

ARTICLES

SAME-SEX MARRIAGE, SECOND-CLASS CITIZENSHIP, AND LAW'S SOCIAL MEANINGS

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GOVERNMENT acts, statements, and symbols that carry the social meaning of second-class citizenship may, as a consequence of that fact, violate the Establishment Clause or the constitutional requirement of equal protection. Yet social meaning is often contested. Do laws permitting same-sex couples to form civil unions but not to enter into marriage convey the social meaning that gays and lesbians are second-class citizens? Do official displays of the Confederate battle flag unconstitutionally convey support for slavery and white supremacy? When public schools teach evolution but not creationism, do they show disrespect for creationists? Different audiences reach different conclusions about the meaning of these and other contested acts, statements, and symbols. Accordingly, one needs some method for selecting the relevant audience. No method is perfect, but this Article tentatively advances a “reasonable victim” perspective as the presumptive starting point for constitutional analysis.

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INTRODUCTION

To date, high courts in four states have found a basis in their respective state constitutions for invalidating laws restricting marriage to opposite-sex couples: California;¹ Connecticut;² Iowa;³ and Massachusetts.⁴ Each state high court made clear that same-sex civil unions or domestic partnerships⁵ are not an adequate substitute for marriage, even if they afford all of the tangible benefits of marriage.⁶ Although the respective decisions differed from one another in some important particulars, with respect to the question of marriage versus civil unions each rested on the same core principle: withholding the word marriage impermissibly connotes a kind of second-class citizenship that is inconsistent with the government's basic obligation of equal protection.⁷

¹ In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

² Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

³ Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

⁴ Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). Same-sex marriage was made legal by legislation in the District of Columbia, D.C. Code § 46-401(a) (2010); Maine, An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws § 2 (codified as Me. Rev. Stat. tit. 19-A, § 650-A (2009)); New Hampshire, N.H. Rev. Stat. Ann. § 457:1-a (2010); New York, 2011 N.Y. Laws ch. 95 (eff. July 24, 2011); and Vermont, Vt. Stat. Ann. tit. 15, § 8 (2009). A referendum thereafter repealed the Maine law. Abby Goodnough, A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands, N.Y. Times, Nov. 4, 2009, <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>.

⁵ Although state and local laws offer a variety of packages of rights, duties, and benefits under the headings of "civil union" and "domestic partnership," for simplicity I shall use the term "civil union" throughout this Article to refer to the legal status of marriage without the term "marriage."

⁶ One important issue in these cases has been whether civil unions in fact provide all of the tangible benefits of marriage. See, e.g., *Marriage Cases*, 183 P.3d at 416 n.24 (noting nine substantive differences). The state cases appear, however, to say that even if tangible benefits were truly equal, the withholding of the term "marriage" would still deny equal protection.

⁷ *Id.* at 434–35 ("The current statutes—by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership—pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry."); *Kerrigan*, 957 A.2d at 419 ("Despite the truly laudable effort of the legislature in equalizing the legal rights afforded same sex and opposite sex

The state court same-sex marriage rulings were based on state constitutional interpretation and thus were not subject to further review by the Supreme Court of the United States. Yet eventually, the Court will likely face a case pressing parallel arguments rooted in the federal Constitution's Fourteenth Amendment. One case that could win the race to the Supreme Court is currently pending in the United States Court of Appeals for the Ninth Circuit. In the district court, plaintiffs successfully challenged California's Proposition 8, which overturned the California Supreme Court's same-sex marriage ruling and (prospectively) relegated same-sex couples to civil unions once again.⁸ If that case or another from a state that recognizes same-sex civil unions but not same-sex marriage reaches the Supreme Court, more or less the same arguments that moved the high courts in California, Connecticut, Iowa, and Massachusetts will be in play, for the relevant state constitutional doctrines in those states do not differ substantially from the relevant federal constitutional doctrines.⁹

Proponents of same-sex marriage can be expected to argue, *inter alia*, that despite formal equality between marriage for opposite-sex couples and civil union for same-sex couples, in fact the latter does not offer all of the tangible benefits of the former.¹⁰ But we can—and for purposes of this Article I shall—imagine a case in which the tangible benefits provided by the government are in fact

couples, there is no doubt that civil unions enjoy a lesser status in our society than marriage.”); *Varnum*, 763 N.W.2d at 906 (“A new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”); Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”).

⁸ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

⁹ Each of the state high courts invoked equality principles that parallel federal equal protection doctrine. See *Varnum*, 763 N.W.2d at 885–96; *Marriage Cases*, 183 P.3d at 446; *Kerrigan*, 957 A.2d at 418–19; *Goodridge*, 798 N.E.2d at 971–72. The federal district court ruling in *Perry* relied on the federal equal protection and due process clauses. See *Perry*, 704 F. Supp. 2d at 1004.

¹⁰ See *supra* note 6; Misha Isaak, Comment, “What’s in a Name?”: Civil Unions and the Constitutional Significance of “Marriage,” 10 U. Pa. J. Const. L. 607, 613–30 (2008).

(or are assumed for purposes of litigation to be) truly equal.¹¹ In such a case, would the denial of the term marriage be unconstitutional?

To begin to answer that question, consider a related one. Suppose that in response to the Supreme Court's decision in *Loving v. Virginia*,¹² states (such as Virginia) that had on the books laws forbidding interracial marriage amended those laws to provide that interracial couples would thenceforth be eligible to enter civil unions with all of the benefits of marriage but that such couples would not be legally deemed married. Would *those* laws be valid?

Let me clarify what I do and do not intend to evoke by this question. I am not propounding what the case law and academic literature call the "*Loving* analogy,"¹³ which goes like this: *Loving* held that laws restricting whom one could marry based on whether the proposed spouses are of the same race are laws discriminating on the basis of race; such laws must satisfy strict scrutiny, and they do not even come close. Likewise, laws restricting whom one can marry based on whether the proposed spouses are of the opposite sex are laws discriminating on the basis of sex; such laws must satisfy intermediate scrutiny, and they do not do so. The standard counter-argument contends that the *Loving* analogy elides the fact that the laws in question here only formally draw distinctions based

¹¹ Professor Courtney Cahill argues that, in light of the history and legacy of persecution of LGBT persons, denial of the term marriage to same-sex couples can never be equal. See 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 (2009). She places special emphasis on the ancient practice of referring to same-sex sexual relations (and occasionally heterosexual sodomy as well) as an act "not fit to be named." Id. at 1181 (quoting the early Church father John Chrysostom); see also, e.g., id. at 1182 (noting that Thomas Aquinas deemed sex between men "unnameable"). Thus her argument goes, in denying the term marriage to same-sex couples, modern laws in most states hearken back to a tradition of unnameability connoting disgust. See id. at 1187 (averring that "disgust for sodomy . . . rendered that conduct uniquely unspeakable or unnameable in the Christian theological tradition as well as in modern American law"). This Article nonetheless hypothesizes tangible equality coexisting with nominal inequality because doing so helps clarify the issues at stake.

¹² 388 U.S. 1 (1967).

¹³ For a forceful presentation of the *Loving* analogy in the marriage context and beyond, see Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197 (1994). For a skeptical perspective, see Lynn D. Wardle & Lincoln C. Oliphant, In Praise of *Loving*: Reflections on the "*Loving* Analogy" for Same-Sex Marriage, 51 How. L.J. 117 (2007).

on sex, while in fact distinguishing based on sexual orientation. And because discrimination based on sexual orientation (for now) only triggers rational basis scrutiny, the state bears a minimal burden of justification in restricting marriage to opposite-sex couples.¹⁴

I am not here concerned with whether the *Loving* analogy is persuasive,¹⁵ for I am using *Loving* in a much more limited way. One argument against recognition of a right to marriage for same-sex couples who are legally permitted to form civil unions asserts that the denial of the term marriage in these circumstances does not constitute any state-imposed harm. But if that were true, then it would be equally true that the denial of the term marriage to interracial couples would also amount to no state-imposed harm. An opponent of same-sex marriage could lose this battle yet win the war; she could concede that there is state-imposed harm in both circumstances but contend that the harm is unconstitutional in the case of the interracial union while it is constitutional in the case of the same-sex union. It would be difficult to maintain, however, that there is a state-imposed harm in one case but not in the other.

So, can the state withhold the term marriage from interracial couples, while allowing such couples to enter full-benefit civil unions? Surely the courts would rightly condemn such a move as a transparent effort to circumvent *Loving*.¹⁶

Brown v. Board of Education suggests that a law or policy with the obvious, even if formally unstated, goal of relegating a class of citizens to second-class citizenship ipso facto denies equal protec-

¹⁴The California Supreme Court rejected the *Loving* analogy, even as it went on to find that sexual orientation is a suspect classification for purposes of California's state equal protection doctrine. See *Marriage Cases*, 183 P.3d at 437–39. In *Perry*, the district court laid the groundwork for the conclusion that heightened scrutiny was applicable but went on to invalidate California's Proposition 8 as failing even rational basis scrutiny. See *Perry*, 704 F. Supp. 2d at 997.

¹⁵Although nothing in my analysis in this Article turns on the point, for the record I will say that I do find the *Loving* analogy persuasive. The discrimination that one finds in laws banning same-sex marriage is not merely formally based on sex. Sexual orientation discrimination is sex discrimination in a deeper sense: hostility to homosexuality is fundamentally about policing sex roles, and sex stereotyping is the principal evil at which sex equality doctrine takes aim. See Koppelman, *supra* note 13, at 218–19.

¹⁶Cf. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 417 n.14 (Conn. 2008) (contending that opposite-sex couples would feel themselves injured by the withholding of the term “marriage” from their unions).

tion.¹⁷ The point was made explicitly by the first Justice Harlan in his dissent in *Plessy v. Ferguson*.¹⁸ Thus, Charles Black's response to Herbert Wechsler's fretting over *Brown's* rationale¹⁹ remains the most persuasive and obvious account of *Brown's* correctness. Black observed incredulously that only a Court suffering from "self-induced blindness" could fail to notice "the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority."²⁰

Yet *Brown* has not been read to establish that a law's social meaning alone—even the social meaning of white supremacy—invariably establishes a constitutional violation. Consider *Palmer v. Thompson*, which upheld against an equal protection challenge, the decision of Jackson, Mississippi to close its public swimming pools in the face of an order to desegregate them.²¹ The Court had earlier invalidated the decision of Prince Edward County, Virginia, in the wake of a school desegregation order, to close its public schools and provide grants to students to attend private white-only schools.²² In *Palmer*, the Court distinguished that case on the ground that Prince Edward County was so entangled with the nominally private schools as to render them de facto public schools. By contrast, the Court saw no concrete (as opposed to dignitary) difference in state treatment based on race in Jackson's closing of its swimming pools. For the *Palmer* Court, the absence of such state-imposed concrete harm meant that Jackson was guilty of no more than "an *unsuccessful attempt* to violate the Constitution."²³

¹⁷ 347 U.S. 483, 494 (1954) ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group.") (quoting district court opinion) (internal quotation marks omitted).

¹⁸ 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution . . . neither knows nor tolerates classes among citizens.").

¹⁹ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 31–34 (1959).

²⁰ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 426–27 (1960).

²¹ 403 U.S. 217 (1971).

²² See *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964).

²³ Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 Sup. Ct. Rev. 1, 23. Professor Tribe suggests that *Palmer* was wrongly decided because the closing of the public swimming pools did adversely affect African Americans, who had fewer pri-

Palmer is not, however, perfectly analogous to the hypothetical relegation of interracial couples to civil unions, because in the hypothetical case there remains a formal distinction in how people are treated based on race: their relationships receive different labels. A better analogy to *Palmer* might be a case in which, following *Loving*, a state abolished the legal institution of marriage for everyone and only recognized civil unions. If *Palmer* is right—and it was, admittedly, a 5-4 decision that remains controversial—then it would seem that the state could abolish marriage for everyone. Indeed, some LGBT activists (and others) argue that this would in fact be a better approach than extending the institution of marriage to everyone.²⁴ Nonetheless, even many LGBT activists who think that marriage is an inherently hetero-normative institution nonetheless conclude (quite sensibly) that *if* the state recognizes opposite-sex marriage, it must also recognize same-sex marriage.²⁵

Let us for now put aside the interesting issues that would be raised by state abolition of marriage for everyone and return to the core question: is the formal legal denial of the term marriage to same-sex couples the sort of government action that triggers prima facie equal protection concerns? Unlike in *Palmer*, here there is at least a formal distinction being drawn, albeit one that “only” affects naming.

Numerous Supreme Court cases, cutting across doctrinal subject matter areas, treat mere labeling as presenting no cognizable con-

vate options than whites. See *id.* at 29 n.71. Professor Caroline Corbin correctly notes that the Supreme Court’s opinion in *Palmer* was based on the proposition that an otherwise permissible government action is not rendered invalid by an illicit motive. See Caroline Mala Corbin, *Nonbelievers and Government Religious Speech*, 97 Iowa L. Rev. (forthcoming Jan. 2012) (“[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.” (citing *Palmer*, 403 U.S. at 224)). Thus, Professor Corbin reads *Palmer* as rejecting a motive test, not as rejecting a social meaning test. Yet if it did reject a motive test, *Palmer* was overruled in *Washington v. Davis*, 426 U.S. 229 (1976) (stating that proof of subjective intent to discriminate can render invalid an otherwise permissible facially neutral law or policy with a disparate impact).

²⁴ See, e.g., Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 Am. U. J. Gender Soc. Pol’y & L. 167, 176 (2000); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 Cardozo L. Rev. 1161, 1210–11 (2006).

²⁵ See, e.g., Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 Rutgers L. Rev. 529, 545 (2009).

stitutional harm.²⁶ These cases could be said to stand for something like a principle that “sticks and stones may break my bones but names will never hurt me.” In addition, the government speech doctrine—as exemplified by cases such as *Rust v. Sullivan*²⁷ and *Pleasant Grove City v. Summum*²⁸—gives the government substantial leeway to express its own messages, even about the private exercise of constitutional rights. Such cases might be invoked to defeat a claim of interracial or same-sex couples to the right to state recognition of their unions as marriages.

Yet there are also some expressive harms inflicted by the state that ought to count as constitutionally cognizable, even if unaccompanied by any more concrete harm. Imagine a state law requiring non-heterosexuals to wear visible pink triangles whenever they appear in public; even if not coupled with any state-sponsored adverse consequences, surely such a law would be invalid precisely because of the unmistakable message of second-class citizenship (or much worse) that it would convey.

Although this Article ultimately concludes that laws withholding the term marriage from same-sex couples unconstitutionally convey the message of second-class citizenship, that concrete doctrinal point merely illustrates a broader argument. This Article aims chiefly to shed light on the general problem of the social meaning(s) of government acts, statements, and symbols. It considers both positive and normative questions. The methodology could be best characterized as “interpretive” in the Dworkinian sense.²⁹ It 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.

This Article rejects the views of those scholars who have articulated general skepticism about “expressivist” theories of law; they

²⁶ See *infra* Part I.

²⁷ 500 U.S. 173 (1991) (upholding the abortion “gag rule”).

²⁸ 555 U.S. 460 (2009) (treating the decision whether to grant or deny municipal permission for placement of a permanent monument in a public park as within the purview of permissible government speech).

²⁹ See Ronald Dworkin, *Law’s Empire* 228 (1986) (characterizing his own “interpretive” approach to law as one in which principles both fit and justify legal practice).

argue that law ought to concern itself solely with direct, concrete harms.³⁰ To my mind, the skeptics do not adequately address how deeply embedded expressivist notions are in at least some of our constitutional doctrine. The skeptical view of expressivism may explain why the law often denies recovery or liability for expressive harm, but expressivism-skepticism has clearly been rejected in at least some contexts.

Once one accepts that some expressive harms “count” for constitutional purposes, one must grapple with an issue that has bedeviled constitutional law at least since *Plessy*: how can courts and others determine a law’s social meaning? Charles Black was surely right that this task was laughably easy in the case of Jim Crow. Likewise, discerning the social meaning of laws withholding the term marriage from same-sex unions does not appear to be particularly difficult. Proponents of restricting marriage to traditional opposite-sex couples have been quite open in declaring that opposite-sex couples are, at bottom, superior to same-sex couples.³¹ Thus, the district court in the Proposition 8 litigation readily concluded both that civil unions lack the social meaning of marriage³² and that California’s Proposition 8 therefore carried the social meaning that same-sex unions are inferior to opposite-sex marriages.³³

³⁰ See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363, 1444–47 (2000); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 Md. L. Rev. 506, 549–76 (2001) (critiquing the notion of law’s “objective” meaning and questioning the normative grounds for expressivism). For a general defense of expressivism, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000).

³¹ See, e.g., Transcript of Proceedings at 1928, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW) (Testimony of Hak-Shing William Tam) (referring to those who seek to enter same-sex marriage as “falling into Satan’s hand”).

³² *Perry*, 704 F. Supp. 2d at 994 (“[D]omestic partnerships are distinct from marriage and do not provide the same social meaning as marriage.”); see also Vincent J. Samar, *Privacy and the Debate Over Same-Sex Marriage Versus Unions*, 54 DePaul L. Rev. 783, 785 (2005) (“[C]ivil unions do not carry the same social meaning as marriage, nor are they intended to imbue such social meaning.”).

³³ *Perry*, 704 F. Supp. 2d at 973 (quoting an expert who testified that “Proposition 8, in its social meaning, sends a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals”).

But there are cases in which a law's social meaning is not obvious. Consider Colorado's Amendment 2, invalidated in *Romer v. Evans*.³⁴ *Romer*, of course, was not a case about social meaning alone. As a consequence of Proposition 2, LGBT Coloradans were denied the quite tangible benefit of protection from discrimination.³⁵ The case is instructive nonetheless because the disagreement between the majority and the dissent was over whether Amendment 2 was rooted in "animus" and if so, whether such animus rendered it impermissible.³⁶ That was not so much a dispute about the aggregated intentions of the millions of people who voted for Amendment 2 as it was about the symbolic impact of Amendment 2—that is, its social meaning.

Such issues of contested meaning will necessarily be at the heart of any dispute about the harm allegedly accomplished by symbolic measures, for a symbol may mean one thing to one audience and something else to another audience. For example, official government display of a Confederate battle flag may simply show respect for history and tradition to some while connoting the ugly ideology of white supremacy to others. Formulating an approach that is suited to difficult cases will require both an account of what social meaning is and why it matters. It will also require grappling with the question of whether courts are best suited to define and enforce the proper limits on government messages.

The balance of this Article proceeds in five parts. Part I describes the concerns that expressive theories of law target and the fears that these concerns in turn inspire. Because of these fears, the law typically does not provide redress for expressive harms. I call this feature of American law the "sticks-and-stones baseline": absent special circumstances, government is entitled to employ labels that cause incidental economic, psychological, or other harm to persons and other juridical entities. The successive Parts of the Article identify and analyze an exception to the sticks-and-stones

³⁴ 517 U.S. 620 (1996).

³⁵ *Id.* at 629 ("Amendment 2 bars homosexuals from securing protection against the injuries that . . . public-accommodations laws address.").

³⁶ Compare *id.* at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects . . ."), with *id.* at 644–45 (Scalia, J., dissenting) (distinguishing "moral disapproval" from "animus" and arguing that "Coloradans are . . . entitled to be hostile toward homosexual conduct").

baseline for government actions, words, and symbols that convey the meaning of second-class citizenship.

Part II identifies a cross-ideological consensus that some government actions, words, and symbols are constitutionally impermissible in virtue of the meaning they convey, although judges and scholars disagree about exactly which social meanings the Constitution forbids the government from endorsing. Part II uses jurisprudence under the Establishment Clause and the equal protection requirements of the Fifth and Fourteenth Amendments to elucidate the points of agreement and disagreement about the limits on the social meanings that government may express.³⁷

Part III explicates the harm done by official statements that some persons are second-class citizens and explains why many of the most troubling instances of government expressing forbidden messages involve an additional element: they coerce private speech. Thus, to return to an example mentioned above, a law requiring LGBT persons to wear pink triangles is not simply government speech, it is a requirement that individuals speak the government's message. Part III concludes that the struggle over the term marriage also involves an element of coerced private speech.

Part IV addresses cases in which the social meaning of some government act, symbol, or statement is disputed. It uses contests over the Confederate battle flag and the teaching of evolution in the public schools to test the reader's intuitions.

Part V maps various approaches to discerning, or more properly, to constructing, social meaning. It tentatively concludes that the law should adopt a "victim" perspective, requiring the government to offer a substantial justification for acts, words, or symbols that an identifiable victim group reasonably understands as conveying the message that they or their relationships are second-class.

³⁷ Although this Article locates the government's obligation to treat all citizens as first-class chiefly in equal protection and the Establishment Clause, one might also point to the Title of Nobility Clauses, U.S. Const. art. I, §§ 9–10. For a useful elucidation of the connections among these provisions, see Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 *UCLA L. Rev.* 1297, 1304 (1994).

I. THE LIMITED ROLE OF EXPRESSIVE HARM IN AMERICAN LAW

American law sometimes recognizes expressive harms as real harms but more commonly it does not. This Part begins by unpacking the notion of expressive harm into three distinct phenomena: hurt feelings and offense; collateral consequences; and wrongs in themselves. It then shows how, across a wide range of cases, American law—and especially American constitutional law—provides no remedy for purely expressive harms.

A. Expressive Harms

How might a government action be problematic in virtue of what it expresses? The concept of expressive harm may best be understood to refer to at least three distinct types of harms. Each type raises concerns that cut against providing a legal remedy.

1. Hurt Feelings and Offense

Some private and government actions cause hurt feelings without also causing physical, economic, or other injury. Of course, feelings are not literally intangible. They correspond with physical states of the brain. Whether *D* punches *P* in the nose or calls *P* a hurtful name, *P* will experience discomfort through a complicated sequence of neurochemistry. Emotional harm thus *is* physical harm. Accordingly, to the extent that expressive theories of law aim to identify and provide redress for the emotional pain that insults and other actions or statements can cause, they may best be understood as simply striving to combat mind/body dualism.³⁸

Nonetheless, one need not be a Cartesian to worry about the consequences of providing legal redress for emotional injury absent physical or economic injury. Issues of proof and floodgates concerns probably suffice to explain tort law's historical and ongoing wariness in this area. Thus, in most jurisdictions, causes of action for both intentional and negligent infliction of emotional distress are tightly circumscribed: recovery will be denied for purely

³⁸ See Nancy Levit, *Ethereal Torts*, 61 *Geo. Wash. L. Rev.* 136, 191 (1992) (“Despite the cumulative and trenchant evidence in psychology, sociology, biology, medicine, and psychopharmacology dispelling ancient concepts of mind-body dualism, the mental-material distinction persists in tort law.”).

emotional injury under many circumstances in which analogous conduct giving rise to physical or economic injury would be compensable.³⁹ Similar concerns appear to animate the limits that federal law places on a plaintiff's ability to make out a successful claim of sexual harassment by alleging a hostile environment. The harassment must be so "severe or pervasive to alter the conditions of . . . employment and create an abusive working environment."⁴⁰

One sees parallel worries in the constitutional law of standing. A citizen may be genuinely distressed about any number of actions the government takes or fails to take: enactment of a regressive tax, inadequate regulation of polluters, failure to adopt single-payer health insurance legislation, and so forth. Yet standing doctrine categorically rejects the possibility that just anyone can sue to redress these sorts of harms and not merely because they do not invade legal rights. Rather, the doctrine asserts that the citizen in such circumstances is not "injured" or has not suffered a sufficiently "concrete" and "particularized" injury.⁴¹ In so reading Article III's case-or-controversy requirement, the Court need not be saying that no one suffers real psychic harm in virtue of witnessing legal transgressions by the government. Instead, the Court should be understood to be ruling that certain sorts of real injury—genuine distress that occurs through physical processes in the brains of potentially millions of citizens—cannot be treated as real by the courts without licensing a litigation explosion.

I do not stop to consider whether that fear is warranted. It suffices for present purposes simply to note the deep roots of the impulse to treat purely emotional events as providing a problematic basis for legal redress.

2. Collateral Consequences

Purely expressive actions by the government may cause substantial indirect concrete harm through the actions of third parties. Consider, for example, the role that official expressions of white

³⁹ See, e.g., *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998).

⁴⁰ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (internal quotation marks omitted).

⁴¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (rejecting Article III standing for anyone who has suffered only a "procedural injury").

supremacy play in mobilizing whites to disadvantage African Americans and more broadly to shape norms.⁴² Or consider laws denying same-sex couples the legal status of marriage. When a state labels same-sex couples as domestic partners rather than married, it tells third parties they are gay or lesbian. That “outing” in turn can lead to discrimination.

Just as we saw with respect to the emotional-injury account of expressive harm, so too with respect to collateral consequences expressive harm is concrete. Private discrimination or even private violence can lead to monetary and physical damage. We should thus understand this account of expressive harm not as seeking recognition for a new category of harm but as seeking a broader understanding of causation.

But here too the law has historically been reluctant. In tort law, notions of proximate cause limit the ability of *P* to recover from *D* for *D*'s actions that led some third-party, *T*, to harm *P*. We can acknowledge that the concept of proximate cause reflects policy judgments about the limits on responsibility rather than factual judgments about what events literally caused other events.⁴³ But we are still left with the underlying reluctance.

Constitutional law exhibits similar ambivalence about attributing blame to upstream causal actors—especially government actors. The “traceability” requirement of standing doctrine⁴⁴ may be understood as a constitutional analogue of tort law's requirement of proximate causation. Likewise, state action doctrine only rarely attributes harms perpetrated by private actors to the government, even though the government played a substantial role in facilitating or encouraging the relevant private action.⁴⁵ Here, as with respect to emotional harm, the reluctance appears to be rooted in flood-gates fears and concerns about proof. We may be able to say with confidence that government stigmatization of some characteristic

⁴² See, e.g., Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003, 1006–08 (1995).

⁴³ See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103–04 (N.Y. 1928) (Andrews, J., dissenting).

⁴⁴ See, e.g., *Lujan*, 504 U.S. at 560.

⁴⁵ See *United States v. Morrison*, 529 U.S. 598, 620–22 (2000); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195–96 (1989); *The Civil Rights Cases*, 109 U.S. 3, 17–18 (1883).

increases the overall level of private discrimination based on that characteristic, but it will typically be much more difficult to say that any particular private wrong was attributable to government expression of a stigmatizing (or otherwise negative) view.

3. *Inherent Wrongs*

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;⁴⁶ strong deontologists could judge an action wrongful even if no one were made worse off by it.⁴⁷ Anti-caste theories of equal protection often rest on the inherent wrong view;⁴⁸ indeed, as Part II argues, formalist views of equal protection also rely on the notion of inherent wrongs and treat racial classification as the principal villain.

As we saw with respect to the emotional-harm view and the collateral-consequences view of expressivism, so too with respect to the inherent-wrong view we can see worries about proof and a flood of litigation. If some government action is simply wrong in itself, the law could give everyone standing to complain about it but instead typically gives no one standing absent a further demonstration of concrete harm.

That is not to say, however, that constitutional law has no place for harms in themselves. Consider most structural issues in constitutional law. Does some lawmaking act comport with the procedures set forth in Article I, Section 7? Has Congress attempted to exercise a power beyond those enumerated in Article I, Section 8 or elsewhere? These issues are justiciable in a case involving a

⁴⁶ See Andrew Koppelman, Commentary, On the Moral Foundations of Legal Expressivism, 60 Md. L. Rev. 777, 781 (2001) (“Insult is a wrong even if it is accompanied by no tangible harm, loss of status, or even psychic distress.”).

⁴⁷ See Immanuel Kant, Grounding for the Metaphysics of Morals 63–65 (James W. Ellington trans., Hackett Publishing Co. 3d ed. 1993) (1785).

⁴⁸ See Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1 (2000); Andrew Koppelman, Antidiscrimination Law and Social Equality 57–76 (1996); Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993); Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410 (1994).

party who has been otherwise harmed.⁴⁹ Although the Supreme Court occasionally articulates the values served by structural features of the Constitution, it rarely attempts to show how adherence to the doctrines developed under them advances those values in a particular case. Thus, even if the Constitution's structural features are not quite ends in themselves in the deontological sense, they are at least strongly rule-utilitarian. For practical purposes, these norms function as ends in themselves such that violations of them may be treated as wrongs in themselves.⁵⁰

Having articulated three accounts of expressive harm, this Article does not argue that any one of them is best or even correct.⁵¹ Instead, in keeping with my interpretive aims, this Article will refer to expressive harms more broadly, explicating particular examples using one or more of the three foregoing accounts, as appropriate in context. Before doing so, however, it will be useful to explore in somewhat broader perspective how pervasively hostile constitutional law is to invocations of expressive harm.

⁴⁹ See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("The limitations that federalism entails are not . . . a matter of rights belonging only to the States."); *INS v. Chadha*, 462 U.S. 919, 930–31 & n.6 (1983) (finding justiciable a controversy between a deportable alien and the government, where Congress was willing to defend the constitutionality of the legislative veto).

⁵⁰ Commenting on an earlier draft of this Article, Mitchell Berman objected that failures to comply with a structural constitutional provision governing lawmaking do not *violate* that provision but merely entail a failure of the legislature to enact law. I have considerable sympathy for this view. See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105, 1108–09 (2003) (distinguishing between constitutional provisions that speak to whether lawmaking has occurred and those that prohibit various forms of government action). Nonetheless, conventional parlance at least allows for the possibility of treating structural prohibitions as regulatory norms. For example, a President who went to war without first receiving congressional authorization and absent an emergency could sensibly be said to have *violated* the Constitution rather than merely having failed to act. Readers who persist in the objection should simply disregard the invocation of structural provisions, which are used in the text merely for their analogical power. The Constitution's prohibitions on government expression of certain ideas are certainly regulatory.

⁵¹ Nor do I argue that my typology exhausts the full range of possible expressive harms. Consider messages that the hearer welcomes but that may be against her interests, such as assurances given to women in traditional societies that they should subordinate their ambitions to those of their husbands. See *infra* text accompanying notes 117–18 (discussing false consciousness).

B. The “Sticks and Stones” Baseline

“Sticks and stones may break my bones but names will never hurt me” is not only a familiar playground aphorism; within limits, it embodies a constitutional principle that is connected to, if not strictly derived from, the First Amendment.⁵² Consider a leading case. In *New York Times Co. v. Sullivan*, the Supreme Court held that the First Amendment prevented state law from protecting a government official against the publication of an allegedly defamatory story absent proof that the defendant acted with reckless disregard for the truth.⁵³ Hurt feelings and even damaged reputations are simply the price we pay for freedom of expression, the Court concluded. “[D]ebate on public issues should be uninhibited, robust, and wide-open,” even though “it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁵⁴

To be sure, persons who are neither public officials nor public figures (a category later held to be subject to the *Sullivan* rule as well) can be shielded from defamatory statements to a greater extent.⁵⁵ The principle of “uninhibited, robust, and wide-open” speech, however, is far-reaching and indicative of an underlying ideal that is appropriately treated as at the heart of the First Amendment: bearing occasional insults, hurt feelings, and reputational harm is the price we pay for the benefits of free speech. Even serious offenses—such as seeing the words “fuck the draft” in a public place⁵⁶ or watching deliberately disrespectful treatment of an American flag⁵⁷—must sometimes be endured.

⁵² Cf. *Milwaukee Deputy Sheriff’s Ass’n v. Clarke*, 574 F.3d 370, 372–73 (7th Cir. 2009) (“Sticks and stones may break my bones, but words will never hurt me.”).

⁵³ 376 U.S. 254, 283 (1964).

⁵⁴ *Id.* at 270.

⁵⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (“[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”). But see *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (finding constitutional limits on tort of intentional infliction of emotional distress in a case involving picketing near a military funeral).

⁵⁶ *Cohen v. California*, 403 U.S. 15 (1971).

⁵⁷ See *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (noting that a purpose of the First Amendment is to discomfit).

Moreover, the government itself will sometimes be the source of injurious or offensive messages. Governments, to be sure, do not have free speech rights in the same way that natural persons do. But the government speech doctrine need not rest on an analogy between governments and natural persons. Rather, governments must be permitted to speak freely because government speech is often a form of government action. Government speaks on issues of public health—for example, by discouraging smoking—as a means of promoting public health; government promotes responsible behavior—such as recycling—through campaigns of public education; and government builds community by such measures as erecting monuments and curating museums. As a practical matter, government could not function effectively if, in each of these contexts, it were treated as a regulator subject to full First Amendment constraints rather than as a speaker in its own right.

As a consequence of the government's legitimate ability to speak, many people will inevitably suffer collateral harm. For example, taxpayers will end up contributing to support messages with which they disagree.⁵⁸ More directly relevant, some people will be insulted by government-sponsored messages. Consider a federally sponsored website devoted to providing resources to people trying to quit smoking. It describes the reasons people may have for smoking as the product of "smoky thinking."⁵⁹ Smokers who are either not interested in quitting or finding themselves unable to quit could certainly find that a patronizing or insulting description. In

⁵⁸ Cf. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833–34 (1995) (observing that government subsidies of private speech cannot be viewpoint based, with the unmentioned consequence that people will end up subsidizing speech with which they disagree); *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991) (noting the government's power to subsidize selectively, without mentioning that many taxpayers may disagree with the choice of what to subsidize). At least superficially incongruously, another line of cases forbids the government from requiring people to fund private messages with which they disagree. See, e.g., *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007) (upholding a state law requiring public-sector unions to obtain prior authorization of bargaining unit members to use their dues for non-bargaining ideological purposes); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (holding that the state bar could not charge objecting compulsory bar members for its ideological and political activities); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union may not charge objecting non-union members of a bargaining unit for the union's ideological activities that are not related to collective bargaining).

⁵⁹ Putting a Stop to Smoky Thinking, Smokefree.gov, <http://www.smokefree.gov/topic-benefits-smoky.aspx> (last visited May 18, 2011).

the same vein, and more dramatically, government campaigns to discourage drunk driving and domestic violence may stigmatize drunk drivers and perpetrators of domestic violence.⁶⁰ Yet the fact that government messages condemning smoking, drunk driving, and domestic violence may impose stigmatic injury on smokers, drunk drivers, and domestic abusers does not warrant the conclusion that the underlying campaigns are unconstitutional.

Why not? We might say that the government has a very strong—or in the language of constitutional doctrine, a “compelling”—interest in reducing smoking, drunk driving, and domestic violence. We need not go down that road, however. Because nearly all government speech can inflict stigmatic or other harm, the government generally need not come forward with an especially good reason for inflicting harm by speaking. Being incidentally insulted or otherwise harmed by government speech, we might say, is just part of the price each of us potentially pays for having an effective government, much in the same way that being harmed by private speech is part of the price we pay for the First Amendment.

II. CONSTITUTIONAL LIMITS

Despite the sticks-and-stones baseline, a number of constitutional doctrines limit the messages that government may permissibly express through acts, statements, and symbols. This Part explores limits arising out of the Establishment Clause—which has been construed to forbid some purely symbolic government actions—and the constitutional requirement of equal protection. Despite longstanding controversy over the proper scope of the doctrine in these areas, this Part identifies a cross-ideological consensus that social meaning alone can be the basis for limiting government speech and action when the social meaning expressed is second-class citizenship.⁶¹

⁶⁰ See Impaired Driving, Nat'l Highway Traffic Safety Admin., <http://www.nhtsa.gov/Impaired> (last visited May 18, 2011); About Domestic Violence, U.S. Dep't of Justice, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited May 18, 2011).

⁶¹ This Article makes no attempt to catalogue all of the constitutional limits on government speech. For discussion of one possible limit outside the scope of this Article, see Gia B. Lee, Persuasion, Transparency, and Government Speech, 56 *Hastings L.J.* 983 (2005) (proposing a government duty of candor).

A. Establishment and Second-Class Citizenship

Supreme Court doctrine interpreting the First Amendment's Establishment Clause is so unclear that one cannot even say with confidence which cases are good law, much less what those cases mean. In 1993, Justice Scalia likened the leading doctrinal formulation—the test set forth in *Lemon v. Kurtzman*⁶²—to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”⁶³ Yet even today, *Lemon*'s status remains uncertain, so that lower courts faced with Establishment Clause cases commonly apply *Lemon* alongside whatever rules and standards they can discern from other cases.⁶⁴ Thus, the Court's official doctrine provides a slippery handhold for grasping the meaning of the Establishment Clause.

Nonetheless, we must begin somewhere, and for present purposes it will be useful to consider the question of whether government may endorse religious views. According to one view, religious displays and government speech invoking religious themes more broadly run afoul of the Establishment Clause when they “convey[] a message to nonadherents of [some faith] that they are not full members of the political community, and a corresponding message to [adherents of that faith] that they are favored members of the political community.”⁶⁵ There is a lively debate over the question whether government may endorse religion in general as against non-religion.⁶⁶ But even the ac-

⁶² 403 U.S. 602, 612–13 (1971).

⁶³ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

⁶⁴ See, e.g., *Satawa v. Bd. of Cnty. Rd. Comm'rs of Macomb Cnty.*, 687 F. Supp. 2d 682, 701 (E.D. Mich. 2009); *Weinbaum v. Las Cruces Pub. Schs.*, 465 F. Supp. 2d 1116, 1135–36 (D.N.M. 2006); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 806–07 (S.D. Ind. 2002).

⁶⁵ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 626 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

⁶⁶ Compare *Lamb's Chapel*, 508 U.S. at 395 (majority opinion) (upholding religious use of public school facility after school hours because “there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed”), with *id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment) (eschewing the majority's focus on whether the challenged government action was “endorsing religion,” on the ground that this test “cannot suffice as a rule of decision consistent with our precedents and our traditions in this part of our jurisprudence”), and *id.* at 400 (Scalia, J., concurring in the judgment) (“What a strange notion, that a Constitution which *itself* gives ‘religion in general’ preferential

accommodationists⁶⁷ in this debate recognize limits on the government's power to express a preference for one sect over another.

For example, even while decrying the particular version of the endorsement test used by his more separationist⁶⁸ colleagues and even in his most accommodationist opinion, Justice Kennedy acknowledged that "the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."⁶⁹ Note, however, that government is permitted to proselytize on behalf of most sorts of belief having nothing to do with religion. For example, surely the government could permit—indeed, the government itself could undertake—the permanent erection of other, non-religious, symbols and mottoes atop city hall: the scales of justices, say, or lady liberty, or the phrase "Equal Justice Under Law." It appears that even the Justices who reject the endorsement *test* accept the notion that the Establishment Clause sets limits on the religious content of messages the government may endorse.

The fault line dividing the current Supreme Court, in other words, is not a line between those who think government can never endorse religion and those who think that it always can. The line

treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

⁶⁷ I am using "accommodationist" here to connote a relatively modest view of the limits the Establishment Clause places on government action. I recognize that one could go still further in rejecting such limits. For example, some jurists have argued that the Establishment Clause does not bind the states at all because as a structural provision, rather than a protection for individual liberty, it should not be incorporated by the Fourteenth Amendment's Due Process Clause. See *Van Orden v. Perry*, 545 U.S. 677, 730–31 n.32 (2005) (Stevens, J., dissenting) (questioning incorporation as a matter of original understanding but concluding it would be "unwise to reverse course"); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment) (arguing against incorporation).

⁶⁸ I am using "separationist" here to connote a relatively robust view of the no-endorsement approach, even at the risk of some sloppiness. For example, Justice O'Connor was a strong proponent of the no-endorsement view, even as she was less insistent on separating church and state than some of her colleagues. Compare *Cnty. of Allegheny*, 492 U.S. at 624–25 (O'Connor, J., concurring in part and concurring in the judgment), with *id.* at 637 (Brennan, J., concurring in part and dissenting in part). I gloss over these distinctions here.

⁶⁹ *Id.* at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

divides those who say government cannot endorse particular sects or, more narrowly still, particular monotheistic sects,⁷⁰ from those who go further to say that government also cannot endorse religion over non-religion because doing so communicates the message that the non-religious lack full citizenship.

I do not intend to referee this dispute. Instead, let me note the common ground and suggest that it is firm. For those Justices who accept the broader endorsement test as stated above, what makes government endorsement of religion a violation of the Establishment Clause is the social meaning of second-class citizenship. That is, after all, what the test expressly states. To repeat, government runs afoul of the Establishment Clause when it “conveys a message to nonadherents of [some faith] that they are not full members of the political community, and a corresponding message to [adherents of that faith] that they are favored members of the political community.”⁷¹ Crucially, even the most accommodating of the accommodationists appear to accept the foregoing principle if we substitute “monotheistic sect” for “faith.”

To be sure, the accommodationists do not *admit* that they accept a narrow endorsement test. Instead, they have sometimes suggested that the constitutional harm in the relevant cases—including the hypothetical permanent Latin cross atop city hall—has nothing to do with endorsement at all but is simply a matter of coercion.⁷²

Yet the constitutional imperative of avoiding governmental coercion in matters of faith, while undoubtedly an important principle of religious liberty, cannot explain what is wrong with a perma-

⁷⁰ Justice Scalia has stated that the government may not endorse a particular monotheistic viewpoint. See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 894 n.4 (2005) (Scalia, J., dissenting) (“The Establishment Clause would prohibit . . . governmental endorsement of a particular version of the Decalogue as authoritative.”). Although joined in this portion of his *McCreary County* dissent only by Chief Justice Rehnquist and Justice Thomas, the rest of the Court did not object to Justice Scalia’s condemnation of government endorsement of a particular monotheistic faith; they objected to his contention that the Establishment Clause permits the government to endorse monotheism over polytheism and atheism. *Id.* at 868 (majority opinion) (identifying the profession of monotheism in the Ten Commandments with the beliefs of Christians and Jews).

⁷¹ *Cnty. of Allegheny*, 492 U.S. at 626 (O’Connor, J., concurring in part and concurring in the judgment).

⁷² See *id.* at 660–63 (Kennedy, J., concurring in the judgment in part and dissenting in part); see also *Lee v. Weisman*, 505 U.S. 577, 592–93 (1992).

nent Latin cross atop city hall. Yes, it proselytizes, but proselytization is not, by itself, necessarily coercive. After all, individuals have a free speech right to proselytize—that is, to expound the principles of their faith to willing listeners, even to the point of approaching fellow citizens who may or may not turn out to be willing listeners.⁷³ Surely if proselytizing were inherently coercive there would be no constitutional right to proselytize. Likewise, as noted above, government routinely proselytizes in favor of secular messages without anyone thinking that in so doing it is coercing belief or affirmation. Notably, the successful plaintiffs in *West Virginia State Board of Education v. Barnette* only earned a right to opt out of *participating* in the flag salute.⁷⁴ In the very opinion that most famously condemns coerced orthodoxy in matters of opinion and belief,⁷⁵ the Court allows that impressionable schoolchildren may be required to *listen* to daily recitations of a government (secular) creed. If there is no unconstitutional coercion in these instances of secular speech—as the cases clearly assume—then neither would there be unconstitutional coercion arising out of a Latin cross atop city hall. Thus, a non-coercion principle cannot explain the willingness of even the Court’s most accommodationist members to read the Establishment Clause as barring government from expressly endorsing clearly sectarian religious views.

Instead, the accommodationists, no less than the separationists, appear to be moved by a principle of non-endorsement that protects religious minorities against being made to feel like outsiders. The only difference is the scope of the non-endorsement principle the accommodationists embrace: for them, it protects dissenting monotheists but not dissenting polytheists or non-believers. They so limit their understanding of the non-endorsement principle for a combination of reasons, including: their reading of the original understanding;⁷⁶ the fact that the overwhelming majority of Americans professing any faith profess a monotheistic faith, so that ex-

⁷³ See *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

⁷⁴ 319 U.S. 624 (1943).

⁷⁵ *Id.* at 642 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

⁷⁶ See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 897–98 (2005) (Scalia, J., dissenting).

purgating official non-sectarian monotheistic views would appear to disfavor all religion as such;⁷⁷ and with respect to non-believers, the additional claim that the First Amendment itself favors religion over non-religion.⁷⁸

Yet why should the Court enforce *any* principle of non-endorsement, narrow or broad? Here again, it may be useful to contrast government expressions of contested secular viewpoints. To a white supremacist, the motto “Equal Justice Under Law” on the Supreme Court building’s facade may connote that he, as someone who strongly rejects that principle, is a political outsider or second-class citizen; yet we are (or certainly I am) perfectly comfortable rejecting any constitutional claim the white supremacist might make that a government proclamation of equality treats him as a second-class citizen.

Perhaps, however, that hypothetical example is too rich. A self-declared racist could be estopped from complaining about being treated unequally on account of his belief in inequality. But we can imagine less self-defeating claims. Consider government campaigns promoting ideals such as democratic participation⁷⁹ or the virtues of education.⁸⁰ Proclamations such as “Vote for the candidate of your choice” or “Stay in school” could connote a kind of second-class citizenship for anarchists and ignoramuses; yet no one could seriously maintain that government endorsement of democracy or education accordingly violates some constitutional prohibition on government endorsement of all political or social principles. Why should government endorsement of religion or a particular religion be treated differently?

Human history provides part of the answer. From ancient times through the present, religion has been a potent basis for dividing societies, often violently. That reality was well known to the

⁷⁷ See *id.* at 899–900.

⁷⁸ See *id.* at 887 (“[T]he First Amendment itself accords religion (and no other manner of belief) special constitutional protection.”).

⁷⁹ See, e.g., Maine Youth Voting Campaign, Maine Citizenship Education Task Force, http://www.maine.gov/education/mecitizenshiped/youth/youth_voting.html (last visited May 18, 2011).

⁸⁰ See, e.g., Stay-in-School Program, U.S. Dep’t of State, <http://www.state.gov/m/a/c15165.htm> (last visited May 18, 2011); Prepared Remarks of President Barack Obama: Back to School Event at The White House (Sept. 8, 2009), <http://www.whitehouse.gov/mediareources/preparedschoolremarks/>.

Founding generation for whom wars of religion in the Old World—and the association of the established Church of England with the least popular features of English rule over the colonies—provided an essential backdrop for the Religion Clauses of the Constitution.⁸¹ To be sure, “the most advanced pre-Revolutionary arguments for disestablishment—arguments that would eventually bear fruit in all the governments of the new nation—were unstable compounds of narrow denominationalism and broad libertarianism.”⁸² But these compounds were refined during the course of the Revolution and thereafter, giving rise to a Constitution that is naturally read to insist on at least some notion of religious equality. Here, too, contemporary dissensus over the exact scope of the Religion Clauses masks consensus on their core: all agree, for example, that the Free Exercise Clause forbids official discrimination on the basis of religion, even as Justices disagree over whether it does anything else.⁸³

Such agreement should hardly be surprising. The Constitution’s text provides a strong basis for paying special attention to government signals favoring one or another religious group, as opposed to government expression drawing most other sorts of distinctions. The Constitution expressly forbids Acts of Congress respecting an establishment of *religion*; it says nothing expressly barring the establishment of a political or economic system. One need not embrace textualism to see that the text does quite a bit of work—both here and with respect to the related matter of identifying suspect and semi-suspect classifications for equal protection purposes. “Constitutional text matters, in substantial part, because the text reflects a process that inscribes the nation’s deepest commitments.”⁸⁴ Whatever else the Free Exercise and Establishment Clauses may mean, it should not be controversial—and it turns out

⁸¹ See Bernard Bailyn, *The Ideological Origins of the American Revolution* 246–72 (1967).

⁸² *Id.* at 257.

⁸³ Compare *Emp’t Div. v. Smith*, 494 U.S. 872, 877–78 (1990) (holding that the Free Exercise Clause only bars official discrimination on the basis of religion but not generally applicable laws that impose incidental burdens on religion), with *City of Boerne v. Flores*, 521 U.S. 507, 546–47 (1997) (O’Connor, J., dissenting) (disagreeing with the *Smith* Court’s narrow reading of Free Exercise), and *id.* at 565–66 (Souter, J., dissenting) (questioning *Smith* rule).

⁸⁴ Michael C. Dorf, *Equal Protection Incorporation*, 88 Va. L. Rev. 951, 987 (2002).

not to be controversial—to say that they forbid government from treating religion as a kind of caste.

Seeing the Establishment Clause as including an anti-caste principle immediately connects it to doctrines construing equal protection,⁸⁵ to which I now turn.

B. Equality

The question whether equal protection doctrine should recognize purely expressive harms may appear closely connected to the longstanding debate between formalists—who favor colorblindness in race cases and analogous principles in other contexts—and those who read the requirement of equal protection as expressing an anti-subordination principle.⁸⁶ Anti-subordinationist jurists clearly focus on social meaning, asking whether an affirmative action classification operates as a “No Trespassing” sign or a welcome mat.⁸⁷ Likewise, academic proponents of the anti-subordination principle tie it to social meaning. Thus, Professor Reva Siegel aptly summarizes the 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.”⁸⁸ Social status, of course, is a product of the social meaning of acts and institutions.

At first blush, it may appear that equal protection formalists do not care about social meaning. Yet careful reading of the formal-

⁸⁵ See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“There is no caste here.”).

⁸⁶ Compare *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (Roberts, C.J., plurality opinion) (arguing that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”), and *id.* at 748 (Thomas, J., concurring) (agreeing with Chief Justice Roberts), with *id.* at 798–99 (Stevens, J., dissenting) (disagreeing with Chief Justice Roberts’s analysis of *Brown*), and *id.* at 864 (Breyer, J., dissenting) (same). For a survey of the debate, see Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, *Issues in Legal Scholarship* 1–6 (Aug. 2002), <http://scholarship.law.cornell.edu/facpub/116/>.

⁸⁷ See *Adarand Constructors v. Pena*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (“The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”).

⁸⁸ Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *Harv. L. Rev.* 1470, 1472–73 (2004). For earlier elaborations of the anti-subordination principle, see *id.* at 1473 n.8 (collecting sources).

ists' argument reveals that just as with respect to religion, there is a cross-ideological consensus that social meaning counts; but here too there is disagreement about which social meanings should count as impermissible.

Consider the formalists' complaint that anti-subordinationists have over-emphasized what the formalists regard as the careless citation of psychological studies in the Court's opinion in *Brown v. Board of Education*.⁸⁹ In his concurrence in *Missouri v. Jenkins*, Justice Thomas opined that "[p]sychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause."⁹⁰ If the social meaning of an *act* of segregation is not itself constitutionally significant, it appears to follow that mere words making one group feel inferior to another do not register on the constitutional scales.

Yet it would be a mistake to read Justice Thomas or the other formalists as unconcerned about the social meaning of race discrimination. For formalists, the core of the state's obligation to provide equal protection is an obligation not to classify people on the basis of race or other illicit grounds. But what is classification if not a form of expression? The point can be seen most clearly in cases reading the Equal Protection Clause to constrain the ability of states to create majority-minority voting districts. Whereas prior cases had only found constitutional violations where apportionment schemes resulted in vote dilution, in *Shaw v. Reno* and subsequent cases, the Court—led by its formalist wing—found that plaintiffs could raise the "analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."⁹¹ Liberals—both on and off the Court—complained that, absent an allegation of vote dilution, the white plaintiffs had suffered no cognizable harm

⁸⁹ 347 U.S. 483, 494 n.11 (1954).

⁹⁰ 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

⁹¹ 509 U.S. 630, 652 (1993). Though not a thoroughgoing formalist, Justice O'Connor, who authored the *Shaw* opinion, certainly had the support of the Court's formalist wing in that case.

by having their votes counted as part of a district including a majority of minority voters.⁹²

But the most astute observers of the Court's voting rights jurisprudence recognized that in fact the formalists behind *Shaw* did have a theory of injury. As Professors Richard Pildes and Richard Niemi grasped in *Shaw*'s immediate aftermath, the harm that the Court's formalists recognized in subjecting the drawing of race-based district lines to strict scrutiny was "expressive," that is, a harm "that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."⁹³

What message, exactly, does government express when race becomes the predominant factor in the drawing of electoral districts?⁹⁴ Here is the formalist view: "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."⁹⁵ Quoted, *inter alia*, in the voting rights line of cases,⁹⁶ this principle is, for formalists, so strong that mere classification based on race—even absent any other tangible harm—amounts to constitutionally cognizable "treatment." Strikingly, in cases in which tangible benefits may be granted or denied based on race, the formalists point to

⁹² See, e.g., *id.* at 676 (Blackmun, J., dissenting) ("[T]he conscious use of race in redistricting does not violate the Equal Protection Clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly."); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 *Harv. L. Rev.* 2276, 2285–88 (1998) (arguing that the "analytically distinct" injury that *Shaw* recognized does not fit with the standing rules that go with it).

⁹³ Pildes & Niemi, *supra* note 48, at 506–07. Interestingly, Pildes and Niemi also note that Justice O'Connor was both the author of *Shaw* and the chief proponent of the endorsement test in Establishment Clause cases. See *id.* at 512; *supra* Section III.A; accord Issacharoff & Karlan, *supra* note 92, at 2285–86.

⁹⁴ It appeared for a time as though *Shaw* might be limited to districts with a "bizarre" shape. See *Shaw*, 509 U.S. at 644. Subsequent cases made clear, however, that the *Shaw* principle applies whenever race predominates over other factors in districting, regardless of the shape of the resulting districts. See, e.g., *Bush v. Vera*, 517 U.S. 952, 980 (1996) (O'Connor, J., plurality opinion); *Miller v. Johnson*, 515 U.S. 900, 912–13 (1995).

⁹⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (quoting *Miller*, 515 U.S. at 911) (internal quotation marks omitted).

⁹⁶ See *Miller*, 515 U.S. at 911.

the act of classification itself as especially fraught—even invoking comparisons to the race laws of Nazi Germany and apartheid South Africa.⁹⁷

Thus, for equal protection formalists, no less than for anti-subordinationists, social meaning can create cognizable constitutional harm. The difference concerns which social meanings do so. To return to Justice Thomas's *Jenkins* concurrence, we can now see that he was not saying—or not *just* saying—that psychological injury is insufficient to make out an equal protection claim. His main point was that psychological injury is unnecessary to make out such a claim. Where the government has utilized a racial classification—as de jure segregated public schools undoubtedly did pre-*Brown*—that classification carries the presumptively unconstitutional social meaning that persons are mere tokens for their racial group, rather than individuals.⁹⁸

To be clear, I do not contend that equal protection doctrine—as seen by formalists, anti-subordinationists, the Court as a whole, or even in some ideal form—is *only* about social meaning.⁹⁹ The claim here is more modest: that social meaning matters, not that nothing else matters. We see in the equal protection context, as in the relig-

⁹⁷ See *Metro Broad. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (“If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935” Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting)). Justice Kennedy and, to an even greater extent, Justice Stevens became less attached to the formalist position over time. See *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring in part and concurring in the judgment); *Adarand Constructors v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

⁹⁸ One might object that the formalists do not *really* care about social meaning but object to racial classifications because of the consequences that they believe flow from racial classifications. Yet that objection strikes me as misplaced for two reasons. First, as my exegesis of social meaning aimed to show, concern about the consequences of expression is a form of expressivism—at least as I would use the term. See *supra* text accompanying notes 42–43. Second, although one could object to racial (or other) classifications simply on consequentialist grounds, the formalists’ rhetoric in the relevant cases bespeaks a depth of feeling that suggests an objection to classifications for their own sake.

⁹⁹ But see Hellman, *supra* note 48, at 5–6 (“[I]t is the expressive character of state action that determines whether a law or policy violates Equal Protection.”).

ion context, a consensus on the significance of social meaning amidst a contest over which social meanings matter.

Consider the most contested ground in equal protection doctrine and theory: the first Justice Harlan's dissent in *Plessy v. Ferguson*.¹⁰⁰ He famously stated that “[i]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”¹⁰¹ Anti-subordinationists contend that the requirement of color-blindness only comes into play in reaction to state-sponsored efforts to subordinate whole classes of persons.¹⁰² Formalists, by contrast, argue that color-blindness is a freestanding constitutional requirement, but in so saying they do not deny that the Equal Protection Clause states an anti-caste principle. Instead, they read Justice Harlan's simultaneous invocation of color blindness and denunciation of classes of citizens to mean that departures from color blindness inherently divide citizens into classes. In short, the formalist approach, no less than the anti-subordination approach, condemns some government actions because they convey the message of second-class citizenship.

The consensus also breaks down over the question of whether the Equal Protection Clause *generally* condemns government actions that convey the social meaning of second-class citizenship. Cases condemning laws based on “animus” even absent any heightened scrutiny¹⁰³ exemplify the broader view. The dissenters in those cases would appear to deny that there is a freestanding obligation of government to avoid labeling anyone as second-class,¹⁰⁴ but it is not clear how they reconcile that view with the broad anti-caste language of Justice Harlan's *Plessy* dissent.¹⁰⁵ In any event,

¹⁰⁰ 163 U.S. 537 (1896).

¹⁰¹ *Id.* at 559.

¹⁰² See, e.g., *Parents Involved*, 551 U.S. at 864 (Breyer, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 301–02 (2003) (Ginsburg, J., dissenting).

¹⁰³ See *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 448–49 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

¹⁰⁴ See *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (“Coloradans are . . . *entitled* to be hostile toward homosexual conduct.”).

¹⁰⁵ Perhaps the best that can be said for the view that the anti-caste principle only applies within the domain of heightened scrutiny is that such an approach—like the very decision to apply different tiers of scrutiny in the first place—serves to validate

the core point of this Section stands: a cross-ideological consensus holds that some government expressions of second-class citizenship offend equal protection precisely because of their social meaning.

III. GOVERNMENT LABELING AND COMPELLED PRIVATE SPEECH

The previous Part showed the existence of a consensus that the Constitution—through the Establishment Clause, the Equal Protection Clause of the Fourteenth Amendment, and the equal protection component of the Fifth Amendment—sometimes forbids the government from acting or speaking in ways that connote the second-class citizenship of various persons. The hard question is which government actions amount to labels of second-class citizenship. I forestall the hardest examples of that question to the next Part, which considers government actions that speak different messages to different audiences or that speak mixed messages to the same audience. This Part discusses how mere government labeling can cause significant harm. It explicates the principle that government speech that conveys the social meaning of second-class citizenship is unconstitutional and sketches a normative justification for that proposition.

This Part proceeds with a series of examples. In most of these examples, it should be clear that the labeling at issue causes dignitary harm (at least where my own intuitions do not substantially differ from the reader's). As will become apparent, the harm may be especially acute where, in addition to a government message of second-class citizenship, the law or policy in question also enlists individuals to participate in their own denigration. In doctrinal terms, that factor may call into play the First Amendment right not to speak, but insofar as the leading such cases focus on the right not to affirm state dogma,¹⁰⁶ they do not fully capture the special harm of being turned into a collaborator in one's own oppression. That harm, this Part contends, makes some government labels of second-class citizenship especially problematic. The Part concludes by arguing that denial of the term marriage to same-sex couples fits

democratic outputs by reserving judicial intervention for those forms of discrimination that are deemed most odious.

¹⁰⁶ See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

into this most serious category, albeit not entirely uncontroversially.

A. Badges of Inferiority

Let us begin with an egregious case. Imagine a state law requiring Jews to wear yellow stars of David or gays and lesbians to wear pink triangles. Resonant with Nazi law,¹⁰⁷ absent some extraordinary circumstances, the social meaning of such a requirement would clearly be anti-Semitism or homophobia, respectively, even if, by contrast with the law of the Third Reich, no other legal disabilities were imposed on Jews or gays and lesbians. Of course, such a law would not *merely* cause dignitary harm. Presumably a principal purpose of such a law would be to enable non-Jews or straights to identify, and thus discriminate against or persecute, Jews or gays and lesbians.

Nonetheless, even absent any private discrimination or persecution, the requirement that the minority groups in these examples identify themselves in this way “stamps [them] with a badge of inferiority.”¹⁰⁸ That language, of course, comes from the majority in *Plessy*—and was used to support its less-than-credible claim that de jure segregation did *not* stamp African Americans with a badge of inferiority. But in making that very claim, even the *Plessy* Court accepted by negative implication that a law that *did* stamp a race or class with a badge of inferiority would violate the Constitution.

Perhaps it would be possible to argue, as in *Plessy*, that a requirement that people identify some social or other group to which they belong does not in fact connote second-class citizenship. We can imagine the anti-Semite or homophobe echoing the *Plessy* Court and saying that if Jews or gays and lesbians choose to view their religious ancestry or sexual orientation as a mark of inferiority, that is simply their problem. But such a claim would be no more credible here than it was in *Plessy*. Even if we were to in-

¹⁰⁷ See Saul Friedländer, *The Years of Extermination: Nazi Germany and the Jew, 1939–1945*, at 251–53 (2007); *Polizeiverordnung über die Kennzeichnung der Juden, Verfassungsgesetze des Deutschen Reichs*, <http://www.verfassungen.de/de/de33-45/juden41.htm> (last visited Oct. 27, 2010) (setting forth a Nazi law establishing criminal penalties for Jews who failed to wear a yellow, palm-sized, six-pointed fabric star on their clothing when appearing in public).

¹⁰⁸ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

dulge this hypothetical objection, we could change the example slightly to imagine that the required identifying badge literally includes some word connoting second-class citizenship, such as “inferior” or simply “second-class citizen.” These (admittedly far-fetched) hypotheticals underscore that the *Plessy*-based objection is simply a way of saying that the social meaning of the badges could be unclear. Where the social meaning is clear—as in the modified examples or, for any reasonable person, in the original examples themselves—we have a core violation of the principle that government may not label people as second-class citizens.

B. Right Not to Speak

Some of the constitutional harm done by a requirement that people wear a badge of inferiority sounds in freedom of expression. If the government cannot force its citizens to drive a car bearing a license plate with the motto “Live Free or Die,”¹⁰⁹ then neither can it require anyone to wear a yellow star or a pink triangle. Nonetheless, the right not to speak in the sense of the right not to affirm a message with which one disagrees (or which one, for whatever reason, simply does not want to affirm), does not really account for all or even most of the harm in the badges-of-inferiority examples. Some variations on a further example can illustrate why.

Consider *Bowen v. Roy*.¹¹⁰ A Native-American couple objected on religious grounds to the use of a Social Security number to identify their daughter, Little Bird of the Snow. Writing in this respect for a majority of the Supreme Court, Chief Justice Burger first rejected the Roys’ objection to the government’s internal use of a number to identify the girl. “The Free Exercise Clause,” he wrote, “simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”¹¹¹

The couple also objected to the requirement, imposed through a combination of federal and state law, that they themselves list their daughter’s number on an application for welfare benefits. Here, in language that anticipated the Court’s later decision in *Employment*

¹⁰⁹ See *Wooley*, 430 U.S. at 715, 717.

¹¹⁰ 476 U.S. 693 (1986).

¹¹¹ *Id.* at 699.

Division v. Smith,¹¹² Chief Justice Burger rejected the claim that the mere incidental burden on the plaintiffs' religion violated the Free Exercise Clause. Speaking in this respect only for a plurality of the Court, Burger wrote: "The statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable. There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs."¹¹³ A majority of the Court in *Roy* thought the question whether the plaintiffs themselves could be required to use their daughter's social security number was not properly presented, but given the Court's later adoption of the Burger standard in *Smith*, it is likely that the outcome he favored on this question too would now command a majority as an interpretation of the First Amendment.

Today, however, the Roys would not be limited to their First Amendment claim. *Smith*, after all, was superseded by the Religious Freedom Restoration Act ("RFRA"), and although RFRA was held to be beyond congressional power as a limitation on the states and their subdivisions,¹¹⁴ it remains valid as a limit on the federal government.¹¹⁵ Were plaintiffs like the Roys to sue the Social Security Administration under RFRA today, the general applicability of the requirement that parents write down their children's social security numbers would not immunize that requirement from scrutiny. To be sure, our latter-day Roys might still lose on the ground that they seek a benefit rather than claiming exemption from a direct regulatory requirement, but then again, they might not.¹¹⁶ And if that aspect of the case causes trouble, we can hypothesize around it: suppose that the government simply requires all persons to refer to themselves and their minor children by number in interactions with the government.

¹¹² 494 U.S. 872 (1990).

¹¹³ *Bowen*, 476 U.S. at 703.

¹¹⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997).

¹¹⁵ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

¹¹⁶ The express statutory purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)." 42 U.S.C. § 2000bb(b)(1) (2006). In *Sherbert* itself, the plaintiffs sought (and ultimately received) an exemption from a requirement for receiving a conditional benefit, unemployment compensation. *Sherbert*, 374 U.S. at 400–01, 410 (1963).

One thing such a generalized requirement of identification by number would *not* do is convey the social meaning of second-class citizenship. The government's attitude in *Roy* is more callously indifferent than hostile to the interests of the Roys. We can nonetheless use this example to see that government labeling is—or at least can be—especially problematic where the government requires persons to label themselves. The Roys objected both to the government's use of a number to refer to Little Bird of the Snow and to the requirement that they themselves so refer to her. Whatever one thinks is the right outcome in *Roy* or the variations on it that I have suggested, I suspect that most people will share the intuition that the requirement of self-labeling imposes a harm in addition to whatever harm the government's internal use of the number causes.

That is not analytically true, of course. We can imagine circumstances in which one might feel more of an injury when someone else uses a harmful label than when one uses it oneself. For example, gay people who call themselves queer or African Americans who semi-jokingly refer to themselves by the N-word can rightly object to such terms when used by persons outside the group, because such use by outsiders carries a pejorative meaning not intended by in-group use. But this analogy is imperfect: a government *requirement* that African Americans identify themselves by the N-word and that gays identify themselves as queer would be experienced as hateful and harmful.

Would it be worse than the government's internal use of such epithets? Possibly, although that does not mean that internal use would be unobjectionable. Suppose the following variation on *Roy*: in keeping track of demographic data compiled by the Census Bureau, the government converts all references to people who identify as African American to the N-word. Even if somewhat less objectionable than a requirement that people self-identify by such an offensive term, the practice nonetheless would be (or at least I would deem it) unconstitutional on equal protection grounds.

The next Section explores variations on government use of offensive names, but before leaving the current topic, two points are worth making in summary. First, my offensive census example suggests that we should not read too much into *Roy*. The case may stand for the proposition that the Free Exercise Clause does not

validate objections to internal government policies, but it does not (or at least should not) stand for the broader proposition that the Constitution permits the government to use whatever language it likes in its internal affairs.

Second, *Roy* itself nonetheless validates the intuition that the requirement of self-labeling can be (even though it is not always) worse than the application of an offensive name by a third party. The point is related to the radical feminist critique of patriarchy. As stated most clearly by Professor Catharine MacKinnon, patriarchy “works” by inducing women to participate in their own oppression and thus to mistake their lives under patriarchy for their true identities. Writing specifically about pornography but using language that instantiates her broader claim, Professor MacKinnon says that “[m]en’s power over women means that the way men see women defines who women can be.”¹¹⁷ Karl Marx expressed similar views about the failure of the peasantry of his day to develop class consciousness.¹¹⁸

MacKinnon, Marx, and others who decry false consciousness worry that the dominant ideology so infects the thinking of the oppressed that the latter participate in their own oppression without even realizing that they are doing so. It thus adds insult to injury without the injured realizing how or even that they have been injured. In this view, women, nineteenth-century French peasants, and other oppressed groups suffer from a kind of Stockholm syndrome writ large. To an outsider, the oppressor’s turning of the oppressed against themselves is an added cruelty but to the person who has been successfully indoctrinated against her true interests, the wound is invisible.

By contrast, in the real and hypothetical examples in which I am principally interested here the puppet-master’s hand is plainly visible. To return to the examples discussed in the previous Section, not only do the wearers of the yellow stars and pink triangles know that they have been labeled inferior by the state; being made the instrument of the state’s project, they know as well that they have

¹¹⁷ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 172 (1987).

¹¹⁸ See Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (1852), *reprinted in* Karl Marx: *Selected Writings* 300, 317–22 (David McLellan ed., 1977) (explaining the support of the French peasantry for Louis Bonaparte).

been rendered powerless to resist such labeling. If the cultivation of false consciousness subtly turns the oppressed against themselves, the sort of express labeling under consideration here does so overtly. That fact, I claim, often exacerbates the injury.

C. Offensive and Archaic Names

The census example in the foregoing Section is, one hopes, quite unrealistic. It is not, however, difficult to point to real variants. Consider the phenomenon of changing social norms regarding acceptable names for various groups. A couple of generations ago, persons with physical disabilities were routinely called “cripples.” That term, which is clearly offensive today, gave way to “handicapped,” which in turn has mostly given way to “disabled.” (In some circles, terms like “differently abled” are preferred, but “disabled” and “disability” appear to remain widely acceptable.)

Likewise, persons with developmental disabilities were once called such terms as “imbeciles,” “morons,” and “idiots,” all of which are clearly offensive today. As recently as 2002, in deciding *Atkins v. Virginia*, all members of the Supreme Court were comfortable using the term “mentally retarded.”¹¹⁹ Yet in 2010, President Obama signed a bill that substituted the term “intellectual disability” for “mentally retarded” in federal law.¹²⁰

What are we to make of this phenomenon? Broadly speaking, social attitudes infect language. There is no reason to believe that, as a matter of literal language, “handicapped” is more offensive than “disabled.” To be sure, “crippled” may be inherently pejorative, insofar as it suggests that a “cripple” is unable to care for herself at all, but arguably the newer term “disabled” is more pejorative than “handicapped.” “Handicapped” connotes an obstacle that a person faces but can overcome (as its continued use in golf indicates), and thus seems closer to the term “challenged,” which is

¹¹⁹ 536 U.S. 304, 306 (2002); *id.* at 324 (Rehnquist, C.J., dissenting). For one view of the old terminology, see *id.* at 341 (Scalia, J., dissenting) (noting, among other things, that in the nineteenth century “imbeciles” were understood to suffer from “a less severe form of retardation” than “idiot[s]”).

¹²⁰ See Remarks by the President at the Signing of the 21st Century Communications and Video Accessibility Act of 2010 at The White House, <http://www.whitehouse.gov/the-press-office/2010/10/08/remarks-president-signing-21st-century-communications-and-video-accessib> (last visited Oct. 27, 2010).

sometimes preferred. By contrast, a person who is “disabled” could be literally understood to be *unable* to perform some set of life tasks.

Likewise, with respect to intellectual disabilities, if we focus on the words alone it is difficult to discern any difference between the old terminology and the new. “Intellectual” in this context is simply a synonym for “mental,” and “retarded” literally means “slowed,” whereas “disabled” could again stand for a total inability. Taken literally, “mentally retarded” appears to connote the same or greater capacities than “intellectually disabled.”

Yet to focus on the literal meaning of the words in the way I have just done is to miss their larger social meaning. The terms “handicapped” and “mentally retarded” came to be associated with the social attitudes of the larger public at the time these terms were widely used. Those attitudes were infected by disgust and pity on the part of the non-disabled, while persons with disabilities were made to feel shame. Contrast President Franklin D. Roosevelt’s elaborate efforts to conceal his wheelchair use¹²¹ with the role that former Senator Bob Dole played in promoting passage of the Americans with Disabilities Act¹²² and in serving more broadly as a spokesperson and role model for Americans with disabilities. Or contrast the horrible mistreatment of Rosemary Kennedy¹²³ with Sarah Palin’s proud display of her son Trig. “Handicapped” and “mentally retarded” came to be considered offensive terms because of how the words made people feel about certain conditions, rather than because of their literal meanings.

Now let us suppose that Congress had voted down the law substituting “intellectually disabled” for “mentally retarded.” Such a defeat would not necessarily convey a negative social meaning. Perhaps a majority of Congress, following the linguistic analysis above, does not regard the term “mentally retarded” as more offensive than “intellectually disabled.” Or perhaps some members

¹²¹ See Jennifer Swize, Note, Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Interests of Adopted Children, 88 Va. L. Rev. 1079, 1113 n.118 (2002).

¹²² See The Robert J. Dole Institute of Politics, The Americans with Disabilities Act (ADA), <http://www.doleinstitute.org/archives/wordsDisabilities.shtml> (last visited Oct. 27, 2010).

¹²³ See Rosemary Kennedy, JFK’s Sister, Dies at 86, MSNBC.com, Jan. 8, 2005, <http://www.msnbc.msn.com/id/6801152/>.

of the majority in Congress do not think that language matters enough to bother amending the law in this “cosmetic” way. There is also an inherent challenge in ascribing meaning to legislative inaction.¹²⁴ Can we really say that it is worse for Congress to consider but reject the change of language than never even to consider it? Given all of these complexities, it becomes quite difficult to say whether the retention of an outdated term such as “mentally retarded” in federal law would connote the meaning of second-class citizenship. (Similar difficulties arise for other terms or for legislative failure to rewrite laws to be gender-neutral.)

Indeed, even a label that is widely regarded as appropriate can become the instrument of oppression under the right circumstances. Consider a preoperative male-to-female transsexual who self-identifies as a woman but is required to list her sex as male on government and other forms. There can be little doubt that such a requirement will be experienced as hurtful.¹²⁵ We may even want to say that the government ought to permit people to choose their sex.¹²⁶ But it is not clear that laws classifying people by sex in accordance with common biological markers connote the second-class status of transgender persons.

Nonetheless, the foregoing complexities merely show once again that it can sometimes be difficult to discern social meaning. We can at least hypothesize clear cases that illuminate the core principle. Suppose that the government in some city—perhaps in misguided protest against a requirement that it set aside parking for persons with disabilities in municipal lots—labels such spaces “for cripples.” The deliberate choice to adopt an outdated and widely-understood-to-be offensive term (rather than simply the choice not to update) would certainly violate the core of the constitutional norm I am exploring here: it would be a gratuitous insult to persons with disabilities. What is worse (to continue the discussion from the previous Section), placing the word “cripple” on the parking space would force persons with disabilities who wish to take advantage of the proximate parking to embrace the offensive term.

¹²⁴ See Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 *Ind. L.J.* 515 (1982).

¹²⁵ See, e.g., *B. v. France*, App. No. 13343/87, 16 *Eur. H.R. Rep.* 1, 19 (1992).

¹²⁶ See U.S. Census Bureau, *LGBT Fact Sheet*, available at http://2010.census.gov/partners/pdf/factSheet_General_LGBT.pdf.

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Same-Sex Marriage

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D. Married Names

We are almost ready to turn directly to state control of the term marriage, but before doing so, consider an intermediate example involving both names and marriage. As recently as the 1970s, state and federal laws mandated that a woman's surname change to that of her husband upon marriage, even if she wished to retain her maiden name.¹²⁷ Legislative action and state court decisions changed that rule, and while the Supreme Court has never faced this issue, it is hard to imagine that it would uphold such laws if the issue were presented today.

What exactly is wrong with such laws? Part of the offense can be characterized as a limitation on free speech. A person's name can be an essential part of his or her identity, and thus a law that assigns a woman a name she does not want limits her freedom of expression.

That is not, however, the central difficulty with laws requiring married women to take their husbands' names. As the *Roy* case shows, the government does have some interest in controlling how people are identified. For example, it is not obvious that a law limiting persons to legal names that can be spelled with alpha-numeric characters would be unconstitutional. Such a law would have caused difficulty for the artist once again known as Prince during the period in which he chose to be identified by the unpronounceable glyph "ꜛ" but its social meaning hardly would have been second-class status for metrosexual funk/rock stars.

The core problem with requiring women but not men to take their spouses' last names, of course, is that such a requirement is expressly sex-based. Moreover, such laws deploy the archaic stereotypes most redolent with the subordination of women. They are reminiscent of such odious practices as the prohibition on married women owning property and the marital rape exception, insofar as they indicate that marriage subordinates wives to their husbands.

¹²⁷ See Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 *Cardozo Women's L.J.* 321, 354 (1998).

To be sure, even today most American women choose to take their husbands' last names upon marriage,¹²⁸ but in doing so they do not typically experience themselves as affirming a subordinate status. They frequently cite tradition, convenience, and other factors that are, at least in principle, consistent with gender equality.¹²⁹ Nonetheless, the element of choice is crucial. The law's imposition of a man's name on a woman (but not the reverse) as the price of marriage has a social meaning that a voluntary name change typically does not.

Note finally in connection with this example that just as in some of the examples discussed in the previous two Sections, so too here, the laws under discussion both connote a kind of inferiority and enlist the victims of the offensive government labeling to participate in that labeling. Even before the women's movement of the 1960s and 1970s, some women (including, most prominently, actresses) continued to use their maiden names in their professional activities, but such uses were typically unofficial. On official forms and for legal purposes they could be required to sign their names—literally to identify themselves—by their husbands' names. Thus, at least for those women who would not have independently chosen to take their husbands' names, laws requiring them to do so committed the double harm of labeling them inferior and forcing them to affirm that inferiority.

E. Same-Sex Marriage

Laws banning same-sex marriage also appear to brand citizens as second-class and to enlist those very citizens in the enterprise. Questions of marital status arise not only in interactions with the government but in social settings: registering children for school, bringing a partner to the hospital, at professional gatherings, and so forth. Every time the members of a same-sex couple that wish to be married but are denied that opportunity under state law answer "no" to the question of whether they are married, they participate in their own oppression. Even apart from the tangible consequences that may result, such denials must surely sting—all the

¹²⁸ Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 *Ind. L.J.* 893, 910–11 (2010).

¹²⁹ See *id.* at 911–13.

worse so because the wounds will be experienced as partly self-inflicted.

Nonetheless, a skeptic can grant that same-sex couples experience the denial of the right to marry as unpleasant but deny that such unpleasantness amounts to second-class citizenship. Answering the skeptic will help us refine the notion of second-class citizenship to the point that it covers not only individuals but may also cover conduct and relationships.

On what grounds might someone resist the contention that denial of the term marriage to same-sex couples unconstitutionally connotes second-class citizenship? Here I shall briefly note three leading arguments against same-sex marriage, before turning to the question whether any of them may be fairly characterized as consistent with equal citizenship for gays and lesbians.¹³⁰

One argument is institutional. It asserts that the question of same-sex marriage is currently a matter of social contestation and that, accordingly, courts should not intervene to cut short the political process. This view has been voiced by opponents of same-sex marriage,¹³¹ as well as by supporters of same-sex marriage who fear political backlash if the courts move too quickly to legalize same-sex marriage¹³² or who simply favor judicial restraint more broadly.¹³³ I set aside this institutional question for now because, as Part V explains, the view that the Constitution forbids government expressions of second-class citizenship need not lead to the conclusion that all or even any such expressions are actionable in court.

¹³⁰ In addition to the three arguments discussed below, one might add inertia or, more grandly, Burkean traditionalism. Because the status quo in most states denies recognition to same-sex marriage, a simple disposition against change could explain much opposition to same-sex marriage. This view may inform the second argument I address below—the notion that marriage is simply defined per tradition as opposite-sex marriage. Its explanatory force should not be overstated, however. Especially in times of rapid social change, the decision to retain one tradition while other closely related traditions are being discarded must rest on something other than respect for tradition per se.

¹³¹ See, e.g., Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 *Regent U. L. Rev.* 21, 28 (2004) (decrying the imposition of same-sex marriage in Massachusetts “by unelected and electorally unaccountable judges”).

¹³² See, e.g., Cass R. Sunstein, *Backlash’s Travels*, 42 *Harv. C.R.-C.L. L. Rev.* 435, 435–36 (2007).

¹³³ See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1348–49 (2006).

The institutional objection takes a position on who should decide whether denial of the term marriage to same-sex couples relegates them to second-class citizenship; it does not entail any particular answer to the question.

Opponents of same-sex marriage also frequently resort to a definitional claim. Marriage, they say, simply *is* opposite-sex marriage. In asking for a right to marry, according to this view, same-sex couples are asking for something that they, by definition, cannot have.

It is difficult to know what to make of the definitional claim. Proponents of same-sex marriage do not deny that the law in most states does not now permit, and has not ever permitted, same-sex marriage. What they seek is a change in that definition. How, one wants to know, does the descriptive insistence that marriage has heretofore meant one-man-one-woman marriage respond to the normative claim that henceforth it should include same-sex couples?

We can begin to glimpse what opponents of same-sex marriage must really mean by looking at a somewhat more sophisticated version of the definitional claim. Here is how Professor Robert George, arguably the leading natural-law conservative in this country, states the definitional argument: state recognition for same-sex marriage “[literally abolishes t]he idea long embodied in our law of marriage as the one-flesh union of spouses consummated, actualized, and integrated around acts fulfilling the behavioral conditions of procreation, acts which are the biological foundation of the comprehensive, multi-level sharing of life that marriage is.”¹³⁴ For Professor George—whose views I shall attribute to the mass of same-sex marriage opponents who make the definitional claim—same-sex couples cannot marry because they cannot have heterosexual sex, which Professor George takes to be the essence of marriage.¹³⁵ The definitional claim is ultimately a moral claim about *conduct*. It thus connects closely with a third objection to same-sex marriage, and we can consider it alongside that objection in asking whether it is consistent with full citizenship for gays and lesbians.

¹³⁴ George, *supra* note 131, at 29.

¹³⁵ See Robert P. George, What’s Sex Got to Do With It?: Marriage, Morality, and Rationality, *in* *The Meaning of Marriage: Family, State, Market, and Morals* 142 (Robert P. George & Jean Bethke Elshtain eds., 2006).

A third argument frequently made in opposition to same-sex marriage (and to gay rights more broadly) draws a conduct/status distinction: laws forbidding same-sex marriage do not classify anyone as second-class or in any other way, this argument goes. Such laws instead simply deny to everyone the opportunity to marry a person of the same sex.¹³⁶ Or in the version of this claim that translates the definitional contention into a view about same-sex sexual conduct, laws that disadvantage people on the basis of same-sex sexual relations do not condemn anyone on the basis of status.

In a strictly formal sense, the same-sex marriage opponents are right. Denial of the term marriage to same-sex couples does not brand the members of those couples as inferior in the way that a requirement that gays and lesbians wear pink triangles would. But why should this formal distinction make a difference? Surely denying same-sex couples the use of the word married stamps their unions as inferior to the unions of the opposite-sex couples who can obtain that label. The question thus becomes whether the constitutional prohibition on government labeling individuals as second-class citizens should be expanded to also forbid labeling conduct and relationships as second-class.

Take conduct first. Opponents of same-sex marriage (and of gay rights more broadly) argue that there is nothing necessarily objectionable about the government condemning—or, a fortiori, withholding approval of—conduct. Imprisoning persons for murder, rape, and robbery, and branding them felons, no doubt expresses a view about the inferiority of the conduct in which murderers, rapists, and robbers engage, without thereby expressing a view about the inherent moral worth of the perpetrators. Likewise, the argument goes, the state may withhold approval of same-sex sexual relations—and the fact that the state may not criminalize same-sex sexual relations¹³⁷ does not necessarily mean that it must approve it¹³⁸—without thereby expressing a view about the worth of persons who engage in same-sex sexual relations.

¹³⁶ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 974 (Mass. 2003) (Spina, J., dissenting).

¹³⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹³⁸ Cf. *Maher v. Roe*, 432 U.S. 464, 474 (1977) (stating that government may “make a value judgment favoring childbirth over abortion”).

The same point could be made about relationships. Consider a relationship the state clearly has the power to forbid, such as an incestuous relationship between a parent and a minor child. In forbidding *that* relationship the state need not express any value judgment about the worth of any persons. Thus it looks as though the opponents of same-sex marriage have drawn an important distinction. Even if (as Part II argued) the Constitution condemns all government statements that convey the social meaning that some persons are second-class citizens, it clearly permits the government to favor some conduct and some relationships over others.

But if the state may, consistent with the Constitution, disapprove some conduct and some relationships, it hardly follows that the state may disapprove of any conduct or of any relationship. State disapproval of the conduct of worshipping a golden calf would violate the Religion Clauses of the First Amendment. State disapproval of interracial marriage (along the lines of the hypothetical examples discussed in the Introduction¹³⁹) would violate the Equal Protection Clause. The question thus becomes whether the formation of a same-sex union is the kind of conduct or relationship that the state may disapprove by withholding the term marriage. More to the main point, if not, is that because disapproval of the underlying conduct or relationships is tantamount to disapproval—relegation to second-class status—of gays and lesbians?

The answer to that last question would appear to turn on whether one accepts the conduct/status distinction in this context. If so, then state disapproval of same-sex relationships expresses no view about the worth of the people who enter them. If, however, state efforts to express disfavor for same-sex relationships and same-sex conduct are tantamount to state efforts to express disfavor for the people who (tend to) enter those relationships and engage in that conduct, then the conduct/status distinction is inapposite.

For its part, the Supreme Court itself has squarely rejected the conduct/status distinction as a basis for sustaining claims that prohibitions on same-sex sexual conduct and same-sex relationships

¹³⁹ See *supra* text accompanying notes 12–25.

do not target gays and lesbians.¹⁴⁰ Yet the cases taking that view are of recent vintage and decided by narrow margins.

More disturbingly (or perhaps amusingly), positions on the relevance of the conduct/status distinction appear to be opportunistic. Today, those who would expand gay rights deny the significance of the conduct/status distinction,¹⁴¹ while those who resist such expansions insist on its importance.¹⁴² Yet during the seventeen-year period between *Bowers v. Hardwick*¹⁴³ and *Lawrence v. Texas*,¹⁴⁴ the positions were reversed. Then, *proponents* of gay rights themselves distinguished status from conduct to argue that even if the state could criminalize same-sex sexual conduct it could not otherwise discriminate on the basis of sexual orientation,¹⁴⁵ while *opponents* of gay rights denied that the conduct/status distinction had normative force.¹⁴⁶

Is it possible to ask whether the conduct/status distinction should matter in this context without rigging the analysis to produce one's favored outcome? Perhaps not. There is no doubt that gays and lesbians typically experience the denial of the right to marry and other forms of disapproval of same-sex relationships and same-sex conduct as disapproval of *them*—that is, as conveying a message

¹⁴⁰ See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.” (citing *Lawrence*, 539 U.S. at 575; *id.* at 583 (O'Connor, J., concurring in the judgment))).

¹⁴¹ See Plaintiffs' and Plaintiff-Intervenors' Joint Opposition to Defendant-Intervenors' Motion for Summary Judgment at 13–14, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW) (arguing that a Supreme Court decision protecting same-sex sexual conduct nullified prior Ninth Circuit precedent resting permissibility of status discrimination on proscribability of such conduct).

¹⁴² See Brief for Petitioner at 39–40, *Christian Legal Soc'y*, 130 S. Ct. 2971 (2010) (No. 08-1371).

¹⁴³ 478 U.S. 186 (1986).

¹⁴⁴ 539 U.S. 558 (2003).

¹⁴⁵ See, e.g., *Watkins v. U.S. Army*, 875 F.2d 699, 716–17 (9th Cir. 1989) (en banc); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1166–67 (1988).

¹⁴⁶ See *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) (“If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”)

that they are second-class citizens.¹⁴⁷ Yet while some, perhaps even most, of the people who support the laws conveying such disapproval no doubt do intend to convey just that message, few of them in positions of power will publicly admit to that. Their public stance is “hate the sin, love the sinner.”

Yet what of the fact that the status of sexual orientation is defined by orientation towards conduct and relationships? Surely when a person’s very identity is defined by an orientation towards particular conduct or particular sorts of relationships, it is sophistry to distinguish between acts and actors.

Indeed it is, but the opponents of same-sex marriage and gay rights more broadly want to deny that the *law* has anything to do with this. The law banning same-sex marriage does not tell gays and lesbians to define their identities in terms of their ability to have same-sex relationships, they say, any more than the law banning murder defines the identities of people who commit murder as murderers.¹⁴⁸

Thus, we have a case of contested social meaning: gays and lesbians experience the inability to marry as conveying the message that they are second-class citizens. Opponents of same-sex marriage counter that this is not the intended meaning of the law. That view contains an uncomfortable echo of *Plessy*’s you-choose-to-see-the-law-that-way, but there may nonetheless be no getting around the problem. In law, as in interpersonal relations, sometimes the meaning a speaker intends differs from the meaning an audience hears.

Were I interested in ultimately resolving the question of whether the law’s denial of the term marriage to same-sex couples labels gays and lesbians as second-class citizens, I would say yes. But that conclusion is probably tied to my views about core issues I have tried to bracket in this Article; in particular, I regard disapproval of same-sex relationships as disapproval of the identity gays and lesbians take as men and women—a policing of sex roles that impli-

¹⁴⁷ See Plaintiffs’ and Plaintiff-Intervenors’ Joint Opposition to Defendant-Intervenors’ Motion for Summary Judgment at 9, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292 VRW) (asserting that California’s Proposition 8 relegates same-sex couples “to the second-class status of domestic partnership”).

¹⁴⁸ See *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

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cates norms of sex equality.¹⁴⁹ Absent some method for resolving contests over law's social meaning, it may not be possible to say much more than that the social meaning of laws banning same-sex marriage is contested.¹⁵⁰ Part V will consider the costs and benefits of a number of such methods, but first, Part IV provides further illustrations of how law's social meaning may be contested.

IV. ASCERTAINING SOCIAL MEANING IN HARD CASES

The previous Part of this Article discussed cases in which government labels persons or their identity-affirming actions or relationships as second-class to illustrate the harm experienced by such labeling. This Part explores one category of hard cases—circumstances in which the social meaning of a law is unclear.

Some contests over social meaning are insincere. Segregationists defended Jim Crow as separate but equal, even though just about everyone knew it to be a system for enforcing white supremacy. Despite my conclusion in the previous Part, some readers may draw the same inference about opposition to same-sex marriage: they may conclude that even those Americans who support same-sex civil unions and anti-discrimination laws forbidding sexual orientation discrimination nonetheless mean to express the view that same-sex unions and the people who form them are not quite the equal of opposite-sex marriages and the people who enter them.¹⁵¹ Why else reserve the term marriage, they may wonder, if not to signify that one kind of relationship, and by implication, the people in it, are superior to the other?

¹⁴⁹ See supra note 15.

¹⁵⁰ To be clear, even if one could not conclude that laws banning same-sex marriage convey the social meaning that gays and lesbians are second-class citizens, such laws could nonetheless be unconstitutional. This Article explores the forbidden social meaning of second-class citizenship as one basis, but only one basis, for finding such laws unconstitutional.

¹⁵¹ Public opinion polls frequently show that a substantial percentage of Americans who oppose same-sex marriage nonetheless support legal same-sex civil unions with most or all of the legal rights of marriage. See, e.g., Jennifer Agiesta, Post-ABC Poll: Views on gay marriage steady, more back civil unions, Wash. Post (Feb. 12, 2010, 6:00 AM), http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc_poll_views_on_gay_mar.html; Majority Continues to Support Civil Unions, The Pew Forum on Religion & Public Life (Oct. 9, 2009), <http://pewforum.org/Gay-Marriage-and-Homosexuality/Majority-Continues-To-Support-Civil-Unions.aspx>.

Here I shall mostly bracket the problem of insincere reports of motives to focus on a different circumstance: laws and other government actions that convey an innocuous meaning to their supporters but convey a message of second-class citizenship to others. I consider two chief examples: official displays of the Confederate battle flag and the teaching of evolution but not creationism in public schools.

A. The Confederate Battle Flag

Consider a state's decision to fly the battle flag of the Confederacy¹⁵² at official locations, such as a courthouse or statehouse, whether as a freestanding flag or, as Mississippi currently does, as part of the official state flag.¹⁵³ Flying a flag is, of course, an expressive act, and while a symbol is inherently polysemous, it is nonetheless possible in this instance to provide a reasonably clear articulation of the messages the Confederate battle flag conveys. (Much of what I have to say applies equally to other official remembrances of the Confederacy, such

¹⁵² In contemporary parlance, the term "Confederate flag" usually refers to what was, in its day, a battle flag of some Confederate units. It looks like this:



The second and third Confederate national flags incorporated the Confederate battle flag in the upper left-hand corner. See John M. Coski, *The Confederate Battle Flag: America's Most Embattled Emblem* 17–18 (2005).

¹⁵³ The Mississippi flag looks like this:



The Official State Website of Mississippi, *Flags that have flown over Mississippi*, <http://www.mississippi.gov/flags.jsp> (last visited Oct. 27, 2010).

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as monuments commemorating Robert E. Lee and Jefferson Davis,¹⁵⁴ but for simplicity, I shall focus on the flag.¹⁵⁵)

To some people, the flag symbolizes slavery, the issue that, more than any other, divided North from South and that precipitated the Civil War. Many African Americans, most of whom descend from ancestors who were enslaved in the states comprising the Confederacy, thus quite understandably view the current flying of the Confederate battle flag as a statement of support for, or at best indifference to, the suffering caused by slavery. Moreover, given the revival of the Confederate battle flag during the civil rights struggles of the 1950s and 1960s (and beyond),¹⁵⁶ the flag may also connote an ongoing commitment to segregation and the ideology of white supremacy underlying it. Thus, white supremacy is one reasonable interpretation of a state's decision to fly the Confederate battle flag.¹⁵⁷ Flying it predictably communicates to many African Americans that they are second-class citizens or worse.

But that is not all that the Confederate battle flag symbolizes. To many white Southerners, the Confederate battle flag symbolizes pride in their Southern heritage, the rights of states and individuals within a federal system, a way of life, and character traits such as bravery or rebelliousness; the flag honors the bravery of their ancestors who fought to defend their homeland against what they perceived as Northern aggression.¹⁵⁸ I am willing to stipulate that at

¹⁵⁴ For a very thoughtful discussion of such monuments, 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, 1084–95, 1111–19 (1995).

¹⁵⁵ One important difference concerns the ease of change. Replacing one flag with another is simple; removing large monuments is not, and the act of removal itself conveys both intended and unintended messages. Cf. *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment) (worrying that the removal of a granite Ten Commandments monument could “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid”).

¹⁵⁶ See James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 *Yale L.J.* 505, 513 & n.57 (1991).

¹⁵⁷ See *id.* at 508.

¹⁵⁸ See Levinson, *supra* note 154, at 1094 (describing “the ‘official’ line of Confederate memorializers, who insisted that the Southern cause had been just and legal,” as fundamentally not about slavery but “constitutional rights, the principle of secession, and the preservation of their homeland” (quoting Gaines M. Foster, *Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South 1865 to 1913*, at 125 (1987)) (internal quotation marks omitted)).

least in the conscious minds of many of these white Americans, such ideas have no connection to slavery or racism.

The one significant federal court case to consider a constitutional challenge to the Confederate battle flag rejected the plaintiffs' claims without attempting to decide what message the flag "really" conveys. In *NAACP v. Hunt*,¹⁵⁹ the Court of Appeals for the Eleventh Circuit approved the grant of summary judgment for the defendants in a case challenging the flying of the Confederate battle flag over the Alabama state capitol building. The court—in an opinion by Judge Frank Johnson, himself a civil rights hero for his desegregation rulings as a district court judge—rejected, *inter alia*, a Thirteenth Amendment claim. The opinion did not say that the Confederate battle flag did not symbolize slavery; rather, it said that the Thirteenth Amendment prohibits slavery, not state expressions of support for slavery.¹⁶⁰

The more interesting question in *Hunt* was whether Alabama violated the Equal Protection Clause. One reason given by the Eleventh Circuit for its refusal to grant relief on that basis was the court's conclusion that the subjective motives of the state officials who decided to fly the Confederate battle flag over the state capitol were unclear.¹⁶¹ Although I agree—indeed, part of my reason for using the Confederate battle flag example here is to illustrate the fact—that in many instances the motives for flying the Confederate battle flag will be unclear or mixed, in *Hunt* there was something close to a smoking gun. The flag was placed atop the Alabama Capitol on the very "day that United States Attorney General Robert F. Kennedy travelled to Montgomery to discuss with then-Governor George Wallace the governor's announced intention to block the admission of the first black students to the University of Alabama."¹⁶² There it remained until and through the *Hunt* litigation.¹⁶³ Given that history, at the very least, the burden should have been on the state to disprove the inference that the

¹⁵⁹ 891 F.2d 1555 (11th Cir. 1990).

¹⁶⁰ See *id.* at 1564.

¹⁶¹ See *id.* at 1562.

¹⁶² *Id.* at 1558.

¹⁶³ In 1993, the flag was ordered removed by a state judge who found that state law only permitted the U.S. and Alabama flags to fly over the Capitol. Following the inauguration of a new governor, the state did not appeal. See Levinson, *supra* note 154, at 1099 n.56.

flag flew to symbolize the state's commitment to racial segregation and the ideology of white supremacy that stood behind it.¹⁶⁴

What about a less historically freighted case? It is relatively easy to concoct an example in which the official display of the Confederate battle flag clearly does not connote state endorsement of white supremacy. Suppose, for example, the flag were displayed in a state museum as part of an exhibit of "symbols of repudiated ideologies," perhaps alongside flags bearing the swastika and the hammer and sickle.¹⁶⁵ Here, as with respect to religious displays evaluated under the Establishment Clause, we can draw a sensible distinction between a state display that *refers to* the Confederate battle flag and a state display that *endorses* whatever message the Confederate battle flag conveys.

Most cases will fall somewhere in between the museum example and the facts of *Hunt*, in which the flag's message can be traced directly to the days of George Wallace's governorship. In the cases that most interest me here, the motives of the people who decide to fly—or decide not to stop flying¹⁶⁶—the Confederate battle flag will be mixed and, in some sense, ultimately unknowable, even to themselves. Assume, however, an unrealistically clear case: suppose that the plaintiffs stipulate¹⁶⁷ that a legislative decision to fly the Confederate battle flag was not intended by those voting for the measure to convey a message of white supremacy. Instead, let us assume that they meant only to express one of the benign messages described above: to honor the bravery in battle of the Confederate soldiers, let us say.¹⁶⁸ Might we nonetheless say that the

¹⁶⁴ See Forman, *supra* note 156, at 506–09 (arguing that Alabama failed to adduce evidence that flying the flag served a valid non-discriminatory purpose).

¹⁶⁵ See Levinson, *supra* note 154, at 1105.

¹⁶⁶ In *Hunt* itself, the court thought the 1990 decision not to take down the Confederate battle flag should not be deemed fatally infected by the original decision to fly it as a symbol of resistance to desegregation. See *Hunt*, 891 F.2d at 1562. For the reasons elaborated by Professor Forman, see Forman, *supra* note 156, at 505–09, I disagree, but nothing in my analysis turns on whether the *Hunt* court was right or wrong in this particular.

¹⁶⁷ By invoking plaintiffs and a stipulation, I am using the terminology of litigation, but I leave open the possibility—addressed in the next Part—that these issues are best deemed non-justiciable.

¹⁶⁸ This is hardly a fanciful or outdated suggestion. When Virginia Governor Robert McDonnell declared April 2010 "Confederate History Month," his proclamation called upon "all Virginians to reflect upon our Commonwealth's shared history, to

public display of the Confederate battle flag (in places other than museums and the like) still unconstitutionally conveys a message of second-class citizenship? Why, in other words, should the meaning of the flag turn on the subjective intent of the people who choose to fly it?

One answer might be intentionalism. Perhaps the meaning of symbols and words simply is whatever the respective users and speakers of those symbols and words intend for them to convey. That is certainly *one* view of meaning, and some of its defenders even contend that it is the only possible view of meaning.¹⁶⁹ But American law tends to reject subjective intentions as the touchstone of meaning. From the objective theory of contract through modern textualism in statutory and constitutional interpretation, we generally see a preference for identifying meaning with communal understandings of words (and symbols) rather than with the subjective intentions of speakers.¹⁷⁰

Equal protection doctrine provides a seemingly better reason for looking to the subjective intentions of those who decide to fly (or not to stop flying) the Confederate battle flag. Hornbook constitutional law says that a facially race-neutral law is not unconstitutional simply by virtue of the fact that it has a disparate racial impact.¹⁷¹ To trigger strict scrutiny the disparate impact must be intended.¹⁷² As the Supreme Court first said in the sex discrimina-

understand the sacrifices of the Confederate leaders, soldiers and citizens during the period of the Civil War, and to recognize how our history has led to our present” but did not mention slavery. See Confederate History Proclamation—Original Text, Richmond Times-Dispatch (Apr. 7, 2010), http://www.timesdispatch.com/news/2010/apr/07/confederate_history_proclamation_-_original_text-ar-163836/ [hereinafter Richmond-Times Dispatch]. After public criticism, he apologized for the omission.

¹⁶⁹ See, e.g., Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967, 971–72 (2004); Stanley Fish, There Is No Textualist Position, 42 San Diego L. Rev. 629, 649–50 (2005). For a somewhat more moderate and limited endorsement of the relevance of subjective intentions, see Kent Greenawalt, A Pluralist Approach to Interpretation: Wills and Contracts, 42 San Diego L. Rev. 533, 544–45 (2005).

¹⁷⁰ See Wayne Barnes, The Objective Theory of Contracts, 76 U. Cin. L. Rev. 1119, 1157 (2008); John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2408 (2003) (“[M]odern textualism suggests that the complexities of the legislative process make it meaningless to speak of a legislative ‘intent’ at odds with the intent expressed by the clear social meaning of the enacted text.”).

¹⁷¹ See *Washington v. Davis*, 426 U.S. 229, 245–46 (1976).

¹⁷² See *id.* at 242.

tion context, equal protection doctrine posits that otherwise race-neutral government actions only become race-based where government selects them “‘because of,’ not merely ‘in spite of’” their disparate racial impact.¹⁷³ Accordingly, if we consider the Confederate battle flag’s message of white supremacy as having only a disparate impact on African Americans, then stipulating away the government’s illicit motive gives away the case.

Indeed, that is how the Eleventh Circuit saw *Hunt*. After treating the case as one of uncertain motives, the court added that “there is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position.”¹⁷⁴

It is possible to read that language in two different ways. It could mean that because all Alabamans are affected, flying the Confederate battle flag over the state capitol does not even have a disparate impact. Or it could mean simply that this is *only* a case of disparate impact rather than a case of a law or policy that facially distinguishes on the basis of race.

I would reject the first interpretation as implausible. While it is no doubt true that many white Alabamans were *offended* by the flying of the Confederate battle flag, most of them were not *harmed* by it in the same way or degree as were African American Alabamans. For enlightened white Alabamans circa 1990, the Confederate battle flag conveyed a hateful message with which they disagreed. Yet even at that late date, for African American Alabamans, it conveyed the message that *they themselves* were second-class citizens. Accordingly, I ascribe the second claim to the *Hunt* court: the court was probably saying that the understandably disparate reactions of white and African American Alabamans to the display of the Confederate battle flag did constitute disparate impact but nothing more.

Is that right? It would be useful to untangle the intent inquiry from the logically prior inquiry of whether we are dealing with a case of facial classification or disparate impact. Unfortunately, however, these questions seem closely linked. Contrasting the case

¹⁷³ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

¹⁷⁴ *NAACP v. Hunt*, 891 F.2d 1555, 1562 (11th Cir. 1990).

of the Confederate battle flag with a hypothetical example will illustrate the difficulty.

Suppose that the mayor and city council of some Southern town decide to carve the following inscription in large letters above the entrance to city hall: “The white race is the dominant race in this country, and it will continue to be for all time, if it remains true to its great heritage.”¹⁷⁵ Now suppose that an African American resident of the city complains that the inscription conveys a message of white supremacy. Would it be fair to characterize this complaint as sounding in disparate impact? Hardly. There might be institutional reasons (addressed in the next Part) why the law should withhold a judicial remedy from persons alleging solely expressive harm, even in this unmistakable case, but the underlying complaint is not about disparate impact. Here the challenged government message is *expressly* an affirmation of white supremacy and, ipso facto, subordination of non-whites. Thus, if equal protection doctrine has any purchase here, the relevant branch of that doctrine concerns express racial classifications, for which a subjective intent to discriminate or subordinate is irrelevant.¹⁷⁶

In the foregoing example, there would be no doctrinal requirement that an aggrieved citizen prove that the mayor and city council subjectively intended to express a message of white supremacy because no competent speaker of English could have intended to inscribe the words without thereby intending to convey that message. By contrast, the meaning of the Confederate battle flag is not quite so explicit. No one remotely familiar with American history could display a Confederate battle flag without *knowing* that some people will reasonably interpret that display as support for slavery and white supremacy. But it is also possible that many people who nonetheless display the flag do so “despite” rather than “because of” that association. Yet the despite/because-of inquiry occurs *inside of* the disparate impact box, and we are still trying to figure out whether displaying the Confederate battle flag ought to be understood as conveying a message of white supremacy merely incidentally or expressly.

¹⁷⁵ Except for an omitted ellipsis and set of brackets around the words “is” and “and,” that is a quotation from Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

¹⁷⁶ See *Adarand Constructors v. Peña*, 515 U.S. 200, 228–29 (1995).

Equal protection doctrine currently lacks the tools to answer this question. The *Hunt* court thought the case appropriately handled as a matter of disparate impact, but it seemed simply to assume the point rather than to justify it. The reason the question appears unanswerable is because the Confederate battle flag is *both* an express endorsement of slavery and white supremacy—as understood by one audience—and a merely unintended endorsement—as understood by another audience.

This suite of real and hypothetical examples exposes a gap in equal protection doctrine: we do not have a general test for discerning what counts as an “express” racial (or otherwise invidious) classification or message. In most cases the courts simply know that there is or is not an express classification in use. In those rare cases in which the issue is contested, the Court’s approach appears to be largely ad hoc.¹⁷⁷

Before moving on to the next set of examples, it is worth noting that the issue I have identified here is largely absent in the same-sex marriage context. One can contest the view that denying same-sex couples the use of the term marriage conveys the social meaning of second-class citizenship, but this denial unquestionably amounts to a facial classification. Whether constitutionally actionable or not, the law in states that deny same-sex couples the legal right to call themselves married facially treats those couples differently from straight couples. Along this dimension at least, the argument for striking down laws barring same-sex couples from calling themselves married is stronger than is the argument for striking down official displays of the Confederate battle flag.

B. Evolution and Creationism

Notwithstanding continued controversy over whether and how to commemorate the Confederacy,¹⁷⁸ I suspect that most readers of this article feel little sympathy for those who wish to display the Confederate battle flag, even privately. While it is possible to fly

¹⁷⁷ See, e.g., *Hernandez v. New York*, 500 U.S. 352, 360–61 (1991) (accepting the claim that a prosecutor’s doubt about a Spanish-speaking juror’s willingness to accept the English-language translation of Spanish testimony did not amount to discrimination on the basis of ethnicity).

¹⁷⁸ See *Richmond Times-Dispatch*, *supra* note 168.

that flag without intending to convey a message of support for slavery or white supremacy, it is nearly impossible to do so without expressing at least callous disregard for many of one's fellow citizens. Accordingly, it would be useful to test whatever insights might be derived from the foregoing analysis by considering them alongside an example in which the reader's sympathies—or at least the political valences—are reversed. This Section considers the objection from religious fundamentalists who contend that the teaching in public school science classes of evolution but not creationism conveys a message that persons who believe in the literal truth of the Biblical account of the origins of life are second-class citizens. I focus on so-called “young Earth” creationism (which, for simplicity, I shall just call “creationism”) rather than “intelligent design” because the conflict between neo-Darwinism and young-Earth creationism is unavoidable, whereas some versions of intelligent design could be considered compatible with much of neo-Darwinism.¹⁷⁹

The religious objector I am imagining contends that the teaching in science classes of evolution but not creationism favors some beliefs over others. Moreover, because the beliefs at issue are wrapped up in the identities of the persons who hold them, the teaching of evolution but not creationism brands those who believe in creationism as second-class citizens.

Do creationists really voice this precise objection? Generally not,¹⁸⁰ but that may have more to do with the demands of litigation

¹⁷⁹ Compare Kent Greenawalt, 2 *Religion and the Constitution: Establishment and Fairness* 140 (2008) (“[T]he creationist account most familiar to Americans differs radically in nearly every respect from neo-Darwinism.”), with *id.* at 142 (“[W]hen its crucial premises are spelled out, intelligent design need not dispute most features of neo-Darwinism.”).

¹⁸⁰ Steven Smith comes close. He says that when public schools teach evolution but not creationism, “they prescribe that the right opinion is to reject the pertinent religious beliefs of, for example, biblical literalists and six-day creationists.” Steven D. Smith, *Barnette's Big Blunder*, 78 *Chi.-Kent L. Rev.* 625, 655 (2003). In response to Smith, Steven Shiffrin points to the difference between a public school saying that evolution is correct and the same school saying that evolution is correct and therefore that fundamentalists who believe in creationism are wrong. See Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 *Chi.-Kent L. Rev.* 717, 726 (2003). The prior statement may logically entail the latter one, but expressly making the point that creationists are wrong converts “a logical inference into an insult.” *Id.* (discussing an analogy in which a Catholic either implicitly or expressly rejects Judaism). Smith

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than with their true concerns. Alert to the possibility of Establishment Clause litigation challenging law or policy that results in the teaching of creationism in the public schools, creationists have tended to defend such laws or policies on the liberal ground that students should be exposed to a variety of competing viewpoints so that they can make up their own minds. For example, in *Edwards v. Aguillard*,¹⁸¹ Louisiana defended its law requiring that schools teaching evolution also teach creationism on the ground that doing so advanced academic freedom.¹⁸² Likewise, in 2005, President Bush expressed support for teaching creationism alongside evolution in order to expose students “to different schools of thought.”¹⁸³

We should put aside such litigation-driven contentions. Nobody clamors for the teaching of different schools of thought about the chemical structure of benzene, magnetism, or the ideal gas law because the answers science gives on these matters are not seen as conflicting with religion. Objections to the teaching of evolution and demands that creationism be taught alongside it originate in that conflict.

So, why do some religious fundamentalists object to the teaching of evolution without creationism? Many parents worry primarily that the teaching of evolution as scientific fact will interfere with their efforts to inculcate their contrary views, grounded in religious faith. Children, they say, should be given the intellectual tools to reject evolution.¹⁸⁴

thinks otherwise, treating even the tacit rejection of creationism as insulting creationists. See Smith, *supra*, at 655 n.68.

¹⁸¹ 482 U.S. 578 (1987).

¹⁸² See *id.* at 581.

¹⁸³ Claudia Wallis, *The Evolution Wars*, *Time*, Aug. 15, 2005, at 27, 28 (internal quotation marks omitted). President Bush actually was commenting on intelligent design, but I beg the reader’s indulgence in assuming that he did not draw a sharp distinction between the two concepts.

¹⁸⁴ Some religious parents would go further still. Thus, in a rich and subtle discussion of a mid-1980s federal court challenge to the curriculum in Hawkins County, Tennessee, Nomi Stolzenberg shows how there can be no truly persuasive response to religious fundamentalists who object to neutrality itself as taking the secular side in a dispute between religious and secular grounds for knowledge. See Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 *Harv. L. Rev.* 581, 584–88 (1993). Stolzenberg concludes, perhaps unsurprisingly, that none of the leading philosophical justifications for government neutrality will satisfy those who regard neutrality itself as antithetical to their world view. See *id.* at 666–67. Here I am only considering objec-

Here let us focus on a second worry that parents may have: that their children—and by extension they themselves—will be stigmatized and insulted by the omission of their own views from the science curriculum. This view comes through most clearly in the complaint that “secular humanism” is a religion. That conclusion was even the basis for an order (subsequently vacated on appeal) by a federal district judge in Alabama banning the public school use of nearly forty home economics, social studies, and history textbooks.¹⁸⁵ Less idiosyncratically, one sees something like the same attitude in Supreme Court dissents in public display and other Establishment Clause cases: individual Justices object to what they regard as “an unjustified hostility toward religion.”¹⁸⁶ Whether voiced by Supreme Court Justices or Fox News commentators complaining about a “war on Christmas,”¹⁸⁷ the core objection is the same: exclusion of religion from public life (including public school science curricula) favors irreligion over religion.

It is too easy to dismiss the creationists’ concern. One can say something like this: *We do not exclude creationism from the classroom because it is a religious viewpoint, but because it is either not science or bad science.* But that answer is arguably false. A public school district that wished to teach its pupils the Lamarckian theory of evolution or the Ptolemaic view of the universe would also be engaged in teaching non-science or at least, outdated or bad science; yet the Establishment Clause stands as no impediment to the teaching of Lamarck and Ptolemy as science in the way that it bars teaching the story of Genesis as science. The specifically religious character of creationism will typically play a special role in the decision of public schools not to teach it in science classes.

Of course, the religious origins of creationism need not be among the express reasons for a school’s refusal to teach creationism as science. After all, if new evidence suddenly emerged that,

tions that accept a core premise of liberalism: the state satisfies its duty of equal protection when it acts neutrally. Nonetheless, the argument goes, excluding creationism from the public school curriculum is not neutral.

¹⁸⁵ See *Smith v. Bd. of Sch. Comm’rs*, 655 F. Supp. 939, 982 (S.D. Ala. 1987), rev’d 827 F.2d 684 (11th Cir. 1987).

¹⁸⁶ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹⁸⁷ See John Gibson, *The War on Christmas*, Fox News (Oct. 21, 2005), <http://www.foxnews.com/story/0,2933,173072,00.html>.

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contrary to the existing overwhelming evidence of astronomy, geology, biology, and many other disciplines, the universe is only about six thousand years old, public schools would be well-justified in presenting that new evidence. The fact that this new evidence happened to agree with the Biblical account of creation would not count as a reason for excluding *good* science from the public school classroom.

Thus, let us stipulate that the relevant school authorities choose to teach evolution but to exclude creationism from the biology curriculum on strictly religion-neutral criteria. Now they can say to the religious objectors that they are wrong to take offense; the school does not intend to convey any message about their worth or the worth of their beliefs. Does the problem go away?

Hardly. It seems we have merely reproduced the controversy over the Confederate battle flag. The government authorities choose to engage in expressive conduct (flying a flag/teaching evolution without creationism) with the intention of communicating an innocuous message (honoring bravery in battle/teaching science) despite knowing that many people will nonetheless understand the message differently as an endorsement of slavery and white supremacy/as denigrating creationism and the people who believe in it.¹⁸⁸

How might we distinguish flying the Confederate battle flag from teaching evolution without creation? Here I shall consider a number of possibilities, none of which is completely satisfactory.

We might think that the meanings of slavery and white supremacy are closely connected to the Confederate battle flag but that the teaching of evolution without creationism does not naturally convey a message that creationists are second-class citizens. In truth, I confess that I think this, but that fact may simply be a restatement of the problem. I am not a creationist. In imagining the conflict between a school and fundamentalist parents, I imagine

¹⁸⁸ I am not the first person to note parallels between the claims of creationists and some African Americans objecting to racial subordination. For an instructive comparison between the movements to bring creationism and Afrocentrism into the public schools, see Amy J. Binder, *Contentious Curricula: Afrocentrism and Creationism in American Public Schools 1–5* (2004) (observing how, despite their disparate constituencies, each movement argued for curricular change as a means of redressing discrimination).

myself as a biology teacher or school administrator, and I believe that my motives in excluding creationism from the biology curriculum are unrelated to any message about the inherent worth of people who believe in creationism. But of course the same could be said for the state official who decides to fly the Confederate battle flag to honor the bravery of those who fought for the Confederacy, believing that he does not thereby mean to convey support for slavery or white supremacy. What makes these cases challenging is precisely the fact that the meaning intended by those who send the message differs from the meaning received by some of those who hear it.

Of course, any message can be received bearing a meaning different from the one intended. The parents of a second grader who is told by her teacher that two plus two makes four, not five, *could* hear in that correction a claim that their daughter is a second-class citizen, but this would be a highly idiosyncratic and unreasonable interpretation of the teacher's words. Indeed, it would not even be an interpretation of the words but an inference that the words carry a further implication beyond their literal meaning.

Does that fact point the way to distinguishing the Confederate battle flag from the teaching of evolution without creationism? Consider the literal words "human beings evolved over millions of years from other creatures, which in turn evolved over hundreds of millions of years from single-celled organisms." That language does not even refer to any religious views, much less say anything about the people who hold them. Whereas a flag—because it is a symbol rather than a statement—could be taken to directly convey a message of white supremacy, there is no way the words just quoted could be taken to directly convey the message that creationists are less valuable human beings than non-creationists.

But so what? Suppose that instead of flying the Confederate battle flag, Mississippi or another former member of the Confederacy adopted as its motto—inscribed on public buildings throughout the state—the text "Proud Member of the former Confederate States of America." That motto literally says nothing about slavery or white supremacy but nonetheless conveys roughly the same message as the display of the Confederate battle flag. In both this hypothetical case and in the actual examples of official displays of the Confederate battle flag, the social meaning of white supremacy or

support for slavery requires a further inference beyond the literal text or standard symbolic meaning, just as in the case of the teaching of evolution without creationism.

Nonetheless, the leap from “evolution is true” to “creationists are second-class citizens” seems to cover more ground than the inference from the Confederate battle flag to the message of white supremacy. Indeed, parents who object to the teaching of evolution without creationism in the public schools typically do not argue—or do not principally argue—that this pairing brands them or their children as second-class citizens. As noted above,¹⁸⁹ their core complaint is that by advancing a secular worldview, the public schools undermine their ability to inculcate their values in their children. Yes, religious conservatives also complain that the exclusion of religious symbols and religious exercises from public life treats their views (and thus them) as second-class, but that complaint is not chiefly addressed to the exclusion of creationism from public school biology curricula. Whether that fact should be enough to answer the complaint of a creationist who *does* hear a message of second-class citizenship in such exclusion is not entirely clear, but it does make the creationist’s objection somewhat less forceful than the objection to the Confederate battle flag.

Alternatively, one might distinguish the Confederate battle flag from the teaching of evolution without creationism on the strength of the government interest. It is nearly impossible to teach modern biology without teaching evolution.¹⁹⁰ By contrast, no state or local government *needs* to fly the Confederate battle flag. Even a state that wishes to honor the bravery of the men who fought for the Confederacy can do so while making clear that it does not thereby endorse the cause for which they fought.¹⁹¹ Thus, if we think about the matter in doctrinal terms, a challenge to the Confederate battle flag would have a greater likelihood of success than a challenge to

¹⁸⁹ See *supra* text accompanying note 184.

¹⁹⁰ See Top Scientists and Educators Call on Government to Include Evolution in All Schools, British Humanist Ass’n (June 18, 2010), <http://www.humanism.org.uk/news/view/571> (describing a letter to the United Kingdom’s government from twenty-six scientists and educators, including Richard Dawkins, expressing the need for teaching the theory of evolution in schools).

¹⁹¹ Levinson offers a number of ways in which this could be done. See Levinson, *supra* note 154, at 1112–15.

the teaching of evolution without creationism, because a compelling government interest supports the latter but not the former.

Still, to continue the doctrinal exercise, is it clear that teaching evolution without creationism is narrowly tailored to the compelling interest in effective teaching of biology? Assuming, per *Aguillard* and the objective circumstances, that public schools cannot teach creationism alongside evolution without violating the Establishment Clause, there might nonetheless be narrower measures the state could take.

For example, children of creationists could be excused from the requirement that they study biology. Yet a public school may legitimately judge this solution too severe. Biology is one of the core sciences, an essential part of the secondary school curriculum. We would not think a public school obligated to excuse students from mathematics or reading based on objections to the curriculum, and the same should be true for biology—especially once we recall that geology, astronomy, and other natural sciences also contradict young-Earth creationism.

Moreover, even if a public school were prepared to excuse a student from biology (and perhaps other science classes), doing so would not address the underlying objection. Excusal from biology might be a satisfactory response to parents' concern that the teaching of evolution without creationism undermines their ability to inculcate their values in their children,¹⁹² but here we are imagining that creationist parents object to the state conveying (what they perceive as) the message that, by virtue of their beliefs, creationists are second-class citizens. If that is a constitutionally cognizable harm, it remains so when the message is conveyed to the non-creationist students behind the backs of the creationists. If African American parents objected to a school starting the day with a pledge to the Confederate battle flag, we would not think it a satisfactory solution for their children to be excused from saying the pledge, while the other students recited it.

If students cannot opt out of biology, a disclaimer might be appropriate. Public school biology teachers could inform students about the limits of science, saying something like "science tells us how the world operates but its methods do not shed light on why

¹⁹² See Stolzenberg, *supra* note 184, at 589.

the world is here in the first place or how we should live.”¹⁹³ Yet that sort of disclaimer will likely be unsatisfying because creationists reject the notion that science and religion are “nonoverlapping magisteria,” each claiming authority in its own domain.¹⁹⁴ Creationism makes truth-claims that modern biology denies.

A better-targeted disclaimer might expressly disavow any notion that by teaching evolution the public school intends to convey a view about the worth of people who reject evolution on religious or other grounds. The tricky part here would be figuring out how to include this point in the curriculum. A disclaimer about the kinds of questions science answers is appropriate in a science class because understanding the limits of science is properly part of understanding science and the scientific method. By contrast, to disclaim a message about the status of people who hold dissenting beliefs does not fit naturally in a science class any more than in, say, a political science or history class. Worse, the disclaimer itself might plant the notion of inferiority in the minds of students who otherwise would not even have thought to draw that inference.

* * *

In sum, if one thinks that a state violates a constitutional principle forbidding official declarations that anybody is a second-class citizen by flying the Confederate battle flag, one may also have to say that the teaching of evolution without creationism violates the same principle. But that conclusion is untenable: the Establishment Clause forbids teaching creationism as science; the remedy of excusing creationist students from biology (and possibly other subjects) is too severe; and disclaimers may be largely ineffective. Thus, it is important to be able to distinguish the evolution case from the Confederate battle flag case—unless one is prepared to give up the notion that official displays of the Confederate battle flag violate equality. In this Part, I have offered tentative grounds

¹⁹³ See Greenawalt, *supra* note 179, at 148 (proposing this approach).

¹⁹⁴ Stephen Jay Gould, *Nonoverlapping Magisteria*, in *Intelligent Design Creationism and Its Critics: Philosophical, Theological, and Scientific Perspectives* 737, 738–39 (Robert T. Pennock ed., 2001) (distinguishing creationism based on Biblical literalism from most mainstream Christian and Jewish views and noting that the latter do not conflict with evolution).

for distinguishing the cases, but I leave the reader to conclude whether these grounds are ultimately persuasive.

V. A MENU OF APPROACHES

The last Part identified considerations relevant to discerning—or perhaps more accurately, constructing—social meaning in circumstances in which some people claim that government has labeled them or their relationships as second-class, while others contest that understanding of the challenged government action. This Part draws on the foregoing analysis to propose a number of possible approaches. I tentatively favor adopting a “reasonable victim” perspective as a starting point for testing whether the government has a sufficient basis for using words or symbols that an identifiable victim group understands as labeling them as second-class citizens. My primary goal, however, is to articulate the respective strengths and weaknesses of the various approaches.

A. *Nonjusticiability*

Suppose you think that selecting a single social meaning of a contested symbol (such as the Confederate battle flag) or statement (such as the labeling of some but not all unions marriages) is inherently arbitrary or an otherwise improper task for the judiciary. If so, you might be inclined to treat all or most challenges to social meaning alone—that is, challenges to social meaning unaccompanied by more tangible direct harm—as non-justiciable. You could still acknowledge that elected officials and even ordinary citizens (in voting for or against referenda, for example) would be constitutionally obliged to avoid committing the government to expressing the view that any group of persons or relationships are second-class, but you would deny judges the authority to invalidate such government expressions on that basis alone. In other words, it is possible to think that the Constitution really does forbid the government from expressing the view that some persons and relationships are second-class, but that this constitutional prohibition is appropriately “underenforced.”¹⁹⁵

¹⁹⁵ See Lawrence G. Sager, *Justice in Plainclothes* 86–95 (2004) (expounding the thesis that courts may stop short of fully enforcing constitutional provisions, even as political actors should feel the full force of the constitutional norms).

For courts, treating cases of contested social meaning as non-justiciable would have the obvious advantage of avoiding difficult questions. In the sorts of cases under consideration, a contest over social meaning typically indicates a broader social contest and, it has long been argued, unelected (or even elected) judges should not embroil themselves in such politically charged matters.¹⁹⁶ Although he made the point in the course of a highly problematic dissent, Justice Scalia was not entirely wrong when he wrote that the Supreme Court (and by extension, other courts) should not “take[] sides in the culture wars.”¹⁹⁷ Same-sex marriage, the flying of the Confederate battle flag, the teaching of evolution but not creationism, and just about any truly active controversy over government deeds, words, or symbols that substantial numbers of people regard as conveying the meaning of second-class citizenship will typically comprise a front in the culture wars. Courts cannot get too far ahead of public opinion on such matters without risking backlash,¹⁹⁸ and therefore, according to one view, they ought to invoke justiciability limits to avoid deciding divisive social questions.¹⁹⁹

Yet the non-justiciability approach has a serious drawback. A rule actually barring the courts from granting relief in cases in which government action is challenged on the ground that it conveys the social meaning of second-class citizenship would not only weed out weak cases and close cases, it would also bar relief in strong cases, such as some of the hypothetical examples explored in previous Parts: requirements that LGBT persons wear pink triangles, express verbal statements of white supremacy, and so forth.

¹⁹⁶ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647–48 (1943) (Frankfurter, J., dissenting) (“For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.” (quoting *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting)) (internal quotation marks omitted)).

¹⁹⁷ *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting). Justice Scalia’s *Romer* dissent was otherwise problematic because of, inter alia, his assertion that LGBT persons “enjoy[] enormous influence in American media and politics.” *Id.* To see what is troubling about this claim, substitute “Jews” for “homosexuals” in his dissent.

¹⁹⁸ See generally Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009).

¹⁹⁹ See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 127–32 (2d ed. 1986).

In order to allow courts to grant relief in cases in which the government *obviously* conveys the social meaning of second-class citizenship of some persons or relationships, a rule of non-justiciability would have to be abandoned in favor of something like a presumption against granting relief. But adjudication subject to such a presumption—even if a strong presumption—would not keep the courts *out* of the business of identifying social meaning, thus sacrificing one of the core benefits of the non-justiciability approach.

B. The Reasonable Observer

The Establishment Clause doctrine of “endorsement” may be a good starting point for discerning or deciding whether a particular government action conveys a message of second-class citizenship. Although continuing to question whether the Establishment Clause really does forbid endorsement of religious views,²⁰⁰ a recent plurality opinion nonetheless explained the substance of the endorsement test in a way that is faithful to the principles underlying it.²⁰¹ The endorsement “test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement.”²⁰²

In the Establishment Clause context, courts ask whether the reasonable observer, so informed, would understand the government to be endorsing religion. Here, I treat such endorsement as one species of impermissible designations of second-class citizenship. More generally, courts following the no-endorsement approach would ask whether the fully informed reasonable observer would see second-class citizenship in a contested government act, symbol, or statement.

Whatever the reasonable-observer test’s strengths when limited to the religion context—where it has been proposed principally as a means for discerning whether the government, as opposed to private actors speaking only for themselves, stands behind a religious message²⁰³—it has a serious limitation as a tool for deciding what a

²⁰⁰ See *supra* Section II.A.

²⁰¹ See *Salazar v. Buono*, 130 S. Ct. 1803, 1819–20 (2010).

²⁰² *Id.*

²⁰³ For an application of the endorsement test outside the context of the Establishment Clause, see *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1142 (2009)

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contested symbol or text means. We only need such a test for hard cases, but it is precisely in hard cases that different people may reasonably ascribe different meanings to the same symbol or text. There is no unique reasonable observer.

This critique is of a piece with longstanding criticisms of the reasonable person in criminal law, tort law, and beyond.²⁰⁴ Given the fact that people perceive different messages in difficult cases, adjudicating them by deciding that only one group's perception is "reasonable" appears to be conclusory. Perhaps some widely held views about the meaning of symbols and words should be regarded as unreasonable, but if so, we ought to be able to articulate why. The objective reasonable person does not help us do so.

To be sure, in many contexts in which the reasonable person test applies, the courts can respond by building many of the characteristics of the actual person into the objective circumstances of the hypothetical reasonable person. Thus, we would not ask whether a hypothetical genderless person would have objectively felt threatened by her husband (and thus justified or excused for killing him), but whether a reasonable woman, given historical patterns of gender subordination, would have felt threatened by him. Likewise, instead of asking whether a reasonable person would flee the police, we might ask whether a reasonable African American living in a community in which there is a history of police brutality would reasonably flee.

With sufficient particularization, the reasonable person standard can overcome the problem of multiple perspectives. However, as one increases the number of particular factors that count as part of the objective circumstances faced by the reasonable person, the notion that one is employing a singular reasonable person standard becomes increasingly fictional. Legal fictions have uses, of course, and this one may be warranted, but if one wants to understand what is really going on, it may be more useful to consider multiple reasonable perspectives directly.

(Souter, J., concurring in the judgment). For skepticism about whether the endorsement test should be applied to any private speech, see *Buono*, 130 S. Ct. at 1819.

²⁰⁴ For a critical overview of debates about the reasonable person in criminal law, see Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 *New Crim. L. Rev.* 33 (2008).

C. A Presumption for Multiple Reasonable Perspectives

Critique of the single reasonable person standard may lead to the conclusion that although there is no *single* reasonable observer whose viewpoint warrants privileging, there can be *multiple* reasonable perspectives. For example, we might say that the (presumably mostly) white Southerners who vote to fly the Confederate battle flag reasonably believe that they are thereby honoring the bravery in battle of their ancestors, while the people who take offense reasonably perceive a symbol of slavery and white supremacy.

A presumption could serve as the starting point for legal analysis, but what presumption? If one worries about the legitimacy and competence of the judiciary to make these judgments, a very permissive rule might suit: so long as some substantial group's inoffensive interpretation of the symbol or words is *a* reasonable one, then there is no actionable constitutional violation, even if another reasonable interpretation would render the symbol or words offensive.

That rule would largely avoid judicial entanglement in cases of offensive social meaning but only by rejecting the plaintiffs' claims in nearly all of the hard cases. If one thinks that result is too harsh, one might flip the rule and adopt a victim perspective: if some identifiable group of people reasonably takes offense at what it regards as a government message of second-class citizenship, then the challenged government speech is unconstitutional.²⁰⁵ Stated in that way, this approach—like its opposite—would be relatively easy to apply, although it would result in considerable judicial interference with ordinary politics.

To be sure, the requirement that an identifiable group of people actually regards the relevant government act, symbol, or statement as conveying a message of second-class citizenship and the requirement of reasonableness—however conclusory—serve as important filters. They screen out claims by the isolated crank who sees a message that virtually no one else does—the smoker who regards the Surgeon General's warnings as denigrating his personhood, say, or the anarchist who takes offense at government-

²⁰⁵ Caroline Corbin has proposed a similar approach for Establishment Clause cases. See Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 *UCLA L. Rev.* 1545 (2010).

printed notices informing voters of the location of polling places. Were I interested in fully translating the argument into a doctrinal test, I might borrow from asylum law, which permits eligibility for refugee status based on, *inter alia*, persecution based on “membership in a particular social group.”²⁰⁶ A still-narrower definition could tie identifiability to the suspect classes or classifications in the Supreme Court’s equal protection doctrine. However one defines identifiability at the level of a doctrinal test, to maintain the “sticks and stones” baseline discussed in Part I, even robust protection for minority sensitivities cannot be so robust as to credit every idiosyncratic view.

At the same time, one must be cautious not to pre-judge claims. Thus, a requirement that the group challenging the government’s act, symbol, or statement be identifiable should be understood less in strictly numerical terms than in social terms. For example, even a very small Native American tribe should be taken seriously in contesting a state university’s use of its tribal name and a stereotypical figure as a school mascot.²⁰⁷

The requirements of identifiability and reasonableness will filter out some but hardly all claims. I tentatively favor a qualified victim perspective: if some identifiable group of people reasonably takes offense at what it regards as a government message of second-class citizenship, then the challenged government act, symbol, or statement is not automatically invalidated; instead, it is subjected to some form of heightened scrutiny. This intermediate approach makes the presumption in favor of the victim perspective rebuttable—a default rule. It would likely lead to more attractive results than either of the polar approaches—automatic validation or automatic invalidation—although the intermediate approach carries with it the cost of greater uncertainty and thus more litigation.

One might also worry that a legal test requiring claimants to point to victimization could be counter-productive, creating or exacerbating a culture of victimization. In the long run, the best strategy for dealing with official (or unofficial) insults may be to develop a thick skin, and going to court to complain about insults

²⁰⁶ 8 U.S.C. § 1101(a)(42)(A) (2006).

²⁰⁷ See, e.g., *Crue v. Aiken*, 370 F.3d 668, 674 (7th Cir. 2004) (noting the objection of the Illiniwek to the “Chief Illiniwek” figure used by the University of Illinois at sporting events).

could undermine efforts in that direction. This is not a completely fanciful worry, but neither is it a dispositive objection to a reasonable victim group approach.

For one thing, no matter what legal test applies, the structure of legal disputes—in which a plaintiff files a complaint alleging that the defendant violated his rights—tends to reward claims of victimization. Indeed, even the most extremely minimalist approach, in which complaints about social meaning alone are not judicially cognizable, presents the victim-culture risk. In the minimalist approach, objections to being labeled a second-class citizen are relegated to the domain of constitutional politics where, if taken seriously, they can just as easily give rise to or exacerbate the phenomenon of thin skins.

Accordingly, the worry about thin skins may be best understood as a challenge to the entire enterprise of accounting for harmful social meaning, inside or outside of the courts. Yet so conceived, it overshoots its mark, for it assumes that expressive harm is only ever a matter of feeling bad about insults. As discussed above,²⁰⁸ however, hurt feelings are only one aspect of expressive harm. Hence, the view that people should “tough it out” would have them bear potentially serious injury no matter how thick their skins become in response to this advice.

D. Means/Ends Rationality

To the extent that existing doctrine takes a position on purely expressive harms, it appears to favor the identifiable victim group approach, at least when the criterion of second-class citizenship corresponds with a classification that triggers heightened scrutiny. Thus, in this Article’s three main examples: an official decision to fly the Confederate battle flag would count as race discrimination, triggering strict scrutiny; an official decision to deny the use of the term marriage to same-sex couples would either trigger intermediate scrutiny as sex discrimination²⁰⁹ or, if sexual orientation dis-

²⁰⁸ See *supra* Section I.A.

²⁰⁹ The Supreme Court doctrine will only sustain an official sex-based classification if it is supported by “an exceedingly persuasive justification.” *United States v. Virginia*, 518 U.S. 515, 546 (1996) (internal quotation marks omitted). That standard is arguably stricter than intermediate scrutiny. See Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 *Harv. L. Rev.* 4, 75 (1996).

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crimination were recognized as a suspect or semi-suspect classification, heightened scrutiny on that basis; and the teaching of evolution without creationism, if reasonably perceived by creationists as connoting second-class citizenship, would trigger heightened scrutiny under the Establishment Clause.

We should not, however, necessarily rely on existing doctrine to determine when to apply heightened scrutiny. Existing equal protection doctrine would restrict the application of heightened scrutiny to government messages that key to suspect and semi-suspect classifications. Yet Part II argued that the law should and sometimes does recognize a freestanding constitutional principle condemning the labeling of persons as second-class citizens. If the government were to adopt a policy that, from the perspective of the victims, had the social meaning of declaring obese people, smokers, or convicted sex offenders to be second-class citizens, the constitutional test I am tentatively advancing could come into play.

That last move, however, threatens a principle defended in Part I—the “sticks and stones” baseline, under which people must simply accept that valid government programs may sometimes have the collateral consequence of insulting them. Yet from a victim’s perspective, collateral consequences often look intentional. Thus, numerous commentators regard some aspects of public health campaigns aimed at obesity and smoking and such measures as “Megan’s Laws” as treating the obese, smokers, and convicted sex offenders, respectively, as second-class citizens.²¹⁰

Whether to subject such policies to heightened scrutiny based on the victim perspective is a hard question. Doing so would have the salutary effect of weeding out truly gratuitous insults. For example, people who must register as sex offenders undoubtedly suffer social opprobrium when their names, addresses, and pictures appear

²¹⁰ See Todd S. Purdum, Registry Laws Tar Sex-Crime Convicts with Broad Brush, N.Y. Times, July 1, 1997, at A1; Paul Campos & Marilyn Wann, Fatties, It’s Time to Fight Back: If You’re Judged Obese, You’re a Second-Class Citizen at Best, NY-DailyNews.com (Mar. 8, 2010, 4:00 AM), http://www.nydailynews.com/opinions/2010/03/08/2010-03-08_fatties_its_time_to_fight_back.html; Noah Rosenberg, Heated Debate at Hearing on Smoking Ban in Parks, N.Y. Times City Room Blog (Oct. 14, 2010, 5:57 PM), <http://cityroom.blogs.nytimes.com/2010/10/14/air-cleared-at-parks-smoking-ban-hearing/>.

on national and state databases.²¹¹ More than any other example discussed in this Article, the designation as a sex offender truly comes close to a designation of second-class citizenship. To be sure, there is an important government interest at stake: notifying the public of potential risks to themselves and their children enables them to take precautions, but it also carries a very high social cost for those on the list. That cost may be justified in cases in which the listed party has a record of serious violence but where, as sometimes happens, a person is listed solely because of a conviction for consensual sex with a not-especially-young minor, the branding seems especially harsh. A court could sensibly conclude, therefore, that registering such persons as “sex offenders” is unconstitutional. Ordinary rational basis scrutiny would not likely produce that conclusion, and so, to reach it, one would have to say that close means-ends scrutiny sometimes applies even to government labeling on the basis of non-suspect criteria.

To be clear, the government should not be able to *expressly* label any sex offender as a second-class citizen. The government may only be using the term “sex offender” in order to issue a warning to the public, without taking a position on the inherent worth of the people thus labeled.²¹² But from the perspective of the persons so labeled, the term “sex offender” connotes second-class citizenship. Scrutiny of the relation between the government’s ends and means reveals whether that is an unfortunate but unavoidable collateral consequence of the pursuit of a permissible end. Here the answer appears to be “somewhat.” Insofar as the database includes people who do not pose an ongoing threat, the labeling is gratuitous and could therefore be deemed invalid as to them. As to released felons who pose a potential threat, the label “sex offender” could be justified as a warning to the public, and thus any resulting insult would be collateral.

²¹¹ The federal website compiles information from state and tribal databases. See National Sex Offender Public Website, U.S. Dep’t of Justice, <http://www.nsopw.gov> (last visited Oct. 27, 2010).

²¹² The federal website warns users not to use the data to “threaten, intimidate, or harass any individual.” See National Sex Offender Public Website, U.S. Dep’t of Justice, <http://www.nsopw.gov/Core/Conditions.aspx> (last visited Oct. 27, 2010). One may doubt the warning’s efficacy, however.

Smoking and obesity present a different sort of hard question. Part I explored examples in which government efforts to discourage smoking were received by hypothetical smokers as disparaging them as persons. Careful examination of the government's actual words and deeds can help a court to discern the difference between public health messages that incidentally offend some smokers and messages that gratuitously challenge the moral worth of smokers. There may be no way to say that "smoking damages health" without also implying something pejorative about people who smoke, but there is nonetheless a difference between the government saying smoking is harmful and the government expressly saying smokers are weak-willed, unattractive, or unhealthy. In the former case, the insult is a side-effect; in the latter cases, it is the point.

Yet what if the best way to dissuade young people from smoking or eating unhealthy diets is to create or maintain a stigma on smoking or obesity? Should the government be precluded from undertaking advertising campaigns that expressly seek to bolster negative images of smokers and the obese as a means of discouraging smoking and obesity?²¹³ There is no easy answer. Crediting the public health goals means insulting substantial numbers of people. If such campaigns are permissible, it would have to be because they are substantially more effective than the ready alternatives.²¹⁴

These examples show that sorting permissible from impermissible government messages through means-ends scrutiny would sometimes present difficult, often fact-intensive questions. It would spur litigation and uncertainty. Accordingly, worries about judicial legitimacy and competence could be invoked to limit heightened scrutiny to special cases: per traditional equal protection doctrine, it could be limited to suspect and quasi-suspect classifications. As in other contexts, such a limit would preserve scarce judicial resources for the most serious cases. Persons subject to statements that connote second-class citizenship on the basis of traditionally

²¹³ For an argument that such a public health approach should prevail over the anti-discrimination approach, see Adam R. Pulver, *An Imperfect Fit: Obesity, Public Health, and Disability Antidiscrimination Law*, 41 *Colum. J.L. & Soc. Probs.* 365, 405–08, 410–14 (2008).

²¹⁴ At least one study casts doubt on their efficacy. Smokers were shown images of diseased organs that resulted from smoking, which led to cravings for cigarettes, as measured by fMRI (functional magnetic resonance imaging). See Martin Lindstrom, *Buy•ology: Truth and Lies About Why We Buy* 9–16 (2008).

suspect or semi-suspect classifications are likely to suffer greater collateral harm from private actors than are those who are the victims of idiosyncratic insults. The factors that go into the determination whether a classification is suspect—especially a history of subordination and lack of political power²¹⁵—will tend to make official disparagement of a singled-out group resonate with private prejudices.

E. Applications

The existence of difficult questions should not blind us to the relatively straightforward cases—even if we relegate some or all of them to the domain of constitutional politics rather than justiciable constitutional law. Having already explained in Part IV why the teaching of evolution without creationism should withstand heightened scrutiny, I conclude this Part by briefly reexamining the relation between ends and means in each of the other two chief examples addressed in this Article: the Confederate battle flag and same-sex marriage.

1. The Confederate Battle Flag

From the victim perspective, the Confederate battle flag symbolizes support for slavery and white supremacy. Given our history, that is a reasonable interpretation, and the group most likely to feel this way is identifiable in exactly the way that matters. Indeed, they are the descendants of the very group for whose benefit the Fourteenth Amendment was originally adopted.

From the perspective of at least some of those who want the government to fly the Confederate battle flag, it symbolizes such ideas as bravery in battle, loyalty to homeland, self-rule, and respect for the past. We can grant that these ideals—and others that might be attributed to the Confederate battle flag—are noble. That is, we can grant that the government has an important or, in the language of strict scrutiny, a “compelling” interest in espousing such ideals.

²¹⁵ See Dorf, *supra* note 84, at 964–67 (describing the somewhat ad hoc method by which the doctrine designates classifications as suspect or semi-suspect).

Nonetheless, the question remains whether flying the Confederate battle flag is in any way necessary to showing the state's commitment to those ideals. Surely there are alternative means of making the same points.²¹⁶

Now, one must be careful in invoking alternatives because some alternatives will themselves be objectionable on the same grounds as the Confederate battle flag. Indeed, just about any commemoration of the Confederacy can trigger the associations that the flag triggers. Depending on what its inscription says, a monument to the Confederate dead could even connote greater support for slavery and white supremacy than the battle flag connotes.

Still, a government that articulates its message in a plaque or other memorial using words has a substantial advantage over one that employs a symbol such as a flag: the words can be crafted to convey the laudable aspects of the message while disclaiming any unintended support for second-class citizenship.²¹⁷ Accordingly, although it will be impossible to satisfy everyone, there do seem to be sufficient alternatives to ground the conclusion that the flying of the Confederate battle flag, without more, offends the Constitution and should be invalidated under a reasonable victim group test.

2. *Same-Sex Marriage*

The federal district court opinion in the Proposition 8 case exhaustively considers each of the proffered rationales for denying same-sex couples the use of the term marriage and finds that none even satisfies rational basis scrutiny.²¹⁸ I have my doubts about that conclusion. At least as traditionally understood, a challenged government law or policy satisfies rational basis scrutiny if it would be rational under any "reasonably conceivable state of facts,"²¹⁹ whereas the district court evaluated the actual evidence introduced at trial.²²⁰ Perhaps the district court's approach reflects the fact that the Supreme Court itself has applied a kind of rational basis scru-

²¹⁶ See *supra* text accompanying notes 190–91.

²¹⁷ See Levinson, *supra* note 154, at 1112 (disclaimer example).

²¹⁸ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010).

²¹⁹ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (internal quotation marks omitted).

²²⁰ See *Perry*, 704 F. Supp. 2d at 956–91.

tiny “with bite” in cases involving gay rights,²²¹ but if so, that appears to be an unstable resting ground for the law. I would prefer to see laws discriminating on the basis of sexual orientation openly and expressly subjected to heightened scrutiny.

If nothing else, the Proposition 8 litigation should show that the reasons adduced in that case for denying same-sex couples the use of the term marriage do not withstand heightened scrutiny. Under the proposal I am tentatively advancing here, such laws would be judged by heightened scrutiny because the members of an identifiable victim group reasonably understand those laws as branding them and their relationships as second-class. In other words, under my tentative approach, heightened scrutiny would apply regardless of whether sexual orientation counts as a suspect or semi-suspect classification and regardless of whether laws banning same-sex marriage are deemed a form of sex discrimination.

Are there grounds for withholding the term marriage from same-sex unions that do not—implicitly or explicitly—depend on the claim that opposite-sex couples are superior to same-sex couples? One possibility is that such laws are a relatively gentle means by which the state discourages homosexual conduct. As discussed above,²²² however, LGBT Americans perceive even gentle condemnation of homosexual conduct as connoting second-class citizenship, and under a victim-perspective test, that should be enough to estop the proponents of the contested expression from relying on conduct condemnation as a justification for the expression.

Are there other potentially inoffensive grounds for denying same-sex couples the right to marry? The most plausible argument I have seen claims that marriage does valuable work as a means of

²²¹ See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003); *Romer v. Evans*, 517 U.S. 620, 632–33 (1996); see also Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *Fordham L. Rev.* 2769, 2770 (2005) (characterizing *Romer* and *Lawrence* as applying “a more searching form of rational basis review”); Steven P. Wieland, Note, *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address Varnum v. Brien*, 94 *Iowa L. Rev.* 413, 436–37 (2008) (referring to the *Romer* and *Lawrence* Courts’ application of “a much more aggressive and complex inquiry” than conventional rational-basis review).

²²² See *supra* text accompanying notes 137–51.

taming the potential bad behavior of men towards women.²²³ Yet even if one accepts the tacit sociobiological assumptions that underwrite this view, its unique application to same-sex couples renders it suspicious. If one really thought opposite-sex marriage's core role were to discipline men into lifelong commitments to women, then one might want to start by banning divorce and adultery. To be sure, there is a constitutional right to divorce,²²⁴ and criminal laws banning adultery may likewise be unenforceable.²²⁵ Thus, it could be said that the only measure remaining on the table is a ban on same-sex marriage. But given the proliferation of alternative visions of opposite-sex marriage, the claim that banning same-sex marriage somehow promotes lifelong monogamy within opposite-sex marriage is practically a non sequitur.²²⁶ Assuming that the policy goal of disciplining heterosexual men's supposed natural lust does not count as sex discrimination against men, we can, for the sake of argument, credit it as laudable. Banning same-sex marriage, however, is at best a barely rational means of promoting whatever is "distinctive and remarkable" about "lifelong heterosexual monogamy at its best."²²⁷ It certainly should not survive heightened scrutiny.

²²³ See Ross Douthat, *The Marriage Ideal*, N.Y. Times, Aug. 9, 2010, at A19 (contending that opposite-sex marriage should be held up as an ideal because it "cuts against both the male impulse toward promiscuity and the female interest in mating with the highest-status male available"); cf. Nathan Oman, *Why Conservatives Should Support Gay Marriage*, Patheos (July 7, 2009), <http://www.patheos.com/Resources/Additional-Resources/Why-Conservatives-Should-Support-Gay-Marriage-07072009.html> (supporting legislation but not constitutional protection for same-sex marriage while lamenting that eliminating the gendered basis of marriage makes it "much less important as a mechanism for defining and socially enforcing the obligations that men owe to women and mothers").

²²⁴ See *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971).

²²⁵ See *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (asserting, without contradiction by the majority on this point, that the Court's holding calls into question the constitutionality of laws forbidding adultery).

²²⁶ See Andrew Sullivan, *The Unique Quality of "Lifelong Heterosexual Monogamy"*, *The Daily Dish*, *The Atlantic* (Aug. 9, 2010), http://andrewsullivan.theatlantic.com/the_daily_dish/2010/08/the-unique-quality-of-lifelong-heterosexual-monogamy.html (criticizing Douthat's view as merely "one faction of one religion's specific definition of Matrimony out of countless arrangements that are available for cohabitation in civil society and world history").

²²⁷ Douthat, *supra* note 223.

CONCLUSION

This Article has argued that, in general, government acts, symbols, and statements that have the incidental effect of causing offense or hurt feelings to individuals do not violate the Constitution. There is, however, 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.

Regardless of the principle's scope, hard cases arise when a government act, symbol, or statement conveys different messages to different audiences. In those circumstances, constitutional doctrine could adopt any of a range of options, from treating such cases of contested social meaning as nonjusticiable to per se invalidating government acts, symbols, and statements that, from the perspective of an identifiable victim group, are reasonably understood as conveying a message of second-class status. This Article has tentatively proposed an intermediate approach, in which the reasonable perception of a message of second-class citizenship by an identifiable victim group triggers heightened scrutiny. Hard cases remain under that approach, but denial of the right to marry to same-sex couples is not one of them.