mayor Michael Bloomberg defended plans to build an Islamic cultural center near the lower Manhattan site of the former World Trade Center:

Let us not forget that Muslims were among those murdered on 9/11 and that our Muslim neighbors grieved with us as New Yorkers and as Americans. We would betray our values—and play into our enemies’ hands—if we were to treat Muslims differently than anyone else. In fact, to cave to popular sentiment would be to hand a victory to the terrorists—and we should not stand for that.\(^{87}\)

But governments – like most institutions and indeed all of humanity – are riddled with contradictions, inconsistencies, and mixed motives. The government’s aims when extolling equality are often inspired by strategic as much as by moral objectives. After years of resisting the women’s suffrage movement, for instance, President Woodrow Wilson finally relented, in great part because of his need for women’s support for the nation’s World War I efforts. He made a special, and unprecedented, appearance in the Senate to plead personally for the Senate’s ratification of the Nineteenth Amendment: “This war could not have been fought . . . if it had not been for the services of women . . . not merely in the fields of effort in which we have been accustomed to see them work, but wherever men have worked and upon the very skirts and edges of the battle itself.”\(^{88}\) “Wilson’s unprecedented appearance in the Senate created controversy,” law professor William Ross notes, as no President previously had made such a direct appeal on the Senate floor.\(^{89}\) The Senate, however, did not pass the Amendment until the following year, and it was finally ratified the year thereafter.

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\(^{89}\) Id.
As another illustration of the government’s often complicated motives when speaking about equality, foreign policy goals inspired the federal government’s Cold War speech opposing segregation as much as humanitarian aspirations. As legal historian Mary Dudziak explains:

U.S. government officials realized that their ability to promote democracy among peoples of color around the world was seriously hampered by continuing racial injustice at home. In this context, efforts to promote civil rights within the United States were consistent with and important to the more central U.S. mission of fighting world communism. The need to address international criticism gave the federal government an incentive to promote social change at home.90

Along these lines, President Eisenhower publicly identified the damage of Little Rock, Arkansas’s resistance to desegregation not in terms of its harm to African-Americans but instead to American prestige abroad: “[O]ur enemies are gloating over this incident and using it everywhere to misrepresent our whole nation. We are portrayed as a violator of those standards of conduct which the peoples of the world united to proclaim the Charter of the United Nations.” He called upon white Arkansans to stop their resistance so that “a blot upon the fair name and high honor of our nation in the world will be removed.”91

For another example of how the government’s laudable speech can be complicated, recall the early years of the AIDS epidemic. The 1986 “Surgeon General’s Report on Acquired Immune Deficiency Syndrome” was hailed as “a call to arms against the epidemic, complete with marching orders. For one of the first times, the problem of AIDS was addressed in purely public health terms, stripped of politics.”92 As U.S. Surgeon General C. Everett Koop wrote in the report:

At the beginning of the AIDS epidemic many Americans had little sympathy for people with AIDS. The feeling was that somehow people from certain groups “deserved” their illness. Let us put those feelings behind us. We are fighting a disease, not people. Those who are already afflicted are sick people and need our care as do all sick patients. The country must face this epidemic as a unified society. We must prevent the spread of AIDS while at the same time preserving our humanity.93

But the Surgeon General’s office only delivered this important message after five years of silence, a time when tens of thousands of Americans were dead or dying, with hundreds of thousands more to come. As journalist and author Randy Shilts observed, “Koop’s interest was historic for its impact, not its timeliness.”94 Even though the government’s public education frequently provides a powerful antidote to public health crises, the many potential federal, state, and local government actors equipped to speak to the AIDS epidemic struggled for years to overcome their political fears, and thus their silence, as the disease’s death toll climbed.

91 Id. at 133.
93 OFFICE OF THE SURGEON GENERAL, REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (1986).
The Bad and the Ugly

The government’s speech sometimes explicitly demonizes, disparages, and divides. Consider President Andrew Johnson’s 1867 annual message to Congress, in which he characterized African-Americans as possessing less “capacity for government than any other race of people. No independent government of any form has ever been successful in their hands. On the contrary, wherever they have been left to their own devices they have shown a constant tendency to relapse into barbarism.”\(^95\) Around the same time and along the same lines, a report by a Reconstruction-era Florida state commission “praised slavery as a 'benign' institution deficient only in its inadequate regulation of black sexual behavior.”\(^96\) In 1907, Mississippi Governor James Vardaman declared, “[I]f it is necessary every Negro in the state will be lynched; it will be done to maintain white supremacy.”\(^97\)

Flash forward to the mid-twentieth century when, in the aftermath of the Supreme Court’s decision in *Brown v. Board of Education*, many Southern governments and their officials engaged in an expressive campaign of “massive resistance” to attack the Court’s legitimacy and thus undermine enforcement of its desegregation orders. “The whole point of the Southern [campaign] was to confuse legal and moral issues and to undermine any sense of inevitability a Supreme Court decision normally commands,” historian Numan Bartley explains. “The propaganda barrage undermined the validity of the right of dissent and became a part of a general effort to stamp out the expression of unorthodox thought throughout the South.”\(^98\)

To these ends, Southern state legislatures expressed themselves through a variety of resolutions declaring the Court’s decision “null, void, and of no effect”\(^99\) and announcing their “condemnation of and protest against the illegal encroachment of the central government”\(^100\) As Bartley notes, these “resolutions per se were statements of policy – or in some cases protest – without direct force and certainly without constitutional sanction, as Virginia’s own attorney general pointed out. Yet the sound and fury surrounding interposition signified a deadly serious intent.”\(^101\) At the same time, a number of state and local governments made the expressive choice to fly the Confederate flag or incorporate it into their state symbols: Georgia redesigned its flag in 1956 to include the Confederate logo, and in 1962, South Carolina placed the Confederate flag atop its capitol.\(^102\) The governmental preachers of discrimination included George Wallace, who climbed the Alabama state capitol’s steps at his 1963 inauguration as governor, to declare:

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95 Eric Foner, *Reconstruction* 180 (1988); see also Dorothy Overstreet Pratt, *Sowing the Wind: The Mississippi Constitutional Convention of 1890* 74-75 (2018) (describing how a Mississippi state constitutional convention committee urged repeal of the 15th Amendment because “the white people only are capable of conducting and maintaining the government” and “the negro race, even if its people were educated, [are] wholly unequal to such great responsibility if they should come into control of such government”).
Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again, through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.103

(As an example of governmental counterspeech—that is, its speech in rebuttal to others’ speech, contrast Jimmy Carter’s inaugural address as Georgia governor eight years later: “The time of racial segregation is over.”104)

The campaign for massive resistance exemplified well-organized and well-financed government speech—in this case, the government’s speech committed to defend segregation and repress opposing views. For instance, in 1956 the state of Mississippi created its State Sovereignty Commission; officially charged with protecting the state from federal encroachment and usurpation, “the Commission in actuality was the state’s secret intelligence arm, committed and devoted to the perpetuation of racial segregation in Mississippi.”105 The Commission “sent ghost-written editorials to newspapers around the country and bought ads in 500 daily and weekly papers. By April 1964, the group had distributed over a million pamphlets and mailings, Sovereignty Commission records indicate.”106 Years later a federal court described the commission’s work, accomplished largely through its speech:

The Commission used several patterns in attempting to thwart desegregationists. The first was simply to warn local officials prior to boycotts, meetings, and voter registration drives, leaving the response to the local authority. The Commission also harassed individuals who assisted organizations promoting desegregation or voter registration. In some instances, the Commission would suggest job actions to employers, who would fire the targeted moderate or activist. The Commission caused applications for commissions as notaries public to be denied. The Commission maintained and distributed lists of people reported to be supporters of civil rights organizations or who supported public measures toward moderation or desegregation. These lists were made available to other law enforcement agencies . . . . The avowed intent of the Commission and its co-conspirators was to chill or

105 ACLU v. Mississippi, 911 F.2d 1066 (5th Cir. 1990).
preclude the Plaintiffs from speech, assembly, association, and the petition of government.\textsuperscript{107}

The government’s expressive choices have undercut equality in many other ways as well. Around the same time as the campaign of massive resistance, a Senate subcommittee charged with investigating “The Employment of Homosexuals and Other Sex Perverts in Government” concluded that “[o]ne homosexual can pollute a Government office.” It went on:

In the opinion of this subcommittee homosexuals and other sex perverts are not proper persons to be employed in Government for two reasons; first, they are generally unsuitable, and second, they constitute security risks. . . . [O]ur investigation has shown that the presence of a sex pervert in a government agency tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices.\textsuperscript{108}

Some states continue to insist that their public schools engage in homophobic expression. As of 2018, for example, Alabama and Texas still require public schools’ sex education curricula to include “[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public” and to assert that “homosexual conduct is a criminal offense under the laws of this state.”\textsuperscript{109} (Even though the Supreme Court ruled in 2003 that laws prohibiting same-sex sexual behavior are unconstitutional,\textsuperscript{110} several state legislatures have yet to repeal those laws, which thus remain on the books even though unenforceable. The legislatures’ failure to repeal them is itself an expressive choice.).

At times the government’s speech includes its deliberate wartime effort to instill or exacerbate the public’s fear and hatred of certain individuals or communities. In so doing, government speakers have often targeted immigrants, the government’s critics, and others perceived as outsiders. As legal scholar Geof Stone observes, “Fear has proved a potent political weapon.”\textsuperscript{111}

The government generally defends its wartime fearmongering speech as a necessary response to emergent threats to national security. But vulnerable individuals and groups pay a steep price when the government chooses its targets based on stereotypes and falsehoods rather than on evidence. Government speakers during World War I invited hatred of German immigrants in the United States, as President Wilson, for example, claimed that "the agents and dupes of the Imperial German Government" were actively engaged in a "sinister intrigue" within the United States, and

\textsuperscript{107} ACLU v. Mabus, 719 F. Supp. 1345 (S.D. Miss. 1989), vacated and remanded on other grounds.
\textsuperscript{108} S. Doc. No. 81–241, at 4 (1950); see also id. ("[I]t is generally believed that those who engage in overt acts of perversion lack the emotional stability of normal persons. In addition there is an abundance of evidence to sustain the conclusion that indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.").
\textsuperscript{110} Lawrence v. Texas, 539 U.S. 558 (2003).
that “many of our own people were corrupted.” The government's fearmongering speech in World War II included that which ultimately deprived its targets of their physical liberty. Dissenting from the Supreme Court’s decision in Korematsu v. United States, Justice Frank Murphy described how the government’s reports justifying its internment—that is, its imprisonment—of Japanese Americans were riddled with racist stereotypes and falsehoods:

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General’s Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as “subversive,” as belonging to “an enemy race” whose “racial strains are undiluted,” and as constituting “over 112,000 potential enemies . . . at large today” along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

. . . .

A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

The Court’s majority infamously disagreed, holding that the government’s action, concededly based on race and national origin, did not deny its targets the equal protection of the laws. Not until 2018 did the Supreme Court finally make clear that Korematsu “was gravely wrong the day it was decided.”

State and local governments also engage in fearmongering speech that stereotypes individuals and communities. Maine Governor Paul LePage announced at a 2016 press conference: “You try to identify the enemy and the enemy right now, the overwhelming majority of people coming in, are people of color or people of Hispanic origin.” For a time the New York Police Department’s (NYPD) training materials included videos that portrayed Muslims in stereotypically negative and inaccurate ways; one of the films declared that “the true agenda of much of Islam in America” is “to

112 President Woodrow Wilson, Address on Flag Day (June 14, 1917) (transcript available at https://www.presidency.ucsb.edu/node/206616) [https://perma.cc/U6C4-MPE5].
113 323 U.S. 214 (1944).
114 Id. at 235–40 (Murphy, J., dissenting).
infiltrate and dominate America.” Then-Attorney General Eric Holder ultimately repudiated the FBI’s use of similar training materials, observing that such materials “really have a negative impact on our ability to communicate effectively.”

In short, the government’s speech on matters of equality is both consequential and complicated. The government often speaks in an effort to engage ongoing national conversations about race, gender, national origin, sexual orientation, and more—and this speech can be valuable even when controversial, even when painful. On the other hand, the government’s speech that communicates hatred or hostility towards certain individuals or groups can encourage private parties’ discriminatory behavior, deter its targets from exercising their rights, and deliver messages of exclusion and second-class status. Like all hateful words, the government’s hateful speech hurts. But the government’s hateful speech sometimes hurts differently, and more dangerously, precisely because of its governmental source.

**WHEN, IF EVER, DOES THE GOVERNMENT’S SPEECH DENY ITS TARGETS “THE EQUAL PROTECTION OF THE LAWS”?**

Thinking about whether and when the Equal Protection Clause limits the government’s speech requires us to wrestle anew with what it means for the government to “deny to any person within its jurisdiction the equal protection of the laws.” In other words, determining when the government’s speech violates the Equal Protection Clause forces us to identify our theory of that Clause and its values, our answers to the questions “Why does the Constitution include the Equal Protection Clause? What goals does the Clause seek to achieve, and what harms does it strive to prevent?”

As Chapter 1 explained, the government’s speech generally advances free speech values so long as the message’s governmental source is transparent. This is because the government’s expression exposes its priorities to the electorate, informing the public’s political conversations and choices. Even the government’s hateful speech reveals a great deal about that government that can valuably shape the public’s decisions and facilitate democratic self-governance. That the government’s speech may be consistent with free speech values, however, does not mean that it is necessarily consistent with equal protection values, as very different purposes underlie the two constitutional protections.

The values animating the Equal Protection Clause are themselves deeply contested, as courts, policymakers, and scholars have long debated whether we should understand the Constitution’s commitment to equality as driven by anticlassification or instead antisubordination commitments.

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Anticlassification and Antisubordination Theories of the Equal Protection Clause

Anticlassification theory understands the Equal Protection Clause's core value as forbidding the government from classifying, or distinguishing among, individuals based on race or other class status regardless of the government’s motive for its distinction.\(^{119}\) In the context of race, for example, the anticlassification perspective views the Constitution as barring the government from “reduc[ing] an individual to an assigned racial identity for differential treatment.”\(^{120}\) Anticlassification theory is driven by the moral commands of colorblindness: “[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”\(^{121}\) But instrumental concerns about inflaming racial divisions also inform the anticlassification view: in Justice Clarence Thomas's words, governmental classifications are “precisely the sort of government action that pits the races against one another, exacerbates racial tension, and ‘provokes[s] resentment among those who believe that they have been wronged by the government’s use of race.’”\(^{122}\) Anticlassification advocates generally conclude that the government’s race-based classifications with immediate and obvious effects—its laws or other actions in which “the government distributes burdens or benefits on the basis of individual racial classification”—violate the Equal Protection Clause.\(^{123}\) Whether the government’s speech, unaccompanied by its lawmaking or other regulatory action, offends an anticlassification understanding of the Equal Protection Clause depends on whether we think that the government’s speech, by itself, “classifies” on bases that trigger suspicion and in ways that deny the equal protection of the law.

Antisubordination theory, in contrast, understands the Equal Protection Clause to bar the government’s actions that have the intent or the effect of perpetuating longstanding racial and other hierarchies, thus disadvantaging those who have historically suffered discrimination or political vulnerability. The antisubordination perspective also understands the Clause to permit the government’s actions that have the intent or effect of undercutting those hierarchies. Like anticlassification theory, antisubordination theory draws from both moral and instrumental rationales; it considers the government’s maintenance of subordinating hierarchies both morally repugnant and instrumentally disastrous, and finds “no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”\(^{124}\) Whether the government’s speech, unaccompanied by its hard law, offends an antisubordination approach to the Equal Protection Clause turns on whether it perpetuates traditional patterns of subordination.

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\(^{119}\) This chapter uses the term “class status,” rather than “protected class status,” to refer not only to those classifications that the Supreme Court has already identified as triggering heightened scrutiny (race, national origin, gender, and a few other characteristics), but also those that the Court has yet to characterize (for example, LGBTQ status).


\(^{122}\) Parents Involved, 551 U.S. at 759-60 (Thomas, J., concurring).

\(^{123}\) Id. at 719 (plurality opinion).

To illustrate the points of agreement and disagreement between the two theories, consider the decision in Brown v. Board of Education, where the Supreme Court held that public schools’ race-based segregation of their students violated the Equal Protection Clause. Here anticlassification and antisubordination perspectives converge to support the Court’s decision: the government classified students based on race, and the government perpetuated racial subordination by subjecting African-American students to inferior educational opportunities. But some disputes force us to choose between the two theories. For example, affirmative action programs that consider race as a plus-factor to expand employment and educational opportunities for those historically denied them generally offend anticlassification theorists (because the government is classifying on the basis of race) while appealing to antisubordination theorists (because the government is seeking to dismantle racial hierarchies).

The anticlassification and antisubordination perspectives reflect different answers to the questions: “What values does the Equal Protection Clause protect? A commitment to end the government’s classifications on certain bases? Or instead a commitment to end longstanding racial and other hierarchies?” Just as our theory of the Establishment Clause often drives our choice among noncoercion, nonendorsement, or neutrality approaches to that Clause’s protections, so too is the case with the Equal Protection Clause. Our intuitions about the sorts of governmental effects and governmental motives that violate the Clause turn on whether, when push comes to shove, we prefer an anticlassification or antisubordination understanding of the Clause.

With this as background, next we ask and answer a familiar series of questions about the consequences of, and the motivations underlying, the government’s speech. First, does the government’s speech change its targets’ choices or opportunities to their disadvantage, and does the Equal Protection Clause bar the government from causing those changes? Next, does the government’s speech inflict expressive, or dignitary, harm upon its targets by communicating hostility to or disrespect for its targets based on their race or other class status, and does the Equal Protection Clause bar the government from inflicting that harm? Finally, is the government’s speech motivated by animus or other discriminatory intent and, if so, does the Equal Protection Clause bar the government from speaking for those reasons?

FOCUSBING ON GOVERNMENT EXPRESSION’S EFFECTS:
SPEECH THAT CHANGES ITS TARGETS’ CHOICES AND OPPORTUNITIES IN DISCRIMINATORY WAYS

This approach to second-stage government speech problems focuses on the effects, the harmful consequences, of the government’s speech, identifying discriminatory change in its targets’ choices or opportunities as the constitutionally forbidden harm. As we’ll see, the government can achieve these changes by directing its speech to either of two different audiences: the government’s speech may cause third parties to deny opportunities to, or otherwise discriminate against, class members; and the government’s speech directly to its targets may change their opportunities and choices to their disadvantage.

We can expect disagreement about whether and when the government’s voice, by itself, achieves these constitutionally forbidden effects—just as we saw disagreements among advocates of the noncoercion principle about whether and when government’s religious speech coerces its listeners’ choices in violation of the Establishment Clause. The quicker we are to find a causal connection between the government’s speech and discriminatory changes in its targets’ opportunities and choices, the more we encourage the government to think twice about its expressive choices, the more we protect its targets from the harms of that speech. But the more we constrain the government’s speech, the more we may also cramp its communication in counterproductive ways. This recurring tension forces us to grapple with important and difficult questions about the requisite causal connection between the government’s speech and discriminatory consequences in violation of the Equal Protection Clause.\textsuperscript{126}

\textit{The Government’s Speech That Commands or Coerces Others to Discriminate}

The Supreme Court interprets the Equal Protection Clause to forbid the government from intentionally discriminating based on race, gender, or certain other characteristics (except in rare circumstances where the government can justify its choice under heightened scrutiny).\textsuperscript{127} The Court has also interpreted the Clause to forbid the government’s speech that commands, threatens, or otherwise coerces others to discriminate on these bases. Consider the following illustration: in the 1960s, New Orleans city officials issued a statement announcing their intent to enforce trespass law to prevent the desegregation of restaurants and other public accommodations. In \textit{Lombard v. Louisiana}, the Supreme Court found that the city’s statement by itself commanded others to continue to segregate, and that that command violated the Equal Protection Clause:

As we interpret the New Orleans city officials’ statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct. We have just held . . . that where an ordinance makes it unlawful for owners or managers of restaurants to seat whites and Negroes together, a conviction under the State’s criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance.\textsuperscript{128}

In other words, if the Equal Protection Clause forbids New Orleans from enacting an ordinance requiring restaurants to segregate, then it also forbids the city from commanding continued segregation, or threatening punishment for those who resist, since that speech is functionally

\textsuperscript{126} In \textit{Washington v. Davis}, the Supreme Court held that government actions that impose a discriminatory effect based on protected class status do not violate the Equal Protection Clause unless accompanied by a facial classification or some other evidence of the government’s intent to distinguish based on protected class status. 426 U.S. 229, 239 (1976). Here we address situations in which government’s speech references class status on its face, and explore the circumstances under which we should understand the government’s speech to be imposing a discriminatory effect as well.


\textsuperscript{128} 373 U.S. 267, 273 (1963).
indistinguishable from the government’s own discrimination. This presents an easy case, in part because it does not require us to choose between anticlассification and antisubordination theory: here the government’s speech classified based on race, and it perpetuated racial subordination in the form of segregation.

The Government’s Speech That Encourages Others to Discriminate

What if the government’s speech does not command, threaten, or otherwise coerce its listeners, but instead encourages them to discriminate against others based on targets’ race or other class status? In Anderson v. Martin, the Court held that the government’s racially identifying speech on a ballot violated the Equal Protection Clause because it enabled and encouraged voters to discriminate based on race. In so holding, the Court explained how the government’s speech facilitated voters’ discriminatory decisionmaking:

[This case] has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race. In the abstract, Louisiana imposes no restriction upon anyone’s candidacy nor upon an elector’s choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process – the instant before the vote is cast – the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.

The Court enjoined the statute’s enforcement, concluding “that the compulsory designation by Louisiana of the race of the candidate on the ballots operates as a discrimination against appellants.” Did the government command voters to discriminate based on race, or threaten them if they did not? No. But as the Court pointed out, “[T]hat which cannot be done by express statutory prohibition cannot be done by indirection.”

“The vice,” the Court made clear, lies “in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.” This is an empirical prediction—and, in my view, an accurate one—that the government’s speech in this setting will cause some voters to discriminate based on race. Through its speech, the government designated, and thus classified, candidates based on race. And it did so in a subordinating way, by talking about candidates’ race at

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129 Recall from Chapter 2 that, in the Establishment Clause context, advocates of the noncoercion principle ask only whether the government’s religious speech coerces its listeners’ behavior. As we’ll see, there are other ways to describe the potential causal connections between the government’s speech and changes in its targets’ choices, and we can understand the government’s speech in some of those circumstances to violate specific constitutional provisions.

130 375 U.S. 399, 402-03 (1964).

131 Id. at 401-02.

132 Id. at 404.

133 Id. at 402.
a critical point in voters’ decisionmaking at a time and in a place when African-Americans’ voting rights were under siege.

In other circumstances where courts must determine whether the government has unconstitutionally caused a nongovernmental party to take action that the Constitution forbids the government itself to undertake, the Supreme Court tells us that the government “normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” In both Lombard and Anderson, we can see the requisite causal connection between the government’s speech and discriminatory consequences. In Lombard, the government threatened the exercise of its coercive power against those who resisted its command to segregate. In Anderson, the government encouraged voters’ discriminatory decisions based on race. Although we can imagine other situations in which the parties contest the causal connection between the government’s speech and discriminatory change in its targets’ choices and opportunities, those causal questions—however difficult—are neither new nor uncommon.

The Government’s Speech That Alters or Interferes With Its Targets’ Opportunities in Discriminatory Ways

Next we turn to the effects of the government’s speech not on third parties but instead on its targets themselves, more specifically on their choices and opportunities. Under what circumstances does the government’s speech to those listeners, by itself, limit or otherwise disadvantage their opportunities in violation of the Equal Protection Clause?

Longstanding antiharassment law recognizes that speech can inflict discriminatory, and thus unlawful, effects on targets’ educational or job opportunities when it forces its targets to endure miserable environments because of their race, gender, or other class status. More specifically, a wide range of federal, state, and local statutes prohibit discrimination by public and private actors in education, employment, housing, and other settings, with the illegal discrimination interpreted to include verbal harassment that is sufficiently severe or pervasive to create a hostile environment. When the harassing speaker is a government entity, that speech can also violate the Equal Protection Clause, as federal courts have made clear that “harassment by state actors violates the Fourteenth Amendment . . . .” Verbal harassment in the government’s workplace, by itself, is sometimes sufficiently severe or pervasive to violate the Equal Protection Clause.

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135 E.g., Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (interpreting federal statute prohibiting job discrimination to forbid unwelcome workplace speech on the basis of protected status that is sufficiently severe or pervasive to create a hostile work environment and alter the terms and conditions of employment); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (same); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (interpreting federal statute prohibiting sex discrimination in federally funded educational activities to forbid “harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”).
136 Tuggle v. Mangan, 348 F.3d 714, 720 (8th Cir 2003); see also Williams v. Herron, 687 F.3d 971, 978 (8th Cir. 2012), cert. denied, 568 U.S. 1160 (2013) (“[S]ection 1983 sexual harassment claims are treated the same as sexual-harassment claims under Title VII.”).
137 E.g., Wright v. Rolett Cnty, 417 F.3d 879, 882 (8th Cir. 2005), cert. denied, 546 U.S. 1173 (2005) (concluding that verbal harassment, by itself, can constitute unconstitutional sexual harassment under 42 U.S.C. section 1983 and
Think of a government official’s racist, misogynist, or other harassing speech to workers in the public workplace that is sufficiently severe or pervasive to create a hostile work environment and alter the terms and conditions of employment. The coercive potential of the government’s workplace speech can be severe, as workers confronted with a governmental employer’s harassing speech on the job have limited ability to leave or rebut because of their economic dependence on their continued employment. Here the government’s expression can change its targets’ job opportunities in a discriminatory way. Just as compelling public employees to endure miserable conditions for discriminatory reasons (for example, relegating targets to an unheated office in the dead of winter based on race or gender) violates equal protection, so too does forcing them to endure a gauntlet of verbal abuse. The government’s harassing speech that alters the terms and conditions of employment based on race or sex classifies based on race and sex, and perpetuates longstanding subordination.

To be sure, constitutional claims of this sort are not easy to win. Challengers must often show a longstanding pattern of epithets, slurs and more to establish that the government’s speech is sufficiently severe or pervasive to alter the terms and conditions of employment. And governmental immunities (discussed in more detail in Chapter 7) often limit the government’s liability for monetary damages. My point for now is that sometimes the government’s harassing speech, by itself, alters its targets’ job opportunities in violation of the Equal Protection Clause.

Relatedly, the government’s speech based on protected class status sometimes deter its targets from pursuing certain opportunities as effectively as an outright command. Consider a government employer that says or writes “Only whites need apply.” Here too the government’s speech offends both anticlassification and antisubordination understandings of the Equal Protection Clause: it classifies its targets’ job opportunities based on race, and it perpetuates longstanding hierarchies by reserving those opportunities for whites. We can imagine other governmental expression that discourages its targets from seeking certain opportunities. Imagine the effect, on a gay or lesbian worker planning to apply for a government position, of the Senate subcommittee report stating that “[i]n the opinion of this subcommittee homosexuals and other sex perverts are not proper persons to be employed in Government.”

In short, both anticlassification and antisubordination theorists can understand the Equal Protection Clause to forbid the government’s speech that commands, threatens, and coerces third parties to discriminate; the government’s speech that encourages third parties to discriminate; and the government’s speech that creates a hostile environment or otherwise disadvantages its targets’ opportunities. We can understand the Equal Protection Clause to prohibit the government’s speech that achieves those effects, even as we disagree about when the government’s speech, without more, does so.


138 See id.

139 See S. REP. NO. 81–241, at 4 (1950). Note that the subcommittee report itself is immune from liability under the Speech and Debate Clause, discussed in more detail in Chapter 7. But no such immunity would attach if some other governmental entity, like the Office of Personnel Management issued the same report, or uttered the same statement.
FOCUSING ON GOVERNMENT EXPRESSION’S EFFECTS:
SPEECH THAT INFlicts EXPRESSIVE HARM BY DE尼GRATING ITS TARGETS
BASED ON CLASS STATUS

Next, maintaining a focus on the consequences of the government’s speech, when, if ever, does the Equal Protection Clause forbid the government’s speech that inflicts harmful effects other than disadvantaging its targets’ choices and opportunities in discriminatory ways? More specifically, does the Equal Protection Clause deny the government the power simply to say that its targets are inferior or second-class citizens because of their race or other class status? If so, how do we determine whether the government has communicated this message of inferiority? (As we’ll see, the perceived difficulty of the second question leaves some reluctant to answer “yes” to the first).

Recall the nonendorsement approach to second-stage Establishment Clause problems, which interprets the Clause to prohibit the government’s speech that inflicts expressive, or dignitary, harm without more. Remember, more specifically, that adherents of the nonendorsement principle identify equality and inclusiveness as among the key values informing the Clause, and thus conclude that the government inflicts a constitutional wrong when its speech sends a message of inferiority based on religion or nonreligion entirely apart from whether it coerces its listeners. As Richards Pildes and Niemi explain:

On this view, the meaning of a governmental action is just as important as what that action does. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution. 140

An emphasis on expressive, or dignitary, harm thus identifies the constitutional wrong as the government’s communication of this disrespect, regardless of whether it causes material disadvantage or distresses its targets; the emotional resilience of the target does not erase the harm.

Those who identify equality and inclusiveness as among the key values underlying the Establishment Clause may well share a similar view of the Equal Protection Clause, the constitutional provision that is all about equality. If we understand the Equal Protection Clause to require that government treat individual members of the polity with equal respect and equal concern regardless of class status, then the government’s speech alone may violate this constitutional commitment when it denigrates its targets, when it communicates exclusion or inferiority based on that class status. And the more the government denigrates a group, the easier it becomes to treat them differently, and not just talk about them differently.

If we understand the Equal Protection Clause to prohibit the government from inflicting discriminatory expressive harm, the next question is whether and when the government’s message

in fact inflicts that harm. Remember that the nonendorsement principle’s adherents in the Establishment Clause setting ask whether a reasonable observer would understand the government’s message as endorsing or denigrating religion (or nonreligion). So too would an expressive harm approach to the Equal Protection Clause turn on whether a reasonable listener understands the government’s message to disparage its targets based on their race or other class status. Assessments of a message’s meaning can be hotly contested, but law has long wrestled with related questions. Most relevant, statutory antidiscrimination law looks to the perceptions of a reasonable target when determining whether harassing speech in the workplace is sufficiently severe or pervasive to create a hostile environment and alter the terms and conditions of the target’s employment.\textsuperscript{141}

One’s comfort or discomfort with an expressive harm approach to the Equal Protection Clause likely turns in part on one’s theory of the Clause and the values it protects. Those who adopt an antisubordination perspective may feel that the government’s speech violates the Clause when it delivers a message that reinforces traditional hierarchies, as would be the case of the government’s speech that denigrates the competence, or advocates the exclusion, of women or people of color. But under this view, the government’s expression of concern for some groups does not necessarily involve disparagement of others: teaching African American history is not the same as teaching white supremacy, and recognizing that race has mattered in American life is not the same as disparaging white people.

In contrast, those who adopt an anticlassification perspective may be reluctant to characterize the government’s speech that disparages its targets for their class status as a “classification”—a distribution of benefits and burdens—for equal protection purposes. Under this view, the difference between “hard” and “soft” power, between the government’s regulatory action and its speech, may be especially relevant to a constitutional provision that demands “the equal protection of the laws.”

But some anticlassification adherents might emphasize the theory’s roots in both moral and instrumental rationales to conclude that the government’s hateful speech is not only morally offensive in demeaning its targets but also instrumentally dangerous by contributing to social divisions and instability. Recall that “[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”\textsuperscript{142} As some of the illustrations offered at the beginning of this chapter make clear, the government’s speech can certainly express the government’s judgment of a person based on ancestry rather than on merit.\textsuperscript{143} As another illustration, imagine a public school that announces that it will offer electives in white supremacy—the theory that the white race is superior to all others—that no one is required to attend or teach. (This example is not so far-fetched: during the Southern campaign for massive resistance in the 1950s and 1960s, “[s]egregationists sometimes sought positively to promote the teaching of white

\textsuperscript{142} Rice v. Cayetano, 528 U.S. 495, 517 (2000).
\textsuperscript{143} E.g., ERIC FONER, RECONSTRUCTION 180 (1988) (quoting President Andrew Johnson’s state of the union address in which he claimed that “wherever [African-Americans] have been left to their own devices they have shown a constant tendency to relapse into barbarism.”).
supremacy in the public schools.” 144 Interpreting the Equal Protection Clause to forbid the government’s infliction of expressive harm based on race or other class status would doom these expressive choices. 145

So the government’s speech that denigrates its targets based on certain class statuses communicates a message that is subordinating and thus repugnant to many antisubordination theorists. And the government’s speech that denigrates its targets on these bases may or may not classify its targets in ways that disturb anticlassification theorists. 146

Criticisms of an expressive harm approach to the Equal Protection Clause are reminiscent of those levelled against the nonendorsement approach to the Establishment Clause. Those who are skeptical worry that assessing the government’s expressive meaning inevitably brings about inconsistent, unpredictable, and unprincipled results. Relatedly, some may fear that the indeterminacy and thus uncertainty of this inquiry threaten to chill or deter the government’s laudable expressive efforts to promote equal protection values. They may also wonder about further unintended, and damaging, consequences, as constitutional constraints on the government’s transparent expression of bigotry might drive that bigotry underground in ways that impede political mobilization in opposition. 147

Next we turn from the possible consequences of the government’s speech from an Equal Protection perspective to consider instead the government’s motivations for speaking. (As noted in the Introduction, in this book I generally use the terms “intentions,” “purposes,” and “motivations” interchangeably. 148 We can, and in certain contexts should, recognize shades of distinction among these terms, but for now I put those subtleties aside.)

FOCUSBING ON THE GOVERNMENT’S PURPOSES WHEN SPEAKING:
THE GOVERNMENT’S SPEECH MOTIVATED BY ANIMUS

This chapter earlier considered whether the government’s speech that intended a discriminatory effect—like the government’s speech that commands or invites discrimination—

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145 The majority identified expressive harm as among the injuries inflicted by federal law that excluded same-sex couples from the federal definition of marriage. See United States v. Windsor, 570 U.S. 744, 772 (2013) (“And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).
146 See Bush v. Vera, 517 U.S. 952, 980 (1996) (“Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.”).
147 But it’s also true that the cognitive effort required by government speakers who must then express bigotry in more veiled ways may be valuable in and of itself; in other words, there may be value in giving the government reason to take care with its expressive choices. See Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 600 (4th Cir. 2017) (“To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.”), vacated and remanded by Trump v. Int’l Refugee Assistance Project, 138 S. Ct. 353 (2017).
actually achieved that effect. Now it considers whether the Equal Protection Clause forbids the government’s speech motivated by animus regardless of its effect—in other words, apart from whether it harms its targets’ opportunities or inflicts expressive harm.\textsuperscript{149} Does the Equal Protection Clause constrain the government’s speech motivated by animus, without more?

The government’s intentions are relevant to courts’ assessment of whether its lawmaking or other regulatory actions violate the Equal Protection Clause. The Court’s Equal Protection Clause doctrine—that is, its body of law interpreting and applying the Clause—treats the government’s actions with great suspicion when it intentionally distinguishes among individuals on certain bases.\textsuperscript{150} When courts find that the government intended to draw such distinctions, they treat the government’s choices with suspicion; in other words, the government bears the burden of showing an unusually tight connection between its choice and an extremely strong government interest, a burden that the government usually fails to meet.\textsuperscript{151}

On several occasions the Court has also held that the government’s lawmaking and other regulatory actions automatically violate the Equal Protection Clause when motivated by the government’s “bare desire to harm”—its animus—because such a motivation “cannot constitute a legitimate governmental interest” under any level of scrutiny.\textsuperscript{152} More specifically, in \textit{U.S. Dep’t of Agriculture v. Moreno}, the Supreme Court struck down a federal limitation on those eligible for food stamps that it found to be motivated by “a bare congressional desire to harm a politically unpopular group” (“hippies”, in Congress’s terms, who formed households of unrelated folks).\textsuperscript{153} In \textit{City of Cleburne v. Cleburne Living Center}, the Court nullified a city’s decision to deny a zoning permit to a group home for the mentally disabled because the Court found the decision based “on an irrational prejudice against” those individuals.\textsuperscript{154} In \textit{Romer v. Evans}, the Court invalidated Colorado’s state constitutional amendment that barred local jurisdictions from protecting their citizens from sexual

\textsuperscript{149} Of course, we can anticipate that when the government intends to send a hurtful message it will also often succeed in doing so. Perhaps for this reason, the Court has sometimes characterized the constitutional injury involving animus as involving both purpose and effect. See \textit{United States v. Windsor}, 570 U.S. 744, 775 (2013) (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

\textsuperscript{150} Under the Supreme Court’s equal protection doctrine, the government’s intent is generally necessary to a finding that the government’s action violated the Clause; in other words, the Court does not apply heightened scrutiny to government actions that have a discriminatory effect based on protected class status unless accompanied by the government’s intent to draw distinctions based on protected class status. \textit{Washington v. Davis}, 426 U.S. 229, 239 (1976). Although this section focuses on the government’s speech motivated by animus, we can imagine situations in which the government’s speech has some other discriminatory motive. In that case, if we understand the Equal Protection Clause to constrain the government’s speech when motivated by discriminatory intent, without more, we’d apply heightened scrutiny to the government’s speech inspired by that intent.

\textsuperscript{151} For the rare exception of a governmental program that survives strict scrutiny, see \textit{Grutter v. Bollinger}, 539 U.S. 306 (2003) (upholding the University of Michigan School of Law’s consideration of race as a plus-factor in its admissions decision as narrowly tailored to achieving the school’s compelling educational interest in a diverse student body).

\textsuperscript{152} See \textit{U.S. Dep’t of Agriculture v. Moreno}, 413 U.S. 528, 534 (1973) (“For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} 473 U.S. 432, 450 (1985).
orientation discrimination, concluding that Colorado’s action was “inexplicable by anything but animus toward the class it affects.” And in United States v. Windsor, the Court struck down a federal law that excluded same-sex couples from its definition of marriage once it found that the law had “the purpose and effect to disparage and to injure” those couples. Finally, in Trump v. Hawaii, the majority suggested that a governmental choice “inexplicable by anything but animus” would violate the Constitution (even as it concluded that motivations other than animus could support the Administration’s travel ban restricting the nationals of several majority-Muslim countries from entering the United States).

So if the Equal Protection Clause limits the government’s power to act when motivated by animus—its hostility towards or strong dislike for certain individuals or groups—does it also limit the government’s power to speak, without more, when motivated by animus? Those who answer “yes” may do so for instrumental reasons: if the government speaks with a “bare desire to harm,” it is probably more likely actually to cause harm. Those who answer “yes” may do so based on moral intuitions: it’s just wrong for the government to try to hurt people through words as well as deeds. And they may answer “yes” based on a theory of the government’s constitutional power: the Constitution does not empower the government to try to harm us or to otherwise try to achieve objectives that are not public-regarding. As the Court declared in Romer, “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.”

For an illustration of how an animus inquiry might apply to the government’s speech, consider public schools’ curricular decisions, decisions that communicate the ideas and values that the government chooses to impart. In 2010, more specifically, Arizona’s legislature passed a law barring its public schools from teaching classes that “promote resentment toward a race or class of people,” “are designed primarily for pupils of a particular ethnic group,” or “advocate ethnic solidarity instead of the treatment of pupils as individuals.” The state board of education then applied this law to put a stop to Tucson’s Mexican American Studies program. Teachers, students, and parents challenged Arizona’s decision on equal protection grounds, alleging that it was motivated by animus against Latinos. In determining whether a government’s lawmaking and other regulatory action was motivated by animus or other discriminatory intent, the Court has looked to decisionmakers’ own statements, the historical background of the government’s choice, the specific sequence of events leading up to its choice, any departures from normal processes in making the choice, and any lack of a relationship between the government’s choice, and its stated ends (which

156 570 U.S. 744, 775 (2013).
158 See WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 4-5 (2017) (explaining that animus doctrine seeks to ensure that the government’s choices are motivated by public-regarding goals).
159 See id. at 109 (explaining that animus doctrine seeks to ensure that the government’s choices are motivated by public-regarding goals).
160 Romer, 517 U.S. at 635.
would create doubt about the credibility of the government’s self-described purposes). After applying those factors to the choices made by Arizona’s decisionmakers, a federal district court found that the law’s enactment and enforcement were motivated by the government’s animus. The state’s action in this case constituted hard law because it docked noncompliant districts 10% of their state education funding, but we can imagine softer counterparts, where a public school simply announces that it will stop teaching Latino history, and the same evidence reveals that animus inspired its choice.

To be sure, the Court’s animus doctrine triggers substantial controversy even when used to strike down governmental actions as violating the Equal Protection Clause, much less its speech. The doctrine’s detractors charge that it is not only unworkable, but also threatens instrumental harm of its own. To elaborate, critics of the animus doctrine object that the judicial effort to ascertain the government’s motives is too indeterminate and subjective an inquiry, especially when multiple decisionmakers with mixed, and sometimes mysterious, motives are involved. They also fear that branding governmental decisionmakers as motivated by animus denigrates those decisionmakers themselves, exacerbating social conflict and polarization. Along these lines, legal scholar Steven Smith is among those to argue that the Court’s animus doctrine fuels more division and exclusion rather than less: “[i]t is hard to imagine a jurisprudence better calculated to undermine inclusiveness, destroy mutual respect, and promote cultural division.”

To illuminate the three approaches’ various strengths and limitations, let’s apply them to a few problems, both real and hypothetical.

**Comparing and Contrasting the Three Approaches in Action**

Consider an Equal Protection Challenge brought by African-Americans to their state’s choice to display the Confederate flag on its property or as part of its state flag.

If we focus on harm to protected class members’ choices and opportunities, we ask whether the flag’s display commanded, coerced, or encouraged third parties to discriminate against African Americans; whether it reasonably deterred African-Americans from seeking certain opportunities; or (if displayed in public workplaces or schools) whether it created a hostile environment. If we focus on expressive harm, we ask whether reasonable onlookers would understand the flag to communicate a message of racial inferiority or second-class status. And if we focus on the government’s purpose for its choice, we ask whether the government’s choice was motivated by animus towards African-Americans.

We can see these various approaches at work—or not—in the handful of lower court decisions to date that have considered Equal Protection Clause challenges to governments’ display of the Confederate flag. All of these courts rejected the claims, with several ruling against the challengers.

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164 González, 269 F. Supp. 3d at 965-73.
on the merits and one, more recently, rejecting the challenge for lack of standing. In so holding, all of the courts appeared to conclude that the government’s choice to display the Confederate logo would violate the Equal Protection Clause only if its choice caused a discriminatory change in its targets’ choices or opportunities: “specific factual evidence to demonstrate that the [flag] presently imposes on African-Americans as a group a measurable burden or denies them an identifiable benefit.” None found evidence of such a change. All of the courts rejected, implicitly or explicitly, the possibility that the Equal Protection Clause forbids the government’s infliction of expressive harm, without more. Several of the courts acknowledged that the government’s initial choice to display the flag was motivated by a discriminatory purpose, but none considered the possibility that the Equal Protection Clause prohibits the government’s speech motivated by animus or other discriminatory purpose apart from any discriminatory effect on its targets’ choices or opportunities.

More specifically, in *NAACP v. Hunt*, the Eleventh Circuit found that Alabama’s expressive choice to fly the Confederate flag above the state capitol dome inflicted no discriminatory harm on African-Americans. The panel concluded simply that whites as well as African-Americans were offended by the flag’s display, and that such offense did not establish the requisite discriminatory harm for equal protection purposes: “[T]here is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position.”

Several years later, in *Coleman v. Miller*, the Eleventh Circuit rejected an equal protection challenge to Georgia’s incorporation of the Confederate flag logo into its own state flag design. There the plaintiff alleged that “the flag’s 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, and sends an exclusionary message to Georgia’s African-American citizens.” In other words, the plaintiff alleged, among other things, that the flag inflicted expressive harm by sending a message of African-Americans’ inferiority and exclusion. The panel, however, declined to credit expressive harm as an injury forbidden by the Equal Protection Clause:

After carefully reviewing the record, and drawing all inferences in the light most favorable to appellant, we find no evidence of a similar discriminatory impact imposed by the Georgia flag. He testified that the Confederate symbol in the Georgia flag places him in imminent fear of lawlessness and violence and that an African-American friend of his, upon seeing the Georgia flag in a courtroom, decided to plead guilty rather than litigate a traffic ticket. This anecdotal evidence of intangible harm to two individuals, without any evidence regarding the impact upon other African-American citizens or the comparative effect of the flag on white citizens, is

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166 Coleman v. Miller, 117 F.3d 527, 529-30 (11th Cir. 1997), cert. denied, 523 U.S. 1011 (1998) (requiring that the challenger “first demonstrate that the flying of the [] flag produces disproportionate effects along racial lines, and then prove that racial motivation was a substantial or motivating factor behind the enactment of the flag legislation”).
167 891 F.2d 1555, 1562 (11th Cir. 1990); see also Daniels v. Harrison Cnty. Bd., 722 So. 2d 136, 139 (Miss. 1998) (rejecting a constitutional challenge to county’s display of confederate flag on beaches and other county property: “As in *Hunt*, the record in the present case contains no indication that the flying of the single Confederate Flag at Eight Flags serves to deprive any citizens of this State of any constitutionally protected right.”).
168 Coleman, 117 F.3d at 527.
169 Id. at 529.
insufficient to establish ‘disproportionate effects along racial lines. Coleman also offered the affidavit of another witness who testified that, in his opinion, the flying of the flag promotes violence against blacks and continues to represent a symbol of Georgia’s efforts against integration. This mere allegation, without any accompanying support, also is not sufficient to demonstrate a disproportionate racial effect.\textsuperscript{170}

But the court left open the possibility that evidence that the government’s display encouraged third parties to discriminate against African-Americans could establish a violation: “We recognize that a government action may in some instances violate the Constitution because it encourages private discrimination. There is no evidence in the record of this case, however, that connects the Georgia flag to private discrimination or racial violence.”\textsuperscript{171}

More recently, in \textit{Moore v. Bryant}, a federal district court dismissed, for lack of standing, an equal protection challenge to Mississippi’s incorporation of the Confederate flag logo into its state flag; the state also required its flag to be displayed “in close proximity” to all public schools, where students must be taught the “proper respect” for the flag.\textsuperscript{172} Recall (as discussed in more detail in Chapter 2) that to establish standing, a plaintiff must allege that he suffered a concrete and particularized injury as a result of the defendant’s choice. The challenger alleged that his regular exposure to the flag caused him to fear for his safety, to feel like a second-class citizen, and to experience emotional distress. The court found this insufficient to establish standing, asserting the need to allege a discriminatory change in his opportunities: “Without sufficient facts that Moore is treated differently because of the state flag, this argument that he feels like a second-class citizen does not give rise to a legal injury.”\textsuperscript{173} The judge thus implicitly rejected the notion that the Equal Protection Clause prohibits the government’s speech that inflicts expressive harm.

On appeal, the Fifth Circuit agreed that the challenger had not established standing. It too required the challenger to allege that Mississippi’s expressive display of the Confederate logo resulted in a discriminatory injury to his choices and opportunities. In so holding, the court acknowledged but distinguished Establishment Clause precedent in which courts apply the nonendorsement principle to find standing when plaintiffs allege direct and unwelcome exposure to the government’s religious display:

The reason that Equal Protection and the Establishment Clause cases call for different injury-in-fact analyses is that the injuries protected under the Clauses are different. The Establishment Clause prohibits the Government from endorsing a religion, and thus directly regulates Government speech if that speech endorses religion. Accordingly, Establishment Clause injury can occur when a person

\textsuperscript{170} Id. at 530 (citations omitted); see also id. (“In order to demonstrate disproportionate impact along racial lines, appellant must present specific factual evidence to demonstrate that the Georgia flag presently imposes on African-Americans as a group a measurable burden or denies them an identifiable benefit.”).

\textsuperscript{171} Id. at 530 n.6.

\textsuperscript{172} MISS. CODE. ANN. SEC. 37-13-5.

\textsuperscript{173} Moore v. Bryant, 205 F. Supp. 3d 834, 853 (S.D. Miss. 2016).
encounters the Government’s endorsement of religion. The same is not true under the Equal Protection Clause: the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging.\textsuperscript{174}

Regardless of whether the flag communicates a governmental message of inequality, the Fifth Circuit tells us, the Equal Protection Clause does not forbid the government from inflicting such expressive harm. The Establishment Clause is different, according to the Fifth Circuit. But if we adopt the nonendorsement principle in the Establishment Clause context (and we may or may not), that’s because we believe that equality and inclusiveness are key values underlying that Clause. Why wouldn’t a similar emphasis on expressive harm be appropriate in the Equal Protection Clause context, a Clause assuredly steeped in equality values? The Fifth Circuit offers little explanation, but its emphasis on “differential governmental treatment” suggests that it adopts an anticlassification understanding of the Equal Protection Clause, and finds no classification here.

The Fifth Circuit also rejected the plaintiff’s claim that the flag’s display in and near courtrooms, where his work as a prosecutor required him to encounter it, created a hostile work environment. In its words, “analogizing Plaintiff’s equal protection claim to a hostile work environment claim fails for the same reason that the Establishment Clause analogy fails: under Title VII, exposure to a hostile work environment alone is the injury; under the Equal Protection Clause it is not.” But courts have repeatedly held that a government employer that creates a hostile environment based on protected class status violates the Equal Protection Clause.\textsuperscript{175} Allegations of a hostile work environment, if proven, demonstrate that the government has altered the terms and conditions of employment, and has thus both classified and subordinated, based on race. To be sure, hostile environment claims based on the government’s speech alone are tough to win. But whether the display of the flag creates a hostile environment in any given workplace in violation of the Equal Protection Clause is a context-specific inquiry on the merits.\textsuperscript{176}

Finally, several of these courts concluded that state governments intended to communicate a message of white supremacy with their initial choice to display the Confederate flag.\textsuperscript{177} In the words of the 11\textsuperscript{th} Circuit:

\textit{The current flag design was adopted during a regrettable period in Georgia’s history when its public leaders were implementing a campaign of massive resistance to the

\footnotesize{\textsuperscript{174} Moore v. Bryant, 853 F.3d 245, 250 (5\textsuperscript{th} Cir. 2017), cert. denied, 138 S. Ct. 468 (2017).}
\footnotesize{\textsuperscript{175} E.g., Tuggle v. Mangan, 348 F.3d 714, 720 (8\textsuperscript{th} Cir 2003); Williams v. Herron, 687 F.3d 971, 978 (8\textsuperscript{th} Cir. 2012).}
\footnotesize{\textsuperscript{176} See JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 30-31 (2006) (“Standing focuses on the interests of the parties to the dispute, but standing decisions invariably reflect judicial views about the fitness of the legal question for judicial resolution. Questions about fitness, in turn, often implicate the merits of the dispute, and open the Court to criticism that its standing doctrine lacks principle.”).}
\footnotesize{\textsuperscript{177} For a discussion of the original Confederacy’s origins by one of its founders, see Alexander Stephens, Vice-President of the Confederate States of America, Cornerstone Speech (Mar. 21, 1861) (“Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.”), available at http://teachingamericanhistory.org/library/document/cornerstone-speech/.
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Supreme Court’s school desegregation rulings. . . . As many of Georgia’s politicians and citizens openly resisted the Supreme Court’s desegregation rulings, increasing numbers of white Southerners began expressing renewed interest in their Confederate heritage. It was in this environment of open hostility to the Supreme Court’s civil rights rulings and of developing interest in Confederate history that the Georgia General Assembly acted to re-design its state flag. It chose as an official state symbol an emblem that historically had been associated with white supremacy and resistance to federal authority.178

Another panel explained that Alabama raised the Confederate flag above its capitol dome in 1963 when Attorney General Robert F. Kennedy traveled to the state capitol to discuss then-Governor George Wallace’s announced plan to block the admission of black students to the University of Alabama.179

And before dismissing the challenge in Moore v. Bryant for lack of standing, district court Judge Carlton Reeves offered a lengthy discussion of governments’ discriminatory purpose in displaying the Confederate logo, detailing the Confederacy’s goal of racial supremacy, and governments’ efforts to keep that objective alive during the campaign of massive resistance by erecting Confederate monuments and displaying the Confederate flag. Judge Reeves’s dictum itself reflects government speech about government speech:

It should go without saying that the emblem has been used time and time again in the Deep South, especially in Mississippi, to express opposition to racial equality. Persons who have engaged in racial oppression have draped themselves in that banner while carrying out their mission to intimidate or do harm.180

In short, Judge Reeves, like several of the other courts, found evidence that governments’ display of the flag had a subordinating purpose. But like the other courts considering related claims, he did not consider the possibility that the Equal Protection Clause might forbid the government’s expressive choice, without more, if motivated by the government’s animus or other discriminatory purpose.

Finally, return to the example that opened this chapter: state law that requires public schools’ sex education curriculum include “[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public” and that “homosexual conduct is a criminal offense under the laws of our state.”

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178 Coleman, 117 F.2d at 528-30.
179 Hunt, 891 F.2d at 1558; see also Daniels, 722 So. 2d at 139-40 (Banks, J., concurring) (“Quite recently, many state governments adopted the battle flag as a symbol of continued support of white supremacy, segregation and discrimination against persons of black African descent.”).
180 Moore, 205 F.Supp.3d at 844.
If we focus on discriminatory harm to class members’ choices or opportunities, we ask whether a challenger can show that the government’s speech commanded, coerced, or encouraged third parties to discriminate against gay or lesbian students; whether it deterred those students from seeking certain opportunities; or whether it created a hostile educational environment. It’s not hard to imagine that the government’s speech could encourage bullying or other discrimination by other students, especially given its misleading assertion that same-sex sexual behavior is a criminal offense (yes, those laws remain on those state’s books but no, those laws are not enforceable), or that it could create a hostile educational environment, as lesbian and gay students face an obstacle to thriving in their educational environment that others don’t face when the government tells them, and their classmates, that theirs is not a life acceptable to the general public. At the same time, we can expect disputes about the causal connection between the government’s speech and those discriminatory consequences, including disputes about whether the government’s speech rose to the level of a hostile environment.

If we focus on expressive harm, we ask whether reasonable onlookers would understand the government to be communicating a message of inferiority or second-class status. As is so often the case, this turns on who constitutes a reasonable observer—a lesbian or gay teenager or the child of lesbian or gay parents? Someone whose religion teaches that same-sex sexual behavior is morally wrong? Someone who hasn’t thought about it much? Your preference for an antisubordination or anticlassification understanding of the Equal Protection Clause might inform your choice.

And if we focus on the motivations for the government’s speech, we ask whether the government’s speech was motivated by its animus based on sexual orientation. The state would likely argue that its choice was motivated not by hostility or dislike but instead by its moral and pedagogical views about healthy sexual behavior. At times the Court has signaled that moral disapproval in this context is a type of animus. In Windsor, as evidence of the government’s animus in enacting the Defense of Marriage Act (DOMA), the Court’s majority opinion pointed to a House committee report explaining that DOMA expressed “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.” And years earlier, Justice O’Connor wrote, “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the

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181 As noted earlier, for purposes of this discussion, I assume that courts would treat the government’s discrimination of this type based on LGBTQ status as an equal protection violation even absent a finding of animus, although the Court has not affirmatively decided this question.

182 This invites the question whether an expressive harm approach would preclude the government from criticizing same-sex sexual conduct. While race and many other class statuses are of course not inextricably linked to certain behavior this distinction is not meaningful in the sexual orientation context, where orientation is the basis for defining and protecting the class. In other words, it remains possible to express hostility towards a specific position or course of conduct regardless of the actor’s religion (or nonreligion), race, gender, national origin, etc., but it is not possible to express hostility towards same-sex behavior or orientation without expressing hostility based on LGBT class status.

183 United States v. Windsor, 570 U.S. 744, 770–71 (2013) (describing, as evidence of the government’s discriminatory intent in enacting DOMA, the House committee report explaining that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.”).
Equal Protection Clause.” But the Court’s dissenters contest the premise that animus and moral disapproval are indistinguishable.

These problems force us to think hard about the meaning of equality, about when the government’s speech threatens our conception of equality, and about our hierarchy of values when we weigh the costs and benefits of constraining the government’s speech related to equality. We can see the cleavages, the points of contention. The government’s speech violates the Equal Protection Clause when it results in certain discriminatory effects, but some will be quicker than others to find those effects. Our views about whether the Equal Protection Clause forbids the government’s denigrating messages that inflict expressive harm or the government’s messages inspired by animus turns in part on whether we prefer an anticlassification or antisubordination understanding of the Clause, as well as on our assessment of courts’ institutional competence to ascertain expressive meaning or governmental purpose. These difficulties may mean that even the nastiest of the government’s expressive choices may only rarely violate the Constitution. But the answer to the question “When does the government’s speech violate the Equal Protection Clause” is “sometimes” rather than “never.”

We confront similarly hard and important problems in the next chapter when we consider when, if ever, the Due Process Clause restrains the government’s speech, including its lies and other falsehoods, its disclosure of intimate information, and its cruel and humiliating speech.

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185 Windsor, 570 U.S. at 795 (Scalia, J., dissenting) (“As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms.”).