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THE EQUAL PROTECTION IMPLICATIONS OF GOVERNMENT'S HATEFUL SPEECH

HELEN NORTON*

ABSTRACT

Under what circumstances should we understand government's racist or otherwise hateful speech to violate the Equal Protection Clause? Government speech that communicates hostility or animus on the basis of race, gender, national origin, sexual orientation, or other class status can facilitate private parties' discriminatory behavior, deter its targets from certain important opportunities or activities, and communicate a message of exclusion and second-class status. Contemporary equal protection doctrine, however, does not yet fully address the harms that such government expression potentially poses. The recent emergence of the Court's government speech doctrine—which to date has emphasized the value of government expression without yet fully addressing its potential costs—offers an important new opportunity to consider the situations in which government speech might offend equal protection values.

This Article offers a framework for assessing the equal protection implications of government speech that expresses hatred on the basis of class status. To this end, it first identifies the ways in which such speech might inflict a range of discriminatory behavioral and expressive harms. The Article then describes lower courts' general

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failure to address these potential harms when considering equal protection challenges to such government expression, and contrasts courts' more expansive understanding of the constitutionally salient harms potentially posed by government's religious speech in the Establishment Clause context.

Drawing from the Establishment Clause experience, the Article then proposes two alternatives for determining when government's hateful speech runs afoul of equal protection values. First, under a behavioral harm approach, we might understand the Equal Protection Clause to prohibit hateful government expression when it would facilitate private parties' discrimination or cause class members to alter their behavior—for example, by discouraging class members from pursuing a government job or petitioning the legislature because they reasonably conclude that such efforts would be pointless or unwise. Second, under an expressive meaning analysis, we might understand the Equal Protection Clause to prohibit government speech that communicates that class members are outsiders or second-class citizens. After addressing possible objections, the Article concludes that both approaches more accurately recognize those situations in which government speech may inflict harms repugnant to equal protection values than does the status quo, which largely ignores or dismisses those harms.

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INTRODUCTION

Although government has engaged in speech since its inception,¹ the Supreme Court has only just begun to consider whether and how the Constitution limits the government's expressive choices.² In its "recently minted"³ government speech doctrine, the Court has held that the Free Speech Clause does not constrain the government's expression, interpreting the First Amendment to include a "government speech" defense to free speech claims by private parties who seek to alter or enjoin a state actor's delivery of its own views.⁴ The Establishment Clause context is the only other area in

1. See 2 ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 723 (1947) ("Now it is evident that government must itself talk and write and even listen."); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 698 (1970) ("Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources."). See generally JOSEPH TUSSMAN, *GOVERNMENT AND THE MIND* 110-15 (1977) (documenting longstanding examples of government speech); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 5-19 (1983) (detailing the means and methods of government communication). Indeed, government *must* speak if it is to govern effectively.

2. For a brief history of the Court's government speech doctrine, see Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 *DENV. U. L. REV.* 899, 904-07 (2010).

3. *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

4. *Id.* at 467 (majority opinion) ("If [public entities] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (explaining that the government's own speech is "exempt" from Free Speech Clause scrutiny). Resting on the premise that government speech is of great value to the public, the Court's government speech doctrine permits the government to prevent other speakers from changing, joining, or otherwise garbling the government's own message. *Summum*, 555 U.S. at 467-68 ("A government entity has the right to 'speak for itself.'... Indeed, it is not easy to imagine how government could function if it lacked this freedom." (citations omitted)).

A number of scholars have proposed an array of Free Speech Clause limits to the government speech defense, as yet to no avail. See, e.g., Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 *N.Y.U. L. REV.* 605, 671-91 (2008); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 *U. MICH. J.L. REFORM* 35, 55-88 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 *HASTINGS L.J.* 983, 1015-31 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 *B.U. L. REV.* 587, 597-618 (2008). Nelson Tebbe seeks more broadly to identify an overarching set of constitutional limits on government speech. Nelson Tebbe, *Government Endorsement and Disparagement* (Brooklyn Law Sch.,

which the Supreme Court has to date wrestled with the constitutional implications of government expression.⁵ Whether and when the government's racist or otherwise hateful speech—that is, its speech that intentionally communicates hatred, hostility, or animus on the basis of class status⁶—violates the Equal Protection Clause thus remains unclear under the Court's current doctrine.

More specifically, government speech that communicates hatred, hostility, or animus on the basis of race, gender, national origin, sexual orientation, or other class status can facilitate private parties' discriminatory behavior, deter its targets from certain important opportunities or activities, and communicate a message of exclusion and outsider status.⁷ These disturbing possibilities

Working Paper No. 287, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125243. While this Article focuses specifically on the Equal Protection Clause as a possible source of constitutional constraint on government's hateful speech, note that Professor Tebbe seeks to identify a broader limiting principle that he calls "government nonendorsement," locating it in a variety of constitutional sources. *Id.* at 5.

5. See *Summum*, 555 U.S. at 468. Indeed, courts and commentators had considered Establishment Clause limits on what we now understand as government expression long before the Court had developed a vocabulary—much less a doctrine—for addressing government speech. See Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Summum*, 19 WM. & MARY BILL RTS. J. 1, 24 (2010) ("[A] large proportion of all Establishment Clause jurisprudence could be thought of as involving claims about government religious speech, with the other broad category relating to government aid.").

6. By emphasizing "class status," rather than "protected class status," this Article does not limit its focus to those government classifications that trigger heightened scrutiny under the Supreme Court's equal protection doctrine, which is especially suspicious of government actions that target individuals based on race, national origin, gender, and a few other characteristics. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 555 (1996) (gender); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (race). Indeed, the Court has also made clear that government action motivated by class-based animus may violate the Equal Protection Clause even under rational basis scrutiny. See, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down a governmental classification on the basis of sexual orientation as "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

7. See *infra* Part II. Note that the term "government speech" here refers to the collective speech of a government agency or body, such as a resolution, proclamation, or report, or the speech of an individual empowered to speak for such a body. See Helen Norton, *Campaign Speech Law with a Twist: When Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 213-14 (2011) [hereinafter Norton, *Campaign Speech Law*] (distinguishing government speech that reflects the position of government institutions from speech by

require us to consider the constitutional implications of government's hateful speech. For example, should we understand the Equal Protection Clause to bar a government's decision to adopt and display the motto "White Supremacy Forever" on the state seal or a state license plate?⁸ What if a governor or a president were to issue a proclamation or a legislature were to pass a resolution declaring that members of the Latino, Arab, or gay, lesbian, bisexual, and transgender (GLBT) communities are not worthy of respect?⁹ Many would consider such governmental messages to be offensive to equal protection values.¹⁰ Yet the small number of decisions in this area—that, to be sure, largely predate the Supreme Court's developing government speech doctrine—do not necessarily confirm that intuition. Because government's hateful speech unaccompanied

individuals who happen to hold office but who retain their Free Speech Clause rights to express their own views). Such "government speech" does not include "speech by individual government officials expressing their own views in a personal, nongovernmental capacity—e.g., when a governor endorses a particular candidate for Senate on her own time and without any expenditure of government resources." *Id.* at 214. For a discussion of the circumstances under which such individuals' speech might be regulated because they are perceived to be speaking for the government, see Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 47-64 (2009) [hereinafter Norton, *Constraining Public Employee Speech*].

8. For parallel examples from the Establishment Clause context, see *infra* notes 83-95 and accompanying text; see also I. Bennett Capers, *Flags*, 48 HOW. L.J. 121, 156 (2004) ("[I]magine the message that would be communicated by a state or local authority displaying, in addition to the American flag, a flag depicting a Swastika.").

9. See *Farley v. Healey*, 431 P.2d 650, 657 (Cal. 1967) (listing hypothetical examples of municipal government resolutions communicating troubling messages, such as those endorsing the view "[t]hat schools be segregated"); see also Kelly Sarabyn, *Racial and Sexual Paternalism*, 19 GEO. MASON U. C.R. L.J. 553, 559 (2009) (posing a hypothetical in which Congress established a policy of donning Ku Klux Klan robes and hoods when engaging in official business to express its commitment to racial hierarchy).

10. See Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 957-58 (2007) ("Under the race cases, government can no more proclaim white supremacy than it can act on racist views to deny concrete opportunities."); Sarabyn, *supra* note 9, at 559 (stating that a governmental policy of donning Klan robes for official business "appears to violate the command of equal protection").

Constitutional provisions other than the Equal Protection Clause may also be in play. See, e.g., Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 543 (2002) ("[G]lorifying Confederate symbols on official state property should be prohibited pursuant to the Thirteenth Amendment to the U.S. Constitution [which] prohibits all relics of servitude, including state sponsored displays meant to laud a breakaway republic which idealized and waged war to perpetuate black slavery.").

by the traditional exercise of state power does not directly distribute or deny tangible benefits on the basis of class status, such expression raises the difficult question of whether and when such speech should be understood to deny class members the equal protection of the laws.¹¹

Our historical and continuing experience suggests that the possibility of government's hateful speech is more than theoretical. As just one of many examples, recall President Andrew Johnson's 1867 annual message to Congress, in which he characterized blacks as possessing less "capacity for government than any other race of people" and stated that "[n]o independent government of any form had ever been successful in their hands. On the contrary, wherever they have been left to their own devices they had shown a constant tendency to relapse into barbarism."¹² Along the same lines, a report by a Reconstruction-era, Florida state commission "praised slavery as a 'benign' institution deficient only in its inadequate regulation of black sexual behavior."¹³

Such matters have generated contemporary controversies as well. For example, a number of state and local governments flew the Confederate flag or incorporated it into their state symbols in response to the Supreme Court's decision in *Brown v. Board of Education* and other efforts to enforce the Equal Protection Clause with respect to segregation.¹⁴ Some, such as Caddo Parish, Louisiana, still do.¹⁵ Such a choice is, and is intended to be, expressive of the government's views, although the exact nature of those views

11. See *infra* notes 71-82 and accompanying text (describing cases in which lower courts have been reluctant to find that plaintiffs challenging allegedly hateful government speech have established that the speech imposed sufficiently discriminatory effects to violate the Equal Protection Clause).

12. ERIC FONER, RECONSTRUCTION 180 (1988). Professor Foner characterized this as "probably the most blatantly racist pronouncement ever to appear in an official state paper of an American President." *Id.*

13. *Id.* at 200. More recently, the State of Mississippi established the Mississippi State Sovereignty Committee in the 1960s as a state agency dedicated to defending white supremacy through speech and other actions. TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65, at 240-41 (1998).

14. See *infra* notes 74-82 and accompanying text.

15. See Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 125, 125, 127-37 (2011) (describing the history underlying the Confederate flag's placement in Caddo Parish).

remains the subject of vigorous controversy.¹⁶ To be sure, whether the government's speech actually expresses animus on the basis of class status—that is, whether it actually communicates such hatred or hostility—is often deeply contested.¹⁷ But such contests have largely obscured the theoretical question I seek to examine here: whether concededly hateful or otherwise facially discriminatory government speech¹⁸ that is unaccompanied by the government's traditional exercise of its coercive power violates the Equal Protection Clause.

The hypotheticals and examples offered above are extreme and perhaps—one fervently hopes—increasingly unlikely at this point in our history. I offer them, however, so that for purposes of this Article we can focus simply on the threshold question of whether government speech, by itself, should *ever* be understood to violate the Equal Protection Clause. This Article seeks to provide a framework for assessing the equal protection implications of such expression. To this end, Part I starts by reviewing contemporary courts' and commentators' competing approaches to assessing equal protection problems, explaining that the challenges posed by government's hateful speech encourage us to explore whether and how we might reconsider the sorts of harmful effects of government classifications that should be understood to violate the Equal Protection Clause. Part II turns to an examination of the ways in which government speech that expresses hatred, hostility, or animus on the basis of class status might inflict a range of discriminatory behavioral and expressive harms: it may facilitate discrimination by private parties, deter its targets from engaging in certain

16. See *infra* note 76.

17. See *infra* notes 35-43 and accompanying text.

18. In this paper, I sometimes use the phrases "government's hateful speech" or "discriminatory government speech" as shorthand for government speech that expresses hatred, hostility, or animus based on class status. Note that here I do not revisit the Supreme Court's holding that the Equal Protection Clause does not prohibit government's facially neutral action that imposes discriminatory effects on protected class members absent a showing of discriminatory government purpose. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976). Instead, I am examining the possibility that, under certain conditions, the Equal Protection Clause should be understood to prohibit government's facially discriminatory expression—in other words, government speech that intentionally expresses animus on the basis of class status that is otherwise unaccompanied by the government's traditional exercise of its coercive power.

important opportunities or activities, and send a message of inferiority and second-class status. Part III describes lower courts' failure to address these harms when considering equal protection challenges to such government expression, and then contrasts courts' more expansive understanding of the constitutionally salient harms of government speech in the Establishment Clause context—the only area other than the Free Speech Clause in which the Supreme Court to date has wrestled with the constitutional implications of government expression.

Part IV draws from the Establishment Clause experience to propose two alternatives for determining whether and when government's hateful speech runs afoul of the Equal Protection Clause. First, under a behavioral harm approach, we might understand the Equal Protection Clause to prohibit such government expression when it would facilitate private parties' discrimination or cause its targets to alter their behavior—for example, by discouraging class members from pursuing a government job or petitioning the legislature because they reasonably conclude that such efforts would be pointless or unwise. Second, under an expressive meaning analysis, we might understand the Equal Protection Clause to prohibit government speech that communicates that class members are outsiders or second-class citizens. After addressing possible objections, the Article concludes that both analyses more accurately recognize those situations in which government speech may inflict harms repugnant to equal protection values than does the status quo, which largely ignores or dismisses those harms.

I. COMPETING VIEWS OF EQUALITY AND THEIR IMPLICATIONS FOR GOVERNMENT SPEECH

Government's hateful speech raises challenging equal protection questions because it does not involve the traditional exercise of state power. Indeed, a number of scholars focus on what they characterize as the presence or absence of the government's coercion to distinguish between what they call "hard" and "soft" law.¹⁹ As an

19. See, e.g., Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 721 (2012) ("Hard power is, quite simply, 'the ability to coerce.'... Soft power, by contrast, is 'the ability to get what you want through attraction rather than coercion or payments.'" (quoting Joseph

example of “hard law,” consider government-imposed segregation or differential punishment of individuals based on race, gender, or other protected class status, which generally violate the Equal Protection Clause except in those rare situations in which the government’s action survives the rigorous demands of heightened scrutiny.²⁰ To be sure, such “hard law” is often deeply expressive as well. As just one of many examples, laws banning interracial marriage expressed the state’s point of view with respect to racial hierarchy by asserting the state’s coercive power to require or punish certain behavior based on the participant’s race.²¹

In contrast, some commentators use the term “soft law” to describe government efforts to persuade rather than to coerce.²² Government speech is thus a prominent illustration of “soft law”: examples include a congressional resolution that communicates the views of one or both chambers of Congress, or a municipality’s

S. Nye, Jr., *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 256 (2004)); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 577 (2008) (defining “soft law” to include statements by lawmaking authorities that do not have legally coercive status—that is, those statements “that do not have the force of law”). To be sure, however, a number of thoughtful commentators contest such distinctions as meaningless, instead urging that *all* government action is coercive. See, e.g., Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470, 471-74 (1923) (arguing that because private actors can assert coercive power just as government can, government’s choice to leave certain matters to background law rather than to public regulation simply creates opportunities for coercion by private actors; government, thus, always distributes coercion in different ways rather than coercing or refraining from coercion).

20. E.g., *United States v. Virginia*, 518 U.S. 515, 555 (1996); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

21. E.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”). For other examples, see *Palmer v. Thompson*, 403 U.S. 217, 240-41, 266-67 (1971) (White, J., dissenting) (characterizing the city’s decision to close its public swimming pools rather than comply with a court order to desegregate them as “an expression of official policy that Negroes are unfit to associate with whites” and that “[c]losing the pools without a colorable nondiscriminatory reason was every bit as much an official endorsement of the notion that Negroes are not equal to whites” as official segregation); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960) (“[T]he social meaning of segregation is the putting of the Negro in a position of walled-off inferiority.”).

22. Along these lines, as Gersen and Posner observe, “Sometimes, but not always, soft law will produce the same behavioral effects that an otherwise equivalent hard law would have produced.” Gersen & Posner, *supra* note 19, at 579.

proclamation of its views on matters over which it has no legal control.²³

Whether and when the Equal Protection Clause might constrain government speech thus requires us to wrestle anew with what it means for the government to deny "the equal protection of the laws,"²⁴ and whether the government's expression, or other forms of "soft law," can ever do so when otherwise unaccompanied by the traditional exercise of its coercive power. As explained below, the answer to this question may turn on whether one takes an antisubordination or an anticlassification view of equal protection values,²⁵ as well as whether one is willing to reconsider the sorts of harmful effects of government classifications that should be understood to violate the Equal Protection Clause.²⁶

I have argued elsewhere that even objectionable or otherwise unwise government speech can further, rather than frustrate, Free Speech Clause values—so long as the expression's governmental source is transparent—because such speech exposes the government's priorities to the electorate and thus enhances opportunities for meaningful political accountability.²⁷ To be sure, a government's hateful speech reveals a great deal about that government that may valuably shape the public's decisions about its government. That the government's discriminatory speech may be consistent with free speech values,²⁸ however, does not mean that it is necessarily consistent with equal protection values. Indeed, the two clauses have very different underlying purposes.

The primary purposes of the Free Speech Clause include facilitating participation in democratic self-governance and contributing to the available marketplace of ideas—political and otherwise.²⁹

23. See, e.g., *Farley v. Healey*, 431 P.2d 650, 651 (Cal. 1967) (assessing a proposed ballot initiative that would express the City and County of San Francisco's interest in "urging an immediate cease-fire and American withdrawal from Vietnam").

24. U.S. CONST. amend. XIV, § 1.

25. See *infra* notes 35-43 and accompanying text.

26. See *infra* Part II.

27. Norton, *Constraining Public Employee Speech*, *supra* note 7, at 20-30.

28. For arguments that the government's hateful speech might also violate the Free Speech Clause under certain circumstances, see *infra* note 117.

29. See, e.g., Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980). Other values often located at the heart of the First Amendment include enhancing individual autonomy and self-fulfillment. *Id.* Unlike private

Even noxious government speech generally furthers those purposes by revealing the government's preferences to the electorate and by adding to the ongoing public discourse.³⁰ But although political accountability measures like lobbying and voting are generally identified as the appropriate remedies from a free speech perspective for those unhappy with their government's views,³¹ such measures are less likely to offer meaningful recourse for government speech that targets politically vulnerable groups.³² Indeed, government is most likely to engage in hateful speech when such expression is politically popular with much of its constituency.³³ Hateful government expression thus often targets unpopular minorities in situations when ordinary political accountability measures provide no meaningful remedy, thus increasing the importance of identifying some means of constitutional redress.³⁴

In contrast, the purposes of the Equal Protection Clause, although themselves contested, are very different from those of the Free Speech Clause. Courts, policymakers, and scholars have long debated whether equality law should be understood as driven by

speakers, however, the government has no autonomy interests that the First Amendment protects. See David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1662 (2006).

30. See Norton, *Constraining Public Employee Speech*, *supra* note 7, at 21-22.

31. See Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1110 (1995) ("That courts ought not strike down some practice does not in the least suggest that the practice is in fact commendable and ought not be changed, voluntarily, by decent people.").

32. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980) (advocating a "representation-reinforcing" view of constitutional rights that emphasizes judicial review as a means of protection for minorities who are unable to protect themselves from majorities through political means).

33. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 12 (1990) ("Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents.").

34. See Jeffrey S. Helmreich, *Putting Down: Expressive Subordination and Equal Protection*, 59 UCLA L. REV. DISCOURSE 112, 115 (2012), available at <http://www.uclalawreview.org/?p=3098> ("[R]acially expressive subordination is not well regulated by majoritarian democracy, as its victims tend to have insufficient voting strength to overturn popularly sanctioned policies.").

antisubordination or anticlassification values. Antisubordination advocates, on one hand, urge that the Equal Protection Clause should be interpreted to bar those government actions that have the intent or the effect of perpetuating traditional patterns of hierarchy, but not those—including those expressly based on race or other class status—that seek to undermine such hierarchies.³⁵ Reva Siegel, for example, explains the antisubordination principle as “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”³⁶ An antisubordination perspective thus finds “no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”³⁷ Hateful government speech that reinforces traditional patterns of hierarchy by communicating a message of exclusion or inferiority based on class status thus offends an antisubordination view of the Equal Protection Clause.

On the other hand, assessing the constitutional implications of hateful government speech may be considerably more challenging

35. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-56 (1976) (urging a “group-disadvantaging” interpretation of the Equal Protection Clause that attends to racial groups’ varying experience of disadvantage in American life); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2455 (1994) (advocating an “anticaste” understanding of the Equal Protection Clause that “forbids social and legal practices from turning highly visible but morally irrelevant differences into a basis for second-class citizenship”).

36. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004); see also Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community*, 114 YALE L.J. 1353, 1382 (2005) (“[The Equal Protection Clause] creates a new substantive value of ‘non-slavery’ and antisubordination to replace the old values of slavery and white supremacy.”).

37. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 864 (2007) (Breyer, J., dissenting) (“The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races.”); *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551-52 (1989) (Marshall, J., dissenting) (“A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.”).

for those who urge an anticlassification understanding of the Equal Protection Clause, especially for those who emphasize a distinction between “hard” and “soft” law when defining constitutionally cognizable “classifications.” Anticlassification adherents have long described their views as driven not only by instrumental concerns that race-based classifications stigmatize beneficiaries and exacerbate racial divisions,³⁸ but also by the moral commands of color blindness.³⁹ Anticlassification theorists thus take the view that the Constitution prohibits government from “reduc[ing] ... an individual to an assigned racial identity for differential treatment”—regardless of whether the government seeks to perpetuate or instead undermine longstanding racial hierarchies.⁴⁰

As Andrew Carlon has observed, an increasingly anticlassification Court is most suspicious of “classification[s] with effect[s],” or in other words, “individual racial classifications with immediate effect on the persons classified.”⁴¹ The easiest cases for anticlassification advocates thus involve those actions with the most

38. See *Parents Involved*, 551 U.S. at 759-60 (Thomas, J., concurring) (maintaining that government’s race-based classification is “precisely the sort of government action that pits the races against one another, exacerbates racial tension, and ‘provoke[s] resentment among those who believe that they have been wronged by the government’s use of race’” (quoting *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment))); *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (describing the government’s race-based classifications as “divisive” and as creating “antagonisms” (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting))).

39. See *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”); see also *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”); *Adarand*, 515 U.S. at 224 (majority opinion) (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”); *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual, and its rejection of dispositions based on race, or based on blood.” (citations omitted)).

40. *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in the judgment).

41. Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1159, 1199.

immediate and obvious effects—that is, “hard law” in which “the government distributes burdens or benefits on the basis of individual racial classifications.”⁴² But government speech, by itself, does not distribute such burdens or benefits, at least not in traditional ways. Whether government speech or other forms of “soft law” that intentionally express animus on the basis of class status offend anticlassification theorists thus depends on such theorists’ willingness to reconsider the sorts of classifications that are repugnant to equal protection values.⁴³

Another way of thinking about the government speech problem in this context is thus whether we need to rethink the sort of “effects”⁴⁴ or “harms” of classifications that we understand as violating the Equal Protection Clause and whether they include

42. *Parents Involved*, 551 U.S. at 720 (plurality opinion). Andrew Carlon also describes these as “racial adjudications”—in other words, the product of “a particularized proceeding that seeks to identify, as one of its determinative elements, the race of the person whose rights or liabilities are being adjudicated” and that has “immediate effect on the persons classified.” Carlon, *supra* note 41, at 1159, 1199. In contrast, as Professor Carlon notes, the Court has generally refused to consider “classifications *without* immediate effect,” such as tracking racial demographics for census purposes, as suspicious for equal protection purposes. *Id.* at 1158-59; see also Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 240 (2010) (“[T]he Court’s comfort with—or suspicion of—race-conscious actions sometimes turns on the government’s underlying ends [or purpose] and sometimes on the degree to which the individual effects of its racially motivated means can be characterized as concrete or diffuse.”).

43. Michael Dorf has recently suggested greater optimism that anticlassification theorists would consider government’s hateful speech to be unconstitutional. See Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1346 (2011) (“There is ... a cross-ideological consensus that at least some sorts of government acts, symbols, and statements run afoul of a principle barring the government from labeling persons or their relationships as second-class, although the consensus breaks down over the scope of that principle.”). Although I admire much in Professor Dorf’s article—and I share his normative view that such examples *should* be understood to violate the Constitution—I do not share his descriptive confidence that contemporary anticlassification advocates necessarily agree that such examples are constitutionally impermissible under current equal protection doctrine. This Article is in part prompted by my concerns in this regard.

44. Recall, for example, the Court’s decision in *Washington v. Davis*, in which it held that government actions that imposed a discriminatory impact on the basis of protected class status did not violate the Equal Protection Clause unless accompanied by the government’s discriminatory intent. 426 U.S. 229, 239 (1976). Focusing on expressive situations in which government’s discriminatory intent is uncontested, this Article explores the circumstances under which we should understand the government’s speech to be imposing a discriminatory impact as well.

those government messages that intentionally “classify” individuals as worthy or not worthy of respect based on such status.⁴⁵ To aid this inquiry, the next Part identifies and examines the potential harms of government’s hateful speech.

II. THE POTENTIAL HARMS OF GOVERNMENT’S HATEFUL SPEECH

This Part identifies a range of behavioral and expressive harms potentially caused by government speech that communicates hatred, hostility, or animus on the basis of class status.⁴⁶ As

45. For another example of a governmental classification that may or may not impose the sorts of effects sufficient to sustain an equal protection violation under anticlassification theory, recall some states’ longstanding retention of unenforceable laws criminalizing interracial marriage or same-sex sexual conduct. *See, e.g.*, VA. CODE ANN. § 18.2-361(A) (2005) (prohibiting sodomy). Of course, the state code that declares that people of different races shall not marry, or that people of the same sex shall not engage in consensual sexual activity, no longer carries legal effect after the Supreme Court’s decisions in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Nonetheless, South Carolina and Alabama took more than three decades to repeal their long-unenforceable antimiscegenation statutes. *See, e.g.*, *Interracial Marriage Ban Up for Vote in Alabama*, N.Y. TIMES, June 3, 1999, at A21. Texas and Kansas have yet to repeal the sorts of statutes struck down in *Lawrence* under the Due Process Clause. A.G. Sulzberger, *Kansas Law on Sodomy Stays on Books Despite a Cull*, N.Y. TIMES, Jan. 21, 2012, at A13 (reporting that Kansas Governor Sam Brownback had declined to include the state’s anti-sodomy statute in his recommendation that the legislature repeal dozens of “out-of-date, unreasonable and burdensome state laws”); Ben Wermund, *Bills Would Take Texas’ Illegal Sodomy Ban off Books*, STATESMAN (Mar. 25, 2011), <http://www.statesman.com/news/texas-politics/bills-would-take-texas-illegal-sodomy-ban-off-1349429.html> (describing to date unsuccessful efforts to remove now-unenforceable laws criminalizing same-sex sexual conduct from Texas lawbooks). All of these statutes classify on the basis of race or sexual orientation in ways that are generally thought to violate the Equal Protection Clause—*except* that here, those classifications no longer have the force of law. Instead, the government’s now-inaccurate characterization of protected class members’ behavior as illegal may well operate as a type of soft, or persuasive, law that deters such behavior, or encourages others to discriminate against protected class members who engage in that behavior. *See* Sulzberger, *supra* (quoting gay rights advocate that the failure to repeal such laws has “a stigmatizing effect on same-sex relationships and can sometimes be wrongly cited by law enforcement officers unaware that they are no longer enforceable”).

46. Courts, advocates, and commentators continue to wrestle with the constitutional salience of expressive harm in contexts other than those involving pure government speech. Consider, for example, state laws that refuse to permit same-sex “marriage,” but that nevertheless provide all of the legal benefits of marriage through separate civil unions or other measures. *See Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012) (“[California law amending the state constitution to eliminate the right of same-sex couples to marry] serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior

discussed below, such government speech can classify its targets in ways that may offend at least some anticlassification theorists, and can communicate a subordinating message repugnant to most antisubordination theorists.

A. Behavioral Harms

Under some circumstances, government's racist, homophobic, or similarly hateful speech may sufficiently command or otherwise coerce its listeners' behavior in ways that impose the sorts of concrete effects that most anticlassification theorists would agree fall within the ambit of the Equal Protection Clause.⁴⁷

Recall, for example, *Lombard v. Louisiana*, in which the Supreme Court held that city officials' speech commanding continued segregation by private restaurants was sufficiently coercive to constitute state action in violation of the Constitution:

As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city

to those of opposite-sex couples."); Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never Be 'Equal'*, 97 GEO. L.J. 1155, 1163 (2009) ("The name issue, in a nutshell, is this: Is it constitutionally permissible to give same-sex couples all the benefits and responsibilities of marriage ... but to officially call that status by another name?"); Dorf, *supra* note 43, at 1343-45. Regardless of whether one characterizes such laws as "hard" or "soft," behavioral and expressive harm analysis might helpfully apply to such government action as well.

Caroline Mala Corbin similarly focuses on the potential harms that government's religious speech that violates the Establishment Clause may pose to nonbelievers. Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 375-78 (2012). For a discussion of the relevance of harm when analyzing government regulation of potentially harmful speech by private, non-governmental parties for First Amendment purposes, see generally Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81 (2011).

47. Cf. Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1218 (2008) ("Coercion is normally claimed when one has been forced by another to act, or refrain from acting, against their will. Coercive pressure can overcome one's will and make a particular course of action unreasonably costly. For example, where coercive pressure is applied to Bob, that pressure would render one or more of his options unreasonably costly. Coercive pressure in this respect makes a particular option unreasonable but not necessarily impossible. A small number may always be able to resist such pressure. In other words, coercion need not be a 'success' term." (footnotes omitted)).

must be treated exactly as if it had an ordinance prohibiting such conduct. We have just held that where an ordinance makes it unlawful for owners or managers of restaurants to seat whites and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance.⁴⁸

Consider, as another example, racially or sexually hostile speech by a government actor in the government workforce.⁴⁹ As the Supreme Court has held, when unwelcome speech or other workplace behavior targets protected class members and is sufficiently severe or pervasive to create a hostile work environment, it constitutes unlawful discriminatory conduct by altering the target's terms and conditions of employment.⁵⁰ In other words, just as compelling workers to endure miserable working conditions on the basis of protected class status—for example, assigning them to a dangerous worksite or an unheated office in the dead of winter—alters the terms and conditions of employment in violation of federal or state antidiscrimination law, so too does creating miserable working conditions by requiring individuals to endure verbal abuse on the basis of their class status.

Focusing on such expression's coercive effects on targets' working conditions has at least two significant constitutional implications. First, when the harassing speaker is a private party, the Court has characterized him or her to have engaged in discriminatory "conduct" largely unprotected by the First Amendment and thus subject to government regulation through antidiscrimination law.⁵¹ Second,

48. 373 U.S. 267, 273 (1963) (citation omitted).

49. *See, e.g.,* Faragher v. City of Boca Raton, 524 U.S. 775, 782-83, 810 (1998) (holding that certain sexually harassing speech in the government workforce violated Title VII).

50. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

51. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664-65 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." (citation omitted)); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (characterizing federal antidiscrimination law's regulation of harassing workplace speech as "an example of a permissible content-neutral regulation of conduct"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[S]ince words can in some circumstances

and key to this Article's inquiry, when the harassing speaker is a government entity, such action runs afoul of constitutional as well as statutory equality principles. We might thus recognize such harassing speech, when delivered by a government actor, as creating classifications with constitutionally cognizable discriminatory behavioral effects or harms.⁵²

As another illustration of this dynamic, consider examples from the educational context that may involve government's monopolistic speech to a captive and vulnerable audience.⁵³ Just as workers confronted with an employer's racially or sexually harassing speech on the job may not be free to escape or counter that speech because of their economic dependence on their continued employment, a captive audience of young people in the public schools may not be free to avoid or resist a government actor's racially harassing or otherwise discriminatory speech.⁵⁴ Here, too, we might understand

violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." (citations omitted)). Note that one can also justify government regulation of harassing workplace speech as consistent with the First Amendment without resorting to distinctions between protected "speech" and unprotected "conduct." For example, many who see such distinctions as inherently artificial propose that the relevant First Amendment inquiry should be understood instead to turn on the government's motive for regulating the contested speech—that is, "whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message," or whether the targeted harm would instead arise "even if the defendant's conduct had no communicative significance whatever." John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-97 (1975).

52. See, e.g., *Wright v. Rolette Cnty.*, 417 F.3d 879, 882, 884 (8th Cir. 2005) (finding that sex-based verbal harassment in a public workforce can support a § 1983 claim); *Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (implying racially hostile slurs in a government workforce may support a § 1983 claim); *Boutros v. Canton Reg'l Transit Auth.*, 997 F.2d 198, 204 (6th Cir. 1993) (holding that verbal harassment in a public workplace based on national origin can support a § 1983 claim).

53. See Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 940-41 (2009) (suggesting a constitutional right against government-compelled listening, especially in contexts that raise captive audience concerns like state-mandated abortion counseling or diversity training).

54. See, e.g., Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 97-99 (2002) (identifying free speech concerns with respect to government speech

the government's hateful speech as creating classifications with constitutionally cognizable effects because of the behavioral harm it inflicts by requiring students to endure such harassment.

Under some circumstances, moreover, government's hateful speech may inflict behavioral harm on its targets by facilitating private parties' discrimination against them. Along these lines, on at least one occasion—albeit one long predating the emergence of “government speech” in the Court's constitutional vocabulary—the Supreme Court recognized that government's racially identifying speech on a ballot offended equal protection values when it enabled voters' private discrimination. In *Anderson v. Martin*, the Supreme Court struck down, on equal protection grounds, Louisiana's law requiring that political candidates be identified by race on all ballots and nominating papers, recognizing the danger that government speech might facilitate others' discriminatory decision making:

[T]his case ... has nothing ... to do with the right of a citizen ... to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race.... [B]y placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.⁵⁵

Recognizing the potential for similar behavioral harms in related contexts, both state and federal legislatures have enacted statutes that prohibit public, as well as private, decision makers from

in public schools that seeks to indoctrinate “a captive audience of undeveloped and impressionable minds”). For these reasons, as discussed *infra* notes 92-95 and accompanying text, courts not infrequently consider government's religious speech in the public school setting as coercive for Establishment Clause purposes.

Along these lines, courts have interpreted statutory prohibitions on discrimination in federally funded educational activities to include verbal and other forms of harassment that are “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (interpreting Title IX's prohibition on sex discrimination by federally funded educational activities).

55. 375 U.S. 399, 401-02 (1964).

posting discriminatory advertisements or otherwise expressing discriminatory preferences for employment, housing, or credit applicants based on race, sex, age, national origin, religion, sexual orientation, or other protected characteristics.⁵⁶ Courts have interpreted those statutes to prohibit speech that would facilitate discriminatory decision making by both public and private actors. As then-Judge Ginsburg explained, for example, housing advertisements violate the Fair Housing Act when they “create[] a public impression that segregation in housing is legal, thus facilitating discrimination by defendants or other property owners.”⁵⁷ Here, too, we might understand such speech as creating classifications with constitutionally cognizable effects because of the behavioral harm it inflicts by facilitating discriminatory decisions on the basis of class status. Because such statutes are generally limited to specific contexts such as employment and housing, however, they do not address many instances of government expression. Absent an applicable statute, the Equal Protection Clause would provide the sole legal remedy for government’s hateful speech that facilitates discrimination by private actors.

56. See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(e) (2006) (prohibiting employers from printing or publishing “any notice or advertisement ... indicating any preference, limitation, specification, or discrimination, based on age”); 42 U.S.C. § 2000e-3(b) (2006) (prohibiting employers from printing or publishing “any notice or advertisement ... indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin”); Fair Housing Act, 42 U.S.C. § 3604(c) (prohibiting “any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin”); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d) (prohibiting employers from making disability-based inquiries at various points in the employment process); Equal Credit Opportunity Act, 12 C.F.R. § 202.4(b) (2011) (prohibiting creditors from making “any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application”). For discussion of such statutes’ First Amendment implications when applied to private, rather than public, actors’ speech, see Helen Norton, *You Can’t Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 741-77 (2003).

57. See *Spann v. Colonial Vill., Inc.* 899 F.2d 24, 30 (D.C. Cir. 1990). Caroline Mala Corbin has explored such harms in the Establishment Clause context as well. Corbin, *supra* note 46, at 400 (“In sum, government religious speech does not have solely an expressive dimension but also leads to material harms.... [T]he state perpetuates the stereotypes that result in discrimination—discrimination that deprives atheists of equality in politics, employment, education, and custody decisions, and makes them outcasts in their own community and country.”).

Finally, government's hateful speech may also inflict discriminatory behavioral harm by causing its targets to alter their behavior—for example, by discouraging class members from pursuing certain opportunities or activities because they reasonably conclude that such efforts would be pointless or unwise. Consider, for example, the possible effects of a state capitol's or courthouse's racist proclamation on African Americans' willingness to enter that building to petition the legislature, file a complaint, or serve as a witness or juror.⁵⁸ Along these lines, courts and legislatures that have recognized this danger have interpreted antidiscrimination statutes to prohibit public or private decision makers' discriminatory speech that discourages protected class members from seeking employment, housing, or other important opportunities. For example, several circuits have interpreted the Federal Fair Housing Act to prohibit housing or real estate advertisements that would discourage reasonable readers of a particular class from responding to them.⁵⁹ Here, too, we might understand such speech as classifying its targets in a way that inflicts discriminatory behavioral harm. And again, the Equal Protection Clause provides the only potential opportunity for legal redress in many cases involving

58. See Trenticosta & Collins, *supra* note 15, at 127 (hypothesizing the effects of a courthouse's display of the Confederate flag on due process, privileges and immunities, and equal protection rights); James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 525 (1991) (asserting that a state capitol's display of the Confederate flag might inhibit African Americans from exercising their right to petition); see also Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 703 (2008) (describing the deterrent effects of displaying Christian messages on courthouses on non-Christian litigants and witnesses).

59. See, e.g., *White v. U.S. Dep't of Hous. & Urban Dev.*, 475 F.3d 898, 905-06 (7th Cir. 2007) ("The inquiry under this objective standard is whether the alleged statement would suggest to an 'ordinary listener' that a person with a particular [protected] status is preferred or disfavored for the housing in question."); *Jancik v. Dep't of Hous. & Urban Dev.*, 44 F.3d 553, 556 (7th Cir. 1995) ("[E]very circuit that has considered a claim [under the Fair Housing Act] has held that an objective 'ordinary reader' standard should be applied in determining what is 'indicated' by an ad."); *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 647-49 (6th Cir. 1991) (appearing to adopt the Second Circuit's *Ragin* interpretation while simultaneously holding that a single ad with a large number of white models failed to state a cognizable claim under the *Ragin* rationale); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999-1000 (2d Cir. 1991) (interpreting the Fair Housing Act to prohibit "any ad that would discourage an ordinary reader of a particular race from answering it").

government's hateful speech because such antidiscrimination statutes are limited to specific contexts.⁶⁰

B. Expressive Harms

In analyses of "hard law" that may also apply to government speech and other forms of "soft law,"⁶¹ a number of scholars have explored potential expressive harms caused by governmental actions that communicate the government's view of class members' inferiority. Under such an expressive meaning approach, the government inflicts a constitutional wrong simply by sending a message of inferiority based on class status, regardless of whether listeners suffer emotional distress or experience material harm as a result.⁶² Deborah Hellman, for example, has applied expressive meaning theory in the equal protection context, albeit focusing on the government's action or "hard law," rather than on government speech or other forms of "soft law."⁶³ She concluded

60. The Equal Credit Opportunity Act's regulations take a similar approach, forbidding creditors from making oral or written statements "that would discourage on a prohibited basis a reasonable person from making or pursuing [a credit] application." 12 C.F.R. § 202.4(b).

61. See *supra* notes 19-23 and accompanying text.

62. Many expressive meaning scholars use the term "expressive harms" to describe this dynamic. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1543-44 (2000) ("We reject the view that no harm results from trying to humiliate another person, so long as one does not succeed. Action taken with the purpose of humiliation is an expressive harm in itself."); William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 8 (2011) (distinguishing "expressive harms" from "tangible harms"); Dorf, *supra* note 43, at 1279-83 (describing the "expressive harm" of various government actions). But note that some expressive meaning theorists deliberately choose a different vocabulary, focusing on expressive "wrongs," rather than on expressive "harms" or "effects," to emphasize the wrong of government's demeaning message in moral, rather than consequentialist, terms. See, e.g., DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 30 (2008) ("Demeaning is wrong because the fact that people are of equal moral worth requires that we treat them as such. We must not treat each other as lesser beings even when doing so causes no harm."); see also Dorf, *supra* note 43, at 1282 ("One might regard some expressive harms as wrongs in themselves in the way that deontological moral theorists regard some actions—such as telling a lie—as inherently wrong, even if no one suffers any concrete harm as a result; strong deontologists could judge an action wrongful even if no one were made worse off by it." (footnote omitted)).

63. See Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000) ("[W]e ought to judge whether state action violates Equal Protection not by looking at the intent of those who enacted laws nor by looking at the effect a law has in the domains in which it operates. Rather, we ought to judge whether laws violate Equal

that a governmental act is repugnant to equal protection values when its meaning conflicts with the government's obligation to treat each person with equal concern, even absent any showing of stigmatic effect on its targets—that is, even absent any showing of psychological or reputational injury, or behavioral harm.⁶⁴ Deborah Brake similarly defines the “fundamental principle of equality [to] require[] equal concern, a broader principle than mere equal treatment. An equal concern principle must be sensitive to inequality in social relations and must reject actions that devalue and exclude persons from equal membership in a shared community.”⁶⁵ Although, to date, expressive meaning scholars have made this point in the context of evaluating “hard” rather than “soft” law,⁶⁶ whether the government delivers that hateful message through “hard” law or “soft” should be immaterial if these scholars are right about the sort of expressive harm that is constitutionally salient for equal protection purposes.⁶⁷ Antisubordination theorists are especially likely to agree that government's hateful speech perpetuates longstanding patterns of hierarchy and subordination by inflicting

Protection by looking at the meaning or expressive content of the law or policy at issue.”).

64. See *id.* at 14 (“It is a strength of my theory that people can challenge state action without needing to assert that they have been stigmatized. Some cultural critics have attacked what they see as the growth of a culture of victimhood. My theory ensures that governmental action does not denigrate any person or group, while simultaneously not discouraging the thick skin that ought to be treated as a civic virtue.” (footnote omitted)).

65. Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 524 (2004); see also Helmreich, *supra* note 34, at 118 (“[T]o harm someone expressively is to treat her as one would if one harbored insulting attitudes towards her. It is, in other words, to treat her in an objectively insulting way.”).

66. Focusing on the expressive meaning underlying various instances of “hard,” rather than “soft,” law, William Carter urges that government messages about race should not generally trigger equal protection scrutiny. See Carter, *supra* note 62, at 7; *id.* at 8 (“Where the harm alleged from government race consciousness is primarily expressive and nonsubordinating (that is, it does not result in differential treatment, racialized distribution of a limited resource, or racial stigmatization to any appreciable degree), this Article argues that First Amendment principles can be helpful in assessing whether the expression amounts to a constitutional injury.”). Professor Carter leaves open the possibility, however, that a different analysis might apply to government's hateful speech. *Id.* at 8 n.23.

67. Jeffrey Helmreich makes a similar point in the context of “hard law.” See Helmreich, *supra* note 34, at 121 (“The possibility of expressive subordination, then, challenges any putative dichotomy between tangibly disadvantaging people based on race, on the one hand, and merely communicating a racially charged message, on the other. Expressive subordination marks an important third category.”).

expressive harm on the basis of class status.⁶⁸ Some anticlassification theorists, however, emphasize the difference between “hard” and “soft” law as constitutionally relevant in this context and thus may resist characterizing government speech that inflicts expressive harm as a cognizable classification for equal protection purposes given the comparative diffuseness of such “effects.”⁶⁹ But perhaps some other anticlassification theorists may agree that government’s hateful speech classifies its targets in ways that should be understood to violate the Equal Protection Clause, especially if we recall anticlassification theory’s roots in both moral and instrumental grounds.⁷⁰ Under this view, government’s hateful speech can be seen as not only morally offensive in demeaning its targets based on their class status but also instrumentally dangerous by contributing to social divisions and instability. In short, government’s hateful speech can communicate a subordinating message repugnant to most antisubordination theorists and can classify its targets in ways that may trouble at least some anticlassification theorists.

III. COURTS’ CONTRASTING EQUAL PROTECTION AND ESTABLISHMENT CLAUSE ANALYSES OF GOVERNMENT SPEECH

The preceding Part explored a variety of behavioral and expressive harms potentially inflicted by government’s hateful speech. This Part now describes lower courts’ failure to grapple thoughtfully with these possibilities when considering equal protection challenges to such expression. It then contrasts courts’ more expansive understanding of constitutionally salient harms when evaluating Establishment Clause challenges to government’s religious speech.

A. Equal Protection Clause Analysis

In cases decided long before the recent emergence of the Court’s “government speech” vocabulary, the Court appears to have

68. *See supra* notes 35-37 and accompanying text.

69. *See supra* notes 41-43 and accompanying text.

70. *See supra* notes 38-40 and accompanying text.

recognized at least two situations in which government speech might deny its targets "the equal protection of the laws."⁷¹ For example, we might understand the Court's decision in *Lombard v. Louisiana* to conclude that government speech commanding discrimination by private actors violates the Equal Protection Clause,⁷² and its decision in *Anderson v. Martin* to mean that government speech that facilitates such discrimination does so as well.⁷³ Despite these precedents, however, lower courts have been generally unwilling to credit equal protection challenges to government speech.

More specifically, the small number of cases in this area involve various constitutional challenges to governments' expressive display of the Confederate flag. There the courts first required plaintiffs to show that the government's expressive choice had both a discriminatory purpose *and* a discriminatory effect.⁷⁴ They then defined the requisite discriminatory effects narrowly,⁷⁵ found none, and thus avoided inquiry into whether the government's speech was actually motivated by a discriminatory purpose.⁷⁶

71. U.S. CONST. amend. XIV, § 1.

72. See *supra* note 48 and accompanying text.

73. See *supra* note 55 and accompanying text.

74. *E.g.*, *Coleman v. Miller*, 117 F.3d 527, 529 (11th Cir. 1997) ("[The plaintiff] must first demonstrate that the flying of the Georgia flag produces disproportionate effects along racial lines, and then must prove that racial discrimination was a substantial or motivating factor behind the enactment of the flag legislation.").

75. *Id.* at 530 ("In order to demonstrate disproportionate impact along racial lines, appellant must present specific factual evidence to demonstrate that the Georgia flag presently imposes on African-Americans as a group a measurable burden or denies them an identifiable benefit.").

76. *Id.* at 531 n.8 ("We recognize that the Georgia flag conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression.... Having concluded that appellant has failed to demonstrate that the Georgia flag presently imposes a discriminatory racial effect, we need not decide whether discrimination against African-Americans was a motivating factor in the flag bill's passage."); see also *NAACP v. Hunt*, 891 F.2d 1555, 1562 (11th Cir. 1990) ("Because there are two accounts of why Alabama flies the [Confederate] flag, however, it is not certain that the flag was hoisted for racially discriminatory reasons." (citation omitted)).

Although a detailed inquiry into the intent underlying governments' expressive choice in this context is beyond the scope of this Article, a number of courts, scholars, and other commentators have extensively parsed the evidence that governments intended to communicate a message of white supremacy in choosing to display the Confederate flag. See, *e.g.*, *Coleman*, 117 F.3d at 528-29 ("As many of Georgia's politicians and citizens openly resisted the Supreme Court's desegregation rulings, increasing numbers of white Southerners began expressing renewed interest in their Confederate heritage. It was in this environment of open hostility to the Supreme Court's civil rights rulings and of developing

For example, in *NAACP v. Hunt*, the Eleventh Circuit found that Alabama's expressive choice to fly the Confederate flag above the state capitol dome inflicted no discriminatory harm on African Americans. The panel concluded simply that whites as well as African Americans were offended by the flag's display, and that such offense thus did not establish the requisite discriminatory harm for equal protection purposes: "[T]here is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position."⁷⁷ Thus not only did the court fail to explore the possibility that the flag might inflict discriminatory behavioral harm—for example, that it might deter African Americans from pursuing certain activities or opportunities—but it also rejected expressive harm as a constitutionally sufficient injury.

Several years later, and for similar reasons, the Eleventh Circuit rejected an equal protection challenge to Georgia's incorporation of the Confederate flag into its own state flag design.⁷⁸ There the plaintiff focused specifically on the flag's differential harms as experienced by African Americans, alleging that "the flag's Confederate symbol, which is often used by and associated with hate groups such as the Ku Klux Klan, inspires in him fear of violence, causes him to devalue himself as a person, and sends an exclusionary message to Georgia's African-American citizens."⁷⁹ The panel, however, found the plaintiff's evidence insufficient to prove the required discriminatory effect:

After carefully reviewing the record, and drawing all inferences in the light most favorable to appellant, we find no evidence of

interest in Confederate history that the Georgia General Assembly acted to redesign its state flag. It chose as an official state symbol an emblem that historically had been associated with white supremacy and resistance to federal authority."); *Daniels v. Harrison Cnty. Bd. of Supervisors*, 722 So. 2d 136, 139 (Miss. 1998) (Banks, J., concurring) ("Quite recently, many state governments adopted the battle flag as a symbol of continued support of white supremacy, segregation and discrimination against persons of black African descent.").

77. *Hunt*, 891 F.2d at 1562; see also *Daniels*, 722 So. 2d at 139 (majority opinion) (rejecting a constitutional challenge to the county's display of Confederate flags on beaches and other county property because just "[a]s in *Hunt*, the record in the ... case contain[ed] no indication that the flying of the single Confederate Flag at Eight Flags serve[d] to deprive any citizens of the State of any constitutionally protected right").

78. *Coleman*, 117 F.3d at 531.

79. *Id.* at 529.

a similar discriminatory impact imposed by the Georgia flag.... He testified that the Confederate symbol in the Georgia flag places him in imminent fear of lawlessness and violence and that an African-American friend of his, upon seeing the Georgia flag in a courtroom, decided to plead guilty rather than litigate a traffic ticket. This anecdotal evidence of intangible harm to two individuals, without any evidence regarding the impact upon other African-American citizens or the comparative effect of the flag on white citizens, is insufficient to establish 'disproportionate effects along racial lines.' Coleman also offered the affidavit of another witness who testified that, in his opinion, the flying of the flag promotes violence against blacks and continues to represent a symbol of Georgia's efforts against integration. This mere allegation, without any accompanying support, also is not sufficient to demonstrate a disproportionate racial effect.⁸⁰

The panel thus cursorily declined to credit the various behavioral and expressive harms alleged by individual African Americans as establishing the requisite effects for equal protection purposes.⁸¹

In short, even assuming arguendo that the Confederate flag communicates an intentionally hateful government message, which remains contested,⁸² the courts concluded that the harms or effects of such expression were not sufficient to establish a violation of the

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

81. Note, however, that the panel left open the possibility that other evidence might support an equal protection challenge to the government's expressive choice in this context. *See id.* at 530 n.6 ("We recognize that a government action may in some instances violate the Constitution because it encourages private discrimination. There is no evidence in the record of this case, however, that connects the Georgia flag to private discrimination or racial violence." (citations omitted)). Whether the plaintiffs in these cases failed to offer such evidence, or whether the courts simply ignored it, remains unclear. *See Capers, supra* note 8, at 141 ("Rather than relying on empirical data or expert testimony and reports from sociologists, as the NAACP had done to great effect in *Brown*, the plaintiffs in *Hunt* and *Coleman* instead relied on personal, anecdotal evidence. One could argue that the failure on the part of the plaintiffs to present data supporting their claim of disparate impact was fatal, though whether the Eleventh Circuit would have been receptive to, or persuaded by, such data is questionable." (footnote omitted)); Gellman & Looper-Friedman, *supra* note 58, at 728 ("One problem [with the Confederate flag litigation] may have been the plaintiffs' not having produced sufficient evidence of marginalization.").

82. *See supra* note 76.

Equal Protection Clause. The next section contrasts courts' more expansive understanding of the constitutionally relevant harms of government speech in the Establishment Clause context.

B. Establishment Clause Analysis

The Establishment Clause context offers the only area outside of the Free Speech Clause⁸³ in which courts have, to date, seriously wrestled with the constitutional implications of government speech. Indeed, on a number of occasions the Supreme Court has upheld Establishment Clause challenges to what we now understand as government expression.⁸⁴ There the Court has held that government action—including, but not limited to, government's religious speech—violates the Establishment Clause given a finding of either impermissible purpose⁸⁵ or effect;⁸⁶ moreover, it has defined the requisite harmful effects comparatively broadly.⁸⁷

Please note that I do not suggest that the Court's Establishment Clause precedent in any way binds courts considering equal protection challenges to government speech. Instead I simply suggest

83. See *supra* note 5 and accompanying text.

84. See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 867-74, 881 (2005) (striking down Ten Commandment displays in Kentucky courthouses as an Establishment Clause violation); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312-13 (2000) (striking down a public school's religious invocation before a high school football game as an Establishment Clause violation); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (striking down a public school district's required teaching of creation science as an Establishment Clause violation); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (striking down a public school's daily prayers as an Establishment Clause violation).

85. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). Note, however, that courts' Establishment Clause analysis rarely focuses on governmental purpose because of the evidentiary challenges inherent in proving governmental intent. See B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 503-04 (2005); see also *id.* at 502 ("In practice, however, the role of intent in deciding the religious symbol cases has been decidedly minimized.").

86. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (finding an Establishment Clause violation upon a showing of any one of three elements: (1) that the government's contested action was not motivated by a "secular legislative purpose"; (2) that the action's "principal or primary effect" was to advance or inhibit religion; or (3) that the action "foster[ed] an excessive government entanglement with religion" (internal quotation marks omitted)).

87. See *infra* notes 90-95 and accompanying text.

that we can choose to learn from courts' experience wrestling with whether and when government's religious speech impermissibly "establishes" religion when confronted with the parallel challenge of determining whether and when government's hateful speech might deny "the equal protection of the laws." Note too that the Court's Establishment Clause doctrine is not without controversy.⁸⁸ Indeed, the Court has yet to reach consensus on the appropriate approach to such problems; contemporary divisions center primarily—but not only—on the choice between coercion and endorsement analyses.⁸⁹ In any event, as described below, courts considering Establishment Clause challenges to government's religious speech have been considerably more willing to accept a wider array of harms as constitutionally salient than have lower courts assessing the equal protection implications of government's allegedly hateful speech.

1. Coercion Analysis

Some propose a coercion analysis for determining when, if ever, government violates the Establishment Clause through its religious speech or other action.⁹⁰ Under this view, government does not violate the Establishment Clause unless and until it coerces behavior. As articulated by Justice Kennedy, who is among those most often associated with coercion analysis: "[G]overnment may not coerce anyone to support or participate in any religion or its exercise Forbidden involvements include compelling or coercing participation or attendance at a religious activity, requiring religious oaths to obtain government office or benefits, or delegating government power to religious groups."⁹¹ Under this approach, courts should

88. See *infra* notes 98-110 and accompanying text.

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

90. See, e.g., Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) ("Recognition of the centrality of coercion—or, more precisely, its opposite, religious choice—to Establishment Clause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action." (footnote omitted)).

91. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (citations omitted).

find government to violate the Establishment Clause only when its religious or antireligious speech—or other action—coerces behavioral change, rather than when it inflicts expressive harm.

To be sure, divisions remain even among coercion theorists about that test's application to specific facts.⁹² Most important for purposes of this Article is the question of whether and when government's religious speech alone can coerce behavior, as some coercion theorists are quicker to identify a listener's behavior as coerced by the government's religious speech than others. For example, Justice Kennedy is open to a comparatively wide range of behavioral harms when assessing the potentially coercive effects of government action, including government's religious speech.⁹³ He thus defines impermissible "coercion" relatively broadly to include government's religious speech that influences onlookers' behavior through peer pressure and other social dynamics—as he found to be the case with a prayer at a public high school graduation that students feel pressure to attend and not to leave.⁹⁴ Justice Scalia, in contrast, defines impermissible "coercion" quite narrowly to include only the threat or imposition of government punishment.⁹⁵

2. Endorsement Analysis

Justice O'Connor is among those most commonly associated with endorsement analysis.⁹⁶ She identified the key constitutional harms imposed by an Establishment Clause violation as expressive in nature; under this view, the government offends a constitutional commitment to religious pluralism when it delivers a message that citizens' status varies based on their religion or nonreligion. She

92. See McConnell, *supra* note 90, at 941 ("A noncoercion standard, of course, would not answer all questions. For example, it obviously would not answer the question, 'What is coercion?' Enormous variance exists between the persecutions of old and the many subtle ways in which government action can distort religious choice today.").

93. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

94. *Id.* at 593-95.

95. *Id.* at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.").

96. See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 122-28 (2007) (explaining the Court's endorsement analysis as recognizing that government sponsorship of religious symbols endorses one group at the expense of another).

considered this to be true regardless of whether the government's message inflicted emotional distress or other psychological harm upon onlookers. More specifically, she explained the endorsement test as follows:

As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message "that religion or a particular religious belief is favored or preferred." ... If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.⁹⁷

For this reason, Justice O'Connor objected to coercion analysis as incompletely capturing the nature of an Establishment Clause violation:

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.⁹⁸

97. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted); *see also* *Lynch v. Donnelly*, 465 U.S. 668, 669 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders ... and an accompanying message to adherents that they are insiders, favored members of the political community."); *id.* at 694 ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."). For further discussion, see Marci A. Hamilton, *The Endorsement Factor*, 43 ARIZ. ST. L.J. 349, 355 (2011) ("It is my view that 'endorsement' is a new factor [in the *Lemon* test], not a new test, and that it is visionary and crucially important in this era of religious terrorism and triumphalism.").

98. *Cnty. of Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted). Professor Corbin similarly maintains that a sufficient constitutional harm for Establishment Clause purposes is

caused by the expressive content of the law or policy at issue. The focus is on

Justice Kennedy, in contrast, views the endorsement test and its focus on expressive harm as inappropriately “border[ing] on latent hostility toward religion,” and “install[ing] federal courts as jealous guardians of an absolute ‘wall of separation.’”⁹⁹

In short, coercion and endorsement theorists disagree as to whether a challenger must show that the government’s religious speech caused behavioral, as opposed to expressive, harm to demonstrate an Establishment Clause violation. Whether either coercion or endorsement, or even some other analysis, currently commands a majority of the Court on Establishment Clause questions remains unclear.¹⁰⁰ And even if we agree on the appropriate test, considerable room for disagreement remains as to whether its application to particular facts would support a finding of coercion or endorsement. To be sure, government’s religious speech by itself will generally violate the coercion principle in a narrower universe of cases than the endorsement principle. Consider, for example, a public school’s decision to lead its students in prayer at graduation¹⁰¹ and a legislature’s decision to start its session with denominational prayer.¹⁰² Both governmental choices appear to endorse religion;¹⁰³ whether either violates the coercion principle

the message conveyed by the state action rather than its intent or its practical effect.... Under an expressivist approach, the government violates the Establishment Clause’s equality component if its religious speech fails to treat believers and nonbelievers with equal concern. Again, the injury turns not on intent or on material harms, but on the state’s message of unequal worth.

Corbin, *supra* note 46, at 380-81 (footnotes omitted).

99. *Cnty. of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

100. See *supra* note 89 and accompanying text.

101. *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

102. *Marsh v. Chambers*, 463 U.S. 783, 784 (1983); see also *id.* at 792-95 (holding that the Nebraska state legislature did not violate the Establishment Clause by opening each session with a chaplain’s nonsectarian prayer).

103. See, e.g., *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 342, 349, 354-55 (4th Cir. 2011) (striking down legislative prayer with specific references to Christianity by distinguishing *Marsh* as involving “nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide,” and asserting that “legislative prayer must strive to be nondenominational so long as that is reasonably possible—it should send a signal of welcome rather than exclusion.... [H]owever, the Board’s policy falls short. It resulted in sectarian invocations meeting after meeting that advanced Christianity and that made at least two citizens feel uncomfortable, unwelcome, and unwilling to participate in the public affairs of Forsyth County.... While it is true that plaintiffs were not coerced, they claim pressure to stand and bow their heads along with the rest or risk having their civic participation

depends on how broadly or narrowly one defines coercion. While Justice Scalia, for example, would find that neither coerces behavior because he sees attendees as simply free not to join the prayer,¹⁰⁴ Justice Kennedy would find that high school students—unlike adults—might feel coerced to participate given their youth and the importance of the occasion.¹⁰⁵ In contrast, neither Justices Kennedy nor Scalia would find the government's public display of religious symbols to coerce onlookers' behavior.¹⁰⁶ As another example of how the choice of analysis might well determine the outcome of an Establishment Clause challenge to government speech, consider a state legislature's decision to issue a specialty state license plate that features a cross and Christian message—but not to issue plates featuring symbols of any other religions—that drivers are free, but not compelled, to buy and display on their vehicles.¹⁰⁷ Assuming that such plates are characterized as delivering the government's speech,¹⁰⁸ they would likely violate endorsement,¹⁰⁹ but not coercion, principles. Along the same lines, the choice between coercion and endorsement analysis may also determine the outcome of Establishment Clause challenges to city or county choices to adorn their governmental seal with a cross.¹¹⁰

correspondingly devalued.”).

104. *Lee*, 505 U.S. at 642 (Scalia, J., dissenting).

105. *See id.* at 592-95 (majority opinion).

106. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs.”).

107. *See* *Summers v. Adams*, 669 F. Supp. 2d 637, 657 (D.S.C. 2009) (striking down South Carolina's approval of a specialty license plate that featured a cross and the statement “I Believe”).

108. Lower courts are currently split on whether specialty license plates are best characterized as the speech of the government that approves and produces them, or of the private party that buys and displays them. *See* Helen Norton, *Shining a Light on Democracy's Dark Lagoon*, 61 S.C. L. REV. 535, 537-41 (2010).

109. *Summers*, 669 F. Supp. 2d at 663 (“This is true not only because the ‘I believe’ plate has the effect of any other form of ‘advertising,’ but, more ominously, because legislative authorization of this plate (and no other religious plate) signals that the referenced religion is uniquely worthy of legislative endorsement and promotion.”).

110. *Compare* *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) (holding that a city seal's inclusion of the Christian cross violated the Establishment Clause), *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 782 (10th Cir. 1985) (same), *and* *ACLU v. City of Stow*, 29 F. Supp. 2d 845, 853 (N.D. Ohio 1998) (same), *with* *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 291, 299 (6th Cir. 2001) (upholding the state motto

Neither coercion nor endorsement analysis guarantees easy answers in all cases. But once one acknowledges that government's religious speech—by itself—can be constitutionally impermissible in at least some contexts, regardless of how broadly or narrowly we define those contexts, then we might recognize the same with respect to government speech that expresses hatred, hostility, or animus on the basis of class status. Indeed, the potential harms inflicted on “outsiders” by government's racist, homophobic, or otherwise discriminatory speech seem at least as significant as those inflicted on religious outsiders by government speech that endorses or disapproves of religion.¹¹¹ In other words, just as government's religious speech under certain circumstances impermissibly “establishes” religion in violation of the First Amendment, so too might government speech sometimes impermissibly deny certain individuals “the equal protection of the laws.”¹¹²

The remainder of this Article seeks to start a conversation about how courts—and the rest of us—might think about the constitutional implications of government's hateful speech. It thus urges that we start to ask a different and more difficult set of questions than those that have historically been posed in the equal protection context: those that focus not on whether the government has en-

“With God, All Things are Possible” as compelling no religious participation and indicating no denominational preference), and *Ky. Office of Homeland Sec. v. Christerson*, 371 S.W.3d 754, 763 (Ky. Ct. App. 2011) (holding that a state statute requiring the state to publicize the legislature's findings that the state's safety and security could not be achieved “apart from reliance on Almighty God” did not violate the Establishment Clause).

111. See Note, *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 2017-18 (2010) (“Surely the message that one is an ‘outsider[.]’, not [a] full member [.] of the political community’ because of one’s race is not somehow less injurious than the message that one is an outsider because of one’s religion. For many, race is just as central to self-identity as religion; indeed, race may be *more* central because it is immutable. Moreover, the scars that remain from our nation’s sad history of excluding racial minorities from full political participation are surely at least as deep as those that remain from past instances of religious exclusion, and very likely a good deal deeper.” (footnotes omitted)). Indeed, some might argue that the harms of discriminatory government speech on the basis of race, gender, national origin, et cetera, are *greater* than the harms of government speech that delivers a message of outsider status based on religion or nonreligion. For example, some suggest that, in America’s pluralistic society, “[r]eligion is under no special disability in public life ... it is at least as protected and encouraged as any other form of belief and association—in some ways more so.” Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14.

112. U.S. CONST. amend. XIV, § 1; see also *supra* Part II.

gaged in “hard” law or “soft,” but instead on whether government speech denies its targets the equal protection of the laws in constitutionally cognizable ways.

IV. RECONSIDERING EQUAL PROTECTION CHALLENGES TO GOVERNMENT’S HATEFUL SPEECH

Although not without its controversy, the Court’s Establishment Clause doctrine offers a potentially helpful parallel in its approach to considering the range of constitutionally suspicious harms potentially posed by government speech. This Part thus draws from the Establishment Clause experience to consider possible applications of behavioral harm and expressive meaning analyses to government’s hateful speech.

A. Behavioral Harm Analysis

First, we might approach equal protection challenges to hateful government speech by focusing our inquiry on whether and when such expression inflicts certain types of behavioral harm—that is, whether the government’s expressive classification facilitates private parties’ discrimination or deters its targets from engaging in certain activities. This approach helps explain both *Lombard v. Louisiana*, in which the Court found government speech that commanded private segregation to be unconstitutional,¹¹³ and *Anderson v. Martin*, in which the Court found unconstitutional the government’s racially identifying speech on ballots for fear that the government was thus facilitating voters’ racially discriminatory choices.¹¹⁴ A focus on behavioral harm analysis similarly helps explain why verbal harassment by a government actor in the public workforce or in public schools may violate equal protection values: such speech forces its targets to endure altered and diminished employment and educational conditions on the basis of protected

113. See *supra* note 48 and accompanying text.

114. See *supra* note 55 and accompanying text.

class status.¹¹⁵ In other words, such speech classifies its targets in a way that inflicts discriminatory behavioral harm.

A behavioral harm approach also offers opportunities for reconsidering our understanding of the ways in which hateful government speech may cause such harm. As we know from parallel debates over government coercion in the Establishment Clause context, behavioral harm analysis leaves room for advocates to argue, and courts to evaluate, whether and when government speech impermissibly coerces or otherwise influences behavior in a discriminatory way.¹¹⁶ For example, we might understand the Equal Protection Clause to prohibit government speech that expresses hostility on the basis of class status in a way that would cause a reasonable class member to alter her behavior—for example, by discouraging class members from pursuing a government job or petitioning the legislature because they reasonably conclude that such efforts would be pointless or unwise. Indeed, antidiscrimination statutes often take this approach, and courts have interpreted such laws to prohibit decisionmaker speech that would reasonably deter a protected class member from pursuing employment, housing, or credit opportunities.¹¹⁷

Such an approach may be attractive to both anticlassification and antisubordination theorists, in that it requires a showing of

115. See *supra* notes 49-50 and accompanying text; see also Pillard, *supra* note 10, at 958 (“[T]he conduct-shaping purpose of sex education curricula makes them vulnerable to equal protection challenge even if communicating retrogressive sex roles in traditional academic classes might not be.”).

116. See *supra* Part III.B.1 (describing the differing views of coercion offered by Justices Kennedy and Scalia).

117. See *supra* notes 56-57 and accompanying text. Under a behavioral harm approach, the deterred activity need not be constitutionally protected to establish the requisite discriminatory harm. What matters instead is whether the government’s hateful speech causes adverse and discriminatory behavioral change. To be sure, government speech that deters constitutionally protected activity might violate constitutional provisions in addition to the Equal Protection Clause. See, e.g., Dorf, *supra* note 43, at 1278 (concluding that “the struggle over the term marriage also involves an element of coerced private speech” in violation of the First Amendment); Forman, *supra* note 58, at 516 (urging that the Confederate flag display violates the First Amendment because it chills African Americans’ speech rights); Trenticosta & Collins, *supra* note 15, at 127 (arguing that the government’s Confederate flag display in front of a courthouse may change the behavior of defendants or jurors in ways that violate the Due Process Clause); Tebbe, *supra* note 4, at 15-17 (describing how some racialized government speech may silence citizens or otherwise distort public discourse in violation of the Free Speech Clause).

relatively concrete and subordinating behavioral “effects” or “harms” of government’s expressive classifications. Behavioral harm analysis may also be comparatively attractive to those concerned about the indeterminacy of assessing a governmental message’s expressive meaning; indeed, the practical challenges of expressive harm analysis, described in some detail below,¹¹⁸ may convince some that behavioral harm analysis is the better approach.

To be sure, however, behavioral harm analysis has its drawbacks. As explored in more detail below, for example, such an approach involves significant practical challenges in proving the causal relationship between the government’s hateful speech and private parties’ behavior¹¹⁹—just as we have seen disagreements among coercion theorists about whether and when government’s religious speech actually coerces, or causes, behavioral change.¹²⁰

B. Expressive Meaning Analysis

Expressive meaning analysis would focus on the expressive, rather than the behavioral, implications of government’s hateful speech. Drawing from expressivist scholars’ analysis of the expressive wrongs inflicted by government’s discriminatory conduct, or “hard law,” we might similarly understand government speech, or “soft law,” to violate the Constitution when the government’s expressive meaning is repugnant to equal protection values.¹²¹ Indeed, a focus on *expressive* meaning seems especially appropriate when the challenged governmental action is actually the government’s *expression*. In other words, if the Equal Protection Clause demands that government treat individual members of the polity with equal respect and equal concern,¹²² then the government’s speech alone may violate this constitutional commitment when it communicates exclusion or inferiority on the basis of class status.

Under an expressive meaning analysis, we would focus on whether the government has communicated a message of hatred, hostility, or animus based on class status, regardless of whether the

118. See *infra* notes 138-43, 146-52, 158-60 and accompanying text.

119. See *infra* notes 129-31 and accompanying text.

120. See *supra* notes 92-95 and accompanying text.

121. See *supra* Part II.B.

122. See Brake, *supra* note 65, at 560-70.

message succeeds in inflicting psychological damage on or lowering public opinion of its targets—and certainly regardless of whether the message carries behavioral effects like encouraging private discrimination against, or deterring certain activity by, protected class members.¹²³ Such an expressive meaning analysis would identify the constitutionally relevant wrong as the government's imprimatur on a message communicating that its targets are outsiders or something other than full members of the political community.¹²⁴

This approach may be especially attractive to antisubordination theorists because it focuses on whether the government's speech sends a demeaning, or subordinating, message. Whether it appeals to anticlassification theorists depends on their willingness to include expressive harms as among the constitutionally cognizable effects of government's classifications. While I anticipate many will resist,¹²⁵ the moral and instrumental roots of pure anticlassification theory¹²⁶ may lead some to agree that the government's expressive classifications, too, can violate the Equal Protection Clause. Government's hateful speech can be seen as not only morally offensive in demeaning its targets based on class status but also instrumentally dangerous by contributing to social divisions and instability.¹²⁷

123. See *supra* Part II.B.

124. See Hellman, *supra* note 63, at 2.

125. For example, I do not expect that a proposal to extend expressive meaning analysis to equal protection challenges to government speech will persuade those already skeptical about endorsement analysis in the Establishment Clause context. See *infra* notes 139-43 and accompanying text.

126. See *supra* notes 38-39 and accompanying text.

127. Michael Dorf and Nelson Tebbe have each written very thoughtful articles that address some of the same issues. See *supra* notes 4, 43. My focus in this paper is simultaneously both broader and narrower than each of theirs. Professor Dorf does not focus solely on government speech—my exclusive target here—but instead more broadly on the expressive meaning of a wide range of government actions that include, but are not limited to, speech. See Dorf, *supra* note 43, at 1275 (“[This Article] articulates and unpacks the thesis that the Constitution forbids government acts, statements, and symbols that label some persons or relationships as second-class—with a special focus on those government actions, like the denial of the term marriage to some but not all couples, that have ‘only’ a symbolic impact.”). On the other hand, because I am less confident that anticlassification theorists will embrace an expressive meaning approach, I focus more broadly on behavioral as well as expressive harm approaches to the government speech problem. See *supra* Part IV.A-B. Like Professor Dorf, Professor Tebbe focuses primarily on expressive rather than behavioral harms. However, he is interested in a broader constitutional theory of “government

C. Applications and Concerns

This Section discusses how these proposals might apply to some specific situations, and in so doing, anticipates and addresses possible concerns. To start, how might behavioral harm and expressive meaning analyses apply to the hypotheticals posed in this paper's introduction: a government's decision to adopt the motto "White Supremacy Forever" or an executive proclamation or legislative resolution declaring that members of the Latino, Arab, or GLBT communities are not worthy of respect?¹²⁸

A behavioral harm approach would focus on allegations that such government speech facilitates private actors' discrimination against class members or that it deters reasonable class members from engaging in certain behavior.¹²⁹ Evidence in support of such a claim could include the testimony of class members that the government's hateful speech reasonably discouraged them from filing a claim before that entity, participating in a meeting of that body, or engaging in other related activity; expert testimony about the deterrent effects on class members generally; or evidence that the government's speech facilitated discrimination by private actors.¹³⁰

To be sure, in light of the significant evidentiary challenges often inherent in proving a causal link between government speech and private behavior, skeptics may well doubt the ability of behavioral harm analysis to provide meaningful redress for the harms caused by discriminatory government speech.¹³¹ Nonetheless, such an analysis permits us to consider those situations in which discriminatory government speech may inflict behavioral harms repugnant to equal protection values—that is, government speech that denies certain individuals the equal protection of the laws—more fully

nondisparagement" located, in part, in the Free Speech and Due Process Clauses as well as in the Equal Protection Clause. *See* Tebbe, *supra* note 4, at 5. I am specifically interested in the Equal Protection Clause as a constitutional limitation on government's hateful speech.

128. *See supra* notes 8-9 and accompanying text.

129. *See supra* Part IV.A.

130. *See supra* notes 80-81 and accompanying text.

131. *See, e.g.,* Dorf, *supra* note 43, at 1281-82 (noting causation challenges of collateral consequences arguments). For an example of attempting to bridge this causal gap, see Corbin, *supra* note 46, at 398-400 (discussing arguments that government's religious speech "causes" constitutional harm to nonbelievers).

than does the status quo, which too often ignores or dismisses those harms.

In contrast, an expressive meaning analysis of the hypotheticals posed above is comparatively easy because they involve examples of government speech that clearly delivers the governmental message that targeted class members are second-class citizens. Indeed, I chose these examples precisely because their expressive meaning was uncontested.¹³²

1. *Indeterminacy*

Of course, few cases will be so easy, and many will invite controversy not only over any behavioral harms inflicted, but also over the precise nature of the expressive meaning of the government's message. The Confederate flag cases offer a particularly prominent example. Behavioral harm theorists would look for evidence that the flag's display facilitated discrimination by lawyers, jurors or other individuals, or that it deterred African Americans from filing suit, serving as witnesses or jurors, or otherwise participating in the justice system.¹³³ Such evidence may or may not be forthcoming. In contrast, under an expressive meaning approach, we would ask whether reasonable onlookers would understand the flag to be communicating a message of racial inferiority or second-class status.¹³⁴ Many continue to contest the answer.

132. See *supra* notes 8-9 and accompanying text.

133. For related arguments, see Capers, *supra* note 8, at 163 ("Specifically, empirical data and expert testimony should be introduced to demonstrate that minorities read and experience the Confederate flag differently."); Forman, *supra* note 58, at 515 ("The selection of an exclusionary symbol to fly above the state capitol is harmful in part because of the effect it may have on the desire and ability of the excluded to participate in the political and legal processes."); see also L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521, 522 (2001) ("Serena Williams, U.S. Open champion, withdrew from the Family Circle Cup tennis tournament at Hilton Head Island to protest South Carolina's flying of the Confederate flag.").

134. See Capers, *supra* note 8, at 164 ("In the end, the state display of the Confederate flag itself functions as a pledge, a pledge of allegiance, to protect one class of citizens over another, to mark an entire state and its resources as belonging, in the first instance, to one class of citizens over another, and to preserve a hegemony that accords one class of citizens a higher status than another."); Forman, *supra* note 58, at 525 (describing the expressive meaning of the Confederate flag to African Americans).

As another example, Alabama state law requires that public schools' sex education curriculum include "[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public."¹³⁵ Although public schools' curricular decisions are generally considered to be government speech¹³⁶ largely insulated from Free Speech Clause review if schools are to function effectively,¹³⁷ such speech might violate the Equal Protection Clause under behavioral harm analysis if the plaintiffs could show that such speech facilitated discrimination against GLBT students by other students or faculty, or if it deterred GLBT students from participating in certain educational or extracurricular activities. Similarly, an expressive meaning approach could also conclude that such government speech communicated GLBT students' outsider or second-class status in violation of the Equal Protection Clause.

Some may wonder whether efforts to assess the expressive harm of government's discriminatory speech are inevitably and unacceptably indeterminate, leading to inconsistent and unprincipled results.¹³⁸ Indeed, many commentators criticize endorsement analysis in the Establishment Clause context for the same reason, objecting that the effort to characterize a governmental message as endorsing or disapproving religion exceeds courts' institutional competence.¹³⁹

135. ALA. CODE § 16-40A-2(c)(8) (1975).

136. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (suggesting that "speech by an instructor or a professor in the academic context" constituted government speech); *Chiras v. Miller*, 432 F.3d 606, 618 (5th Cir. 2005) (concluding that school's choice of textbooks and other curricular materials constituted government speech).

137. See Rosemary C. Salome, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 185 (1996) ("Commentators embracing a more comprehensive approach maintain ... that schools as unique 'mediating structures' linking the young to the local community and larger society make curricular decisions that should be upheld as long as they are rational.").

138. To be sure, many are untroubled by indeterminacy in this context and see it as generally unavoidable. See, e.g., HELLMAN, *supra* note 62, at 85 ("People are likely to disagree about whether any actual practice demeans. No theory could, nor should, hope to eliminate such disagreement entirely. The theory I propose helps to channel that disagreement to the right question. Of course as a society we need mechanisms for dealing with disagreement, whether disagreement about when discrimination is wrong or anything else. In our society, these methods include democratic and judicial decision making."). For a more detailed discussion of the indeterminacy challenge in this context, see *id.* at 59-85.

139. See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1389, 1440-41 (2000); Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1822 (2011) ("That there are

Although not without force, such criticisms are neither new nor uncommon.¹⁴⁰ Indeed, some find value in such indeterminacy, characterizing it more positively as “minimalistic.”¹⁴¹ Moreover, although the exercise of determining expressive meaning can be challenging, it is not without parallel elsewhere. Endorsement analysis itself assesses the perceptions of a reasonable observer when determining whether a governmental message approves or disapproves of a particular religion in violation of the Establishment Clause.¹⁴² Along the same lines, the Supreme Court’s “true threats” doctrine considers whether contested expression would lead a reasonable target to fear violence in determining whether the speech is unprotected by the First Amendment and within the government’s power to regulate.¹⁴³ Perhaps most relevant for purposes of this Article, statutory antidiscrimination law looks to the

things that matter very much—decisions that are very important, and that go to the heart of our constitutional enterprise—but that are nevertheless, for the most part, best handled politically and not through judicial review, is not an unfamiliar or novel idea.”); McConnell, *supra* note 111, at 13-14; Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 521 & n.48 (2001).

140. See Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL’Y 263, 282-83 (2006) (noting that “[t]he argument that the endorsement test is indeterminate, provides little guidance for lower courts, and will inevitably result in inconsistent decisions is a strong critique. However, this claim is hardly unique among analytical frameworks in constitutional law, which is filled with such ‘know it when we see it’ tests,” and then offering examples of such tests (footnote omitted)).

141. See, e.g., *id.* at 283 (“The endorsement test, like these other tests, is an example of judicial minimalism, in the sense that it necessarily results in very narrow decisions that turn on the specific details and characteristics of the particular case being adjudicated. Because they are minimalistic, these tests will inevitably give little guidance to lower courts and may result in inconsistent decisions.... One of the[] benefits [of judicial minimalism] is that by employing [it], the Court can take its time with particularly difficult issues (such as the proper limits of church-state interaction) and allow the state of the law to evolve as the Court learns more about the particular circumstances giving rise to these complicated controversies.” (footnote omitted)).

142. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (adopting the perspective of “an objective observer, acquainted with the text, legislative history, and implementation of the statute” in assessing its secular or sectarian purpose and effect); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (asking whether a reasonable observer would conclude that the government had communicated “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”).

143. See *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (defining a true threat as that which a reasonable person would consider an expression of the speaker’s intent to inflict bodily harm).

perceptions of a reasonable person when determining whether harassing speech in the workplace is sufficiently severe or pervasive to alter the terms and conditions of employment based on protected class status.¹⁴⁴ To be sure, such assessments are often hotly contested, but courts nevertheless have a body of experience from which to draw.¹⁴⁵

2. *Standing*

Those who are concerned about the indeterminacy of expressive meaning analysis are often similarly inclined toward a constraining standing principle to protect against judicial subjectivity in areas where they see limits on courts' institutional competence as well as the need to conserve judicial power.¹⁴⁶ Indeed, one might plausibly ask who would have injury-in-fact standing under an expressive meaning approach to bring an equal protection challenge to government speech.¹⁴⁷ Similar controversies are common in the

144. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993).

145. In response to indeterminacy criticisms directed to endorsement analysis in the Establishment Clause context, Jay Wexler proposes a bright line rule providing that government speech disapproving religion violates the Establishment Clause only when it makes express negative reference to religion or a religion. Jay Wexler, *Government Disapproval of Religion* 4 (Bos. Univ. Sch. of Law, Working Paper No. 11-32, 2011), available at <http://www.ssrn.com/abstract=1883597> ("Government messages expressing views about social, political, scientific, or other issues that do not explicitly refer to religion but are nonetheless offensive to religious believers are also not unconstitutional disapprovals, because if they were, the government would be unable to function. This leaves statements, displays, symbols, and other messages that do explicitly refer to and condemn religion as subject to disapproval analysis, a task that will be, in many cases, as difficult and controversial as typical endorsement analysis but equally as important to keeping the government from taking explicit positions on religious truth or value."). In Wexler's view, this offers a narrower, but more surgically precise, approach to identifying constitutionally salient harms: "[B]y outlawing only explicit negative references to religion, the test focuses on the government action that is most harmful to religion and most likely to make believers feel like outsiders in the political community." *Id.*

146. Note, *supra* note 111, at 2012.

147. Note that this discussion of injury-in-fact standing as it arises in the Establishment Clause context is very different from the possibility of taxpayer standing, in which a plaintiff taxpayer seeks to challenge specific congressional appropriations alleged to establish or endorse religion in violation of the First Amendment. See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 592-93, 610-11 (2007) (finding no taxpayer standing when the plaintiff brought an Establishment Clause challenge to "the President's Faith-Based and Community Initiatives program [in which], among other things, President Bush and former Secretary of Education Paige gave speeches that used 'religious imagery' and praised the

Establishment Clause context, although the Supreme Court has yet to confront the matter.¹⁴⁸ Indeed, the issue has split the lower courts: some require the plaintiffs to allege that the government's religious speech caused them to alter their behavior, while others instead require the plaintiffs simply to allege direct and unwelcome contact with the government's religious message.¹⁴⁹

A number of lower court decisions illustrate these tensions especially effectively, as they wrestle with Establishment Clause challenges to "pure" government speech in the form of proclamations or resolutions that endorse or celebrate religious activity. For example, the Seventh Circuit recently considered an Establishment Clause challenge to President Obama's "National Day of Prayer" proclamation and dismissed the case for lack of standing.¹⁵⁰

There the majority and concurring opinion quarreled over the nature of the injury generally required to satisfy standing for Establishment Clause challenges. The majority required behavioral harm to support an allegation of injury-in-fact:

efficacy of faith-based programs in delivering social services," because taxpayer standing is limited to exercises of congressional power under the Taxing and Spending Clause and thus not available with respect to challenges of executive expenditures).

148. Indeed, as a number of commentators have observed, the Court not infrequently altogether fails to address standing issues in the Establishment Clause context. See, e.g., Gellman & Looper-Friedman, *supra* note 58, at 722-23 & n.215 (describing examples of such failures).

149. For discussion of the disarray among lower courts in determining injury-in-fact standing for Establishment Clause purposes, see David Harvey, *It's Time to Make Non-Economic or Citizen Standing Take a Seat in 'Religious Display' Cases*, 40 DUQ. L. REV. 313, 315, 321-63 (2002) (describing the split in circuits); Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 501-04 (1995) (noting how the Supreme Court has failed even to discuss standing in many of its Establishment Clause cases); David Spencer, Note, *What's the Harm? Nontaxpayer Standing to Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL'Y 1071, 1075 (2011) (describing "[t]wo basic tests" among the courts of appeals: "The dominant approach requires a plaintiff to show some version of direct and unwelcome contact with the challenged symbol or display. A second approach requires a plaintiff to show that he altered his behavior to avoid contact with the allegedly offensive display." (footnote omitted)); Note, *supra* note 111, at 2003-05 (describing the two tests).

150. *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 806-07 (7th Cir. 2011) ("Plaintiffs contend that they are injured because they feel excluded, or made unwelcome, when the President asks them to engage in a religious observance that is contrary to their own principles. It is difficult to see how any reader of the 2010 proclamation would feel excluded or unwelcome.... Still, hurt feelings differ from legal injury.").

Eventually we may need to revisit the subject of observers' standing in order to reconcile this circuit's decisions, but today is not the time.... What did provide standing [in a previous case], we held, is that the plaintiffs had altered their daily commute, thus incurring costs in both time and money, to avoid the unwelcome religious display.

... Plaintiffs have not altered their conduct one whit or incurred any cost in time or money. All they have is disagreement with the President's action. But unless all limits on standing are to be abandoned, a feeling of alienation cannot suffice as injury in fact.¹⁵¹

In contrast, concurring Judge Williams urged "a direct and unwelcome exposure" standard that seems to recognize cognizable injuries as including expressive wrongs:

Nor, as the majority suggests, must the plaintiffs alter their behavior in order to have a cognizable injury.... We stated [in a previous case] that a plaintiff can also satisfy the standing requirement by establishing that he is subject to direct and unwelcome exposure to religious messages....

....

The rule in every other circuit that has considered the question is that while an allegation of a change in behavior is sufficient to confer standing, it is not required.¹⁵²

In many ways, these divisions repeat those over whether behavioral change or expressive harm is required to violate the Establishment Clause itself¹⁵³—and are driven by similar concerns over the limits of courts' institutional competence, the dangers of unprincipled subjectivity, and the need to conserve judicial

151. *Id.* at 807-08.

152. *Id.* at 810-11 (Williams, J., concurring); *see also* *Ariz. Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927, 933 (D. Ariz. 2000) (finding injury-in-fact standing for a plaintiff challenging town's proclamation of "Bible Week": "That the Proclamation is announced rather than displayed does not preclude unwelcome direct contact with the Proclamation via news reports. A reported Proclamation can be more invasive than a visual display due to the pervasiveness of media coverage. To avoid the Proclamation, Plaintiffs would be faced not with the option of merely altering a travel route. Rather, they would need to avoid the media entirely, an option close to impossible in this age. Moreover, no such avoidance is required.").

153. *See supra* Part III.B.

resources.¹⁵⁴ Neither standing standard, however, would prove insuperable in the Equal Protection context¹⁵⁵: most potential plaintiffs could show direct and unwelcome contact with the government's message,¹⁵⁶ and some could show that the government's message altered their behavior.¹⁵⁷

3. *Unintended Consequences*

Consider yet another set of objections. Skeptics might well argue that interpreting the Equal Protection Clause to prohibit some government speech might thwart or deter government's laudable expressive efforts to shape norms about race, gender, national origin, sexual orientation, or another class status.¹⁵⁸ Indeed, government speech that makes reference to class status often seeks to promote equal protection values.¹⁵⁹ For example, a state's decision to teach African American, Latino, or GLBT history in the public schools¹⁶⁰ seeks to counter, rather than reinforce, historical patterns of hierarchy based on protected class status. Just as government might exercise its expressive choices in ways that reinforce dis-

154. Cf. Spencer, *supra* note 149, at 1088-89 ("There is at least an intuitive tension between a rule of standing that bars all claims based solely on stigmatic injury and a substantive constitutional guarantee that, according to several Supreme Court decisions, is aimed at protecting individuals from the stigma caused by certain governmental messages.").

155. See Hellman, *supra* note 63, at 41, 43 ("[O]ne can accept a very broad conception of standing in areas of constitutional law where the injury is expressive. This appears to be the 'solution' adopted by the Court in some Establishment Clause cases.... [P]erhaps we ought not worry so much about standing after all. In most Equal Protection cases, standing will stand alone because the state action will not affect all equally. In those rare instances where the state action does affect all equally, a commitment to the right understanding of the constitutional guarantee must make us accept the inconvenience of a broad standing requirement.").

156. See *supra* Part IV.B.

157. See *supra* Part IV.A.

158. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) ("[L]egal 'statements' might be designed to change social norms. I catalogue a range of possible (and in my view legitimate) efforts to alter norms through legal expressions about appropriate evaluative attitudes. I also argue that the expressive function of law makes most sense in connection with efforts to change norms.").

159. See Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1120-22, 1187-88 (2010) (extolling the benefits of government speech that challenges or counters hate speech by private speakers).

160. See, e.g., Ian Lovett, *California to Require Gay History in Schools*, N.Y. TIMES, July 15, 2011, at A16.

crimination, so too might it use its voice to combat racism and other forms of bias. Would such government speech be understood to violate the Equal Protection Clause under either behavioral or expressive harm analysis?

Behavioral harm analysis would require a showing that such speech facilitated private parties' discrimination against whites or heterosexuals, or discouraged them from engaging in certain activity. As discussed above, such a causal showing is difficult to make in any event,¹⁶¹ and appears especially unlikely in these cases. Indeed, longstanding experience with antidiscrimination law shows the difficulty of persuading judges that any speech rises to the level of regulable discriminatory conduct.¹⁶²

Moreover, just as Title VII treats workplace speech that references protected class status to extol the benefits of diversity—or for other nonsubordinating reasons—very differently from workplace speech advocating the exclusion of women or people of color,¹⁶³ so too would be the case with respect to government speech under expressive meaning theory. An expressive meaning approach would focus on whether the government message communicates outsider or second-class status based on protected class status; to be sure, expressing concern for some does not necessarily include, much less require, disregard or denigration of another.¹⁶⁴ For this reason, government's expressive support for gay and lesbian rights or for

161. See *supra* notes 128-31 and accompanying text.

162. Many will doubt courts' ability or willingness to find the requisite behavioral harm given plaintiffs' often unsuccessful experience under Title VII. See, e.g., Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 568 (2001) (documenting high rate of dismissals and summary judgment rulings against harassment plaintiffs under Title VII); see also Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 794-95 (2002); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 313-16 (1999) (describing courts' reluctance to find for harassment plaintiffs).

163. Cf. HELLMAN, *supra* note 62, at 85 ("People are likely to disagree about whether any actual practice demeans. No theory could, nor should, hope to eliminate such disagreement entirely. The theory I propose helps to channel that disagreement to the right question. Of course as a society we need mechanisms for dealing with disagreement, whether disagreement about when discrimination is wrong or anything else. In our society, these methods include democratic and judicial decision making.").

164. As Jeffery Helmreich explains, treating race or any other class status as relevant is not the same as treating it as inferior or demeaned. See Helmreich, *supra* note 34, at 125 ("[R]ace-consciousness by itself is not obviously subordinating.").

affirmative action can certainly be framed in ways that do not demean others based on class status.¹⁶⁵ Along these lines, government may criticize certain behavior—such as hate speech or hate crimes—without denigrating the class status of specific individuals who engaged in that behavior.¹⁶⁶ In short, government messages that seek to undermine traditional patterns of hierarchy would not frustrate an antisubordination understanding of equal protection values;¹⁶⁷ on the other hand, a governmental message that in fact disparaged whites' racial identity or straight people's sexual orientation would, and should, lead to a very different result under expressive meaning analysis.

Finally, perhaps some might also argue that recognizing equal protection challenges to government's hateful speech will have further unintended, and damaging, consequences. More specifically, some might suggest that providing a constitutional remedy for

165. See Wexler, *supra* note 145, at 12 ("Praise of one religion for doing something good for society (I'm not talking here about the truth or inherent value of the religious tradition) does not send a message to other religions and nonreligious people that they are disfavored, unless perhaps those other people and groups have done something obviously exactly the same as the praised group but have not received the same governmental support."). The same should be true of government speech for or against affirmative action, or addressing some political controversy involving race or immigration, so long as government is not expressing hatred of class members based on race, national origin, et cetera. Indeed, critics may object that either or both behavioral and expressive harm analysis offer little meaningful redress for government's hateful speech because few plaintiffs will ever satisfy the requisite tests. I agree that these tests will be hard to satisfy—but, generally, they should be to prevent chilling government discussion of difficult topics.

166. This invites the question whether an expressive meaning approach to equal protection analysis would preclude government from criticizing gay or lesbian sexual conduct. While race and many other class characteristics are of course not inextricably linked to certain behavior, much less orientation, this distinction is not meaningful in the sexual orientation context, where orientation *is* the basis for defining and protecting the class. In other words, it is possible to express hostility towards a specific position or course of conduct regardless of the actor's religion or nonreligion, race, gender, national origin, et cetera, but it is not possible to express hostility towards gay and lesbian orientation without expressing hostility based on that class status. The Supreme Court remains divided as to whether such hostility violates the Constitution. Compare *Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down a governmental classification on the basis of sexual orientation as "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests"), with *id.* at 651 (Scalia, J., dissenting) (characterizing the government as instead engaging in a "reasonable effort to preserve traditional moral values").

167. As Deborah Hellman observes, such classes often turn on whether "that characteristic has been used to separate people in the past and the relative social status of the group defined by the characteristic today." HELLMAN, *supra* note 62, at 28.

government's transparent expression of bigotry may simply drive such speech underground in ways that make political mobilization in opposition more difficult. At times this may be true. On the other hand, the cognitive effort required by government speakers who must then express bigotry in more veiled ways may be valuable in and of itself, further entrenching the Constitution's commitment to equality. Consider, for example, the experience under Establishment Clause doctrine: expressive meaning theory finds value in forcing government actors to think hard before engaging in speech that assumes religious adherence as a condition of insider status.¹⁶⁸ The same should be true for government actors contemplating the delivery of a message that communicates outsider status on the basis of other class status.

CONCLUSION

Private parties' hateful speech generally remains protected from government regulation by the First Amendment's Free Speech Clause.¹⁶⁹ Whether *government* speech that expresses such animus on the basis of class status runs afoul of the Constitution, however, is an entirely different question. Not only does the government possess no First Amendment rights of its own,¹⁷⁰ but its racist or otherwise hateful speech can inflict a range of behavioral and

168. See *supra* notes 96-98 and accompanying text.

169. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392, 395-96 (1992) (striking down, on First Amendment grounds, a city ordinance that regulated private actors' bias-motivated or hateful speech); see also *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (holding that the First Amendment protects a private party's "hurtful" speech at a funeral protest); Schauer, *supra* note 46, at 90 ("As a case about the First Amendment and harm, *Snyder* represents a clear statement, among the clearest the Court has ever issued, about the extent to which the First Amendment protects even personally harmful speech.").

170. See, e.g., *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139-41 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."); YUDOF, *supra* note 1, at 42-50 (arguing that government does not possess First Amendment free speech rights); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501-08 (2001) (arguing that, because the First Amendment is drafted as a constraint on government action, recognizing government's own First Amendment rights is inconsistent with constitutional text and purpose). This leaves legislatures free to enact laws limiting government speech—and they often do so. See Norton, *Campaign Speech Law*, *supra* note 7, at 259-61 (describing federal and state statutes that constrain government speech in various contexts).

expressive harms repugnant to equality values.¹⁷¹ Contemporary equal protection doctrine, however, does not yet fully address the potential harms of such government speech.

The recent emergence of the Court's government speech doctrine—which to date has emphasized the value of government expression without yet fully addressing its potential costs—offers an important new opportunity to consider the situations in which government expression might violate the Equal Protection Clause. In so doing, we might draw from our experience in assessing the potential Establishment Clause implications of government's religious speech. First, under a behavioral harm approach, we might understand the Equal Protection Clause to prohibit government's hateful expression when it would facilitate private parties' discrimination or cause a reasonable target to alter her behavior¹⁷²—for example, by discouraging class members from pursuing a government job or petitioning the legislature because they reasonably conclude that such efforts would be pointless or unwise.¹⁷³ Second, under an expressive meaning analysis, we might understand the Equal Protection Clause to prohibit government speech that communicates that class members are outsiders or second-class citizens.¹⁷⁴

This Article concludes that both behavioral harm and expressive meaning analyses more completely recognize the array of harms potentially posed by government speech that expresses hatred, hostility, or animus on the basis of class status than does the status quo, which largely ignores such harms. In exploring these frameworks, I neither pretend that they will suddenly make hard cases easy, nor do I mean to suggest that they are the only, or necessarily the best, approaches for addressing these issues. My concern instead is that, to date, we lack an equal protection framework for assessing what should be even relatively straightforward cases. I thus see value in recognizing that, at least under some circumstances, government may deny individuals the equal protection of the laws when its expression intentionally classifies individuals as worthy or not worthy of respect based on their class status.

171. *See supra* Part II.

172. *See supra* text accompanying notes 113-14.

173. *See supra* text accompanying notes 116-17.

174. *See supra* text accompanying notes 123-24.

