OF CROSSES AND CONFEDERATE MONUMENTS: A THEORY OF UNCONSTITUTIONAL GOVERNMENT SPEECH

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This Article uses controversies over government-sponsored religious symbols and Confederate monuments to consider the appropriate constitutional limits on the government's symbolic expression. It contrasts two types of constitutional harm that can arise from the government's expressive acts. "Expressions that harm" refers to denigrating or exclusionary government speech that causes material harm to members of the community. "Expressive wrongs" describes constitutional violations that arise when a government action conveys an improper social meaning. The government's symbolic speech can and should be subject to constitutional review under either theory.

The Supreme Court has been increasingly hesitant to impose substantive constraints on the government's speech, however. Recently, the Court decided American Legion v. American Humanist Association, *holding that a 40-foot-tall Latin cross in Bladensburg, Maryland, does not violate the Establishment Clause. It further held that long-standing government-sponsored religious symbols enjoy a presumption of constitutionality.*

This Article critiques American Legion *and asks what it portends for potential equal protection challenges to Confederate iconography. It argues that even as the Court is hesitant to impose substantive restrictions on the government's symbolic speech, the Court should be attentive to the dangers of majoritarian control of the public square. The Article describes three such dangers: entrenchment, favoritism, and domination. Government symbolic speech that is a product of, or results in, the entrenchment of permanent symbolic majorities, that favors some private speakers over others, or that is imposed by one political community on another, should be constitutionally troubling. The Article applies these minimal conditions for*

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legitimate government speech to current debates about religious symbols and Confederate monuments.

INTRODUCTION

Does the Constitution impose restrictions on the government's symbolic speech? Should it? These questions are perennial, though recent events have highlighted their continued salience. In *American Legion v. American Humanist Association*, decided in 2019, the U.S. Supreme Court considered the constitutionality of a publicly-owned 40-foot-tall Latin cross located in Bladensburg, Maryland.[1] That decision, which upheld the constitutionality of the cross and established a presumption of constitutionality for long-standing government-sponsored religious symbols,[2] still requires the courts to assess the public meaning of such symbols, old or new. Though perhaps intended to, the

1. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).
2. *Id.* at 2081–90.

Court's decision is unlikely to de-escalate the religious culture wars or put an end to controversies over religious symbolism in the public square.[3]

At the same time, a heated and sometimes violent debate over Confederate monuments has been occurring across the country.[4] In a number of cities—Charlottesville, Virginia, is the most well-known example—debates over the removal of Confederate monuments have turned into literal battles for control of public parks and streets; the figurative fights over the content of the public square have been matched by actual violent clashes over territory.[5] More recently, Black Lives Matter ("BLM") protests, sparked by the police killing of George Floyd in the spring of 2020, have targeted Confederate names and symbols, especially Confederate statuary.[6] A number of states and cities, as well as other institutions,[7] have responded by removing existing Confederate iconography.[8] Many statues and symbols still remain, however, and laws in a number of states bar local governments from pursuing removals.[9]

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3. *Cf.* Zach Montague, *Holding It Aloft, He Incited a Backlash. What Does the Bible Mean to Trump?*, N.Y. TIMES (June 2, 2020), https://nyti.ms/2BjXVv5.

4. *See, e.g.*, Scott McDonald, *Confederate Statue Vandalism Becoming More Frequent in the South*, NEWSWEEK (June 20, 2019), https://www.newsweek.com/confederate-statue-vandalism-becoming-more-frequent-south-1445117; Sarah Mervosh, *What Should Happen to Confederate Statues? A City Auctions One for $1.4 Million*, N.Y. TIMES (June 22, 2019), https://nyti.ms/2IyiDIP.

5. *See generally* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY (Louis P. Nelson & Claudrena N. Harold eds., 2018).

6. *See, e.g.*, Colin Dwyer, *Protesters Fell Confederate Monument in D.C., Provoking Trump's Fury*, NPR (June 20, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/20/881199628/protesters-fell-confederate-monument-in-d-c-provoking-trumps-fury; Ned Oliver & Sarah Vogelsong, *Confederate Memorial Hall Burned as Second Night of Outrage Erupts in Virginia*, VA. MERCURY (May 31, 2020), https://www.virginiamercury.com/2020/05/31/a-second-night-of-outrage-erupts-in-virginia/; *Protesters Topple Confederate Statue in Virginia Capital*, ASSOCIATED PRESS (June 6, 2020), https://apnews.com/03a58610bc55d5a422040cf3f388b917.

7. *See, e.g.*, Jenny Gross, *U.S. Marine Corps Issues Ban on Confederate Battle Flags*, N.Y. TIMES (June 6, 2020), https://nyti.ms/2YcAsDS; Dan Lamothe, *Defense Secretary Effectively Bans Confederate Flags from Military Bases While Rejecting 'Divisive Symbols'*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/national-security/confederate-flag-military-bases-ban/2020/07/17/301e9b48-c832-11ea-a9d3-74640f25b953_story.html; Emily Wagster Pettus, *Ole Miss Moves Confederate Statue from Prominent Campus Spot*, ASSOCIATED PRESS (July 14, 2020), https://apnews.com/d5824d7b24b9d7af5976da60741d4a28.

8. *See, e.g.*, Bill Chappell, *Massive Robert E. Lee Statue in Richmond, Va., Will Be Removed*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/869519175/massive-robert-e-lee-statue-in-richmond-va-will-be-removed; Rick Rojas, *Mississippi Lawmakers Vote to Retire State Flag Rooted in the Confederacy*, N.Y. TIMES (June 28, 2020), https://nyti.ms/3eIlHjk; Laurel Wamsley, *Richmond, Va., Mayor Orders Emergency Removal of Confederate Statues*, NPR (July 1, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/01/886204604/richmond-va-mayor-orders-emergency-removal-of-confederate-statues.

9. *See, e.g.*, Alabama Memorial Preservation Act of 2017, ALA. CODE §§ 41-9-230 to -237 (LexisNexis 2019); Cultural History Artifact Management and Patriotism Act of 2015, N.C. GEN. STAT. § 100-2.1 (2019). *See generally* Richard Schragger & C. Alex

Whether religious symbols or Confederate iconography, competing cultural and political forces are engaged in highly fraught battles over government expressive conduct. But whether the Constitution should have anything to say about these battles remains unsettled. The Establishment Clause has been read to impose limits on government-sponsored religious expression pursuant to a "nonendorsement," "neutrality," or "secular purpose" principle.[10] The scope of this limitation has been narrowed, however, by a series of Supreme Court decisions, of which *American Legion* is only the latest.[11]

Meanwhile, nonreligious government symbolic speech appears to be mostly doctrinally unconstrained. Unlike religious speech, secular government speech is not limited by a neutrality requirement, at least not formally,[12] and other constitutional provisions, like the Equal Protection Clause, have not regularly been applied to the government's symbolic expression.[13] Current doctrine treats crosses and Confederate monuments differently.[14] Current doctrine is also increasingly skeptical of constitutional restrictions on any type of government speech, whether or not it is religious.

This differential treatment has generated scholarly puzzlement, and I too am skeptical of a doctrine that treats the government's religious speech differently from other forms of government speech.[15]

Retzloff, *Confederate Monuments and Punitive Preemption: The Latest Assault on Local Democracy*, LOC. SOLUTIONS SUPPORT CTR. (June 2019), https://www.abetterbalance.org/resources/confederate-monuments-and-punitive-preemption-white-paper/.

10. *See* Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

11. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014); Pleasant Grove City v. Summum, 555 U.S. 460 (2009); McCreary Cty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

12. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

13. Two federal courts of appeals have considered constitutional challenges to the Confederate battle flag. In one, the court held that the plaintiffs lacked sufficient tangible injury to establish standing. *See* Moore v. Bryant, 853 F.3d 245, 249–53 (5th Cir. 2017). In the other, the court held that the challengers did not plead sufficient injury to state an equal protection violation. *See* Coleman v. Miller, 117 F.3d 527, 530 (11th Cir. 1997) (per curiam); NAACP v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990); *cf.* James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991).

14. *See* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 12 (2000) ("The Constitution forbids the establishment of religion, but it does not forbid the establishment of secular conceptions of the good . . . .").

15. *See* Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2013); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013). An older literature explores limits on secular government speech from within the First Amendment. *See, e.g.*, Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 L. & CONTEMP. PROBS. 530 (1966); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578 (1980). For a more

But there is a more fundamental distinction in the symbolic speech cases—the distinction between speech and conduct—of which I am also skeptical.[16] The view that communicative acts should be less subject to constitutional scrutiny than other kinds of government acts is unconvincing. Whether religious or nonreligious in character, the government's expressive acts can produce two kinds of constitutionally cognizable wrongs. First, government speech can cause material harms that are not appreciably different from the harms caused by other forms of government conduct that are susceptible to constitutional scrutiny.[17] Second, government conduct, regardless of whether it is purposefully communicative, can express an inappropriate attitude or a demeaning or denigrating social message.[18] When government engages in symbolic acts with these characteristics, there is no reason for constitutional constraints not to apply simply because the government activity at issue is communicative.[19]

These claims are partly descriptive and partly normative. As I argue below, the Court does sometimes recognize the harms of the government's expressive conduct outside of the First Amendment.[20] When the Justices employ terms like *nonendorsement* or *stigma*, or refer to *dignity* or *disrespect* or *animus*, they are in some instances referring to the material harms of government expressive conduct. They might also be embracing an expressivist theory in which government conduct can only be understood as unconstitutional by reference to its social meaning,[21] that is, by reference to the *message* that the government act conveys.

Both approaches are evident in *American Legion*. The majority opinion in that case considered the exclusionary harm of the symbolic speech—the effects of

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recent discussion, see Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans, *Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265.

16. *Cf.* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983) (arguing that the activities covered by the First Amendment are not appreciably different from the activities not covered by it); Schwartzman, *supra* note 15 (applying a similar analysis to religion as a category).

17. *See, e.g.*, Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 174–83 (2012).

18. *See, e.g.*, Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000).

19. I thus join Fred Schauer and others in calling into question the conceptual distinction between speech and conduct. *See* Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427, 430 (2015); Schauer, *supra* note 16; *see also* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO 106 (1994).

20. *See infra* Part III.

21. The literature on expressive harms is vast. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Simon Blackburn, *Group Minds and Expressive Harms*, 60 MD. L. REV. 467 (2001); Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267 (2011); B. Jessie Hill, Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993); Michelle Moody-Adams, Taking Expression Seriously: Equal Citizenship, Expressive Harm and Confederate Iconography (Nov. 2019) (unpublished manuscript) (on file with author).

the message that the cross conveys. But the Court also considered the message conveyed by a potential court order to remove the cross. In both instances, the Justices engaged in examining the meaning conveyed by a government act, either to maintain the cross or to dismantle it. In holding that the meaning conveyed by removing the cross would be more damaging to Establishment Clause values than permitting it to remain, the Court insulated most long-standing government religious displays and practices. The decision, however, has less to say about more recent expressive practices.[22]

As for Confederate monuments, the Court's approach in religious-display cases, which involves an assessment of the meaning conveyed by the government's symbolic speech, could apply equally well to Confederate iconography. There is no good reason to treat religious speech differently from secular speech. Both are forms of government conduct that can be assessed for their unconstitutional effects or meanings, even if the former is analyzed under the Establishment Clause and the latter is analyzed under the Equal Protection Clause.

The Court's hesitance to order the removal of long-standing religious monuments, however, suggests that extending an expressive equal treatment principle to Confederate iconography and other forms of potentially exclusionary government speech is unlikely. Despite the obvious harms that attend certain forms of symbolic conduct, the Court appears to contemplate relatively narrow restraints on government speech, permitting majorities to dictate the content of the public square.

This judicial reality animates this Article's prescriptive claims. I assume that the Court will continue to narrow the circumstances under which symbolic speech is constitutionally actionable. In light of the Court's resistance to treating symbolic speech like any other act, expressive or otherwise, and thus just as susceptible to equal treatment norms, this Article suggests a second-best approach that focuses on the democratic legitimacy of that speech.

If the Court is going to retreat from regulating government expression in the public square, leaving government symbolic speech to be dictated by majoritarian political processes, then it should at least police those processes. Three concerns are paramount: *entrenchment*, *favoritism*, and *domination*. First, courts should be attentive to the ways that government symbolic speech may be used to undermine majoritarian democratic processes, either by reinforcing the entrenched power of existing electoral factions or by intimidating those who would seek to challenge those factions. Second, courts should invalidate public symbolic speech that is too closely aligned with, and reinforces, the exercise of private speech. And third, courts should be wary of symbolic speech that is imposed by one political community on another.

This Article has four remaining Parts. Part I describes two different accounts of the harm or wrong of government speech: *expressions that harm* and *expressive wrongs*. Borrowing in part from a literature that questions the distinction between speech and conduct,[23] the first approach argues that the government's

22. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2067 (2019).
23. *See, e.g.*, Schauer, *supra* note 15.

"speech" can cause material harms to individuals and groups, akin to the harms caused by the government's "acts."[24] Relying on a separate literature that applies expressivist theories of morality to law,[25] the second approach argues that the constitutionality of government conduct, regardless of whether that conduct is purposely expressive, often turns on the message that the conduct conveys.

Part II turns to doctrine. The Court is often preoccupied with the communicative aspects of government acts, symbolic or otherwise. Indeed, scholars have shown how certain legal doctrines appear to reflect an expressive theory of constitutional harm.[26] And yet the Court has never been consistent about when symbolic speech or communicative acts rise to the level of a constitutional violation. In Establishment Clause cases, the Court has toggled back and forth, unsure of where to place the line between legitimate and illegitimate government-sponsored religious speech,[27] though its most recent decisions point toward broader acceptance of government religious expression.[28] In equal protection race cases, the mere fact of government classification seems to be offensive to the majority of the Justices, even when that classification is not accompanied by material harm.[29] And recently, the Court has in one instance dismissed as irrelevant clearly denigrating government speech directly related to the government's action,[30] while in another case it held that "disrespectful" official speech is sufficient to invalidate an otherwise constitutional government act.[31] An expressive equal treatment principle seems to be lurking, even if it is undertheorized.

After examining Supreme Court cases in an effort to discern when the Court thinks government expression matters and when it does not, this Article turns in Part III to the constitutional debates over crosses and Confederate monuments. In these cases, the Court is both navigating the existing cultural politics while simultaneously contributing to it. Symbols cases—whether in the religious or nonreligious context—have always been politically sensitive. In prior work, I have expressed sympathy for the Court's reticence to regulate too aggressively the content of the public square. Underenforcement, I have argued, has been a feature of

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24. Norton, *supra* note 17, at 174–83.

25. *See* Anderson & Pildes, *supra* note 21; Dorf, *supra* note 21; Hellman, *supra* note 18; Pildes & Niemi, *supra* note 21; Tebbe, *supra* note 15; Hill, *supra* note 21; Moody-Adams, *supra* note 21.

26. *See, e.g.*, Anderson & Pildes, *supra* note 21.

27. *See, e.g.*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 13 995 (2011) (Thomas, J., dissenting from denial of certiorari) ("[O]ur [Establishment Clause] jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess.").

28. *See* Town of Greece v. Galloway, 572 U.S. 565 (2014) (permitting the use of sectarian prayer at town board meetings); Van Orden v. Perry, 545 U.S. 677 (2005) (allowing a monument to the Ten Commandments to remain on the grounds of the state capitol).

29. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

30. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

31. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

Establishment Clause jurisprudence dealing with official religious displays and government officials' religious speech—not a bug.[32]

But that does not mean that courts should entirely abandon the field. In light of the Court's reticence to police the content of government speech, Part IV argues that judges should be attentive to the potential political pathologies of the majoritarian public square. Entrenchment, favoritism, and domination are particularly evident in cases of Confederate monuments, especially those that were erected in segregated Southern cities during Jim Crow.

The First Amendment demands that the government act neutrally when it regulates private speakers in the public square.[33] But the First Amendment does not generally require such neutrality when the government speaks.[34] The justification for majoritarian government speech therefore must be that it is responsive to political will. At a minimum, it must be representative. If the Court is not willing to enforce an expressive equal treatment principle, it should at least invalidate those messages that are nonrepresentative.[35]

I. MATERIAL HARMS AND EXPRESSIVE WRONGS

I begin by describing and distinguishing two theories of constitutional harm or wrong that can ground constitutional challenges to government symbolic speech: *expressions that harm* and *expressive wrongs*. It is important at the outset to identify why these are different. Professor Helen Norton, in her excellent book on government speech, deploys three categories: government speech that causes harm by changing its targets' choices and opportunities, government speech that causes expressive or dignitary harms, and government speech that is motivated by an improper purpose.[36]

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32. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 615–28 (2011).

33. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest."); Carey v. Brown, 447 U.S. 455, 463 (1980) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

34. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression.").

35. I am aware of but seek to avoid here the substance/procedure debate that has conventionally roiled process theories of constitutional law. *Compare* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980), *with* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991). I do not want to be mistaken; both a principle of expressive equal treatment and a principle of equal democratic participation are "substantive" even if judicial inquiries look slightly different.

36. *See* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 8–9 (2019).

In this Article, I emphasize the central divide between causal and noncausal accounts of government wrongdoing. The government's speech or conduct *can cause harm*, including dignitary or other intangible harms; these harms can be the source of government wrongdoing. Alternatively, government speech or conduct *can be wrong* because of what that speech or conduct *means*; a wrong occurs when the government's actions communicate an inappropriate message or on account of the government's inappropriate attitude. As for "purpose," the impermissibility of bad motive in constitutional law can similarly either be grounded in a concern that bad motive *causes* harm or by a conclusion that bad motive *is in itself* a wrong.

The causal and noncausal accounts are importantly different, as I describe below. What unifies them, however, is that both collapse the distinction between speech and acts.[37] In the absence of such a distinction, it makes little sense to treat the government's symbolic conduct differently from other types of government conduct for purposes of applying constitutional principles such as disestablishment, equal protection, or due process.[38]

A. Expressions That Harm

The first category of constitutional injuries falls under the heading of *expressions that harm*. These refer to material harms that might be caused by the government's communicative conduct, including differential treatment, bullying, or psychological distress. In describing these harms, I mean to contest the common view that "speech" as a category of activity is meaningfully different from something called "conduct,"[39] and that therefore the former should be treated with more deference than the latter for purposes of constitutional doctrine.

The special treatment of speech has been labeled the "sticks and stones" approach.[40] At least at first glance, outside the religion context, noncoercive government communication can do no constitutionally cognizable harm. The Court might acknowledge that speech can be hurtful in certain ways,[41] but as a doctrinal matter, constitutional law generally holds that the Constitution does not protect against "mere offense."

We should take care not to overstate the reach of "sticks and stones" conceptually or doctrinally, however. "Sticks and stones" could be understood to suggest that *words* can do no harm. But the law often recognizes the harmful consequences of "mere words." Indeed, much of law and legal sanction involves communications that have consequences: entering or breaching a contract, defaming someone, engaging in a conspiracy, failing to disclose or disclosing too much

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37. *Cf.* Schauer, *On the Distinction Between Speech and Action*, *supra* note 19.

38. *Cf.* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 551 (2018) (noting that material harms and expressive wrongs are entangled to such a degree as to be nearly inseparable).

39. *See* Schauer, *On the Distinction Between Speech and Action*, *supra* note 19.

40. Dorf, *supra* note 21, at 1284–86.

41. *See* Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 83, 96–97.

information, committing fraud by lying or misrepresenting, failing to warn, and making threats.[42]

One can argue that these are "acts" effectuated by words. But as Professor Fred Schauer has repeatedly argued, it is difficult to discern a plausible distinction between speech and conduct that would justify treating the former differently from the latter when both cause harm.[43] As a descriptive matter, the line between communicative and noncommunicative conduct is difficult to maintain, and once that line is appropriately muddied, it might appear that the bulk of the law is concerned with communications and their consequences.

First Amendment doctrine carves out certain kinds of communications for protection, even if harmful, and in that specific context "mere offense" is not normally actionable.[44] But that does not mean that those words do not matter or that the law cannot take cognizance of their harms. Hateful speech is not actionable on the street, but it can be, if the same words are spoken in the workplace or at a school.[45] Racial slurs directed at a coworker can ground a discrimination claim.[46] Sexual harassment claims are often based on offensive communications.[47] An educational institution can violate Title IX if it does not protect against verbal harassment.[48] "Mere words" hurt all the time in the law and those harms are often cognizable. The question in the context of the government's symbolic speech is whether such harms rise to the level of a constitutional violation and on what theory.

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42. *See id.*

43. *See* Schauer, *On the Distinction Between Speech and Action*, *supra* note 19, at 428, 438.

44. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint. We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" (quoting Street v. New York, 394 U.S. 576, 592 (1969))); Diamond v. Charles, 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). Whether this is an appropriate carve-out is a legitimate question, which I do not address here. *See* Schauer, *supra* note 41.

45. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (allowing school districts to restrict student use of speech that is lewd, indecent, offensive, or vulgar without running afoul of Free Speech protections).

46. *See, e.g.*, Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 848 (Cal. 1999), *cert. denied*, 529 U.S. 1138 (2000) (holding that a permanent injunction barring the continued use of racial slurs in the workplace did not raise Free Speech concerns).

47. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (suggesting that regulation of sexual harassment speech under Title VII does not raise First Amendment concerns); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 9 ("[I]t is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech.").

48. *See, e.g.*, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 646–47 (1999) (finding that, under Title IX, "recipients of federal funding may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority").

One account, which I am calling *expressions that harm*, contends that harms follow from speech—that government communications can cause material injuries to one's reputation, to one's financial interests, or to one's standing in the community.[49] There is no doubt that government officials can produce these harms through their individual speech, just as private individuals can.[50] It seems equally plausible that the government—acting in its institutional capacity—can cause these harms through its collective speech as well.

In the context of public symbolic displays, the harm is often articulated as damage to one's standing in the community. This reputational harm can be a form of damage in its own right: being considered less valuable or worthy in the eyes of the government or one's fellow citizens is itself a harm. But that harm is often based on the view that one's standing is related to how one is treated by government officials or other citizens. It is partly this concern that animates Justice Kagan's dissent in *Town of Greece v. Galloway*, a case about the constitutionality of a town council's practice of opening its meetings with highly sectarian and predominantly Christian prayers.[51]

I will say more about *Town of Greece* below. For now, I simply note that Kagan wonders whether town councilors who insisted on Christian prayers before council meetings would treat non-Christians less favorably in concrete ways and that other citizens might do so as a result.[52] The idea is that the government's symbolic speech causes officials or other citizens to behave differently toward those who do not share the majority's religious commitments,[53] as those commitments are expressed through the government's explicit messages. This harm is material.

Psychological harms are also material, even if sometimes described as "intangible." Government messages that suggest that some citizens are less worthy than others or do not share basic cultural commitments may make the individuals who are treated differently feel differently about themselves. This harm is sometimes articulated as a stigmatic harm.[54]

Stigma results in concrete injuries. Most famously, the decision in *Brown v. Board of Education* invalidating school segregation relied in part on the claim that forced separation of the races, even if school facilities were in all ways materially equal, harmed Black children because the message of separation made them understand themselves differently.[55] The Court's much-discussed citation to

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49. *Cf.* Moody-Adams, *supra* note 21.

50. Whether there is constitutional recourse for such harms is less certain. *Compare* Wisconsin v. Constantineau, 400 U.S. 433 (1971) (holding a statute authorizing public notices identifying "excessive drinkers" without notice and a hearing violated the Due Process Clause), *with* Paul v. Davis, 424 U.S. 693 (1976) (holding that government speech that defames, without more, does not violate the Due Process Clause).

51. 572 U.S. 565 (2014).

52. *Id.* at 630–33 (Kagan, J., dissenting).

53. *Cf.* Norton, *supra* note 17.

54. Anderson & Pildes, *supra* note 21, at 1542–43.

55. 347 U.S. 483 (1954). On the stigmatic theory of *Brown* and how it may have distracted future courts and litigants from addressing the economic harms of segregation, see RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 251 (2007).

Kenneth and Mamie Clark's "doll studies" was meant to establish that the government's enforced separation of the races produced psychological damage to Black children.[56]

Stigmatizing expression that affects one's standing in the community might be what Professor Michelle Moody-Adams calls "citizenship harms," borrowing a term from Professor Robin Lenhardt.[57] Citizenship harms are those harms that follow from the state treating certain individuals or groups as inferior.[58] The idea of a citizenship harm can also be captured by a constitutional anti-caste or anti-pariah principle.[59]

These concepts, or similar ideas, seem to be at work in Justice O'Connor's well-known (though much maligned) endorsement test in Establishment Clause display cases. In assessing the constitutionality of public religious symbols—creches, crosses, holiday displays—O'Connor asserted that the Constitution does not allow the government to "send a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[60]

It is important to be clear about why this kind of message might be unconstitutional. The causal account asserts that the message of insider/outsider status is harmful because it causes government officials or citizens to treat certain other citizens less favorably in material ways or causes the citizens themselves to view themselves as less worthy. These are material harms caused by government expression.

Such expression can be more or less explicit and more or less coercive. Professor Nelson Tebbe suggests examples like a government-erected billboard declaring that "America is a white nation."[61] He compares such a billboard to the message conveyed by flying the Confederate battle flag.[62] But one could cite multiple examples: the public school that sponsors only Christian prayers, the teacher that refers to the Muslim child in her class as that "little infidel," or the Jew forced to wear a yellow star. Courts have recognized some of these kinds of symbolic activity as unconstitutional.[63]

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56. *Brown*, 347 U.S. at 494–95.

57. Moody-Adams, *supra* note 21, at 5; *see also* R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 844 (2004).

58. Moody-Adams, *supra* note 21, at 5; *see also* Lenhardt, *supra* note 57.

59. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3 (1989); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 266–68 (1996); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–13 (1994).

60. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also* Caroline Maa Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 453, 465–75 (2019) (arguing that Christian legislative prayers promote Christian nationalism).

61. Tebbe, *supra* note 15, at 659.

62. *Id.* at 660.

63. The school prayer decisions might fit into this category. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

One might draw a distinction between coercive and noncoercive speech, invoking *West Virginia State Board of Education v. Barnette*, the famous compulsory flag-salute case.[64] But the *Barnette* distinction falls short in important ways. As Professor Steven Shiffrin notes, "The fragility of the *Barnette* principle . . . should have been evident from the beginning."[65] The government forces us to "speak" all the time: school children are required to recite, citizens must submit information to the government and to the public, and witnesses are compelled to testify.[66] Because the constitutional problem does not arise from the government's act that forces expression, it must arise elsewhere—presumably the social meanings and effects flowing from the government's coercion. Consider a high school named in honor of a Confederate general, in which students who wish to participate in sports must wear jerseys emblazoned with the name "Rebels."[67] One can query whether expressing symbolic allegiance to the Confederacy is more or less coercive than being forced to stand during the Pledge of Allegiance.

At its root, the coercion/noncoercion distinction rests on an assumption that words can only hurt us if we are compelled to say them. But that cannot be right. The relevant inquiry is the message's effects; coerced speech might be more damaging in this regard, but not necessarily so. Signs indicating separate white and Black water fountains may do more damage than a compulsory prayer. In any case, both involve expressive conduct.

"Sticks and stones" is not a plausible approach to government expressive conduct. "Words will never hurt me" is patently untrue, as any child who has been on either side of name-calling can attest. The government's symbolic conduct can cause harm, and that harm can be as or more serious than the harm it causes through its nonsymbolic conduct.[68]

To be sure, assessing those harms requires judgment. Whether Professor Tebbe's example of a government declaration of white supremacy is the equivalent of raising the Confederate battle flag is contested. So too, we can have arguments over whether Bladensburg's 40-foot-tall cross on public land is similar to a declaration that Christianity is the state's official religion. What seems less contestable is that racist, exclusionary, or derogatory government speech can cause material harms, and if speech causes harm, stigmatic or otherwise, constitutional law has the resources to reach it.

B. Expressive Wrongs

Government symbolic speech can do material harm. For some theorists, however, the central constitutional wrong of government communicative acts is not material at all—it is through-and-through expressive.[69] Even though these approaches sometimes run together, *expressions that harm* should be distinguished

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64. 319 U.S. 624 (1943).

65. Shiffrin, *supra* note 15, at 566–67.

66. *See id*. at 565–68.

67. Amanda Lineberry, Note, *Standing to Challenge the Lost Cause*, 105 VA. L. REV. 1177, 1177 (2019); *see* Hanover Cty. Unit of the NAACP v. Hanover Cty., 461 F. Supp. 3d 280, 287 (E.D. Va. 2020).

68. *Cf*. Schauer, *On the Distinction Between Speech and Action*, *supra* note 19.

69. *See* Anderson & Pildes, *supra* note 21, at 1531.

from *expressive wrongs*. These two ways of looking at potential constitutional harms are importantly different. *Expressions that harm* treat expression as a predicate for some material, even if sometimes intangible, harm. The relationship between message and harm is causal. By contrast, expressivist theories of morality and law understand the goodness or badness of all acts, including communicative acts, by the attitude expressed by the act or by the social meaning that attaches to the act. *Expressive wrongs* occur when a government act, symbolic or otherwise, communicates a constitutionally inappropriate meaning.[70]

Under an expressivist theory, a person's or government's actions, including communicative actions, cannot be understood morally without reference to what that action or speech act expresses.[71] Importantly, under such a theory, both "speech" and "conduct" can be communicative—that is, reflective of attitudes or constitutive of social meaning. The material consequences of acts or speech matter when considering expressive wrongs, but consequences alone are not the harm. The moral (and constitutional) wrongness or rightness of any act is encompassed by whether it expresses the appropriate attitude toward another or conveys the appropriate social meaning. As Professors Elizabeth Anderson and Richard Pildes have written, a person "suffers an expressive harm when treated according to a principle that expresses an inappropriate attitude toward her."[72] Expression does not precede a material harm; it is the way we define the wrong. On expressivist accounts, the meanings of government actions are constitutionally salient "independent of their causal consequences."[73]

There are many variants of expressivism and expressivist accounts of law, and they differ in important ways. But to illustrate, consider Professor Deborah Hellman's claim that the way to understand the problem of government classifications under the Equal Protection Clause is by what those classifications express.[74] The government classifies and favors some citizens over others all the time: differential tax rates; regulations for large businesses that do not apply to small businesses; different rules for minors and adults. How do we know when equal protection is implicated? Hellman's answer is that the wrongness of any given classification cannot be the act of treating one group less favorably than another, but rather the *meaning* conveyed by that differential treatment.[75] Equal protection is violated if the meaning or expressive content of the law or policy conflicts with the "government's obligation to treat each person with equal concern."[76] The law or policy fails if it *means* or *expresses* the wrong thing—specifically if it demeans or denigrates persons or groups.

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70. *Cf.* Hellman, *supra* note 18; Norton, *supra* note 17.
71. *See, e.g.*, Anderson & Pildes, *supra* note 21 at 1540.
72. *Id.* at 1529.
73. *Id.* at 1574; *see* Dorf, *supra* note 21, at 1279–86; Norton, *supra* note 17, at 181–83; Tebbe, *supra* note 15, at 706.
74. Hellman, *supra* note 18, at 1–2.
75. *See id.* at 13–14.
76. *Id.* at 2.

Unlike *expressions that harm*, the *expressive wrongs* that Hellman describes are not contingent on a material injury, psychological or otherwise.[77] To be sure, there are often material consequences of the government's acts or communications: some group is treated less favorably or some citizens experience a psychological wound. But these effects of government action cannot all be actionable, so we need a way to figure out which ones are constitutionally problematic. *Expressions that harm* and *expressive wrongs* can coexist, but conceptually they are very different. The former assesses the material effects of an expression; the rightness or wrongness of the expression is a function of what the expression *does*. The latter assesses the expressive import of a communicative act; the rightness or wrongness of the act is a function of what the act *means*.

To make understandable the idea of expressive wrongs, legal expressivists look for instances in which the outcome or effect of a government action or communication has no functional consequences and yet is determined to be constitutionally suspect anyway. Scholars have argued that the Equal Protection Clause and—as already noted—the nonendorsement doctrine under the Establishment Clause are especially driven by concern with expressive wrongs.[78] They have also argued that expressive wrongs are evident in constitutional doctrines related to gerrymandering, federalism, and the Dormant Commerce Clause,[79] as well as in same-sex marriage cases.[80] This latter example seems particularly apt, because states that had extended domestic partner status to same-sex couples argued that same-sex and opposite-sex couples were in all ways treated equally except for the term "marriage."[81] Courts nevertheless held that equal protection required equal access to the term.[82]

Consider again the endorsement test. Unlike the doll studies that the Court cites in *Brown* to buttress its conclusion that segregation causes psychological injuries to Black children, the endorsement test does not depend on psychological data to prove stigmatic effects. Whether a religious display sends a message of outsider status is determined by reference to the reasonable observer.[83] The test seems concerned primarily with the social meaning of the government act and not with its actual effects on listeners.

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77. *Id.* at 13–14.

78. *See generally* Anderson & Pildes, *supra* note 21; David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 583–86 (2002); Dorf, *supra* note 21, at 1275–76; Hill, *supra* note 21, at 1318; *see* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 509 (2005); Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 684 (2003).

79. *See* Anderson & Pildes, *supra* note 21, at 1538–39, 1551–64.

80. *See* Dorf, *supra* note 21, at 1308–15.

81. *Id.* at 1269–72.

82. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

83. Cty. of Allegheny v. ACLU, 492 U.S. 573, 620 (1989) (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring)); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). *See generally* B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407 (2014); *cf.* Salazar v. Buono, 559 U.S. 700, 720–21 (2010).

To be sure, it may not be possible to entirely decouple meaning and effects. Messages need to be received: the recipient needs both to understand the message and "get" what it seeks to convey. If the message is not conveyed because the recipient does not share the same language or understand the cultural meaning of an act or communication, or if the recipient does not treat the communication or act as a message, then what is the message's import? The concept of expressive wrongs presumes a message sent and received. One may not call that an "effect" of the message, but it is important to note the necessary interplay of speaker and recipient.

It is also important to observe that in constitutional cases, the messenger is the government.[84] And here again, effects and social meaning could be intertwined. Individuals can harm each other through words and acts that communicate disrespect—expressivism is a theory of right action between actors, not a political theory of the state's relationship to its citizens. Indeed, nongovernmental speakers often exercise more power over individual well-being than does the government.[85] Nevertheless, even committed expressivists appear wary of extending a constitutional requirement of expressive equal treatment to nonstate actors.[86] The nonendorsement doctrine, for instance, is concerned wholly with inappropriate government messages.

This state action limitation on expressive equal treatment suggests that the relationship between state and citizen is importantly different from relationships between citizens.[87] Private individuals may show disrespect for same-sex couples by refusing to use the term "marriage" to describe same-sex unions.[88] So too, private citizens may consider the United States a Christian country and declare it to be so loudly and repeatedly. Indeed, they may have a "right" to do so.[89] But a government-

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84. That being said, one should be careful not to reify state action in light of the realist critique of the public/private distinction. *See generally* Morris Cohen, *Property and Sovereignty and The Basis of Contract*, *in* LAW AND THE SOCIAL ORDER 41, 103 (1933); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Duncan Kennedy, *Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

85. The law does sometimes require private actors to engage in expressive equal treatment, as in the employment discrimination context. *See* Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 862–63 (Cal. 1999), *cert. denied*, 529 U.S. 1138 (2000) (requiring a private employee to refrain from using racial slurs). So too, cross-burning bans could be justified on these grounds. *Cf.* Virginia v. Black, 538 U.S. 343, 347–48, 362 (2003) (declaring that cross-burning with intent to intimidate was an act that could be proscribed without infringing on Free Speech protections); R.A.V. v. City of St. Paul, 505 U.S. 377, 381, 385, 391 (1992) (invalidating local ordinance banning cross burning).

86. *But see* Moody-Adams, *supra* note 21, at 23–30 (discussing the phenomenon of cross burning and other hate speech in the United States and abroad).

87. Hellman argues that "one needs a degree of power or status to demean another." DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 35 (2008).

88. A current question is whether those citizens can also deny services to those couples. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

89. The basis for this private right again raises questions about why we treat speech differently from conduct for constitutional purposes, when there are harms associated with the former that may be as severe as the harms associated with the latter. *See* Schauer, *On the Distinction Between Speech and Action*, *supra* note 19, at 450.

erected 40-foot-tall cross sending the same message could be understood as placing the imprimatur of the state behind a message of exclusivity.

Free speech doctrine carves out certain kinds of private speech for protection. The government's speech, by contrast, must comport with constitutional norms, however thin those may be. Government speech might raise heightened concerns because we think that the government's messages are more influential, that they can induce people to undertake acts that will do harm, or that the government will exercise its power to the material detriment of those citizens who are tagged with disrespectful messages.[90] Or it may be that the government is under a higher obligation than private citizens to avoid denigration. This obligation may be a necessary corollary to the state's claim to be democratically legitimate.[91] It may be that the requirement to treat all citizens equally under the law must be accompanied by an attitude of equal concern and respect that is not required of nongovernmental actors except in limited circumstances.

A theory of state action—a theory that justifies treating state-sponsored harmful speech differently from private harmful speech—is beyond the scope of this Article. Suffice it to say that both the causal- and meaning-based accounts of the constitutionality of government speech appear to be based on an antecedent understanding of the appropriate relationship between the state and its citizens. The concept of *expressions that harm* treats government speech just as seriously as government conduct in applying the Constitution. The concept of *expressive wrongs* asserts that constitutionality itself is contingent on what the government's conduct, symbolic or otherwise, *means*. Both accounts of constitutional harm could be said to reflect a common view: that the state exercises power through what it communicates to its citizens. The state's words speak as loudly as its actions. And its actions speak too.

C. Intent, Purpose, and Animus

It is necessary here to say something about intent, as intent tests in constitutional law seem to coincide or overlap with at least certain forms of expressivism. If intent matters, then the constitutionality of government acts, communicative or otherwise, will turn on whether government officials acted with the right motive or purpose. Government acts with identical consequences will be treated differently depending on the intent of government officials. Improper motive might supply the constitutional wrong, either because motive suggests the presence of a material harm or because improper motive *is* the wrong. These two ways of thinking about improper motive track the distinction between *expressions that harm* and *expressive wrongs*.

Equal protection doctrine is often the location for debates about the role of intent in constitutional law. There are competing views about the importance of intent and its relationship to harm.[92] We know that a "bare . . . desire to harm a

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90. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 5–6, 259–63 (1983).

91. Moody-Adams, *supra* note 21, at 1.

92. *Compare, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 136–45 (1980) (defending the role of intent in constitutional law and

politically unpopular group cannot constitute a *legitimate* governmental interest" that can pass muster under rational basis review.[93] Contemporary equal protection doctrine appears to disqualify government acts that are motivated solely by animus. *Washington v. Davis* requires an impermissible discriminatory intent.[94]

Here, again, it is important to be attentive to the nature of the constitutional harm or wrong.[95] One possibility is that "animus" is a term of art that courts apply to government acts that identify certain groups for impermissible unfavorable treatment, whatever the government's true reasons for acting. On this account, any targeting of certain groups for disfavored treatment would constitute animus.[96] Another possibility is that hostility toward a particular group or individual is evidence that the government act itself is suspect. Government acts infected by hostility toward particular groups or individuals are likely to violate some other constitutional commitment.[97] A third possibility is that animus evidences the kind of hostility that is likely to metastasize into government acts that ultimately will do harm to those groups. Overt hostility towards a particular group might indicate a failure of representation or corruption of the democratic process.[98]

Animus-infected lawmaking can also be understood in more purely expressive terms, without reference to material harms. An impermissible purpose is one that expresses disdain or contempt toward a particular group.[99] The act of treating a group or person with disdain—as inferior, as less than a full member of the political community—entails some level of intentionality. It assumes a

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advocating a process-based understanding of Equal Protection), *with* KARST, *supra* note 59, at 13 (arguing that judges deciding Equal Protection cases should focus less on intent and more on the impact their decision will have on "the exclusion of groups from equal citizenship"), *and* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 57–114 (1998) (challenging the value of Ely's intent inquiry and focusing instead on the impact the challenged action has on disadvantaged groups). *See also* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 530 (2016); Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2156–57 (2019); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1108 (2018).

93. Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)); *see also* United States v. Windsor, 570 U.S. 744, 746 (2013); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985).

94. 426 U.S. 229, 239, 245 (1976).

95. *See* Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 185–86; Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1106 (1989). For background on animus, see Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

96. *See Romer*, 517 U.S. at 632 (invalidating a state constitutional amendment partly on the ground that "the amendment seems inexplicable by anything but animus toward the class that it affects").

97. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (rejecting the discriminatory administration of local ordinances regulating laundries because "no reason for [the discriminatory administration] exists except hostility to the race and nationality to which the petitioners belong").

98. *See City of Cleburne*, 473 U.S. at 448.

99. Anderson & Pildes, *supra* note 21, at 1542.

purposeful actor, who can have a certain mental state—an "attitude," in Anderson and Pildes's terms, toward others.[100]

There are different ways to get at constitutional "bad attitudes." One can look at the acts or consequences of the acts themselves. How we act toward others certainly expresses a certain attitude. One can also examine an individual's stated intent or purpose, or seek to divine an underlying purpose in acts that otherwise do not seem to have a rationale.

Admittedly, intent is sometimes difficult to ascertain. People have multiple, sometimes conflicting, reasons for acting. Divining the government's intentions can also be challenging because the government is not a person but an institution or a collective body.[101] As a practical matter it may be difficult to discern the intent of any multimember body.[102] That is not to say that it cannot be done—a sophisticated literature has proposed how and why it makes sense to treat collective intentions similarly to individual ones.[103]

Divining the intent of individual lawmakers or of collective bodies is not necessary, however. One could instead look to the objective social meaning of the act. Again, Justice O'Connor's endorsement test seems to embrace this approach.[104] Anderson and Pildes also seem to argue in favor of such an account when they assert that "[e]xpressive theories of action hold people accountable for the public meanings of their actions."[105]

Professor Hellman more emphatically argues that intent is irrelevant in equal protection analysis. For her, the constitutional wrong of unequal treatment turns on the objective social meaning of a law or policy.[106] School segregation is wrong because, as Charles Black stated in his defense of the decision in *Brown v.*

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100. That attitude can be hostility or indifference; it can also be caring or love or respect. How those kinds of attitudes are made manifest—through a combination of words and deeds—is the province of expressivism. *Id.* at 1509–11.

101. *See generally* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 1–76, 218–43 (2012).

102. *See* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment . . . . It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."); *see also* Fallon, *supra* note 92, at 530 (noting the "peculiar problems posed by judicial inquiries into the intentions of multimember legislative bodies for the purpose of determining the validity of statutes or other policies").

103. *See, e.g.*, MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 58–59 (1986); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 153–85, 174–78 (2011); Adina Preda, *Group Rights and Group Agency*, 9 J. MORAL PHIL. 229 (2012); Richard C. Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 345, 345 (Micah Schwartzman et al. eds., 2016).

104. *Cf.* Hill, *supra* note 83, at 1413–15.

105. Anderson & Pildes, *supra* note 21, at 1513.

106. Hellman, *supra* note 18, at 2. Though she has perhaps modified her views more recently in light of Benjamin Eidelson's work. *See generally* BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT (2015); Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600 (2020).

Board of Education, whatever the material harms of separate schools, "the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority."[107]

There is some intramural tension in these accounts. Anderson and Pildes's "attitudes" look a lot like intentions. Those intentions might matter when assessing the public meanings of peoples' actions, but they might not. Even unintentional acts can express the wrong attitude. At the same time, it seems that intentions should be relevant to the social meaning of government action, especially if those intentions are express.[108]

Consider the infamous case of *Palmer v. Thompson*.[109] In the 1960s, the city of Jackson, Mississippi, closed all its public pools (and transferred one to the YMCA), to avoid desegregating them. The Court held that the closures did not violate the Equal Protection Clause because the decision treated Blacks and whites equally, and the Court was not willing to strike down an otherwise legitimate act solely based on "the motivations of the men who voted for it."[110]

One of the reasons judges give for avoiding motivation inquiries is the problem of obfuscation.[111] If government officials and legislative bodies can justify an act on permissible grounds, what prevents them from going back and redoing the law or policy without the taint of bad motives?[112] The city of Jackson could have recited a legitimate justification for closing the public pools. The judicial enforcement of a proper intent requirement seems like formalism.

These are legitimate concerns. But to do away with intent altogether seems problematic. Indeed, despite *Palmer* and the judicial discomfort with intent inquiries, improper motive is still a reason to strike down laws as unconstitutional. Under an expressivist theory, the reasons that government officials and public bodies undertake certain actions should be relevant to the objective social meaning of those actions. Are bad motivations required to express the wrong attitude toward individuals and groups? No. But bad motives should not be ignored.

The idea that there is a wrong, independent of material consequences, when the state acts for the wrong reasons is grounded, again, in a theory of state legitimacy. On some theories of political legitimacy, the state is required to give reasons for its actions that all citizens can understand and accept.[113] But one need not embrace such an account to be concerned about state actions that are motivated by bad intent. Closing pools because a city does not want to integrate them is the

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107. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

108. *See, e.g.*, EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 106.

109. 403 U.S. 217 (1971).

110. *Id.* at 224, 226. On *Palmer*, see Brest, *supra* note 95, at 95–99.

111. Brest, *supra* note 95, at 98; Fallon, *supra* note 92, at 530–31; Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1835–50 (2008).

112. *Palmer*, 403 U.S. at 225.

113. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 137 (2d ed. 2005).

same as saying "Blacks are inferior to whites."[114] This kind of act violates a basic requirement of reason-giving; it also sends a message of second-class status.

A social-meaning approach can encompass problematic motivations. "[E]ven a dog distinguishes between being stumbled over and being kicked," Oliver Wendell Holmes famously observed.[115] Social meaning and motivation are invariably linked; we normally assume an intentional actor when we interpret the meaning of a given act. Both the Black and white citizens of Jackson knew exactly what the closing of the pools *meant*, even if the closing was ostensibly facially neutral.

The concern with improper motive in constitutional law underlines the idea that the reason that the government acts, independent of the acts or the consequences of the acts themselves, can serve as an independent basis for constitutional concern. One need not prove material harms to invalidate acts that arise from the wrong attitude. Like all government conduct, symbolic conduct can be motivated by an impermissible purpose. Alternatively, the government's symbolic conduct can itself be an expression of an improper attitude.

The problem with the government-sponsored cross or the Confederate monument in the center of the public park might be what those symbols *do* or it might be what those symbols *say* or it might be what the government *intends* for them to do or say or it might be what the community *believes* those symbols do or say. Often, these ways of thinking about the nature of the harms or wrongs of government communicative conduct are in play simultaneously. The reasons for constitutional concern in any given case can be complimentary. Nevertheless, it is helpful to disentangle them, at least theoretically.

II. WHEN EXPRESSION MATTERS . . . AND WHEN IT DOESN'T

I have already noted some doctrinal areas in which *expressions that harm* or *expressive wrongs* appear to play a role in constitutional jurisprudence. This Part continues that exercise, with attention to the current status of what might be called an *expressive equal treatment* principle. Some form of that principle is attractive to the Justices; they regularly deploy language that suggests a preoccupation with the communicative aspects of government action. Nevertheless, there is deep disagreement over what such a principle might entail. Perhaps unsurprisingly, that disagreement is often most evident in cases involving religion, race, and sexual orientation.

A. Endorsement Underenforcement

Religion is the most obvious doctrinal area in which we see the rise and fall of an expressive equal treatment principle. At one time, the Court seemed sympathetic to embracing such a principle; as I have already noted, Justice

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114. William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 23 (2011).

115. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Little, Brown & Co. 1881); *see also* Michael C. Dorf, Response, *Even a Dog: A Response to Professor Fallon*, 130 HARV. L. REV. F. 86, 92–93 (2016).

O'Connor's endorsement test seems to reflect such a view.[116] Indeed, borrowing from Establishment Clause doctrine, Professor Tebbe argues that a general government nonendorsement principle is an implicit constitutional value that can and should be extended to other areas of constitutional doctrine.[117]

In the wake of *American Legion*, the endorsement test as applied to religious speech looks mostly moribund, at least for long-standing symbolic speech—a point I will address below. But whatever the future of nonendorsement doctrine, its past was always at best uneven. The nonendorsement doctrine certainly never cleansed the public square of religious content[118] nor did it meaningfully restrict government officials' endorsement of religious interests or tenets.

The first reason for the limited reach of the concept of nonendorsement was its uncertain application; the Justices never agreed on exactly how to think about the message of outsider status, as either inherently suspect or as causally connected to other harms.[119] As already noted, O'Connor's nonendorsement language can be read to bar messages of outsider status, whatever the consequences of those messages.[120] Objective social meaning would tell us when the wrong had occurred; the wrong, however, is the message, not any material consequences of the message.

Consequentialist reasons for regulating the government's religious speech, however, have had more influence on the outcomes of recent cases. Consider the twin Ten Commandments cases, *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*. Those cases were decided in opposite directions, with Justice Stephen Breyer serving as the fifth vote in both. In *McCreary County*, Breyer joined the majority in striking down a Ten Commandments display placed in a county courthouse, on the ground that the display violated the secular purpose prong of the *Lemon* test.[121] But in the companion case, *Van Orden*, Breyer permitted a Texas monument with the Ten Commandments, on the ground that a contrary decision "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[122]

For Breyer, the exclusionary message of the Ten Commandments display had to be balanced against the consequential harm of religious strife that might result from forcing state and local governments to remove long-standing memorials. Instead of assessing the meaning conveyed by the Ten Commandments display to determine if it communicated a message of outsider status, Breyer considered the

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116. Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

117. Tebbe, *supra* note 15, at 657–96; *see also* Norton, *supra* note 17, at 162. Earlier authors also sought to expand the reach of the Establishment Clause into other areas of government speech. *See, e.g.*, Shiffrin, *supra* note 15, at 608–609; Kamenshine, *supra* note 15, at 1104.

118. *See generally* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

119. *See generally* Schragger, *supra* note 32.

120. *See supra* Section I.A.

121. 545 U.S. 844, 850, 859, 864–65, 881 (2005).

122. 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

effects of the display on religious-based social conflict. This approach involves a weighing of costs and benefits—a functional approach to the competing meanings of government acts. Religious divisiveness is a perfectly legitimate reason to order the removal of government-sponsored religious symbols. But it also becomes a reason to *keep* those symbols despite their exclusionary messages.

A second reason for the limited reach of the nonendorsement principle is that it was always underenforced. Despite what seem to be highly consequential battles over public religious displays, the Court has never been willing to enforce an expressive equal treatment principle beyond a small subset of government symbolic acts. The Court's religious expression decisions have been primarily restricted to certain formal settings: schools,[123] religious displays in and around government buildings,[124] and monuments.[125]

The realm of government religiously expressive conduct is much broader, however. Consider religious speech at inaugurations or in campaign settings, or on the floor of Congress. The Establishment Clause has not been read to apply to religiously themed events, such as prayer breakfasts or religiously infused meetings or events hosted by the Executive Branch.[126] And it has never reached those political activities intended to reinforce certain religious–political alliances.[127] When public officials promise to pursue aims that are religiously motivated and reflect the goals of religious interest groups or explicitly endorse the positions of specific religious groups and indicate their shared values, the message of more-favored status could not be more clear.[128]

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123. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 599 (1992) (prohibiting religious exercises on public school grounds as a violation of the Establishment Clause).

124. *See, e.g.*, Cty. of Allegheny v. ACLU, 492 U.S. 573, 612–13, 621 (1989) (prohibiting the display of a creche in a county courthouse because it expressly endorsed a Christian message).

125. *See, e.g.*, *McCreary Cty.*, 545 U.S. at 864 (striking down a Ten Commandments display placed in a county courthouse on the grounds that the display violated the secular purpose prong of the *Lemon* test).

126. *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 593 (2007); Newman v. City of East Point, 181 F. Supp. 2d 1374, 1382 (N.D. Ga. 2002).

127. *Cf.* Robert Justin Lipkin, *Reconstructing the Public Square*, 24 CARDOZO L. REV. 2025, 2062 (2003) ("The Establishment Clause requires only the final stage of lawmaking to be free from religious reasons, not debates in the media, school board meetings, and other non-lawmaking contexts of political justification."). For discussion of the state action issue in Establishment Clause doctrine, see Richard J. Ansson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, The Public Forum, and Private Religious Speech*, 8 TEMP. POL. & C.R. L. REV. 1, 6–8 (1998).

128. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4–5 (2004) (dismissing Establishment Clause challenge to the words "under God" in the Pledge of Allegiance on procedural grounds); Harris v. McRae, 448 U.S. 297, 319 (1980) (rejecting an Establishment Clause challenge to restrictions on abortion funding, holding that it would be improper to assume that religion is being advanced because a law "happens to coincide or harmonize with the tenets of some or all religions"); Collmer v. Edmondson, 16 F. App'x 876, 876–78 (10th Cir. 2001) (rejecting challenge to judge praying from the bench); ACLU v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 291 (6th Cir. 2001) (rejecting

To be sure, nonendorsement's underenforcement and its ultimate demise have not stopped the Justices from invoking principles of expressive equal treatment in Establishment Clause cases. Consider again *Town of Greece v. Galloway*.[129] Recall that in *Town of Greece*, the Court held that a town's practice of inviting local religious leaders to lead prayers at town council meetings, even if those prayers were sectarian and predominantly Christian, did not violate the Establishment Clause. The Court in *Town of Greece* held that the ministers' prayers were not government speech subject to Establishment Clause constraints even though the town council had commissioned the prayers and regularly opened their meetings with them.[130]

By characterizing the Town's prayer practices as private speech, the Court avoided the question of whether the prayers conveyed a message of outsider status. Justice Kagan, writing the principal dissent for four Justices, engaged that inquiry, however. Though Kagan did not invoke the endorsement test explicitly, her opinion in *Town of Greece* is one of the clearest statements of the wrongs and harms of government practices that convey messages of outsider status.

In her dissent, Kagan argues that the Constitution does not only embrace tolerance—the freedom to worship as one chooses—but also a principle of equal citizenship.[131] "A Christian, a Jew, a Muslim (and so forth)," she writes, "—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American."[132] Sectarian religious speech in public settings undercuts that individual and collective identity. "And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government."[133]

Kagan couples this expressive wrong with the material harms that might follow. What if a judge starts a trial by asking those present to stand while a minister blesses the proceedings in sectarian terms, or an election official asks a minister to say an invocation before the opening of the polls, or a presiding officer in a naturalization ceremony has a minister invoke Christ before administering the oath

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challenge to state motto that included reference to God). *See generally* Schragger, *supra* note 32, at 587–615 (cataloging the diverse ways in which the Court has generally left messages of religious exclusivity unchallenged).

An infamous example is when President Trump used the National Guard and federal police to clear protestors from Lafayette Park outside the White House so that he could pose with a bible in front of St. John's Church. *See* Katie Rogers, *Protesters Dispersed with Tear Gas So Trump Could Pose at Church*, N.Y. TIMES (June 1, 2020), https://nyti.ms/36VrPSm. That action may have violated constitutional norms, but even under a judicially robust conception of nonendorsement it would not be justiciable.

129. 572 U.S. 565, 591–92 (2014).

130. *Id.* at 569–71, 589–90.

131. *Id.* at 632–33, 637 (Kagan, J., dissenting).

132. *Id.* at 615.

133. *Id.* at 621.

for new citizens?[134] These prayer practices would be problematic, Kagan asserts, both because they violate the equal citizenship principle and also because the person coming before the government in these instances would feel pressure to comply, because "[a]fter all, she wants, very badly, what the judge or poll worker or immigration officer has to offer."[135] Once put to the choice, the person who opts not to participate "must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations."[136] The implication is that in addition to marking herself as "other," she will receive less favorable treatment from government officials and her fellow citizens.

In this way, Kagan's dissent tracks the distinction between *expressive wrongs* and *expressions that harm*. The government's expressive conduct—its prayer practices—expresses an attitude that alters the fundamental relationship of equal concern and respect required of the state. It alters the citizen's identity before the law, placing her in a position of coming to the law clothed with a disfavored status.[137] Those prayer practices may also cause government officials or other citizens to act differently toward those who are so marked.

B. The Lessons Taught by Racial Classifications

The status of racial classifications under the Equal Protection Clause is another arena in which the Justices seem to be battling over the appropriate application of an expressive equal treatment principle. Here, too, messages seem to matter to the Justices, even as they disagree about what messages the acts at issue convey. One might have assumed that a conservative Court would generally reject the idea of expressive harms or expressive wrongs, but at least some conservatives on the Court have articulated a heightened concern with those harms.

Consider racial classifications. Conservative Justices have long argued that racial classifications are inappropriate, whatever their effects and whatever the government's good intentions.[138] The Constitution is "colorblind;"[139] government racial consciousness is inappropriate even if its purpose is to desegregate segregated institutions and even if its effects are to increase opportunities for traditionally disfavored groups.

Parents Involved in Community Schools v. Seattle School District, in which the Court rejected a voluntary race-conscious pupil placement plan intended to remedy school segregation, represents this approach at its most rhetorically demanding.[140] In writing for the Court, Chief Justice Roberts recites a litany of expressive wrongs of government racial classification. "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality;" race

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134. *Id.* at 617–18.
135. *Id.* at 620.
136. *Id.* at 621.
137. *See id.* at 630–32.
138. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007).
139. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
140. *Parents Involved*, 551 U.S. at 710–11.

consciousness is forbidden because it "demeans the dignity and worth of a person to be judged by ancestry;" racial classifications promote "notions of racial inferiority" and "reinforce the belief . . . that individuals should be judged by the color of their skin."[141]

These statements again seem to reflect a mix of consequentialist and nonconsequentialist approaches to expressive conduct, a combination of harm- and meaning-based concerns. Nevertheless, Chief Justice Roberts's rhetoric points strongly to the illegitimacy of the *message* conveyed by racial classifications as opposed to the harms or consequences of such classifications.[142] The Chief Justice appears to understand the harm in *Brown v. Board of Education* as being the fact of racial identification and classification itself, not the material consequences to Black children of being compelled to attend segregated schools.[143]

That a government racial classification itself conveys the wrong message is evident from the way Chief Justice Roberts understands segregation. He argues that *de jure* segregation deprived Black children of equal educational opportunities "regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority."[144] Of course, Blacks had received plenty of messages of inferiority from the government long before Jim Crow; segregated schools were premised on a long-standing white assumption of Black inferiority, a message conveyed by barring Blacks from attending white schools and not by the use of racial classifications by the government. As Justice Stevens points out in his *Parents Involved* dissent, state action that leads to compulsory mixing on the part of both minority and majority races conveys a quite different message than compulsory separation effectively imposed on only the minority race.[145]

For Chief Justice Roberts, however, the message conveyed by government classification is the only one that matters. On Roberts's account, the fact that government-run schools are *de facto* segregated does not itself convey a denigrating message. That the government tolerates segregated schools or engages in practices unrelated to schools that might foster segregation does not convey any message because only *de jure* classifications have expressive effects.[146] Only messages conveyed by government action and not messages conveyed by government inaction are expressive.

On this view, in other words, the government's attempt to remedy *de facto* segregation through a race-based pupil assignment system sends the exact same

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141. *Id.* at 745–46 (first quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214 (1995); then quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000); then quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989); and then quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)).

142. *Cf.* Hellman, *supra* note 18, at 1–2.

143. On colorblindness as a restriction on substantive equality, see GOLUBOFF, *supra* note 55, at 13–15

144. *Parents Involved*, 551 U.S. at 746.

145. *Id.* at 799–800 (Stevens, J., dissenting).

146. *Id.* at 736 (plurality opinion). *But cf.* Reitman v. Mulkey, 387 U.S. 369, 380–81 (1967).

message as the government's active enforcement of *de jure* segregation.[147] Justice Thomas, in concurrence, goes even further. He argues that the government's attempt to remedy *de facto* segregation itself—independent of the use of specific racial classifications—conveys the message that homogeneous Black schools are inferior to mixed or all-white schools, and by extension, it conveys a message that Blacks are inferior to whites.[148] For him, practices that seek to promote race intermixing have the effect of stigmatizing the minority race.

The language of stigma, dignity, and respect is deployed by conservative and liberal Justices. As Kagan's dissent in *Town of Greece* and Roberts's opinion in *Parents Involved* illustrate, these constitutional controversies revolve around an expressive equal treatment principle. In both cases, government messages, whether or not accompanied by effects, are understood to be powerful. These messages have the power to exclude, stigmatize, demean, and denigrate. They also exhibit the wrong attitude regardless of material consequences. They *teach* the wrong lessons.

C. Same-Sex Marriage and Disrespectful Government Speech

We see a similar application of an expressive equal treatment principle in recent cases involving LGBTQ rights, as well as in cases about the rights of religious persons who seek to avoid compliance with LGBTQ anti-discrimination laws.

As to the former, *Obergefell v. Hodges*, the same-sex marriage case, is an obvious example.[149] Justice Kennedy's opinion for the Court notes the differential treatment that exclusion from marital status imposes on gays and lesbians. But his first concern is the government's "symbolic recognition" of the marriage relationship and the demeaning message that nonrecognition conveys.[150] Kennedy employs the word "dignity" nine times in the opinion; in discussing the urgency of judicial action even as legislators move to recognize same-sex marriage, Kennedy notes that "[d]ignitary wounds cannot always be healed with the stroke of a pen."[151] Exclusion from equal marital status for gays and lesbians "has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. . . . Without the recognition . . . [their] children suffer the stigma of knowing their families are somehow lesser."[152]

For Kennedy, despite all its materiality, marriage status is ultimately the state's recognition of an intimate and transcendent bond. Lack of state recognition demeans the institution of marriage, delegitimizes the intimacy shared by gays and lesbians in committed relationships, and treats gays and lesbians as less than equal in all respects. In other words, Kennedy seems concerned about the social meaning of denying the term "marriage" to same-sex couples, as well as the actual stigmatizing effects of that denial. At stake is the wrong of government

147. *See* James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 147–48 (2007).

148. *See Parents Involved*, 551 U.S. at 761–70 (Thomas, J., concurring).

149. 135 S. Ct. 2584 (2015).

150. *Id.* at 2601.

151. *Id.* at 2606.

152. *Id.* at 2600–02.

nonrecognition. Material harms, psychological and otherwise, are secondary. Marriage status is centrally concerned with demeaning government communications.

Notably, demeaning government communications were also at issue in a case involving religious claimants seeking to *avoid* serving same-sex married couples: *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[153] *Masterpiece* is a wedding vendor case—one of many involving petitioners who claim that they should be exempt from LGBTQ anti-discrimination laws on the ground that their religious beliefs bar them from providing marriage-related services to same-sex couples. Kennedy again wrote for a Court not entirely certain about how to think about the respect that needs to be accorded to those who assert that they cannot comply with a general law for religious reasons. This has been a perennial problem in the jurisprudence of religious accommodations under the Free Exercise Clause. In expressivist terms, we might ask whether government enforcement of a law that conflicts with important tenets of a religion or with important conscience commitments conveys a denigrating or exclusionary message.

Three Justices would have granted the petitioner-baker in *Masterpiece* relief even under the general rule—stated in *Employment Division v. Smith*[154]—that the Free Exercise Clause does not normally provide protection for claimants seeking exemptions from generally applicable neutral laws.[155] But in his opinion Justice Kennedy recognizes that ruling for the baker would have its own expressive implications. He affirms—as he presumably must following *Obergefell*—that "gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[156] A broad rule permitting religious persons to deny marriage-related service to gay couples would "result[] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[157] The stigma of service denials is a harm along with the denial of service itself.

Despite these concerns, the Court ruled for the baker because the process of adjudicating his claim was infected with religious "hostility."[158] The problem, according to the Court, was in the ways that certain members of the Colorado Civil Rights Commission *spoke* about the baker's religious beliefs and justified their initial ruling enforcing the Colorado Anti-Discrimination Act against him. First, the Court notes that the Colorado Commission had failed to pursue an anti-discrimination claim against a different baker who had failed to serve a customer who requested a cake decorated with anti-gay statements. Second, the Court asserts that certain statements by some commissioners evidenced hostility to the baker by disparaging his religious beliefs. The majority points in particular to a statement by a commissioner: "Freedom of religion and religion has been used to justify all kinds

153. 138 S. Ct. 1719 (2018).
154. 494 U.S. 872, 878–79 (1990).
155. *Masterpiece*, 138 S. Ct. at 1734 (Gorsuch, J. & Alito, J., concurring), 1740 (Thomas, J., dissenting).
156. *Id.* at 1727.
157. *Id.*
158. *Id.* at 1732.

of discrimination throughout history . . . . And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[159] This statement could be understood as the Commission treating the baker's conscience-based objections as illegitimate, "thus sitting in judgment of his religious beliefs themselves."[160] The Commission's words, in other words, "send[] a signal of official disapproval of [the baker's] religious beliefs."[161]

Doctrinally, *Masterpiece* turns on improper intent or motive. The majority is willing to attribute bias (the term "animus" never comes up in the majority opinion, though Justice Gorsuch uses it in his concurrence[162])—or at least a lack of religious neutrality—to the decision-makers. This is so despite the fact that there was no evidence at all that Colorado's anti-discrimination law was adopted in an effort to target a particular religion or out of a "bare desire to harm" traditionalist believers. Nevertheless, according to the Court, the Commission's error was in failing to provide the cake baker with "neutral and respectful consideration."[163] On this theory, applying the anti-discrimination law to wedding vendors is appropriate, but only if religious claims are afforded appropriate procedural respect.[164]

Like in *Town of Greece*, *Parents Involved*, and *Obergefell*, at issue in *Masterpiece* was the message conveyed by government conduct. Writing for a cobbled-together majority, Kennedy sought neither to denigrate gays and lesbians nor to stigmatize religious conscientious objectors. But does the state's recognition of same-sex marriage demean orthodox religious believers? Does a nondiscrimination ordinance that protects gays and lesbians send a message that fundamentalist Christians are second-class citizens? Does the state have to exempt religious persons from generally applicable neutral laws to show them equal concern and respect? The Court in *Obergefell* and the Colorado legislature both appear to have picked sides. Nevertheless, the demand for exemptions sounds in the same expressive register as the demand for equal access.

Against the backdrop of the religious and political culture wars, controversies over mandatory exemptions have both symbolic and material aspects. In 31 states, lesbians and gays are not protected by public accommodations laws, and thus anyone can refuse to serve them.[165] Nevertheless, some state legislatures have adopted explicit conscience protections for those who oppose same-sex marriage[166]—a purely symbolic action in states that already permit LGBTQ discrimination. These laws seem intended to buttress the expressive fortunes of

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159. *Id.* at 1729.
160. *Id.* at 1730.
161. *Id.* at 1731.
162. *Id.* at 1737 (Gorsuch, J., concurring).
163. *Id.* at 1729 (majority opinion).
164. Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133–34 (2018).
165. MOVEMENT ADVANCEMENT PROJECT, LGBT POLICY SPOTLIGHT: PUBLIC ACCOMMODATIONS NONDISCRIMINATION LAWS 1 (2018), http://www.lgbtmap.org/policy-spotlight-public-accommodations.
166. *See* Mark Strasser, *Neutrality, Accommodation, and Conscience Clause Legislation*, 8 ALA. C.R. & C.L. L. REV. 197, 231–32 (2017).

religious traditionalists[167] to *send a message*. *Masterpiece* also sends a message: the decision suggests that even the slightest hint of religious disrespect should doom the application of an otherwise facially neutral law.

D. The Limits of Expressive Equal Treatment

The Court's concern with anti-religious disrespect only goes so far, however. Compare *Masterpiece* with *Trump v. Hawaii*, the Muslim travel ban case, decided in the same Term. As Professors Leslie Kendrick and Micah Schwartzman have observed:

> The principle of religious neutrality, along with the duty of civility . . . forbids public officials from acting on the basis of hostility toward religion. But if there was a clear case involving religious animus this past Term, it was not *Masterpiece*, but *Trump v. Hawaii*, in which the Supreme Court upheld the third iteration of President Trump's travel ban. There has never been a case in which the Court was presented with more evidence of religious animus on the part of a single and final executive decisionmaker.[168]

Trump v. Hawaii arose from a challenge to the President's Executive Order limiting travel to the United States from a set of predominantly Muslim countries. The ban's roll-out was famously chaotic, with travelers becoming stuck in U.S. airports and lawyers rushing to ports-of-entry to offer legal assistance.[169] A number of district and appellate courts struck down the ban on the ground that it violated the Establishment Clause insofar as the purpose and intent of the ban was to target a particular religious group.[170] The evidence for that targeting was everywhere and extensive. The President, who had sole authority to enact the ban, had repeatedly promised to adopt a "Muslim ban" and made good on that promise, and he continued to engage in "an unrelenting attack on the Muslim religion and its followers" even as the ban was contested in courts across the country.[171]

The Muslim ban case illustrates the malleability of the expressive equal treatment principle, or at least the Justices' capacity to see disrespect only when they want to.[172] There are good reasons for the Court to give wide berth to the President

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167. Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 282. *But see* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1734 (2020) (interpreting Title VII's anti-discrimination in employment provisions to apply to sexual orientation and identity).

168. Kendrick & Schwartzman, *supra* note 164, at 168 (citing Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018)); *see also Trump*, 138 S. Ct. at 2439 (Sotomayor, J., dissenting) (highlighting that the President "continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers" rather than disclaim his previous remarks).

169. *See* Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), https://nyti.ms/2jGsqQG.

170. *See, e.g.*, Darweesh v. Trump, No.17 Civ. 480 (AMD), 2017 U.S. Dist. LEXIS 13243, at *2–3 (E.D.N.Y. Jan. 28, 2017).

171. *Trump*, 138 S. Ct. at 2439 (Sotomayor, J., dissenting).

172. *See* Clarke, *supra* note 38, at 510 (observing that courts "regularly turn a blind eye" to stereotyping and discrimination, distorting "discrimination doctrines to overlook explicit government bias").

when he is exercising the Executive Branch's power to regulate the national borders. But the Court's failure to place constitutional limits on facially neutral government acts that are well known to be motivated by animus looks quite similar to the willful disregard of social facts in the *Palmer* pool-closing case. In ignoring the stated targeting of Muslims by the President, while at the same time protecting the cake baker from religiously insensitive remarks in *Masterpiece*, Justice Kennedy in particular showed himself to be inconsistent at best, and insincere and ends-driven at worst.[173]

The expressive favoritism conveyed by the Court's own conduct is difficult to ignore. In the same Term, the Court struck down a state anti-discrimination decision against an evangelical Christian in part because a state equal rights commissioner made one or two general comments about religiously motivated intolerance. But it upheld an Executive Order closing the border to Muslims despite the fact that the President of the United States repeatedly and pointedly attacked an especially insular and reviled religious minority.[174]

In light of the disparate outcomes in *Masterpiece* and *Trump*, one might be skeptical of the Court's rhetorical and doctrinal invocations of dignity, respect, and stigmatic harm. Nevertheless, these concepts continue to play a significant role in constitutional adjudication. When the Justices employ these terms, they are in some instances referring to the material harms of the government's expressive conduct. They might also be embracing—however undertheorized—an expressivist theory in which government conduct can be understood as unconstitutional only by reference to its social meaning; that is, with reference to the *message* that the government act conveys.

III. OF CROSSES AND CONFEDERATE MONUMENTS

With this doctrinal background in mind, we now turn to crosses and Confederate monuments. This Part begins with a close reading of the Bladensburg

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173. *See Trump*, 138 S. Ct. at 2401 (majority opinion); Kendrick & Schwartzman, *supra* note 164, at 169; *cf.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916–19 (Sotomayor, J., concurring in part and dissenting in part).

174. *See also* Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), https://nyti.ms/2EzkEQe (describing Haiti and some African nations as "shithole countries"); Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), https://nyti.ms/2DCJqPP (declaring that immigrants to the United States from Haiti "all have AIDS" and warning that as soon as Nigerian immigrants saw the United States, they would never "go back to their huts" in Africa); *Full Transcript and Video: Trump's News Conference in New York*, N.Y. TIMES (Aug. 15, 2017), https://nyti.ms/2vBs7wD (declaring that, concerning the violence perpetrated by white supremacists and neo-Nazis against counter protesters in Charlottesville, Virginia, there were "very fine people on both sides"); Donald J. Trump (@realDonaldTrump), TWITTER (July 14, 2019, 5:27 AM), https://twitter.com/realDonaldTrump/status/1150381395078000643 (telling four minority congresswomen, all of whom are U.S. citizens and only one of whom was born abroad, to "go back and help fix the totally broken and crime-infested places from which they came").

Cross case, *American Legion*, and then asks what implications it might have for potential constitutional challenges to Confederate monuments and symbols.

American Legion is notable because a majority of the Justices continues to take seriously the Court's role in plumbing the meaning and effect of government-sponsored religious symbols even as the Court holds that such symbols should enjoy a presumption of constitutionality. What is also notable about the case is that the majority is concerned not only with the message the cross conveys but also the message that the Court would convey if it ordered the cross's removal. A remarkable inversion occurs in *American Legion*: the central religious symbol of the dominant, majority religion must remain in place because its continuous presence for so many years represents "a society in which people of all beliefs can live together harmoniously" and to remove it would suggest otherwise.[175] Over time, and even as the United States becomes more religiously diverse, the cross becomes more entrenched rather than less.

The logic of *American Legion* can be applied to long-standing Confederate monuments as well. To be sure, *American Legion* indicates the Court's lack of appetite for regulating symbolic government speech and certainly does not suggest a Court that would be amenable to regulating symbolic speech outside the religion context. At the same time, however, the case highlights the oddness of restricting a meaning-based analysis to religious symbols alone.

A. Of Crosses: Establishment Clause Inversion

American Legion's inversion of the Establishment Clause occurs in two steps.[176] First, the Court empties the cross of its religious significance and meaning. And second, it credits the religious and civic majority's understanding of what the cross means over and above religious and civic minorities' understandings.

1. The Cross Is Not a Religious Symbol

The first step in Justice Alito's majority opinion has all the indications of Justice Breyer's influence. Breyer was first to advance a "grandfathering" theory for religious displays. On this theory, developed in his opinion in the *Van Orden* case, long-standing religious displays are presumptively constitutional because the passage of time drains them of religious significance and imbues them with more civic and secular meanings.[177] The Bladensburg Cross was erected in 1925 to memorialize the World War I dead, and Justice Alito's opinion for the Court spends a great deal of time discussing the history of the cross and how it became a central secular symbol of World War I.[178] Alito's engagement with cultural history is quite

175. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

176. A preliminary version of this analysis was first presented by Richard Schragger and Micah Schwartzman. Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, 2018–2019 ACS SUP. CT. REV. 21.

177. *See* Van Orden v. Perry, 545 U.S. 677, 701–03 (2005) (Breyer, J., concurring).

178. *Am. Legion*, 139 S. Ct. at 2074–78.

remarkable, including references to poetry ("In Flanders fields the poppies blow/Between the crosses, row on row") and other cultural and literary materials.[179]

That history is also somewhat selective. Obviously, the United States was a much more homogeneously Christian country in the early part of the twentieth century. That a cross would symbolize the war dead in early twentieth century America is not surprising considering the overwhelming dominance of the majority Christian culture. More specifically, the 1920s were a time of religious hostility and conflict—resurgent Ku Klux Klan ("KKK") activity, nativism, anti-Semitism, and anti-Catholicism,[180] a "period when the country was experiencing heightened racial and religious animosity"—as the majority opinion concedes.[181] Nonetheless, Justice Alito asserts that the Bladensburg Cross seems not to be associated with those animosities; indeed, though one "can never know for certain what was in the minds of those responsible for the memorial . . . we can perhaps make out a picture of a community that, at least for the moment, was united by grief and patriotism and rose above the divisions of the day."[182] This statement is a surprisingly rosy portrait of a much more contentious time.

Justice Alito's primary purpose in recounting this history, however, is to cast doubt on the enterprise of plumbing the motivations of the people who erected the cross decades ago. He argues that it is impossible to tell whether "the cross's association with the war was the sole or dominant motivation for the inclusion of the symbol in every World War I memorial that features it."[183] In addition, "as time goes by" the purposes of monuments and other symbols "often multiply"—with religious and secular purposes sharing cultural space.[184] And further, the message a monument conveys may change with the passage of time: "religiously expressive monuments . . . can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their religious roots."[185] The opinion cites the universal appreciation for Notre Dame Cathedral in Paris as an example, as well as the cities and towns across the United States that bear religious names, and concludes that "[f]amiliarity itself can become a reason for preservation."[186]

The Court raises these objections ostensibly as a criticism of intent- or meaning-based tests in the Establishment Clause, namely the *Lemon* test's secular purpose prong and O'Connor's endorsement test. Justice Alito's discussion of the

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179. *Id.* at 2075 (quoting John McCrae, *In Flanders Fields*, *in* IN FLANDERS FIELDS AND OTHER POEMS 3, 3 (G. P. Putnam's Sons ed., 1919)).

180. *See generally* DAVID M. CHALMERS, HOODED AMERICANISM (1987); KENNETH T. JACKSON, THE KU KLUX KLAN IN THE CITY, 1915–1930 (1967); MICHAEL NEWTON, THE KU KLUX KLAN: HISTORY, ORGANIZATION, LANGUAGE, INFLUENCE AND ACTIVITIES OF AMERICA'S MOST NOTORIOUS SECRET SOCIETY (2007); WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA (1987); Roland G. Fryer, Jr. & Steven D. Levitt, *Hatred and Profits: Under the Hood of the Ku Klux Klan*, 127 Q.J. ECON. 1883 (2012).

181. *Am. Legion*, 139 S. Ct. at 2089–90.

182. *Id.* at 2090.

183. *Id.* at 2085.

184. *Id.* at 2082.

185. *Id.* at 2084.

186. *Id.*

difficulties of interpretation is intended to cast doubt on both tests and more generally on the enterprise of judicial inquiries into the meaning of long-standing religious-expressive practices. In light of these difficulties, the Court stated those practices enjoy "a strong presumption of constitutionality."[187]

It is notable, however, that the Court's central conclusion about the Bladensburg Cross is that it no longer conveys a religious message. Justice Alito argues that crosses were always secular symbols of the war dead, at least in the context of World War I dead. Before his death, Justice Scalia had maintained a similar position, arguing in a much-noted exchange with a Jewish lawyer that crosses represented all war dead, despite the lawyer's protestation that he had never seen a cross on the tombstone of a Jewish soldier.[188]

Indeed, the Court applies a meaning-based analysis in the very case in which it eschews it. On a nonendorsement theory—an approach that the majority rejects—the case could have ended there. If the Bladensburg Cross is a secular symbol of the war dead, then it likely does not convey a message of outsider status and, on that view, would not violate the Establishment Clause.

2. Perspective Switching

Alito's opinion for the Court proceeds to a second step, however. After draining the cross of its religious purpose and meaning, the Court considers the meaning of *removing* the cross from the perspective of those who favor keeping it. In many cases, that will be a political and religious majority, though it need not be. The opinion moves from history and motive to contemporary meaning and effect, but from a particular perspective. In a striking passage, Justice Alito writes:

> When time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive.[189]

Whose understanding of "neutrality" is being upset here? Who is being disturbed? To whom is the act of removing a monument divisive? The endorsement test sought to view government-sponsored religious displays from the perspective of the reasonable observer. There has been much criticism of this "reasonable observer" and some dispute as to whether the reasonable observer is a member of a religious and civic majority or a civic and religious minority.[190] Professor Jessie Hill

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187. *Id.* at 2085.

188. Transcript of Oral Argument at 38–39, Salazar v. Buono, 559 U.S. 700 (2010) (No. 08-472).

189. *Am. Legion*, 139 S. Ct. at 2084–85.

190. *See* Note, *Developments in the Law: Religion and the State: III. Accommodation of Religion in Public Institutions*, 100 HARV. L. REV. 1639, 1648 (1987)

has defended the reasonable observer as a heuristic for determining the social meaning of government acts.[191] But whatever one's position on the reasonable observer, commentators had uniformly assumed that the message being observed was the message conveyed by the religious display, not the message that would be conveyed by a judicial order to remove it.

The Court inverts this perspective, however. Alito's opinion takes the perspective of those who already favor the cross and asks what message they would receive if the Court were to order the cross's removal. For those people who believe that the cross is a historical landmark, a symbolic resting place for the dead, or a place to honor veterans, "destroying or defacing the cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."[192] In this way, the Court converts an emphatically nonneutral religious symbol into its opposite.

Do messages matter? Indeed. Government message-sending assumes central importance, as the majority asserts that removing a long-standing memorial could send as potent a message as erecting it. The equivalence is notable—compare this to *Parents Involved* in which we see a similar message-sending equivalence between classifications intended to foster segregation and those intended to remedy it.[193] Note also who is receiving the message of disrespect and intolerance: not the members of minority religions who do not understand the cross to represent them and therefore receive a message of outsider status but rather the people who have come to cherish the monument and therefore would feel harmed by its destruction.

That harm—the harm of removal—is not exactly stigmatic or exclusionary. Religious believers and other members of the community who have secular commitments to the memorial will feel badly about the removal, but it is difficult to imagine that the government or other citizens will treat them differently in concrete ways because of the message sent by the removal or that those members of the community will be stigmatized in some way. The wrong here seems to be entirely expressive.

But maybe a material harm lurks beneath this asserted failure of respect. In *Van Orden*, the Ten Commandments case, Justice Breyer was fairly explicit about his concern that a judicial decision ordering the removal of Ten Commandments monuments across the country would cause more religious and cultural division than

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(arguing that the reasonable observer standard "must turn on the message received *by the minority or nonadherent*"); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 510–22 (2002).

191. *See* Hill, *supra* note 78.

192. *Am. Legion*, 139 S. Ct. at 2090.

193. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 741–42 (2007) (rejecting the argument "that different rules should govern racial classifications designed to include rather than exclude"); *see also id.* at 748, 773–80 (Thomas, J., concurring) (drawing parallels between the arguments in favor of maintaining segregation advanced by Southern segregationists and the dissent's arguments in *Parents Involved*).

allowing them to stand.[194] Possible harms of ordering a cessation of certain forms of symbolic religious speech are political backlash and social conflict.

Such conflict is certainly a material harm. But we should be uncomfortable with a doctrine that essentially allows aggrieved majorities to exercise a "heckler's veto"[195] on the inclusionary rights of minorities. Indeed, it seems to invert the Establishment Clause to use it as a shield to defend majoritarian religious practices as opposed to a sword to strike them down. Certainly, taking down a cross that has the support of the community will "harm" the members of that community. But that is the harm of being demoted from a favored status, not the harm of being treated as a second-class citizen. Consideration of the harms of removing religious speech could be understood as attentiveness to religious sensibilities, but the whole point of the Establishment Clause is that no one religion enjoys a favored civic status.

Presumably, the argument for treating long-standing monuments differently from more recent ones is that the majority recognizes that divisiveness can be generated by the feelings of disrespect on both sides. Perhaps the Justices are looking to broker a truce: no more contesting existing monuments, practices, and symbols, but no more erecting or implementing new ones. The old/new distinction seems meant to prevent governments from suddenly erecting crosses across the landscape, including in or on courthouses and city halls—locations that seem particularly problematic. But that distinction also freezes in place the relatively homogeneous religious, social, and cultural commitments of the early- to mid-twentieth century. It is a rule that entrenches a particular historical moment—a moment of Protestant hegemony.

It is also probably naïve.[196] Justices Breyer and Kagan both dissented in the *Town of Greece* town council prayer case, so they are fully aware that new government-sponsored religious practices are being upheld by a Court that is inclined to narrow the Establishment Clause significantly.[197] Short of a declaration that the United States is a Christian nation or the return of school prayer, the conservative Justices seem inclined to permit many government-sponsored religious practices, most of which can be justified by reference to some historical practice.

Moreover, at least two Justices—Gorsuch and Thomas—would reject constitutional challenges to symbols altogether. Justice Gorsuch argues at length in concurrence that "offended observer" standing is an anomaly and should be eliminated altogether.[198] He takes the strong "sticks and stones" position, arguing

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194. Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) ("[T]o reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.").

195. Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) (citing HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–60 (1965)).

196. *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 281.

197. *See* Town of Greece v. Galloway, 572 U.S. 565, 615–38 (2014) (Kagan, J., dissenting).

198. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098–103 (2019) (Gorsuch, J., concurring).

that "mere offense" can never give rise to a constitutional violation under the Establishment Clause or otherwise. Justice Thomas argues that the Establishment Clause should never have been incorporated against the states, and further, that the Free Exercise Clause only protects against coerced religious practice, not government expression.[199]

These are minority views, though they have received some sympathy in the academic literature.[200] To be sure, the Court does not embrace these more radical approaches, though *American Legion* could have served as a vehicle to do so. Indeed, the Justices seem perfectly comfortable assessing the communicative import of government acts. That the majority concludes that the message conveyed by removal of the cross would be more injurious than the message conveyed by its continued existence is a function of who the Justices credit in receiving the multiple messages conveyed by government conduct.

B. Of Confederate Monuments: Why Not Level Up?

What are the implications of *American Legion* for the constitutionality of Confederate monuments? Courts have rejected equal protection challenges to Confederate iconography,[201] and *American Legion* can easily be read to support those outcomes. But the case also illustrates the inconsistency of an expressive doctrine that only applies to religious speech.

1. Leveling Up

Start with the puzzle of religious speech's exceptionalism. That exceptionalism makes little sense in light of *American Legion* for two reasons. First, there is no way to differentiate "religious" government speech (which is amenable to Establishment Clause analysis) from "nonreligious" government speech (which is not) without first assessing the meaning of a particular symbol. Indeed, according to the majority in *American Legion*, the Bladensburg Cross is no longer a religious symbol, if it ever was. The cross commemorated and continues to commemorate the heroic sacrifices of World War I veterans and was and is preoccupied with honoring that War's dead. Moreover, the cross's meaning has changed over time and has become imbued with additional meanings, all of them secular.[202]

In other words, to understand what the cross *is* is to understand what the cross *means*. And to figure out what the cross means, the Court must engage in

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199. *Id.* at 2095–97 (Thomas, J., concurring).

200. *E.g.*, Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998); Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 257 (2014); Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795, 797–98 (1993). *But see* Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 676 (2013) (defending Establishment Clause incorporation as both "logically coherent and textually defensible.").

201. *See, e.g.*, Moore v. Bryant, 853 F.3d 245, 249–53 (5th Cir. 2017) (holding that plaintiffs did not have standing to contest the flying of the Confederate battle flag); *cf.* James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991); Lineberry, *supra* note 67.

202. *Am. Legion*, 139 S. Ct. at 2089.

interpretation. Some ostensibly religious symbols turn out to be secular and some secular symbols might turn out to be religious. Often the central dispute in these kinds of cases—as in *American Legion*—concerns whether a given expression (the Ten Commandments or the cross or "In God We Trust") is a civic statement with a civic meaning or religious statement with a theological meaning. If secular symbols can become religious and vice versa, then the doctrinal religious/nonreligious distinction collapses.

Second, even if the Justices can determine which symbols are facially religious and which ones are not, they would be hard-pressed to justify why the former are subject to constitutional limits on expressive harms or wrongs and the latter are not. The special status of religious-based conflict in our constitutional tradition might weigh in favor of unique sensitivity to government-sponsored religious practices. But racial conflict is deeply embedded in the American constitutional experience and is as pernicious or more so than religious-based conflict. As I have already observed, equal protection doctrine is uniquely attentive to messages of racial inferiority: both those who support benign racial classifications and those who oppose them tend to read *Brown v. Board* as a case about the social meaning of forced separation.[203]

As noted above, in his concurrence in *American Legion*, Justice Gorsuch observed that "offended observer" standing is an anomaly in the law and that it should be eliminated.[204] He pointed out that claimants asserting religious-based expressive harms are in a more favorable position than those asserting racially based expressive harms, and he found that disparity odd.[205] What follows, he argued, should be the elimination of such standing for those asserting religious-based expressive harms.[206]

But Gorsuch's argument could point in the other direction just as easily—to justify *extending* observer standing instead of eliminating it. Such an extension would be consistent with the Court's appreciation for expressive harms and wrongs in a number of other doctrinal contexts, as described above. The Court already seems prepared to address expressive wrongs in nonreligious contexts, even if it does not do so through First Amendment doctrine.[207]

Indeed, Gorsuch is right about the anomaly: why should constitutional law not apply to potentially racially hateful government speech when it applies to potentially religiously hateful government speech? Under Gorsuch's theory, the government would be permitted to sponsor an annual cross-burning, which seems obviously problematic.[208] But the social meanings of government acts have always been subject to constitutional restraint under equal protection.[209] Gorsuch would level down by eliminating standing under the Establishment Clause. But why not

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203. *See supra* Section II.B.
204. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring).
205. *Id.* at 2099 (citing Allen v. Wright, 468 U.S. 737 (1984)).
206. *Id.* at 2102–03.
207. *See supra* Section I.A.
208. *See* Tebbe, *supra* note 15, at 651.
209. *See supra* Section II.B.

level up and allow those with colorable claims of racially discriminatory state expression to bring those claims?[210]

2. The Changing Meaning of Confederate Monuments

If we were to read *American Legion* to apply to speech that facially implicates the Equal Protection Clause, then what might the case say about Confederate iconography, and in particular statues that honor Confederate officials and officers, like Jefferson Davis, Robert E. Lee, and Thomas J. "Stonewall" Jackson? This question remains a live one not just as a matter of standing doctrine, but substantively as well, because whether or not observer standing extends to Confederate monuments under the U.S. Constitution, there may be other ways to contest their constitutionality, either as a defense or under state constitutions with less stringent standing requirements.[211]

One possibility is that *American Legion*'s old/new distinction would protect all long-standing Confederate monuments too. One could call this rule (only somewhat facetiously) a presumption of constitutionality for old, white men. If the Court does not want to intervene in disputes over Confederate iconography, it can easily avoid doing so through its existing standing doctrines or through the grandfathering embraced by *American Legion*.[212]

But consider a court applying *American Legion* conscientiously to Confederate monuments. As in *American Legion*, one would begin with the motivations of the builders and the meaning of the monument at the time it was erected. On this score, the historical consensus is fairly clear. As the American Historical Association's official statement reads: Confederate monuments erected in the early- and mid-twentieth century were "part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South. . . . [and] were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African Americans politically and isolate them from the mainstream of public life."[213]

The monument building that accompanied the "Lost Cause" narrative that emerged in the early part of the twentieth century was unlike the association of white crosses with World War I dead. It had an explicit political purpose—to re-entrench white supremacy and assert dominance in the face of rising Black rights consciousness.[214] It is no accident that the bulk of Confederate statues were built

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210. *See* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 516–17 (2004) (criticizing the current permissibility of leveling down).

211. *See* Lineberry, *supra* note 67.

212. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019).

213. Am. Historical Ass'n, *Statement on Confederate Monuments*, PERSPECTIVES ON HISTORY (Oct. 1, 2017), https://www.historians.org/publications-and-directories/perspectives-on-history/october-2017/aha-statement-on-confederate-monuments [https://perma.cc/8Q6E-HKBH].

214. In various speeches commemorating the unveiling of statues to Confederate generals Stonewall Jackson and Robert E. Lee in Charlottesville, Virginia, the commentators all made their race-based intentions clear. At the unveiling of the Jackson statue on October 18, 1921, Edwin Alderman, President of the whites-only University of Virginia, celebrated

during two periods: during the 1920s, when states were adopting Jim Crow laws meant to restrain and send a message to Blacks of whites' dominant status, and during the 1950s and 1960s, when the Black civil rights movement was again threatening white supremacy.[215] The intended message of social and political inferiority was clear.

Consider for instance the Robert E. Lee statue in downtown Charlottesville, Virginia—the site of neo-Nazi rallies in the summer of 2017.[216] The Lee statue was part of a downtown Charlottesville beautification effort that began in the second decade of the twentieth century and was inspired in part by the architectural reform "City Beautiful" movement that followed the 1893 World's Columbian Exposition in Chicago.[217]

In cities and towns across the South, "City Beautiful" and segregation were handmaidens. To make way for the park that was constructed to house the statue, Charlottesville had to raze a block of houses and buildings occupied by Black residents. The razing of the "McKee block" was the first in a series of "urban renewal" projects that took Black land and transferred it to whites-only use.[218] Lee Park was segregated and it was flanked by an imposing, neoclassical whites-only library on one side and by a similarly imposing whites-only elementary school a block away.[219] In the lead up to the dedication of the Lee statue in 1924, the KKK held a cross-burning[220] and organized a grand, night-time parade.[221] Thousands of residents lined the streets, the local paper reported, and the "march of the white robed

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Jackson as "a great Christian warrior . . . . [who] passed without dispute, in the glory of unconquerable youth, into the inner circle of the soldier-saints and heroes of the English race." *Jackson Statue is Unveiled*, DAILY PROGRESS, Oct. 19, 1921, at 3. Similarly, at the dedication of the Lee statue on May 21, 1924, the event's keynote speaker was celebrated as a man for whom "[e]very drop of the red blood that visits his heart and flows in his veins is CONFEDERATE BLOOD . . . ." *Introduction of Rev. M. Ashby Jones, D.D.*, DAILY PROGRESS, May 21, 1924, at 1. Subsequent speakers celebrated Lee himself as "the South's ideal hero" who represented "all those traditions and characteristics that constituted the moral greatness of the Old South at its best estate." *Dr. H. L. Smith Presents Statue*, DAILY PROGRESS, May 21, 1924, at 7.

215. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy [https://perma.cc/GFE4-LGN7] [hereinafter *Whose Heritage?*].

216. Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html [https://perma.cc/3DBW-V2BJ].

217. DANIEL BLUESTONE, BUILDINGS, LANDSCAPES, AND MEMORY: CASE STUDIES IN HISTORIC PRESERVATION 212–15 (2011); CITY OF CHARLOTTESVILLE BLUE RIBBON COMM'N ON RACE, MEM'LS, & PUB. SPACES, REPORT TO CITY COUNCIL 7 (Dec. 19, 2016), https://perma.cc/R82U-JPPP [hereinafter BLUE RIBBON COMM'N].

218. *See* Louis P. Nelson, *Object Lesson: Monuments and Memory in Charlottesville*, 25 BLDGS. & LANDSCAPES 17–18, 23, 31 (2018); BLUE RIBBON COMM'N, *supra* note 217, at 11. *See generally* CHARLOTTESVILLE 2017, *supra* note 5.

219. BLUESTONE, *supra* note 217, at 213–15.

220. *Cross Burned on Patterson's Mountain*, DAILY PROGRESS, May 17, 1924, at 1.

221. BLUE RIBBON COMM'N, *supra* note 217.

figures was impressive and directed attention to the presence of the organization in the community."[222] The official dedication program included Confederate balls, parades, and meetings organized by the United Confederate Veterans and their affiliates.[223] Edwin Alderman, President of the whites-only University of Virginia, declared at the unveiling that "[t]he South's great Chieftain had done even more than his great prototype, Washington," and that Lee "was the embodiment of the best that there is in all the sincere and romantic history of the whole state. Its triumphs, its defeats, its joys, its sufferings, its rebirth, its pride, and its patience center in him."[224]

The Lee statue was only one way in which white Charlottesville inscribed its political and social dominance into the landscape. A number of other monuments—including a statue of Stonewall Jackson—were erected around the same time and in the center of core civic spaces.[225] Jackson was placed alongside the county courthouse; a Confederate soldier statue stood guard right in front.[226] So too, whites sought to physically and symbolically occupy Black spaces. The early part of the twentieth century witnessed bomb-throwings[227] and lynchings;[228] the KKK's march into Charlottesville's Black neighborhood was an explicit provocation.[229]

What were the motivations of those who built these statues across the South? White supremacy went without saying—the Lost Cause narrative assumed the moral rightness of the Southern cause and the honorability of those who fought to preserve slavery. At the dedication of the Silent Sam memorial at UNC Chapel Hill in 1913, Julian Carr, an alumnus and benefactor of the University, celebrated "the Anglo-Saxon race . . . the purest strain of which is to be found in the 13 Southern States."[230] This rhetoric was unsurprising: white racial superiority was taught in major universities across the country as part of the early-twentieth century eugenics discourse.[231] When Richmond, Virginia, unveiled its own Lee statue in

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222. *Klan Parade Drew Big Crowd*, DAILY PROGRESS, May 19, 1924, at 1.

223. *Complete Program of the Reunion*, DAILY PROGRESS, May 19, 1924, at 1, 4.

224. *Lee Ideal of a Whole Land*, DAILY PROGRESS, May 21, 1924, at 1, 8.

225. Nelson, *supra* note 218, at 18.

226. That statue was removed in September 2020. Derrick Bryson Taylor, *Confederate Statue Near Site of White Nationalist Rally in Charlottesville is Removed*, N.Y. TIMES (Sept. 12, 2020), https://nyti.ms/2ZuRU86.

227. *See, e.g.*, *Klan Burns Cross Near Mechums River*, DAILY PROGRESS, June 23, 1924, at 1 (reporting that the KKK set off "heavy explosions from three bombs").

228. *See Lynching Party is Dispersed*, DAILY PROGRESS, Apr. 17, 1917, at 1.

229. *See* DAILY PROGRESS, *supra* note 222.

230. Julian S. Carr, Address at Unveiling of Confederate Monument at University 9-B (June 2, 1913) (transcript available in Folder 26, Julian Shakespeare Carr Papers #00141, Southern Historical Collection, Wilson Special Collections Library, University of North Carolina at Chapel Hill).

231. *E.g.*, *Biologist Supports Curb on Immigrants: Dr. Lewis Calls Johnson Bill a "Reasonable Attempt" to Bar Inferior Racial Stock: Discusses Negro Question*, N.Y. TIMES, Apr. 6, 1924, at E3 (describing a public lecture by Dr. Ivey F. Lewis, Miller Professor of Biology at the University of Virginia, on eugenics and the importance of Virginia's new Racial Integrity Act).

1890,[232] one Black resident noted its clear message: "The Southern white folks is on top."[233]

But perhaps meanings change? The *American Legion* majority observed that over time a statue or memorial can attain different meanings. In the early-twenty-first century South, few might associate segregation with an old soldier on horseback; the meaning of the Lee statue is obscured by the passage of time. Jim Crow has been dismantled and statues that were intended to send one message have been undercut by legal reforms and advances in race relations that send quite a different message. As a cross's meaning can change from religious to secular, on this theory a statue of Lee can change from sectarian to inclusive, or from representing the Confederacy to representing "Southern culture."

It is also possible that meanings can change in the opposite direction, however. The BLM protests in the spring and summer of 2020 in many cases targeted Confederate monuments, both in response to and heightened by the public recognition that symbols of the Confederacy are associated with white supremacy.[234] That connection has only been strengthened by the use of Confederate symbols by white supremacist groups. After a white supremacist murdered Black churchgoers in Charleston, South Carolina, in 2015, the state removed the Confederate battle flag from its capitol grounds.[235] The Confederate statuary in New Orleans, Louisiana, was also removed in response to white supremacist violence.[236]

A similar shift in the trajectory of meaning unfolded in Charlottesville. It is fair to say that few residents—Black or white—took notice of the Confederate generals in their midst before 2017. After being urged to do so by a high school student,[237] the city appointed a Blue Ribbon Commission to study its Confederate and other monuments.[238] The Commission favored contextualizing them, and the city council initially voted against their removal, though it subsequently did vote to remove the Lee statue.[239]

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232. *127-0181 Robert E. Lee Monument*, VA. DEP'T HIST. RES., https://www.dhr.virginia.gov/historic-registers/127-0181/ (last updated July 10, 2019).

233. John Mitchell, Jr., *Langston*, RICHMOND PLANET, June 7, 1890, at 38.

234. *See supra* notes 6, 8.

235. *See* Richard Fausset & Alan Blinder, *Era Ends as South Carolina Lowers Confederate Flag*, N.Y. TIMES (July 10, 2015), https://nyti.ms/1dPPSEE.

236. *See* Tegan Wendland, *With Lee Statue's Removal, Another Battle of New Orleans Comes to a Close*, NPR (May 20, 2017), https://www.npr.org/2017/05/20/529232823/with-lee-statues-removal-another-battle-of-new-orleans-comes-to-a-close.

237. Zyahna Bryant, *Change the Name of Lee Park and Remove the Statue*, CHANGE.ORG, https://www.change.org/p/charlottesville-city-council-change-the-name-of-lee-park-and-remove-the-statue-in-charlottesville-va (last visited July 15, 2019); Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), https://nyti.ms/2vudaMV.

238. BLUE RIBBON COMM'N, *supra* note 217.

239. Chris Suarez, *Charlottesville City Council Votes to Remove Statue from Lee Park*, DAILY PROGRESS (Feb. 6, 2017), https://dailyprogress.com/news/local/charlottesville-city-council-votes-to-remove-statue-from-lee-park/article_2c4844ca-ece3-11e6-a7bc-b7d28027df28.html.

Those events were coupled with a rising tide of white supremacist interest in the monuments. In August 2017, a mix of neo-Nazi and other hate groups joined in a "Unite the Right" rally to protest the city's decision to remove the Lee statue, marching with torches on the University of Virginia grounds and engaging in violent altercations with counter-protestors around downtown Charlottesville and near the Lee statue.[240] During the demonstrations, an avowed white supremacist drove his vehicle into a group of pedestrians, murdering a counter-protester.[241]

Those events changed the meaning of Confederate monuments in Charlottesville and across the country. The media coverage of the violence and death and the subsequent statement by President Trump that there were "very fine people on both sides"[242] led to calls to remove Confederate monuments around the country.[243] Cities, including many majority Black cities, either removed or attempted to remove their Confederate monuments.[244] And in Virginia, the Democrats won a majority in the General Assembly in 2019 and amended a state law that had been on the books since the early 1900s that had prevented local governments from removing Confederate monuments.[245]

The *American Legion* majority saw no immediate connections between the cross and racism, anti-Catholicism, or anti-Semitism. But there are certainly such connections in the message that Confederate monuments send, both historically and today. White Christian nationalists venerate the Lee and Jackson statues on grounds that they symbolize racial and religious purity; in marching in favor of it, they chanted both racist and anti-Semitic slogans, declaring that "Jews shall not replace us!"[246] So too, a "nonreligious" cross can be converted through burning into—as

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240. Stolberg & Rosenthal, *supra* note 216.

241. *Id.*

242. N.Y. TIMES, *Full Transcript*, *supra* note 174.

243. *E.g.*, Karen L. Cox, Opinion, *Why Confederate Monuments Must Fall*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/opinion/confederate-monuments-white-supremacy-charlottesville.html [https://perma.cc/P8VX-J93M].

244. The Southern Poverty Law Center identifies 114 Confederate symbols that have been removed from public spaces since the 2015 Charleston attack, with a surge in removals after the violent protests in Charlottesville, though this tally does not include those removed during the racial-justice protests during the summer of 2020. *Whose Heritage?*, *supra* note 215. Cities like New Orleans, Louisiana; Baltimore, Maryland; and Dallas, Texas drew considerable media attention when they removed monuments to the Confederacy from public property. *E.g.*, Nicholas Fandos et al., *Baltimore Mayor Had Statues Removed in 'Best Interest of My City,'* N.Y. TIMES (Aug. 16, 2017), https://nyti.ms/2vCLfKp; Ken Kalthoff, *Dallas City Council Votes to Remove Confederate Monument*, NBC (Feb. 13, 2019), https://www.nbcdfw.com/news/local/Dallas-City-Council-Votes-to-Remove-Confederate-Monument-505803841.html; Christopher Mele, *New Orleans Begins Removing Confederate Monuments, Under Police Guard*, N.Y. TIMES (Apr. 24, 2017), https://nyti.ms/2pdsxqd.

245. Act of Apr. 10, 2020, ch. 1100, 2020 Va. Acts 1100; Zach Rosenthal, *New Law Allows Virginia Localities to Remove Confederate Statues and Monuments*, CAVALIER DAILY (Apr. 13, 2020), https://www.cavalierdaily.com/article/2020/04/new-law-allows-virginia-localities-to-remove-confederate-statues-and-monuments.

246. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.4288027b46aa [https://perma.cc/8VJU-U64N]; *see also* Complaint at 20, Sines v. Kessler, No. 3:17-cv-00072 (W.D. Va. Oct. 12, 2017).

some justices have observed—an undeniable symbol of white (and Christian) supremacy and domination.[247]

Here again, meanings are contested.[248] From the perspective of an insular minority, it is difficult to attribute anything other than hostile meaning to a statue that celebrates as a national hero the defender of a side in a civil war that fought to keep that minority enslaved. An important difference between the Bladensburg Cross and Confederate iconography is that World War I had little to do with religion; the cross was not celebrating the victory of Christians over Jews or Muslims or other "infidels." Despite neo-Confederates' protestations to the contrary, however, the Civil War had everything to do with slavery.[249] And Confederate statues valorize the enslavers over the enslaved.[250]

How should we credit the seemingly genuine affection and connection that some feel toward these monuments? The same question arose in *American Legion*. In that case the Court decided not to act in part because it was concerned that ordering the cross to be removed would generate a political backlash and foster social divisiveness. As Justice Alito observed, for many the "image of monuments being taken down will be evocative, disturbing, and divisive."[251]

The events in Charlottesville and the BLM protests should illustrate the problem with this reasoning. First, as we have seen, social divisiveness exists regardless of what the Court does. The cross, like Confederate monuments, is already divisive, which is in part why courts are asked to intervene. Second, on this reasoning the Confederate statues should remain standing because to take them down would embolden a violent and often racist reaction. The avoidance of strife and violence is a laudable aim, but allowing the factions that support discriminatory speech to dictate whether the government can engage in discriminatory speech seems quite backwards.[252] Any principle of expressive equal treatment would be

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247. Virginia v. Black, 538 U.S. 343, 381–84 (2003) (Souter, J., concurring in part and dissenting in part); *cf. id.* at 394–95 (Thomas, J., dissenting) (arguing that the majority was wrong to read an expressive element into cross-burning; cross-burning is wrong because it is a hateful act, not a hateful expression).

248. *See* Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPP. 15, 17–18 (2018).

249. *See, e.g.*, Jeff Paulk, *Answering the Myths About What the "Civil War" Was About*, S. HERITAGE NEWS & VIEWS (May 8, 2019), http://shnv.blogspot.com/2019/05/answering-myths-about-what-civil-war.html ("MYTH #1 - The war was all about freeing the slaves. TRUTH – The war had nothing to do with slavery."); *see also* Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes,"* 91 TEMP. L. REV. 1, 14 (2018); Owley & Phelps, *supra* note 248, at 17.

250. Some have gone even further, charging that "Confederate statues, no matter whether they are designated as military monuments or heroic statues, are *badges of slavery*." Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 KY. L.J. 695, 709 (2020) (emphasis added).

251. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019).

252. *See* Clarke, *supra* note 38, at 511–12 (suggesting that the goal of avoiding backlash, though reasonable, should be weighed against harms of condoning explicit bias); Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 8–22 (2013); *see also* Forman, *supra* note 13, at 513–16.

defeated if the majority could simply threaten violence when faced with a constitutional demand.[253]

IV. GOVERNMENT SPEECH DOCTRINE'S POLITICAL PROCESS PROBLEM

To be sure, though the Court does not reject observer standing in *American Legion*, it is difficult to imagine the six conservative Justices extending the doctrine to symbols that implicate the Equal Protection Clause. But the lack of general observer standing is not the only barrier to bringing such claims. Government speech doctrine itself has served to foreclose constitutional challenges to the government's expressive conduct, religious or otherwise. That doctrine is grounded in an explicit political process rationale—it has been regularly justified on the grounds that electoral politics serves as an adequate check on the government's expressive activities. The assumption is that expressive activities that are offensive to the majority of voters will be overridden through the political process.[254]

Government speech doctrine generally takes for granted that the government's expressive acts are in fact expressive of the "community's" views.[255] If the Court is going to defer to the "community" in symbolic speech cases, however, it should presumably do so only if that speech is representative. But there are many reasons to worry about representativeness. For starters, attribution is easily manipulated.[256] The Court's government speech cases need first to establish that the government is in fact speaking. But the doctrine has been troubled by the lack of clear principles for drawing lines between government and private speech.[257]

Even when the Justices agree that the government is speaking, however, we might worry about the political origins and political effects of government speech.[258] Three concerns are highlighted here: *entrenchment*, *favoritism*, and

253. *See* Lineberry, *supra* note 67, at 1182.

254. Pleasant Grove City v. Summum, 555 U.S. 460, 468–69 (citing Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000)).

255. *See Am. Legion*, 139 S. Ct. at 2083.

256. *See infra* Section IV.A.

257. *See generally* Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008) (recognizing that speech is often neither private nor public, but mixed, and offering a possible means by which the Court can untangle mixed speech); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 597–98 (2008) (outlining a process by which to determine whether speech should be considered government speech or private speech); Schauer, *supra* note 41. Gia Lee recommends that courts enforce a transparency principle to ensure that government does not mask the source of speech, and thereby manipulate public opinion. *See* Gia B. Lee, *Persuasion, Transparency and Government Speech*, 56 HASTINGS L.J. 983, 988–89 (2005).

258. These kinds of concerns are not new. In the aftermath of the Vietnam War, legal commentators raised alarms about the government's false speech and the potency of state-sponsored propaganda. *See, e.g.*, YUDOF, *supra* note 90, at 62–69; Van Alstyne, *supra* note 15. These scholars worried about the government's selective use and dissemination of information to undermine democratic processes, manipulate the media, and shape public opinion and the electorate in ways congenial to those in power. That concern, while still important, seems quaint in a more thoroughgoing era of manipulation—one in which nonstate

domination. Government speech may be deployed to undermine majoritarian democratic processes, either by reinforcing the entrenched power of existing electoral factions or by intimidating those who would seek to challenge those factions.[259] Public symbolic speech might also exhibit too close an alignment with private interests, thereby reinforcing the exercise of private expressive power and undermining the neutrality demands of the First Amendment.[260] And finally, symbolic speech might be a mechanism by which one political community exercises political domination over another, as when a state requires its cities to engage in government speech with which a majority of a city's citizens disagrees.[261] All of these pathologies are evident in the case of Confederate monuments.

A. Attribution Avoidance

It is first necessary to say a word about attribution. Once the Court determines that a particular form of conduct constitutes "speech," it must also decide who is doing the speaking. This determination does almost all the work in dictating the outcomes of cases. If the government is speaking, it is not bound by the neutrality requirements of the First Amendment. The government can say what it wants unburdened by free speech principles, even if it has to comply with the fairly limited constraints imposed by other constitutional provisions. Alternatively, if a private citizen is speaking, she too can say almost anything, unburdened by the Establishment Clause or other constitutional provisions. The government cannot place substantive restrictions on private speech. The Justices' ability to toggle back and forth between these categories is an effective means for avoiding constitutional restraint.

Compare two government religious speech cases, *Pleasant Grove City v. Summum*[262] and *Town of Greece*—the town council prayer case. In the former, Pleasant Grove had accepted a privately donated Ten Commandments display that

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and quasi-state actors seem to exercise even more influence than the government. My concerns are more pedestrian, even if they invariably touch on the problem of propaganda. No doubt, crosses, Confederate monuments, and other civic displays can be understood as forms of government indoctrination. Here, though, I mean to cabin the important issues raised when a particular regime seeks to buttress its own authority and power. I instead focus on the initial and ongoing representativeness of a given government display, while avoiding broader questions concerning the state's appropriate role in shaping public opinion.

259. *See* Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 466 (1990) (noting how the First Amendment did not historically protect the speech of Black Americans, even when they were the majority); *cf.* Greene, *supra* note 14, at 25 (discussing concerns with monopolization, coercion, and ventriloquism).

260. *Cf.* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 706–19 (2011).

261. *See* Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 69 (2018) (observing that when the state blocks local efforts to remove a statue that local residents find repugnant, "the state is putting a thumb on the speech scale—in this case in favor of a white supremacist message that is anathema to the local community"). *See generally* Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365 (2019) (arguing that the Court should recognize a city's constitutional right to free speech and should block efforts by state and federal authorities to limit that speech).

262. 555 U.S. 460 (2009).

was erected in its local public park. The Summum Church offered its own display of the Church's Seven Aphorisms to the city, which the city declined. The Church argued that the city's selective receipt of the Ten Commandments violated the First Amendment's requirement that government not pick and choose among speakers to favor in the public square.[263]

Under conventional free speech doctrine, a government cannot select among viewpoints when it is operating a traditional public forum—in this case a city park.[264] The Court, however, determined that the city was not operating a public forum when it accepted gifts of certain monuments, but was instead engaged in government speech because the reasonable observer would assume that monuments in the public park represented the city's views.[265] Government speech does not have to be viewpoint neutral.[266]

The Court took a different position in *Town of Greece*, when it held that a town's practice of inviting local religious leaders to lead prayers at town council meetings, even if those prayers are sectarian and predominantly Christian, did not violate the Establishment Clause.[267] In contrast to *Summum*, the Court in *Town of Greece* held that the ministers' prayers were *not* government speech even though the town council had commissioned and regularly opened their meetings with the prayers.[268]

If prayers at the town council meeting are not government speech, what are they? The *Town of Greece* majority suggests two possibilities. The first possibility is that the prayers were meant solely for the edification of the town's councilors, thus, they were "internal" to the council's own practices and not government communications intended to promote public religiosity.[269] The second possibility is that the prayers were the private speech of the ministers who were invited to speak and thus insulated from government regulation altogether. As to the latter, Justice Kennedy's majority opinion observes that it would be constitutionally problematic for the town to regulate any aspect of the ministers' religious invocations under principles of free speech and free exercise neutrality.[270]

The Court's ability to characterize speech as public or private is an effective way to restrict the application of constitutional restraints. Consider also

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263. *Id.* at 464–66.

264. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.").

265. *Summum*, 555 U.S. at 471–72.

266. *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect . . . ."); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view . . . .").

267. 572 U.S. 565, 591–92 (2014).

268. *Id.* at 569–71.

269. *Id.* at 587–88.

270. *Id.* at 581–82.

Walker v. Texas Division, Sons of Confederate Veterans, which involved a challenge to Texas's denial of a "specialty license plate" exhibiting the Confederate battle flag.[271] The Court divided 5–4 over whether specialty license plates are government or private speech, with the majority concluding the former, thus insulating from First Amendment scrutiny the Texas DMV's decision to reject a Confederate flag application.[272]

One might conclude that the nature of the speech at issue in these cases is driving the Justices' determinations of attribution.[273] All the Justices joined *Summum*'s central holding, however, which suggests some amount of agreement. But the question in *Summum* was quite narrow: whether a city had to adopt an all-comers policy for permanent monuments in its park. *Town of Greece* and *Walker* concern more controversial speech.

More importantly for my purposes is the Court's assumption that government speech is representative. In *Summum*, the Court determined that a private donation by the Fraternal Order of Eagles to the city did not change the speech from public to private, but it did not inquire into the political process that resulted in the acceptance of the Order's Ten Commandments monument and the rejection of the Summum's Seven Aphorisms.[274] Indeed, in all these cases, once the Court makes a determination that the speech at issue is governmental, the Justices also assume that the speech is representative. But this presumption might be unwarranted.

B. Entrenchment

Indeed, even when attribution is uncontroversial, there are many reasons why we might be skeptical of the political process that is meant to serve as a check on government speech. Start with the fact that in *Summum*, all the parties were well aware that the city was *never* going to accept the Summum's Seven Aphorisms—not in 1975, when the Summum was founded and four years after the city had accepted the Fraternal Order's Ten Commandments, and not in 2003, when the Summum offered their own similarly designed monument.[275] Should that political reality worry us? On one view, the city council, elected to exercise its judgment, gets to choose what the government says—that there will be perpetual losers is unavoidable.

But what if the perpetual losers had been excluded from the political process in the first place? A basic precondition for the legitimacy of government speech is the accountability of government speakers. As the Court observed in *Board of Regents v. Southworth*, the primary limitation on government speech is political: the fact that a government entity is ultimately "accountable to the electorate and the political process for its advocacy," and that "[i]f the citizenry objects, newly elected

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271. 576 U.S. 200 (2015).

272. In that case, Justice Alito, the author of the majority opinion in *Summum* and a member of the majority in *Town of Greece*, complained in dissent that government speech doctrine was being used to take a "large and painful bite out of the First Amendment." *Id.* at 2255 (Alito, J., dissenting).

273. Schauer, *supra* note 15, at 267.

274. Pleasant Grove City v. Summum, 555 U.S. 260, 476–77 (2009).

275. *Id.* at 465.

officials later could espouse some different or contrary position." The political check is a basic feature of the majoritarian public square.[276]

The Summum might be one type of discrete and insular minority—an obscure religious sect, though not necessarily reviled. Their symbolic exclusion from the park might not indicate their wider exclusion from the polity. The acceptance of a Ten Commandments monument obviously reflects majoritarian preferences. The denial of the Summum's Seven Aphorisms is predictable too, but does not necessarily indicate a political process failure, except insofar as minority preferences always lose in a majoritarian political system.

The government's acceptance of a gifted statue of Robert E. Lee in the 1920s, however, is a different matter. Government decisions to erect Confederate monuments throughout the first half of the twentieth century were made in the absence of Black political participation—indeed, as part and parcel of its active suppression.[277] The government's valorization of the Confederacy was unrepresentative at its inception and impossible to remedy while Jim Crow and white supremacist terrorism ruled the South. Indeed, the purpose of the Confederate monuments was to send a signal of political and cultural dominance and entrench that message across generations.[278] Monuments are intended to be permanent, as the *Summum* majority points out, and are purposefully erected by one generation to bind future generations.

If government speech is ultimately supposed to be responsive to majoritarian political will, however, political and physical entrenchment is a significant problem. Monuments are the speech of the dead; it is not at all clear why old speech should trump new speech. And if old monuments are the result of an oppressive political process, then it seems that they have no claim to legitimacy, whatever their current meaning.[279] Presumably it is for this reason that we are less concerned when a liberatory movement tears down statutes of dictators; it is also why we are more concerned when the tearing down occurs in the opposite direction.

It could be said that the very goal of government monument-making is to embed a particular political or cultural perspective into the landscape in perpetuity, or at least beyond the next election. Entrenchment seems inherent in certain forms of government symbolic speech. Political entrenchment, however, is also what may undermine the legitimacy of a monument either at the time it was erected or thereafter.

That some types of government speech are a form of dead hand control does not mean that relatively permanent civic displays have no place in a democratic regime. But the representativeness of a given exercise of government permanent or semi-permanent speech is an essential aspect of its legitimacy. Recent BLM protests

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276. *Id.* at 468–69 (quoting Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000)).

277. *See supra* Section III.B.2.

278. *Whose Heritage?*, *supra* note 215.

279. *See* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 54 (2d ed. 2018) (noting that at least some monuments and statuary "properly face [this] as the penalty for [their] association with a hated political regime").

have targeted Confederate statues erected during a time of Black disenfranchisement for a reason:[280] those monuments are a product of the deep and ongoing failure of the majoritarian political process.

C. Favoritism

Entrenchment is accompanied by a second concern with certain forms of government speech: *favoritism*. To be sure, government speech is a necessary concept within the discourse of First Amendment doctrine. As the Court has repeatedly observed, government could not "function" if its officials, officers, and institutions could not take positions and express them, individually and collectively, without a requirement that they remain neutral or afford the opposite viewpoint equal time.[281]

But this creates an asymmetry. The public square must be neutral with regard to private speech but majoritarian with regard to public speech. This "hybrid" public square presents the real risk that the government will use its expressive leeway to favor or support certain private speakers over others.[282] A dominant political and cultural force can commandeer government speech for its own purposes. The neutrality demanded of government in its relation to private speech can easily be compromised.

I am not referring here to the government's rejection of certain viewpoints. That the government does not give equal time to racist perspectives and encourages nondiscrimination is not a form of government favoritism for nonracists. Indeed, as I have been arguing throughout, substantive equal protection principles require that the government not speak in a racist register.

The concept of favoritism is instead meant to be understood in political terms. Confederate monuments are again an obvious example. The connections between Confederate monuments and a resurgent KKK in the 1920s and 1950s—and the connection between those monuments and a resurgent neo-Nazi movement today—are not coincidental.[283] In the early-twentieth century, the interpenetration of the KKK and Southern political culture served to advance white supremacy while distancing the state from the acts of terror that were necessary to maintain it.[284] So too, those who defend the monuments today assert that they are defending "Southern

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280. For more on the mass removals of Confederate statues during the BLM protests, see Glenny Brock, *Protests Take Aim at Confederate Monuments*, ARCHITECTURAL REC. (June 30, 2020), https://www.architecturalrecord.com/articles/14705-architectural-preservationists-and-historians-consider-confederate-monument-removal. For an argument that this is a form of "popular constitutionalism," see Nathan T. Carrington & Logan Strother, *Who Thinks Removing Confederate Icons Violates Free Speech?*, 9 POL. GROUPS & IDENTITIES 208, 209 (2020), https://doi.org/10.1080/21565503.2020.1748067.

281. *See, e.g.*, *Summum*, 555 U.S. at 467–68 ("A government entity has the right to speak for itself. [I]t is entitled to say what it wishes, and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom.") (internal quotation marks and citations omitted); *see also* Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV. 1, 39 (2019).

282. YUDOF, *supra* note 90.

283. *Whose Heritage?*, *supra* note 215.

284. Am. Historical Ass'n, *supra* note 213.

culture" while disavowing the deeply discriminatory nature of that culture.[285] The extremists who embrace the monuments as embodiments of white supremacy can be dismissed even as the symbols and policies of white primacy are maintained.

The hybrid public square invites entanglement (to use language from the *Lemon* test[286]). Private speakers have every reason to seek to capture the public square, dominate it, and entrench their preferred signs and symbols. This process might be highly unstable, with no single interest achieving dominance. But it also might be quite one-sided. The city will never honor the Summum with a permanent monument that reflects its tenets. Religions that venerate the Ten Commandments, by contrast, will be so honored.

Justice Kagan's dissent in *Town of Greece* again states the relevant principles. While the majority attributes the dominance of sectarian Christian prayers in the town council meetings to inadvertent biases in the town's outreach to particular clergy, Kagan and the other dissenters see something more insidious: a local political culture obviously interested in endorsing and advancing Christian rhetoric and values. The constitutional deregulation of the public square permits such endorsement, thus allowing certain groups to assert a closer identification with the government than others. It also raises the political stakes, as control of the government can mean control of a powerful message machinery.

Short-circuiting this political dynamic seems to be the chief reason for the *American Legion* Court's distinction between old and new monuments. In attempting to prevent future fights over public symbols, however, the Court legitimized the entrenchment of old ones. The political community that adopted the Bladensburg Cross in 1925 was undoubtedly less representative than it is now. One could thus make the argument that old monuments require *more* judicial oversight because they were erected under less ideal political circumstances. The Court's concern with new monuments nevertheless recognizes that no matter how representative the polity, highly motivated interests—either dominant majorities or entrenched minorities—often get their way. This realization also suggests that the Court's effort to end the symbolic culture wars by broadening instead of narrowing the arena of permissible government speech is—as I have previously noted—likely mistaken.

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285. *See* Ben Jones, Opinion, *The Confederate Flag Is a Matter of Pride and Heritage, Not Hatred*, N.Y. TIMES (Dec. 22, 2015), https://www.nytimes.com/roomfordebate/2015/06/19/does-the-confederate-flag-breed-racism/the-confederate-flag-is-a-matter-of-pride-and-heritage-not-hatred; *see also* Zachary Bray, *From 'Wonderful Grandeur' to 'Awful Things': What the Antiquities Act and National Monuments Reveal About the Statue Statutes and Confederate Monuments*, 108 KY. L.J. 585, 588 (2019) (noting that arguments in favor of keeping Confederate monuments generally boil down to: (1) that they are aesthetically beautiful, and (2) that they represent "heritage"); L. Darnell Weeden, *A Growing Consensus: State Sponsorship of Confederate Symbols Is an Injury-in-Fact as a Result of Dylann Roof's Killing Blacks in Church at a Bible Study*, 32 B.Y.U. J. PUB. L. 113, 121–22 (2017); Forman, *supra* note 13, at 509 n.31 (noting "the frequency with which one is told that the Confederate flag is not a statement about race or racism, but is instead a celebration of a commitment to Southern history, culture, and independence").

286. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

D. Domination

In addition to entrenchment and favoritism, courts considering the representativeness of government speech should consider the problem of *domination*—in this instance, efforts by one political community to impose its expressive preferences on another. Consider state laws that prevent local governments from removing or otherwise interfering with local Confederate monuments.[287] If the minimal test of a monument's legitimacy is its representativeness, then courts need to be attentive to which government is purportedly doing the speaking.[288]

The doctrine is not currently attentive to the unit of government that owns a monument or maintains a park, however. But the intense localness of symbolic government speech is important, especially if the Court is assuming the representativeness of a given government expressive practice.

That assumption is simply wrong in a number of cases. It is notable that cities, including many that are majority Black, have been most active in seeking to remove Confederate monuments.[289] It is also notable that a number of Southern states have prevented or have sought to prevent cities from doing so.[290] As the Court observes in *Summum*, monuments in city parks are presumed to be the city's expression.[291] Thus, the forced maintenance of Confederate monuments in municipal parks in cities that do not want them looks a great deal like coerced speech.[292]

Again, an account of government speech's minimal legitimacy—which assumes representativeness—should be skeptical when state-wide majorities demand that local communities keep and maintain monuments that they do not want. Government speech needs to be tied to some identifiable polity and to specific elected officials. When the state prevents those to whom the speech is attributed

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287. *See* Bray, *supra* note 249, at 13–44; Kasi E. Wahlers, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2181–82 (2016).

288. As I have previously observed, constitutional conflicts over government religious practices seem to disproportionately involve municipalities, counties, school boards, and other organs of local government. *See* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1820 (2004).

289. *Whose Heritage?*, *supra* note 215.

290. Bray, *supra* note 249, at 7.

291. Pleasant Grove City v. Summum, 555 U.S. 460, 470–72 (2009).

292. In this way, political domination gives rise to the problems of coercion and ventriloquism that Abner Greene identifies in Greene, *supra* note 14, at 27–52, but in the context of political communities instead of individuals. See Gia B. Lee, *Persuasion, Transparency and Government Speech*, 56 HASTINGS L.J. 983, 988–89 (2005), for a similar argument grounded in political accountability. Note that the objection to domination here does not sound in the same autonomy rationales that are often invoked to oppose coerced speech when applied to individuals or corporations. The city's free speech right could be understood in such terms, compare Blank, *supra* note 261, at 380, but need not be.

from disavowing it, the political accountability mechanisms that the Court relies on to police government speech are undermined.[293]

Invoking Justice Brennan's famous *Harvard Law Review* article celebrating state constitutional experimentation, Justice Kavanaugh noted in his concurrence in *American Legion* that local and state officials are not required to keep their crosses, or by extension, engage in any particular forms of government speech.[294] He also noted that state courts are available to vindicate rights above the federal floor established by the U.S. Constitution.[295] For this salutary federalism to work, however, government speech doctrine cannot simply assume representativeness. The doctrine needs to be attentive to the origins and attribution of a given expressive governmental act.

Origins and attribution are important because of the principle of minimal legitimacy. Government speech has to be the actual speech of the relevant political community. If the local political process is flawed in substantial ways, then judicial deference is misplaced.

To be sure, Justices and commentators have articulated further limitations on government speech,[296] even as the Court as a whole has narrowed those substantially. Majoritarianism will not protect against demeaning and denigrating government speech that cannot be rectified through electoral politics. The representativeness requirement for the legitimacy of government speech is necessary but not sufficient. Nevertheless, if the Court is unwilling to enforce a robust expressive equal treatment principle, it should at least invalidate those messages that are nonrepresentative.

E. Litigating Confederate Monuments

How should the demands of representativeness cash out? Litigation over state laws that preempt local government decisions to remove Confederate monuments provides some recent examples.[297] Cities have argued—albeit unsuccessfully thus far—that they enjoy a constitutional right or are under a constitutional obligation to remove their Confederate monuments.[298] Importantly, cities may have standing to assert these constitutional claims because they are

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293. *Cf.* Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61, 61–62 (2015).

294. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

295. *Id.*

296. *See generally* Norton, *supra* note 17; Tebbe, *supra* note 15.

297. *See, e.g.*, City of Norfolk v. Virginia, No. 2:19CV436 (E.D. Va. filed Aug 19, 2019); State v. City of Birmingham, 299 So. 3d 220, 225 (Ala. 2019); Payne v. City of Charlottesville, No. CL17-145 (Va. Cir. Ct. Jan 29, 2020), *appeal docketed*, No. 200790 (Va. Aug. 20, 2020).

298. The city of Charlottesville, Virginia, has raised the latter defense but not the former. Brief for Defendant in Opposition to Plaintiff's Motions for Partial Summary Judgment and to Strike Equal Protection Affirmative Action Defense, at 25–39, Payne v. City of Charlottesville, No. CL 17-145 (Va. Cir. Ct. Jan. 29, 2020).

coming to the court as owners of their monuments, not merely as "offended observers."[299]

The municipal rights claim sounds in the First Amendment, under the heading of "coerced government speech"—a doctrine that does not yet exist. Professor Yishai Blank has proposed a cogent argument for why cities should enjoy speech rights; current doctrine is fairly hostile to such a right, but not irretrievably so.[300] In Alabama, a trial judge held that a state law requiring Birmingham to maintain its Confederate monuments was a violation of the city's speech and property rights—as much a violation of the First Amendment as forcing a private landowner to erect a Confederate monument in her front yard.[301] The Alabama Supreme Court reversed on the grounds that the city does not enjoy a free speech right that can be asserted against the state.[302] A similar claim was asserted by the City of Norfolk, Virginia, before the state legislature repealed the ban on local removals.[303]

A different free speech theory is suggested by Professors Chip Lupu and Bob Tuttle, who have argued briefly that the speech rights that have been violated by state "statue" statutes belong to the city's citizens.[304] Those citizens can be understood to act in concert through their municipal government in the same way that individual owners of a private corporation act in concert through the corporate form.[305] The recognition of taxpayer standing in state courts appears to reflect this conception of the relationship between a local government and its citizens.[306]

As always, the state action doctrine is a barrier to these kinds of claims.[307] While corporate or associational entities can assert rights against the state, the state cannot assert rights against itself, and municipal corporations are often understood

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299. *Id.* at 32 n.6.

300. *See* Blank, *supra* note 261; *see also* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1641 (2006). Over 35 years ago, Mark Yudof wrote at length about a local-government speech right in *When Government Speaks*. YUDOF, *supra* note 90, at 38–51.

301. State v. City of Birmingham, 299 So. 3d 220, 225 (Ala. 2019).

302. *See id.* at 234–35, 237–38.

303. City of Norfolk v. Virginia, No. 2:19CV436, at *1 (E.D. Va. filed Aug. 29, 2019); *Northam Signs Bill to Allow Removal of Confederate Monuments*, DAILY PROGRESS, (Apr. 11, 2020), https://dailyprogress.com/news/local/northam-signs-bill-to-allow-removal-of-confederate-monuments/article_4df43809-e039-5f7b-a728-046a2c954627.html.

304. Ira C. Lupu & Robert W. Tuttle, *The Debate Over Confederate Monuments*, TAKE CARE (Aug. 25, 2017), https://perma.cc/F2Y3-T35E; *cf.* Bray, *supra* note 249, at 13–44.

305. *Id.*

306. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (establishing a limited form of taxpayer standing in federal cases); Goldman v. Landsidle, 552 S.E.2d 67, 72 (Va. 2001) (recognizing taxpayer standing to challenge local government actions and expenditures); Solares v. City of Miami, 166 So. 3d 887, 888 (Fla. Dist. Ct. App. 2015), *appeal denied*, No. SC15-1503, 2015 Fla. LEXIS 1947 (Fla. Sept. 15, 2015) (recognizing a limited taxpayer standing when certain criteria are met).

307. *See* Richard C. Schragger, *What is "Government" "Speech"? The Case of Confederate Monuments*, 108 KY. L.J. 665 (2020).

for constitutional purposes to be mere arms of the state, akin to a state's department of motor vehicles.[308]

It is worth observing that this reductionist view of the city is not quite right.[309] No state treats its municipal corporations exactly the same as its administrative agencies.[310] Nor does the Supreme Court always treat municipal corporations as if they were mere arms of the state.[311] In *Summum*, the Court is perfectly comfortable attributing speech to the city *qua* city, not to the state acting through the city as its agent.[312]

But even if a court failed to recognize municipal corporate speech rights, one could argue that the absence of representativeness should limit the state's ability to invoke government speech when it is not speaking directly, but rather imposes its will on nonconsenting local governments. Under *Summum*, government speech is understood by citizens from the social context: a monument in a city park represents the city's views, not the state's.[313] On this argument, if that nexus is disturbed, then the government speech doctrine should not shield the speech for all the accountability reasons already stated.

This framing of the constitutional objection is not premised on some free-floating city "right" to free speech, which depends on conceiving the municipal corporation as an autonomous personality. Rather, it is part and parcel of the basic legitimacy condition for government speech: that it be representative of the community that reasonable observers would assume is doing the speaking.[314]

That basic legitimacy condition can also be heard in cities' claims that they are under an obligation to remove Confederate monuments pursuant to federal or state equal protection guarantees. In litigation that preceded the Virginia legislature's repeal of its statue statute, members of the Charlottesville city council

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308. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them . . . ."). For a clear recent exposition of this position, see State v. City of Birmingham, 299 So. 3d 220, 225 (Ala. 2019).

309. *Cf.* Bowie, *supra* note 281, at 39.

310. *See* Kathleen S. Morris, *The Case for Local Constitutional Enforcement* 47 HARV. C.R.-C.L. L. REV. 1, 3 (2012); *see also* RICHARD C. SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 1–2 (2016); Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 598–99 (2020).

311. *See* Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393 (1978) (failing to extend state antitrust immunity to municipal corporations, preferring to view the municipal corporations as independent bodies for the purposes of antitrust liability); *see also* Richard C. Schragger, *Reclaiming the Canvassing Board:* Bush v. Gore *and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 395–96, 407–09 (2002) (collecting cases).

312. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 472–73 (2009).

313. *Id.* at 470–72.

314. This is, however, easier said than done, as there is frequently great disagreement over who comprises the relevant community and should be permitted to choose what it says. *See* Sanford Levinson, *Written in Stone: The Meaning of Public Monuments and Whether They Remain or Go*, 108 KY. L.J. 641, 659–61 (2019).

defended their vote to remove local Confederate statues on these grounds.[315] Again, standing doctrine appears to limit equal protection challenges brought by offended observers.[316] But that does not mean that the substantive equal protection claim is invalid, and in the Charlottesville case, the city councilors were already in court as defendants.

The equal protection claim is straightforward. The city councilors argued that if the Confederate statues were motivated by animus, and did and do send a clear message of inferiority to Black citizens, they should fall.[317] Virginia's governor asserted a similar claim in seeking the removal of a state-owned Robert E. Lee statue located in Richmond.[318] That removal decision is being contested by private landowners who claim that the state is bound by a covenant that accompanied the gift of the land and statue to the Commonwealth in 1890 and that committed the government to preserve the statue in perpetuity.[319]

In these instances, a trial judge, applying *American Legion*, might demand unique and overwhelming evidence that the monuments conveyed and still convey only one message: white racial supremacy. One might think that erecting a monument to a Confederate general in a whites-only park in the active presence of the KKK would be sufficient to prove animus.[320] But the plaintiffs could point to other messages conveyed by the statues: Southern pride, the importance of honor, or remembrance of the war dead. A court might credit those as well.

What a court cannot ignore is the fact that the statues were erected under a system of apartheid that effectively denied Blacks the franchise and failed to allow

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315. *See* Brief for Defendant in Opposition to Plaintiff's Motions for Partial Summary Judgment and to Strike Equal Protection Affirmative Action Defense, *supra* note 298.

316. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2102–03 (Gorsuch, J., concurring); Moore v. Bryant, 853 F.3d 245, 249–53 (5th Cir. 2017); Coleman v. Miller, 117 F.3d 527, 529–31 (11th Cir. 1997).

317. *See* Brief for Defendant in Opposition to Plaintiff's Motions for Partial Summary Judgment and to Strike Equal Protection Affirmative Action Defense, *supra* note 298, at 25–39.

318. *See, e.g.*, Memorandum for Defendant in Opposition to Plaintiff's Motion for Permanent Injunction at 24–26, Gregory v. Northam, No. CL20-2441 (Va. Cir. Ct. June 16, 2020); Press Release, Office of the Governor of the Commonwealth of Virginia, Governor Northam to Remove Robert E. Lee Statue in Richmond (June 4, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/june/headline-857181-en.html ("Think about the message [the Lee statue] sends to people coming from around the world . . . . Or to young children. What do you say when a six-year-old African American little girl looks you in the eye, and says: What does this big statue mean? Why is it here? When a young child looks up and sees something that big and prominent, she knows that it's important. And when it's the biggest thing around, it sends a clear message: This is what we value the most. But that's just not true anymore. In Virginia, we no longer preach a false version of history.").

319. As of this writing, the trial court has ruled for the Commonwealth pending an appeal. *See* Letter Op., Taylor v. Northam, No. CL20-3339 (Va. Cir. Ct. Oct. 22, 2020).

320. *See* Forman, *supra* note 13, at 505–06. *See generally* MITCH LANDRIEU, IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY (2019).

them to participate in the political community.[321] It also cannot ignore that when given the chance to participate, and through a coalition with sympathetic white voters, they have succeeded in having their preference for removing the monuments instantiated as law.[322] Under a *Romer v. Evans*-style theory of equal protection, the state's act of overriding local political preferences that otherwise protect a discrete and insular minority is suspect.[323] Such a theory connects the political backstop that justifies deference to government speech with a core equal protection concern.

In the case of cities that are resisting state statue mandates, that concern is what I have called *domination*. In the case of the Virginia governor's decision to remove a state-owned Lee statue, the problem is *entrenchment* and *favoritism*. Permitting a private actor to dictate the content of government speech despite the objections of the political branches is ultimately inconsistent with the basic concept of government speech.

The equal protection arguments are premised on a basic legitimacy condition of the majoritarian public square. To be sure, equal protection can and has been understood to require that the government behave and express itself in a certain way toward all its citizens, regardless of what majorities demand. Expressive acts that demean or denigrate or make certain groups experience themselves as nonmembers of the community are and should be suspect on this account.[324]

But even if one adopts a majoritarian conception of the public square, that conception should demand at a minimum that those majorities be genuine, politically accessible, and appropriately scaled to back up their claims to be speaking on behalf of the people.

CONCLUSION

The playground chant, "sticks and stones," suggests that words can do no harm, but constitutional law is not so quick to dismiss the power of expression. Messages can cause material harms to citizens who experience shame or self-loathing, or who are treated differently by citizens and government officials because they have been marked as outsiders to the community. Government acts—whether explicitly communicative or not—can also convey a social meaning that is inconsistent with the demand that citizens be treated with equal concern and respect. The Justices often refer to individual and group *dignity*, worry about *stigma*, speak of laws that *demean* or *endorse*, or speak of government reinforcing or *teaching* certain kinds of lessons.

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321. *See* BLUE RIBBON COMM'N, *supra* note 217.

322. *See* Suarez, *supra* note 239.

323. *See* David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 586–94 (1999) (proffering that *Romer* may serve to preserve a sphere of local authority); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 167–77 (2005) (arguing that *Romer* requires that state same-sex marriage bans be struck down). *But cf.* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291 (2014) (finding no constitutional authority to invalidate a preemptive state constitutional amendment that prohibited sex- or race-based affirmative action in public education, employment, and contracting).

324. *See, e.g.*, Hellman, *supra* note 18.

That the Court is drawn into controversies over public meaning is both unsurprising and appropriate. The desire for state recognition contributes to races for recognition—pitched battles over symbolic and expressive slights. And as the Court expands the permissible scope of government speech, those fights will become increasingly bitter. *American Legion* did not put an end to disputes over the content of the public square. In adopting a presumption of constitutionality for pedigreed religious practices in *American Legion*, the Court nevertheless could not avoid determining the objective social meaning of the cross in that case. *American Legion* inverted the usual direction of expressive harms, as it focused less on what the government action in erecting and maintaining a cross expresses and more on the expressive significance of a court order mandating it be removed.

Thus far, the battles over Confederate monuments have not generated Supreme Court doctrine, even as courts have begun to address the legal questions posed by them.[325] Yet those monuments are still divisive. There seems to be no good reason for courts to avoid applying the same analysis to racially infused symbols as they would apply to religiously infused ones. The Establishment Clause and the Equal Protection Clause both plausibly impose outside limits on government speech, even as the government speech doctrine looks increasingly unbound.

If the Court is not willing to support substantive limitations on government speech in the form of a broad expressive equal treatment principle, however, then it should at least police the majoritarian public square for its representativeness. State-backed ideology formation is not always inappropriate, but we should still be hesitant about its exclusionary content. Some forms of indoctrination are inconsistent with the idea of a constitutional democracy.[326] Both crosses and Confederate monuments have the power to convey messages of approval to one group and messages of exclusion to another. That is why the political and cultural battles over their presence are so heated.

The power of symbols and government expression is also why the Court should be concerned about the political processes that have led to their adoption. Indeed, when a legitimately democratic regime determines to stop speaking in the register and on behalf of an illegitimate and antidemocratic one, we should call that progress.

Majoritarian political processes can be depended on to police government speech only if the polity is fully represented, majorities are fluid, and winners cannot entrench themselves so as to ensure their perpetual favored status. The problem with a 40-foot-tall cross or a 2-ton statue of a Confederate general is that those monuments are literally hard to move—and purposefully so. In considering their constitutionality, the courts should not mistake that permanence for consent.

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325. *E.g.*, State v. City of Birmingham, CV-17-903426-MGG (Ala. Cir. Ct. Jan. 14, 2019); Payne v. City of Charlottesville, No. CL 17-145 (Va. Cir. Ct. Jan. 29, 2020); Sons of Confederate Veterans, Ky. Div. v. Louisville Jefferson Cty. Metro Gov't, No. 16-CI-2009, slip op. at 1 (Ky. Cir. Ct. June 16, 2016).

326. *See, e.g.*, West Virginia v. Barnette, 319 U.S. 624, 642 (1943) ("No official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").